NATHALIE SUEMI TIBA SATO

FRAMING THE RIGHT TO REGULATE IN THE PUBLIC INTEREST IN INTERNATIONAL ECONOMIC LAW

Tese de Doutorado
Orientador: Professor Associado Dr. Geraldo Miniuci Ferreira Junior

UNIVERSIDADE DE SÃO PAULO
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Versão corrigida da tese apresentada a Banca Examinadora do Programa de Pós-Graduação em Direito, da Faculdade de Direito da Universidade de São Paulo, como exigência parcial para obtenção do título de Doutora em Direito, na área de concentração Direito Internacional, sob orientação do Professor Associado Dr. Geraldo Miniuci Ferreira Junior.

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ABSTRACT

This study aims to understand the emergence of the concept of "the right to regulate in the public interest" in international discourse in the past decade and provide it with descriptive and normative precision. The first chapter analyses the context in which the concept emerged and formulates the research questions: What is the right to regulate in the public interest? How to safeguard the right to regulate in the public interest in international economic treaties and adjudication? Can the experience with the WTO DSM be instructive in the objective of safeguarding the right to regulate in the public interest? In order to properly address the legal innovations on actual treaties and the context of backlash against international economic adjudication, the definition of the concept was divided between how it is and should be framed in new generation treaties and how it is and should be framed by the adjudicator in the context of the analysis of a domestic regulatory measure. The definition adopted is one of an inherent right to regulate in the public interest where the public interest equals reasonable consideration of plural regulatory values and procedures. Due to the inherent nature of such right, framing it and confining it to exceptions or carve-outs could be interpreted as recognition that customary expressions of sovereignty need to be incorporated into a treaty to operate. The study relies on a literature review, historical analysis and deductive reasoning to elaborate the hypothesis that: (i) adjudicators adopt a plethora of standards of review, including strict forms of substantial and procedural review that are inadequate in light of the VCLT and unduly restrict the right to regulate in the public interest and (ii) that the right to regulate in the public interest can be safeguarded without explicit framing in the treaty. The analysis of cases under the WTO DSM and investment treaty arbitration confirmed the hypothesis, indicating that efforts to safeguard should be compounded with institutional measures. The study further investigates whether new generation agreements are adopting adequate institutional reforms.

Keywords: right to regulate; World Trade Organization; International Investment Agreements; standards of review.

RESUMO

Este estudo tem como objetivo compreender a emergência do conceito de "direito de regular no interesse público" no discurso internacional na última década e fornecer-lhe precisão descritiva e normativa. O primeiro capítulo analisa o contexto em que o conceito surgiu e formula as questões de pesquisa: O que é o direito a regular no interesse público? Como proteger o direito a regular no interesse público em tratados e na adjudicação econômica internacional? A experiência com o MSC da OMC pode ser instrutiva na busca pela proteção do direito a regular o interesse público? A fim de abordar apropriadamente as inovações legais dos tratados atuais num contexto de crítica contra a adjudicação econômica internacional, a definição do conceito foi dividida entre o que é e como deve ser enquadrado em tratados de nova geração e o que é e como deve ser enquadrado pelo adjudicador no contexto da análise de uma medida reguladora doméstica. A definição adotada é a de um direito inerente a regular no interesse público, em que o interesse público equivale a uma consideração razoável de valores e procedimentos regulatórios plurais. Devido à natureza inerente de tal direito, enquadrá-lo e confiná-lo a exceções ou exclusões poderia ser interpretado como o reconhecimento de que as expressões costumeiras de soberania precisariam ser incorporadas em um tratado para operar. O estudo baseia-se em uma revisão de literatura, análise histórica e dedução teórica para elaborar a hipótese de que os adjudicadores adotam uma grande variedade de padrões de revisão, incluindo formas rígidas de revisão substancial e processual que são inadequadas à luz da CVDT e que o direito a regular no interesse público pode ser protegido sem enquadramento explícito em tratado. A análise de precedentes no âmbito do MSC da OMC e de arbitragens de investimentos baseadas em tratados confirmou a hipótese, indicando que os esforços para proteger o direito a regular no interesse público devem ser combinados com medidas institucionais. O estudo investiga ainda se os novos acordos de geração estão adotando reformas adequadas.

Palavras-chave: direito a regular; Organização Mundial do Comércio; Acordos de Investimentos Internacional; critérios de revisão.

RESUMEN

Este estudio tiene como objetivo comprender el surgimiento del concepto de "derecho a regular en el interés público" en el discurso internacional en la última década y proporcionarle precisión descriptiva y normativa. El primer capítulo analiza el contexto en el que surgió el concepto y formula las preguntas de investigación: ¿Cuál es el derecho a regular en interés público? ¿Cómo proteger el derecho a regular en el interés público en la adjudicación económica internacional? ¿Puede la experiencia con el MSC de la OMC ser instructiva para tratar de proteger el derecho a regular el interés público? Para abordar adecuadamente las innovaciones legales de los tratados actuales en el contexto crítico contra la adjudicación económica internacional, la definición del concepto se ha dividido entre lo que es el derecho a regular en el interés público y cómo debe enmarcarse en los tratados de nueva generación y lo que es y debe enmarcarse por el adjudicador en el contexto del examen de una medida reglamentaria nacional. La definición adoptada es la de un derecho inherente a regular en el interés público, donde el interés público equivale a una consideración razonable de los valores y procedimientos reguladores plurales. Debido a la naturaleza inherente de tal derecho, enmarcarlo y limitarlo a excepciones o exclusiones es reconocer que las expresiones habituales de soberanía tendrían que incorporarse a un tratado para operar. El estudio se basa en una revisión de literatura, análisis histórico y deducciones teóricas para hipotetizar que los jueces adoptan una amplia variedad de estándares de revisión, incluidas formas rígidas de revisión sustantiva y procesal que son inadecuadas a la luz del CVDT y que el derecho a regular en interés público puede protegerse sin un marco explícito en el tratado. El análisis de los casos de DSM de la OMC y el arbitraje de los tratados de inversión confirmaron la hipótesis, lo que indica que los esfuerzos para proteger deberían combinarse con medidas institucionales. El estudio también investiga si los acuerdos de nueva generación están adoptando reformas apropiadas.

Palabras clave: derecho a regular; Organización Mundial del Comercio; Acuerdos Internacionales de Inversiones (AII); criterios de revisión.

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INTRODUCTION

This study aims to understand the emergence of the concept of "the right to regulate in the public interest" in international discourse in the past decade and provide it with descriptive and normative precision. The first chapter analyses the context in which the concept emerged and formulates the research questions: **What is the right to regulate in the public interest? How to safeguard the right to regulate in the public interest in international economic adjudication? Can the experience with the WTO Dispute Settlement Mechanism (DSM) be instructive in the quest for safeguarding the right to regulate in the public interest?**

The second chapter conducts a review of the literature dedicated to the "right to regulate in the public interest" in light of their underlying perceptions of the nature of the international trade and investment regimes. Considering the status of the regimes under public international law, the chapter analyses the contingent elements to the interpretation of domestic regulatory measures under the Vienna Convention on the Law of Treaties and analyze the adequacy of public international standards of review.

The third chapter looks into the historical development of the "right to regulate in the public interest" in order to provide it with normative prevision and to define a working hypothesis for the analysis of the precedents, in light of the context and its nature under public international law. It is argued that, where the treaty or institution provides no guidance regarding the appropriate standard of review, as long as public international economic law remains formed by single-value regimes, the adoption of strict substantive and procedural review of domestic regulatory measures in the public interests is inadequate under customary international law.

The fourth chapter analyzes precedents of the World Trade Organization Dispute Settlement Mechanism and arbitral tribunals arising from International Investment Agreements where domestic regulatory measures have been analyzed. The standards of review adopted by adjudicators are contrasted with our proposed framework to verify the working hypothesis.

Finally, the fifth chapter assesses the reforms or innovations undertaken in five “new generation treaties”. The analysis is focused on the extent to which these treaties address the criticism directed to investment arbitration and the problems identified in the fourth chapter. The thesis is concluded with main findings and indication of avenues of research.

1. FRAMING THE RIGHT TO REGULATE IN THE PUBLIC INTEREST

1.1. THE EXPANSION OF THE INTERNATIONAL TRADE AND INVESTMENT REGIMES

1.1.1. Material expansion through treaty-making

Institutions of international economic governance[1] are created on the basic premise that state sovereignty has to be limited in order for greater overall welfare to be achieved[2]. That was clearly the spirit of the Bretton Woods conferences, held between 1944 and 1947, where 44 states[3] agreed upon the need of binding themselves over commitments to avoid the "beggar-thy-neighbour"[4] policies that led to the economic turmoil of the inter-war period. Their aim was to rebuild the postwar economy and build a "new economic world order" founded on cooperation in the pillars of money, finance and trade[5].

The institutions conceived in Bretton Woods to supervise the first two pillars, the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) have since expanded from the initial 29 to 189 members[6]. However, the IMF's role in international governance has diminished since the demise of the Bretton Woods Monetary system[7]. On its turn, the IBRD's, - now part of the World Bank Group -

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1 The term "international" here denotes phenomena in which two or more States are involved. It differs from the terms "global", "transgovernmental" and "transnational", that will be used ahead in this study, in which actors other than States are involved.

2 This is also the case for other institutions of international governance. For instance, global and regional human rights systems respond almost entirely to the threat that sovereignty, unabated and unrestrained, poses.

3 Delegates of the 44 Allied nations in WWII gathered in Washington, D.C., after numerous bilateral and multilateral meetings led mainly by the United States and Great Britain. The result of the meeting was the adoption of the "Final Act of the United Nations Monetary and Financial Conference" (the Bretton Woods agreement), which can be found at: https://treaties.un.org/ [22/07/2019]

4 "Beggar-thy-neighbour" is an expression in economics describing policies that seek benefits for one country at the expense of others. See: (BAGWELL; STAIGER, 2004; WTO SECRETARIAT, 2011). After the first world war, in the absence of international economic coordination states began to manipulate currency and tariffs, deteriorating trade flows and further exacerbating the effects of the economic crisis of the late 1920s and the collapse of the gold standard in early 1930s (WTO SECRETARIAT, 2007, p. 20).

5 The idea of a creating a new world order was largely based on the United Sates experience with the New Deal. See Steil (2013) for an account of the role of economists Harry Dexter White from the United States and John Maynard Keynes as architects of the Bretton Woods system.

6 The International Monetary Fund's and International Bank for Reconstruction's Articles of Agreement were adopted during the Bretton Woods conference. They were formally created in 1945 and 1946, after ratification of the agreements by 29 states.

7 Under the Bretton Woods monetary system, countries agreed to fix their exchange rates and only to adjust them for dealing with severe balance of payments' crisis. The value of their currencies was fixed in terms of

objective of providing loans to the countries devastated by wars has shifted to providing financial resources to developing countries[8].

In the realm of trade, the International Trade Organization, envisioned in Bretton Woods and drafted in Havana in 1948 never came into force[9]. Thus, the General Agreement on Trade and Tariff (GATT), a provisional agreement signed in 1947, became the *de facto*, less ambitious, multilateral institution for international trade[10].

The end-run around state sovereignty in trade matters was only devised in the 1990s, when the GATT was superseded by the World Trade Organization (WTO)[11]. The creation of the WTO and the WTO Dispute Settlement Mechanism (DSM) resulted in the "legalization" of trade rules[12]. The weak GATT dispute settlement mechanism was replaced by a "*quasi*-judicial"[13] dispute settlement system where WTO panels and Appellate Body (AB) rulings are binding due to the reverse consensus rule[14].

With regards to foreign investment[15], the "finance" pillar of the Bretton Woods system, further developed by the World Bank Group, promotes and facilitates private

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US dollars and the American dollar was fixed in terms of gold. In 1971, the US government suspended the convertibility of the dollar, ending the Bretton Woods system. Since then, IMF´s role is restricted to surveillance and provision of financial assistance.

8 The World Bank Group is formed by the IBRD, the International Development Association (IDA), the International Finance Corporation, the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).

9 The Bretton Woods Agreement recommended, in its Article VII, that participating governments reached an agreement as soon as possible on "ways and means (…) to reduce obstacles to international trade". Later in 1948 the International Trade Organization (ITO) was designed to assure the orderly expansion of international trade, as adopted in the "Final Act of the United Nations Conference on Trade and Employment" (the "Havana Charter"). No country ratified the Havana Charter because they were all waiting for the US to ratify first. However, President Truman decided not to (re) submit the Havana Charter for Congress Approval in 1950 due to the perceived strong internal opposition. Ostry (1997, p. 66) argues that the main reason the ITO was abandoned was the opposition of both free traders and protectionists, that later argued the unconstitutionality of delegating power to an international body.

10 See (IRWIN; MAVROIDIS; SYKES, 2008) for a historical account of the GATT negotiations, focusing on the roles of the United States and United Kingdom.

11 The GATT 1947 is now an integral part of the World Trade Organization Agreement resulting from the Uruguay Round of 1994.

12 Lafer (1998) refers to the increased "adensamento da juridicidade" or "legalization" of trade rules to denote the adoption of the Dispute Settlement Understanding (DSU) and its set of procedural rules for the WTO's DSM.

13 The DSM's jurisdiction is compulsory and quasi-automatic, the DSU established strict timeframes for the dispute settlement process and there is a possibility of appellate review of the panel reports by the Appellate Body, making the system "quasi-judicial" (BOSSCHE, 2005, p. 181).

14 The DSB is a session of the General Council of the WTO where representatives of the members decide on the request for the initiation of a panel and the adoption of the recommendations issued by panels or the Appellate Body. The reverse consensus means that disputes will not be initiated or will be suspended only if all the Members, including the complainant, agree in this sense. In the previous GATT system, the consensus rule prevailed, by which any party could block the process at any stage.

15 The expression "foreign investment" is used broadly, to cover both foreign direct investment (FDI) and other forms of cross-border investments. The UNCTAD defines it as "an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct

investments, as it provides guarantees and methods for dispute resolution[16]. From the post-war period to the 1990s, several efforts to establish substantive multilateral rules regarding foreign investment were advanced, but never materialized.

The demand for regulation of foreign investment beyond national law ad customary international law was thus met regionally and bilaterally. The 1990s saw the proliferation of international investment agreements (IIA), either as regional or bilateral investment treaties (BIT), or as treaties with investment provisions (TIP). The number of IIAs went from 500 total until 1990 to more than 3000 signed until the end of 2004 (UNCTAD, 2017). By the end of 2018, 3317 IIAs had been signed (2,932 BITs and 385 TIPs), of which 2,658 were in force (UNCTAD, 2019a, p. 18).

While each international investment agreement (IIA) is a stand-alone agreement with considerable diversity, agreements negotiated until late 1990s, often called "first generation" IIAs are typically short and contain similar, vaguely worded standards of treatment and protection clauses. Most relevantly, most of them provide for treaty-based investor-state dispute settlement (ISDS), granting private investors direct access to independent international arbitration, usually without prior exhaustion of local remedies.

In the first decade of the 21st century, WTO members wishing to further their trade commitments turned to bilateral and regional agreements, especially after the failed efforts to deepen their commitments within the WTO. As of 2019, 295 preferential trade agreements (PTA) are in effect[17]. All of the current 164[18] WTO members have negotiated at least one PTA with one or more other members[19].

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investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate)." It comprises equity capital, reinvested earning and intracompany loans. (UNCTAD, 2018a, p. 3) The World Bank and the OECD work with the following definition: "Foreign direct investment is a category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy". (OECD, 2008, p. 13)

16 The Multilateral Investment Guarantee Agency (MIGA) is a member of the World Bank Group. Its mandate is to promote cross-border investment in developing countries by providing guarantees (political risk insurance and credit enhancement) to investors and lenders. It was establish in 1988 (see: https://www.miga.org/history) [7/4/2019]. The International Centre for Settlement for Investment Disputes (ICSID) was established in 1966.

17 Preferential trade agreements establish trade preferences among its members, an exception to the non-discrimination principle allowed by articles XXIV of the GATT and V of the GATS and the Habilitation Clause. They are referred to as "regional trade agreements" by the WTO, irrespective of their regional character. The WTO maintains a database of PTAs that have been notified, or for which an early announcement has been made. Available at: http://rtais.wto.org [25/11/2018].

18 The last member to join the WTO was Afghanistan, in 14 July 2016. Other 23 governments hold the status of observers. Information available at: https://www.wto.org [25/11/2018].

19 For a taxonomy of preferential trade agreements, see, A significant part of these PTAs foresee compulsory mechanisms of adjudication largely inspired by the WTO.

The expansion of international trade and investment law was accompanied by a degree of material approximation. Around half of PTAs also include investment chapters[20]. This apparent convergence seemed to be consolidating with the emergence of the "mega regional agreements"[21] in the early 2010s, most notably the Transpacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA). However, the move towards regional agreements comprehending both trade and investment rules seems to have waned since the United States withdrew from the TPP and the negotiations surrounding the TTIP came to a halt in 2017. As will be seen in the third section of this chapter, the ISDS mechanism contained in these treaties became highly controversial.

1.2. RISE AND BACKLASH AGAINST INTERNATIONAL ECONOMIC ADJUDICATION

The increased legalization[22] of international economic law and the strength of its dispute settlement mechanisms (compulsory and binding jurisdiction) is unparalleled in other regimes. In other words, while international trade and investment regimes moved towards "rule-oriented" structures, going as far as laying systematic "judicialization"[23], other regimes remained oriented by diplomacy and power. Yet, it is in the realm of dispute

20 See: (CHORNYI; NERUSHAY; CRAWFORD, 2016). IIAs typically include: prohibitions against expropriation without adequate compensation, full protection and security, fair and equitable treatment, most-favoured nation treatment and national treatment.

21 This emphasis towards mega-regional agreements represents a shift from the first wave of deeper agreements signed in the 1990s, when the EU and the US began to negotiate Regional Trade Agreements. Bown (2017, p. 2) argues that major economies push for mega-regionals is explained by the interest of multinational firms in global supply chains and the rise of China, that triggered geopolitical and national security interests, especially in the United States.

22 See Abbott et al's (2000) definition of legalization: "*Legalization'' refers to a particular set of characteristics that institutions may (or may not) possess. These characteristics are need along three dimensions: obligation, precision, and delegation. Obligation means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behavior thereun'sr is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. Precision means that rules unambiguously define the conduct they require, authorize, or proscribe. Delegation means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.*

23 For accounts on why international dispute settlement becomes "judicialized", see (PETERSMANN, 1999; SCHNEIDER, 2006).

settlement mechanisms, in spite of the degree of cooperation achieved, that sovereignty-related arguments are staging a comeback[24].

1.2.1. The WTO DSB: from crown jewel to time bomb

Around fifteen years after its inception, the WTO dispute settlement body consolidated its status as "crown jewel"[25] of the global trading system. As Appellate Body ("AB") decisions are final, binding and generally accepted by the parties, it is considered by many to be a role model for the peaceful resolution of international disputes[26]. Indeed, it could be considered a relative success by the sheer number of cases brought by its members in total. Until July of 2019, 586 cases have been taken to the WTO DSB, 201 panel and 134 AB reports were adopted[27]. In contrast, the ICJ, the second most active international court[28] has issued 85 judgements in contentious cases[29].

The numbers show that member states have confidence in the ability of the system to resolve disputes and uphold their rights under the WTO Agreements. Nevertheless, throughout its existence the WTO DSB has faced controversy of one sort or another, either in terms of legitimacy[30] and effectiveness[31].

The most visible one is the so-called "Trade and…" debate that emerged with the first cases of collision between the trade regime and countervailing values and regimes mainly the protection of the environment and human rights[32]. The issue of "policy space" for development has also been vastly explored in the literature[33].

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24 At the FMI and World Bank, for example, decision-making remain based on the weighted voted and, consequently, largely political. The UN Article 33[…] Nevertheless, other regimes developed strong dispute settlement mechanisms, such as the 1982 Law of the Sea Convention, and deep regional integration agreements (the EC treaty and the European Convention of Human Rights)

25 See for instance in the press release by WTO Director-General Pascal Lamy, on the occasion of the system reaching the milestone of having the 400th trade dispute brought to it, in November 2009: "The dispute settlement system is widely considered to be the jewel in the crown of the WTO". (THORSTENSEN; OLIVEIRA, 2014, p. 15)

26 Effectiveness may be understood broadly as "the closeness of actual results achieved to meeting expectations" in (BLACK, 1995) But see Oliveira (2015), who applies the concept of "technical effectiveness" to the jurisdictional remedies available in the DSU for inducing compliance and finds that they are only partially effective, as they are directly related to the variables and parties of the specific case.

27 In 2018 there were 10 new consultations and 34 panels. (UNCTAD, 2019b)

28 Regional integration system's tribunals were not considered. The European Court of Justice, European Court of Human Rights and Andean Tribunal of Justice would be the three more active international courts based on number of decisions issued.

29 As well as 26 advisory opinions and had denied jurisdiction or admissibility in 26 cases.

30 See Weiler (2000) for an analysis of WTO legitimacy vis a vis its internal and external constituencies.

31 That was the conclusion of a WTO Consultative Board, in a report issued in January 2005.

32 See: (TRACHTMAN, 1998) (BOISSON DE CHAZOURNES, 2016a).

33 See Chang (2006) Nasser (2003) for an analysis of development countries at the WTO.

At the same time, the role of international trade agreements is contested, as tariff barriers are overcome and RTAs turn to regulatory convergence. The main issue is that good regulation varies from country to country. For some, the thematic complexification of the WTO moved it away from the state agreement paradigm, to become a point of interaction in a network of legal and regulatory arrangements dominated by technical discourses (PICCIOTTO, 2011).

The shift from addressing tariffs to second- and third-generation issues of non-tariff barriers including domestic regulation greatly expanded the number of stakeholders who did not form part of the inner circles of the GATT clubs. It raised increasing concerns as to the legitimacy of the WTO from the point of view of deliberate democracy.

But until recently criticism did not a pose threat to the viability of the system[34]. Today, however, the DSM is on the brink of its demise. For the past few years, US officials have blocked appointments of Appellate Body members to force WTO members to negotiate new rules that address US concerns and limit the scope for judicial overreach (MCDOUGALL, 2018; PAYOSOVA; HUFBAUER; SCHOTT, 2018). Without resolution of this problem, the Appellate Body soon will not have enough members to review cases and the vaunted WTO dispute settlement system will grind to a halt[35].

Failure to resolve this crisis thus runs the risk of returning the world trading system to a power-based free-for-all, allowing big players to act unilaterally and use retaliation to get their way. In such an environment, less powerful players would lose interest in negotiating new rules on trade.

However, the deeper problem with the concerns expressed by the US is that they reveal a disagreement about the nature of the dispute settlement system that have emerged under previous US administration. According to the United States Trade Representative: "*Whereas the United States considers the system to be more akin to contract arbitration, it*

[34] For example, developing countries learned how to navigate the system (VARELLA; SILVA, 2006). See also: (SHAFFER; SANCHEZ; ROSENBERG, 2008) Santos (2012) analyzes Brazil's and Mexico's activities in the WTO, reaching the conclusion that members can, through litigation and lawyering, influence rule interpretation to advance their interests and "carve out" policy space, as a shield for heterodox economic policies.

[35] As of July 2019, the WTO AB is composed of only 4 members. The number will go below the minimum number of necessary for a decision in December 10, 2019, when Ujal Singh Bhatta and Thomas R. Graham complete their terms. Thus, in September 30 2018, when Shree Baboo Servansing completes his term, the DSB will effectively come to a halt.

considers that some important members and perhaps the Appellate Body itself see it as "evolving kinds of governance" (sic)[36].

1.2.2. International Investment dispute settlement: From diplomatic protection to fragmented investor state dispute settlement

Before the process of "legalization", controversies regarding foreign investment were mainly guided by competing doctrines aiming for customary international status with regards to the protection of aliens abroad and the development of standards of compensation (ASPREMONT, 2012) .

The mechanism of treaty-based investor-state arbitration was first included in a BIT in 1969[37]. A few years earlier, the International Centre for Settlement of Investment Disputes (ICSID) had been created, after ratification of the Washington Convention by twenty signing countries. The Convention offers a framework, under the auspices of the World Bank Group, for institutionalized, transnational arbitration of investment disputes based on consent between the states and investors involved. The first ICSID disputes were not based on BITs, but on contracts between investors and states or on national legislation that provided for direct access of foreign investors to international arbitration.

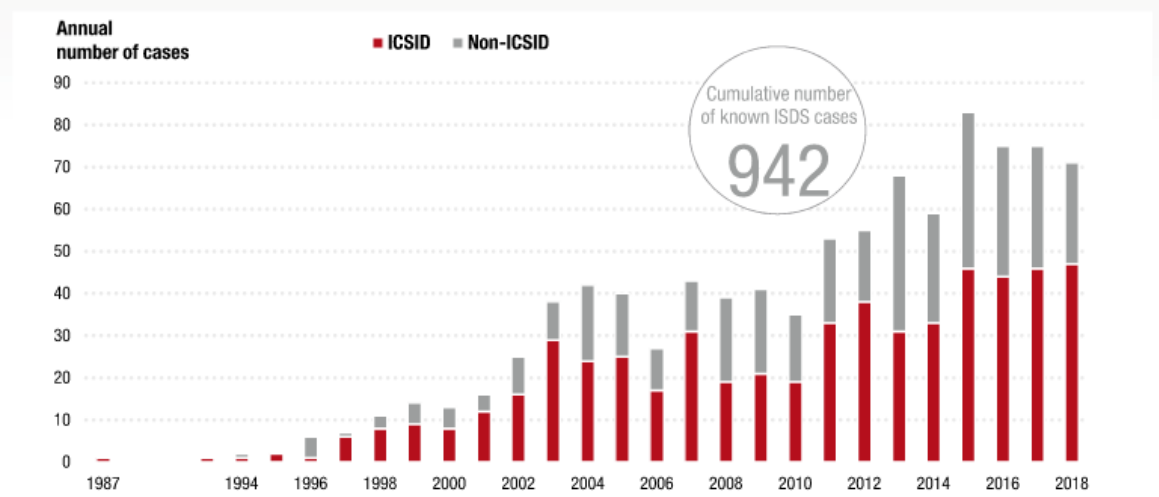
Until the end of the 1980s less than 10 arbitrations had been taken to the ICSID. The explosion in the number of cases only happened in the 1990s. Between the years of 1990 and 2000, more than 300 arbitrations were initiated, based in a BIT. According to the UNCTAD (2019c), there have been 942 known ISDS cases the end of 2018[38].

Figure 1 – Trends in known treaty-based ISDS cases, 1987-2018

[36] Interview of USTR Robert Lighthizer by John Hamre, "U.S. Trade Policy Priorities" (18 September 2017 at the Center for Strategic and International Studies) [Lighthizer interview], online: <www.csis.org/analysis/us-trade- policy-priorities-robert-lighthizer-united-states-trade-representative>.

[37] Earlier BITs provided for state-state dispute settlement clauses. The first investor–state dispute settlement clause was included in the Chad-Italy BIT signed in 1969. For a comparative study between state-state and investor-state dispute settlement clauses see (BERNASCONI-OSTERWALDER, 2014).

[38] UNCTAD compiles the information used in its reports from public sources. This number does not include investor-State cases based exclusively on investment contracts, national investment laws or cases in which a party has signaled its intention to submit a claim to ISDS but has not commenced the arbitration.



Source: Unctad (2019c, p. 1).

The legal framework of arbitration is provided in the treaty texts, but commercial-style arbitrators can apply only international law as well as domestic law and contracts (DOUGLAS, 2004). With regards to procedural rules, those might be provided in the treaty, but in most cases, parties are left to choose from a set of arbitration rules or as agreed between them. This has led to the inclusion of rules used for commercial arbitration in investment arbitration, mostly the UNCITRAL rules, but increasingly rules of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce (SCC) and other national arbitration institutions (BOCKSTIEGEL, 2012).

But instead of being seen as a sign of its prestige, the proliferation of cases in the 2000s was followed by a backlash against the international investment regime. As it has been claimed that 'no other category of private individuals' is 'given such expansive rights in international law as are private actors investing across borders', the regime is a victim of its own success (SIMMONS, 2014, p. 42)

Accordingly, the backlash is characterized by voiced discontent by practically all stakeholders of the regime other than private investors: governments, civil society and academics[39]. The following sections focus on the criticism directed to the substantial foundations and outcomes of international investment arbitration.

1.2.2. Critique: Regime failure and deviating jurisprudence

[39] From the beginning of the century, there has been an emergence of writings on the issue of the "legitimacy crisis" of the international investment regime.

The main substantive criticism directed towards the international investment regime relates to the perception that the treaties are unbalanced instruments that are geared towards protecting foreign investment while relinquishing states ability to regulate in the public interest. As soon as the number of cases boomed, high-profile cases concerning regulatory measures undertaken in order to protect non-economic interests such as public health, the environment, human rights and indigenous rights made the regime transact from obscurity to prominence.

Even if host countries are successful in such cases, there is concern over whether potential disputes could reduce government's willingness to introduce or postpone introduction of new regulations, what has been called "regulatory chill"(SATWICK, 2016)[40].

All in all, the mere fact that private investors are able to take regulatory measures to be judged by arbitrators, a small elite of experts (SORNARAJAH, 2015), is considered problematic. In this sense, the fact that arbitration is predominantly used in international commercial relations is criticized as a source of pro-investor bias that alters the balance in the relationship between private rights and public interests to the detriment of the public.

In this context, the commercial arbitration aspects of the regime mentioned in previous section may point to its completely inadequacy as a method of balancing the relationship between private rights and public interests, such as costs and conflict of interest. For example, it might be argued that arbitrators predominantly accustomed with commercial arbitration have a pro-investor-bias or an economic incentive to decide cases in favour of investors as only this will increase the number of cases and their own future reappointment (HARTEN, 2012).

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[40] To date, some researchers have conducted empirical studies on regulatory chill, but none has reached a positive or negative conclusion. Furthermore, criticism towards the hypothesis point to the fact that it assumes that regulators are aware of the threat of arbitration (TIENHAARA, 2011a) Not only that, the hypothesis misses the point that governments should expect to win cases when regulation is bona fide, especially in the case of health regulation, which aim to transform social behavior in favor of a common value to all society, no matter if they will antagonize with private interests (SUNSTEIN, 1996, p. 34) It is difficult to prove a causal relation between credible litigation threats and the action or inaction of policy makers, nonetheless, evidence might be found, such as in the often cited case of New Zealand. In 2012, New Zealand initiated a public consultation process to introduce a plain packaging regulation in line with the Australian regulation. After the analysis of an expressive number of submissions, in 2013, the Ministry of Health, represented by Minister Tariana Turia, recognized that the Cabinet decided to "wait and see what happens with Australia's legal cases" , acknowledging the "risk that tobacco companies will try and mount legal challenges against any legislation" Available at https://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products [11/06/2018].

