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PhD in	Legal Studies
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Abstract

Moran, N, 'Preferential Trade and Investment Agreements and engagement between the trade and investment law regimes,' Department of Legal Studies, Bocconi University.

This thesis explores engagement between the trade and investment law regimes and the extent to which this is being driven by Preferential Trade and Investment Agreements.
It provides an empirical analysis of engagement between the two regimes using data from 40 PTIAs and 40 Bilateral Investment Treaties to see whether PTIAs result in increased engagement and whether they are doing so over time.
This thesis then examines four areas identified as key drivers of engagement and explores the question of when engagement is appropriate and to what extent it is appropriate in relation to each of these areas. It assesses the differing approaches to engagement adopted by parties in PTIAs as compared to other types of treaties in relation to the following four areas; preambles and the right to regulate, national treatment, likeness, and general exceptions.
Based on the findings of this study's empirical and comparative law analysis of PTIAs, BITs, and the trade and investment law regimes, this study examines whether the conclusion of PTIAs as compared to BITs has resulted in increased levels of engagement between the trade and investment law regimes.
This thesis does not put forth the view that convergence between trade and investment is always appropriate. It does however provide recommendations as to how treaties may be formulated and interpreted in a manner that takes inter-regime engagement into account with a view to ensuring the harmonious simultaneous development of the two regimes.

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List of Abbreviations

BIT: Bilateral Investment Treaty
BLEU: Belgium-Luxembourg Economic Union
BNM: Banco Nuevo Mundo
CETA: EU-Canada Comprehensive Economic and Trade Agreement
CJUE: Court of Justice of the European Union
CPTPP: Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DCS: Directly Competitive or Substitutable products
DSB: Dispute Settlement Body
DSS: Dispute Settlement System
DSU: Understanding on Rules and Procedures Governing the Settlement of Disputes
EFTA: European Free Trade Association
EC: European Communities
ECA: Economic Cooperation Agreement
ECHR: European Court of Human Rights
EPA: Economic Partnership Agreement
EU: the European Union
FET: Fair and Equitable Treatment
FTA: Free Trade Agreement
GATS: General Agreement on Trade in Services
GATT: General Agreement on Tariffs and Trade
GVC: Global Value Chain
GSC: Global Supply Chain
ICSID: International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules: ICSID Rules of Procedure for Arbitration Proceedings
ICSID Convention: Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA: International Investment Agreement
ICJ: International Court of Justice
ICS: Investment Court System
ILC: International Law Commission
IMF: International Monetary Fund
ITO: International Trade Organisation
ISDS: Investor-State Dispute Settlement
JEEPA: Japan-EU Economic Partnership Agreement
KORUS: Korea- US FTA
MAI: Multilateral Agreement on Investment
MFN: Most-Favoured-Nation
MIC: Multilateral Investment Court
MRTA: Mega-regional trade agreement
MST: Minimum Standard of Treatment
MTBE: methyl tertiary-butyl ether
NAFTA: North American Free Trade Agreement
NAFTA FTC: North American Free Trade Agreement Free Trade Commission
NTB: Non-Tariff Barrier
OECD: The Organisation for Economic Co-operation and Development
PCA: Permanent Court of Arbitration

PCB: Polychlorinated biphenyl
PCIJ: The Permanent Court of International Justice
PIL: Public International Law
PTIA: Preferential Trade and Investment Agreement
RCEP: Regional Comprehensive Economic Partnership
RTA: Regional Trade Agreement
SCM: Subsidies and Countervailing Measures
SME: Small and Medium-sized Enterprises
SOE: State Owned Enterprise
SPS: Sanitary and Phytosanitary Measures
TBT: Technical Barriers to Trade
TiSA: The Trade in Services Agreement
TPP: Trans-Pacific Partnership
TRIMS: Trade-Related Investment Measures
TRIPS: Trade-Related Aspects of Intellectual Property Rights
TTIP: Transatlantic Trade and Investment Partnership
UNCTAD: United Nations Conference on Trade and Development
UK: United Kingdom
US: United States
VCLT or 'the Vienna Convention': the Vienna Convention on the Law of Treaties
WTO: World Trade Organization

Chapter 1- Introduction

1. Introduction
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Introduction

International trade and investment are two of the three traditional pillars of international economic law and interaction between these two regimes is examined in this thesis.[1] As international trade and investment increase in volume and complexity, so too do the demands on the international legal order to put effective rules and enforcement procedures governing the regimes in place. Whether these rules should be largely distinct or should at times draw from the experience of other regimes is examined throughout this thesis.
The trade and investment regimes share the goal of facilitating economic efficiency through international economic activity and complement one another in this regard.
However, despite certain observed commonalities, major differences between the two regimes remain. These two pillars of international economic law have developed largely separately in the modern era for historical reasons and what some view as the differing purposes of the two regimes. The extent to which these fundamental differences limit engagement between the two regimes, and whether or not this is optimal, is considered in this thesis.
The relationship between trade and investment has been discussed in detail in the recent

[1] The third pillar is monetary/ financial policies; see Charnovitz, Steve, 'What Is International Economic Law?' 14 Journal of International Economic Law 1, 3–9 (2011), See also SIEL 5th Biennial Global Conference: Call for papers (2016)

literature. Broude has described the regimes as twins,[2] Puig sees them as “merging”,[3] Pauwelyn sees them as "bound at the hip",[4] while Van den Broek notes that they operate in “distinct but highly parallel universes”.[5] Several factors are now also pushing the two regimes closer together including the joint negotiation of trade and investment chapters in many recent Preferential Trade and Investment Agreements (PTIAs). This potential for increased interaction between the trade and investment regimes could have substantial effects on the evolution of both regimes and international economic law in general. Given the shared legal norms and overlap of jurisdiction between the two regimes, increased engagement could reduce fragmentation of the law and erodes any claim that the trade and investment regimes must be separate or that similar norms found in the two regimes must be interpreted in a fundamentally different manner. The many factors driving and limiting engagement between the two regimes and the implications of this for parties when concluding trade and investment agreements are examined in this thesis.

This introductory chapter is divided into ten parts. Part I gives the background to this thesis and the research question being addressed. Part II looks at the emergence of and shift towards the conclusion of PTIAs since the turn of the century.
Part III looks at what is meant by the ‘trade law regime’ and the ‘investment law regime’ for the purposes of this thesis. It also elucidates the concepts of engagement and convergence, and their meanings for the purposes of this thesis. Definitions of these concepts as they relate to the trade and investment law regimes are put forth.
Parts IV & V look the types of provisions and other factors driving engagement between the trade and investment law regimes. Part VI looks at the effect of negotiating trade and investment law as part of a single agreement. Part VII considers the fundamentals of interpreting trade and investment law agreements and when inter-regime engagement is appropriate. Part VIII provides some background on the evolution of international economic law and places the regimes within the broader context of Public International Law. Part IX introduces this study's methodology and research approach. Finally, Part X looks at the structure of this thesis.

1.1. Background to this thesis and the research question

This study examines the role played by PTIAs in facilitating increased engagement between the trade and investment law regimes. There are many factors driving this increased engagement including the fact that the regimes are economically interdependent, have overlapping jurisdictions, and share similar norms that may be interpreted in similar ways. This thesis charts areas of engagement between the two regimes in an empirical study. It then examines whether engagement in these areas is accelerated as a result of the conclusion of PTIAs (part one). This thesis then examines four areas identified as key drivers of

[2] Broude, T, ‘Investment And Trade: The "Lottie And Lisa" Of International Economic Law?’ *International Law Forum of the Hebrew University of Jerusalem Law* (2011) 20
[3] Puig, Sergio, ‘The Merging of International Trade and Investment Law,’ *33 Berkeley Journal of International Law 1* (2015) 58
[4] Di Mascio & Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ American Journal of International Law (2008) 48
[5] Van den Broek, ‘WTO Litigation, Investment Arbitration and Commercial Arbitration,’ *Kluwer Law International* (2013) 42

engagement and explores the question of when engagement is appropriate, and to what extent it is appropriate, in relation to each of these areas (part two). These areas include preambles and the right to regulate, national treatment, likeness, and general exceptions.

Why engagement between trade and investment?
Instead of looking at the evolution of trade or investment law in isolation, this study adopts a comparative law approach, examining the factors separating the regimes as well as those that bring the regimes closer together. Some of these factors were causing considerable shifts within the regimes during the course of this thesis, which is one of the motivating factors for this study. This comparative law approach is based on the conviction that the regimes have much in common and that both regimes can take lessons from the experience of the other regime. This idea is supported by the burgeoning literature in this area focusing on the relationship between these two foundational pillars of international economic law.[6]

Why the role of PTIAs?
This study tests the hypothesis that engagement between the trade and investment regimes increases when parties conclude PTIAs and that this increased engagement is evidenced in the texts of concluded PTIAs. In the context of PTIAs, this thesis tests the hypothesis that concluding agreements with chapters that focus on both trade and investment within a single agreement has brought about an increasing level of engagement between the trade and investment regimes.

Against this background, the primary research question of this thesis is the following: *Based on the findings of this study's empirical and comparative law analysis of PTIAs, BITs, and the trade and investment law regimes, can it be concluded that the conclusion of PTIAs as compared to BITs has resulted in increased levels of engagement between the trade and investment law regimes?*

For the purposes of this thesis, this question is broken down into the following sub-parts:
1) for the sample of IIAs contained in this study, is there evidence that the conclusion of PTIAs as compared to BITs has resulted in increased levels of engagement between the trade and investment law regimes? (Chapter 2)
2) is there evidence of increased levels of engagement between the trade and investment law regimes in relation to key areas such as preambles, national treatment, likeness, and treaty exceptions? (Chapters 2-6)
3) is there evidence that the conclusion of PTIAs as compared to BITs gives greater scope to tribunals to draw upon the jurisprudence of the other regime and make cross-regime references? (Chapters 3-6)

[6] In terms of recent major works in this area, see for example: Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016), Douglas, Pauwelyn & Vinuales (Eds.), 'The Foundations of International Investment Law,' *Oxford University Press* (2014), Echandi & Sauvé (Eds.), 'Prospects in International Investment Law and Policy,' *Cambridge University Press* (2013), Sacerdoti, Acconci, De Luca & Valenti, 'General Interests of Host States in International Investment Law,' *Cambridge University Press* (2014), Wagner, Markus, 'Regulatory Space in International Trade Law and International Investment Law,' *University of Pennsylvania Journal of International Law, Volume 36:1* (2014) et al.

Based on the empirical evidence and comparison between the trade and investment law regimes in Chapters 2-6, conclusions are drawn as to the improvements that can be made to the regimes to better enable them to achieve their objectives.
Such a study to examine the effect of concluding PTIAs on engagement between the trade and investment law regimes based on empirical evidence has not been conducted before to the author's knowledge.
Thus the aim of the thesis is to examine whether the conclusion of PTIAs results in greater engagement between the trade and investment law regimes as well as whether or not increased levels of engagement are a good thing in relation to several key areas. This study compares the levels of inter-regime engagement present in different types of International Investment Agreements and has potentially far-reaching implications for the future of the trade and investment law regimes and policy-making in this area.

1.2. The emergence of and shift to Preferential Trade and Investment Agreements

Traditionally, states have pursued investment protection through Bilateral Investment Treaties (BITs) and trade liberalisation through Free Trade Agreements (FTAs), which build on their WTO commitments. Trade and investment provisions were contained in FTAs and BITs respectively. However trade and investment provisions are increasingly being negotiated simultaneously as part of single agreements known as Preferential Trade and Investment Agreements (PTIAs). Some earlier treaties in the BIT format contained both trade and investment provisions. These could be considered to be first generation PTIAs and an example of this would be the Gabon- Switzerland BIT (1972), which contains fifteen articles that are a mix of trade and investment provisions.
The term 'PTIA' is relatively recent and for the purposes of this thesis, any agreement containing both trade and investment provisions is considered to be a Preferential Trade and Investment Agreement. This is the case even where the parties refer to an agreement as a BIT, an FTA, or by another name.

The early 21st century has been a surge in countries concluding trade agreements at the regional level. International economic law has been advanced both bilaterally and multilaterally during this time by countries concluding Regional Trade Agreements (RTAs). Many of these RTAs include investment chapters and can thus be considered to be PTIAs. More modern PTIAs deal with a wide range of issues, which have been split into three areas in some recent agreements: 1) market access (for agricultural and industrial goods as well as public procurement); 2) Non-Tariff Barriers (NTBs) and regulatory cooperation and; 3) rules. PTIAs usually contain a specific chapter dedicated to investment, which provides protection to foreign investment and investors. The provisions of these chapters are often similar to those of a BIT. Provisions on dispute settlement may be contained within this chapter or in a separate chapter. PTIAs may also contain other chapters that touch on investment issues, such as chapters on exceptions and services. Other standard-setting chapters may contain rules

affecting investment. These chapters may concern topics such as the environment, labour, transparency and anti-corruption, SMEs, intellectual property, etc.
Modern PTIAs can take many forms and have a number of different parties as signatories. The vast majority of PTIAs considered in this thesis are bilateral, though trilateral, quadrilateral and multilateral PTIAs are also considered. Of the 40 PTIAs considered in detail in Chapter 2, 37 are bilateral, and three contain more than two parties.[7]
These bilateral PTIAs are referred to by a variety of names such as Economic Partnership Agreements (e.g. Japan- Mexico EPA). Trilateral Agreements containing trade and investment chapters are also considered to be PTIAs (e.g. NAFTA, ASEAN-Australia-New Zealand FTA, China-Japan-South Korea FTA).

PTIAs of a certain size and that fulfil certain criteria are known as Mega Regional Trade Agreements (MRTAs),[8] and these include the original Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). The Trade in Services Agreement (TiSA) and Regional Comprehensive Economic Partnership (RCEP) are the two other examples of MRTAs.[9] These agreements have been described by the World Economic Forum as "deep integration partnerships between countries or regions with a major share of world trade[10] and foreign direct investment (FDI), and in which two or more of the parties are in a paramount driver position, or serve as hubs, in global value chains."
The Trans-Pacific Partnership was signed in February 2016, but had to be renegotiated when the US withdrew from the Agreement in early 2017. The 11 remaining members re-negotiated the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) which was signed on 9 March 2018.[11] The Agreement, still referred to as TPP,[12] is a PTIA but is no longer a MRTA without the US. It may become a MRTA in the future should the US (or perhaps even China)[13] join the Agreement.[14] Another example of a major PTIA concluded in recent times that is not a MRTA is the EU- Japan FTA which was concluded in June 2017.[15]
The Transatlantic Trade and Investment Partnership (TTIP) is a proposed PTIA between the EU and the United States which has been described as "in the freezer" since the end of the Obama Administration.[16]
RCEP is a proposed PTIA with 16 negotiating parties including China. It has been described as an alternative to (the formerly US led) TPP and as of February 2018 is in its 22nd

[7] Protocol Pacific Alliance (2014), Central America Mexico (2011), and Korea EFTA (2005)
[8] See 'Mega-regional Trade Agreements: Game-Changers or Costly Distractions for the World Trading System?', Report of the World Economic Forum's Global Agenda Council on Trade & Foreign Direct Investment (2014)
[9] Whether or not these MRTAs would be classified as PTIAs is currently uncertain.
[10] In order to be considered a MRTA, the Agreement would have to affect 25% of global trade in goods, services and FDI.
[11] Press Release of Australian Minister for Trade, Tourism and Investment of 8 March 2018 at: http://trademinister.gov.au/releases/Pages/2018/sc_mr_180308.aspx (last accessed 31 March 2018)
[12] This Agreement is still to be referred to as TPP as the CPTPP incorporates by reference the provisions from the Trans-Pacific Partnership (TPP), with the exception of some provisions to be suspended upon entry into force. See the Canadian government website: http:international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng (last accessed 31 March 2018)
[13] This was hinted at by Chile President Sebastián Piñera on 22 March 2018: https://www.washingtonpost.com/outlook/chiles-new-president-is-concerned-about-donald-trump/2018/03/22/d20e2da0-2d53-11e8-8688-e053ba58f1e4_story.html?utm_term=.7c738e7f28e7
[14] US Treasury Secretary Steven Mnuchin, 27 February 2018: "The president is more focused on bilateral trades, and that's our priority and that's what we're negotiating. What the president has said is kind of when we get done with the bilaterals that we're focused on, to the extent that kind of the TPP will change, we will consider — not a question of whether they will let us back in — we will consider whether we want to go into the multilateral agreement." See https://www.marketplace.org/2018/02/27/world/treasury-secretary-steven-mnuchin-conversation-kai-ryssdal
[15] See European Commission- Press release database: www.europa.eu/rapid/press-release_IP-17-1902_en.htm
[16] Euractiv, 'Malmström: EU-US trade deal 'frozen' after Trump vote,' November 11, 2016 (last accessed 11 June 2018) https://www.euractiv.com/section/trade-society/news/malmstrom-eu-us-trade-deal-frozen-after-trump-vote/

negotiating round.[17] TiSA aims to liberalise trade and investment in services among its 23 negotiating states which include the EU and US. There have been 22 negotiation rounds as of July 2017.[18]

1.3. Key Concepts

1.3.1. The investment law regime

This thesis examines engagement between the trade and investment law regimes. The investment law regime is made up of thousands of International Investment Agreements (IIAs). IIAs come in a variety of forms, including BITs, PTIAs, and multilateral treaties such as the Energy Charter Treaty. Other sources that make up the investment law regime include tribunal awards and decisions of annulment committees. Separate or dissenting opinions of tribunal do not of course have the same force of law but can be valuable illustrations of the tensions at hand in interpreting investment treaties. These sources of investment law are complemented by general rules of international law including the customary international law and customary rules of interpretation of public international law. These treaties and the awards of tribunals in cases taken under them make up what is referred to as 'the investment law regime' throughout this thesis.