Finally, it is contested whether bilateral investment treaties actually promotes foreign investment[41]. Even if investments are attracted, they expose policy makers to potentially large scale liabilities and curtail different reform options (HALLWARD-DRIEMEIER, 2003).

Other sources of criticism relate to the use of judge-created doctrines, or the employment of a "catch-all" interpretation of standards of treatment, leading to the expansion of international investment rules.

Traditional IIAs contain vague terms such as "fair and equitable treatment", leaving broad leeway for adjudicator interpretation (KULICK, 2016; ÜNÜVAR, 2016). According to Sornarajah (2015, p. 397), expansive interpretation by arbitrators has resulted in the expansion of arbitrators jurisdictional scope beyond what had been agreed by the state parties.

Beyond expansion, there has been instances of inconsistent case law[42], leading to, as argued by Franck (2005), the "privatization" of a public international law instrument.

1.2.3. Overview of current discontents with international economic adjudication: beyond interpretation

In the most recent period, public opinion has played an important role in the pushback against arbitration. This is especially after the cases Philip Morris v. Australia[43] and Uruguay[44], Vattenfall v. Germany[45] and Chevron v. Uruguay received unprecedented

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[41] Yackee (2010) argues that BITs are not meaningfully correlated with measures of political risk, that providers of political risk insurance do not reliably take BITs intoaccount when deciding the terms of insurance, and that inhouse counsel in large U.S. corporations don't view BITs as playing a major role in their companies' foreign investment decisions. Therefore, *BITs are unlikely to be a ignifican driver of foreign investment.*

[42] SGS cases – two different tribunals arrived at contradictory interpretations of umbrella clauses. ICSID, SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan – Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, ICSID Case no. ARB/01/13; ICSID, SGS Société Générale de Surveillance S.A. v. Republic of the Philippines – Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ICSID Case no. ARB/02/6.

[43] Concerning legislation enacted for the protection of public health. Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12. Available at: https://www.italaw.com/cases/851 [10/10/2018]

[44] The Uruguay case led to the signing in 2010 of a statement by the Health Ministers of the Mercosur and Chile, which read: [the Ministers] "*1 - Reaffirm the power of State Parties and Associates of Mercosur to implement measures destined to protect the population from the harmful consequences of tobacco consumption and smoke exposure, according to the FCTC of the WHO.*" Available at: www.mercosur.int [11/06/2018]

[45] Concerning a measure related to the protection of the environment. Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I) (ICSID Case No. ARB/09/6). Available at : https://investmentpolicyhub.unctad.org/ISDS/Details/329 [10/10/2018]

coverage, consolidating the diagnosis that the ISDS are unbalanced, as even bona fide regulation can be challenged.

All these critiques have influenced the negotiations of the so-called mega-regional trade agreements, that include ISDS mechanisms. In 2016 the EU opened consultation on ISDS and the TTIP that received 150,000 submissions[46]. In 2015 200 U.S. law professors and economics professors sent a letter urging Congress to oppose the Trans-Pacific Partnership (TPP) and its ISDS regime[47]. In 2017 a letter sent by 230 economists urged President Trump to remove ISDS from NAFTA and other pacts [48].

Primarily, the crisis in the investment regime is not solely tied to the expansiveness of the substantive rights granted to foreign investors under IIAs but, rather, the combination of such rights with the robustness of the ISDS mechanisms embedded within them. In this sense, the backlash against the investment regime finds echoes in older demands for the re-calibration of the WTO to permit its adjudicators to have greater discretion to respect states' capacity to comply with their non-trade obligations, including those demanded by the Covenant on Economic, Social and Cultural Rights (such as to ensure the right to water or health).

In the episode called the "Battle of Seattle" of 1999 the issue of global trade governance became mainstream as the Ministerial Conference was blocked by protesters from labor, environmental and human rights organizations, each with different specific demands, but expressing an overall discontent with the spread of globalization.

It could be argued thus that the international investment regime has displaced the WTO among critics of globalization. Nevertheless, although the WTO DSM has survived the public opinion backlash in the beginning of the century, it is going through a new crisis that is rooted in the disagreement between the members as to what is the nature of international adjudication at the WTO. In that sense, it is fundamentally connected to the crisis of the investment regime.

Furthermore, the crisis at the investment regime echoes a deeper critique that has not been resolved by the WTO as adjudication of regulatory measures became more frequent. The discontent with economic international adjudication is not solely directed to

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[46] Available at EU Commission website: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179[10/10/2018].

[47] Available at: https://www.citizen.org/wp-content/uploads/migration/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf

[48] Available at: https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose_ISDS_Letter.pdf?noredirect=on

the incorrect interpretation and application of the agreements by the adjudicators, but to the allocation of power to them. In other words, the affected communities are responding to the fact that their life conditions are being decided in the disembedded processes of economic globalization[49].

The matter, thus, is one of how to reassess the power granted to the adjudicators or how to allocate power between the domestic and international spheres.

1.3. REORIENTATION OR RE-CALIBRATION OF THE INVESTMENT REGIME

The first signs of backlash in the beginning of the century signaled the start of new phase for the international regime of investments, that has been called a phase of re-orientation[50] recalibration[51] or uncertainty[52]. In this era, Roberts (2014, p. 5) argues that rights and claims of both investors and treaty parties are recognized and valued, rather than one being reflexively privileged over the other. Polanco (2019) and Sornarajah (2018) are not so optimistic, arguing that reform efforts might still generate "unbalanced" treaties.

How states have responded to the voiced criticisms listed in the previous section has varied greatly. Reflecting the skepticism of its overall benefits, some countries have announced their disengagement from the treaty-based arbitration system, either by withdrawing or denouncing their existing BITs[53]. Others have announced that they will stop including ISDS in their future IIAs[54].

In 2017, for the first time, the number of effectively terminated IIAs (22) exceeded the number of newly concluded treaties (18) and the number of new treaties entering into

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[49] See: (KOSKENNIEMI, 2017).
[50] See: (MUCHLINSKI, 2012).
[51] See: (UNCTAD, 2015).
[52] See: (SORNARAJAH, 2010).
[53] Bolivia, Ecuador and Venezuela withdrew from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). South Africa, India and Indonesia have revised their model BITs or have declared their intention not to sign new BITs. Ecuador has denounced all of its bilateral investment treaties (BITs). It does not mean, though, that domestic courts will have exclusive jurisdiction over investment disputes, as regional or contract-based international arbitration may still be an option.
[54] In 2011 the Australian Gillard Government vowed that it will no longer include provisions on ISDS in bilateral and regional trade agreements. (DEPARTMENT OF FOREIGN AFFAIRS AND TRADE (DFAT), 2011)

force (15)[55]. Both developing and developed countries, including the former champions of the regime, have joined the pushback[56].

Nevertheless, there is still a relevant stock of "traditional" BITs in effect, and only a few states have chosen to completely leave the system. Instead, countries are signing the so-called "new generation" IIAS[57].

1.3.1. The right to regulate as guideline for recalibration of the investment regime

In this scenario of recalibration or re-orientation, where states are evaluating their existing and new agreements, the "right to regulate in the public interest" became a household name in public discourse.

In a "Public Statement on the International Investment Regime", academics from 24 universities, in 9 countries, made recommendations to states, international organizations, international business community and civil society based on their concern that "harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability". They agree that, as a general principle[58]:

> "*States have a fundamental right to regulate on behalf of the public welfare and this right must not be subordinated to the interests of investors where the right to regulate is exercised in good faith and for a legitimate purpose*."

International organizations have become relevant fora for the promotion of reform parameters in the move for the recalibration of investment agreements, such as the

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[55] In 2017, countries concluded 18 new IIAs: 9 bilateral investment treaties (BITs) and 9 treaties with investment provisions (TIPs) (UNCTAD, 2018c).

[56] See official position of the German government as stated on the website of the German Ministry for Economic Affairs and Energy: www.bmwi.de/EN/Topics/Foreign-trade/TTIP/faq.html (accessed 22 September 2016): 'It should only be possible to initiate investor-to-state dispute settlement as a last resort after exhausting the legal process before the national courts.''The German government would like to keep the arbitration procedures out of the TTIP negotiations. They are only needed where there is no functioning state based on therule of law, and that does not pertain to the EU and the US.',

[57] According to Titi (2015b, p. 644) "new generation" of BITs are represented by the US and Canadian Model BITS of 2004, where host states are allowed ample policy space.

[58] Other principles are: The protection of investors, and by extension the use of investment law and arbitration, is a means to the end of advancing the public welfare and must not be treated as an end in itself; All investors, regardless of nationality, should have access to an open and independent judicial system for the resolution of disputes, including disputes with government.; Foreign investment may have harmful as well as beneficial impacts on society and it is the responsibility of any government to encourage the beneficial while limiting the harmful.". See: (SIGNATORIES, 2010).

Organization for Economic Cooperation and Development (OECD)[59], the United Nations Conference on Trade and Development (UNCTAD)[60] and the G20[61], as well as non-governmental organizations, such as the International Institute for Sustainable Development (IISD).

Since 2012 the UNCTAD publishes reports indicating reform options for international investment agreements[62]. It subsequently published guidelines for reform in general, a Roadmap for IIA reform in 2015 and the Reform Package for the International Investment Regime in 2018.

Among the main principles, it noted:

> *Each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects*[63].

The principle is further developed below:

Principle 6: Right to regulate
The right to regulate is an expression of a country's ***sovereignty****. Regulation includes both the general legal and administrative framework of host countries as well as sector- or industry-specific rules. It also entails effective implementation of rules, including the enforcement of rights. Regulation is not*

[59] The protection provided to the "right to regulate" is defended in the sphere of the Organization for Economic Cooperation and Development (OECD), specifically on its Policy Framework for Investment- (PFI). The PFI aims to assist governments engaged with domestic reforms, regional cooperation and international dialogues on investments. As the OECD states: "*The Framework recognizes a government's right to regulate in the public interest to achieve established policy objectives and does not assume that less regulation is always better. Well-crafted regulations can improve the investment climate by creating an efficient framework and ensuring high standards of rule of law. Good regulation does not necessarily mean less regulation. Rather, it suggests that administrative burdens should be streamlined where necessary and that the objectives of regulations should be transparent and their effectiveness regularly monitored and evaluated*" (OECD, 2015:16).

[60] In the 2015 edition of one of its main publications, the, UNCTAD outlined what has become known as the Benchmarking Framework for International Investment Agreements, in response to the "emergence of a shared vision of the need for international investment regime works for all stakeholders. The Framework identifies five main reform challenges: (1) protection of the right to regulate, (2) reform of investment dispute resolution, (3) promotion and facilitation investment, (4) the guarantee of responsible investments and (5) the improvement of systemic consistency (UNCTAD, 2015, p. 120).

[61]During the G20 Ministerial in 2016 in Shanghai, China, the G20 countries adopted the Guiding Principles for Global Investment Policy, with the objective of (i) fostering an open, transparent and conducive global policy environment for investment , (ii) promoting coherence in national and international investment policymaking, and (iii) promoting economic growth and sustainable development, G20 members hereby propose the following non-binding principles to provide general guidance for investment policymaking. On the occasion, they expicitly reaffirmed the right to regulate investment for legitimate public policy purposes.

[62] The 2012 annual World Investment Report included a "Investment Policy Framework for Sustainable Development" (UNCTAD, 2012).

[63] *Ibid.*

only a State right, but also a necessity. Without an adequate regulatory framework, a country will not be attractive for foreign investors, because such investors seek clarity, stability and predictability of investment conditions in the host country.
The authority to regulate can, under certain circumstances, be ceded to an international body to make rules for groups of states. It can be subject to international obligations that countries undertake; with regard to the treatment of foreign investors this often takes place at the bilateral or regional level. International commitments thus reduce "policy space". This principle advocates that countries maintain sufficient policy space to regulate for the public good.

The Roadmap further explains that the "principle" of the right to regulate is reflected in policy options such as IIA clauses stating that investments need to be in accordance with the host country's laws, allowing countries to lodge reservations (including for future policies); clarifying and circumscribing the content of indirect expropriation or general exceptions.

When detailing policy options for IIAs, it mentions the importance of clarifying that the investor protection objectives shall not override States' right to regulate in the public interest as well as with respect to certain important policy goals, such as sustainable development, protection of human rights, maintenance of health, labour and/or environmental standards, corporate social responsibility and good corporate governance.

With regards to public policy exceptions, it mentions:

> "*To date few IIAs include public policy exceptions. However, more recent treaties increasingly reaffirm States' right to regulate in the public interest by introducing general exceptions. Such provisions make IIAs more conducive to SD goals, foster coherence between IIAs and other public policy objectives, and reduce States' exposure to claims arising from any conflict that may occur between the interests of a foreign investor and the promotion and protection of legitimate public-interest objectives."*

1.3.2. The right to regulate in new generation agreements

Studies on "new generation agreements"[64] indicate that agreements signed in the last fifteen years are substantially different from the so-called "traditional BITs". Attempts to categorize them usually refer to how far they have distanced themselves from the old investor-State arbitration paradigm (ROBERTS, 2013).

[64] See (ALSCHNER, 2013; XAVIER JÚNIOR, 2018) for taxonomies of new generation investment agreements.

a. Paradigm shifters – No ISDS

Brazil is often regarded as one of the most relevant proponents of a radically different approach to IIAs. For many years the country remained as the only, between great economies, without a single BIT. In the 1990s, 14 BITs were signed, although never ratified by the Congress. The conditions for change emerged in the 2000s, under the Brazilian industry leadership, concerned in protect its investments abroad, especially in South America and Africa. Thus, in 2015, the country launched its Agreement on Cooperation and Facilitation of Investments (*Acordo de Cooperação e Facilitação de Investimentos* [ACFI]) [65].

These agreements are focused on mitigating the risks preemptively, providing for a State-State dispute resolution mechanism. In their preamble, all the ACFIs nod to the right to regulate in the public interest by inserting the following preambular language: "*Reaffirming their legislative autonomy and policy space*".

b. Systemic reformers - Standing ISDS tribunal

Other countries are choosing to revise their BIT models or are signing treaties that are substantially different from traditional BITs, while still focusing on investment promotion and protection, including methods of dispute resolution other than the old ISDS paradigm. They champion more significant, systemic reforms, such as replacing investor-state arbitration with a multilateral investment court and including an appellate body.

c. Incrementalists / Selective adjustments – limited or improved ISDS

Substantially, States are re-evaluating their investment commitments by inserting flexibilities for state regulation, *vis-à-vis* foreign investors and their investments.

In 2016, Argentina signed a BIT with Qatar, after fifteen years without negotiating new agreements. According to some authors, the BITs' provisions reflect directly Argentina's experience as the most demanded country before the ICSID, especially in cases associated to the 2001 financial crisis (CORTEZ, 2017; PÉREZ-AZNAR, 2017). Nevertheless, investment arbitrator is still an option. In its article 10, it establishes a "right to regulate":

"ARTÍCULO 10 Derecho a regular

[65] See Morosino & Badin (2017) for an analysis of the new Brazilian approach to foreign investment.

> *Ninguna de las disposiciones del presente Tratado afectará el derecho inherente de las Partes Contratantes a regular dentro de sus territorios a través de las medidas necesarias para lograr objetivos políticos legítimos, como la protección de la salud pública, la seguridad, el medio ambiente, la moral pública, y la protección social y del consumidor."*

The EU-Canada Comprehensive Economic and Trade Agreement (CETA) enshrines the right to regulate in its preamble:

> *'RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity'.*

According to extensive quantitative research, general exception clauses modelled after Article XX have found its way into IIAs, although in a small representative number (ALSCHNER; HUI, 2018).

Finally, there is a growing trend of giving more precision of the so-called vague standards, mainly the FET standard and definition of what constitutes expropriation (SPEARS, 2011; ÜNÜVAR, 2016).

The literature points to two main trends in new generation agreements within those called paradigm shifters: (i) the limitation of substantive clauses and (ii) the inclusion of the right to regulate as a stand-alone clause or a whole treaty or standard-specific exception or carve-out.

1.4. THE RETURN OF THE STATE

This chapter has provided a broad context to the thesis and to the formulation of the research questions.

1. The post-world war II period saw the material expansion of international trade and investment law through treaty-making. In the late 1990s bilateralism predominated, leading to a normative and institutional fragmentation.
2. The increased legalization of the international trade and investment regimes was followed by its increased "judicialization" in the 1990s.
3. In the last few years there has been a backlash against the international investment regime, mainly leading to State's reassertion of control of international economic adjudication.

4. In this context, the investment regime is under "recalibration", in order to rebalance the investors right and the right to regulate in the public interest.

What is, then, the right to regulate in the public interest?

5. Preliminarily, it is clear that the right to regulate in the public interest is not equal to the concept of sovereignty, for the following reasons:
    a. The increased legalization and judicialization did not mean that states lost their sovereignty. As Jan Klabbers (1998, p. 345) puts it, the "state can become bound precisely because it is sovereign."
    b. The concept has surfaced under a plethora of legal guises (principle, legal right, exception) in actual treaty-making efforts that do not completely reject the regime but aim to counterbalance private investors and adjudicator's power in the regime.
6. Among those that choose to negotiate treaties with ISDS, there seems to be a trend to either specify clauses, thus limiting arbitral interpretation or/and to reaffirm the right to regulate and include treaty-wide or clause-specific exceptions or carve-outs.
7. The right to regulate in the public interest, therefore, has to do with the reassertion of power from the adjudicators. The problem with this approach is that it says nothing about the allocation of power, therefore, it could either result in giving states too much discretionary power, or confining sovereignty to a few exceptions.

How to safeguard the right to regulate in international economic adjudication? Can the WTO experience serve as a paradigm for safeguarding the right to regulate in the public interest?

In order to answer this question, this chapter has already provided some context and preliminary findings:

1. The problem with ISDS is not only how it deals with economic and countervailing values, but the issue that regulation affecting communities are being decided in the disembedded processes of globalization.
2. The WTO DSM has already faced and survived regime collision backlash, but still has no solution to the matter of power allocation.

3. The problem with sovereignty concepts is that they say nothing about the allocation of power. Therefore, the allocation of power will be left to the adjudicators' perception of the nature of the regime and its role in it.

2. THE NATURE OF THE INTERNATIONAL TRADE AND INVESTMENT REGIMES AND ADJUDICATION

The first section of this chapter provides common ground to the discuss allocation of power in light of the status of the trade and investment regimes under general public international law. Thus, the second and third sections of this chapter analyzes the concept of standards of review and its application in trade and investment adjudication. and the concept of standard of review.

The fourth section provides a review of the literature on the "right to regulate in the public interest" as they align with the understandings of the nature of international trade and investment regimes: (i) functional positivism, (ii) law and economics, (iii) global constitutionalism (duty to regulate), (iv) multilevel constitutionalism, (v) global public law (community interests)\ global administrative law.

The objective is to analyse the underlying notions of the nature of the regimes with respect to: (i) what is understood by regulation, (ii) what is the public interest, and (iii) how power is allocated between domestic and international spheres.

2.1. INTERNATIONAL TRADE AND INVESTMENT LAW AS SUB-FIELDS OF PUBLIC INTERNATIONAL LAW

International trade and investment treaties are clearly creatures of public international law: they are entered into by two or more states and are substantively governed by public international law. But this general observation is not enough to clarify the nature of the international trade and investment regimes, much less the nature of the adjudication conducted within them and the allocation of power when it comes to the adjudication of domestic regulatory measures in the public interest.

With regards to the WTO agreement, one of the earlier debates was whether WTO regime was a self-contained regime, isolated from other international regimes.

This matter is exacerbated in the fragmented investment regime, with its thousands of short and vaguely worded treaties. The majority of IIAs allow investors to bring arbitral claims directly against host states based on procedural and enforcement mechanisms developed largely in the context of international commercial arbitration and investor-state contracts.

Because of this tie with commercial arbitration, even though international investment agreements are entered into by two states, and is thus public by nature, investor arbitration has long drawn from private law and commercial arbitration[66] (BURKE-WHITE, 2010). However, there is a majority understanding that investment arbitration cannot be understood merely as contractual disputes between private parties as these disputes concern public actions and involve public interests. Vadi and Gruszczynski (2013) and Roberts (2013) argue that international investment law could be classified as a *sui generis* system, composed of hybrid-features of international investment law and arbitration, so when conceptualizing it analogies can be drawn from different national and regional systems, as well as subsystems of international law (2013).

This debate on their nature has implications on the proposals for reform of both regimes. Accordingly, attempts to define the "right to regulate in the public interest" both descriptive and prescriptive, vary greatly, as they are a by-product of the commentator's understanding of the nature of the international trade and investment regime.

2.2. ALLOCATION OF POWER AND STANDARDS OF REVIEW

The previous chapter showed that the right to regulate in the public interest has been linked to the concept of sovereignty. Within this logic, regardless of how one tries to give it specific content, a definition of "right to regulate" will invariably turn to a purely factual concept of sovereignty, according to which sovereignty is the point of departure of international law, just as individual liberty is in the domestic order, and both can only be restricted by a duly ratified treaty or duly promulgated law. Therefore, the problem of resorting to a right to regulate in the public interest provision is that the treaty will only establish duties as exceptions to the initial freedom, and nothing will be said regarding how to allocate competences (KOSKENNIEMI, 1989, p. 256).

Whether the adjudicator interprets the right to regulate as a value (or principle, or interest) of same, superior or inferior hierarchy of another value (free trade, protection of property etc.), or as an issue of antinomy to be resolved via treaty interpretation will influence the outcome and is directly related to the criticism the international adjudicator constantly face, either as being biased or conducting expansive interpretation.

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[66] As Schill (2011, p. 107) points out, 'a culture clash of different epistemic communities' is taking place, 'because private commercial and public international lawyers often have different perspectives on, and different philosophies about, the role of law, the state, and the function of dispute resolution'.

How the international adjudicator decides when dealing with a governmental regulatory measure entails a hierarchy or equality of values and effectively results in the allocation of power between domestic and international spheres[67]. Therefore, the concept of standard of review offers legal discourse an instrument useful for understanding, assessing, and criticizing the ways international courts allocate power between themselves and domestic authorities. When used in domestic law, "standard of review" usually refers to the aggressiveness with which an appellate court will review a lower court's ruling (GUZMAN, 2008, p. 75). For the purposes of this chapter, it is defined as the nature and intensity of an adjudicator's scrutiny of the legal validity of a legislative or administrative decision (BOHANES; LOCKHART, 2009, p. 493).[68]

The main issue is that the standard that adjudicators should adopt when reviewing regulatory measures are rarely articulated in the treaties, so they are otherwise determined by the relevant adjudicator (GRUSZCZYNSKI; WERNER, 2014, p. 4).

Ultimately, the choice of the standard of review will depend on the adjudicator's conception of the legal regime (whether and to what extent it is constitutionalized) and its role in it. This discretion leads to two challenges. First, the adjudicator may import doctrines from bodies of law of a distinct and even incompatible legal nature when compared to international economic law. Second, considerations made by the adjudicator beyond the interpretation of the rules will be influenced by its beliefs and political assumptions, and easily discredited as international adjudicators are not embedded in the local community (HENCKELS, 2014, p. 134).

In fact, Burke-White (2010, p. 285) asserts that part of the growing criticism directed to investor-state arbitration stems from the inappropriate standards of review applied by those tribunals when adjudicating public law elements of state conduct and from a lack of clear jurisprudential foundations for the choice of applicable standards of review (2010, p. 285).

2.3. STANDARDS OF REVIEW IN INTERNATIONAL TRADE AND INVESTMENT ADJUDICATION

[67] See: (CROLEY; JACKSON, 1996, p. 194).
[68] The standard of review can also refer to the review of panel decisions by the Appellate Body, but that is a different issue that is not addressed in this article.

Whether the adjudicator chooses to show deference to the domestic legislator is only one of the factors that will influence the chosen standard of review[69]. These factors can relate to the nature of the primary norm, its specificity and the degree of harmonization or consensus with respect to the subject matter, the characteristics of the primary decision-maker and the nature of the regime and institutional design[70].

In this sense, this section analyses the common factors that shall influence the adoption of the standards of review in light of the public international law status of the international trade and investment regimes.

a. The Vienna Convention on the Law of Treaties

The first general rule set in article 31(1)[71] is that treaties must be interpreted in 'good faith', in accordance with the 'ordinary meaning' of the 'terms' or text of the treaty, in their 'context', and in light of the treaty's 'object and purpose'. However, it does not provide guidance as for which of the criteria it lists should be given prevalence. Therefore, different schools have developed over time, such as the "textualists"[72], the "intent" or "founding fathers"[73], and the "teleological" or "aims and objectives"[74] school. The ideas of

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[69] Gruszczynski and Werner (2014) investigate patterns of justification followed by the adjudicating body and identify five judicial criteria for awarding deference: (i) sovereignty, (ii) democratic accountability - domestic decision-makers enjoy superior democratic legitimacy vis-à-vis international courts., (iii) expertise on domestic laws / scientific expertise, (iv) quality of reasoning: the 'all relevant factors' and 'reasoned explanation' tests – complex factual determinations pose a significant challenge for determining criteria for deference, (v) participation and procedural due process.

[70] A more detailed list of factors is provided by Henckels (2014): stipulation or guidance (the treaties or provisions establish the standard of review to be applied), the extent of interference with the legal regime's primary norm (for example, human rights norms may be afforded more deference), the nature of the primary norm (For example, the ECtHR applies a less strict standard of review to interferences with property rights than the right to privacy. The CJEU also takes a more stringent approach to review of Member State measures impeding free movement than in relation to EU measures ostensibly taken in furtherance of the aims of the TFEU.) and degree of specificity with which it is expressed (for example, the use of vague words such as prescribing "fairness" versus providing specific guidance on what is considered fair) , the degree of international harmonization or consensus with respect to the subject matter of the measure (e.g. restricting marketing on tobacco products vs trans-fat food), the level of dependence the court or tribunal has on other organs in the legal system (e.g. whether there is a system of appeals) and whether it desires to manifest respect for the primary decision-maker for strategic reasons, and the characteristics of and ambit of discretion enjoyed by primary decision-makers.

[71] "*Article 31, GENERAL RULE OF INTERPRETATION 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".

[72] The textualist approach maintains that the best and most objective expression of intent can be found in the treaty text itself. See, for instance, Gerald Fitzmaurice (1951).

[73] Contention within the intention approach revolves around how to give effect to the intention of the parties. In this sense, the textual element might be only one element that the interpreter needs to uncover the subjective intentions of the parties. In this sense, see Lauterpacht (1950).

[74] For examples of the teleological approach, see, for instance, Hersch Lauterpacht (1949).

these schools are not necessarily exclusive of one another but might compound elements of each[75].

Furthermore, the VCLT interpretive rules leave considerable scope for reason through analogies. Under article 31(1), dictionary definitions are unlikely to provide much assistance in determining the "ordinary meaning" of many international economic provisions, such as the obligation to ensure that foreign investments receive "fair and equitable treatment".

Article 31(2)[76] thus provides guidance on what provides the context for the purpose of a treaty and 31(3)[77] lists elements that shall be considered together with the context.

Most relevantly, article 31(3)(c) requires interpreters to consider the subsequent agreements and practice of the treaty parties on interpretation along with "any relevant rules of international law applicable in the relations between the parties." This provision encourages "systemic integration" as it assumes that questions not resolved by the treaty at issue could be referred to customary international law and general principles of law[78]. Nevertheless, its relevance varies according to different regimes.

At the WTO, the relevance of VCLT seems to be uncontested. Article 3.2 of the Dispute Settlement Understanding (DSU) reads that:

> *Article 3.2 - The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with* ***customary rules of interpretation of public international law.*** (…).

In the case US-Gasoline the Appellate Body (AB) of the WTO stated that the "general rule of interpretation" contained in Article 31 of the Vienna Convention has

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[75] See: (BIANCHI; PEAT; WINDSOR, 2015).

[76] 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

[77] 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.

[78] Appellate Body Report, US – Gasoline , p. 17.

attained the status of "customary or general international law". Therefore, the AB often refers to the Article 31(1) of the VCLT to clarify the provisions of the WTO Agreements[79].

As an international treaty that governs inter-state relationship, interpretation should follow the principles of the VCLT. Yet, it could be argued that is unclear the extent to which they apply to investor-state relation, as states have delegated the task of resolving the cases at issue to the arbitrator[80]. In this sense, while some argue that arbitral tribunals do start their analysis by invoking VCLT article 31, empirical work has showed that the principles have been "either neglected or misapplied"[81], or that "only in exceptional decisions did tribunals integrate the VCLT into their reasoning beyond general references[82].

b. Guidance or stipulation

The issue of standards of review was discussed extensively during the Uruguay Round, but no consensus was reached regarding a general formulation applicable to all international trade disputes (IOANNIDIS, 2014, p. 95). Only the Antidumping Treaty provides for a clear standard of review in its article 17.6, applicable only to disputes concerning anti-dumping measures[83]:

> "*(i)If the establishment of the facts [by the competent domestic authorities] was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;*
>
> *(ii)Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations*".

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[79] In Japan-Alcoholic Beverages the AB confirms that the "reference to customary rules of interpretation at art. 3.2 of the DSU allows reference to Article 32 of the VCLT. Appellate Body Report, Japan – Alcoholic Beverages II , p. 10.

[80] See: (UNCTAD, 2011, p. 3).

[81] See: (TRINH HAI YEN, 2014).

[82] See: (FAUCHALD, 2008, p. 314).

[83] The Decision of the Ministerial Conference on Review of Article 17.6 of the Agreement of the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, the Parties called the Parties to re-examine this standard of review after three years "with a view to considering the question of whether it is capable of general application". No such review has been undertaken by the WTO Members nor the matter was addressed at a Ministerial Conference. Decision of the Ministerial Conference on Review of Article 17.6 of the Agreement of the Implementation of Article VI of GATT 1994, Marrakesh Agreement Establishing the World Trade Organization, Ministerial Decisions, Declarations and Understanding, 15 April 1994, 1867 UNTS 75.

Absent other clear guidance, the most important textual basis for the WTO standard of review besides antidumping is Article 11 of the DSU, which requires panels to make 'an objective assessment' of the matter before them.

In *EC—Hormones,* the leading WTO case in this context, the Appellate Body stated that this provision '*articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements'*[84]. The AB went on to rule that '*the applicable standard is neither de novo review as such, nor "total deference*", but rather the "*objective assessment of the facts*."[85]

This does not, however, provide much guidance, as there is a great room between total deference and objective assessment of the facts. According to Bohanes and Lockhart (2009, p. 51), at the WTO, "beneath the overarching requirement for an 'objective assessment', there are several different approaches to the standard of review, that apply in different treaty contexts".