1.3.2. The trade law regime

The trade law regime is made up of the texts of the WTO Agreements as well as those in Regional Trade Agreements (RTAs), to use the term employed in GATT Article XXIV. FTAs and the trade chapters of PTIAs are all part of what this thesis refers to as 'the trade law regime'. Other sources of law that inform trade law include dispute settlement reports (of the WTO's DSB or the dispute settlement mechanism of an RTA), general rules of international law, customary international law, and the customary rules of interpretation of public international law.[19]
Engagement between the trade and investment law regimes is discussed throughout this thesis. Although this engagement is frequently analysed with reference to WTO law, it is of equal relevance to the entire trade law regime. Where necessary, conclusions drawn in these chapters in relation to engagement and convergence between shared legal norms of the two regimes distinguish between their relevance to WTO law and the trade regime as a whole. WTO dispute settlement reports are often referred to when discussing the trade regime as a whole due to the predominance of WTO case law in recent times. However the potential for engagement in relation to shared legal norms of the regimes and how they have been interpreted may be of even greater relevance to trade disputes under RTAs than those at the WTO. Trade cases under RTAs may be taken under agreements that are more similar to

[17] Indian Times, 'RCEP pact: 700 officials from 16 nations to meet in Hyderabad,' 28 June, 2017 (last accessed 11 June 2018) http://economictimes.indiatimes.com/news/economy/foreign-trade/rcep-pact-700-officials-from-16-nations-to-meet-in-hyderabad/articleshow/59353011.cms
[18] Government of Canada Website, Global Affairs Canada, Trade Topics, Services: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/services/tisa-acs.aspx?lang=eng (last accessed 11 June 2018)
[19] Article 3.2 of the WTO's Dispute Settlement Understanding states that it seeks to preserve the rights and obligations of Members "in accordance with customary rules of interpretation of public international law".

IIAs.[20]

Despite the abundance of trade law texts outside of the WTO Agreements, dispute resolution in international trade law has been dominated by the WTO since its establishment in 1995. Over 500 cases had been initiated under the WTO's dispute settlement system by the end of 2015.[21] In contrast to the dynamism of WTO dispute resolution, there is a general paucity of litigation of trade matters under FTAs or the trade chapters of PTIAs. Between 2007-17, only two cases were successfully initiated and completed under FTAs.[22] These cases included *Costa Rica v El Salvador*[23] and the *Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*[24] which were both taken under CAFTA-DR (Dominican Republic-Central America FTA).

Where disputes are taken under the dispute settlement mechanisms of RTAs, to what extent do they take WTO law into account? In the Guatemala Labor Panel Report the tribunal said it would take WTO law into account "where appropriate"[25] and this was found to be the case in relation to submissions that "relied heavily" on WTO panel and Appellate Body reports. The panel found WTO precedent “helpful” concerning the submission of evidence[26] and “minimally useful” in interpreting CAFTA-DR Article 16.2[27] on the enforcement of labour laws.[28]

WTO Members tend to litigate at the WTO rather than under the Dispute Resolution Mechanisms of RTAs for various reasons. These include the high levels of trust in the WTO dispute settlement system, the relative predictability of the system, the enforceability of WTO awards, and the reputational damage the offending Member may suffer if it is seen to be violating its WTO commitments. Notwithstanding this preference, the importance of Dispute Resolution Mechanisms in RTAs should not be underestimated, particularly in light of the recent crisis at the WTO’s Appellate Body, which could lead to "paralyzing appellate proceedings."[29] The purpose of concluding a RTA is that it goes beyond what has been agreed among all 164 Members of the WTO. When litigating a matter that does not feature in the WTO Agreements, the Dispute Settlement Mechanism of the RTA including these 'WTO plus' provisions will likely be more appropriate.

WTO Members may have greater recourse to the dispute resolution mechanisms in RTAs if a solution isn't found to the recent impasse concerning the nomination of new members of the

[20] RTAs may even be IIAs, for example the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada is both a Regional Trade Agreement and an International Investment Agreement).

[21] See the WTO’s Chronological list of disputes at: www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

[22] See Vidigal, Geraldo, 'Why Is There so Little Litigation Under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement,' *CTEI Working Paper No. CTEI-2017-14* (2017) 1

[23] Informe Final del Grupo Arbitral, Costa Rica vs El Salvador – Tratamiento Arancelario a Bienes Originarios de Costa Rica, 18 November 2014 (CAFTA-DR/ARB/2014/CR-ES/17).

[24] Final Report of the Panel, Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR (2017)

[25] Final Report of the Panel, Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR (2017) para 69

[26] See Annex 2: Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence, para 47

[27] Article 16.2: Enforcement of Labor Laws 1. (a) A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

[28] Final Report of the Panel, Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR (2017) para 189

[29] WTO website, Farewell speech of Appellate Body Member Ricardo Ramírez-Hernández: 'Appellate Body chair calls for “constructive dialogue” on addressing dispute settlement concerns,' 3 May 2018. Available at: https://www.wto.org/english/news_e/news18_e/ab_07may18_e.htm

Appellate Body.[30] Even before this issue arose, there were question marks over the ability of the WTO to deal with its heavy workload.

1.3.3. Engagement

Engagement between trade and investment occurs wherever the content of an investment treaty has a parallel in the trade regime or vice versa. The term 'content' can cover a treaty's preamble, definitions, substantive provisions, exceptions etc. Engagement also occurs in dispute settlement whenever there are cross-regime references by the parties or the tribunal or parallels in the practices of tribunals. Engagement does not imply convergence and may fall short of this in a given area between the two regimes.
The implications of inter-regime engagement differ according to the context and this is explored in Part II of this thesis. Part II examines the question of when engagement is appropriate and to what extent it is appropriate in relation to four of the areas identified as drivers of convergence in Chapter 2. It also looks at the role of PTIAs in this area as potential drivers of convergence.
Chapter 2 divides the areas that evidence engagement into three areas: host state flexibility, dispute settlement, and substantive provisions. In terms of substantive provisions, engagement may simply be evidenced by the existence of shared norms between the regimes. The question then becomes how close are these norms and how similarly should tribunals treat them? Concerning host state flexibility, engagement may be seen in provisions such as the following: those that directly refer to WTO law and minimise conflict between the two regimes; provisions that are directly inspired by the WTO Agreements; or provisions that have counterparts in the WTO Agreements.
For dispute settlement, engagement may be apparent where procedural rules in investment law are similar to those found at the WTO.
This thesis does not answer the question as to whether engagement or convergence between the trade and investment law regimes is a good thing *in a general manner*. Rather it takes the stance that engagement between trade and investment is a good thing *when it is appropriate*. Determining when it is appropriate is the focus of Part II of this thesis, and this is done in relation to four of the key areas measured in Part I.

The extent of engagement depends on how closely the content of one regime mirrors the other. The closer the content of provisions across the two regimes is, the more likely parties and tribunals are to invoke and draw upon the law and jurisprudence of the other regime. Parties can subsequently adapt the content of treaties, or adopt binding interpretations of provisions, to encourage or discourage cross-regime references by tribunals.
The appropriateness of crossfertilisation of jurisprudence between the two regimes is for tribunals to consider on a case-by-case basis. Two provisions with largely similar wordings that contain important textual differences may have less potential for crossfertilisation than two provisions that share a key word such as "necessary". Chapter 2 on the empirical analysis of engagement attributes values for the potential for crossfertilisation of provisions in the categories of "treaty exceptions" and "preambles and the right to regulate".
Part II seeks to identify when engagement is appropriate in relation to the four areas identified as potential key drivers of convergence in Chapter 1. Should investment tribunals have regard to how the WTO preambles have been interpreted and vice versa? Part II examines this

[30] See Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, August 31, 2017: https://geneva.usmission.gov/wp-content/uploads/2017/08/Aug31.DSB_.Stmt_.as-delivered.fin_.public.pdf

question in relation to Preambles and the Right to Regulate, National Treatment, Likeness, and Exceptions.

1.3.4. Convergence

Engagement occurs where there are parallels in the content of the two regimes. Not all forms of interaction between the regimes are equal and degrees of engagement are quantified in Chapter 2 for Preambles and General Exceptions. As the content and context of provisions approximates, the potential for engagement between the two regimes becomes greater. Where the content of the treaty texts is sufficiently close, and the contexts are sufficiently similar, the level of engagement may be tantamount to convergence between the two regimes.
Convergence or "points of convergence"[31] may be achieved in certain limited areas between the trade and investment law regimes. Commentators have referred to this convergence in various ways in the recent academic literature. Broude sees trade and investment as having "strongly converged over the last decade or two", particularly in relation to dispute settlement and the provision of services.[32] Alford describes the regimes as having points of convergence and being on "parallel tracks headed in the same direction" with similar but distinct ends.[33] Wagner sees "converging trends" in both the commentary and jurisprudence of the two regimes.[34]
When discussing convergence, commentators should be clear whether they mean points of convergence or a holistic concept of convergence. While some may view a general concept of convergence as undesirable and/ or at least difficult to achieve, the idea of there being points of convergence is much easier to contemplate. . Kurtz prefers the double helix metaphor with strands "increasingly cohering around a unifying core".[35] Arguments against convergence have centred on the idea that the two regimes have evolved on different historical trajectories and serve fundamentally different purposes; that investment law governs the relationship between the state and investors while trade law manages state-to-state conflict.[36]
Although this thesis is framed in terms of factors that increase engagement, these are the same factors that drive convergence, the only difference being the end point described. Convergence is not a relative term and it is difficult to speak of degrees of convergence. Full convergence is not possible in some areas and when authors speak of partial convergence, the implication remains that full convergence is the destination. For this reason, the more open concept of engagement is preferred throughout this thesis with some references to points of convergence between the two regimes.[37]

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[31] Alford, page 37, makes this distinction.
[32] Broude, T, 'Investment And Trade: The "Lottie And Lisa" Of International Economic Law?' *International Law Forum of the Hebrew University of Jerusalem Law* (2011) 10
[33] Alford, Roger, 'The Convergence of International Trade and Investment Arbitration,' *Santa Clara Journal of International Law*, Volume 12, Issue 1 (2014) 60
[34] Wagner, Markus, 'Regulatory Space in International Trade Law and International Investment Law,' *University of Pennsylvania Journal of International Law*, Volume 36:1 (2014) 86
[35] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 279
[36] See Alvarez's arguments in Chapter 6.3.1.
[37] Wu refers to "select cross-fertilization, rather than true convergence', see Wu, Mark, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime,' The Foundations of International Investment Law, Editors Douglas, Pauwelyn & Vinuales, *Oxford University Press* (2014) 175

1.4. Types of provisions driving engagement

Chapter 2 operationalises engagement in a sample of PTIAs and BITs for the period 2005-15 by coding for 24 elements evidence inter-regime engagement when present in agreements.[38] Of these elements, the following categories of provisions are found: 1) Provisions that minimise conflict between the regimes; 2) Provisions that harmonise procedural rules between the regimes; 3) Provisions that represent shared norms between the regimes; 4) Provisions that refer to the applicability of rules of international (economic) law and the suitability of arbitrators with knowledge of international (trade) law. This section explores these categories of provisions and how they are drivers of inter-regime engagement.

1) Provisions that minimise conflict between the regimes

Treaty drafters may minimise conflict between the trade and investment regimes in a number of ways. Two examples coded for in Chapter 2 include expropriation articles that provide an exemption for measures that are TRIPS compatible and references to performance requirements that provide exemptions for measures compatible with TRIMS. As negotiators consciously minimise conflict between the regimes, the potential for inter-regime engagement becomes greater, or at least does not decrease.

2) Provisions that harmonise procedural rules between the regimes

Engagement between the trade and investment law regimes can be seen in increasingly similar procedural rules. As seen in Chapter 2, many recent IIAs provide for rules that were previously more commonly seen in trade law and public international law. These rules include provisions for transparency in proceedings, the allowance of *amicus curiae* submissions from third parties, more robust conflict of interest provisions for adjudicators, and potentially more robust appeal procedures. As procedural rules between the regimes approximate, the barriers to tribunals and the parties to disputes making cross-regime references decrease.

3) Provisions that represent shared or similar norms between the regimes

The trade and investment law regimes contain a variety of shared norms that are part of the twin strands making up their "unifying core".[39] Part I of this thesis identifies 24 treaty provisions that evidence engagement between trade and investment and many of these shared legal norms can be seen among these 24 provisions. Classically, the shared legal terrain between trade and investment encompasses areas such as National Treatment and MFN Treatment. The shared terrain of the two regimes also reaches areas such as General Exceptions as some IIAs are incorporating these by reference to the WTO Agreements or modeling exceptions clauses on those at the WTO. Tribunals them have to interpret these shared norms in dispute settlement systems that often contain some degree of harmonisation of procedural rules. This core of shared norms provides abundant evidence of engagement between the two regimes.
Within these norms, concepts such as 'likeness' are shared by the two regimes. The interpretation of shared norms is context dependent and, for example, the meaning of likeness in the context of the WTO Agreements may be entirely different to the meaning of likeness in

[38] For a discussion of these elements, see Chapter 2.9
[39] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 24

an IIA. Tribunals must keep this proviso in mind when interpreting similar norms developed in a parallel regime.
As such, the level of engagement may vary between agreements for a given norm. Kurtz categorises three types of engagement in relation to general exceptions, including those with explicit, implicit, and thin commonalities between the regimes.[40] This study categorises two additional types of engagement for general exceptions including provisions that protect against arbitrary and discriminatory measures, and exceptions within articles on performance requirements.[41]
An example of explicit engagement is the direct incorporation of GATT Article XX or GATS Article XIV. Implicit engagement may be seen in investment agreements that include clauses modelled on WTO law, while thin commonalities may arise where agreements contain exceptions sharing more limited common elements with the other regime. E.g. Article XI, US-Argentina BIT 1994, which states:

> "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests."

This article provides for three exceptions to the Agreement. These are exceptions to the Agreement that function in a manner similar to the policy objectives set out in subparagraphs (a) – (j) of GATT Article XX. This article also contains a necessity test which is found in subparagraphs (a), (b) and (d) of the GATT. These elements represent commonalities between the GATT and US-Argentina BIT, albeit thin commonalities. The degree of engagement present in the treaty text affects the legitimacy afforded to cross-regime borrowing, which is explored later in this chapter.

4) Provisions that refer to the applicability of rules of international (economic) law and the suitability of arbitrators with knowledge of international (trade) law

The inclusion of a reference to the application of international law or international trade law in the investment chapter of a BIT or PTIA is an expression of the desire of the parties for the possibility of trade principles to be included in the analysis of the chapter's provisions. These provisions are usually included in the Dispute Settlement/ ISDS section of investment chapters. E.g. Japan- Kazakhstan BIT (2014), Article 17.15:

> "An arbitral tribunal established under paragraph 4 of this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

Principles of international law, including trade law, may thus inform decisions relating to disputes under the agreement if the tribunal deems them applicable. This is generally limited to areas with a clear overlap of legal norms.

[40] For more, see Kurtz who describes these types of engagement and characterises them as being evidence of: 1) deep integration by incorporation by reference; and 2) those modelled from the law of the WTO; and 3) those that evidence thin commonality.
[41] See Chapter 2.9 for a more detailed account of these five types of General Exceptions provisions.

Similarly, the inclusion of a reference to the suitability of arbitrators with knowledge of trade law is also an acknowledgement by the parties of the overlap and potential for engagement between the two regimes. The obvious implication of including arbitrators with knowledge of trade law is that this knowledge may be useful when deciding disputes and considering norms that overlap between the two regimes under the agreement. An example of such a provision is found in Article 24.2 of the Canada- China BIT (2012):

> "Article 24 Arbitrators
> (…) 2. Arbitrators shall:
> (a) have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements;"

1.5. Other factors driving engagement

As well as the above categories of provisions, Kurtz identifies three additional convergence factors that are "pushing together" trade and investment with "uncertain trajectories and end-points".[42] These factors include interdependence between the regimes, shared jurisdiction, and sociological factors. These three factors are briefly considered here.[43]

1) Overlapping jurisdiction

State measures can give rise to claims that fall within the jurisdiction of both the trade and investment law regimes and there have been several instances of parallel proceedings being brought at the WTO and under IIAs.[44] Examples in recent times have included the Softwood Lumber and High Fructose Corn Syrup disputes[45] and proceedings arising out of Australia's Tobacco Plain Packaging Act.[46]
Investment protection clauses in IIAs may provide a remedy for states and parties that can be an alternative to proceedings at the WTO, or that can operate concurrently to proceedings at the WTO. If it is deemed more effective or expedient, states may shift away from taking actions at the WTO and encourage industry affected by measures to litigate under IIAs.[47]

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[42] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 10
[43] Kurtz identifies five convergence factors in total, the other two being shared legal norms and cross-fertilisation in jurisprudence. As these two factors are already considered in this chapter (1.4 and 1.7 respectively) and the empirical section of this study, only these other three categories need to be added to the analysis.
[44] For analysis of relevant recent case law, see Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 13-15. Kurtz outlines instances of shared jurisdiction in trade remedies, plain packaging of tobacco, and its potential in the renewable energy sector.
[45] See *Mexico - Taxes on Soft Drinks*, WT/DS3 0 8 /R; Appellate Body Reports, *Mexico - Corn Syrup* (Article 21.5 - US), WT/DS 132/AB/RW; *Mexico - Taxes on Soft Drinks,* WT/DS308/AB/R; *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 Sep. 2000
[46] For a comprehensive account of parallel proceedings at the WTO and under IIAs, see Alford, Roger, 'The Convergence of International Trade and Investment Arbitration,' *Santa Clara Journal of International Law* Volume 12, Issue 1 (2014) 44-50
[47] In the aftermath of a concluded TTIP, if measures such as those in *EC-Hormones* (1998) were disputed among the parties, the complainants would ask themselves where they would be more likely to get an effective solution for their grievance. If complainants deem the relief under the investment chapter of the PTIA to be more beneficial, international economic law could see a shift towards disputes such as these being litigated under PTIAs.

This overlap in jurisdiction between the trade and investment law regimes has the potential to increase engagement as tribunals *may be required* to look across the aisle when parallel proceedings are taking place. Looking to proceedings in the other regime may be useful in terms of seeing the pleadings of the parties as well as the findings of the tribunal. In *Canfor v. US*, the NAFTA tribunal had regard to WTO proceedings where the US categorised a measure as a "payment programme" rather than as a trade remedy. In view of this categorisation, the tribunal found that it had jurisdiction to consider whether the measure breached investor rights under NAFTA Chapter 11. In light of recent case law, Kurtz concludes that it is "often practically impossible to simply ignore the factual and legal issues" in the other regime.[48] Treaty drafters must consider the desirability of parallel proceedings and the circumstances where it is or is not possible to have concurrent claims at the WTO and under IIAs.

2) Interdependence between the regimes

Trade and foreign investments can be strict substitutes, particularly where an investor is looking for a way to circumvent a high-tariff wall.[49] FDI has however become a complement to cross-border trade because of reduced tariff levels globally and the increasing importance of Global Supply Chains (GSCs) for consumers and Global Value Chains (GVCs) for businesses. Multinational Companies (MNCs) locate different parts of the production process in different countries with a view to reducing overall cost. This necessitates foreign investment and results in increased trade in intermediate goods and services which now account for over 70% of global trade.[50] Between 1999-2014 income associated with GVCs doubled.[51]

GSCs & GVCs depend on unrestricted trade and investment. If state measures restrict the import and export of goods and services, this impacts on the viability of an investment in that state as part of a GSC/GVC. If state measures restrict how investments can operate by obliging them to source inputs locally for example, this impacts on the import of goods and services that can no longer be used as inputs and ultimately impacts on exports if the operation of the investment is affected.

PTIAs involve the coupling of trade and investment issues as part of a single agreement. Agreements that cover interdependent areas such as trade and investment can facilitate greater policy coherence for states and greater certainty for economic operators.

PTIAs also allow states to define in a single agreement the boundaries as to what constitutes a claim under the trade regime and under the investment regime. The possibility for foreign states and parties to strategically consider whether it is best to seek remedies under trade or investment law illustrates the interdependency of the two regimes, but can be limited with

[48] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 14-15. Kurtz takes the first example of Canfor v. US, where investor rights under NAFTA Chapter 11 clashed with state rights under the anti-dumping provisions in Chapter 19. The tribunal found that the claim related entirely to trade remedies except for one part of the US scheme which it had identified as a "payment programme" in WTO proceedings. A second example of looking across the aisle is given in the Mexico High Fructose Corn Syrup case where the Mexican authorities breached their NAFTA obligations in reaction to a legal ruling in the WTO.

[49] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 15-17. This section is a brief summary of Kurtz's argument on these pages.

[50] 'Global Value Chains: Challenges, Opportunities, And Implications For Policy,' OECD, WTO and World Bank Group (2014) 7

[51] 'Global Value Chains: Challenges, Opportunities, And Implications For Policy,' OECD, WTO and World Bank Group (2014) 7

careful treaty drafting.

3) Sociological Factors

Engagement has been facilitated by the interaction of actors of the two "different epistemic communities" including negotiators, adjudicators and scholars acting as expert witnesses between the two regimes.[52] Sociological factors drive engagement where the "movement of actors" in the trade and investment law regimes results in increased engagement, or minimised inter-regime conflict.[53]
Where FTAs and BITs were once negotiated separately, they are now increasingly being negotiated as part of a single agreement. PTIA texts and tribunal reports have been subjected to great scrutiny in the wider literature on convergence. The negotiation process of PTIAs and trade agreements has attracted less attention in general. The negotiating process for trade agreement has been under increasing scrutiny of late however as a result of the negotiation process of TTIP and subsequently the United Kingdom's withdrawal from the European Union.[54]

PTIA negotiators are important potential facilitators of convergence between the two regimes. PTIA negotiators draft trade and investment provisions at the same time, with the relevant negotiators consulting and influencing each other during the process to some extent, or at the very least to the extent that the chief negotiator is aware of the contents of the trade and investment provisions. PTIAs present an opportunity for facilitating convergence that wasn't possible under the old frameworks of negotiating FTAs and BITs separately. The importance of the new PTIA framework depends on the degree of integration and interaction between the departments under the old and new negotiating frameworks.
One example of negotiators minimising inter-regime conflict is negotiators expressly carving out compulsory licencing from expropriation guarantees. Such carve outs, acknowledge that actions in one regime could trigger problems in another. Recent negotiators of PTIAs have tried to avoid hard conflicts such as these, thereby minimising system friction.[55]
Among the fundamental differences between the regimes is the different backgrounds of the lawyers that have dominated the regimes. Trade lawyers who often have backgrounds as government officials have heavily influenced the trade regime, while the role of private parties and lawyers who come from a commercial arbitration background has been more pronounced in investment law.
This distinction extends to the governmental departments that negotiate agreements and we can expect different outcomes where investment negotiations are conducted or influenced by trade lawyers who may previously have had little input into the creation of investment agreements. E.g. In the US, trade negotiations have traditionally been conducted by the USTR and investment negotiations by the Department of State. In the UK, the Foreign and

[52] Wagner, Markus, 'Regulatory Space in International Trade Law and International Investment Law,' *University of Pennsylvania Journal of International Law*, Volume 36:1 (2014) 80
[53] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 19
[54] See for example, Grossman, G. M., 'The Purpose of Trade Agreements', *NBER Working Paper 22070* (2016), Dhingra, Ottaviano & Sampson, 'A hitch-hiker's guide to post-Brexit trade negotiations: options and principles,' *Oxford Review of Economic Policy, volume 33, Number S1*, (2017) pp. S22-S30, Sampson, T., 'Four Principles for the UK's Brexit Trade Negotiations,' *CEP Brexit Analysis* (2016)
[55] E.g. Australia-Chile FTA, Article 10.11: Expropriation and Compensation: (…) 5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such revocation, limitation, or creation is consistent with Chapter 17 (Intellectual Property).

Commonwealth Office (FCO) has traditionally conducted investment negotiations[56] rather than the Department of Trade and Industry (DTI).[57]

Those who negotiate and adjudicate trade and investment agreements can facilitate or potentially exclude engagement between the two regimes. Where agreements are concluded in institutional setups that separate trade and investment, less engagement is expected than in setups where the same department negotiates the trade and investment chapters of an agreement. If separate government departments are in charge of negotiating BITs and FTAs, inter-regime conflict can still be minimised. This can be done if there are frequent interactions between decision-makers in the two departments and these decision-makers are aware of the concerns of both departments. To take the above example of the US Department of State, when negotiating BITs, in terms of minimising conflict with the trade regime, input should be sought from the USTR and vice versa if the USTR is negotiating a FTA. Where the US is negotiating a PTIA such as TTIP, these interactions tend to happen more naturally as the chief negotiator is aware of the different and potentially conflicting elements in trade and investment chapters.
In this author's view, the background of the persons in the three positions of chief investment negotiator, chief negotiator, and signing official have the greatest potential to impact upon engagement between trade and investment. One might imagine that the chief investment negotiator would have the greatest potential to impact upon engagement, and that the signing official might not be involved in such technical matters. However, the signing official sets the overall course for negotiations. To take the example of the EU, the drive in current PTIA negotiations to include the Investment Court System in the investment chapter of agreements does not come from the chief investment negotiator but rather from the level of the signing official. This dictates how the chief investment negotiator proceeds and has great potential to impact upon engagement.
In the case of IIAs, it is hypothesised that the more trade friendly these main actors' backgrounds are, the more inter-regime engagement there is likely to be in agreements. In the case of the EU, negotiators responsible for investment texts tend to come from DG TRADE and would thus be expected to be sensitive to potential conflicts with the trade regime.[58] Where investment negotiators are working within a Department of Trade, and are drawn from workers within such a Department, it can be expected that the negotiated investment outcomes in a PTIA would take trade concerns on board to a greater extent than in a BIT and FTA negotiated in an institutional set up with separate departments negotiating trade agreements and investment agreements if it is the case that the negotiators are largely working separately. The effect of bringing together trade and investment negotiators when negotiating PTIAs could be the subject of an empirical study, although such a study is beyond the scope of this thesis.

[56] Andrew Walter, 'British Investment Treaties in South Asia: Current Status and Future Trends' *Report Prepared for the International Development Center of Japan* (2000)
[57] In the case of the UK it should be borne in mind that trade negotiations have been conducted by the European Union on behalf of the UK since it joined the EU in 1973. This is in accordance with Article 207 Treaty on the Functioning of the European Union (TFEU), formerly Article 133 Treaty establishing the European Community (TEC).
[58] See for example, European Commission, Civil Society Dialogue, 'Update On The Transatlantic Trade And Investment Partnership (TTIP) - First Negotiation Round,' Available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151656.pdf (last accessed 9 November 2017)

1.6. The effect of negotiating trade and investment together

One of the reasons for this shift of focus away from the WTO as a negotiating forum has been the failure by WTO Members to conclude the Doha Development Round since its launch in 2001. This shifted focus towards RTAs as an alternative to global negotiations has been called 'minilateralism'[59] which Puig describes as having "propelled further convergence" between the trade and investment law regimes.[60]
Investment protection chapters are described as being the central mechanism for this, making the relationship between trade and investment "more explicit."[61] Puig notes that under recent agreements, provisions aimed at protecting FDI are being enforced by States and trade breaches are being enforced by private parties in investment arbitration.
The effect of negotiating investment protection as part of a larger overall agreement is unclear. PTIAs can cover trade, investment as well as a whole host of other issues. The interplay between the various interests at stake is part of the bargaining dynamic of a negotiation and some fear that their interests may become a bargaining chip as part of a larger deal. [62]
This bargaining chip dynamic could greatly impact upon trade and investment outcomes in PTIAs and thus affect inter-regime engagement. Wu views the practice as being "fairly limited" but outlines two instances where investment concessions were made in exchange for trade-related benefits. In one instance, Chile began to accept limitations on the use of performance requirements for better market access. In another instance El Salvador agreed to concessions in relation to remedies and procedural matters in exchange for better market access.[63]
Where parties wish to enhance investment protection and go beyond the WTO Agreements, many are choosing to negotiate PTIAs rather than separate BITs and FTAs. It was reported in March 2017 that India refused to negotiate an investment deal with Canada without broader trade negotiations to "ensure a balanced outcome".[64]

The negotiation of investment chapters within PTIAs has the ability to impact the development of investment law. Where parties previously disagreed on an element of investor protection, or a way of dispute settlement, the bargaining chip dynamic wasn't in play to the same extent that it is in PTIAs. One way to analyse how bargaining influences the outcome of PTIAs is to examine the differences in the end products of concluded BITs, FTAs and PTIAs.

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[59] Puig, Sergio, 'The Merging of International Trade and Investment Law,' *33 Berkeley Journal of International Law* 1 (2015) 3
[60] Puig, Sergio, 'The Merging of International Trade and Investment Law,' 33 *Berkeley Journal of International Law* 1 (2015) 13
[61] Puig, Sergio, 'The Merging of International Trade and Investment Law,' 33 *Berkeley Journal of International Law* 1 (2015) 13
[62] See for example: 'Farming risks being used as bargaining chip in EU trade deals' Farmers Weekly, 18 April 2016 'Farming must not become TTIP 'bargaining chip', say MEPs' Farmers Weekly, 15 April 2015 (www.fwi.co.uk/business/farming-must-not-become-ttip-bargaining-chip-says-meps.htm) (www.fwi.co.uk/business/farming-risks-being-used-as-bargaining-chip-in-eu-trade-deals.htm) Last accessed 3 November 2017
[63] See Wu, Mark, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime,' in Douglas, Pauwelyn & Vinuales (eds.), 'The Foundations of International Investment Law,' Oxford University Press (2014) 60-61/82
[64] "The Indian negotiators clearly told the Canadians that both agreements had to be agreed upon simultaneously as only that would result in a balanced outcome," a government official is quoted as saying by the Hindu Business Line. See 'India refuses Canada's proposal of signing investment deal before free trade pact' (March 14, 2017): www.thehindubusinessline.com/economy/policy/india-refuses-canadas-proposal-of-signing-investment-deal-before-free-trade-pact/article9583882.ece

If a country has a consistent practice in its BITs and PTIAs but deviates from this practice in one of its agreements (perhaps with a larger partner), this may be evidence of a concession made by the party.[65] In other instances, the impact of this dynamic may be clearer. It was reported that Canada and Mexico had yielded to US demands on ISDS "as part of a larger bargain" in the renegotiation of NAFTA.[66]

Wu describes PTIAs as an area where trade affects investment and sees treaty formation as perhaps its "greatest influence" on the investment regime.[67] This thesis investigates whether this influence on treaty formation makes tribunals more likely to refer to the jurisprudence of the other regime. It also looks at whether this influence is likely to increase engagement between the two regimes in general. Although the WTO retains its primacy as a settler of disputes and enforcer of the WTO texts, regional negotiating forums are of increased importance in shaping the evolution of trade rules since the turn of the century.[68]
For those who advocate a clear separation of the trade and investment law regimes, a cautious approach concerning the benefits of the simultaneous negotiation of trade and investment is understandable.

1.7. Interpreting Trade and Investment Agreements

1.7.1. WTO Law influence in Investment Law & vice versa

It has been more common for investment tribunals to look to WTO law than the other way around. Although frequency of references has been uneven, it has not been unidirectional. The potential for the trade regime to influence investment treaties can be seen in the treaty texts via references to the trade regime and also shared concepts and legal norms such as likeness and national treatment.
Notable instances of investment tribunals drawing on the jurisprudence of the trade law regime include interpretations of national treatment provisions such as the approach of the tribunal in *SD Myers v. Canada*.
The tribunal in *Continental Casualty v. Argentina* also drew upon the experience of the trade regime in dealing with treaty exceptions when interpreting the concept of necessity.
The practice of tribunals of one regime making cross-regime references has not been without its detractors. Kurtz questioned the findings of investment law tribunals in his article 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents.' He concluded that misuse of WTO law is the controlling factor for critical inconsistency in investment law jurisprudence leading to "wildly inconsistent

[65] Unfortunately, it is beyond the scope of this thesis to delve further into this phenomenon.
[66] See Inside US Trade, 'Canada to propose eliminating ISDS at NAFTA meeting this week; USTR to agree, 'Available at https://insidetrade.com/daily-news/sources-canada-propose-eliminating-isds-nafta-meeting-week-ustr-agree (last accessed 3 May 2018)
[67] Wu, Mark, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime,' The Foundations of International Investment Law, Editors Douglas, Pauwelyn & Vinuales, Oxford University Press (2014) 206
[68] For an overview of three areas of the proposed text of TPP where new trade rules have been agreed upon, See Wu, M, ''The "China, Inc." Challenge To Global Trade Governance,' 57 *Harvard International Law Journal* 1001 (2016) 53-58

outcomes" in cases.[69] The approach of the tribunal in *Continental Casualty v. Argentina* was also criticised by Alvarez & Brink.[70]
More skeptical commentators have described the influence of trade law on investment law as being "relatively limited"[71] and largely confined to general exceptions and instances of imported jurisprudence that remain an anomaly.
As the role of external authorities is not stipulated in the WTO Agreements, their ultimate influence is under the strict control of the adjudicator.[72]

Instances of WTO tribunals referring to the findings of investment tribunals are considerably more rare. In *U.S. – Stainless Steel*, the Appellate Body referred to the findings of an investment tribunal when addressing the question of consistency of jurisprudence.[73]
In *China— Rare Earths* the Panel referred to the ruling in *MTD v. Chile*. The Panel considered the investment tribunal's interpretation of fair and equitable treatment in its interpretation of the term "even-handedness".
There have also been various disputes where the Disputing Parties have referred to the decisions of investment law tribunals in their pleadings.
Although WTO tribunals have shown reluctance to make cross-regime references, this need not be the case. WTO tribunals are able to make such references in line with the VCLT and relying on the principle of systemic integration provided for in Article 31.3(c) of the VCLT. This provides a legal basis for considering the findings of IIA tribunals in WTO disputes and there is a "potential value of PTAs to clarify WTO rules".[74] WTO tribunals have shown reluctance to make external references, which is likely due to their concern for predictability and consistency in the jurisprudence.
The two regimes have recently entered a "crux period", where negotiators and adjudicators must consider whether and how lessons from the WTO can be drawn upon in interpreting investment law provisions and vice versa.[75]

1.7.2. Cross-fertilisation of jurisprudence

The trade and investment law regimes are not self-contained but rather form part of the

[69] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *EJIL Volume 20* (2009)
[70] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' Yearbook on International Investment Law & Policy (2011) See Chapter 6.3 for discussion of this case.
[71] Wu, Mark, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime,' The Foundations of International Investment Law, Editors Douglas, Pauwelyn & Vinuales, Oxford University Press (2014) 206
[72] Zang 292
[73] Appellate Body Report— Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, para. 160. The Appellate Body referred to *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID IIC 280 (2007), p. 20, para. 67, which states that "[t]he Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."

[74] Lanyi & Steinbach, 'Promoting Coherence between PTAs and the WTO through Systemic Integration,' *Journal of International Economic Law*, 20 (2017) 85
[75] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' Cambridge University Press (2016) 77

wider field of public international law.[76] Treaty interpreters should have regard to "any relevant rules" between the parties in accordance with the VCLT and shared or similar legal norms may fall into this category.
These are important points to be kept in mind when considering whether or not tribunals should look to another regime when interpreting a trade or investment text. Tribunals interpret the ordinary meaning of terms "in their context and in the light of its object and purpose", but in cases where this ordinary meaning is elusive, they may look to the wider context of public international law and how other tribunals have dealt with shared or similar legal norms.[77]
Comparative law has been described as the most potent influence on Western legal development as a whole;[78] borrowing has been described as the main way law changes.[79] Where tribunals make references to external sources it can benefit both systems and tribunals should at least take the wider context of international law into account when interpreting shared norms. Such engagement between the regimes provides an opportunity for the systems to learn from each other's experience and cross-regime references can promote coherence across public international law.