Usually, IIAs do not provide any guidance or orientation regarding the standard of review to be adopted by the arbitrator. Furthermore, IIAs usually include vague standards of investment protection and treatment, that do not give arbitral tribunals a clear guidance as to the scope of obligations assumed under the treaties.

Nevertheless, arbitrators do have more opportunities in addressing other bodies of law than the WTO. If the applicable law of the host state refers to any standard of review it could be considered relevant in the context of investment treaty arbitration. Furthermore, in the context of international public law, an arbitrator may resort to customary international law and general principles of law according to article 39 of the Statute of the International Court of Justice (ICJ).

c. Authority of the adjudicator

With regards to the authority of the adjudicator, article 3.2 of the DSU reads that "*the WTO is a central element in providing security and predictability to the multilateral trading system".* Further, it makes clear that "*Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements*".

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[84] Appellate Body Report, *EC—Hormones*, para 116.
[85] Appellate Body Report, *EC—Hormones*, para 117.

In article IX:2 of the Marrakesh Agreement it is provided that 'Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements'[86], which shall be taken "by a three-fourths majority decision of Members".

The DSU establishes that the Panel's role is to examine, in the light of the relevant provisions, the matter referred to the DSB and to make such findings to assist the DSB in making the recommendations or in giving the rulings [87] and the Appellate Body's role is to analyze "an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel"[88].

In addition, according to article 3.9 of the DSU, its provisions 'are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision- making' under the Marrakesh Agreement" [89]. This is interpreted as stating that although the WTO DSB has the quasi-judicial character, their interpretations are not authoritative, in spite of its quasi-judicial nature and the fact that the decisions are binding on the parties to the dispute.

Each of the thousands of BITs that contain an ISDS clause will provide the rules according to which the arbitration will proceed. Typically, they will refer to a framework of rules, the most common being International Center for the Settlement of Investment Disputes (ICSID) Convention, or they might refer to other forms of arbitrations, such as arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Article 42 of the ICSID Convention lays down the applicable law, in the context of Section 3 that rules on the "Powers and functions of the tribunal". Similar provisions may be found in regional treaties such as NAFTA[90] or the Energy Charter Treaty[91].

> *"Article 42*
> *(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its*

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[86] "*2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.*"
[87] DSU art. 7.1
[88] DSU art.17.6
[89] See: (YANNACA-SMALL, 2010, p. 3).
[90] North American Free Trade Agreement, Dec. 8-14, 1992, 32 ILM 289 (1993).
[91] Energy Charter Treaty, Dec. 17, 1994, 34 ILM 360 (1995).

> *rules on the conflict of laws) and such rules of international law as may be applicable. (2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law. (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree."*

Thus, the first sentence of article 42(1) gives the parties full autonomy with regards to the selection of the law applicable to the merits of their dispute.

Some regional agreements may have additional mechanisms, such as NAFTA's Secretariat and Free Trade Commission (FTC), composed of representatives of the three State Parties. Article 1131(2), provides that the FTC may issue authoritative interpretation on the treaties provisions[92].

d. Role of precedent

There is no *stare decisis*[93] or binding jurisprudence in WTO law, but precedent is consistently invoked by parties in defending their positions and legal experts in giving content to abstract legal norms. In US-Steel, the Panel justified departing from a precedent by referring to its mandate under Article 11 of the DSU, that of carrying out an objective examination of the matter at issue. However, the Appellate Body stated their deep concern about the panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues'[94]. It then held that in order to ensure "security and predictability", as mandated by Article 3.2 of the DSU, 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case'[95]

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[92] Indeed, the FTC has made use of this method in July 2001 in interpreting the concepts of "fair and equitable treatment" and "full protection and security" under Article 1105 of the NAFTA. See: Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, paras. 100-125, 11 October 2002; Loewen Group, Inc. and Raymond L. Loewen v. United States , ICSID Case No. ARB(AF)/98/3, Award on Merits, paras. 125-128, 26 June 2003; Methanex v. United States, UNCITRAL.

[93] According to the doctrine of stare decisis, meaning "to stand by things decided", or precedents, later courts are supposed to follow the holdings by earlier courts (GAO, 2018, p. 8). As John Jackson (1998, p. 178) points out, the international legal system does not embrace the common law jurisprudence which would call for courts to operate under a stricter 'precedent' or 'stare decisis' rule'.

[94] Appellate Body Report, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513, at para. 161

[95] Appellate Body Report, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513, at para. 162.

Within the investment regime, precedents are also not legally binding[96] but parties, tribunals and experts seem to rely on them with zeal (SCHILL, 2009)[97]. Although awards are not published without consent of the parties[98], both ICSID and UNCITRAL rules provide an arbitral obligation to render a reasoned award[99]. This has contributed to the formation of a "jurisprudence constante"[100], where arbitrators are not only aware about the decisions rendered in similar cases, but they take them seriously into account in the construction of their legal reasoning.

Yas Banifatemi argues that it is the duty of arbitral tribunals to foster the enhancement of a *jurisprudence constante*, which contributes to deal with inconsistency in investment arbitrations (BANIFATEMI, 2013). Professor Kaufmann-Kohler goes further and sees the employment of precedents as a "moral obligation" of arbitrators, towards a predictable normative environment (KAUFMANN-KOHLER, 2007, p. 374).

The legitimacy of the *jurisprudence constante* and its potential to improve harmonization in the investment law realm depend on the availability of the awards

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[96] Article 53 of the ICSID Convention states that: "The award shall be binding on the parties," which echoes, in part, Article 59 of the Statute of the International Court of Justice: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[97] But Schultz (2014) argues that investment arbitrators should not pursue jurisprudential consistency by referencing to prior reports as their role is to properly settle a dispute, rather than engage in general lawmaking.

[98] According to Bockstiegel (2012, p. 586), almost all ICSID awards are published, irrespective of the answer of the parties.

[99] They do not, however, explain the purpose of the reason-giving requirement.

> "*Article 48 of the ICSID Convention: (1) The Tribunal shall decide questions by a majority of the votes of all its members. (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it. (3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based. (4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent. (5) The Centre shall not publish the award without the consent of the parties*."
>
> "*Article 32 (2) of the UNCITRAL Arbitration rules: 1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.*
> *2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay. 3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature. 5. The award may be made public only with the consent of both parties. 6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal. 7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law*."

[100] The process by which these tribunals make reference to past decisions taken by other tribunals with the same legal status and authority to justify their positions keep similarities with one of the facets of the French legal term *jurisprudence constante*. According to De Brabandere (2012, p. 5), "the chief distinction between *stare decisis* and *jurisprudence constante* is that a single case affords sufficient foundation for *stare decisis*, while a series of adjudicated cases, all in accord, form the basis for *jurisprudence constante'"*.

rendered, which increases the transparency of the employment of arguments adopted in past decisions. In addition, given the great proliferation of investment arbitrations, it is reasonable to assume that there is a competition between arguments in the "market of ideas", where those regarded more consistent tend to prevail (BJORKLUND, 2008: 274-275).

e. Consequence of breach

In WTO dispute settlement, when a governmental measure is found to be in violation of WTO law, there are no retrospective remedies. A panel will not declare such a measure invalid or influence its legal force but authorize "suspension of concessions"[101] The DSU emphasizes that suspension of concession is temporary[102] until the violating measure has been removed or a mutually satisfactory solution has been found[103]. Furthermore, following the adoption of a recommendation or ruling, any WTO Member may raise the issue of implementation at the DSB[104].

In international investment arbitration, remedies for breach of obligations between the states and investors are usually liability for the injury suffered by the investor. Although matters of compensation (e.g. compensation for unlawful expropriation) and the calculation of damages may be determined on the treaty text, it remains a largely controversial issue in investment arbitration[105].

2.4. THE RIGHT TO REGULATE: A LITERATURE REVIEW

2.4.1. Functional approaches

With regards to trade, the creation of the WTO DSB represented the move from a "power-oriented" to a "rule-oriented" system, that had been first called-for by Prof. John H.

[101] DSU art. 22.4.
[102] DSU art. 22.1.
[103] DSU art. 22.8.
[104] DSU art. 21.6.
[105] See: (FRIEDMAN, 2010).

Jackson, as a way of "creating greater predictability, redressing unfair power imbalances, and preventing escalating international tensions"[106].

The move from a diplomatic to a "quasi-judicial"[107] system at the WTO was, thus, a vindication of legal works based on liberal economic theory and the consolidation of international economic law as a field of study, with Prof. Jackson as one of its most eminent authority[108]. Jackson's scholarship presented a pragmatic focus on international business transactions that allowed the domestic and international society to be seen as a single system, both geographically and functionally. As imagined by Jackson, the focus remains on the reciprocal interaction of national governmental and legislative institutions, whereas the role of international trade rules is to function as a "trade constitution" bringing international trade into the domestic public order "to revitalize it as an international system"(KENNEDY, 1995, p. 675).

In this sense, international trade law would be merely an "interface" mechanism between different legal cultures meaning that eventual clashes between national regimes would not lead to "regulatory harmonization"(KENNEDY, 1995, p. 675). The "international economic law revolution" (TRACHTMAN, 1996) was, thus, this perception that possibilities were opened in terms of international legislation and adjudication by the revision of the notion of *domaine reservé* of public international law, or the unquestioned margin of deference accorded to states, associated with classic Westphalian public international law.

Differently from public international law, or transnational law, that emphasize sources and procedural rules in the absence of agreement on particular substantive norms[109], in international economic law procedural rules are replaced by market relations for which a few substantive rules, those of liberal trade goals, are necessary(KENNEDY, 1995, p. 678).

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[106] In 1978 John H. Jackson (1978, p. 340) first argued for a rule-oriented approach to international trading relations with the goal of "*creating greater predictability, redressing unfair power imbalances, and preventing escalating international tensions*".

[107] A jurisdição do SSC é compulsória e automática, com regras de procedimento detalhadas no Entendimento Sobre as Regras e Procedimentos que Regula a Solução de Disputas ("DSU", sigla em inglês). Ainda que não haja sanção no sentido tradicional do Direito, na medida em que o monopólio da força física é detido pelo Estado, existem sanções de outras ordens (econômicas, morais etc) que trazem constrangimentos aos países. (NASSER, 2003)

[108] To date, scholars in international economic law emphasize Prof. Jackson's scholarship role in shaping the international trade system and in the development of international economic law as a field of study. See, for example, the Tribute to John H. Jackson at the Journal of International Economic Law, Vol. 19, Issue 2, June 2016.

[109] According to public international law, conflicts are addressed in a formal and open-ended way, as a matter of legal technique rather than substantive legal-political preference. (KOSKENNIEMI, 2006, p. 245)

Like customary international law, general principles of law are part of general international law. As noted in the previous section, rules of general inter- national law are, in principle, binding on all States. The rules of general inter- national law, including the general principles of law, fill the gaps left by treaties. They are not applicable only when, and to the extent that, a treaty – *in casu*, the WTO Agreement – has 'contracted out' of certain rules of general international law.

Catherine Titi adopts a similar functional approach when analyzing the right to regulate in the international investment regime, as she distinguishes the concepts of right to regulate *latto sensu* and *stricto sensu*. In the sphere of international law, the state always has a *latto sensu* right to regulate, which enables the negotiation of international treaties and its *stricto sensu* right to regulate. Therefore, in the field of international investment law, the concept has specific limits as a concrete legal right. In the authors' words, the right to regulate is:

> *"the legal right exceptionally allowing a host state to regulate in derogation of international commitments it has undertaken by means of an investment treaty, without incurring a duty to compensate aggrieved investors"* (TITI, 2014:33).

Titi concludes that, in practice, the right to regulate is essentially safeguarded through treaty exceptions, usually modelled after the GATT's Article XX. Titi adds that the right to regulate can be complemented by other doctrines, and by deference to the State when adjudicating a case. This attitude will broaden regulatory freedom *ex post*, as it concedes to the regulatory interests of States. However, recourse to doctrines or deference to governmental authority relate to the exercise of a legitimate right to regulate, but not a legal right (TITI, 2014, p. 40). She notes that often, however, such as in the discourse of international organizations, the right to regulate is used in a broader manner to encompass such secondary elements.

In a later paper, she comments on the emergence of different approaches to rebalancing investment treaties, which encompassed other measures than including an exception:

> *"For example, TPP's investment chapter has no applicable general exception modelled after Article XX of the GATT, and so long as there is no multilateral agreement differences will continue to exist.* (…)"

> *The right to regulate is of course not uniformly present even in new IIAs. For example, TPP's investment chapter has no applicable general exception modelled after Article XX of the GATT, and so long as there is no multilateral agreement differences will continue to exist.*

Conversely, Pellet equates the right to regulate to the doctrine of police powers:

> "*While statehood "is characterized by sovereignty", sovereignty does not vest the State with an unfettered power to act at its sole good will. The doctrine of police powers and State's right to regulate ("police powers") represents an attempt by investment tribunals to reconcile the sovereign right of the State, as the guardian of the general, public interest, to regulate economic activities on its territory with its treaty or contractual obligations. In particular, "the right of entering into international agreements is an attribute of State sovereignty".* (...) *In sum, the police powers doctrine accepts that a non-discriminatory taking of property without compensation can be lawful, if decided for a reason of public interest*." (PELLET, 2016, p. 447)

In its turn, Giannakapoulos examines the right to regulate from the standpoint of a legal argument available to State during the course of arbitration, seeking to hand dogmatic precision to the right to regulate deriving from the four different conceptions of rights according to Hohfeld: (i) a claim-right, (or a right *stricto sensu*), (ii) a privilege (or a liberty), (iii) a power, (iv) an immunity.

> "*The primary insight that this contribution sought to offer was that the right to regulate should be conceptualised as a Hohfeldian legal power. Several examples of such a conception of the right to regulate were found, including in the preambles of IIAs, in the FET standard, in expropriation provisions, and in arbitral case law. The second form that the right to regulate often takes in international investment law is that of a Hohfeldian immunity. This conception can be seen in the various non-precluded measures clauses found in IIAs, and in the necessity defence of the ILC Articles on State Responsibility*".

A claim-right is an entitlement to certain treatment or conduct; it is a sign that a person ought to behave or not behave in a certain way. A privilege or liberty (hereinafter, liberty) is a person's freedom to do or not do something and a power denotes the legal ability of a person to alter the existing legal condition of herself or of another by creating rights or imposing duties (GIANNAKOPOULOS, 2017, p. 9).

2.4.2. Constitutional approaches

a. Global constitutionalism

Howard Mann argues that, when reflecting on the concept of the right to regulate, the purpose of investment treaties and its interface with trade must be taken in consideration:

> "(…) *the right to regulate is a basic attribute of sovereignty under international law. The right to regulate is not granted by trade and investment agreements. It is the restriction of the right to regulate that is at issue in this discussion, and a proper starting point would recognize that such restrictions ought to be applied as an exception to the general right to regulate, and only when it is demonstrably in the public interest to do so. A preamble that recognized this approach would reverse the current trends in trade law of seeing the right to regulate as an exception to be narrowly interpreted".* (MANN, 2003, p. 5)

Mann further highlights the two aspects underlying this discussion: (i) "the right to regulate foreign investment **to promote domestic development** priorities and linkages" and (ii) "the right to regulate **to protect the public welfare** from possible negative impacts, both individual and cumulative, of foreign and domestic investments equally" (ibid, p.5).

Mouyal (2016) adopts a human rights perspective in her analysis of the right to regulate:

> *"The right to regulate is the affirmation of the sovereign right for states to choose their political, social and economic priorities – within certain limits – though the adoption of legislation and administrative practices without violating international rules protecting foreign investments. The scope to which states may regulate without vilolating international law, the regulatory space of manoeuvre, is also referred to as the public policy space of host states, the regulatory scope of manoeuvre or in connection with expropriation, the police power of the host state. As a consequence of states duty to regulate under the human rights regime and adoption of social welfare regulation the possibility that investors are met by oncrous regulation is likely to increase"* (MOUYAL, 2016).

In a similar fashion, Polanco (2019) argues that behind the well-intended move of inserting the right to regulate, there is a "an important risk that states use that 'extra' space not for legitimate regulatory purposes, or even in violation of individual rights." A more balanced approach, thus, would be to "consider that states have the 'duty' and not a 'right' to regulate. A 'duty implies that a state has to regulate when needed and shall refrain from it when unnecessary."

Finally, Kulick (2012, p. 149) understands that international investment law has transformed into a legal regime that integrates domestic and international law in a clear hierarchical system. It has formed a system of Global Public Law – a vertical and regulatory public law type control of the exercise of public authority. In this sense, he understand public interest as below:

> *"Public interest in a system displaying constitutional and hence value- based features, however, does not necessarily mean the primacy of what appears best for the collective or the majority. In fact, it also means the protection of minority rights and particularly of individual liberties against intrusion by others, whether those others are the State, the democratic majority or other individuals. Consequently, public interest has two dimensions, both of them equally valuable and applicable as a balance against the conflicting interest. Firstly, it has a collective dimension, i.e. measures that are to the benefit of society as a whole, as decided through democratic, that is majoritarian decision-making, such as the construction of an airport. Secondly, it has an individual dimension, i.e. measures undertaken to protect the interest of a fraction of society or even of only one of its members, such as their or its physical integrity. Both the individual and the collective can be on either side of the balance, which leads to four possible combinations: (1) collective-collective; (2) individual- individual; (3) collective-individual; and (4) individual-collective".*

All these approaches echo the constitutionalism earlier defended by Petersmann (1997) in his studies of WTO law as a system based on citizen rights, inspired by the European integration experience. As Petersmann (2012)argues, principles of justice require that reforms of IEL are directed towards clarifying rights and sovereign duties to protect public interests defined in human rights law. In this sense, WTO law and investment law are seen as constitutive instruments establishing the rule of law above national politics.

Constitutional approaches see that the WTO is already using balancing techniques similar to those emerging in constitutional domestic judiciary. In this sense, they are strong defenders of the adoption of balancing doctrines, mainly proportionality (STONE SWEET; MATHEWS, 2008).

Critics of the constitutionalist notion, such as Alston (2002, p. 815), argue that, without further studies on the impact of trade in human rights, a simple "constitutionalization" could result in the merge and acquisition of the human rights regime by trade.

Furthermore, it is highly contested whether international trade law, as well as international investment law, create communities of shared values with a constitutional nature and density that is similar to that of the European Union or international human

rights law (HOWSE; LANGILLE; SYKES, 2015:89). Approaching the fragmentation of international economic law from this constitutionalist view is problematic as it could lead to the transplantation of constitutional law principles to the quite distinct set of international economic law. In this sense, critics of the adoption of proportionality in investment arbitration see it as an attempt of arbitrators to hold onto their powers (SORNARAJAH, 2015).

2.5. STANDARDS OF REVIEW UNDER PUBLIC INTERNATIONAL LAW

In this section, three doctrines of review that arose from different settings and have different uses in public international law are assessed.

2.5.1. Proportionality

Proportionality analysis has gained considerable attention in international law in the past years. As defined by Sone Sweet & Matthews, it is "a doctrinal construction that emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice", it can also be conceived as a "decision-making procedure and an analytical structure that judges employ to deal with tensions between two pleaded constitutional "values" or "interests". (STONE SWEET; MATHEWS, 2008:76).

As a technique of interpretation, proportionality analysis has diffused during the last decades whenever the adjudicators recognizes that two values or interests at stake collide in a concrete case, demanding a kind of evaluation which surpasses the classical methods to deal with antinomies[110].

Conceived in Germany[111], in the post-war context, proportionality analysis evolved as a tool to assessing whether restrictions and measures affecting human rights appropriately respond to legitimate public interests (COTTIER et al., 2017). Currently, it is

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[110] E.g. *lex posteriori derogat legi priori* or *lex specialis derogat legi generali*.

[111] "The German Basic Law (1949) established a system of constitutional justice that not only transformed German law, politics, and state theory, but has impacted heavily on the development of constitutionalism across the globe. (…) Our concern is with one contribution of the German experience to global constitutionalism: the emergence of PA as a formal procedure for dealing with rights claims. (…) Proportionality then migrated to the constitutional law in the 1950s and (…) developed into the expansive balancing framework" (STONE SWEET; MATHEWS, 2008:98).

applied both in domestic and international courts who seek to evaluate, and ultimately "balance", the appropriateness of state action concerning various rights (CROW, 2017)[112].

The proportionality analysis is triggered once a *prima facie* case has been made to the effect that a right has been infringed by a government measure. In methodological terms, the proportionality's framework comprises four phases of analysis: (1) legitimacy, (2) suitability, (3) necessity and (4) proportionality *stricto sensu*, as described by Stone Sweet & Matthews[113].

In its fully developed form, the analysis comprises four steps, each involving a test. First, in the "legitimacy" stage, the judge confirms that the government is constitutionally authorized to take such a measure. Next, the "suitability" phases devoted to judicial verification that, with respect to the act in question, the means adopted by the government are rationally related to stated policy objectives. In the third step "necessity" has more bite. The core of necessity analysis is the deployment of a "least-restrictive means" (LRM) test: the judge ensures that the measure does not curtail the right any more than is necessary for the government to achieve its stated goals. (…) The last stage, "balancing in the strict sense", is also known as "proportionality in the narrow sense" (…) In the balancing phase, the judge weighs the benefits of the act (…) against the costs incurred by infringement of the right, in order to determine which constitutional value shall prevail, in light of the respective importance of the values in tension, given the facts.

As Stone Sweet & Mathews (2008) argue, the development of the proportionality model is attached to two main reasons. First, the necessity of judges to deal with two overlapping goals, the sensitive management of rights' review and the reinforcement of the salience of constitutional deliberation and adjudication, within the broader political system. Second, in the context of the "new constitutionalism wave" it adapts to the structure of rights provisions. New constitutions proclaim rights and then provide for legitimate exceptions, in the guise of public interests. In theoretical terms, as the authors point out, the adoption of proportionality framework by judges is a response to three basic legitimacy questions aimed towards them: the supposed decision bias, when dealing with confronting values; the usurpation of legislative functions, instead of being the "mouth of the law"; and the politicization of the judicial activity[114].

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[112] For the purpose of this thesis, it is not considered the proportionality analysis that also marks horizontal conflicts between individuals, but only the vertical conflicts between states and individuals (e.g. investors).
[113] See: (STONE SWEET; MATHEWS, 2008, p. 76).
[114]See: (STONE SWEET; MATHEWS, 2008).

In the international realm, proportionality analysis is sometimes appointed as a manifestation of teleological interpretation, but since the Vienna Convention on the Law of Treaties does not set up a hierarchy between methods of interpretation, the question is whether international courts and tribunals are superimposing teleological interpretation at the expense of other methods of interpretation (PIRKER, 2013). In addition, proportionality is also associated to article 38 of the Statute of the ICJ, essentially derived from the tradition of equity or even a manifestation of the customary international law (COTTIER et al., 2017). Although proportionality had indeed found its way in international law, differently from notions such as "the protection of good faith" and "equity", it is not generally recognized (COTTIER et al., 2017).

According to Crow (2017), proportionality is a polysemic term, as he verified in his study on the use of the concept in the European Court of Justice and International Court of Justice. As the author contends, each of the proportionality prongs (legitimacy, suitability, necessity and proportionality *stricto sensu*) calls for culture-specific value assessments of objectivity, and the resulting cultural flexibility of proportionality is largely responsible for claims to its near-universal application at the domestic level. However, if individual states can determine "objectiveness" as it is understood within its own culture, on the international level, the objectivity of proportionality's dimensions crumbles. Sornarajah (2015) goes further in the criticism and argues that the generality and vagueness of the proportionality test means that subjective factors dominate its application, which may harm areas such as investment arbitrations, an area already criticized for prejudiced views.

Without disregard to the criticism around the method, Leonhardsen (2011), for instance, affirms that although proportionality is no panacea, when conducted properly, it may be a useful tool to assist adjudicators, inclusively in international arbitrations, in countering legitimacy-related criticism.

2.5.2. Reasonableness

In International Public Law, reasonableness is fundamentally a positive concept[115]. The ICJ has defined reasonableness as lack of arbitrariness, absurdity and contradiction[116], which evaluation "must depend on its particular circumstances"[117].

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[115] See e.g. Article 9.3 of the International Covenant on Civil and Political Rights guarantees that anyone arrested shall be entitled to a trial within a "reasonable period of time"; Article 39.1 of the UNCITRAL Arbitration Rules instructs that the fees of an arbitral tribunal shall be "reasonable in amount"; Article 57.4 of

In public law, it remains an essentially contested concept, comprising diverse, and even competing notions, although it can be broadly defined as a principle that permeates the legal relationships before and after the emergence of a given dispute. In the first case, as a standard of good governance for States' actions, it helps them to motivate their acts as well as to calibrate public and private interests at hand. In the second moment, it requires adjudicators to interpret the applicable law under certain parameters and to provide reasons for their decisions. In both cases, with regard to eventual private parties, it entitles them with the right to have only reasonable, legitimate, expectations (VADI, 2018).

Moreover, reasonableness addresses the tension between the static nature of a legal system, on the one hand, and the dynamic need to integrate facts, and sometimes values, within that system, on the other (VADI, 2018). In this sense, reasonableness enables pluralist legal approaches, due to its context-specificity (VADI, 2018).

2.5.3. Rationality

Rationality indicates the adoption of logical/efficient measures appropriate to certain objectives. It requires compelling reasoning and keeps similarity to the "suitability element" that constitutes the first part of the proportionality analysis. Moreover, it evokes the idea of a type of decision-making that maximizes the utility of an individual, without necessarily taking into account the interests of others (VADI, 2018).

Although both rationality and reasonableness designate conformity with reason, generally the two terms are not interchangeable. The concepts of "reasonableness" and "rationality" differ insofar as rationality describes a normative result (CROW, 2017, p. 13). Furthermore, rationality as optimality can be opposed to the idea of reasonableness when rationality describes the process of making the "best choice" whereas reasonableness

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the First Additional Protocol to the Geneva Conventions requires that "all reasonable precautions" be taken to avoid losses of civilian life or damage to civilian objects; Article 98.1(b) of the United Nations Convention on the Law of the Sea requires that a ship master proceed with all possible speed to the rescue of persons in distress, insofar as such action "may reasonably be expected" of him; Article X:3 (a) of the General Agreement on Tariffs and Trade (GATT) (requiring member states to 'administer in a uniform, impartial and reasonable manner all [their] laws, regulations, decisions and rulings'); Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ('reasonable period of time' to implement the dispute-settlement body's rulings). The notion of "reasonable" also appears in the judgments and advisory opinions of the International Court of Justice. See: Cook, 2013.

[116] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion [1980] ICJ Reports, para. 49; *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*) [1982] ICJ Reports, para. 72.

[117] *Case Concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*) Judgment, 26 May 1961 [Preliminary Objections] [1961] ICJ Reports 32, 33.

describes the process of making a choice "based on the appropriate efforts of bounded agents"[118]. Alexy (2014) , in broader terms, states that rationality is "*goal*-oriented", whereas reasonableness, by contrast, is "*value*-oriented".

Although both rationality and reasonableness designate conformity with reason, generally the two terms are not interchangeable. Defined as the efficient pursuit of one's objectives, rationality indicates the adoption of logical measures appropriate to their ends. Derived from a mathematical model, rationality requires compelling reasoning. It is analogous to the 'suitability' element that constitutes the first part of the proportionality analysis. It also evokes the idea of a type of decision- making that maximizes the utility of an individual, without necessarily taking into account the interests of others. (VADI, 2018)

2.5.4. Assessment of public international law standards of review for public international economic law

These elements leads to the understanding that, from the point of view of the adjudicator, it is hard to conceive WTO law as a rights-based constitution for protecting not only states' but individuals right to trade. The Dispute Settlement Understanding makes it clear that the DSB's main function remain to serve the rule of law, focusing on contracts of substantially equal sovereign states[119]. There is no guidance, however, as to which standard of review should be adopted. Nevertheless, it must be noted that the WTO DSM counts with a strong institution setting, with a Secretariat to provide with legal and administrative support[120] and other bodies involved in dispute settlement such as the Permanent Group of Experts[121] and, as highlighted by Pauwelyn (2015), it is seated in Geneva, and thus embedded in the context of governmental "trade insiders". This, coupled with the standing court, an appeal and compliance process may affect how strict the procedural and substantive review is conducted.

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[118] See: (CHAPMAN, 1994, p. 41).

[119] The Singapore Declaration refers to the WTO system as being a 'rule-based system'. See: https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm [01/10/2018]

[120] DSU art. 17.7.

[121] Other bodies include: arbitrators under Articles 21.3, 22.6 and 25 of the DSU; the Textile Monitoring Body; the Permanent Group of Experts under Article 4.5 of the SCM Agreement;* the Facilitator under Annex V.4 of the SCM Agreement; experts under Articles 13.1 and 13.2 of the DSU, Article 11.2 of the SPS Agreement, and Article 14 of the TBT Agreement; Expert Review Groups under Article 13.2 of and Appendix 4 to the DSU; Technical Expert Groups under Article 14.3 of and Annex 2 to the TBT Agreement; the Chairman of the DSB and the WTO Director-General.

As for the IIAs, in the absence of guidance regarding the allocation of powers and the preponderant *ad hoc* nature of arbitration tribunals, the vagueness of treaty wording may lead arbitrators to resource to analogies from domestic constitutional law or other regimes, such as the WTO. Nevertheless, the fact that domestic law might be authorized as sources of law does not necessarily allow for the use of doctrines, such as proportionality, that are not customary international law.

3. AN UNIFIED FRAMEWORK FOR SAFEGUARDING THE RIGHT TO REGULATE IN THE PUBLIC INTEREST

In order to answer my research question, I return to the inception of the international trade and investment regimes to see how the relation of substantive and procedural autonomy were dealt with and the underlying forces of coherence or pluralism. In this sense, I adopt a constructivist approach of the development of international relations[122].

Sociolegal and critical studies, particularly those associated with Third World Approaches to International Law (TWAIL) have been fundamental in contesting mainstream views of international investment law[123]. According to Sornarajah (2015), contestation among states has been the feature of the formation of international law. The dominance of positivism, which has concentrated on the formation of rules through the examination of sources of international law, has hidden the extent of the role of power in the shaping of law.

3.1. FROM POST-WAR TO THE 1960S

Historical overviews of the emergence and development of international investment law and international trade law (jointly or separately) mostly adopt a division in four periods, starting after World War II[124]. However, accounts of the historical development of

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[122] Regimes as fields in Bourdieu's sense – as a social arena of struggle between actors with regular and patterned dispositions, structured and organized by shared fundamental principles of vision and significance. Bourdieu and Wacquant (1992)

[123] Third World Approaches to International Law (TWAIL) scholars made important contributions by exposing the historical and conceptual distortions of international economic law which, as becomes clear now, do not only concern issues and places of the South. TWAIL could be considered an approach, a methodology or a theory (OKAFOR, 2008). Eslava defines it "as a virtual site from which scholars and activists, from the South and the North, can work both to resist and to reform international law." In international economic law, this epistemic community of TWAIL scholars is formed by the TWAIL I generation (who attempted to effect change from within international law e.g. in international economic law, working with the analytical categories of the role of customary international law and the establishment of a New International Economic Order from the UN); and TWAL II scholars who, in the post-colonial era, think about the role of (international) law in the maintenance, as well as in the contestation, of colonial patterns of relations. For these second generation, Eslava & Pahua (2012) call for a "methodology of reconstituting routines, spaces, subjects and objects under the name of international.

[124] A correspondence of time periods and their titles: Kurtz (2016) recounts the story of the development of both trade and investment law in three periods: (i) Inception: 1945 to the 1970s, (ii) Expansion: the 1980s to the late 1990s, (iii) Activation, engagement and recalibration: the 2000s. Sornarajah (2015) focuses on the normative conflicts that characterize the international law on foreign investment from its inception, identifying four phases of norm development and their corresponding conflicting interests: (i) First and formative phase – capital-exporting states interest in protecting foreign investment and capital-importing states interest in asserting total domestic control of incoming foreign investment, mainly opposing North and

international economic regulation between modern[125] states may begin as early as in the 18th century, with the signing of trade treaties inspired by the mercantilist tradition, aimed towards facilitating access to colonial markets[126]. Later in the same century the Friendship, Commerce and Navigation Treaties (FCN) became a staple in bilateral diplomacy[127], providing for the most favored nation principle[128] for both trade and investment[129], as well as a wide range of rules on topics such as intellectual property, immigration and taxation[130].

South America; (ii) The second phase of universalization of conflicts, with the decolonization of African and Asian states; (iii) The third phase of neoliberal change, beginning with the dissolution of the Soviet Union and (iv) The fourth and current phase, marked by competition between those that seek to conserve the neoliberal regime and those that aim to displace it or move it away from the purpose of investment protection: from 2004, with the emergence of balanced treaties to nowadays. Costa retells the historical development of international trade rules from the GATT to the WTO from a constructivist approach, as follows: (i) The first phase, between fear from war and fear from recession: from World War II (ii) Development and interdependence in the shadows of the Cold War: from the Bandung Conference (1955) to the 1980s, (iii) Identity crisis and the birth of an organization. Lang (2011) recounts the development of the trade regime through the lens of the collective imagination of the regime purpose, the role of law in achieving it and the institutional processes that reflected and embodied this ideational framework, divided in: (i) embedded liberalism and purposive law, (ii) neoliberalism and the formal-technical turn: from the Tokyo Round (1973), (iii) After neoliberalism: from the end of the twentieth century.

[125] Earlier historical accounts show that the Egyptians negotiated agreements to secure their international trade routes. Modern states here are understood as the units corresponding to the modern-state sovereignty system established after the peace of Westphalia was signed in 1648.

[126] Under the mercantilist tradition, trade treaties were aimed towards market access, elimination of prohibitions and the concession of preferences to the parties. The level of tariffs or trade liberalization was secondary. The first significative treaty of this kind was the Methuen treaty, signed between England and Portugal in 1703. The Utrecht Treaty signed between England and France is another of its kind.

[127] The first known Treaty of Friendship, Commerce and Navigation was signed on 6 February 1778, between the United States of America and France. Available at: http://avalon.law.yale.edu/18th_century/fr1788-1.asp [24/11/2018]. The United States and other major powers concluded a number of such treaties until the 20th century, as an attempt to consolidate their world alliances and spread their influence globally (SORNARAJAH, 2010, p. 180).

[128] Most favoured nation clauses proliferated in the 17th century, under the first wave of expansion of global commerce and amidst fear of discriminatory treatment (MESQUITA, 2014, p. 18). According to the MFN principle any privileges or advantages granted to third parties must be extended to the treaty signatories.

[129] See: (DOLZER; SCHREUER, 2012, p. 1) and (SORNARAJAH, 2010, p. 181). FCN treaties provided assurances for individuals outside their nations of origin as corporations had not emerged as the main actors of commerce and investment. For example, see art. 4. of the FCN treaty signed between the United States of America and France:

> "*The Subjects, People and Inhabitants of the said United States, and each of them, shall not pay in the Ports, Havens Roads Isles, Cities & Places under the Domination of his most Christian Majesty in Europe, any other or greater Duties or Imposts, of what Nature soever, they may be, or by what Name soever called, that those which the most favoured Nations are or shall be obliged to pay; & they shall enjoy all the Rights, Liberties, Privileges, Immunities & Exemptions, in Trade Navigation and Commerce whether in passing from one Port in the said Dominions in Europe to another, or in going to and from the same, from and to any Part of the World, which the said Nation do or shall enjoy.*"

[130] FCN treaties' main provisions dealt with western notions of property, such as protection of the individual and property, freedom of movement and faith, national treatment and most-favored nation and access to ports and territorial waters (MILES, 2013, p. 24). Coyle (2012) considers that appreciation of FCN treaties can enrich contemporary debates on how to addres a wide range of issues in a single text and how to coordinate treaty rights across specialized treaty regimes.

In the 19th century states started signing treaties that dealt only with trade, providing for the reduction of tariffs[131]. Thus, the post-Second World War period, when nations entered into specialized agreements and created the institutions that shape contemporary international relations, a chance for joint regulation of international trade and investment was again opened, relegating FCN treaties to the status of historical relics[132].

The third institution envisioned at the WTO, the International Trade Organization (ITO), was designed to assure the orderly expansion of international trade. The Havana Charter, the constitutional document of the organization, envisaged institutional and secretariat support and legislative underpinning for legislation on trade. Its scope also encompassed investment rules as in article 11 of the chapter for Economic Development and Reconstruction, which stated that: "*no Member shall take unreasonable or unjustifiable action within its territory injurious to the rights or interests of nationals of other Members"* and aimed to assure *"just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another*"[133].

Its article 12 read in the relevant part: "*a Member has the right to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies*". Such article would represent the strong position taken by developing countries years later, although the few present in negotiations at that time opposed the inclusion of investment protection provisions, on the basis that they reflected rules that favored developed states[134].

This arrangement reflected a political compromise later called "embedded liberalism", in which the state, corresponding to the progressive and interventionist Welfare State, had an important role in achieving the economic objectives listed in the GATT's preamble[135]. Such compromise was influenced by the United States negotiators

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[131] Britain's 1860 Cobden-Chavalier Treaty with France is deemed to be the first of its kind.

[132] Although FCN treaties cannot be considered the precursors of modern international investment regulation, some commentators trace the influence of some of its provisions, that are still found in modern bilateral investment treaties. Importantly, the FCN treaties emphasized the protection of the property of individuals from expropriation by the host state, as international trade and investment were then largely led by individuals establishing their selves in foreign countries (SORNARAJAH, 2010, p. 180). Importantly, from the first FCN treaties to the post-war period, relevant doctrines emerged with regards to the status of aliens in general, particularly the international minimum standard, as customary international law impacts modern treaty interpretation and drafting (COYLE, 2012, p. 3).

[133] See: UN Conference on Trade and Employment, UN Doc. E/CONF.2/78, Sales no. 1948.II.D.4.

[134] See: (KURTZ, 2016, p. 34).

[135] In 1982, John Ruggie coined the concept of "embedded liberalism" in its studies of the post-war trade and monetary regimes. Ruggie's work stems from Karl Polanyi's distinction between embedded and disembedded economic orders. normally, the economic order is merely a function of the social, in which it is contained. Under neither tribal, nor feudal, nor mercantile conditions was there, as it was shown, a separate

and their experience with New Deal policies, but was vastly shared among the main actors of international trade (KURTZ, 2016, p. 40) (HOWSE, 2002).

The failure to establish a multilateral organization entrenched the separation of trade and international investment regulation. While the provisions of the GATT reflected a liberal compromise, international investment rules developed bilaterally, initially under two distinct paradigms: American liberalism and post-colonialism.

At the end of the war, US policy makers recognized that capital was available and could be employed abroad by American multinationals, but there was a need of government action to minimize the risks involved[136]. The experience with the failed ITO then led to the reinstatement of the FCN treaties by the US, now reconceptualized as instruments to mainly **promote and protect** foreign investments. The treaties still contained trade and foreign relations provisions, but they had reduced importance, reflecting an "investment in context" approach[137]. Such FCNs were primarily signed between the US and other developed countries, with the more general objective of strengthening political influence (VANDEVELDE, 2017). Investment was promoted by the inclusion of pre-establishment commitments and protected with fair and equitable treatment and protection from expropriation clauses. Nevertheless, regulatory flexibility was preserved in policy sensitive areas, reflecting the arguably symmetrical relation between the parties[138].

While the US FCN treaties were motivated to promote the expansion of American capital and liberal values, European treaties signed during this period, considered the first Bilateral Investment Treaties (BITs), were rooted in a distinct paradigm[139]. In the

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economic system in society. Nineteenth century society, in which economic activity was isolated and imputed to a distinctive economic motive, was, indeed, a singular departure ."(1982:381) The post-war embedded liberalism compromise, then, was an attempt to conciliate the objectives of preserving domestic stability and the pursuit of trade multilateralism, departing from the orthodox liberal regime that prevailed in the interwar period (1982).

[136] For a detailed account of the role of foreign investment in US post-war foreign policy, and, specifically, the role of FCN Treaties in the American liberal project, see Vandevelde, 2017. Whereas "old" FCN treaties contained only a single investment provision, postwar FCN treaties contained mostly investment-provisions, most relevantly, the inclusion of corporations as "protected persons".

[137] Alschner (2013, p. 467) argues that contrary to European BITs, "*FCN treaties were complex and comprehensive agreements placing investment protection in its wider context and designed to cover symmetrical economic exchanges"*.

[138] For example, the FCN treaty signed between the US and Israel in 1951, with regards to the right of entry of nationals: "The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and necessary to protect the public health, morals and safety". Available at: https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005440.asp [10/10/2018]

[139] From 1959, when West Germany and Pakistan signed a BIT considered to be the first of the kind. A new BIT between Germany and Pakistan was signed in 2009, replacing the old BIT signed in 1959 upon entry

immediate decades after the Second World War a number of forced takings of foreign assets occurred in the developing world[140]. While former colonies drove their economies inward and developing countries saw foreign investment with suspicion, the Calvo doctrine gained ground against the view that customary international law protected foreign investment regardless of the domestic rules of host states[141]. Thus, negotiations of BITs represented an attempt to move from such doctrines bilaterally, imposing, for example, an international minimum standard of treatment and protection from the risk of nationalization. By negotiating BITs, countries main objective was not to **promote** investments, but to **protect** the investments already existing in their former colonies and, as some may argue, perpetuate colonial ties (SORNARAJAH, 2015, p. 84). The design of these treaties reflects this asymmetrical relation between capital exporters and capital importers, where there are no considerations for regulatory flexibilities of the host state.

3.2. FROM LATE 1960S TO LATE 1990S

European countries were relatively successful in negotiating BITs with developing countries, signing 170 of them until the late 1970s[142]. On the other hand, the "investment in context" approach taken by the US with FCN treaties became the object of criticism by the American business community, who praised the short, intuitive and focused European model. In the 1970s, the US launched its BIT model, departing from the FCN treaty model, while keeping some of its characteristics[143].

Most importantly, European BITs had moved from the State-State dispute resolution mechanism that characterized diplomatic relations and included Investor-State Dispute Settlement (ISDS) clauses.

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into force. A significant difference in the 2009 Germany-Pakistan BIT is that it incorporates an investor–state arbitration clause.

[140] See: (BREWER; YOUNG, 1998:53). From 1960s to the 1990s the yearly number of expropriations were as follows: 1960-64: 11; 1965-69: 16; 1970-74: 51; 1975-79: 34; 1980-84: 3; 1985-89: 0.4 and 1990-92: 0.

[141] Under the Calvo Doctrine, foreigners and their property are entitled only to the same treatment accorded to nationals of the host country under its national laws. (SUBEDI, 2008, p. 73). The United States and other developed countries espoused the existence of customary international law applying to foreign investment, such as the Hull Rule, according to which expropriation of foreign investment must be prompt and adequately compensated.

[142] From 1965 to 1989 a total of 367 international investment agreements had been signed (UNCTAD, 2015, p. 121).

[143] Alschner (2013, p. 469) identifies five main contributions of the FCN to the US BITs: (1) pre-establishment clauses, (2) non-conforming clauses, (3) international law minimum standard references, (4) personal investment protection and (5) positive integration-type style clauses .

Meanwhile, at the multilateral fora, the non-aligned movement attempted to articulate a New International Economic Order (NIEO)[144] the aim of which was to ensure fairness in trade to developing countries as well as control over the process of foreign investment (PICCIOTTO, 2011, p. 47). Through the use of the numerical strength of its members in the General Assembly of the United Nations, a few resolutions were enacted asserting the principles of economic self-determination and permanent sovereignty over natural resource[145]. In 1974 the General Assembly of the UN adopted the Economic Charter and Duties of States, which read that:

> "*2. Each State has the right:*
> *a. To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;*
> *b. To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph;*
> *c. To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.*"

Developed countries formed a persistent and coherent coalition against the NEIO, contesting its legal status[146].The internal challenges faced by developing countries eventually led to the withering of a strong notion of a third world, as countries adopted measures that distanced them from a cohesive discourse (COSTA, 2011a). Nonetheless,

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[144] The NIEO is inspired by "structuralist" theorist, which pursued the reorientation of the economic order to correct the deep inequalities between developing and developed countries. (CHOUKROUNE, 2016, p. 38) and the "accumulation in global scale", which operates in the center and in the periphery, by reciprocal relations established as part of an integral global development (BEDJAOUI, 1979, p. 24).
[145] General Assembly Res. 1803 (XVII) of 1962. Available at: https://www.ohchr.org/Documents/ProfessionalInterest/resources.pdf [15/06/2017].
[146] The goals of the NIEO were deemed to be hortatory, and ultimately unenforceable requirements (TRACHTMAN, 2009, p. 4).

the views expressed in this resolutions challenged capital exporting countries claim to the existence of a body of customary international law that limits states sovereignty to impose restrictions on foreign investors (RAJAGOPAL, 2003, p. 12).

3.3. FROM THE 1990S TO THE 2000S

The Neoliberal paradigm begins with the end of the Cold War and the strengthening of the market-oriented premises. Third World cohesion, which drove the ideas behind the New International Economic Order, was replaced by ideological alignment with the economic principles underpinning the Washington Consensus. Developing states began to compete with each other for the foreign investment that was virtually the only capital available to fuel their development. Countries that had traditionally opposed signing BITs, e.g. Brazil and Argentina, signed them in the dozens in the 1990s[147].

The number of BITs went from 500 total until 1990 to more than 3000 signed until the end of 2004 (UNCTAD, 2017). This international tendency also has a domestic component. According to the UNCTAD, since 1992, the vast proportion of new regulatory changes were driven towards "liberalization" or "promotion" measures (UNCTAD, 2017).

In 1994, the North American Free Trade Agreement (NAFTA)[148] was signed. Its investment chapter included a reference to measures undertaken in a manner sensitive to environmental concerns of the parties. However, it was conditioned on the measure being "otherwise consistent" with the whole chapter, which lends it an eventual interpretive value, but not a right or exception. The article 1114(1) of the agreement reads as follows:

> "*NAFTA 1114(1)*
> *Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure* ***otherwise consistent*** *with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns".* (Emphasis added).

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[147] Brazil signed fourteen BITs in the 1990s. See: https://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu [22/10/2018].Argentina, in turn, signed fifty-five BITs in the same period. See: https://investmentpolicyhub.unctad.org/IIA/CountryBits/8#iiaInnerMenu [22/10/2018].

[148] Available at: https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta [10/10/2018]

During the Uruguay Round, members agreed to negotiate provisions only regarding the potentially distortive effects of investments on trade. Consequently, the WTO contains provisions on investments in the Trade Related Aspect on Investment Measures (TRIMs), which prohibits measures related to investment that are inconsistent with the GATT, such as the requirement of local content, and in the General Agreements on Trade in Services (GATS), as it deals with foreign investment on services, one of the four modes of service supply.

The Uruguay Round agreements, according to Howse, were a reflection of this neoliberal project: they reflected a policy agenda deeply influenced by "*the predominant economic ideology represented by the Washington Consensus*", including "*scaling down government health and safety and environmental regulation to what could strictly be justified under cost/ benefit analysis and by 'sound' science*" (HOWSE, 2002, p. 30).

Although a compromise was reached, the developing-developed debate surrounding the right to regulate in the public interest can be seen in the negotiations surrounding GATS, the only WTO agreement to expressly mention it:

> *"Recognizing the* ***right of Members to regulate****, and to introduce new regulations, on the supply of services within their territories* ***in order to meet national policy objectives*** *and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right"*

The reference of a right to regulate was, in the first draft texts, included as a self-standing clause:

> *"11. Regulatory situation. Parties to the Framework, and in particular developing countries, shall have the* ***right to regulate*** *the provision of services within their territories in order to implement national policy objectives, including the introduction of new regulations consistent with the objectives, principles and disciplines under the Framework. Regulations shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties*[149]*."*

Developed countries, mainly the US, opposed the inclusion of such clauses, which could be interpreted as an inherent right to regulate[150]. Given the developing countries willingness to open their economies by celebrating bilateral investment treaties, a new attempt on a multilateral instrument to regulate investments began to be drafted under the

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[149] Communication from Brazil, Chile, Colômbia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay MTN.GNS/W/95.

[150] Note on the Meeting of 25 July 1991 MTN.GNS/44.

auspices of the Organization of Economic Cooperation and Development (OECD). In 1995, the Multilateral Agreement on Investment (MAI) was pushed forward. Similar to the NAFTA clause, it is possible to see an attempt of framing the right to regulate in the treaty, by including a general clause regarding regulatory activity by the state, conditioned to the consistency with the agreement, which read:

> *"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****".*

However, from 1995 to 1998, a series of difficulties emerged and blocked the celebration of the agreement. Firstly, there was a stalemate in the terms of the investment protection principles and rules among the own OECD countries, all developed States. In addition, the coalition of environmental and human rights NGOs effectively blocked the negotiations for a MAI, by criticizing its alleged emphasis on the interests of multinational corporations.

3.4. SINCE THE 2000S

3.4.1. Substantive expansion beyond the State: actor and process diversification

An account on the current regulation[151] of international trade and investment relations and transactions must extend beyond the fragmentation of formal normative sources resulting from the proliferation of treaties as has been presented in the first chapter of this study.

As trade barriers decreased, market access is often no longer a border issue, but *behind the border* regulation. Likewise, since the 1990s domestic regulation of foreign investment has increased greatly, driven towards "liberalization" or "promotion" (UNCTAD, 2017).

A further consequence of the reduction of entry barriers is the blurring of the lines between cross-border trade and foreign investment. Complementarity between trade and FDI has increased with the emergence of Global Value Chains (GVCs). Around half of

151 Here "regulation" is not to be understood as a state-centric notion of command and control, but as Julia Black (2002, p. 20) defined: '*regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.*'

world trade now takes place through global value chains. Almost half of developing countries' exports, in value added terms, involve GVCs (OECD -WTO, 2016)[152].

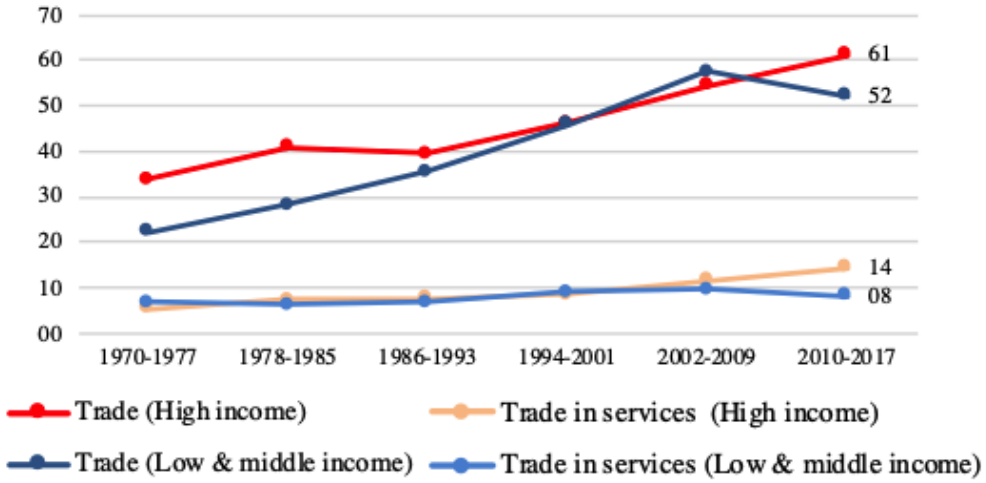
This unbundling of production triggered new patterns of investment flows and cross-border supply, giving rise to what Baldwin calls the 'trade-investment-services' nexus (BALDWIN, 2011). As shown in Figure 1 below, total participation of trade (both goods and services) in GDP has increased for both developing and developed countries. In the last decade, participation of trade in services has increased, particularly for developed countries, up to 14% of GDP from 2010 to 2017, of which half is provided in Mode 3 – Commercial Presence.

This phenomenon is defined by some as "servicification" of trade, where manufacturing firms are increasingly focusing on services (LODEFALK, 2017). Among the reasons why firms turn to services, is that they can overcome entry barriers by establishing a commercial presence in the targeted foreign market. This type of Mode 3 provision of services is also classified as FDI.

Figure 2 - Total trade and trade in services, from 1970 to 2017(% of GDP) [153]

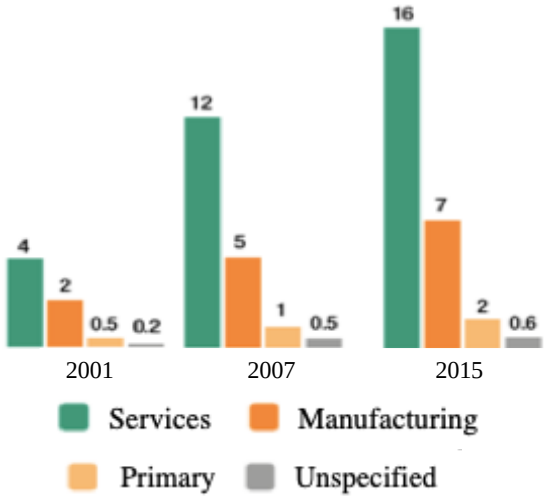
[152] See: OECD-WTO (2016), Trade in Value Added.

[153] High income group aggregate. High-income economies are those in which 2016 GNI *per capita* was $12,235 or more. Middle income group aggregate. Middle-income economies are those in which 2016 GNI per capita was between $1,006 and $12,235. International Monetary Fund, Balance of Payments database, supplemented by data from the United Nations Conference on Trade and Development and official national sources. International Monetary Fund, Balance of Payments database, supplemented by data from the United Nations Conference on Trade and Development and official national sources.



Indeed, the growth of total investment in the last two decades was followed by an increase in the share of investment in services. In 2015, about two thirds of global FDI stock was concentrated in the services sector.

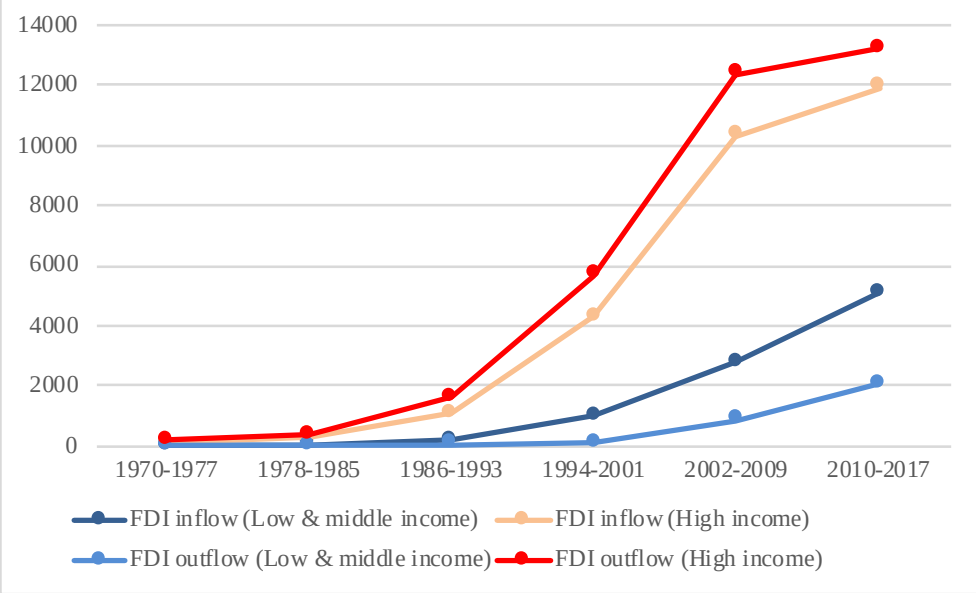
Figure 3-Estimated global inward FDI stock by sector, 2001, 2007 and 2015 (trillions US$)



Source: (UNCTAD, 2017)

Furthermore, the previous paradigm of capital exporters and importers is changing. As can be seen in Figure below, developed countries are increasingly importing capital and developing countries, on their turn, exporting capital.

Figure 4-Foreign direct investment, net inflows and outflows, from 1970 to 2017 (trillions US$)



Source data: World Bank DataBank

This shift in economic logic and reality explains the recent trend in treaty-making of preferential trade agreements containing investment provisions. The depart from the North-South paradigm is further indicated by the fact that 90% of the IIAs signed in this last period have been between developing countries (UNCTAD, 2018b).

For this section, however, it is important to note that it inherently entails increased levels of regulation, accentuating the importance of domestic regulation and their impact on trade and investment flows. This type of regulation involves shared responsibilities of local and central government and puts the domestic regulator, who might absorb international law differently from other regulators and the domestic regulatory processes in the spotlight.

Other intergovernmental institutions now play relevant roles in international economic governance[154], such as the G20[155] and the OECD[156] whose "communiqués", "declarations" and "guidelines" are non-binding, rendering them the status of soft law[157].

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[154] The term "governance" here derives from the Commission on Global Governance, which met in 1995 to report on the future of the UN (Commission on Global Governance 1995). It refers to governance within and as an output of the international system, aimed at addressing those issues that have the potential to affect everyone, irrespective of national borders.

155 The G-20 was set up in 1999, after the collapse of Asian emerging economies. In the beginning, the forum was conceived to articulate discussions in the level of Ministers of Finance. In 2008, after Bush Junior invited all G-20 countries to a meeting in Washington, the group became an important forum to discuss economic and social aspects

157 Nasser (2006, p. 25) defines soft law as "rules that have limited normative value, either because the instruments that contain them are not legally binding or because the relevant provisions, although appearing in a binding instrument, would not create binding positive law obligations or would create less constraining obligations".

Furthermore, the turn of the millennium has witnessed a rise in the formation of informal rules and international standards. Institutions such as *Internet Corporation for Assigned Names and Numbers (*ICANN) and International Organization for International Organization for ISO[158] have gained increased importance in the regulation of international economic transactions[159]. These informal rules go beyond the phenomenon of soft law, as not only outputs, but actors and processes are informal, and states may play a minimal role in international rulemaking[160]

The phenomenon of expansion and actor, process and source diversification, however, is not restricted to economic relations, but results from the functional diversification of society in general and can be observed with respect to the regulation of all global public goods[161]. The regulation of current international relations and transactions, therefore, encompasses public international law, private law, state law, bilateral and multilateral treaties, judicial decisions and infra-state, parastate and private arrangements and usages, where sovereign states play varying roles of influence.

In this scenario where sovereignty has limited role[162], notions of global governance emerge as favored ordering mechanism[163]. In this sense, the notion of international regimes

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158 See Cafaggi et al.'s (2013) account of the emergence of private international regulatory co-operation along with – or sometimes as a replacement for- inter-governmental cooperation. They argue that inter-state regulatory cooperation may be an insufficient response to policy problems of coordination arising out of the globalization of markets and regulatory tasks.

159The relationship between ISO and IEC rules and the WTO has been analyzed in the EC-Sardines and US-Tuna II cases. Sanchez and Takitani (2019) argue that the conflicting interpretations arising out of these cases challenge the mantra that the WTO is a member-driven, consensus-based organization.

160 The term 'informal' is used to encompass non-traditional outputs as well as non-traditional actors (not just states, but also regulators, public agencies, central banks, expert groups, cities, business and NGOs) and processes outputs (not treaty-making in formal international organizations (IOs) like the WTO but in networks, arrangements or groups). Pauwelyn (2014, p. 740) argues that these types of rules might be provide more predictability, stability and neutrality than the traditional sources of international law, with more legitimacy and coherence, from the side of "stakeholder consensus".

161 See Kaul's (2003, p. 3) definition of global public goods:

> "*Public goods are best understood by contrasting them with private goods.1 Private goods can be made excludable and exclusive in consumption. They are associated with clear property rights. And it is up to their owners to determine how to use them—to consume, lease, or trade them. Public goods, by contrast, are goods in the public domain: available for all to consume and so potentially affecting all people. Global public goods are public goods with benefits—or costs, in the case of such "bads" as crime and violence—that extend across countries and regions, across rich and poor population groups, and even across generations."*

162 Henkin (1999, p. 2), for example, argues that "the sovereignty of states in international relations is essentially a mistake, an illegitimate offspring" and could be eliminated in the context of globalization.

163 Slaughter (2003, p. 83) defines global governance as the "collective capacity to identify and solve problems on a global scale". Rosenau (1995, p. 13) defines it as "sytems of rule at all levels of human activity from the family to the international organization in which the pursuit of goals through the exercise of control has transnational repercussions". See also Anne- Marie Slaughter's account of the network of governmental regulators and their importance in global governance going forward and Kal Raustiala's analysis of trans governmental regulatory networks. In other fields, see Tasioulas's (1996) defense of community values.

that developed in the field of international relations theory and acquired distinct legal and sociological meanings[164] may seem more apt to encompass the expansion of those "emerging patterns of constraint" out of private economic activity[165]. In the field of international relations studies, sovereign-centered notions were tied to the realist school and their strong concern with national security and power[166]. The emergence of international cooperation within international organizations has shifted the focus of analysis towards other spheres, bridging the divide between the domestic and international and the state and non-state realms[167].

Sociolegal scholars[168] may include the various forms of private regulation, private dispute resolution bodies, and the activities of private entities like NGOs or trade associations in their discussions of legal pluralism in the international level.