The legitimacy of drawing on the experience of the trade regime when interpreting investment treaties and vice versa has been questioned due to the "stark differences between the investment regime and trade regime".[80] In spite of these differences,
if there is an abundance of jurisprudence in a particular area that has scarcely been dealt with by the other regime, tribunals can consider how a norm has been interpreted in the other regime, while being mindful of the textual, contextual, and systemic differences between the regimes.
It is for this reason that tribunals at the WTO interpret national treatment under the TBT Agreement with reference to case law developed under the GATT. When doing so the tribunal must have regard to the different text and structure of the various provisions. It is similarly uncontroversial for parties to use MFN provisions in BITs not only to import substantive rules, but also in areas such as dispute settlement.
If tribunals do look across the aisle to the other regime, when should they do so, and to what extent should the texts, principles and jurisprudence of the other regime be considered? Douglas tells us that "rules" within the meaning of the VCLT is best understood as "any legal norms" including principles and that tribunals should be able to extract principles to aid treaty interpretation.[81] Some view the potential for cross-fertilisation as being limited. Wu is of the view that cross-regime borrowing "may seem appealing at first, but it often may turn out to be inappropriate because of fundamental differences between the regimes".
Where trade and investment law have shared or similar legal norms, Cook proposes comparing "the underlying textual and structural features of the treaties" to decide whether

[76] See Article 3(2) DSU and in Article 42(1) ICSID and for more on this, see United Nations Report of the Study Group of the International Law Commission: 'Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law' (2006). See also McLachlan Campbell QC, et al, Intl Invst Arbitration: Substantive Principles
[77] Section 5 on Public International Law looks at how the regimes relate to the wider field of Public International Law as this in turn informs our understanding of how in the regimes relate to each other.
[78] Watson, Alan, 'Comparative Law and Legal Change' *Cambridge Law Journal 37.2* (1978) 318
[79] Watson, Alan, 'Comparative Law and Legal Change' *Cambridge Law Journal 37.2* (1978) 321
[80] Alvarez, J, 'Beware: Boundary Crossings,' Public Law & Legal Theory Research Paper Series, New York University (2014) 27
[81] Douglas, Zachary, 'The International Law of Investment Claims,' *Cambridge University Press* (2009) 86

divergent legal tests are appropriate.[82] Kurtz is of the view that there are four primary considerations when comparing legal norms between the systems. He includes textual differences and contextual differences but adds systemic differences and remedy structures as additional considerations.[83]
When interpreting a shared norm, any attempt to draw on the jurisprudence of the other regimes must be done with due regard to textual and structural differences between treaties. There are variances in the language and construction of articles that must be considered when interpreting a treaty. E.g. When interpreting a national treatment provision, the GATT contains Article III:1 which indicates the purpose of the provision. The context may also be shaped by the presence of an article on general exceptions such as that provided in GATT Article XX. Neither of these may be present in a given BIT.
Cook demonstrates the importance of textual and structural differences in agreements by taking the instructive example of the relevance of legal tests developed under the GATT for interpreting the TBT Agreement. The Appellate Body found that the same legal text for likeness could be used given the similar wordings for these standards in the Agreements and the absence of any structural features that warranted differing treatment. It reached the opposite conclusion in relation to less favourable treatment because of structural differences between the Agreements. A claimant can contest a finding of less favourable treatment under the General Exceptions of GATT Article XX. The TBT has no equivalent provision and the type of enquiries concerning regulatory purpose carried out under Article XX are done within Article 2.1 itself. Treaty interpreters must also be wary of systemic differences between the regimes as outlined in Section 8.

Alvarez asks tribunals to consider how permanency itself "may affect what adjudicators do" and warns against the danger of "drawing facile conclusions" from the trade regime where the possibility of exit is constrained.[84] Alvarez suggests that cross-regime borrowing could lead parties to exit treaties, but the option to amend treaties and issue joint interpretations are alternatives for the parties.

Engagement in terms of cross-regime references should only be made where they are appropriate and as such the four considerations above are pre-requisites for such a reference. These considerations are not arguments against engagement between the two regimes, but highlight that tribunals should be cautious to observe these considerations when drawing upon the jurisprudence of another regime.
This thesis uses the term engagement rather than convergence. Judicial communication is a form of engagement and Zang categorises it as a “middle ground” on the continuum between resistance and convergence.[85] When an investment law tribunal is interpreting a provision, it can, with caution, draw upon jurisprudence under the WTO Agreements, having regard not only to differences of the treaty's text and structure, but also to differences of remedies and of the institutional structures of the regimes. In relation to "boundary crossings," this author

[82] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 9
[83] See Kurtz, J, ‘The WTO and International Investment Law: Converging Systems,’ Cambridge University Press (2016) 85-94
[84] Alvarez & Brink, ‘Revisiting the Necessity Defense: Continental Casualty v. Argentina,’ *Yearbook on International Investment Law & Policy* (2011) 347-348
[85] Zang, M, ‘Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement,’ *EJIL* (2017), Vol. 28 No. 1, 274

agrees with Alvarez that the message is to proceed with caution rather than "no trespassing."[86]

1.7.3. The primacy of structure and text?

Section 1.7.2 described Kurtz's four primary considerations when comparing legal norms between the systems including: textual differences and contextual differences but adds systemic differences and remedy structures as additional considerations.[87] This section considers the importance other factors such as the purpose of an agreement.
Some commentators view textual and contextual (or structural) differences as the two primary considerations. This has been the practice at the WTO in relation to the tests applied that compare the approaches under the GATT, GATS, and TBT Agreements. Naturally tribunals don't need to consider systemic differences or differences in remedies in such instances. The legal tests developed by WTO tribunals have taken into account: 1) the presence of a general exceptions article such as GATT Article XX; and 2) textual differences such as those between 'like producers' and 'like suppliers'. In terms of 'likeness', measures considered under the TBT Agreement have been treated similarly to those under the GATT (both refer to 'like products'), whereas measures under the GATS have been considered differently as it refers to 'like services and suppliers'.
As regards 'less favourable treatment', tests developed under the GATT and GATS have been similar but have taken into account textual differences between the Agreements.
The test developed under the TBT Agreement differs considerably from that of the GATT and GATS as it takes structural differences between the Agreements into account, namely the absence of general exceptions and the fact that regulatory purpose is considered within the national treatment provision. Cook refers to this as the Appellate Body's "two-pronged test".[88] The first part incorporates the test under GATT Article III:4, while the second examines whether detrimental impact stems from a legitimate regulatory distinction. Regulatory purpose has also been part of the inquiry of the national treatment provision under NAFTA 1102, where similarly there is no general exceptions article. Thus, given these structural similarities, a tribunal interpreting less favourable treatment in a national treatment claim under the WTO's TBT Agreement may have greater recourse to findings in NAFTA cases such as SD Myers rather than findings in cases under the GATT.

Cook makes the argument that the preambles that commonly feature in the trade and investment law regimes are not dissimilar. The Appellate Body has confirmed that the object and purpose of a treaty "may usefully be sought" where the text is equivocal.[89]
Cook warns of reading too much into preambles that are formulated at a "high level of generality".[90] If different objects and purposes are considered to be truly different to the point where they can shape the interpretation of specific issues, this could block crossfertilisation

[86] Alvarez, J, 'Beware: Boundary Crossings,' *Public Law & Legal Theory Research Paper Series*, New York University (2014) 65
[87] See Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' Cambridge University Press (2016) 85-94
[88] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 8
[89] US- Shrimp see section 3
[90] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 4

and lead to "fragmentation within investment law".[91] Cook argues that a different object and purpose "should not in and of itself" justify the development of different legal tests and that focus should rather be on the text and structure of the provision at hand. He continues that because preambular statements are formulated at a high level of abstraction they "rarely provide much guidance".

Engagement was said to be appropriate when the structure and wording of provisions lend themselves to engagement in light of the purpose of the treaties at issue. However to what extent can differences in the purposes of two regimes block crossfertilisation? To what extent is the text and structure of agreements a primary consideration, and how should tribunals interpret provisions that have similar texts and structures to their counterparts in the other regime? E.g. To what extent could a tribunal draw upon the jurisprudence of the WTO when interpreting a national treatment claim under CETA Article 8.6?[92] The Exceptions Chapter of CETA also incorporates GATT explicitly and GATS implicitly.
To what extent should the different purposes of these Agreements affect the legal tests be developed in relation to provisions with such similar texts and structures?
Take the example of a state that concludes a PTIA and a BIT with two different countries in quick succession where the substantive provisions are largely similar but the object and purpose of the agreement are substantially different. Chapter Two outlines instances where states have concluded a PTIA and BIT in a short space of time, where the substantive provisions are largely similar, but where the strength of the reference to the right to regulate is at different ends of the spectrum.
E.g. Colombia concluded an FTA with Canada in 2008, which scored a 5 on this scale. It subsequently concluded BITs with Japan (2011), Singapore (2013) and Turkey (2014), which scored 2, 0 and 1 respectively on this scale.
The first two sections of the national treatment article of the Colombia- Canada FTA[93] are almost identical to those of the combined national treatment/ MFN article of the Colombia-Turkey BIT.[94] The only difference relates to the scope of the articles. The former covers establishment, acquisition, and conduct in relation to the investment, while the latter covers

[91] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 6

[92] Article 8.6 "National treatment 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."

[93] "Article 803: National Treatment: 1. Each Party shall accord to investors of the other 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 of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory."

[94] "Article 5: National Treatment and Most- Favoured- Nation Treatment: 1. Each Contracting Party shall accord to investor of the other Contracting Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the expansion, management, maintenance, operation, enjoyment, extension and sale or disposal of their investments in its territory.
2. Each Contracting Party shall accord investments of investors of the other Contracting Party, once established, treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the expansion, management, maintenance, operation, enjoyment, extension and sale or disposal of their investments in its territory."

the maintenance and enjoyment of the investment (although different words are used, there is overlap between some of these different concepts). Both treaties cover the expansion and sale or disposal of investments.
This question of how provisions with similar texts and structures but differing objects and purposes is examined in Part II of this thesis, and in particular in Chapter 3.

Text and structure are important but so too is the object and purpose of an agreement, as well as differences in remedies and institutional features. The closer the textual similarity, the closer the structural set up, and the more aligned the objects and purposes of the treaties are, the greater the engagement between treaties and the greater the potential to invoke and draw upon the law and jurisprudence of the other regime. Proximity counts when interpreting a treaty, but so too do the context and wording of provisions. As such when a trade tribunal interprets less favourable treatment in a national treatment claim under the TBT Agreement, drawing on the jurisprudence of GATT and GATS may be secondary to that of an IIA such as NAFTA. It may have greater recourse to findings in cases such as SD Myers rather than trade jurisprudence.

1.8. The regimes in context

1.8.1. Trade and investment; separation of the regimes and differences between the regimes

Although the language used in respect of investment in the Havana Charter establishing the International Trade Organization was merely "hortatory", the failure of the ITO to come into existence set back any prospect of a merged field of trade and investment in the post-war era.[95] For decades to come, the GATT (1947) regulated international trade. The GATT's focus on trade in goods was expanded with the establishment of the WTO in 1995. The WTO Agreements regulate international trade in a much broader manner, with investment featuring prominently in its Agreements on services (GATS) and investment (TRIMS). As Mode 3 of GATS covers services supplied through commercial presence, Newcombe considers it to be the first multilateral investment liberalisation treaty.[96]
Given the failure to conclude a multilateral agreement on foreign investment, a vast network of investment treaties regulated foreign investment after the Second World War. The first BIT was concluded in 1959 and ten European countries had concluded BITs by 1966.[97] It has proven difficult to multilateralise investment commitments in the past for various reasons.[98]

[95] For an account of the separation of trade and investment, see Broude, T, 'Investment And Trade: The "Lottie And Lisa" Of International Economic Law?' *International Law Forum of the Hebrew University of Jerusalem Law* (2011) FN2 at Section 2: 'Degrees of Separation: A Narrative of the Trade/Investment Divide'
[96] Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) 55
[97] See, Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 43
[98] For an account of this, see, Kurtz, 'A General Investment Agreement In The WTO? Lessons From Chapter 11 Of NAFTA And The OECD Multilateral Agreement On Investment,' *University of Pennsylvania Journal of International Law*, Vol. 23, Issue 4, Art. 3 (2014)

Sovereignty concerns have shaped the structure of pre-MAI investment agreements[99] and attempts to bring such negotiations to the WTO have been blocked by developing countries.[100] Developed countries attempted to conclude a Multilateral Agreement on Investment (MAI) among themselves at the OECD but substantial progress couldn't be made.[101] Rounds of trade negotiations have not seen much progress at the WTO either. The Doha Development Round, a round launched by WTO Members in 2001, failed to make any progress on investment and indeed any other areas until "the page was turned" in 2015.[102]

The continued separation of trade and investment goes beyond historical reasons as seen in the many differing characteristics of the regimes today. To expand a bit on these differences, the WTO is inter-State in character and involves state-to-state dispute settlement. Investment treaties give foreign investors standing, are directly enforceable by investors. While all WTO Members have an interest in the long-term success of the WTO, this may not be a concern for an investor making a claim under an IIA. Investment treaties give rise to compensation. Monetary damages are not available as a remedy at the WTO, which focuses on the removal of infringing measures and the right to retaliate via the suspension of benefits in its awards. The WTO has a permanent secretariat and Appellate Body, whereas investment tribunals are ad hoc and their decisions cannot be appealed except on limited grounds.

Some view the regimes as having fundamentally different rather than complementary purposes. Wu sees convergence as undesirable because of the different "normative orientation"[103] of the international investment regime which he sees as "promoting and vindicating the rights of non state actors and providing an expedited legal outlet for private conflicts."[104]
In terms of the substantive and procedural law of the regimes, the law of the trade regime is based on the WTO Agreements and Regional Trade Agreements while investment law is based on investment provisions in diverse IIAs and treaties both multilateral and bilateral. International trade agreements and investment treaties share many similar principles but also have pronounced differences.
Fundamentally the regimes share the goal of protecting aliens; the trade regime has done this by combatting protectionism and ensuring compliance with negotiated concessions. The investment regime on the other hand has focused on protecting investors through the granting of substantive rights in treaties. Despite observed commonalities, differing historical paths

[99] Kurtz 'A General Investment Agreement In The WTO? Lessons From Chapter 11 Of NAFTA And The OECD Multilateral Agreement On Investment,' *University of Pennsylvania Journal of International Law*, Vol. 23, Issue 4, Art. 3 (2014) 726
[100] See Sungjoon Cho, 'A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution,' *Journal of International Economic Law* 7 (2004) 219
[101] Kurtz 'A General Investment Agreement In The WTO? Lessons From Chapter 11 Of NAFTA And The OECD Multilateral Agreement On Investment,' *University of Pennsylvania Journal of International Law*, Vol. 23, Issue 4, Art. 3 (2014) 765. During the negotiations of the MAI, the Chair asked countries to table their exceptions at the outside to aim for the highest level of liberalisation, but this led to many being tabled by the liberal, developed states.
[102] Opening statement by Hon. Joshua Setipa, Chairman of the ACP Ministers of Trade Meeting and Minister of Trade & Industry of Lesotho, 20 October 2015, Brussels
[103] Wu, Mark, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime,' in Douglas, Pauwelyn & Vinuales (eds.), 'The Foundations of International Investment Law,' *Oxford University Press* (2014) 7/82
[104] Wu, Mark, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime,' in Douglas, Pauwelyn & Vinuales (eds.), 'The Foundations of International Investment Law,' *Oxford University Press* (2014) 79/82

and functions have ultimately had a “long-lasting impact on the formal characteristics of the separate frameworks” regulating trade and investment.[105]

1.8.2. Placing the Regimes Within the Context of Public International Law

This thesis looks at engagement between the trade and investment law regimes and how the regimes relate to each other in terms of the formation and interpretation of treaties. This section looks at how each regime relates to the wider field of public international law (PIL) as this in turn informs our understanding of how the regimes relate to each other. It does so via a general survey of the role of PIL in the two regimes, key cases that have referred to PIL, and the potential for PIL in the two regimes.

Trade and investment agreements often contain general concepts of international law and the reason for this is that their content can evolve over time through interpretative practices and so the instrument can adapt to changing realities without requiring constant amendment.[106]

Neither the trade law regime nor the investment law regime is self-contained as recognised in Article 3(2) of the WTO’s DSU and in Article 42(1) ICSID. Article 31(3)(c) VCLT tells us that when interpreting treaties, "any relevant rules of international law applicable in the relations between the parties" shall be taken into account. The regimes may find it useful to look to the interpretations of other tribunals because of their “recognized pedigree”.[107]

The Appellate Body referred to PIL in its first case *US—Gasoline*[108] where it acknowledged that the "General Agreement is not to be read in clinical isolation from public international law".[109]

WTO tribunals semi-regularly refer to non-WTO instruments in reports.[110] To give a couple of examples, in *US-Cotton Yarn*[111] the Appellate Body referred to the rules of general international law on state responsibility in relation to the calculation of appropriate countermeasures. In *US-Shrimp*, the Appellate Body made reference to international conventions and instruments in determining the definition of 'exhaustible natural resources'.

Despite these references there has not been a case where a WTO adjudicator has justified its interpretation of a WTO provision "expressly and primarily on the basis of Article 31(3)(c)".[112] Where tribunals have referred to non-WTO instruments, it has generally been to support an interpretation arrived at "on the basis of the text, context and purpose of the

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[105] Puig, Sergio, ‘The Merging of International Trade and Investment Law,’ *33 Berkeley Journal of International Law 1* (2015) 11

[106] Douglas, Zachary, 'The International Law of Investment Claims,' *Cambridge University Press* (2009) 88

[107] Watson, A, ‘The Birth of Legal Transplants,’ *The Georgia Journal of International and Comparative Law, Vol. 41* (2013) 607

[108] WTO doc. WT/DS2/AB/R, Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, 29 April 1996

[109] WTO doc. WT/DS2/AB/R, Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, 29 April 1996, page 17

[110] For a thorough account of PIL in Appellate Body decisions, see Cook, A Digest of WTO Jurisprudence on Public International Law Concepts and Principles,' *Cambridge University Press* (2015)

[111] *US-Cotton Yarn* para 120

[112] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 65

provision at issue".[113] Thus PIL has played a limited role within the trade law regime and has primarily been used when interpreting procedural law matters.

Tribunals in the investment regime have been more willing to rely on PIL in terms of defining the substantive rights of parties. Reference to PIL has been made when elucidating the meaning of standards in investment law such as Fair and Equitable Treatment, or when importing exceptions for legitimate regulatory measures.[114]
When the ordinary meaning of a broad provision such as FET is unclear, despite the tribunal having regard to its context, object, and purpose, recourse to principles of PIL may be necessary. Douglas asks how else are such standards to be interpreted if not by reference to relevant principles of international law?[115] The subjective notions of individual tribunals is not preferable.