International law scholars, however, have mostly addressed "international legal pluralism" as the existence of a legal system with sprawling tribunals and functionally distinct bodies of legal norms tied to specific areas of regulation that are not coordinated (BURKE-WHITE, 2003). In this context, as found in the study of the International Law

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[164] International relations theory classic definition of regime is attributed to Stephen Krasner in its *Structural causes and regime consequences: regimes as intervening variables* (1992): "*International regimes are defined as principles, norms, rules, and decision-making procedures around which actors expectations converge in a given issue-area*". Constructivist studies emphasize the intersubjective character of regimes, as the set of shared expectations (beliefs), placing emphasis on ideas and values. (LANG, 2006, p. 103) Also (COSTA, 2011a, p. 186) From a constructivist approach, regimes are built on rules and other communicative practices, developed within epistemic communities. But see Nasser (2015) for a critical account of the uses and misuses of the concept of regime in legal studies.

[165] See the seminal International Law Commission (2006) study on the expansion and diversification of international law reported the emergence of "regimes of international that have their basis in multilateral treaties and acts of international organizations, specialized treaties and customary patterns that are tailored to the needs and interests of each network but rarely take account of the outside world" (p. 245). The study recognized the existence of "emerging patterns of constraint out of private activities" from informal or transnational regulation, but did not include them in its attempt to define relationships of priority between international law's different rules or rule-systems.

[166] See especially Morgenthau (2005). Under the realist paradigm states are concerned with the quest for power in an anarchical international society. As Bull (2002, p. 77) puts it: "Whereas men within each state are subject to a common government, sovereign states in their mutual relations are not. This anarchy it is possible to regard as the central fact of international life and the starting point of theorizing about it".

[167] By focusing on the evolution of expectations during interaction, international relations scholars have shown how states can develop international regimes that promote cooperation even after the distribution of power that initially sustained them has gone. See: (GOLDSTEIN; KEOHANE, 1993; PUTNAM, 1988; WENDT, 1994)

168 However, legal pluralists do not agree on a single concept of law, beyond they fundamental depart from the "ideology of legal centralism" (TAMANAHA, 2000). Santos (1995, p. 9), for example, defines law as es law as 'a body of regularized pr normative standards, considered justiciable in any given g contributes to the creation and prevention of disputes, and to thei through an argumentative discourse, coupled with the threat of force'. In this sense, the problem with pluralist notions of law is that they suffer of analytical problems, as there is no agreement on the nature of law, or as Sally Merry put it: 'Where do we stop speaking of law and find ourselves simply describing social life? (MERRY, 1988, p. 869). Teubner (1991, p. 3) addresses the issue with a "linguistic turn", in accordance with autopoietic theory, where law consists of all discourse that invokes the binary communicative code of legal/illegal.

Commission, available general rules of international law are able to provide guidance in case of overlap or conflict (INTERNATIONAL LAW COMMISSION, 2006).

In this sense,

> *"Fragmentation puts to question the coherence of international law. Coherence is valued positively owing to the connection it has with predictability and legal security. Moreover, only a coherent legal system treats legal subjects equally. Coherence is, however, a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so. Therefore, alongside coherence, pluralism should be understood as a constitutive value of the system. Indeed, in a world of plural sovereignties, this has always been so."*

However, the present study is predominantly concerned with the aspect of domestic regulation beyond the fragmentation of the international systems, as domestic regulators incorporate international law in different ways and extents. There is pluralism among sovereigns, as has always been, but pluralism among regulators[169].

3.5. AN UNIFORM FRAMEWORK FOR ALLOCATION OF POWER

This chapter demonstrated how ideas regarding the regulation of trade and investments have been formalized in international treaties. It shows that, in spite of previous attempts, the "right to regulate in the public interest" was not previously formalized because there was no consensus with regards to the role of the State and the regulation of economy.

With regards to trade, the "right to regulate in the public interest" became enshrined in Article XX due to a consensus built on the so-called *embedded liberalism*. During this period, regulation in the public interest relates to the regulatory welfare state. As showed in the previous chapter, this allowed the consolidation of international economic law as a contract between sovereign and the role of adjudication as 'holding the bargain'. This has allowed for the "revolution of international law" when it comes to the strength of procedural and substantive rules when it comes to reviewing domestic regulatory measures.

However, the bargain is less clear as WTO rules began to concern *behind the border* domestic regulation since the 1990s.

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[169] In this context, reference is made to Tamanaha's (2000, p. 396) non-essentialist definition of legal pluralism: "Legal pluralism exists whenever social actors identify more than one source of 'law' within a social arena".

Likewise, with regards to IIAs, the historical development shows that previous efforts to formalize the right to regulate failed due to diverging ideas of state interference in the economy, first related to post-colonialism and the right for self-determination and second, even during the heights of neoliberal, divergence regarding the Washington Consensus ideals.

Although the present moment shows that the economic reality and logic has shifted, so that the North-South paradigm may not be as determining in current international economic relations, no economic paradigm has yet replaced the neoliberalism dogmas.

This reinforces the criticisms to current functional and constitutional approaches to public international economic law. With regards to global constitutionalism, or global public law, no homogenous, hierarchical meta system has emerged that can provide coherence between economic and countervailing values and guidance regarding how to balance them. As for constitutionalism, the focus on procedural norms in order to give coherence to the system presupposed substantive coherence regarding economic regulatory fundamentals that are now both accepted and contested among and within states.

It is argued, thus, that the right to regulate in the public interest is an inherent sovereign right. Therefore, states should be careful about framing it in investment agreements as it confines it to exceptions or carve-outs is recognizing that customary expressions of sovereignty would need to be incorporated in a treaty to operate**.**

The definition of the right to regulate in the public interest adopted in this thesis, thus, is one of regarding the specific "right to regulate in the public interest", but not the broad "right to regulate" that was debated in the context of third world movement claims for self-determination. As for public interest, it encompasses global public interests but should not be equaled or presume coherence of structuring value. In this sense, public interest here equals reasonable consideration of plural regulatory values and procedures. It must be noted that international law remains a "powerful [language] in the interpretation of international events"[170]. Thus, in adopting this approach, the aim of this thesis is to, at the same time, preserve the analytical integrity of international law and assess whether it can provide guidance in facing contemporary demands.

With regards to how to safeguard it when it is "framed" in adjudication, my working hypothesis is that precedents will show that adjudicators adopt a great variety of

[170] (ANGHIE, [s.d.], p. 328)

standards of review, including strict forms of substantial and procedural review that are inadequate in light of the VCLT.

It is argued that, where the treaty or institution provides no guidance regarding the appropriate standard of review, as long as public international economic law remains formed by single-value regimes, the adoption of strict substantive and procedural review of domestic regulatory measures in the public interests are inadequate under customary international law.

This points to the need of stronger institutional provisions and a preference for regional institutions.

4. THE RIGHT TO REGULATE IN THE PUBLIC INTEREST AS FRAMED IN PUBLIC INTERNATIONAL ECONOMIC LAW ADJUDICATION

There is no standard template for international economic law instruments, and in fact, as already explored in this study, the structure of the different WTO treaties, PTAs and IIAs varies considerably. Furthermore, terms used for the categorization of the different treaty elements and the obligations contained therein have developed in parallel with regards to trade and investment, in accordance with their historical development. Trade parlance usually refers to regional and multilateral economic integration, distinguishing between those obligations that lead to 'negative integration' through the striking down of national regulation that is discriminatory or unnecessary and those that lead to 'positive integration' via harmonization of rules or mutual recognition (EPPS; TREBILCOCK, 2013, p. 319). The GATT was in whole an instrument of negative integration, in the sense that states only obligations was to refrain from certain acts, such as discriminating, or increasing tariffs beyond accorded. However, WTO agreements, mainly the TRIPs, require a level of regulatory harmonization among the WTO membership[171].

Another major differentiational structural element among WTO agreements is the existence of affirmative defenses among the positive obligations. While the GATT and the GATS famously contain general exception clauses[172], the extent to which the public interest is safeguarded under other agreements that do not contain similar provisions, such as the Agreement on Subsidies and Countervailing Measures ("*SCM* Agreement") and Protocols of Accession has been controversial[173]. Furthermore, the matter of negative or positive obligations is also contentious.

In their turn, investment obligations are often divided in standards of treatment and standards of protection, considering that it is rare that they foresee defenses that justify

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[171] As a targeted example of this base level of harmonization on patents, consider the fact that TRIPS mandates that '[t]he term of protection available shall not end before the expiration of a period of twenty years counted from the filing date' (TRIPS Art. 33). The TBT and SPS also require harmonization in their articles X and 2.2. According to article Y also non- discriminatory laws directed at human, animal or plant life or health can be challenged because they impose greater burdens on producers in an exporting state

[172] The TRIPS agreement contains general exception clauses to copyrights and to the rights conferred by trademarks, industrial designs and patents. See Rodrigues Jr. (2012) for an analysis the normative meaning pf the exception clauses and their capacity to promote the pillars of sustainable development.

[173] See, for example, the China-Rare Earths case.

breaches or carve-outs from the scope of their application. Standards of treatment[174] are sub-divided into relative standards, non-discrimination obligations that require a comparator for their application, and absolute standards, (i) the international minimum standard of treatment (IMS), the fair and equitable treatment (FET) and the full protection and security standards. Standards of protection usually include protection against unlawful expropriation, compensation in cases of strife, transfer of funds, subrogation and umbrella clause.

In order to facilitate comparison, this chapter is divided in the analysis of positive obligations – relative and absolute - and affirmative defenses. With respect to the WTO, paradigmatic cases under the GATT 1994 and the TBT agreement where domestic regulation was analyzed were selected. As for the IIAs, the paradigmatic cases were selected as publicly available and where the adopted standard of review had been articulated by the adjudicator.

4.1. RELATIVE STANDARDS OF TREATMENT: NON-DISCRIMINATION

The principle of non-discrimination is a cornerstone of international trade and international investment law. Within the WTO agreements, it appears transversely in all treaties in its two aspects: national treatment and most favored nation[175], whereas in IIAs[176]

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[174] For an overview of standards of treatment and protections see: (DOLZER; SCHREUER, 2012; NADAKAVUKAREN SCHEFER, 2016; NEWCOMBE; PARADELL, 2009; SALACUSE, 2015; SORNARAJAH, 2010)

[175] See Preamble to the WTO Agreement, GATT Articles III:7, IV(b), V, VI, VII, XVI, XIX and XVIII:20, Agreement on Trade-Related Investment Measures (WTO Agreement Annex 1A ('TRIMS')) Article 2, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (WTO Agreement Annex 1A ('Antidumping Agreement')) Article 9.2, Agreement on Pre-shipment Inspection (WTO Agreement Annex 1A) Article 2.1, Agreement on Rules of Origin (WTO Agreement Annex 1A) Articles 2(d) and 3(c), Agreement on Subsidies and Countervailing Measures (WTO Agreement Annex 1A ('SCM Agreement')) Article 19.3, Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO Agreement Annex 1C ('TRIPS')) Articles 3 and 4, the plurilateral Agreement on Government Procurement (WTO Agreement Annex 4(b)) Article III, and the expired Agreement on Textiles and Clothing (WTO Agreement Annex 1A) Article 7.1(c). In addition, Article 3.7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO Agreement Annex 2) ('DSU') authorizes discriminatory treatment as a potential remedy and Article 1 of the Enabling Clause (Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT Doc L/4903 (28 November 1979)

[176] Alschner & Skougarevskiy (2016, p. 170) mapped the "universe" of IIAs to measure convergence and divergence on substantive standards. They found that in an universe of 1625 BITs, 97% included national treatment. provisions, showing consensus around this standard of treatment.

these standards they may appear as a single non-discrimination provision [177] (NADAKAVUKAREN SCHEFER, 2016, p. 334).

The most favored has attracted attention since 2010, when a tribunal that it may allow investors to import more favorable provisions from a third-party BIT[178], since the focus of the present thesis is domestic regulation, focus will be given to cases that involved national treatment[179].

Although there could be discrepancy on the wording of the more than 3000 BITs, the classic structure of a national treatment clause is similar to its counterpart in trade, as represented in article 1102 of the NAFTA:

> *"Article 1102: National Treatment*
>
> *1. Each Party shall accord to* ***investors*** *of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *2. Each Party shall accord to* ***investments of investors*** *of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part."*

Dolzen&Scheurer state that their interpretation in investment arbitration has invariably involved a three-step analysis: (i) whether the foreign investment or investor are in a "like situation" or "like circumstance", regarding the domestic relevant business or market, (ii) whether the treatment offered to the foreign investment or investor concerned

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[177] Examples of general non-discrimination clauses: Germany-Pakistan BIT (1959) Art. 2: Neither Party shall subject to discriminatory treatment any activities carried on in connection with investments including the effective management, use or enjoyment of such investments by the nationals or companies of either Party in the territory of the other Party unless specific stipulations are made in the documents of admission of an investment. Colombia-India BIT (2013) Art. 3.2 Each contracting party […] shall not impair with discriminatory measures the management, use, enjoyment, sale or disposition of such investments.

[178] See: (NIKIÈMA, 2014).

[179] It must be noted that the principle of national treatment has "two facets" under international investment law, one remounts to the Calvo doctrine and the other has its basis in the doctrine of state responsibility for injuries to aliens and their property "under which customary international law is regarded to have established a minimum international standard of treatment to which aliens are entitled." (SUBEDI, 2008, p. 73).

is the same provided to domestic investment or investors, and (iii) if the treatment provided to foreign investment or investor is less favorable than the one ensured to domestic investors, one has to evaluate whether the discrimination was justifiable (DOLZER; SCHREUER, 2012, p. 198).

4.1.1. EC-Asbestos[180]

In 1996 the French government introduced a measure effectively banning the domestic production and importation of asbestos and products containing asbestos for the stated reason of protecting workers and consumers[181]. A temporary exception was included in cases when, to perform an equivalent function, an asbestos product did not have a substitute that posed a lesser health risks or provided technical guarantees of safety. Canada claimed that the ban was a violation of national treatment under art. III:4[182] as it afforded less favorable treatment to asbestos products imported from Canada than to "like products", some of which were originated in the EC. Furthermore, The EC argued that its measure was justified under art. XX(b).

The main question in relation to Art. III was whether the analysis of likeness of asbestos and substitute products should consider the health risks associated with the former. The European Union argued that risk to health should be considered in determining a product's nature and quality, and because the products were not like there was no violation of Art. III:4.

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[180] Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos—Containing Products, WT/DS135/AB/R, 12 March 2001.

[181] Decree No. 96-1133, issued pursuant to the Labour Code and the Consumer Code (*décret no. 96-1133 relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consommation*) establishes in its Article 1 that: "I. – For the purpose of protecting workers, [...] the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices.
II. – For the purpose of protecting consumers, [...] the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer under any title whatsoever of all varieties of asbestos fibres or product containing asbestos fibres shall be prohibited [...]." Article 2 of the Decree allows some exceptions to the ban in Article 1. "I. – On an exceptional and temporary basis, the bans instituted under Article 1 shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which: - On the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than chrysotile fibre to workers handling those materials, products or devices; - on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use [...]."

[182] Canada also claimed that the measure was a technical regulation covered by the TBT and violated art. XI:1.

The AB notes that the term ”like products” appear in a number of articles throughout different WTO Agreements and proceeds to interpret it “in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which [it] appears” [183], as their meaning “need not be identical”[184].

After failing to find guidance in the “ordinary meaning” of the word in the dictionary[185], the AB pondered about three technical interpretative difficulties:

> *“First, ‘like products’ does not indicate which characteristics or qualities are important in assessing the ‘likeness’ of products under Article III:4, since most products will have many qualities and characteristics [. . .] Second, it provides no guidance in determining the degree or extent to which products must share quality or characteristics..., as products may share only a few characteristics or qualities, or they may share many...Third, it does not indicate from whose perspective ‘likeness’ should be judged. Ultimate consumers may have a view about likeness of two products that is very different from that of producers of those products (emphasis added*[186]*)”.*

To determine how the public interest should be taken into account, then, the AB turned to a textual analysis of the structure of the GATT agreement. The AB reversed the finding of the panel that considerations of health effects could not be taken into account in the analysis of whether two products are “like” under Article III:4. Nevertheless, it relied on the structure of the test to conclude that the term constitutes a specific expression of the “general principle” of Article III, set forth in Article III:1, that is, to discipline protectionist measures[187]. The AB then concludes that “like products” shall be interpreted broadly and review the four criteria of likeness adopted by the panel. Most importantly, the AB reverted the Panel’s finding that an analysis of “health risks” should not be impaired by the fact that it would deprive art. XX (b) of its *effet utile*. It emphasizes that:

> “*The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of*

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[183] Para. 88
[184] Para. 89
[185] Para. 90 – “*According to one dictionary, "like" means: Having the same characteristics or qualities as some other ... thing; of approximately identical shape, size, etc., with something else; similar*.”
[186] Para. 92
[187] *1.The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

> *treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4."*

Nevertheless, the "health risks" are only evaluated as criteria of "the competitive relationship between products"[188]. As the Panel had not properly analysed consumer's tastes and habits, the AB did not complete the analysis.

The AB further affirmed that a member may "draw distinctions" between products found to be like without according imported products "less favourable treatment" but did not conclude the analysis[189]. Therefore, although the AB rejected an "exclusively" economic interpretation of likeness, it adopted a "fundamentally" economic one which, according to one dissenting Member of the Division[190], is not "free from substantial doubt". He suggests that not "any kind or degree of health risk associated would negate a finding of "likeness", but that he couldn't imagine what evidence could "outweigh" the "undisputed deadly nature" of asbestos products, thus suggesting a more balanced approach. Whether art. III:4 allowed for regulatory distinction remained an open issue for a brief time but seems to have been resolved in EC-Seal.

4.1.2. US - Clove Cigarettes191

In 2009, the United States approved the Family Smoking Prevention and Tobacco Control Act (Public Law No. 111-31)[192]prohibiting the production and sale of cigarettes with characterizing flavors other than tobacco or menthol. The objective with the measure, according to the American authorities, was to reduce the number of individuals under 18 years of age who use tobacco products, but according to Indonesia, Section 907(a)(1)(A) of the emended FFDCA was inconsistent with TBT Agreement. As Indonesia argued, the American act violated the provisions of articles 2.1 and 2.2 of the TBT Agreement, because it accorded to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin, configuring an unnecessary obstacle to international trade.

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[188] Para. 117
[189] Para. 100
[190] The concurring statement of the anonymous third Member of the Appellate Body is found at para. 149-154.
[191] Appellate Body Report, WT/DS406/AB/R, 4 April 2012
[192] The act emended the United States Federal Food, Drug and Cosmetic Act (FFDCA). Available at: https://www.fda.gov/tobaccoproducts/labeling/rulesregulationsguidance/ucm237092.htm [10/9/2018].

The AB upheld the Panel's finding that the measure at issue was inconsistent with article 2.1 of the TBT. However, it clarified the implications of its decision with regards to public health policies in general.

> *"While we have upheld the Panel's finding that the specific measure at issue in this dispute is inconsistent with Article 2.1 of the TBT Agreement, we are not saying that a Member cannot adopt measures to pursue legitimate health objectives such as curbing and preventing youth smoking.*"[193]
> *2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.*

Most relevantly, in addressing whether there was "less favourable treatment" in the case, the AB found that "the existence of a detrimental impact on competitive opportunities" was "not sufficient to establish a violation of the national treatment obligation contained in Article 2.1 of the TBT Agreement"[194]. In this sense, the AB found that the preamble provided context for interpretation of article 2.1[195], and used the term "right to regulate" for the first time in the context of the TBT:

> *"Instead, the sixth recital of the preamble of the TBT Agreement suggests that a Member's* ***right to regulate*** *should not be constrained if the measures taken are necessary to fulfil certain legitimate policy objectives, and provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement*[196]*".*

The AB also observed that the TBT does not contain among its provisions a general exceptions clause. and that "This may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX"[197].

In this sense, it found that:

> *"The balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in*

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[193] Para. 236
[194] Para. 215
[195] "*Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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 provisions of this Agreement*;"
[196] Appellate Body Report, US – Clove Cigarettes, para. 95.
[197] Para. 101.

the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.[198] *"*

4.1.3. EC-Seal[199]

In 2009 the European Union implemented the Seal Regime, banning the placing in the market of seal products in the European Union market[200]. The European Regime provided a few exceptions; most importantly, it allowed the placing on the market of seal products where they "result from hunts traditionally conducted by Inuit and other indigenous communities and contributes to their subsistence." (the IC exception)[201]. Canada and Norway initiated complaints against the EU in 2009, claiming that the Regime violated a series of provisions of the GATT and the TBT. The Panel found a violation of both the TBT found that the EU Regime constituted a technical regulation under the TBT agreement and that it violated its arts. 2.1, 2.2, 5.1.2 and 5.2.1. The AB reverted the Panel's finding that the EU Regime was a technical regulation and declared the other findings under the TBT agreements moot. For the purposes here, the Panel and the Appellate Body reasoning are analyzed in reviewing whether the EU Regime violated the national treatment and whether, as argued by the EU, it was justified under article XX(a).

Canada and Norway argued that the EU Regime accorded their seal products less favorable treatment than that accorded to like products from Sweden, Finland and Greenland. In conducting its analysis, the panel analyzed the impact in the market, and concluded that Canada and Norway were excluded from the EU market by terms of one of the exceptions while domestic seal products still qualified for placing in the market[202].

The European Union argued that in analyzing art. III:4 the panel was required to examine whether the detrimental impact of a measure stemmed "exclusively from a legitimate regulatory distinction"[203]. According to the EU, the different standards adopted

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[198] Para. 96.
[199] DS401: European Communities — Measures Prohibiting the Importation and Marketing of Seal Products.
[200] The European Regime comprises (i) Regulation EC No. 1007/2009 of the European Parliament and of the Council, which regulates trade in seal products (Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R1007&from=en. Accessed in [13/03/2018); and the Commission Regulation (EU) No. 737/2010, which lays down the rules for implementation of the main regulation. (Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0737&from=EN . [13/03/2018]
[201] The Regulation also provided for exceptions for import of seal products consisting of goods for the personal and occasional use of travelers and seal products resulting from hunts with the sole purpose of the sustainable management or marine resources.
[202] Para. 7.608.
[203] Para. 5.117.

under arts. 2.1 and III:4 could lead to the result that a technical regulation could be considered non-discriminatory under the TBT Agreement and still violate the GATT[204]. Furthermore, complainants would have a strong incentive to invoke art. 2.1 of the TBT and bring claims under the GATT.

The AB recalled the findings in US-Clove Cigarettes and noted that the fact that under the GATT 1994, a **Member's right to regulate** is accommodated under Article XX, weighs heavily against an interpretation of Articles I:1 and III:4 that requires an examination of whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.

The European Union had argued that the list of legitimate objectives that might factor into an analysis under art. 2.1 is open, in contrast to the closed list of objectives under Article XX. The Appellate Body addresses that point, noting that beyond this openness argument, the European Union had not presented any concrete example of legitimate objectives that could factor into an analysis under art. 2.1 of the TBT and not under art. XX of the GATT.

Finally, the Appellate Body recalled that its interpretation was based "on the text of those provisions, as understood in their context, and in the light of the object and purpose of the agreements in which they appear, as is our mandate". And further states that: "If there is a perceived imbalance in the existing rights and obligations under the TBT Agreement and the GATT 1994, the authority rests with the Members of the WTO to address that imbalance[205]".

4.1.4. Methanex v. USA

In Methanex v. USA, the matter at issue involved the interpretation of "like circumstances". In 1999 the state of California issued an executive order banning the use of methyl tertiary-butyl ether (MTBE) as a gasoline additive. The ban was based on a study conducted by the University of California, finding that MTBE was polluting surface and groundwater in the state. By the end of the same year, Methanex Corporation (Methanex), a Canadian producer and seller of methanol, submitted a request for arbitration under Chapter 11, claiming the measure violated Articles 1102, 1105 and 1110.

Methanex claimed that the MTBE ban was a discriminatory measure in favor of locally produced ethanol. The company relied on article 38(1) of the CIJ Statute to support

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[204] Para. 5.118.
[205] Para. 5.120.

its submission that the Tribunal should consider the GATT jurisprudence in interpreting the criteria behind "likeness" under NAFTA Article 1102[206]. The Tribunal agrees that the way in which a similar phrase in the GATT has been interpreted in the past might provide guidance on interpreting article 1102 but would not be a binding precedent, as per the principles of interpretation under the Vienna Convention[207] and with reference to the International Tribunal for the Law of the Sea in The MOX Plant case[208]. The US argued, however, that relying on GATT precedents would be inappropriate due to the similar differences between the relevant texts[209].

Methanex argues that article 1102 does not require that two investments or investors to be identical, merely that they are in "like circumstances", and Methanex claimed to be in identical circumstances with US ethanol producers. Methanex than refers to the EC-Abestos case to maintain that "the most accurate and widely recognized test of 'likeness' is competition"[210]. Applying the same test to the products at issue, Methanex argues that MTBE and ethanol are "like products"[211]. Thus, Methanex claims that it and its investments have received less favorable treatment[212].

The tribunal addresses the issue of finding the appropriate comparator for likeness, the ethanol industry, or a particular ethanol producer. It concludes that the appropriate comparator was other MTBE producers in California, as the regulation did not differentiate between foreigners, there was no less favorable treatment[213].

Relying again on a GATT case, Methanex argued that there were no valid environmental, health or safety justification for the MTBE ban, and exceptions to the national treatment were to be construed narrowly, as "pseudo-environmental" measures could disguise local interests against foreign competitors. The Tribunal concludes that GATT provisions were irrelevant at that context, since there were no less favorable treatment, and relied on an amicus curiae submitted by the International Institute for

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[206] Methanex further asked that the Tribunal hear its GATT violation claims. However, the Tribunal reject the argument affirming that its jurisdiction was confined to articles of the NAFTA on deciding claims under Chapter 11, and it did not find that Article 1102 could be read as an *envoi* to the GATT.
[207] The tribunal elaborates on the Vienna Convention: "As to the third general principle, the term is not to be examined in isolation or *in abstracto*, but in the context of the treaty and in the light of its object and purpose. One result of this third general principle, being relevant to Methanex's first argument on GATT jurisprudence"
[208] Part II - Chapter B - Page 7
[209] Part II - Chapter B - Page 4
[210] Part IV - Chapter B - Page 3 – para . 3
[211] Part IV - Chapter B - Page 4 – para. 6
[212] Part IV - Chapter B - Page 3 – para 6
[213] Part IV - Chapter B - Page 10 – para 9

Sustainable Development (IISD) that warned against the transplantation of trade law approaches to investment law[214]. Thus, the Tribunal rejected Methanex claims regarding art. 1102.

4.2. ABSOLUTE STANDARDS OF TREATMENT: FAIR AND EQUITABLE TREATMENT

Fair and equitable treatment clauses date back to the FCN treaties and is the most frequently invoked standard in investment disputes (DOLZER & SCHEURER, 2012: 130). As a broad concept which lacks precise meaning, its development is profoundly rooted on treaty provisions and the developments of case law.

Generally speaking, despite the heterogeneity in its formulation on treaties[215], fair and equitable treatment can be defined as an obligation of conduct, and not a duty to achieve a specific result. It seeks to fill gaps on a flexible manner, giving proper interpretation with independence from national treatment standard[216] and it encompasses the duties of protection of investor's legitimate expectations, transparency, compliance with contractual obligations, procedural propriety and due process, and good faith[217] .

4.2.1. Methanex Corporation v. USA

In Methanex Corporation V. USA, the investor claimed breaches of arts. 1102 and 1110 and a breach of the fair and equitable treatment standard under article 1105 of NAFTA, which reads:

> ***Article 1105: Minimum Standard of Treatment***
>
> *1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*
>
> *2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to*

[214] Part IV - Chapter B - Page 13.
[215] According to Alscher's (2016, p. 170) mapping project, 99% of the 1628 BITs analyzed contained FET clauses.
[216] (DOLZER; SCHREUER, 2012, p. 132)
[217] (DOLZER; SCHREUER, 2012, p. 145)

> *measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.*
>
> *3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).* [218]

Methanex argued that the California measure breached the **"fairness elements"** of Article 1105, because there were less disruptive alternatives available, such as repairing leaking tanks, and because it discriminated against Methanex in favor of domestic ethanol producers[219].

During the proceedings of the arbitration, the NAFTA Free Trade Commission (the "FTC") adopted certain "interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions"[220].

> *"B. Minimum Standard of Treatment in Accordance with International Law*
> *1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.*
> *2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*
> *3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).*
> *Closing Provision*
> *The adoption by the Free Trade Commission of this or any future interpretation shall not be construed as indicating an absence of agreement among the NAFTA Parties about other matters of interpretation of the Agreement."*

Relying on a number of precedents, the Tribunal found that Methanex assertion is unfounded. It argued that (i) differential treatment was not per se a violation of the "minimum standard of treatment", (ii) the FTC interpretation is binding on the tribunal and (iii) absent a contrary rule of international law, a state may differentiate in its treatment of nationals and aliens[221].

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[218] It must be noted that Methanex tried to convince the Tribunal should to disregard the interpretation on the basis that it was nothing more than an attempt by the USA retroactively to suppress a legitimate claim. Part IV - Chapter C - Page 2
[219] Part II - Chapter D - Page 9
[220] Part II - Chapter B - Page 5
[221] Part IV - Chapter C - Page 8-9

4.2.2. Philip Morris International v. Uruguay[222]

The World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) is the first treaty negotiated under the auspices of the WHO. Among the measures promoted to achieve its objectives are those related to packaging and labeling, set out in its article 11[223].These measures establish a minimum space for health warnings on the packaging of tobacco products, thereby reducing the space for marketing and its attractiveness and consumption, especially for a younger population. Additionally, in November 2008, States Parties adopted Guidelines for the implementation of certain provisions, including Article 11 of the FCTC (Guidelines)[224].

Article 11 defines the minimum criteria in two aspects of interest of the present research: (i) the treatment of the tobacco varieties: FCTC forbids the usage of descriptions in the packages which creates the false impression that a specific tobacco-based product is less harmful to health as compared to others, such as "low tar", "light", "ultra-light" or "mild"; and (ii) the size of health warnings should cover 50% or more of and not less than

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[222] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay. ICSID Case No. No. ARB/10/7, Award on Merits (July 8, 2016)

[223] Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:
(a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light", or "mild"; and
(b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:
(i) shall be approved by the competent national authority,
(ii) shall be rotating,
(iii) shall be large, clear, visible and legible,
(iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,
(v) may be in the form of or include pictures or pictograms.
2. Each unit packet and package of tobacco products and any outside packaging and labelling of such products shall, in addition to the warnings specified in paragraph 1(b) of this Article, contain information on relevant constituents and emissions of tobacco products as defined by national authorities.
3. Each Party shall require that the warnings and other textual information specified in paragraphs 1(b) and paragraph 2 of this Article will appear on each unit packet and package of tobacco products and any outside packaging and labelling of such products in its principal language or languages.
4. For the purposes of this Article, the term "outside packaging and labelling" in relation to tobacco products applies to any packaging and labelling used in the retail sale of the product.