The WTO has been willing to refer to non-WTO sources such as PIL and EU law[116] but its approach can be characterised as cautious. Its use has largely been restricted to two functions: "procedural gap-filling" and "legal reasoning strengthening".[117]
Article 3(2) of the DSU states that the dispute settlement system is there to preserve the rights and obligations of Members and to clarify them "in accordance with customary rules of interpretation of public international law." While this opens the door to a role for PIL, the next sentence states that "the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Nonetheless tribunals may still refer to non-WTO instruments so long as it's consistent with the VCLT. If the two regimes are not self-contained and are to look beyond themselves, there is arguably no more appropriate regime for the trade regime to look to than investment law, and vice versa. In terms of the role of PIL in trade law, the Appellate Body will likely continue to draw on PIL as an interpretative instrument except solely except where the treaties explicitly allow otherwise.[118]
Coherence between the trade and investment law regimes depends on the degree to which judicial communication exists and the regimes allow the "integration of alien legal sources".[119]

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[113] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 65

[114] Pogoretsky 28

[115] Douglas, Zachary, 'The International Law of Investment Claims,' *Cambridge University Press* (2009) 87

[116] See Zang, Michelle, 'Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement,' *European Journal of International Law* Vol. 28 (1) (2017) 273-293. Zang's article traces cross-references by the Appellate Body to the CJEU. As with the AB's references to PIL, references are confined to minor points rather than drawing upon the CJUE's jurisprudence in relation to the interpretation of treaty provisions.
"Existing references have had a very limited impact on the substantive outcome of the WTO disputes" (page 292) and serve only as "supporting proof" of what the adjudicator is willing to uphold.

[117] See Zang, Michelle, 'Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement,' *European Journal of International Law* Vol. 28 (1) (2017) 292

[118] Pogoretskyy, V, 'A look at Public International Law in WTO Disputes with a side glance at the approach take n by investment tribunals: is there a "beautiful friendship?"' 17

[119] Lanyi & Steinbach, 'Promoting Coherence between PTAs and the WTO through Systemic Integration,' *Journal of International Economic Law*, 20 (2017) 61-85

1.9. Methodology

This thesis employs a comparative law approach and an empirical approach to analysing engagement between the trade and investment law regimes. Engagement between the two regimes is a phenomenon of increasing importance and this dissertation seeks to chart, critique, and make recommendations for its evolution.

The comparative law approach is described in Watson's seminal work 'Comparative Law and Legal Change' (1978)[120] as being "about legal transplants, the desirability and practicality of borrowing from another legal system".[121] Comparative law does not merely involve the noting of differences between systems, rather the comparison must have "some direct and obvious utility".[122] Utility is described as improvement made possible in one legal system as a result of knowledge of another system. This may occur where a foreign rule provides a satisfactory solution that should be adopted. These improvements involve borrowing and the discipline of comparative law is described as being primarily a study of the relationship between systems that is established by borrowing.[123] The art of comparative law is recognising the "desirability and practicality of borrowing" from another legal system.[124]

A comparative approach is appropriate here because the systems face the same kinds of questions. There are existing and increasing levels of engagement, the potential for greater and better engagement, and similar challenges that lie ahead for the two regimes. This study compares key areas of engagement between the two regimes. It highlights areas where the approaches of the regimes are closely aligned as well as areas where there are tensions between the two approaches. Given the potential for inter-regime engagement to be approached differently in some areas, and to be avoided entirely in other areas, there is utility to studies of and comparisons between the various areas of interaction between the regimes.

The impact of PTIAs on engagement between the trade and investment regimes is considered throughout this thesis as well as whether PTIAs can be considered to be a vehicle for accelerated engagement between the two regimes.
Part one of this thesis provides an empirical study of provisions that are evidence of engagement between the two regimes. Provisions evidencing engagement are selected and their prevalence is coded across a selection of 40 BITs and 40 PTIAs. Part one tests two hypotheses; the first is that PTIAs are increasing engagement between the trade and investment regimes and the second is that engagement is increasing over time. The first hypothesis is tested by comparing provisions that evidence engagement and seeing how often they feature in the BITs and PTIAs in the Agreements included in this study. The second hypothesis is tested by analysing whether there is a difference between how often provisions evidencing engagement feature in three different time periods between 2005-15.

The inclusion of an empirical part to this study was inspired by the courses on Empirical Research for Law and Method and Research Design in Qualitative Research in Bocconi University. Hypothesis testing had not featured in my legal training before this point, but as

[120] Watson, Alan, 'Comparative Law and Legal Change' *Cambridge Law Journal 37.2* (1978) 313-336
[121] Watson, Alan, 'Comparative Law and Legal Change' *Cambridge Law Journal 37.2* (1978) 317-18
[122] Watson, Alan, 'Comparative Law and Legal Change' *Cambridge Law Journal 37.2* (1978) 317
[123] Watson, Alan, 'Comparative Law and Legal Change' *Cambridge Law Journal 37.2* (1978) 318
[124] Watson, Alan, 'Comparative Law and Legal Change' *Cambridge Law Journal 37.2* (1978) 317-18

we were told on the course, once you start thinking empirically, it can be hard to think otherwise. Empirical legal studies is an under-emphasised legal discipline that often doesn't feature in undergraduate or even postgraduate curricula in law. Empirical research has been more central to studies in social sciences and while lawyers are trained to provide assertive conclusions and think in terms of detail, economists often think in terms of averages and their conclusions that can be more equivocal.
Lawless describes the most significant strength of empirical legal scholars as their "understanding of fine-grained institutional detail in the legal system". This different perspective and understanding often results in different questions being asked adding to the research body. As Lawless puts it: "Thus, inquiries that count case outcomes or understand case outcomes as a function of some set of legal inputs can be extraordinarily enlightening."[125] Lawless recounts an observation of a colleague that empirical legal scholars "do work where you can be wrong".[126] Although it may be easier to show that an empirical finding is objectively incorrect, this doesn't mean that non-empirical claims are any less likely to be wrong.

It is this author's hope that the comparative law and empirical approaches complement each other throughout this study. These approaches were coupled because of the potential of each approach to reinforce the conclusions of the other.

1.10. Structure

Following this introductory chapter, the rest of this thesis is divided into two substantive parts and a concluding one.
Part I of this thesis conducts an empirical study of engagement between the trade and investment law regimes.
Chapter 2 introduces areas of engagement between the trade and investment regimes and analyses the different levels of engagement present in a sample of 80 BITs and PTIAs signed between 2005-15. This chapter then examines to what extent the conclusion of PTIAs is leading to increased engagement between the trade and investment regimes.

Part II looks at the extent to which engagement between the two regimes is appropriate, whether tribunals should make cross-regime references, and whether PTIAs have any kind of an impact on this engagement in relation to four of the areas identified as drivers of convergence in Chapter Two. Part II explores the question of when engagement is appropriate and to what extent it is appropriate in relation to each of these areas.

Chapter 3 considers the role of preambles within the trade and investment law regimes as well as in terms of engagement between the two regimes. Preambles set out the object and purpose of a treaty, one of the primary considerations in treaty interpretation, and facilitating or excluding the possibility of inter-regime engagement.

[125] Lawless, Robert M, 'What Empirical Legal Scholars Do Best,' *Temple Law Review, Vol. 87* (2015) 719
[126] Lawless, Robert M, 'What Empirical Legal Scholars Do Best,' *Temple Law Review, Vol. 87* (2015) 721

Chapter 4 examines how the national treatment standard has developed in the treaties and in the case law of the trade and investment law regimes. The degree of separateness, overlap and convergence between the two regimes is then considered in light of this examination.

Chapter 5 considers the concept of likeness in its various wordings, and how it has been interpreted in the trade and investment law regimes. It examines how the likeness standard is worded in the treaties and how it has been interpreted at the WTO and by investment tribunals. It considers what lessons, if any, can be drawn by tribunals in one regime when considering interpretations of likeness in the other regime. It examines when engagement between the regimes is appropriate, to what extent it is appropriate, whether the findings in one regime this should influence tribunals in the other regime.

Chapter 6 consider treaty exceptions and examines how exceptions have developed in the law and jurisprudence of the trade and investment law regimes. It looks at the interpretation of exceptions in the trade regime, and their incorporation and interpretation in the investment regime. In a further section, the application, or misapplication, of WTO law jurisprudence in investment cases is examined. The appropriateness of drawing on WTO law for guidance in deciding investment law disputes and vice versa is considered.

Chapter 7, the concluding chapter, recalls the key findings of this thesis before looking at the future for PTIAs and engagement and whether increased engagement between the trade and investment law regimes is likely to continue in the years to come. Emerging factors such as rising protectionism and the EU's Investment Court System/ Multilateral Investment Court are considered in this regard. Chapter 7 then makes recommendations as regards the development of trade and investment law in a manner that is mindful of the overlap between the two regimes with a view to ensuring their harmonious simultaneous development.

Part I- An empirical study of engagement between the trade and investment law regimes in PTIAs and BITs

Chapter 2– An empirical analysis of levels of engagement in PTIAs and BITs

Introduction

This chapter introduces areas of engagement between the trade and investment law regimes before examining the extent to which the conclusion of PTIAs is leading to increased inter-regime engagement. Increased engagement can be seen as eroding any claim that the trade and investment regimes must be fundamentally separate.

This chapter provides an empirical analysis of engagement between the trade and investment law regimes using data from 80 agreements signed between 2005-15. This chapter looks at: 1) whether there is more evidence of engagement between trade and investment in PTIAs than in BITs; 2) whether there is evidence of increasing engagement between the regimes over time;

and 3) whether there is evidence of increasing engagement in the practice of individual countries over time.[127]

This chapter is divided into ten parts. Part I outlines how engagement is measured and the aims and means of this study. Part II looks at the 80 treaties selected for inclusion in this study and the methodology behind their selection. Part III outlines each of the 24 treaty provisions selected in this study. Part IV gives the results of the study for all 24 provisions showing that there is more evidence of engagement in PTIAs than in BITs and that there is evidence of increasing engagement between trade and investment over time. Part V gives conclusions for this section.
Part VI considers the results of the study in relation to two of the key provisions identified in the three categories this study is divided into (host state flexibility, dispute settlement and substantive provisions). This section shows that for the key provisions only, there is also more evidence of engagement in PTIAs than in BITs and evidence of increasing engagement between trade and investment over time. Part VII gives conclusions for this section.
Part VIII gives an analysis of engagement over time in relation to three individual countries.
Part IX considers the selection of the 24 provisions used to operationalise engagement between trade and investment in this study. It explains what each provision is and how it relates to engagement between trade and investment.
Part X concludes.

2.1. Measuring Engagement between PTIAs v. BITs

The impact of PTIAs on engagement between the trade and investment law regimes is considered here as well as whether they can be considered to be a vehicle for accelerated engagement between the two regimes. This chapter analyses provisions that are evidence of engagement between the two regimes in BITs and PTIAs concluded during the 2005-15 period. Annex 6 codes the prevalence of these provisions across the 80 Agreements featured in this study. 24 provisions evidencing engagement were selected and their prevalence is coded across 40 BITs and 40 PTIAs. The results of this coding can be seen in Annex 6.

This chapter tests two main hypotheses: 1) that PTIAs are increasing engagement between the trade and investment law regimes; and 2) that engagement is increasing over time.
Whether PTIAs are increasing engagement between the regimes is tested by comparing provisions that evidence engagement and seeing how often they feature in the BITs and PTIAs in the Agreements included in this study. This is tested against the set of 80 Agreements as a whole and then a second time factoring in only the two provisions from each of the three categories of provisions that are deemed to have the greatest impact upon engagement between the two regimes.
Whether engagement is increasing over time is then tested by analysing whether there is a difference between how often provisions evidencing engagement feature in three different time periods between 2005-15. As with hypothesis 1, this is tested against the set of 80 Agreements as a whole and then a second time factoring in only the two provisions from each category that are deemed to have the greatest impact upon engagement between the two regimes.

[127] This is tested specifically in relation to three time periods: 1) 2005-07; 2) 2008-11; and 3) 2012-15.

2.2. Case Selection

This chapter codes for 24 provisions across 40 PTIAs and 40 BITs signed during the 2005-15 period. A criterion for selection for this study was that each agreement had to contain an investment chapter containing an investor-state dispute settlement mechanism. Dispute settlement is one of the three main categories this empirical study is divided into and so analysis of the data would have been incomplete if some of the agreements did not contain one of the major categories. As a result, some of the conclusions from this study may be more relevant to IIAs that contain an investor-state dispute settlement mechanism.

Furthermore only BITs that include at least one party that has concluded a PTIA that satisfies the above criterion have been selected to ensure there is some overlap between the parties concluding the two types of agreements examined.
As only 40 BITs were selected for this study, the last four BITs signed each year were the ones chose, where the texts are available on the UNCTAD International Investment Agreement database.[128] Where the same party has deposited more than one BIT among the most recently signed four agreements in a given year, only one is considered in order to keep the sample more general. More than one BIT including the same party is only considered for a given year if there is not a sufficient number of other BITs that have been concluded between other parties.
As there are fewer PTIAs than BITs, the sample of PTIAs is less evenly spread over the 2005-15 period. For example, for the year 2012, there was no text available on the UNCTAD database at the time this study was conducted (May 2016) for a PTIA that contains an investment chapter with an investor-state dispute settlement mechanism.

The reason why each 2012 agreement categorised as 'Other IIA' in the UNCTAD database doesn't qualify is described in footnote 129.[129] Three other PTIAs concluded between 2005-15 were excluded from the analysis. These included the Chile- Colombia FTA (2006) and Chile- Peru FTA (2006) as all three are party to the Protocol Pacific Alliance (2014), which is included in the study. Lastly, the Colombia- Panama FTA (2013) is excluded.[130]
A party to a BIT may feature a maximum of five times for this analysis so the results aren't overly reflective of the treaty preferences of any individual state. Lastly, only treaties that have been uploaded to the UNCTAD database by May 2016 have been considered in this study.

BITs and PTIAs are typically referred to throughout this thesis by reference to their date of entry into force. However, for the empirical section of this study, treaties are categorised by their year of signature, which is the date of interest in this section. It is worth remarking that only treaties that have come into force are considered in the empirical section. So, while in the

[128] As 11 years are considered, the first four BITS signed in the years 2009-15 are coded and the first three BITS in the years 2005-8 are coded.
[129] No investment chapter: EU- Vietnam Framework PCA, Colombia-EU-Peru FTA, EU-Iraq Cooperation Agreement. No ISDS: Australia- Malaysia FTA. Not a PTIA: China-Japan-Korea trilateral investment agreement. Text not available: GCC-Peru Framework Agreement, GCC-US Framework Agreement
[130] This author was unable to access the Colombia- Panama FTA's preamble at the time of this study in May 2016.

substantive chapters of this thesis, a treaty may be referred to as US-Argentina BIT (1994), for this empirical chapter, this treaty is referred to as US-Argentina BIT (1991).

2.3. Operationalising Increased Engagement

Increased engagement in IIAs is operationalised by coding for 24 treaty provisions that evidence engagement across 80 IIAs. 40 PTIAs and 40 BITs that were signed during the period 2005-15 are surveyed across this study. The 24 provisions considered are divided into three categories which include host state flexibility, dispute settlement, and substantive provisions.

1) Host State flexibility

Eight IIA provisions are coded in this study under the heading 'host state flexibility'. The reason why the presence of each of these provisions in PTIAs or BITs is deemed evidence of engagement between the trade and investment law regimes is discussed in section 7 of this chapter. The provisions are as follows;

a. Reference to WTO law in the preamble to the agreement/ treaty
b. Reference to the right to regulate in the preamble to the agreement/ treaty
c. Incorporation of Treaty Exceptions
d. Article providing an exception for health or environmental measures
e. Expropriation Article features TRIPS exception
f. Expropriation Article features reference to health/ environment exception
g. Performance requirements Article features reference to WTO law
h. Capital withdrawal safeguard

2) Dispute Settlement

Eight provisions are coded under the heading 'dispute settlement'. These provisions also evidence engagement between the trade and investment law regimes. The provisions are as follows;

a. Amicus curiae submissions
b. Transparency in proceedings
c. Avoidance of any conflict of interest for arbitrators
d. Reference to arbitrators' knowledge of international law or international trade law
e. Provision providing for appellate mechanism or contemplating one
f. Provision providing for review of dispute settlement
g. Reference to 'Applicable rules of international law' as governing the agreement
h. Ability of the parties to issue binding interpretations on the agreement

3) Substantive provisions

A further eight provisions are coded in the category ‘substantive provisions’ as evidencing engagement between the trade and investment regimes. The provisions are as follows;

a. National Treatment
b. Most-favoured-nation treatment
c. Like circumstances
d. Less favourable treatment
e. Fair and equitable treatment
f. FET with a reference to Customary International Law
g. Expropriation
h. Free transfer of funds

As well as these eight provisions, a ninth column is included in the 'substantive provisions' section recording any additional norm found evidencing engagement between the two regimes. These additional norms are not included in the analysis of the data in sections 4-6 of this chapter.

2.4. Results for the entire set of agreements

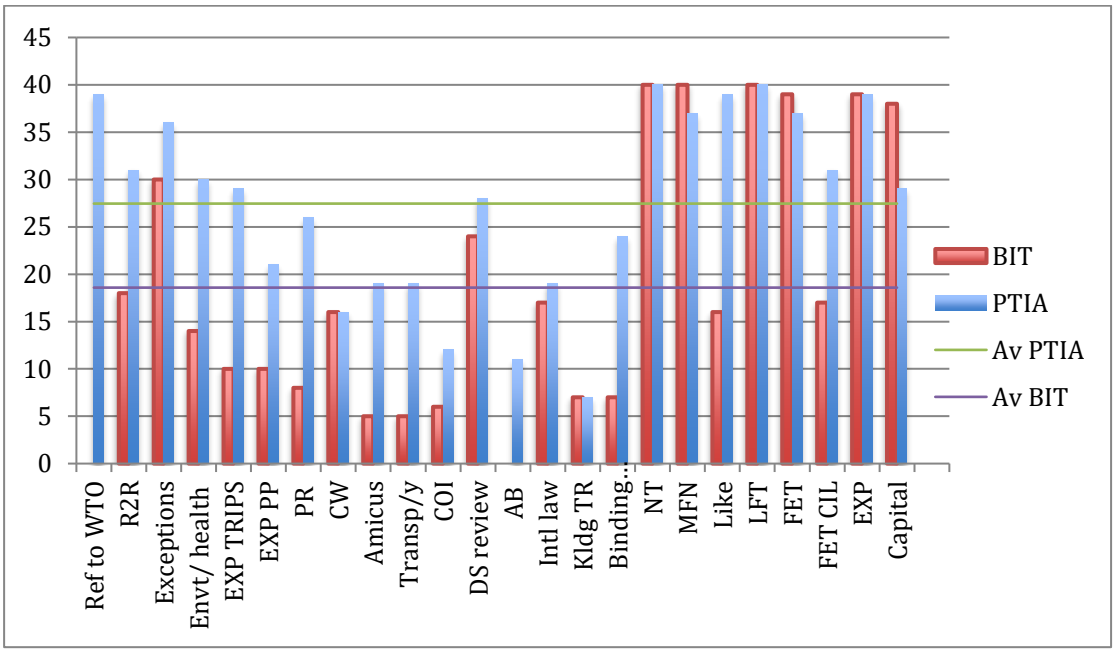
This section tests two hypotheses; the first is that PTIAs are increasing engagement between the trade and investment law regimes (H1) and the second is that engagement is increasing over time (H2).

H1: that PTIAs are increasing engagement between the trade and investment law regimes

This section examines;
1) How frequently provisions that indicate engagement feature in PTIAs compared to BITs in the treaties examined (Graph 1)
2) How many provisions indicating engagement feature on average in PTIAs compared to BITs for every year from 2005-15 (Graph 2)
3) How frequently provisions in the three categories of host state flexibility, dispute settlement, and substantive provisions occur each year from 2005-15
(Graphs 3, 4 and 5)

Graph 1:

Graph 1 looks at the how often each of the 24 provisions featured across the sample of 40 PTIAs and 40 BITs.



Graph 1 shows that on average PTIAs contain more provisions that indicate engagement than BITs.
Graph 1 shows that the average provision featured 27.458 times in the 40 PTIAs surveyed.
Graph 1 shows that the average provision featured 18.583 times in the 40 BITs surveyed.
The number of provisions evidencing engagement that featured in the average PTIA was 15.8.
The number of provisions evidencing engagement that featured in the average BIT was 10.225.

The following table shows how often provisions featured *on average* for the Agreements as a whole, as well as for the three categories that BITs or PTIAs have been broken down into (Host State Flexibility, Dispute Settlement, and Substantive Provisions):

Table 1:

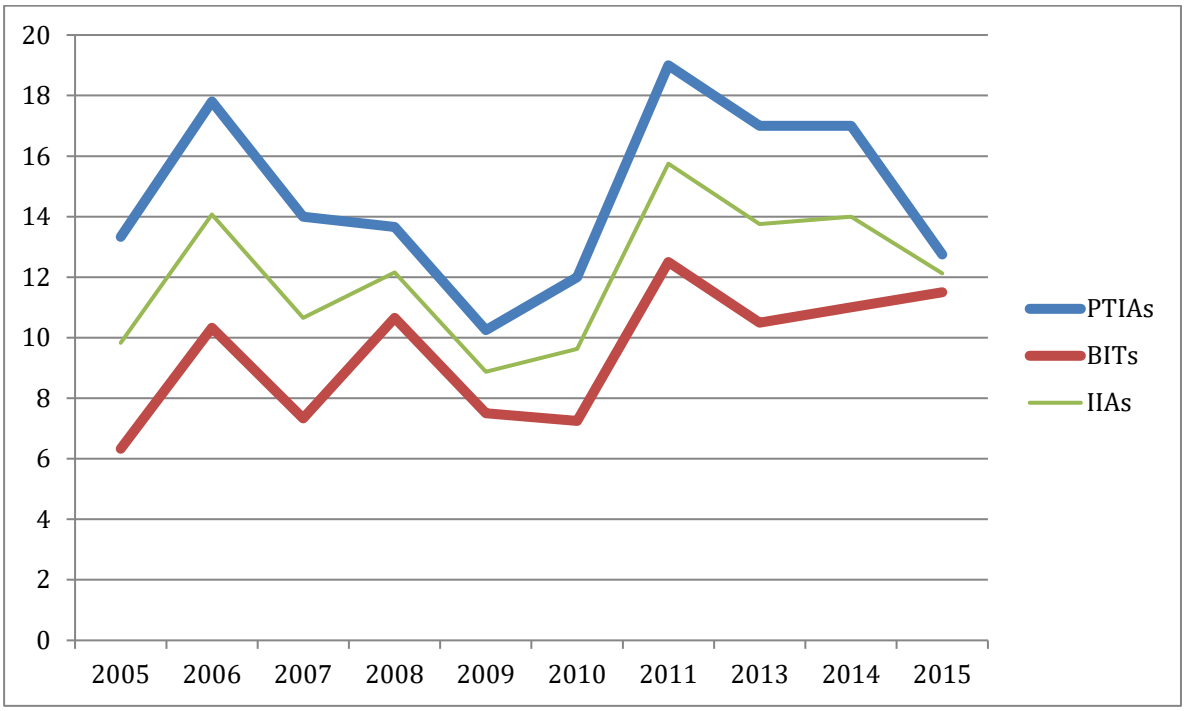
	Agreements as a whole (/40)	Host State Flexibility (/40)	Dispute Settlement (/40)	Substantive Provisions (/40)
PTIAs	27.458 (68.645%)	28.5 (71.25%)	17.5 (43.75%)	36.5 (91.25%)
BITs	18.583 (46.457%)	13.25 (33.125%)	8.625 (21.56%)	33.625 (84%)
Percentage increase between BITs and PTIAs	47.76%	115%	102.9%	8.55%

Table 1's first column shows an average of nearly 48% more provisions evidencing engagement in PTIAs compared to BITs for the agreements as a whole.[131] There are significantly higher levels of engagement for host state flexibilities and dispute provisions, while there are marginal levels of increased engagement for substantive provisions.

[131] As provisions evidencing engagement are 115% more frequent in category 1, and 102.9% more frequent in category 2, one might expect that the overall for the 3 categories would be greater than 47.76%. It must be remember however, that the provisions in category 3 occurred with significantly greater frequency in the 80 Agreements of this study, as a glance at Graph 1 shows, and as a result the percentage for the Agreements as a whole is lower than one might expect given the differences for categories 1 & 2.

Graph 2:

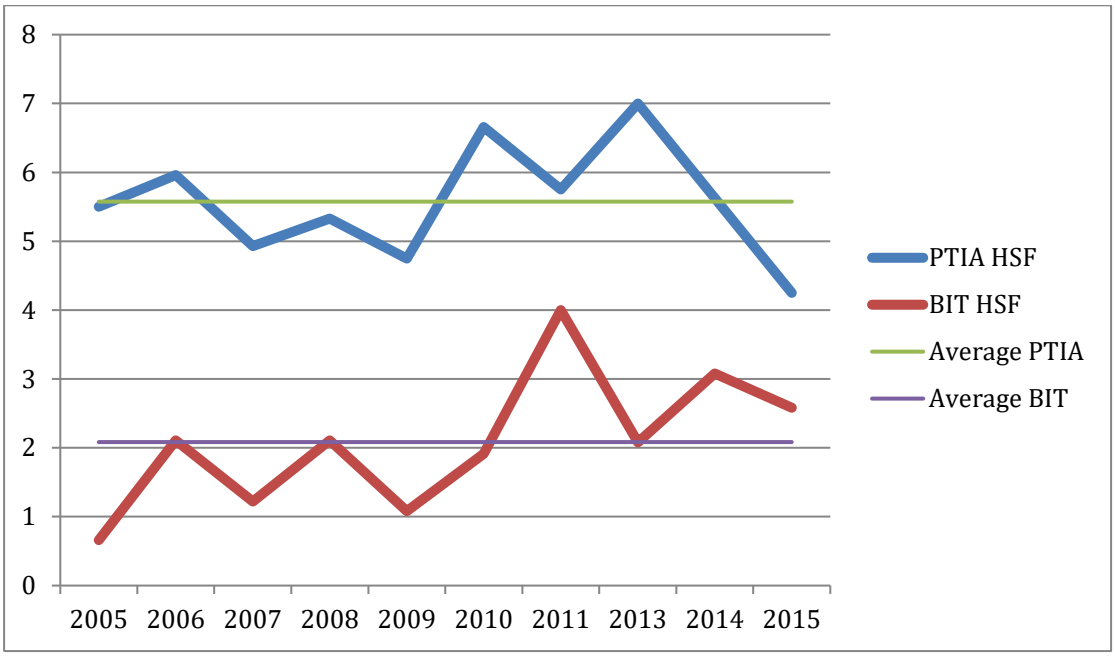
Graph 2 looks at how many provisions indicating engagement feature on average in PTIAs compared to BITs for every year (except 2012) from 2005-15:



For the year 2012, there was no text available on the UNCTAD database at the time this study was conducted (May 2016) for a PTIA that contains an investment chapter with an investor-state dispute settlement mechanism. Graph 2 shows that there is a higher prevalence of provisions that indicate engagement in PTIAs compared to BITs in the treaties examined for every year from 2005-15.

Graph 3:

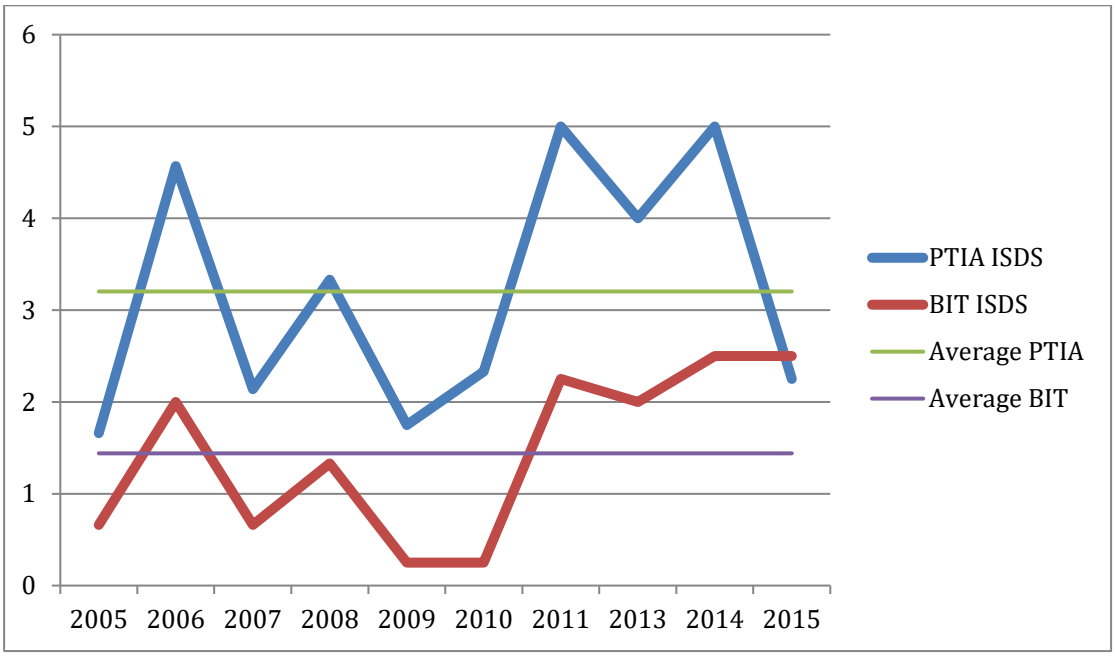
Graph 3 considers how frequently provisions in the category of host state flexibility occur each year from 2005-15, excluding 2012:



In terms of host state flexibility, there is a higher prevalence of provisions that indicate engagement in PTIAs in each of the ten years considered. Over the ten years, the average number of provisions per treaty is 5.57 for PTIAs and 2.08 for BITs.

Graph 4:

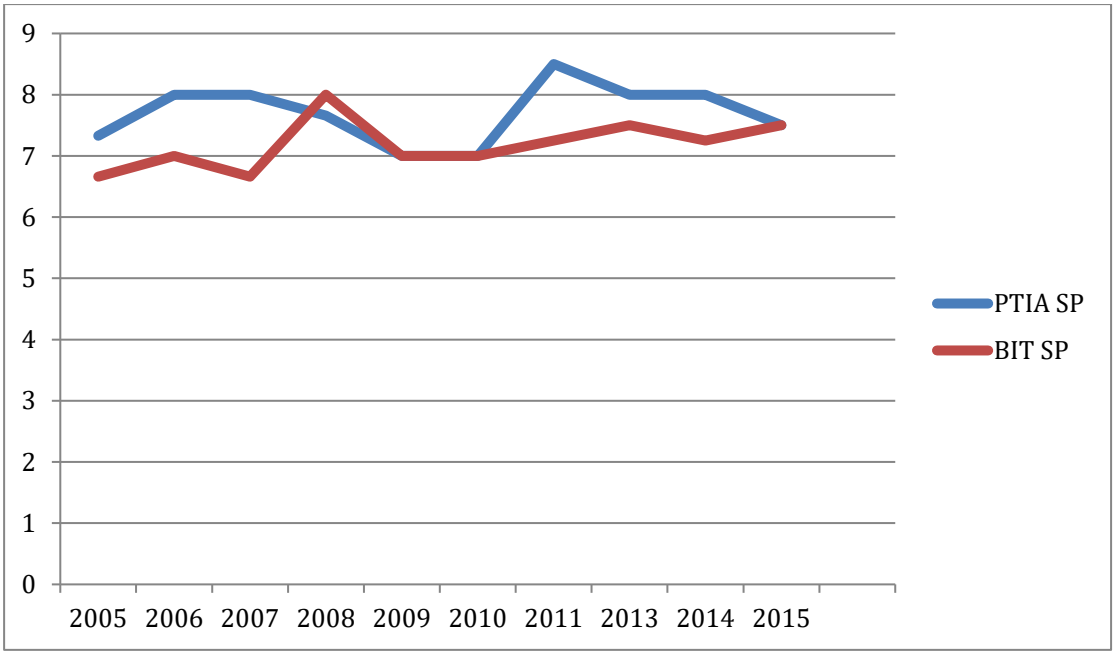
Graph 4 looks at how frequently provisions in the category of dispute settlement occur each year from 2005-15, excluding 2012:



In terms of dispute settlement provisions, there is a higher prevalence of provisions that indicate engagement in PTIAs in each of the ten years considered except 2015. Over the ten years, the average number of provisions per treaty is 3.2 for PTIAs and 1.44 for BITs (having excluded 2012).

Graph 5:

Graph 5 looks at how frequently provisions in the category of substantive provisions occur each year from 2005-15, excluding 2012:



In terms of substantive provisions, there is a higher prevalence of provisions that indicate engagement in PTIAs in six of the ten years considered. There is an even number of provisions that indicate engagement in PTIAs and BITs in three of the ten years.
Over the ten years, the average number of provisions per treaty is 7.675 for PTIAs and 7.08 for BITs.

H1: as demonstrated in Graphs 1, 2, 3, 4 and 5, there is more evidence of engagement in PTIAs than in BITs for the set of agreements as a whole, as well as in each individual category.

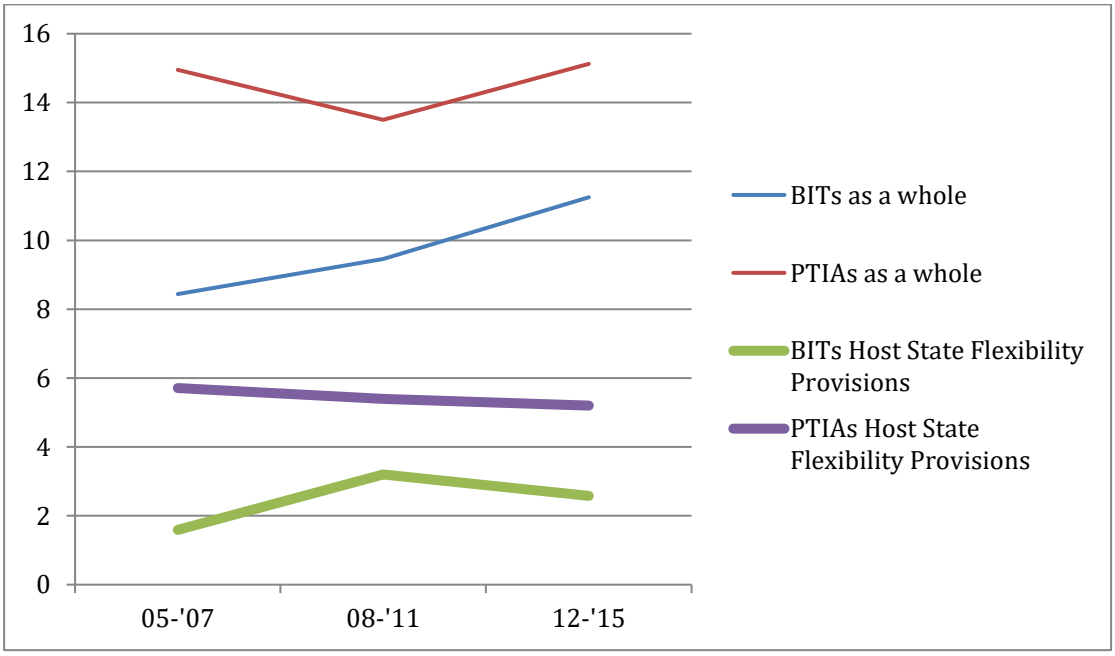
H2: that engagement is increasing over time for the agreements as a whole

This section considers whether there is an increasing level of engagement in PTIAs compared to BITs in three consecutive periods of time (2005-07, 2008-11 and 2012-15) across the three categories. That is this section examines whether there are more provisions that evidence engagement in 2012-15 compared to 2008-11 (T3 compared to T2) and more provisions evidencing engagement in 2008-11 compared to 2005-07 (T2 compared to T1).
These time ranges were the only ones from this study's sample that satisfied the criterion that no sample size fell below eight.