[224] In their ICSID amicus curiae, WHO and the FCTC Secretariat clarify that the Guidelines "are intended to assist Parties in (...) increasing the effectiveness of measures adopted and play a particularly important role in settings where resource constraints may otherwise prevent domestic policy development." Available at: http://www.who.int/fctc [12/06/2017].

30% back and front areas. All parties of the FCTC are bound by such criteria, which shall be implemented within three years of the FCTC's entry into force in their jurisdictions.

Even before the provisions on packaging and labeling became mandatory for Uruguay, the country began to adopt regulations in compliance with its minimum standards, with Decrees 171/2005 and 232/2007 of the Ministry of Health[225]. Between 2008 and 2009 a series of more restrictive regulations were adopted, the so-called Regulation 80/80 (Decree MS 287/2009 and Order of MS 466/2010[226]) and Single Display by Brand (SDB) (Order of MS 514/2008[227]).

The UPB goes beyond the FCTC provisions by limiting each trademark to a single product display. Therefore, brands shall eliminate completely alternative displays, such as "gold", "silver", which, as it was argued, would not fall into the FCTC-prohibited categories of "light" and "mild".

More directly, with the 80/80 regulation, 80% of front and back of tobacco products packaging must be covered by health warnings, advancing the previous minimum 30% set by the FCTC.

In February 2010, Philip Morris International (PMI) initiated an arbitration of investments against Uruguay under ICSID, alleging a violation of its rights under the BIT Uruguay-Switzerland signed in 1998, in particular fair treatment clauses and investments and protection against expropriation.

In turn, Uruguay claimed that the measures were adopted in compliance with the country's international obligations, with the sole purpose of protecting public health. Both measures would have been adopted in a non-discriminatory manner for all tobacco companies and would only be the reasonable and good faith exercise of the country's sovereign prerogatives. It thus claimed that, like any state, it has "the sovereign right to exercise its police powers in a non-arbitrary and non-discriminatory manner to protect public health."[228]

In July 2016, the Tribunal rejected all PMI allegations, stating that (i) SDB is a reasonable measure, justifiable, fair, non-discriminatory and proportional; and (ii) the Regulation 80/80 is a reasonable measure, adopted in good faith to implement an obligation assumed by the State under the FCTC.

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[225] Available at: https://www.impo.com.uy/bases/decretos [11/06/2017].
[226] *Idem.*
[227] *Idem.*
[228] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay. ICSID Case No. No. ARB/10/7, Award on Merits, §240.

This section analyzes the FET claims. With regards to SDB, the Tribunal ruled that it was not necessary "to decide if the SDB, indeed, reached the results aimed by the State, but if the measure was 'reasonable' when it was adopted"[229]. Therefore, it was proved that the "reasonableness" criteria was reached, as "the SDB is an attempt to address a public health concern; the measure was not disproportionate and was adopted in good-faith"[230].

Accordingly, the Tribunal adopted the "margin of appropriation criterion" adopted by the European Court of Human Rights, stating that the responsibility for public health measures rests with governments and investment tribunals should demonstrate deference to government judgments of national needs on issues such as health protection. In such cases, the Tribunal states that "respect is due to the discretionary exercise of sovereign power, not exercised irrationally or in bad faith, involving many complex factors (…) the only question for the Tribunal is whether or not there is manifest absence of reasons for the legislation".[231]

With regards to the Regulation 80/80 the Tribunal noted that PMI did not refute the contents of the warnings, only their increase to 80% from the previously accepted 50% standard. The Tribunal concluded that "how the government requires the communication of health risks associated with tobacco is a matter of public policy, to be left to the regulatory authority for consideration". [232]

It is worth noting that arbitrator Gary Born dissented, rejecting the applicability of the margin of appreciation in the BIT context, considering that the single presentation requirement breached the FET standard as it was arbitrary, irrational and did "*not bear even a minimal relationship to the legislative policy objective cited by Uruguay for the requirement*". However, he emphasized that his conclusions were "*not in any way a comment on the sovereign authority of Uruguay (or any other state) to safeguard its population's health or safety",* such measures being "*within the regulatory sovereignty of Uruguay*". Substantial deference to this regulatory sovereignty was required but was "*not a substitute for reasoned analysis*" of whether the measures satisfied a minimum level of rationality and proportionality between the regulatory measure and the public interest objective.

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[229] *Idem,*§409.
[230] *Idem.*
[231] *Idem,*§399.
[232] *Idem,*§430.

In addition to the different conclusions reached by the majority and dissenting arbitrators, the unsettled status of the issue is reflected in the varying language adopted by the tribunal to describe States' regulatory powers within the FET analysis, using expressions such as "*sovereign power", "sovereign authority to legislate", "normal regulatory power in the pursuance of a public interest*" and "*regulatory sovereignty*" interchangeably.

4.3. ABSOLUTE STANDARDS OF PROTECTION: EXPROPRIATION

Traditional BITs emerged historically as instruments to protect private property in the host state. Therefore, one of its defining features is the present of standards of protection, most famously the protection against unlawful expropriation [233]. which are not present in trade agreements.

The concept of expropriation, however, is not straightforward and has evolved over time. Traditional, or direct expropriation, implies the transfer of title or outright seizure. Today large-scale direct expropriations (nationalizations) are rare.

A classic example of protection against unlawful expropriation clause can be found at NAFTA's Article 1110:

> *"Article 1110: (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* (…)".

4.3.1. Metalclad v. USA

The Metalclad case involves a serious of measures taken by the Mexican government from 1990 to 1995. Metalclad, a company incorporated in the United States, claimed that the Mexican government interfered in the development of a hazardous waste landfill This interference amounted to the violation of Articles 1105 and 1110 of NAFTA. . In this case, there was an expropriation for two reasons. The first related to the obscure municipal permit granting process. The corporation had been led by federal officials to

[233] BITs also contain other standards of protection, such as free transfer of funds, subrogation and umbrella clauses.

believe that it did not require a municipal construction permit that was in fact required, and then later refused, by the local government. The second reason stems from an Ecological Decree enacted in 1997, declaring the property a Natural Area for the protection of rare cacti, which prevented the operation of the landfill. This Decree established a protected natural area that incorporated the landfill site.

As permitted by NAFTA, Article 1128, the United States made a written submission to the Tribunal on November 9, 1999. Although the United States does not have any specific commercial interest in the dispute in this case, the submission set forth the United States' position that the actions of local governments, including municipalities, are subject to NAFTA standards. The United States also submitted that the NAFTA, Article 1110, term "tantamount to expropriation" addressed both measures that directly expropriate and measures tantamount to expropriation that thereby indirectly expropriate investments. The United States rejected the suggestion that the term "tantamount to expropriation" was intended to create a new category of expropriation not previously recognized in customary international law.

In its interpretation of whether the measures were "tantamount" to expropriation according to Article 1110, the Tribunal concluded:

> *"103. Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."*

The Tribunal considered the Ecological Decree a further ground for a finding of expropriation, as it had the "effect of baring forever the operation of the landfill"[234]. Noting that a finding of expropriation on the basis of the Ecological Decree was not needed "a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation. The Tribunal awarded damages, but the compensation did not include lost profits because the landfill was never operational.

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[234] Para. 29.

Hence, the *Metalclad* tribunal focused on the 'effects' of the particular measures in order to decide whether an indirect expropriation had occurred. Accordingly, the tribunal deemed the motivation for the interference with private property rights to be irrelevant. In other words, a State's intention to regulate in the public interest would be immaterial at this early stage of the analysis. Scholars have labeled this approach the 'sole effects' doctrine.

4.3.2. Methanex V. USA

In Methanex v. USA the US advanced in its legal submissions a general international law standard akin to the "police powers doctrine" which was effectively adopted by the tribunal in its findings:

> *"As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is* ***not deemed expropriatory and compensable****".*

The tribunal did not take in consideration the economic impact the regulation had in the investor, or the degree of the interference with the investor's legitimate expectations, which would entail a sort of proportionality or necessity analysis, departing from the Metalclad decision.

Furthermore, in evaluating whether the measure was enacted according to due process, the tribunal referred to the regular or accepted regulatory process in the California context[235]. Nonetheless, it added that such a measure would not be deemed expropriatory and compensable "*unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation*"[236]. This additional procedural element could be problematic in the context of disputes based on investment contracts that include "stabilization clauses", a common feature in contracts negotiated by developing countries[237]. However, Sornarajah argues that there is no policy reason why a stabilization clause would hinder a measure evidently in the public interest. Furthermore, it is not clear

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[235] Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non- governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons.

[236] Para. 7.

[237] See: (IFC, 2009).

whether contractual means of protection, such as stabilization clauses, are protected in investment treaties.

4.3.3. Philip Morris International v. Uruguay[238]

In this case, the claimants stated that both the single presentation requirement and the 80/80 requirement constituted an indirect expropriation of their brand assets. This included intellectual property and good will associated with the brand variants, contrary to Article 5(1) of the BIT.

Conversely, Uruguay argued that the measures adopted could not be considered expropriatory on various grounds. More relevantly, the Latin-American country claimed that the challenged measures were a legitimate exercise of its "*police power*" to protect public health.

By the unanimity of its members, the tribunal rejected the company's claim which regarded the challenged measures as expropriatory. The Court found that the measures did not deprive the claimants of their investment. In addition to that, it ruled that the challenged measures were not expropriatory on the basis that they represented a "*valid exercise of the State's police powers, with the consequence of defeating the claim for expropriation"* (at [287]).

The term "*police powers*", as the tribunal made clear, was referring to States' powers to enact *bona fide*, non-discriminatory measures for the protection of public welfare (which includes public health). The Court considered that the measures (1) were *bona fide*, for the purpose of protecting the public health, (2) were non-discriminatory and (3) were proportionate to the objective pursued (at [305]).

It is worth noting that Article 5(1) of the BIT evoked neither expressly refer to the police power of States, nor is it refers to elsewhere in the treaty text. Nonetheless, the Tribunal considered that Article 5(1) must be interpreted in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties ('VCLT'). In other words, the provision must be interpreted in light of customary international law as a "*relevant rule of international law applicable to the relations between the parties*". Furthermore, the Tribunal considered that the police power of States was reflected in customary international law and, therefore, applied to the expropriation analysis accordingly.

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[238] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay. ICSID Case No. No. ARB/10/7, Award on Merits (July 8, 2016).

Rather than offering an affirmation of the applicability of the police powers of States to indirect expropriation claims under BITs, the award is notable insofar as it explicitly articulates the basis on which it has invoked the police power using the applicable principles of treaty interpretation under the VCLT.

In this sense, while each case turns on its own facts and is not binding on subsequent tribunals, the award is the latest in a number of decisions that suggest that expropriation provisions in BITs, properly interpreted, accommodate the "*police powers"* of States even absent explicit treaty language to that effect.

4.4. AFFIRMATIVE DEFENSES

4.4.1. Korea- Beef[239]

In 1990, South Korea instituted a dual retail system for beef. In 1998, Australia and United States complained that the Korean act violated article III:4 as it had resulted in the exclusion of imported beef from the retail distribution channels, an anticompetitive measure which inhibited the commercial opportunities for specialized imported beef shops, violating article III:4 of the GATT.

According to the claimants, the measure discriminated against imported beef by limiting the sales of imported beef to specialized stores, restricting the manner of its display, and otherwise constraining the opportunities for the sale of imported beef. Moreover, Australia and United States contended that the measure was not covered by the exceptions of the article XX of GATT

The AB upheld the panel finding that the measure violated art. III:4. In assessing whether the measure was "necessary" under art. XX, it stated:

> *"164. In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of* ***weighing and balancing a series of factors*** *which prominently include 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"****.*[240]

[239] Appellate Body Report, WT/DS161, 169/AB/R, 11 December 2000.
[240] Para. 164.

Thus, the Appellate Body upheld the Panel's finding that Korea's Unfair Competition Act was not justified because the dual retail system was not "necessary" within the meaning of Art. XX(d). In doing so, the Appellate Body balanced the contribution of the measure, the importance of the value and impact on trade.

4.4.2. EC- Seal

The Panel had no problem finding that there are EU public concerns on seal welfare in general and that such concerns are of a moral nature within the European Union, turning to the legislative history of the measure and to public survey results [241]. Nevertheless, it concluded that the exceptions, including the IC exception did not reflect the EU citizens' concerns, but "appear to have been included in the course of legislative process"[242].

The Panel starts its analysis by stating that "In examining Members' right to regulate under Article XX of the GATT 1994, a question arises as to what aspects of a measure must be analyzed under the legal framework of Article XX.". The Panel affirmed that the debate concerned only whether the IC exception was justified under Art. XX, the whole measure had to be scrutinized. It then confirmed, based on the evidence brought before it, that there are EU public concerns on seal welfare in general and that such concerns are of a moral nature within the European Union, and there were no GATT-consistent, less trade restrictive alternative to the trade Regime. The measure was thus considered necessary and provisionally justified under article XX (a).

Proceeding to examine the chapeau, the Panel found that the EU Seal Regime was "arbitrary" or "unjustifiable" relying on its findings under article 2.1 of the TBT Agreement:

> "*[T]he legitimacy of the regulatory distinction between commercial hunts and IC hunts should be determined by examining the following questions: first, is the distinction* ***rationally connected*** *to the objective of the EU Seal Regime; second, if not, is there any cause or rationale that can justify the distinction (i.e. "explain the existence of the distinction") despite the absence of the connection to the objective of the Regime, taking into account the particular circumstances of the current dispute; and, third, is the distinction concerned, as reflected in the measure, "designed or applied in a manner that constitutes*

[241] Para. 7.398.
[242] Para. 7402.

> *arbitrary or unjustifiable discrimination" such that it lacks "even-handedness'"*".

The European Union disagreed with the standard of review applied by the Panel, arguing that "*the requirement that the reasons for discrimination be rationally connected to the policy objective of the measure is not reflected in the text of the chapeau or in past Appellate Body jurisprudence*"[243]. In this sense, the consideration of whether there is discrimination may involve the consideration of other factors, as found in Brazil-Tyres.

The AB did not address the EU claim that there was no textual basis for the adoption of a strict rationality test, but rejected the Panel line of reasoning, by discerning the distinct analysis of regulatory measures under article 2.1 and art. XX. Under art. 2.1 the analysis concerns "whether the detrimental impact that a measure has on imported products stems exclusively from a legitimate regulatory distinction rather than reflecting *discrimination* against the group of imported products. In its turn, under the chapeau of Article XX the question is "whether a measure is applied in a manner that would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail".

Furthermore, the AB stated that the provisions differed in functioning and scope. As a non-discrimination provision, under article 2.1, it is "only the regulatory distinction that accounts for the detrimental impact on imported products that is to be examined to determine whether it is "a legitimate regulatory distinction". By contrast, the chapeau of Article XX plays the bigger role of maintaining "a balance between a Member's right to invoke the exceptions under the subparagraphs of Article XX and the substantive rights of the other Members under the various other provisions of the GATT 1994"[244].

The AB then proceeds to analyze the IC exception and recalls that it is linked to "the identity of the hunter with a tradition of seal hunting, the use of by-products from the hunted seals, and the contribution of the hunts to the subsistence of the community. and that "scope and meaning of the 'subsistence' criterion" of the IC requirements "is not defined under the measure".

However, the AB recalls the Panel's finding that the "subsistence criterion" of the exception is not defined and that IC hunts encompass not also the hunting of seals as part of their culture and tradition but also a cultural component. This commercial aspect would

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[243] Para 2.146.
[244] Para. 5.132.

be more related to the "need [of Inuit communities] to adjust to modern society rather than to continuing their cultural heritage of bartering"[245].

Thus, the AB concludes that the European Union has failed to demonstrate how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to 'commercial' hunts **can be reconciled with, or is related to,** the policy objective of addressing EU public moral concerns regarding seal welfare.[246]

Furthermore, in analyzing discrimination, the AB examined the Panels analysis of the procedural aspects of the measure, such as the creation of a recognized body for the implementation of the regulation, arguing that setting such body as required would entail significant burdens in some instances.

> *"In sum, we have identified several features of the EU Seal Regime that indicate that the regime is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, in particular with respect to the IC exception. First, we found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from "commercial" hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Second, we found considerable ambiguity in the "subsistence" and "partial use" criteria of the IC exception. Given the ambiguity of these criteria and the broad discretion that the recognized bodies consequently enjoy in applying them, seal products derived from what should in fact be properly characterized as "commercial" hunts could potentially enter the EU market under the IC exception. We did not consider that the European Union has sufficiently explained how such instances can be prevented in the application of the IC exception. Finally, we were not persuaded that the European Union has made "comparable efforts" to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit. We also noted that setting up a "recognized body" that fulfils all the requirements of Article 6 of the Implementing Regulation may entail significant burdens in some instances*[247].

The EC-Seal adds another dimension to the analysis of domestic regulatory measure at the WTO: that there be no reasonably available alternative measure that is at the same time (a) less discriminatory than necessary to achieve a legitimate objective and (b) less inconsistent with the (different) legitimate purpose that justifies the trade restrictive effects of the measure.

This decision shows an advance in regard to the previous the Brazil – Retreaded Tyres, where it was found that the discriminatory aspect of a measure had to be rationally

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[245] Para 5.306.
[246] Para 5.320.
[247] Para. 5538.

related and justified on the same basis of the whole measure. In this sense, it address the need to analyze discrimination in consideration of the typical process by which regulatory are made, meaning the multiple competing objectives and trade-offs involved and expressed therein.

Nevertheless, it adds that a measure must be less inconsistent with the different justification of the measure, irrespective of the trade measure. Thus, the AB aimed for perfect rationality, in spite of a possible less trade restrictive alternative measure.

As a response to the WTO DSB the European Regime was amended, so that the exception for IC hunt still applies subject to the verification that it is conducted "with due regard to animal welfare, taking into consideration the way of life of the community and the subsistence purpose of the hunt" [248].

Therefore, this case shows the deference accorded by the WTO DSB in respect to values, at least in terms of public morals of its members, but the strict review of the procedural elements of the measure. This indicates that "holding the bargain" paradigm of the WTO has not been replaced by " trade liberalization, but possibly by "good regulation".

[248] Information regarding the regime can be found at: http://www.europarl.europa.eu/meetdocs/2014_2019/documents/deea/dv/04-ec-seal-regime_20160908_/04-ec-seal-regime_20160908_en.pdf [10/12/2018]

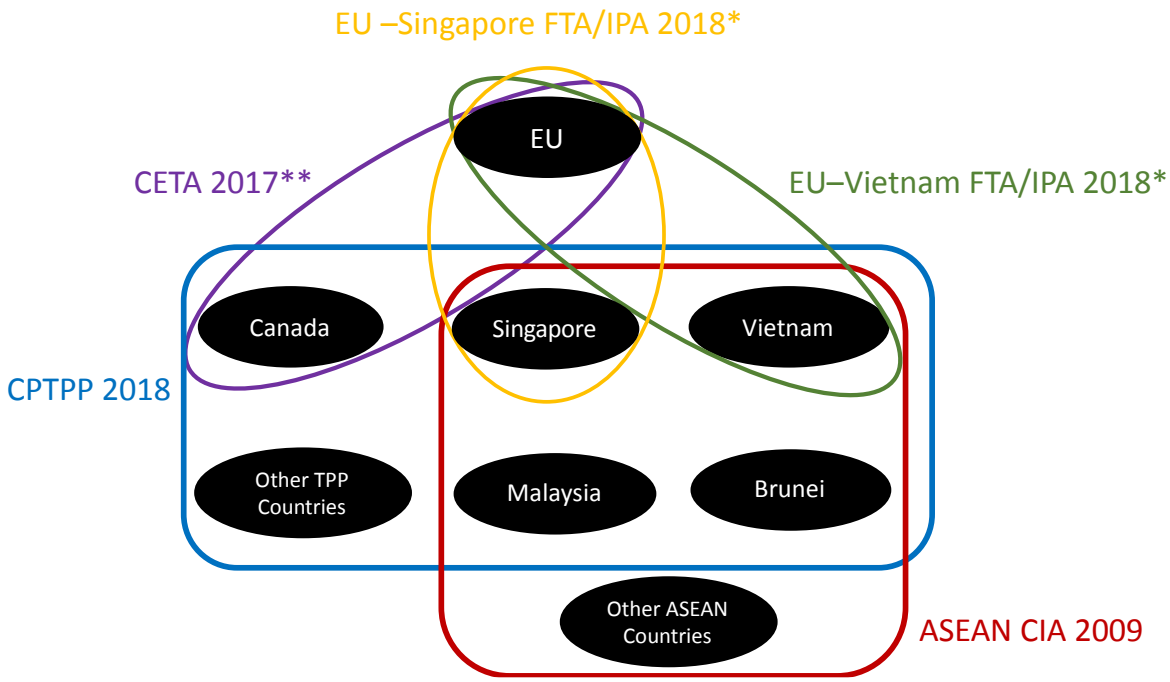
5. ANALYSIS OF SELECTED TREATIES

This final chapter analyzes "new generation agreements" with a focus on the main textual reforms for the safeguarding of the right to regulate and the provision of institutional solutions for the criticisms aimed at investor-State arbitration. As indicated in Chapter 3, in the absence of further indication, the standard of review adopted by the adjudicator might relate to their understanding of the nature of the adjudication. The adoption of the adequate standard of review from the pluralist public international law approach I articulated in Chapter 3, might thus depend not only on textual reform but mostly of institutional reform.

The five treaties, signed from 2009 to 2018, that create a web of rules governing the trade and investment relations of 28 countries of different levels of economic development. They are a "small serving" of the "spaghetti bowl"[249], or a representative sample of the complex web formed by international trade and investment regulation encompasses bilateral and regional treaties, IIAs and BITs. All of them could be placed under the "new generation" label in terms of trade and investment, as they move beyond the objective of removing tariffs barriers to trade in goods and services and past the traditional investment protection model.

[249] Jagdish Bhagwati (2008, p. 63) first used the analogy of an "Spaghetti bowl" to describe the phenomenon and systemic implications of the proliferation of preferential trade agreements.

Figure 1 - Network of selected IIAs



Source: The author. * The texts of EU-Singapore FTA/IPA and EU-Vietnam FTA/IPA 2018 are pending ratification. **CETA's investment protection provision and the Investment Court System will enter in force once all members of the EU ratify it.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is the broadest of the initiatives analyzed in terms of volume of trade[250] and substantive rules. Initially signed by 12 countries in 2017, the CTPP, along with the TTIP[251] and RCEP, were seem as representative of a tendency towards the forming of "mega-regionals"[252]. This tendency seems to have waned since United States withdrew from the CPTPP and the negotiations surrounding the TTIP came to a halt in 2017. Nevertheless, the CPTPP entered into force on December 2018 for its 11 members. The

[250] Comprising public health and product safety standards, labor and the environment, international investment, digital trade and e-commerce, and state-owned enterprises. Initially, the CPTPP covered two fifths of the world trade. The 11 members of CPTPP accounted for 13,5% of the world's GDP in 2017. See: https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/impact-repercussions.aspx?lang=eng

[251] Since 2013 the US and EU are negotiating the Transatlantic Trade and Investment Partnership (TTIP) which, once completed, could become the largest trade agreement in the world. After President Trump threatened the imposition of tariffs on European goods, the negotiations were suspended. On July 2018 the US and EU announced that the negotiation were reignited and had reached a new phase. See the joint U.S.-EU statement at: http://europa.eu/rapid/press-release_STATEMENT-18-4687_en.htm [20/12/2018]

[252] This emphasis towards mega-regional agreements represents a shift from the first wave of deeper agreements signed in the 1990s, when the EU and the US began to negotiate Regional Trade Agreements. Bown (2017, p. 2) argues that major economies push for mega-regionals is explained by the interest of multinational firms in global supply chains and the rise of China, that triggered geopolitical and national security interests, especially in the United States.

current effective text has not been altered substantively from what was considered the "rules of the road for trade in the 21st century"[253].

Before the anti-globalization trend came into full force, the European Union and Canada were able to sign in 2016 the Comprehensive Economic and Trade Agreement (CETA)[254], a broad agreement containing trade and investment provisions. The CETA entered in force provisionally on September 2017. While most of the agreement provisions already apply, investment protection rules and the Investment Court System will enter in force only once all EU members ratify it[255].

The framework agreement on investments negotiated in the broader context of the Association of Southeast Asian Nations (ASEAN) is also assessed[256]. The Investment Agreement (CIA) was signed in 2009, superseding the Framework Agreement on the ASEAN Investment Area, celebrated in 1998. The CIA governs only investment relations, although reference is made in the preamble to the ASEAN Economic Community.

Finally, this chapter scrutinizes the Free Trade Agreements and Investment Protection Agreements (IPA) that EU signed with Vietnam and Singapore. The agreements are regarded as stepping stones 'towards the EU's goal of a trade and investment agreement with ASEAN, for which negotiations were launched in 2007 and paused in 2009 due to difficulties in setting standards amongst the ASEAN countries[257]. While CETA consolidates trade and investment provisions in a single text, although in different chapters, the European Union Vietnam Investment Protection Agreement (EUVIPA) and European Union Singapore Investment Protection Agreement (EUSIPA) deal exclusively with investment provisions, although there is reference to their trade counterparts in the preamble and throughout their texts.

The aim here is to contrast the findings regarding the framing of the right to regulate by treaty interpretation conducted in the previous chapter with the specific

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[253] Former US president Barack Obama (2016) famously wrote in a Washington Post OP-ED, pushing for Congress approval of the TPP, that: "As a Pacific power, the United States has pushed to develop a high-standard Trans- Pacific Partnership, a trade deal that puts American workers first and makes sure we write the rules of the road for trade in the 21st century.

[254] Text available at: http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ [25/11/2018].

[255] Available at: http://europa.eu/rapid/press-release_IP-16-2371_en.htm [25/11/2018].

[256] The ASEAN was established in 1967 having political and security purposes at its foundation. The process of economic integration through agreements was launched in 1993 with the ASEAN Free Trade Area (VILLALTA PUIG; TSUN TAT, 2015) (KAWAI; NAKNOI, 2015).

[257] According to the EU "Alongside the agreement recently reached with Singapore, this agreement [with Vietnam] will make further strides towards setting high standards and rules in the ASEAN region, helping to pave the way for a future region-to-region trade and investment agreement.
http://trade.ec.europa.eu/doclib/press/index.cfm?id=1921

provisions of each treaty (FET, indirect expropriation, general exceptions, right to regulate) as well as the choices regarding dispute settlement and the relation between trade and investment rules.

1. **PREAMBLE**[258]

The preambular language adopted in the five agreements show a clear move away from the minimalist approach adopted by early BITs, in which the context provided was only that of parties' efforts towards strengthening their economic relationships. They vary in extension as well as in content, but, with the exception of the ASEAN CIA, all make reference to non-economic values as well as sustainable development.

Although no reference is made to non-economic concerns, the ASEAN CIA, recognizes the different levels of development between its members, which require "some flexibility, including special and differential treatment", as the parties seek to move towards a more integrated and interdependent future. CPTPP also alludes to the different levels of development of their parties as well as the "diversity of economies".

Besides the ASEAN CIA and EUVIPA, all treaties reaffirm the right of the Parties' to regulate in the public interest. EUSIPA and CETA provide a non-exhaustive list of legitimate policy objectives: "public health, safety, environment, public morals and the promotion and protection of cultural diversity".

The CETA agreement displays a maximalist approach and enshrines political and social values, from democracy, human rights and the rule of law to public health and safety. Additionally, it refers to other international instruments such as the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the OECD Guidelines for Multinational Enterprises, the Charter of the United Nations and the Universal Declaration of Human Rights.

The CPTPP preamble remits to the TPP preamble but reiterates and includes a few values that were not there represented, specifically indigenous rights, gender equality and traditional knowledge. The TPP preamble is as extensive as the CETA, however, it mirrors a more self-contained approach, as no reference is made to other international treaties or political values.

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[258] See Table 1 of the Appendix.

As seen in Chapter III, as provisions have to be read in light of their objective and purpose, according to the Vienna Convention, the inclusion of values in the preamble could provide a basis for the adoption of balanced approaches by the adjudicators. To the extent that these values are not included as substantive provisions in the treaty they have only interpretive value.

2. NATIONAL TREATMENT[259]

All treaties provided for a traditionally worded national treatment clause including "treatment no less favorable" and "in like situations", or "in like circumstances". The treaties differ, though, with regards to market access as the EUSIPA does not grant national treatment to the establishment and admission phases[260].

The CETA adds clarifying language to the standard, by defining that "treatment no less favorable than the most favorable treatment accorded, in like situations, by that government to investors of that Party in its territory and to investments of such investors".

The EUSIPA presents a unique feature in that it adds an exception clause to it.

3. FAIR AND EQUITABLE TREATMENT[261]

All treaties represent a clear move from the vague fair and equitable formulation characteristic of traditional BITs, but with varying levels of precision. Article 11 of ASEAN-CIA equals fair and equitable treatment (FET) with a requirement of a State "not to deny justice in any legal or administrative proceedings in accordance with the principle of due process". CPTPP adopts a similar definition and add that the FET prescribes "the customary international law minimum standard of treatment of aliens as the standard of treatment". CETA, EU-Vietnam and EU-Vietnam adopt a different approach and define the occasion where a breach of FET has been found, in similar wording:

> *2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if its measure or series of measures constitute:*
> *(a) denial of justice in criminal, civil and administrative proceedings;*

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[259] See Table 2 of the Appendix. See also Table 3 for a comparison of most favoured nation clauses. One notable aspect is the absence of such provision in the EUSIPA.
[260] ASEAN-CIA, CETA, CPTPP refer to "the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory". EUVIPA adopts a broader clause.
[261] See Table 4 of the Appendix.

(b) a fundamental breach of due process;
(c) manifestly arbitrary conduct;
(d)harassment, coercion, abuse of power or similar bad faith conduct.

All treaties besides CETA determine that a determination that there has been a breach of another provision of the agreement or of a separate international agreement does not establish that there has been a breach of the fair and equitable treatment.

CPTPP, EU-Vietnam and EU-Singapore address the matter of legitimate expectations of the investors in quite distinct ways. CPTPP states that the mere fact that a party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of FET. Conversely, EU-Vietnam and EU-Singapore guide the adjudicator into taking into account whether a Party made a specific representation that created a legitimate expectation upon which the investor relied upon to make and investment. EU-Vietnam and EU-Singapore also provide guidance for determining whether there has been a breach of the FET standard when a Party has entered into a written agreement with the investor.