This section examines;
1) Whether there is an increasing level of engagement in PTIAs and BITs in T1 compared to T2, and T2 compared to T3 for the agreements as a whole (Graph 6)
2) Whether engagement increased from T1 to T2, and T2 to T3 in the three categories of host state flexibility, dispute settlement, and substantive provisions (Graphs 6, 7 and 8)

Graph 6:

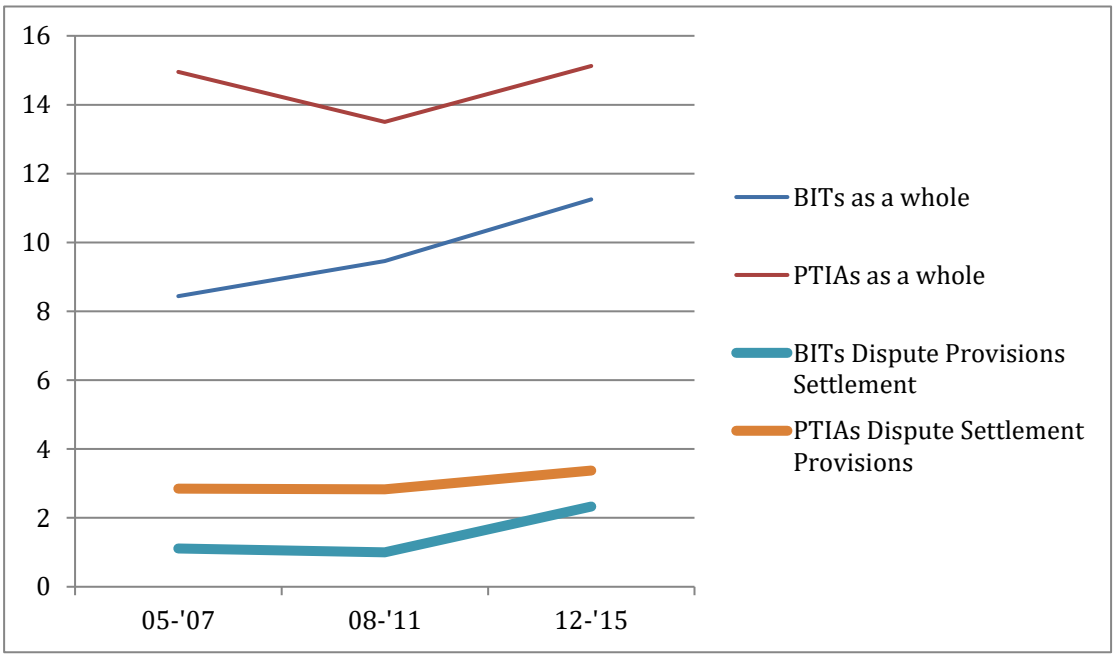
Graph 6 looks at whether engagement increased from T1 to T2, and T2 to T3 for the agreements as a whole and in the category of host state flexibility:



Graph 6 shows that there are increasing levels of engagement in PTIAs and BITs for the category Host State Flexibility as a whole. There has been a marginal decrease in levels of engagement for PTIAs of 5.4% from T1 to T2 and a decrease of 3% from T2 to T3.
There was a significant increase in levels of engagement for BITs of 101% from T1 to T2 followed by a decrease of 18% from T2 to T3.

Graph 7:

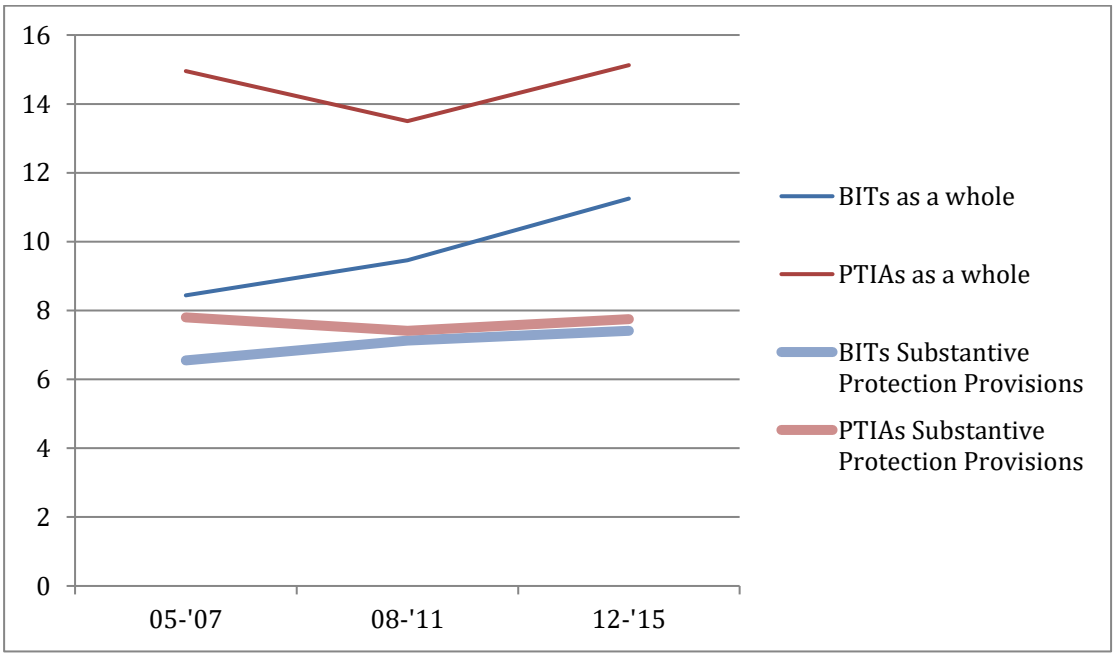
Graph 7 primarily looks at whether engagement increased from T1 to T2, and T2 to T3 for the category of dispute settlement provisions:



Graph 7 shows that there are increasing levels of engagement in PTIAs and BITs for the category Dispute Settlement.
There was a decrease in levels of engagement for PTIAs of 0.7% from T1 to T2 followed by an increase of 19.2% from T2 to T3.
There has been an decrease in levels of engagement for BITs of 9.9% from T1 to T2 and an increase of 133% from T2 to T3.

Graph 8:

Graph 8 primarily looks at whether engagement increased from T1 to T2, and T2 to T3 for the category of substantive protection provisions:



Graph 8 shows that there are increasing levels of engagement in PTIAs and BITs for the category Substantive Provisions as a whole.
There was a decrease in levels of engagement for PTIAs of 5% from T1 to T2 followed by an increase of 4.5% from T2 to T3.
There has been an increase in levels of engagement for BITs of 8.8% from T1 to T2 and an increase of 4% from T2 to T3.

H2: as demonstrated in Graphs 6, 7 and 8, there is more evidence of engagement in T3 than in T2, and in T2 compared to T1 for the agreements as a whole, and in each individual category.

2.5. Conclusions for the entire set of Agreements

Section 2.4 tested H1 and demonstrated that there is more evidence of engagement in PTIAs than in BITs for the set of agreements as a whole, as well as in each individual category.

Table 1 (based on Graph 1) showed that there is an average of nearly 48% more provisions evidencing engagement in PTIAs compared to BITs for the agreements as a whole. This is broken down into 115% more provisions evidencing engagement for the category Host State Flexibility, 103% for the category Dispute Settlement and 8.5% for the category Substantive Provisions.
Graph 2 showed that there is a higher prevalence of provisions that indicate engagement in PTIAs compared to BITs in the treaties examined for every year from 2005-15.
Graphs 3-5 looked at the prevalence of provisions that indicate engagement in each of the three categories and showed that there was a higher prevalence of such provisions in every year for the category of Host State Flexibility, every year except one for the category of Dispute Settlement and six out of ten years for the category of Substantive Provisions.

Section 2.4 tested H2 and demonstrated that there is more evidence of engagement in T3 than in T2, and in T2 compared to T1 for the agreements as a whole, and in each individual category.

Graph 6 showed that there are increasing levels of engagement in PTIAs and BITs for the agreements as a whole. The increase in levels of engagement is marginal for PTIAs decreasing by 9.7% from T1 to T2 and rising by 10.75% from T2 to T3.
The increase in levels of engagement is more significant for BITs increasing by 12% from T1 to T2 and rising by 19% from T2 to T3.
Graph 7 shows that there are increasing levels of engagement in PTIAs and BITs for the category Dispute Settlement.
There was a decrease in levels of engagement for PTIAs of 0.7% from T1 to T2 followed by an increase of 19.2% from T2 to T3.
There has been an decrease in levels of engagement for BITs of 9.9% from T1 to T2 and an increase of 133% from T2 to T3.
Graph 8 showed that there are increasing levels of engagement in PTIAs and BITs for the category Substantive Provisions as a whole.
There was a decrease in levels of engagement for PTIAs of 5% from T1 to T2 followed by an increase of 4.5% from T2 to T3.
There has been an increase in levels of engagement for BITs of 8.8% from T1 to T2 and an increase of 4% from T2 to T3.

2.6. Results for key provisions

Section 7 is different to the previous section that looked at the entire set of agreements in two important ways. Firstly, it only considers data concerning the two provisions that were deemed to be most important from each of the three categories.
Secondly, each of these provisions is given a weighting based on: 1) the calculation in Annex

5 of the importance of the provision; and 2) the specific wording of the provision in all 80 agreements.

Section 5 attributed equal weight to each provision in this study. However, of the 24 provisions considered, some have a greater potential impact on engagement between the trade and investment law regimes than others. This section measures engagement between the regimes where only the two provisions that are deemed to be the most important in each category are considered. The two provisions with the greatest potential to impact upon engagement between the two regimes were chosen for each category and this selection was made in line with analysis in Section 9 of this Chapter.
In making this selection, regard was had to a provision's systemic implications and its importance or potential importance in the jurisprudence of the trade and investment law regimes. Based on these criteria, an initial weighting on a scale of 0-5 was attributed to each provision, which can be seen in Annex 5.

For the three categories, the provisions considered are laid out in Table 4;

Table 4:

	Provision	**Non-weighted scores in PTIAs & BITs**	**Weighted score in PTIAs & BITs**
Host State Flexibility Provision 1	Treaty Exceptions	36/ 30	29.5/ 20.66
Host State Flexibility Provision 2	Right To Regulate In The Preamble	31/ 18	21.6/ 8.6
Dispute Settlement Provision 1	An Appellate Mechanism	11/ 0	3.3/ 0
Dispute Settlement Provision 2	An Arbitrator's Knowledge Of Law	7/ 0	7/ 0
Substantive Provision 1	MFN treatment	37/ 40	30.8/ 25.4
Substantive Provision 1	Like Circumstances	39/ 16	39/ 16

This section tests two hypotheses; the first is that PTIAs are increasing engagement between the trade and investment law regimes for the six key provisions (H3) and the second is that engagement is increasing over time for these six key provisions (H4).

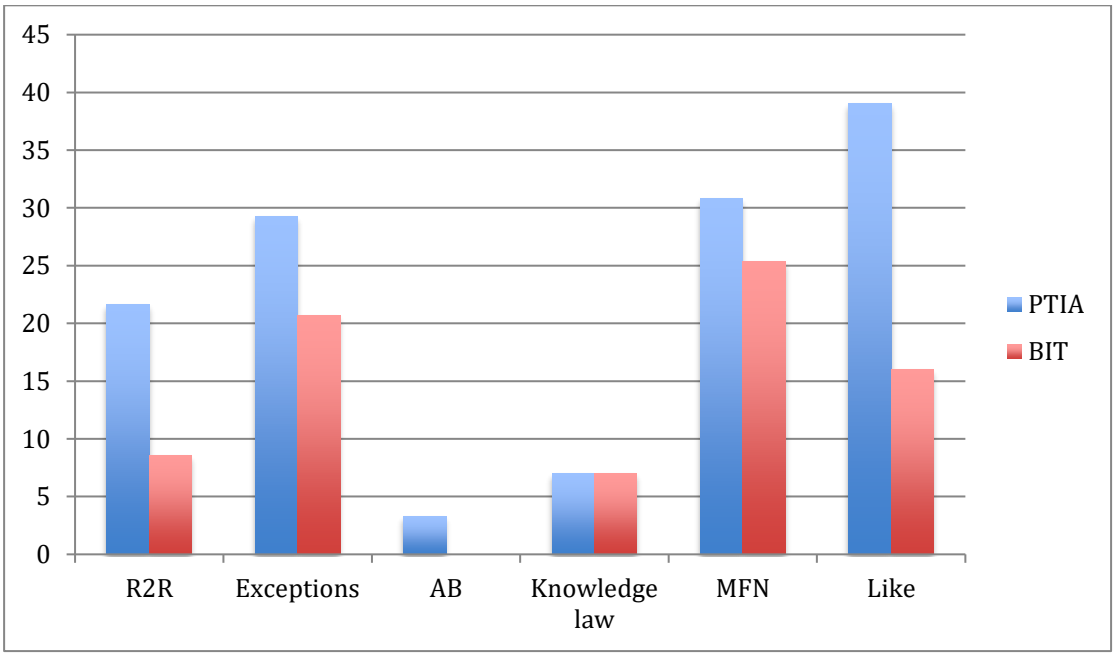
H3: that there is increasing engagement in PTIAs than in BITs for key provisions in the set of agreements as a whole, as well as in each individual category.

This section examines;

1) How frequently provisions that indicate engagement feature in PTIAs compared to BITs in the treaties examined (Graph 9)
2) How many provisions indicating engagement feature on average in PTIAs compared to BITs for every year from 2005-15 (Graph 10)
3) How frequently provisions in the three categories of host state flexibility, dispute settlement, and substantive provisions occur each year from 2005-15
(Graphs 11, 12 and 13)

Graph 9:

Graph 9 looks at the how often each of the 6 key provisions featured across the sample of 40 PTIAs and 40 BITs:



Graph 9 shows that PTIAs contain more of these six key provisions indicating engagement than BITs. There is only one provision where the same level of engagement is present. There are significantly higher levels of engagement for all three categories.

The following table shows how often the average provision featured in the three categories of BITs or PTIAs this study was broken down into;

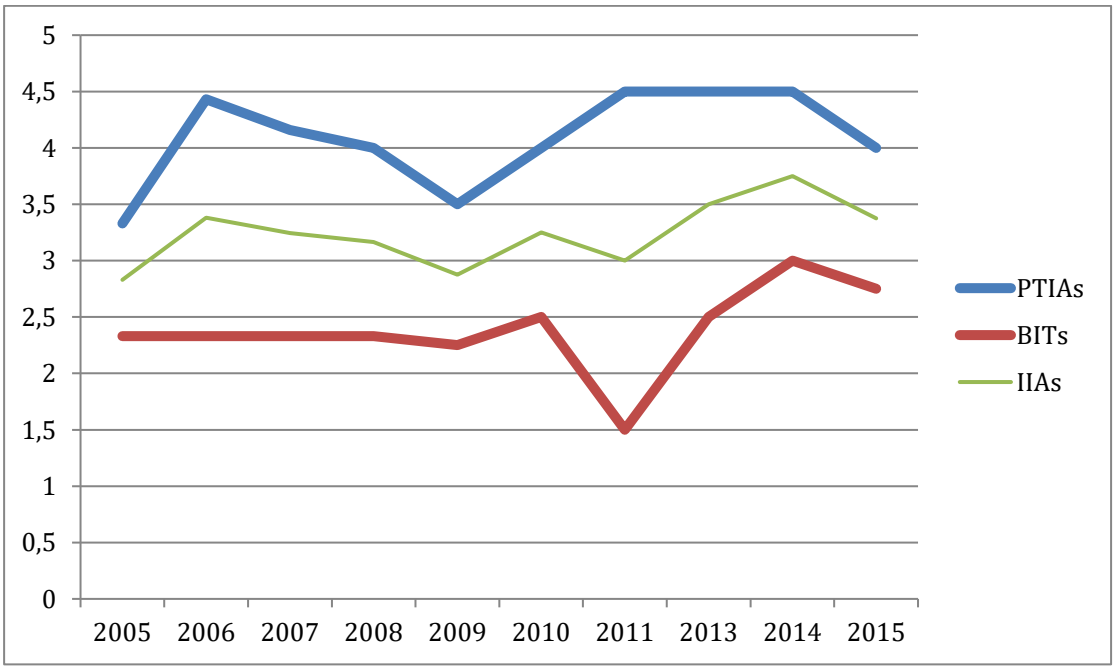
Table 5:

	All provisions	**Host State Flexibility (/40)**	**Dispute Settlement provisions (/40)**	**Investment Protectment Provisions (/40)**
PTIA	21.825	25.425	5.15	34.9
BIT	12.943	14.63	3.5	20.7
Percentage Increase	68.62%	73.8%	50%	68.5%

Table 5 shows an average of 94.33% more engagement in PTIAs compared to BITs across the three categories. There are vastly higher levels of engagement for host state flexibilities and ISDS provisions and 35.7% higher levels of increased engagement in category 3.

Graph 10:

Graph 10 looks at how often key provisions indicating engagement feature on average in PTIAs compared to BITs for every year (except 2012) from 2005-15:

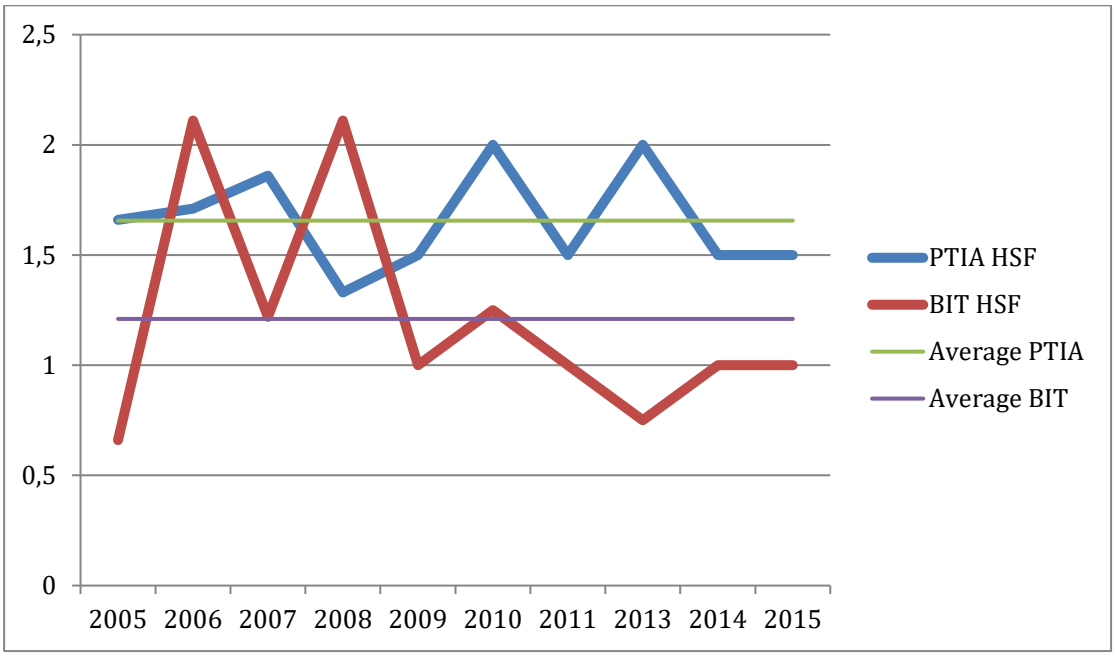


Graph 10 shows that for key provisions there is a higher prevalence of provisions that indicate engagement in PTIAs compared to BITs in the treaties examined for every year from 2005-15.