4. EXPROPRIATION[262]

All agreements contain extensive clarifications regarding expropriation in a dedicated Annex, confirming their understanding that both direct and indirect expropriation are covered by their provisions and providing a definition of the latter. They similarly clarify that a determination of whether indirect expropriation occurred has to be evaluated on a case-by-case basis, considering: (i) the impact of the measure, (ii) the interference with investor's expectations, (iii) an analysis of the character, nature and purpose of the measure

With regards to the impact of the measure, all provisions clarify that an adverse economic effect on the investment, standing alone, does not establish that and indirect expropriation has occurred. This provision seems to codify previous cases where, as seen in Chapter IV, the regulatory intent behind the measure was not even subject to the arbitral review, and the mere economic effect resulted in the determination of an indirect expropriation.

[262] See Tables 5 to 8 of the Appendix.

The clarifications do differ slightly when addressing the interference with investor's expectations, reflecting previous cases such as Methanex, where the tribunal affirmed that a specific commitment by the government that it would refrain from such regulation would be relevant in the determination of an indirect expropriation. The CETA and CPTPP refer to the existence of reasonable investment-backed expectations as one element to be taken into consideration, whereas the ASEAN CIA restricts legitimate expectations to the existence of a governmental prior binding written commitment. The ASEAN CIA also adds guidance with regards to the standard to be applied on review of the character of the government action, as "whether the action is **disproportionate to the public purpose** referred to in Article 14(1)".

Finally, all clarifications on expropriation include a specific exceptional right to regulate clause, diverging slightly on the qualification of the exception. The ASEAN-CIA reflects the findings in Methanex, or the "police powers doctrine", by providing that "non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute a (compensable) expropriation. Such a broad determination could render the expropriation standard ineffective considering that all regulatory measures could be justified on the basis of "public welfare". The other treaties, then, seem to attempt to draw an exception to this broad formulation, affirming that regulation could be considered indirect expropriation in rare circumstances, more specifically *"when the impact of a measure is so severe in light of its purpose that it appears manifestly excessive*"[263].

5. GENERAL EXCEPTIONS[264]

All agreements provide for provisions for exceptions, either clause specific or general. Security exception clauses[265] and "non-conforming measures" provisions[266] are also found in all or most of the agreements analyzed. To the extent that they are "self-

[263] CETA Annex 8-A, EU – Vietnam Annex 4.
[264] See Table 9 of the Appendix.
[265] All agreements have security exception clauses modelled after art. XXI of the GATT. The wording used "its essential security interests", is seen as indication that "no WTO Member, nor group of Members, and no WTO panel or other adjudicatory body, has any right to determine whether a measure taken by a sanctioning member satisfies the requirements." (BHALA, 1998, p. 268) . (CHEN, 2017) argues that the term "self-judging" is misleading and proposes a framework for review of the invocation of a national security exception from the perspectives of the standard of review analysis developed under the WTO jurisprudence. See Table 11 of the Appendix.
[266] See Table 10 of the Appendix.

judging" or identify specific sectors or activities where the treaties obligations do not apply, those provisions will not be analyzed in detail here.

The CPTPP contains a WTO-style General Exceptions clause but it does not apply to the investment chapter. Article XX language can be found in the performance requirements clause, but as its application is confined to such type of measures[267]. Likewise, the EUSIPA does not contain a general exception clause, but provide an almost identically worded exception in the context of its National Treatment clause.

The other two agreements contain article XX style clauses titled "General Exceptions" but with a limited application. The CETA adopts article XX-style and article XIV-style provisions but limits their application to establishment and non-discrimination provisions. Correspondingly, EU-Vietnam's General Exceptions clause is limited to National Treatment and Most-favored National clauses.

This shows that these countries have chosen to safeguard their right to regulate through limiting the vagueness contained in the language of the substantive standards such as FET and indirect expropriation.

6. RIGHT TO REGULATE[268]

References to the right to regulate are found in all agreements analyzed, except the ASEAN-CIA. Further than referencing it in the preamble, the agreements elaborate the right to regulate in standalone provisions. However, the CPTPP adopts an approach similar to that of the NAFTA, by condition its exercise to the non-violation of the provisions of the Chapter:

> "*Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure* ***otherwise consistent with this Chapter*** *that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives."*

The CETA, EU-Vietnam and EU-Singapore reaffirm their right to regulate in the public interest following an almost identical wording:

> "*1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the*

[267] Article 9.10, CPTPP.
[268] See Table 12 of the Appendix.

> *protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."*

With the exception of EU-Vietnam, which did not refer to the "right to regulate" in the preamble, the agreements are merely transposing the preambular language to the body of the treaty. At face value, then, it could be argued that it has only interpretive value, by providing context to the interpretation of investment protection standards. I argue, however, that it could influence the standard of review adopted, as it determines that the start-point of the review should be that the state has the right to regulate in the public interest.

This becomes clearer in paragraph 2 of CETA's article 8.9:

> "*For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.*"

7. **INTERPRETATION**

CPTPP, CETA, EUVIPA and EUSIPA contain state-state dispute settlement clauses that cover their "interpretation or application"[269], CPTPP and CETA's state-to-state rules are modeled after the WTO DSB, but each arbitrator is selected for each dispute, without the support of a permanent secretariat. EUSIPA and EUVIPA's state-state rules will be discussed ahead. Due to their broader scope, CPTPP and CETA provides rule that apply to State-State dispute settlement that could apply to both trade and investment matters. This broader scope is reflected in the guidance provided, such as in the interpretation:

> *Article 28.12: Function of Panels*
> *1. A panel's function is to make an objective assessment of the matter before it, which includes an examination of the facts and the applicability of and conformity with this Agreement, and to make the findings, determinations and recommendations as are called for in its terms of reference and necessary for the resolution of the dispute.*

[269] Article 29.2, CETA.

Conversely, EUVIPA [270] and EUSIPA [271]: provide rules for State-State dispute settlement that deal only with investments. This same reference to the WTO Agreement is included in the section regarding dispute between parties:

EUVIPA

> *"The arbitration panel shall also take into account **relevant interpretations** in reports of panels and of the Appellate Body adopted by the Dispute Settlement Body under Annex 2 of the WTO Agreement (hereinafter referred to as "DSB"). The reports and rulings of the arbitration panel cannot add to or diminish the rights and obligations of the Parties provided for in this Agreement"*

EUSIPA

> *"Where an obligation under this Agreement **is identical** to an obligation under the WTO Agreement, the arbitration panel shall take into account any relevant interpretation established in rulings of the WTO Dispute Settlement Body"*

8. INSTITUTIONAL ARRANGEMENTS AND DISPUTE SETTLEMENT

8.1. ASEAN

The provisions on the management of ASEAN's CIA can be divided in two parts, which correspond to sections B and C of the treaty. Section B goes from article 28 to article 41 and is titled "Investment Disputes between an Investor and a Member State". Section C, in turn, the last of the agreement, has not a specific title and covers a broader range of themes, from article 42 up to article 49. For the purpose of this thesis, with regard

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[270] "*Article 3.21 Rules of Interpretation*
The arbitration panel shall interpret the provisions referred to in Article 3.2 (Scope) in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 (hereinafter referred to as the "Vienna Convention"). The arbitration panel shall also take into account relevant interpretations in reports of panels and of the Appellate Body adopted by the Dispute Settlement Body under Annex 2 of the WTO Agreement (hereinafter referred to as "DSB"). The reports and rulings of the arbitration panel cannot add to or diminish the rights and obligations of the Parties provided for in this Agreement."

[271] "*Article 3.42 Rules of Interpretation The arbitration panel shall interpret the provisions referred to in Article 3.25 (Scope) in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties. Where an obligation under this Agreement is identical to an obligation under the WTO Agreement, the arbitration panel shall take into account any relevant interpretation established in rulings of the WTO Dispute Settlement Body (hereinafter referred to as "DSB"). The rulings of the arbitration panel cannot add to or diminish the rights and obligations provided in the provisions referred to in Article 3.25 (Scope).*"

to Section C, it is relevant to attach specifically to the provisions of article 42, which disciplines the institutional arrangement of the association in the field of investments.

ASEAN is not composed by a permanent arbitral tribunal, Section B sets up the legal framework for *ad hoc* investment arbitrations. Article 28 makes a series of definitions. It defines, for example, that the "appointing authority" is the person in charge of the administration of the arbitration held upon the structures of (i) the ICSID, (ii) the Permanent Court of Arbitration, (iii) the Regional Centre for Arbitration at Kuala Lumpur, (iv) other centre for arbitration of the ASEAN countries or (v) any other institution. In addition, it clarifies the meanings of more intuitive expressions, such as the "disputing investor" and the "disputing member state", and also makes clear the references to the ICSID convention and additional rules, as well as to the New York Convention and the UNCITRAL rules.

Article 29 disciplines the scope of the arbitrations based on a violation of the ASEAN's CIA. It emphasizes the international character of the protection provided (article 29, [3]), since it excludes from its scope the possibility of a natural person which possess the nationality or citizenship of the supposedly violating member state to pursue a claim against that member state.

From article 30 to article 41, Section B provides the rules for the dispute resolution. Article 30 establishes that conciliation may begin or be terminated at any time, at the request of one of the disputing parties. In addition, article 31 fixes the obligation to exhaust the controversy through consultation and negotiation. In the case of the recourse to arbitration, articles 32, 33 and 34 discipline how the claim shall be addressed and articles 35 (Selection of Arbitrators), 36 (Conduct of the Arbitration), 37 (Consolidation), 38 (Expert Reports), 39 (Transparency of Arbitral Proceedings), 40 (Governing Law) and 41 (Awards) regulate the duties of the arbitrators, from the appointment of the parties to the issuance of the awards.

Besides the legal framework provided by Section B, designed to deal with the emerging controversies between investors and member states, the ASEAN agreement, as mentioned above, provides an institutional arrangement. As disposed in the article 42 of Section C, this arrangement could be interpreted as the administrative branch of the association. It comprises the (i) ASEAN Investment Area Council (AIA Council), (ii) the ASEAN Coordinating Committee on Investment (CCI) and (iii) the ASEAN Secretariat, which is the bureaucratic structure to support the first and the second organs.

The CCI is composed by senior officials in charge of investment and other relevant government areas of member states and it basically assists the AIA Council in the performance of its functions. The AIA Council, in turn, is the "gatekeeper" of the agreement, being in charge of its implementation, revision and coordination. It is the Ministerial body under the ASEAN Economic Ministers, composed of ministers from all member states responsible for investment plus the Secretary-General of ASEAN. Among its attributions, the AIA Council is allowed to recommend to the ASEAN Economic Ministers any amendments to the CIA.

8.2. CPTPP

Section B of CPTTP's chapter 9 provides a detailed and stepped framework on investor-state dispute settlement. In the pre-arbitration phase, as provided in the article 9.18, parties shall seek to resolve the dispute through consultation and negotiation, "which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation". If the controversy persists, the Section B, from article 9.19 onwards regulates the arbitration process.

Article 9.19 fixes how the claimant, formally and materially, shall submit the claim to arbitration. In addition, articles 9.20 and 9.21 establish the parties' manifestation of consent and the conditions and limitations for it, respectively. The article 9.22 disciplines the selection of the arbitrators and article 9.23 up to article 9.30 provide a set of rules which comprises the duties of the arbitrators as well as guidelines for their performance, which include detailed rules on the conduct of the arbitration (article 9.23), duties of transparency (article 9.24), clarifications about the governing law (article 9.25), orientation for the interpretation of the annexes (article 9.26), the possibility of request of experts' reports (article 9.27), procedural rules to consolidate the claims and to issue the awards (articles 9.28 and 9.29, respectively) and the service of documents (9.30).

8.3. The Investment Tribunal System

The EU-Vietnam and EU-Singapore Investment Protection Agreements agreement were signed by the end of 2018 but are currently pending ratification. Furthermore, CETA's Investment Court System and related provisions are out of the scope of its provisional application.

The CETA, EUSIPA and EUVIPA provide for the establishment of a two-tiered permanent investment tribunal that is considered the hallmark of the European Union's new approach to investment dispute system in response to the criticisms directed at ISDS. This EU-led initiative represents an effort to provide 'a modern and reformed investment dispute resolution mechanism', which 'strikes the right balance between protecting investors and safeguarding the right of a state to regulate'[272]. Indeed, although the system's trigger is still the submission of a claim by a private investor against a state, the features added to it make it resemble an international "court"[273].

Further institutionalization of ISDS is promoted with the creation of a Joint Committee[274] responsible for, *inter alia*, appointing the Members of the Tribunal and Appellate Tribunal when the treaty enters into force[275]. This represents one of the biggest shifts from the traditional ISDS paradigm, where the arbitration are appointed by the disputing parties[276].

The composition of the Tribunal or roster of arbitrators and stipulated qualifications are slightly different in each agreement. An arbitration panel under CETA shall be composed of three arbitrators chosen in common agreement by the disputing parties or otherwise selected from a list of arbitrators[277]. The list composed of at least 15 individuals, divided in two sub-lists for each Party and one sub-list for individuals who are not nationals[278]. The arbitrators shall be chosen on the basis of "objectivity, reliability and sound judgment", who must have specialized knowledge of international trade law.

The EUVIPA foresees a Tribunal composed of nine Members, three nationals of a Member State of the Union, three nationals of Vietnam and three of third countries[279]. Appointed Members of the Tribunal shall be qualified as "judicial offices" or "jurists of recognized competence", with demonstrated expertise in public international law. The

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[272] Delegation of the EU to Vietnam, Guide to the EU–Vietnam Free Trade Agreement (7 June 2016) 54 http://trade. ec.europa.eu/doclib/docs/2016/june/tradoc_154622.pdf. [08/08/2018]

[273] The agreements contain separate sections regulating dispute settlement between the parties on issues arising the interpretation or application of the provisions therein. However, they explicitly exclude the possibility of parties giving diplomatic protection or initiating a claim in respect of a investors who has consented to submit or submitted to dispute settlement under the agreements. CETA (art. 8.42), EUVIPA, EUSIPA (article 3.23).

[274] CETA also creates a Committee on Services and Investment (art. 26.2).

[275] CETA Joint Committee (art. 8.27), EUVIPA (art. 3.38), EUSIPA (art. 3.9 – Tribunal of First Instance)

[276] Under ICSID Convention's default mechanism, each of the disputing parties appoint one co-arbitrator, and attempt to agree in a third. ICSID Convention Article 37(2)(b). There is a Panel of arbitrators designated by Contracting States but parties do not need to appoint from it ICSID Convention Articles 12 to 16.

[277] CETA art. 29.7.

[278] CETA Art. 29.8.

[279] EUVIPA (art. 3.38).

"Tribunal of First Instance" to be established by EUSIPA shall be composed by two members of the EU, two members of Singapore and two members who are not nationals of either, two be jointly nominated by the two Members. The qualifications are the same as expected under EUVIPA[280]. The Members shall be appointed for a four or five-year term, renewable once and shall be paid a monthly retainer fee[281].

Several provisions seem to address commo criticism regarding arbitrators, such as transparency of the procedures[282] and ethics[283].

Submission of claims to the tribunal shall fallow ICSID Convention, UNCITRAL or other rules agreed by the disputing parties[284]. The tribunal may only award monetary damages and/or restitution of property[285].

Provisional awards may be appealed on the basis of (i) error in the interpretation of the applicable law, (b) manifest error in the appreciation of the facts, including the appreciation of relevant domestic law, or those provided for in Article 52 of the ICSID Convention[286].

The final award may not be appealed or referred to an annulment procedure and only binds the parties to the case and in respect of that particular case[287].

An innovative feature present in all treaties is the inclusion of a clause establishing that any final award pursuant to the Tribunal shall be deemed to be arising out of a commercial relationship for the purposes of Article 1 of the New York Convention[288].

All treaties provide that the parties have committed to pursue the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment

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[280] EUVIPA art. 3.9.

[281] Other fees and expenses shall be paid pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention.

[282][282] The agreements contain similar wording, building on UNCITRAL Transparency Rules. CETA Article 8.36, EUVIPA (art. 3.46).

[283] CETA Article 8.30 – Ethics. The provisions concern the independence of the members of the tribunal, and procedures for challenging a Member of the Tribunal for conflict of interest. EUVIPA (Article 3.40).

[284] USIPA art. 3.6. The treaties provide that before submitting a claim for arbitration the claimant shall try to resolve the dispute amicably or via consultations. EUSIPA (art. 32 – Amicable Resolution; art. 3.3 – Consultation). Parties may resort to mediation and alternative dispute resolution (EUSIPA art. 3.4).

[285] CET Article 8.39 Final award, EUVIPA 3.55.

[286] EUVIPA art. 3.54, CETA Article 8.28, Article 52 of the ICSID Convention lists the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.

[287] CETA Article 8.41 – Enforcement of awards, EUVIPA 3.57.

[288] CETA 8.41.5. A final award issued pursuant to this Section is an arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention. This could facilitate enforcement of decisions, although it would depend on non-parties of the treaties in reference accepting the awards as commercial awards under the New York Convention.

disputes[289]. This shows that Vietnam and Singapore have aligned with the EU in the goal of pursuing a multilateral investment court[290], but there are no further indication of the next steps and the future implications on the interpretation and application of the present treaties.

Further procedural provisions deal with parallel proceedings under other international agreements[291], consolidation of claims[292], participation of non-disputing parties[293] and expert reports[294]

The agreements also elaborate on the applicable law and interpretation by the Tribunal, referring explicitly to the Vienna Convention on the Law of the Treaties and other rules and principles of international law applicable between the Parties[295] Where "serious concerns arise as regards issues of interpretation which may affect matters relating to the agreement", the Joint Committee[296] may adopt a binding interpretation of the agreement"[297].

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[289] EUVIPA (Article 3.41).

[290] In September 2015 the European Commission proposed a new 'court system' for investment disputes (European Commission 2015a). European Commission. (2015a). Proposal for new investment court system for TTIP and other EU trade and investment negotiations. Press release. Brussels, 16 September. http://europa.eu/rapid/press-release_IP-15-5651_en.htm. [25/10/2015].

[291] CETA Article 8.24 Proceedings under another international agreement

Where a claim is brought pursuant to this Section and another international agreement and:

1. (a) there is a potential for overlapping compensation; or
2. (b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section,

the Tribunal shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award.

[292] EUVIPA (3.59).

[293] EUVIPA (3.51).

[294] EUVIPA (3.52).

[295] CETA Article 8.31. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party. EUVIPA (article 3.42).

[296] Or the Committee on Services and Investments, under CETA(art. 26.2).

[297] Article 8.31. 3. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.

CONCLUSION

The objective of this study was to understand the emergence of the concept of "the right to regulate in the public interest" in international discourse in the past decade and provide it with descriptive and normative precision.

In order to do so, attention was given to the context in which the concept emerged, or re-emerged, that of backlash against international economic adjudication. In this context, criticism and reform attempts are geared towards reasserting control over adjudication.

Chapter I showed that the criticism directed to ISDS criticism direct to ISDS is not only related to how arbitrators have dealt with economic and countervailing values, but also to the fact that regulation affecting communities are being decided in the disembedded processes of globalization.

The chapter also illustrated the current trend of framing the right to regulate in the public interest, either in specific clauses, thus limiting arbitral interpretation, or in preambles or treaty-wide or clause-specific exceptions or carve-outs

The problem with this approach is that it does not address how power is allocated between the domestic and international spheres.

Therefore, the definition of the concept was divided between how it is and should be framed in new generation treaties and how it is and should be framed by the adjudicator in the context of the analysis of a domestic regulatory measure.

The literature review showed that both functionalists and constitutionalists have provided descriptive and prescriptive analysis of the right to regulate in the public interest. However, none have addressed the issue of allocation of power. By focusing on strict review of values or strict review of procedure, both approaches could result in the adoption of stances that limit the right to regulate in the public interest. This is because functional analysis rely on an underlying substantive agreement among the parties that once was represented by the "embedded liberalism" and is now a contested issue. As for constitutionalist approaches, they rely on implied agreement on constitutional values, similar to the European system, that is absent in the international trade and investment regimes, risking imperial regulatory convergence.

In order to define what the regulate was, Chapter 3 looked into the historical development of the concept. The definition adopted is one of "the right to regulate in the public interest", that differs from the broad "right to regulate" that was debated in the

context of third world movement claims for self-determination. As for public interest, it encompasses global public interests but should not be equaled or presume coherence of structuring value. In this sense, public interest here equals reasonable consideration of plural regulatory values and procedures. Furthermore, the right to regulate in the public interest is an inherent right. Consequently, framing it and confining it to exceptions or carve-outs is recognizing that customary expressions of sovereignty would need to be incorporated in a treaty to operate. It is argued that, where the treaty or institution provides no guidance regarding the appropriate standard of review, as long as public international economic law remains formed by single-value regimes, adjudicators of international trade and investment treaties strict substantive and procedural review of domestic regulatory measures in the public interests are inadequate under customary international law

Therefore, this study was conducted by the hypothesis that adjudicators adopt a great variety of standards of review, including strict forms of substantial and procedural review that are inadequate in light of the VCLT and that the right to regulate in the public interest can be safeguarded without explicit framing in the treaty.

The cases analysed confirmed the working hypothesis. In the cases concerning non-discrimination within the WTO it is possible to see how the WTO DSM's interpretation of substantive obligations evolved from economic interpretation (EC-Asbestos), focused on the effects of the measure (competition in the market) to textual interpretation (EC-Seal) in GATT case, and how it has adopted a teleological interpretation to the TBT (US-Clove and EC-Seal) that, for instance, allows for consideration of legitimate regulatory distinctions in the analysis of substantive obligations due to the right to regulate provided in the preamble. This has resulted in a stricter standard of review for the obligation of national treatment at the GATT in comparison with the same provision in the TBT, that could lead to treaty-shopping in the WTO.

The Methanex case illustrated an attempt of legal transplantation by analogy of the standard adopted by the WTO DSM to an investment arbitration. This would lead to non-consideration of the legitimate regulatory measures when reviewing a domestic measure. The adjudicator, however, considered that the WTO standard emerged out of a textual interpretation that considers the fact that Article XX provides for the right to regulate and such provision is absent in the BIT in analysis thereunder.

With regards to the Fair and Equitable Treatment, the Methanex case illustrated an attempt of control of adjudication by states, with the publication of the interpretation of Chapter Eleven by the NAFTA Free Trade Commission. This curbed the attempt by the

investor to consider the FET standard as providing more than the minimum standard of treatment. This precedent also illustrate a perception of investor arbitration as public international law, as the BIT was not deemed *lex specialis* that supersede customary rules of international law.

Finally, the PMI v. Uruguay shows the effort to provide justification for the adoption of interpretation of FET standard that is more deferential to the right to regulate in the public interest, due to its unsettled status and varying language adopted over time.

The analysis of expropriation cases showed an evolution from an economic interpretation, focused on the effects of the measure (Metalclad) to the consolidation of the "police powers doctrine". In Metalclad the "police powers doctrine" was not clearly expressed or articulated. The PMI case is thus an advance in the sense that it not only clearly articulates the doctrine, it invokes the VCLT to fundament it.

When it comes to affirmative defenses, the analysis showed that the AB has previously adopted a standard that is similar to the proportionality doctrine in its strict variation, as the importance of the value was measure against the impact on trade. The EC-Seal, however, shows that, at least when it concerns public morals, the substantive analysis is very deferent. However, the AB adopted a strict rationality analysis when it comes to discrimination, to the point that perfect rationality was preferable over an alternative measure that could lead to protection of values and less restrictions on trade. This indicates that the *ethos* of international trade law might not be free trade after all, but "good regulation", in detriment to legitimate regulatory diversity and consideration of the regulatory pluralism with regards to actors and processes.

Finally, the Continental Casualty case illustrated another attempt on legal transplantation of the standard of review of necessity adopted by the WTO AB, without consideration of the contextual development of such standard and the fact that recourse could be had to the necessity defense under customary international law.

Considering the amount of discretion in the choice of standard of review identified in the cases analyzed, chapter 5 analyses the innovations brought by 6 new generation agreements. The sample of cases show that much of the shortcomings of international arbitration have been addressed, mainly with regards to the vagueness of its standards. Almost all the agreements contain qualified definitions of the FET standards, of indirect expropriation and national treatment. Furthermore, expropriation clauses contain carve-outs. However, as the analysis of the cases have showed, the type of expropriatory measure

carved-out of such articles are already not considered a violation due to the doctrine of police powers.

In addition, none of the analyzed treaties contained general exception clauses mimicking article XX of the GATT. In light of the cases analyzed, this could be positive, as interpretation and standards of review adopted in the context of article XX could not be transplanted to investment arbitration. One important consideration is that the WTO DSM induces compliance, whereas a finding of violation of a BIT leads to compensation. The "good regulation" standard adopted by the AB as seen in EC-Seal, therefore, would be particularly restrictive of the right to regulate in the public interest.

In this sense, there are a few institutional advances that could lead to better safeguarding of the right to regulate in the public interest in adjudication. Most notably, the Investment Court proposed by CETA, EUVIPA and EUSIPA are promising avenues for effective change in the investment arbitration scenario. The Investment Court provides the institutional density that has allowed the WTO to adopt an evolving, adaptive standard of review. Moreover, this regional arrangements have rules of arbitral selection that effectively approximate adjudicators to the communities affected by domestic regulation.

The impact of the right to regulate is still to be assessed, but this work show that the concept must be used with caution, in consideration of the context and the specificities of each treaty. In this sense, there is much research to be made on the interaction between trade and investment adjudication, due to the material and epistemic approximation of the regimes. Finally, we conclude on a good note with regards to the emergence of regional courts, which implementation and impact should be closely followed by all dissatisfied with the regimes currently in place.

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APPENDIX

Table 1 – Preamble

ASEAN -CIA
RECALLING the decisions of the 39th ASEAN Economic Ministers ("AEM") Meeting held in Makati City, Philippines on 23 August 2007 to revise the Framework Agreement on the ASEAN Investment Area signed in Makati City, Philippines on 7 October 1998 ("AIA Agreement"), as amended, into a comprehensive investment agreement which is forward-looking, with improved features and provisions, comparable to international best practices in order to increase intra-ASEAN investments and to enhance ASEAN's competitiveness in attracting inward investments into ASEAN; RECOGNISING the different levels of development within ASEAN especially the least developed Member States which require some flexibility including special and differential treatment as ASEAN moves towards a more integrated and interdependent future; REAFFIRMING the need to move forward from the AIA Agreement and the ASEAN Agreement for the Promotion and Protection of Investments signed in Manila, Philippines on 15 December 1987 ("ASEAN IGA"), as amended, in order to further enhance regional integration to realise the vision of the ASEAN Economic Community ("AEC"); CONVINCED that sustained inflows of new investments and reinvestments will promote and ensure dynamic development of ASEAN economies; RECOGNISING that a conducive investment environment will enhance freer flow of capital, goods and services, technology and human resource and overall economic and social development in ASEAN; and DETERMINED to further intensify economic cooperation between and among Member States,
CETA
FURTHER strengthen their close economic relationship and build upon their respective rights and obligations under the *Marrakesh Agreement Establishing the World Trade Organization*, done on 15 April 1994, and other multilateral and bilateral instruments of cooperation; CREATE an expanded and secure market for their goods and services through the reduction or elimination of barriers to trade and investment; ESTABLISH clear, transparent, predictable and mutually-advantageous rules to govern their trade and investment; AND, REAFFIRMING their strong attachment to democracy and to fundamental rights as laid down in the Universal Declaration of Human Rights, done at Paris on 10 December 1948, and sharing the view that the proliferation of weapons of mass destruction poses a major threat to international security; RECOGNISING the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation; **RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity;** AFFIRMING their commitments as parties to the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, done at Paris on 20 October 2005, and recognising that states have the right to preserve, develop and implement their cultural policies, to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity, including through the use of regulatory measures and financial support; RECOGNISING that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-beneficial business activity, without undermining the right of the Parties to regulate in the public interest within their territories; REAFFIRMING their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions; ENCOURAGING enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct; IMPLEMENTING this Agreement in a manner consistent with the enforcement of their respective labour and environmental laws and that enhances their levels of labour and environmental protection, and building upon their international commitments on labour and environmental matters; RECOGNISING the strong link between innovation and trade, and the importance of innovation to future economic growth, and affirming their commitment to encourage the expansion of cooperation in the area of innovation, as well as the related areas of research and development and science and technology, and to promote the involvement of relevant public and private sector entities;
CPTPP
REAFFIRM the matters embodied in the preamble to the Trans-Pacific Partnership Agreement, done at Auckland on 4 February 2016 (hereinafter referred to as "the TPP"); REALISE expeditiously the benefits of the TPP through this Agreement and their strategic and economic significance; CONTRIBUTE to maintaining open markets, increasing world trade, and creating new economic opportunities for people of all incomes and economic backgrounds; PROMOTE further regional economic integration and cooperation between them; ENHANCE opportunities for the acceleration of regional trade liberalisation and investment;

REAFFIRM the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as **the importance of preserving their right to regulate in the public interest**; and
WELCOME the accession of other States or separate customs territories to this Agreement,

[…] TPP PREAMBLE

ESTABLISH a comprehensive regional agreement that promotes economic integration to liberalise trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, contribute to raising living standards, benefit consumers, reduce poverty and promote sustainable growth;
STRENGTHEN the bonds of friendship and cooperation between them and their peoples;

BUILD on their respective rights and obligations under the Marrakesh Agreement Establishing **the World Trade Organization**;
RECOGNISE the differences in their levels of development and diversity of economies;
STRENGTHEN the competitiveness of their businesses in global markets and enhance the competitiveness of their economies by promoting opportunities for businesses, including promoting the development and strengthening of regional supply chains;
SUPPORT the growth and development of micro, small and medium- sized enterprises by enhancing their ability to participate in and benefit from the opportunities created by this Agreement;
ESTABLISH a predictable legal and commercial framework for trade and investment through mutually advantageous rules;
FACILITATE regional trade by promoting efficient and transparent customs procedures that reduce costs and ensure predictability for their importers and exporters;
RECOGNISE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals;
RECOGNISE further their inherent right to adopt, maintain or modify health care systems;
I
AFFIRM that state-owned enterprises can play a legitimate role in the diverse economies of the Parties, while recognising that the provision of unfair advantages to state-owned enterprises undermines fair and open trade and investment, and resolve to establish rules for state-owned enterprises that promote a level playing field with privately owned businesses, transparency and sound business practices;
PROMOTE high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices;
PROTECT and enforce labour rights, improve working conditions and living standards, strengthen cooperation and the Parties' capacity on labour issues;
PROMOTE transparency, good governance and the rule of law, and eliminate bribery and corruption in trade and investment;
RECOGNISE the important work that their relevant authorities are doing to strengthen macroeconomic cooperation, including on exchange rate issues, in appropriate fora;
RECOGNISE the importance of cultural identity and diversity among and within the Parties, and that trade and investment can expand opportunities to enrich cultural identity and diversity at home and abroad;
CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader regional and international cooperation;
ESTABLISH an Agreement to address future trade and investment challenges and opportunities, and contribute to advancing their respective priorities over time; and
EXPAND their partnership by encouraging the accession of other States or separate customs territories in order to further enhance regional economic integration and create the foundation of a Free Trade Area of the Asia Pacific,

EU-Vietnam

RECOGNISING their longstanding and strong partnership based on the common principles and values reflected in the *Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part*, signed in Brussels on 27 June 2012 (hereinafter referred to as the "Partnership and Cooperation Agreement"), and their important economic, trade and investment relationship, including as reflected in the *Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam*, signed in Brussels on dd/mm/yyyy (hereinafter referred to as the "Free Trade Agreement");
DESIRING to further strengthen their economic relationship as part of, and in a manner coherent with, their overall relations, and convinced that this Agreement will create a new climate for the development of investment between the Parties;
RECOGNISING that this Agreement will complement and promote regional economic integration efforts;
DETERMINED to strengthen their economic, trade and investment relationship in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote investment under this Agreement in a manner mindful of high levels of environmental and labour protection and relevant internationally recognised standards and agreements;
DESIRING to raise living standards, promote economic growth and stability, create new employment opportunities and improve the general welfare and, to this end, reaffirming their commitment to promoting investment;
REAFFIRMING their commitments to the principles of sustainable development in the Free Trade Agreement;
RECOGNISING the importance of transparency as reflected in their commitments in the Free Trade Agreement;
REAFFIRMING their commitment to the *Charter of the United Nations*, done at San Francisco on 26 June 1945, and having regard to the principles articulated in *The Universal Declaration of Human Rights*, adopted

by the General Assembly of the United Nations on 10 December 1948; BUILDING on their respective rights and obligations under the *Marrakesh Agreement establishing the World Trade Organization*, done at Marrakesh on 15 April 1994 (hereinafter referred to as the "WTO Agreement") and other multilateral, regional and bilateral agreements and arrangements to which they are party, in particular, the Free Trade Agreement; DESIRING to promote the competitiveness of their companies by providing them with a predictable legal framework for their investment relations,
EU-Singapore
RECOGNISING their longstanding and strong partnership based on the common principles and values reflected in the Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part (hereinafter referred to as "EUSPCA"), and their important economic, trade and investment relationship including as reflected in the Free Trade Agreement between the European Union and the Republic of Singapore (hereinafter referred to as "EUSFTA"); DESIRING to further strengthen their relationship as part of and in a manner coherent with their overall relations, and convinced that this Agreement will create a new climate for further development of investment between the Parties; RECOGNISING that this Agreement will complement and promote regional economic integration efforts; DETERMINED to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote investment in a manner mindful of high levels of environmental and labour protection and relevant internationally-recognised standards and agreements to which they are parties; REAFFIRMING their commitment to the principles of sustainable development and transparency as reflected in the EUSFTA; **REAFFIRMING each Party's right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity;** REAFFIRMING their commitment to the Charter of the United Nations signed in San Francisco on 26 June 1945 and having regard to the principles articulated in The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948; RECOGNISING the importance of transparency in international trade and investment to the benefit of all stakeholders; BUILDING on their respective rights and obligations under the WTO Agreement and other multilateral, regional and bilateral agreements and arrangements to which they are party, in particular, the EUSFTA,

Table 2 – National Treatment

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Article 5 National Treatment	Article 8.6 National treatment	Article 9.4: National Treatment	Article 2.3 National Treatment	Article 2.3 National Treatment
1. Each Member State shall accord **to investors** of any other Member State **treatment no less favourable than that it accords, in like circumstances**, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. 2. Each Member State shall accord to **investments of investors** of any other Member State **treatment no less favourable than that it accords, in like circumstances**, to investments in its territory of its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.	1. Each Party shall accord **to an investor of the other Party and to a covered investment**, **treatment no less favourable than the treatment it accords, in like situations** to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory. 2. The treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a Member State of the European Union, **treatment no less favourable than the most favourable treatment accorded**, **in like situations**, **by that government to investors of that Party in its territory and to investments of such investors**.	1. Each Party shall accord **to investors** of another Party **treatment no less favourable than that it accords, in like circumstances**, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord **to covered investments treatment no less favourable** than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.	1. Each Party shall accord **to investors of the other Party and to covered investments**, with respect to the **operation** of the covered investments, **treatment no less favourable than that it accords, in like situations**, to its own investors and to their investments. 2. Notwithstanding paragraph 1 and, in the case of Viet Nam subject to Annex 2 (Exemption for Viet Nam on National Treatment), a Party may adopt or maintain any measure with respect to the operation of a covered investment provided that such measure is not inconsistent with the commitments set out in Annex 8-A (The Union's Schedule of Specific Commitments) or Annex 8-B (Viet Nam's Schedule of Specific Commitments) of the Free Trade Agreement, respectively, where such measure is: (a) a measure that is adopted on or before the date of entry into force of this Agreement; (b) a measure referred to in subparagraph (a) that is being continued, replaced or amended after the date of entry into force of this Agreement, provided the measure is no less consistent with paragraph 1 after it is continued, replaced or amended than the measure as it existed prior to its continuation, replacement or amendment; or (c) a measure not falling within subparagraph (a) or (b), provided it is not applied in respect of, or in a way that causes loss or damage to, investments made in the territory of the Party before the date of entry into force of such measure.	1. Each Party shall accord **to covered investors of the other Party and to their covered investments**, **treatment in its territory no less favourable than the treatment it accords, in like situations**, to its own investors and their investments with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of their investments. 2. Notwithstanding paragraph 1, each Party may adopt or maintain any measure with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of an establishment that is not inconsistent with commitments inscribed in its Schedule of Specific Commitments in Annex 8-A and 8-B of Chapter 8 (Services, Establishment and Electronic Commerce) of the EUSFTA respectively4, where such measure is: (a) a measure that is adopted on or before the entry into force of this Agreement; (b) a measure referred to in subparagraph (a) that is being continued, replaced or amended after the entry into force of this Agreement, provided the measure is no less consistent with paragraph 1 after being continued, replaced or amended than the measure as it existed prior to its continuation, replacement or amendment; or (c) a measure not falling within subparagraphs (a) or (b), provided it is not applied in respect of, or in a way that causes loss or damage to, covered investments made in the territory of the Party before the entry into force of such measure. 3. [Refer to Table X]

Table 3 – Most Favored Nation

ASEAN -CIA	CETA	CPTPP	EU-Vietnam
Article 6 Most - Favoured - Nation Treatment	Article 8.7 Most-favoured-nation treatment	Article 9.5 Most-Favoured-Nation Treatment	Article 2.4 Most-Favoured-Nation Treatment
1. Each Member State shall accord to investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investors of any other Member State or a non - Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments. 2. Each Member State shall accord to investments of investor s of another Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Member State or a non - Member State with respect to the admission, establishment, acquisi tion, expansion, management, conduct, operation and sale or other disposition of investments. 3. Paragraphs 1 and 2 shall not be construed so as to oblige a Member State to extend to investors or investments of other Member States the benefit of any treat ment, preference or privilege resulting from: 11 (a) any sub - regional arrangements between and among Member States; 5 or (b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement	1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory. 2. For greater certainty, the treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a Member State of the European Union, treatment accorded, in like situations, by that government to investors in its territory, and to investments of such investors, of a third country. 3. Paragraph 1 does not apply to treatment accorded by a Party providing for recognition, including through an arrangement or agreement with a third country that recognises the accreditation of testing and analysis services and service suppliers, the accreditation of repair and maintenance services and service suppliers, as well as the certification of the qualifications of or the results of or work done by those accredited services and service suppliers. 4. For greater certainty, the "treatment" referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach	1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).	1. Each Party shall accord to investors of the other Party and to covered investments, with respect to the operation of the covered investments, treatment no less favourable than the treatment it accords, in like situations, to investors of a third country and their investments. 2. Paragraph 1 does not apply to the following sectors: (a) communication services, except for postal services and telecommunication services; (b) recreational, cultural and sporting services; (c) fishery and aquaculture; (d) forestry and hunting; and (e) mining, including oil and gas. 3. Paragraph 1 shall not be construed as obliging a Party to extend to investors of the other Party or covered investments the benefit of any treatment granted pursuant to any bilateral, regional or international agreement that entered into force before the date of entry into force of this Agreement. 4. Paragraph 1 shall not be construed as obliging a Party to extend to investors of the other Party or covered investments the benefit of: (a) any treatment granted pursuant to any bilateral, regional or multilateral agreement which includes commitments to abolish substantially all barriers to investment among the parties or requires the approximation of legislation of the parties in one or more economic sectors; (b) any treatment resulting from any international agreement for the avoidance of double taxation or other international agreement or arrangement relating wholly or mainly to taxation; or (c) any treatment resulting from measures providing for the recognition of qualifications, licences or prudential

	of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.		measures in accordance with Article VII of the *General Agreement on Trade in Services***1** or its Annex on Financial Services. 5. For greater certainty, the term "treatment" referred to in paragraph 1 does not include dispute resolution procedures or mechanisms, such as those included in Section B (Resolution of Disputes between Investors and Parties) of Chapter 3 (Dispute Resolution), provided for in any other bilateral, regional or international agreements. Substantive obligations in such agreements do not in themselves constitute "treatment" and thus cannot be taken into account when assessing a breach of this Article. Measures by a Party pursuant to those substantive obligations shall be considered "treatment". 6. This Article shall be interpreted in accordance with the principle of *ejusdem generis*

Table 4 – Fair and Equitable Treatment

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Article 11 Treatment of Investment	Article 8.10 Treatment of investors and of covered investments	Article 9.6 Minimum Standard of Treatment	Article 2.5 Treatment of Investment	Article 2.4 Standards of treatment
1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security. 2. For greater certainty: (a) **fair and equitable treatment** requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process (b) **full protection and security** requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments. 3. **A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article**.	1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6. 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process , including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair an d equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.	1. Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.	1. Each Party shall accord fair and equitable treatment and full protection and security to investors of the other Party and covered investments in accordance with paragraphs 2 to 7 and Annex 3 (Understanding on the Treatment of Investments). 2. A Party breaches the obligation of fair and equitable treatment referred to in paragraph 1 where a measure or series of measures constitutes: (a) a denial of justice in criminal, civil or administrative proceedings; (b) a fundamental breach of due process in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment such as coercion, abuse of power or similar bad faith conduct; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3. 3. Treatment not listed in paragraph 2 may constitute a breach of fair and equitable treatment where the Parties have so agreed in accordance with the procedures provided for in Article 4.3 (Amendments). 4. When applying paragraphs 1 to 3, a dispute settlement body under Chapter 3 (Dispute Settlement) may take into account whether a Party made a specific representation to an investor of the other Party to induce a covered investment that created a legitimate expectation, and upon which the investor	1. Each Party shall accord in its territory to covered investments of the other Party fair and equitable treatment8 and full protection and security in accordance with paragraphs 2 to 6. 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if its measure or series of measures constitute: (a) denial of justice in criminal, civil and administrative proceedings; (b) a fundamental breach of due process; (c) manifestly arbitrary conduct; (d) harassment, coercion, abuse of power or similar bad faith conduct. 3. In determining whether the fair and equitable treatment obligation, as set out in paragraph 2, has been breached, a Tribunal may take into account, where applicable, whether a Party made specific or unambiguous representations to an investor so as to induce the investment, that created legitimate expectations of a covered investor and which were reasonably relied upon by the covered investor, but that the Party subsequently frustrated. 4. The Parties shall, upon request of a Party or recommendations by the Committee, review the content of the obligation to provide fair and equitable treatment, pursuant to the procedure for amendments set out in Article 4.3 (Amendments), in particular, whether treatment other than those listed in paragraph 2 can also constitute a breach of fair and equitable treatment. 5. For greater certainty, "full protection and security" only refers to a Party's obligation relating to physical security of covered investors and investments.

		3. **A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.** 4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result. 5. *For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result*.	relied in deciding to make or maintain that investment, but that the Party subsequently frustrated. 5. For greater certainty, the term "full protection and security" referred to in paragraph 1 refers to a Party's obligations to act as may be **reasonably necessary** to protect physical security of the investors and the covered investments. 6. Where a Party has entered into a written agreement with investors of the other Party or covered investments that satisfies all of the following conditions, that Party shall not breach that agreement through the exercise of governmental authority. The conditions are: (a) the written agreement is concluded and takes effect after the date of entry into force of this Agreement; (b) the investor relies on the written agreement in deciding to make or maintain the covered investment other than the written agreement itself and the breach causes actual damages to that investment; (c) the written agreement creates an exchange of rights and obligations in connection to the said investment, binding on both parties; and (d) the written agreement does not contain a clause on the settlement of disputes between the parties to that agreement by international arbitration. 7. **A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article**.	6. Where a Party, itself or through any entity mentioned in paragraph 7 of Article 1.2 (Definitions), had given a specific and clearly spelt out commitment in a contractual written obligation towards a covered investor of the other Party with respect to the covered investor's investment or towards such covered investment, that Party shall not frustrate or undermine the said commitment through the exercise of its governmental authority13 either: (a) deliberately; or (b) in a way which substantially alters the balance of rights and obligation in the contractual written obligation unless the Party provides reasonable compensation to restore the covered investor or investment to a position which it would have been in had the frustration or undermining not occurred. **7. A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.**

Table 5 – Expropriation (part 1)

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Article 14 Expropriation and Compensation*	Article 8.1 Expropriation	Article 9.8 Expropriation and Compensation	Article 2.7 Expropriation	Article 2.6 Expropriation
1. A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation ("expropriation")**, except: (a) for a public purpose; (b) in a non - discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law. *This Article shall be read with Annex 2 (Expropriation and Compensation). **For the avoidance of doubt, any measure of expropriation relating to land shall be as defined in the Member States' respective existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations. Member States understand that there may be legal and administrative processes that need to be observed before payment can be made.	1. A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation ("expropriation"), except: (a) for a public purpose; (b) under due process of law; (c) in a non - discriminatory manner; and (d) on payment of prompt, adequate and effective compensation. […] For greater certainty, this paragraph shall be interpreted in accordance with Annex 8 - A .2.	1. No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except: (a) for a public purpose* (b) in a non-discriminatory manner; (c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and (d) in accordance with due process of law. [17] For greater certainty, for the purposes of this Article, the term "public purpose" refers to a concept in customary international law. Domestic law may express this or a similar concept by using different terms, such as "public necessity", "public interest" or "public use".	1. A Party shall not nationalise or expropriate the covered investments of investors of the other Party either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation"), except: (a) for a public purpose; (b) under due process of law; (c) on a non-discriminatory basis; and (d) against payment of prompt, adequate and effective compensation. […] 6. This Article shall be interpreted in accordance with Annex 4	1. Neither Party shall directly or indirectly nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") the covered investments of covered investors of the other Party except: (a) for a public purpose; (b) in accordance with due process of law; (c) on a non-discriminatory basis; and (d) against payment of prompt, adequate and effective compensation in accordance with paragraph 2. 2.

Table 6 – Expropriation (part 2)

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Annex 2 Expropriation and Compensation	Annex 8 - A.	Annex 9-b Expropriation	Annex 4 Expropriation	Annex 1 Expropriation
1. An action or a series of related actions by a Member State cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment. 2. Article 14(1) addresses two situations: (a) the first situation is where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and (b) the second situation is where an action or series of related actions by a Member State has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.	The Parties confirm their shared understanding that: 1. Expropriation may be direct or indirect: (a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and (b) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.	The Parties confirm their shared understanding that: 1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment. 2. Article 9.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. 3. The second situation addressed by Article 9.8.1 (Expropriation and Compensation) is indirect expropriation, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.	The Parties confirm their common understanding on expropriation: 1. Expropriation as referred to in paragraph 1 of Article 2.7 (Expropriation) may be either direct or indirect as follows: (a) direct expropriation occurs if an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and (b) indirect expropriation occurs if a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.	The Parties confirm their shared understanding that: 1. Article 2.6 (Expropriation) addresses two situations. The first is direct expropriation where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. The second is indirect expropriation where a measure or series of measures by a Party has an effect equivalent to direct expropriation in that it substantially deprives the covered investor of the fundamental attributes of property in its covered investment, including the right to use, enjoy and dispose of its covered investment, without formal transfer of title or outright seizure.

Table 7 – Expropriation (part 3)

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Annex 2 Expropriation and Compensation	Annex 8 - A.	ANNEX 9-B EXPROPRIATION	Annex 4 Expropriation	Annex 1 Expropriation
3. The determination of whether an action or series of actions by a Member State, in a specific fact situation, constitutes an expropriation of the type referred to in sub- paragraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the **economic impact** of the government action, although the fact that an action or series of actions by a Member State has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred; (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and (c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1).	2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors: (a) the **economic impact** of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the duration of the measure or series of measures of a Party; (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and (d) the character of the measure or series of measures, notably their object, context and intent.	(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the **economic impact** of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations;36 and (iii) the character of the government action.	2. The determination of whether a measure or series of measures by a Party, in a specific factual situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, inter alia: (a) the **economic impact** of the measure or series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred; (b) the duration of the measure or series of measures or of its effects; and (c) the character of the measure or series of measures, in particular its object, context and intent.	2. The determination of whether a measure or series of measures by a Party, in a specific situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the **economic impact** of the measure or series of measures and its duration, although the fact that a measure or a series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (b) the extent to which the measure or series of measures interferes with the possibility to use, enjoy or dispose of the property; and (c) the character of the measure or series of measures, notably its object, context and intent.

Table 8 – Expropriation (part 4)

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Annex 2 Expropriation and Compensation	Annex 8 - A.	Annex 9-b Expropriation	Annex 4 Expropriation	Annex 1 Expropriation

4. Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b).	3. For greater certainty, except in the rare circumstance **when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive**, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.	(b) 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, except in rare circumstances. *For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products. [See also annex 9-C – Expropriation relating to land]	3. Non-discriminatory measures or series of measures by a Party that are designed to protect legitimate public policy objectives do not constitute indirect expropriation, except in the rare circumstances **where the impact of such measure or series of measures is so severe in light of its purpose that it appears manifestly excessive**.	For greater certainty, except in the rare circumstance **where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive**, non-discriminatory measure or series of measures by a Party that are designed and applied to protect legitimate public policy objectives such as public health, safety and the environment, do not constitute indirect expropriation.

Table 9 – General Exceptions

ASEAN - CIA	CETA	CPTPP	EU-Vietnam IPA	EU-Singapore IPA
Article 17	Article 28.3 General Exceptions	Article 29.1 General Exceptions	Article 4.6 General Exceptions	Article 2.3. National Treatment
1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of **arbitrary or unjustifiable discrimination** between Member States or their investors **where like conditions prevail**, **or a disguised restriction on investors of any other Member State and their investments**, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures: (a) **necessary** to protect public morals or to maintain public order*; (b) **necessary** to protect human, animal or plant life or health; (c) **necessary** to secure compliance with laws or regulations which are not inconsistent with this Agreement, including those **relating to**: (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety; (d) **aimed at** ensuring the	For the purposes of [list of trade chapters] and Sections B (Establishment of investment) and C (Non-discriminatory treatment) of Chapter Eight (Investment), Article XX of the GATT 1994 is incorporated into and made part of this Agreement. The Parties understand that the measures referred to in Article XX (b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health. The Parties understand that Article XX(g) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources. 2. For the purposes of [list of services chapters] and Sections B (Establishment of investments) and C (Non-discriminatory treatment) of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary: (a) to protect public security or public morals or to maintain public order;33 (b) to protect human, animal or plant life or health; or	1. For the purposes of [list of trade chapters], Article XX of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, mutatis mutandis. 2. The Parties understand that the measures referred to in Article XX(b) of GATT 1994 include environmental measures necessary to protect human, animal or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non - living exhaustible natural resources. 3 . For the purposes of [list of trade in services chapters], paragraphs (a), (b) and (c) of Article XIV of GATS are incorporated into and made part of this Agreement, mutatis mutandis. 3 The Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal or plant life or health.	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 like conditions prevail**, or **a disguised restriction on covered investment**, nothing in Articles 2.3 (National Treatment) and 2.4 (Most-Favoured-Nation Treatment) shall be construed as preventing the adoption or enforcement by any Party of measures: (a) **necessary** to protect public security or public morals or to maintain public order; (b) **necessary** to protect human, animal or plant life or health; (c) **relating to** the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic investors or on the domestic supply or consumption of services; (d) **necessary** for the protection of national treasures of artistic, historic or archaeological value; (e) **necessary** to secure compliance with laws or regulations which are not inconsistent with Articles 2.3 (National Treatment) and 2.4 (Most-Favoured-Nation Treatment) including those **relating to:** (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of	Notwithstanding paragraphs 1 and 2, a Party may adopt or enforce measures that accord to covered investors and investments of the other Party less favourable treatment than that accorded to its own investors and their investments, in like situations, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the covered investors or investments of the other Party in the territory of a Party, or is a disguised restriction on covered investments, where the measures are: (a) necessary to protect public security, public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) relating to the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic investors or investments; (d) necessary for the protection of national treasures of artistic, historic or archaeological value; (e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to: (i) the prevention of deceptive or fraudulent practices or to deal with the effects of a default on a contract; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidential of individual records

equitable or effective** imposition or collection of direct taxes in respect of investments or investors of any Member State; (e) **imposed for the protection of national treasures of artistic, historic or archaeological value**; (f) **relating to** the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. 2. Insofar as measures affecting the supply of financial services are concerned, paragraph 2 (Domestic Regulation) of the Annex on Financial Services of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement ("GATS") shall be incorporated into and form an integral part of this Agreement, *mutatis mutandis*. * The public order exception may be invoked by a Member State only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. **For the purpose of this sub-paragraph, footnote 6 of Article XIV of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement (GATS) is incorporated into and forms an integral part of this Agreement, mutatis mutandis.	(c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or (iii) safety.		confidentiality of individual records and accounts; (iii) safety; or (f) inconsistent with paragraph 1 of Article 2.3 (National Treatment) provided that the difference in treatment is aimed at ensuring the effective or equitable imposition or collection of direct taxes in respect of economic activities or investors of the other Party	and accounts; (iii) safety; (iv) aimed at ensuring the effective or equitable7 imposition or collection of direct taxes in respect of investors or investments of the other Party.
		Article 9.10 Performance Requirements		
		Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; (ii) necessary to protect human, animal or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources.		

Table 10 – Security Exceptions

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Article 18 Security Exceptions	Article 28.6 National security	Article 29.2 Security Exceptions	Article 4.8 Security Exceptions	Article 4.5 Security Exceptions
Nothing in this Agreement shall be construed: (a) to require any Member State to furnish any information, the disclosure of **which it considers** contrary to its essential security interests; or (b) to prevent any Member State from taking any action which **it considers** necessary for the protection of its essential security interests, including but not limited to: (i) action relating to fissionable and fusionable materials or the materials from which they derived; (ii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) action taken in time of war or other emergency in domestic or international relations; (iv) action taken so as to protect critical public infrastructure, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructure; or (c) to prevent any Member State from taking any action pursuant to its obligations under the United Nations Charter for the maintenance of international peace and security.	Nothing in this Agreement shall be construed: (i) to require a Party to furnish or allow access to information if that Party determines that the disclosure of this information would be contrary to its essential security interests; or to prevent a Party from taking an action that **it considers** necessary to protect its essential security interests: (i) connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology undertaken, and to economic activities, carried out directly or indirectly for the purpose of supplying a military or other security establishment; (ii) taken in time of war or other emergency in international relations; or (iii) relating to fissionable and fusionable materials or the materials from which they are derived; or prevent a Party from taking any action in order to carry out its international obligations for the purpose of maintaining international peace and security.	Nothing in this Agreement shall be construed to: (a) require a Party to furnish or allow access to any information the disclosure of which **it determines** to be contrary to its essential security interests; or (b) preclude a Party from applying measures that **it considers** necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	Nothing in this Agreement shall be construed as: (a) requiring a Party to furnish information, the disclosure of which **it considers** contrary to its essential security interests; (b) preventing a Party from taking any action which **it considers** necessary for the protection of its essential security interests: (i) connected with the production of or trade in arms, munitions and war materials and relating to traffic in other goods and materials and to economic activities carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) relating to the supply of services carried out directly or indirectly for the purpose of provisioning a military establishment; (iii) relating to fissionable and fusionable materials or the materials from which they are derived; or (iv) taken in time of war or other emergency in international relations; (c) preventing a Party from taking any action in pursuance of its obligations under the *Charter of the United Nations*, done at San Francisco on 26 June 1945, for the purpose of maintaining international peace and security.	Nothing in this Agreement shall be construed to: (a) require either Party to furnish any information, the disclosure of which **it considers** contrary to its essential security interests; (b) prevent either Party from taking any action which **it considers** necessary for the protection of its essential security interests: (i) connected with the production of or trade in arms, munitions and war materials and related to traffic in other goods and materials and to economic activities carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment; (iii) relating to fissionable and fusionable materials or the materials from which they are derived; or (iv) taken in time of war or other emergency in international relations, or to protect critical public infrastructure (this relates to communications, power or water infrastructure providing essential goods or services to the general public) from deliberate attempts to disable or disrupt it; (c) prevent either Party from taking any action for the purpose of maintaining international peace and security.

Table 11 – Non-precluded Measures

CETA - Article 8.1 5 Reservations and exceptions
1. Articles 8 .4 through 8 .8 do not apply to: (a) an existing non - conforming measure that is maintained by a Party at the level of: (i) the European Union , as set out in its Schedule to Annex I; (ii) a national government, as set out by that Party in its Schedule to Annex I; (iii) a provincial, territorial, or regional government, as set out by that Party in its Schedule to Annex I; or (iv) a local government. (b) the continuation or prompt renewal of a non - conforming measure referred to in subparagraph (a); or (c) an amendment to a non - conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 8.4 through 8.8. 2. Articles 8.4 through 8.8 do not apply to a measure that a Party adopts or maintains with respect to a sector, subsector or activity, as set out in its Schedule to Annex II. 3. Without prejudice to Articles 8. 10 and 8. 12, a Party shall not adopt a measure or series of measures after the date of entry into force of this Agreement and covered by its Schedule to Annex II, that require, directly or indirectly an investor of the other Party, by reason of nationality, to sell or otherwise dispose of an investment existing at the time the measure or series of measures become effective. 4. In respect of intellectual property rights, a Party may derogate from Articles 8.5.1(f), 8.6, and 8.7 if permitted by the TRIPS Agreement, including any amendments to the TRIPS Agreement in force for both Parties, and waivers to the TRIPS Agreement adopted pursuant to Article IX of the WTO Agreement. 5. Articles 8.4, 8.6, 8 .7 and 8.8 do not apply to: (a) procurement by a Party of a good or service purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of a good or service for commercial sale, whether or not that procurement is "covered procurement" within the meaning of Article 19.2 (Scope and coverage); or (b) subsidies, or government support relating to trade in services, provided by a Party.
Article 9.12 - Non-Conforming Measures
1. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to: (a) any existing non-conforming measure that is maintained by a Party at: (i) the central level of government, as set out by that Party in its Schedule to Annex I; (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or (iii) a local level of government; (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or (c) an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) or Article 9.11 (Senior Management and Boards of Directors).29 2. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out by that Party in its Schedule to Annex II. (a) Article 9.4 (National Treatment) shall not apply to any measure that falls within an exception to, or derogation from, the obligations which are imposed by: (i) Article 18.8 (National Treatment); or (ii) Article 3 of the TRIPS Agreement, if the exception or derogation relates to matters not addressed by Chapter 18 (Intellectual Property). (b) Article 9.5 (Most-Favoured-Nation Treatment) shall not apply to any measure that falls within Article 5 of the TRIPS Agreement, or an exception to, or derogation from, the obligations which are imposed by: (i) Article 18.8 (National Treatment); or (ii) Article 4 of the TRIPS Agreement. 6. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to: (a) government procurement; or subsidies or grants provided by a Party, including government supported loans, guarantees and insurance.

EU-Vietnam - - Annex 2 - Exemption for Viet Nam on national treatment
1. In the following sectors, subsectors or activities, Viet Nam may adopt or maintain any measure with respect to the operation of a covered investment that is not in conformity with Article 2.3 (National Treatment), provided that such measure is not inconsistent with the commitments set out in Annex 8-B (Viet Nam's Schedule of Specific Commitments) to the Free Trade Agreement: (a) newspapers and news-gathering agencies, printing, publishing, radio and television broadcasting, in any form; (b) production and distribution of cultural products, including video records; (c) production, distribution, and projection of television programmes and cinematographic works; (d) investigation and security; (e) geodesy and cartography; (f) secondary and primary education services; (g) oil and gas, mineral and natural resources exploration, prospecting and exploitation; (h) hydroelectricity and nuclear power; power transmission and/or distribution; (i) cabotage transport services; (j) fishery and aquaculture; (k) forestry and hunting; (l) lottery, betting and gambling; (m) judicial administration services, including but not limited to services relating to nationality; (n) civil enforcement; (o) production of military materials or equipment; (p) operation and management of river ports, sea ports and airports; and (q) subsidies. 2. If Viet Nam adopts or maintains such a measure after the date of entry into force of this Agreement, it shall not require an investor of the EU Party, by reason of its nationality, to sell or otherwise dispose of an investment existing when that measure enters into effect.
EU-Singapore - Article 2.1. Scope
Article 2.3 (National Treatment) shall not apply to: (a) the procurement by governmental agencies of goods and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of goods or the supply of services for commercial sale; or (b) audio-visual services; (c) activities performed in the exercise of governmental authority within the respective territories of the Parties. For the purposes of this Agreement, an activity performed in the exercise of governmental authority means any activity, except an activity which is supplied on a commercial basis or in competition with one or more suppliers.

Table 12 – Right to Regulate

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
N/A	Article 8.9 Investment and regulatory measures	Article 9.16 Investment and environmental, health and other regulatory objectives	Article 2.2 Investment and regulatory measures and objectives	Article 2.2 Investment and regulatory measures
	1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.	Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure **otherwise consistent with this Chapter** that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.	1. The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection, or promotion and protection of cultural diversity.	1. The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection privacy and data protection and the promotion and protection of cultural diversity.