If we only consider host state flexibility, the results are as follows;

Graph 11:

Graph 11 considers how frequently key provisions in the category of host state flexibility occur each year from 2005-15, excluding 2012:

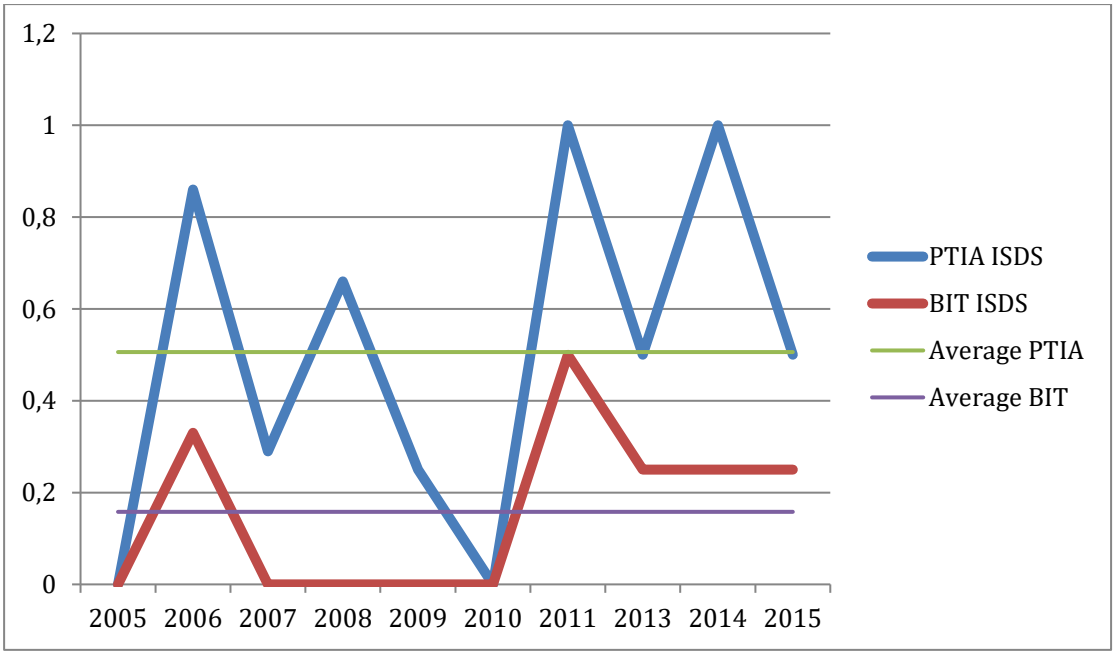


In terms of host state flexibility, there is a higher prevalence of provisions that indicate engagement in PTIAs in each of the ten years considered. Over the ten years, the average number of provisions per treaty is 5.57 for PTIAs and 2.08 for BITs.

If we only consider ISDS provisions, the results are as follows;

Graph 12:

Graph 12 looks at how frequently key provisions in the category of dispute settlement occur each year from 2005-15, excluding 2012:

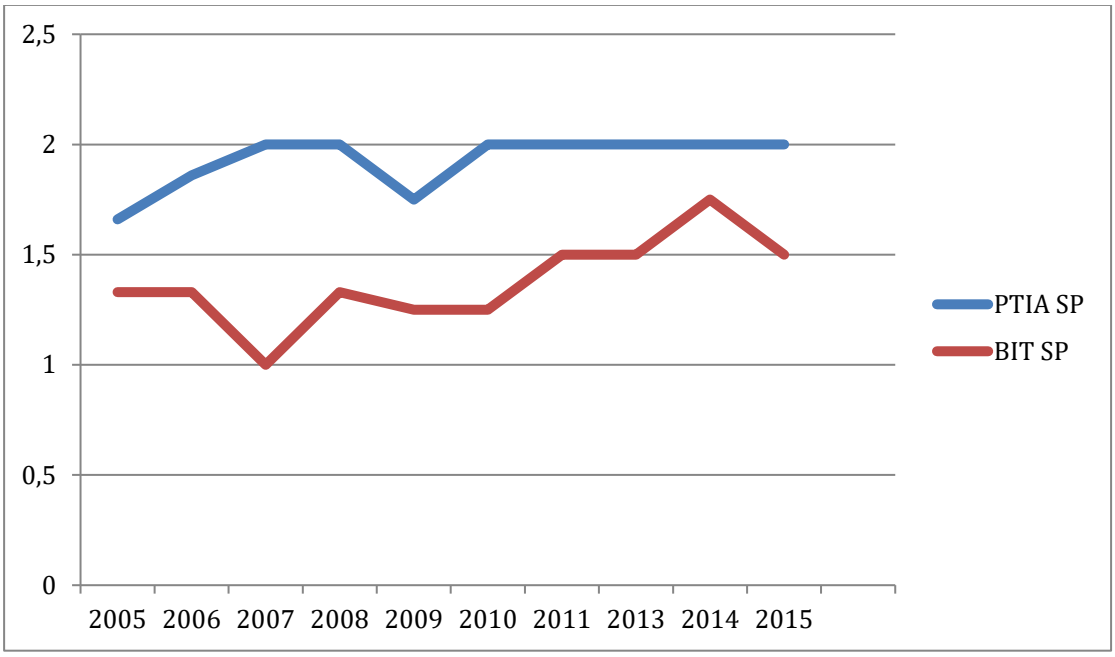


In terms of ISDS provisions, there is a higher prevalence of provisions that indicate engagement in PTIAs in nine of the ten years considered. Over the ten years, the average number of provisions per treaty is 3.2 for PTIAs and 1.44 for BITs (having excluded 2012).

If we only consider substantive provisions, the results are as follows;

Graph 13:

Graph 13 looks at how frequently key provisions in the category of substantive provisions occur each year from 2005-15, excluding 2012:



In terms of substantive provisions, there is a higher prevalence of provisions that indicate engagement in PTIAs each of the ten years considered.
Over the ten years, the average number of provisions per treaty is 7.675 for PTIAs and 7.08 for BITs.

H3: as demonstrated in Graphs 9, 10, 11, 12 & 13 there is more evidence of engagement in PTIAs than in BITs for key provisions in the set of agreements as a whole, as as well as in each individual category.

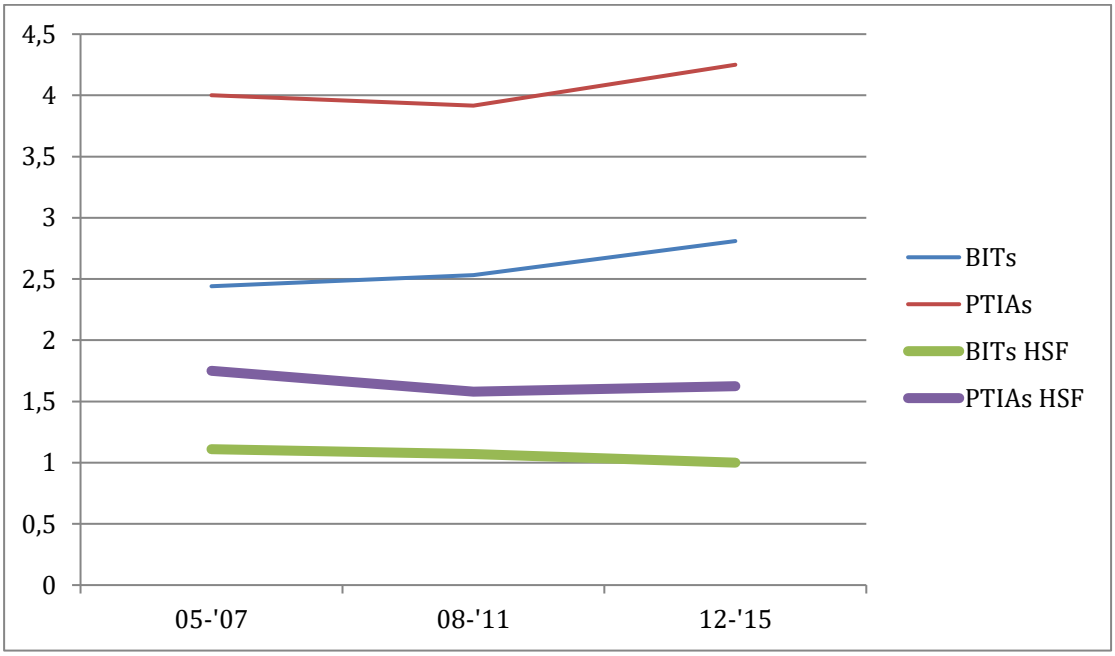
H4: that engagement is increasing for key provisions over time

This section considers whether there is an increasing level of engagement for key provisions in PTIAs compared to BITs in three consecutive periods of time (2005-07, 2008-11 and 2012-15) across the three categories. That is this section examines whether there are more key provisions that evidence engagement in 2012-15 compared to 2008-11 (T3 compared to T2) and more provisions evidencing engagement in 2008-11 compared to 2005-07 (T2 compared to T1).

This section examines;
1) Whether there is an increasing level of engagement in the six key provisions of PTIAs compared to BITs in T1 compared to T2, and T2 compared to T3 for the agreements as a whole (Graph 6)
2) Whether engagement increased from T1 to T2, and T2 to T3 for the six key provisions in the three categories of host state flexibility, dispute settlement, and substantive provisions (Graphs 6, 7 and 8)

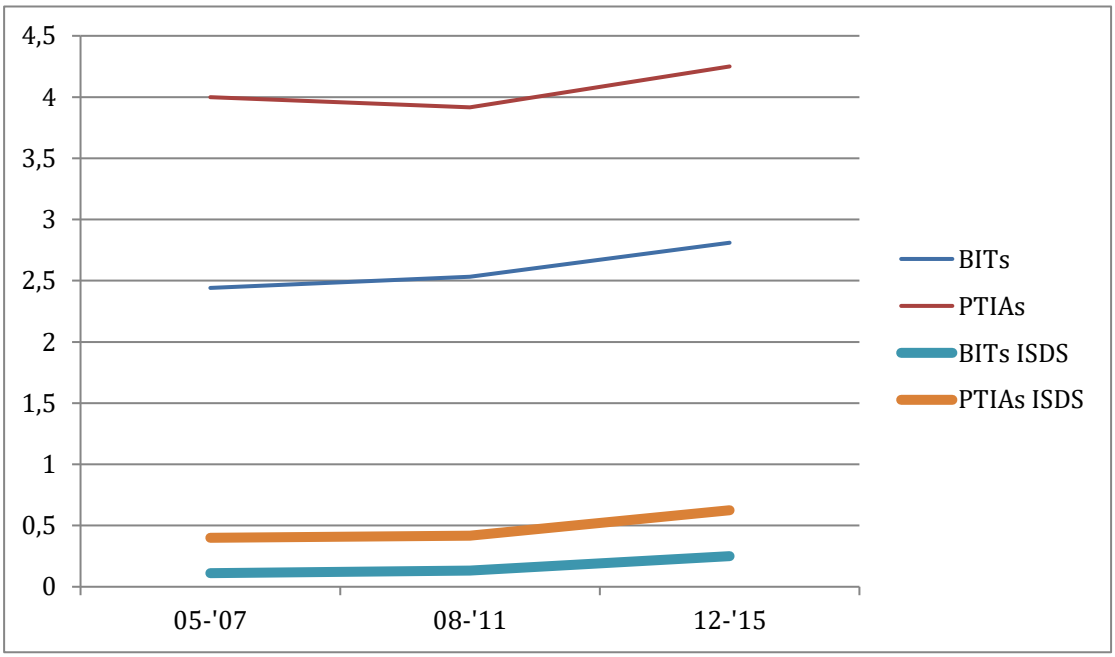
Graph 14:

Graph 14 looks at whether engagement increased from T1 to T2, and T2 to T3 for key provisions in terms of the agreements as a whole and in the category of host state flexibility:



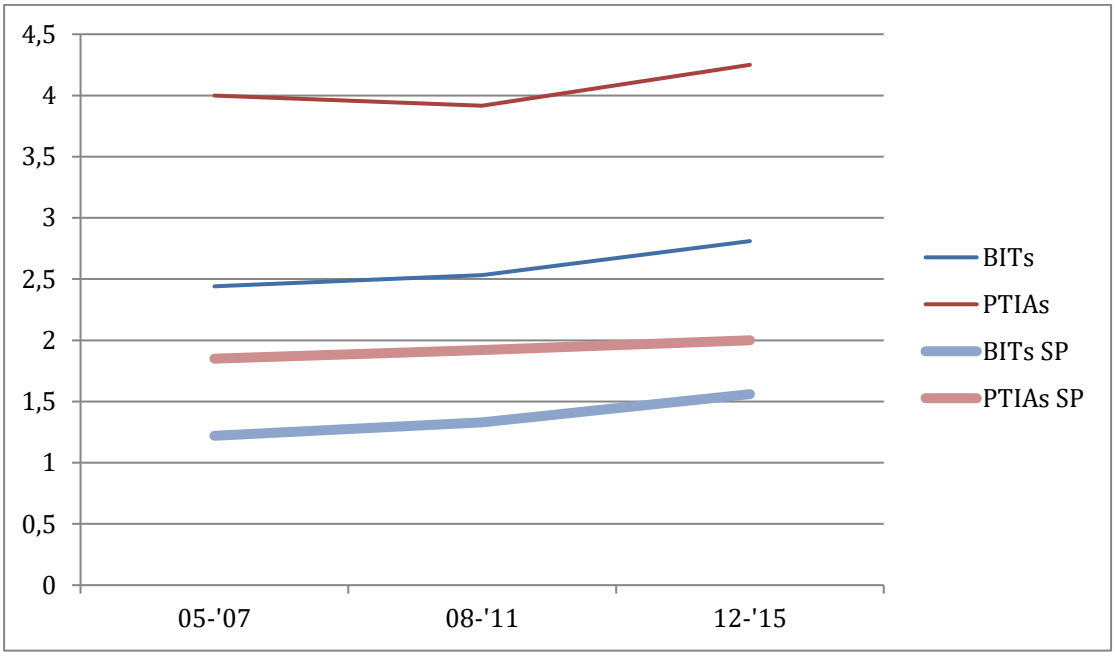
Graph 15:

Graph 15 primarily looks at whether engagement increased from T1 to T2, and T2 to T3 for key provisions in the category of dispute settlement provisions:



Graph 16:

Graph 16 primarily looks at whether engagement increased from T1 to T2, and T2 to T3 for key provisions in the category of substantive protection provisions:



H4: as demonstrated in Graphs 14, 15 & 16, there is more evidence of engagement in T3 than in T2, and in T2 compared to T1 for key provisions in the agreements as a whole, as well as in each individual category.

2.7. Conclusions for key provisions

H3: as demonstrated in Graphs 9, 10, 11, 12 & 13 there is more evidence of engagement in PTIAs than in BITs for key provisions in the set of agreements as a whole, as well as in each individual category.

H4: as demonstrated in Graphs 14, 15 & 16, there is more evidence of engagement in T3 than in T2, and in T2 compared to T1 for key provisions in the agreements as a whole, as well as in each individual category.

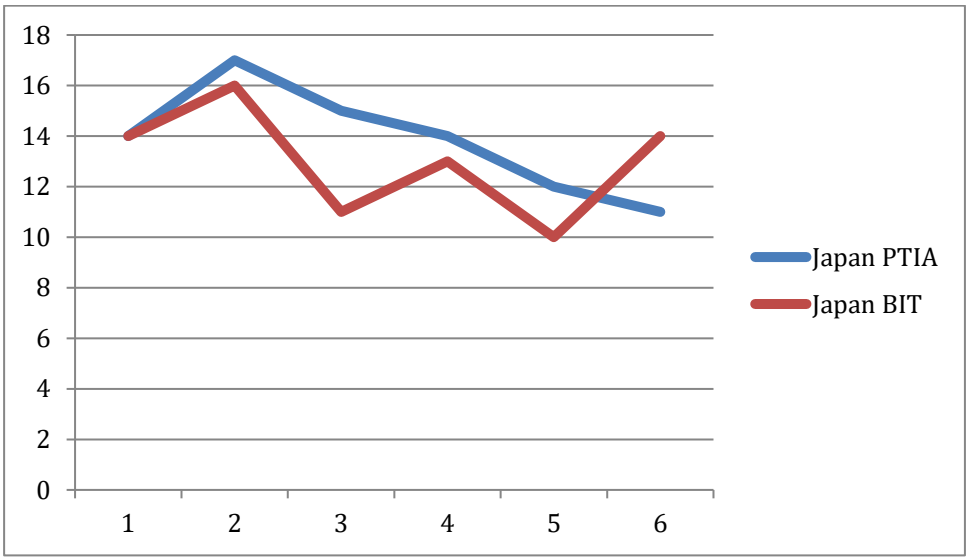
In general PTIAs tend to provide for more, but certain BIT provisions may do so to an even greater extent. The landscape of IIAs is marked mostly by diversity of Agreements. The analysis now turns to the level of the country.

The question is why does it appear as though the frequency of provisions evidencing engagement has not really increased in PTIAs in ’05-’07 as compared to ’12-’15?

2.8. A country by country analysis

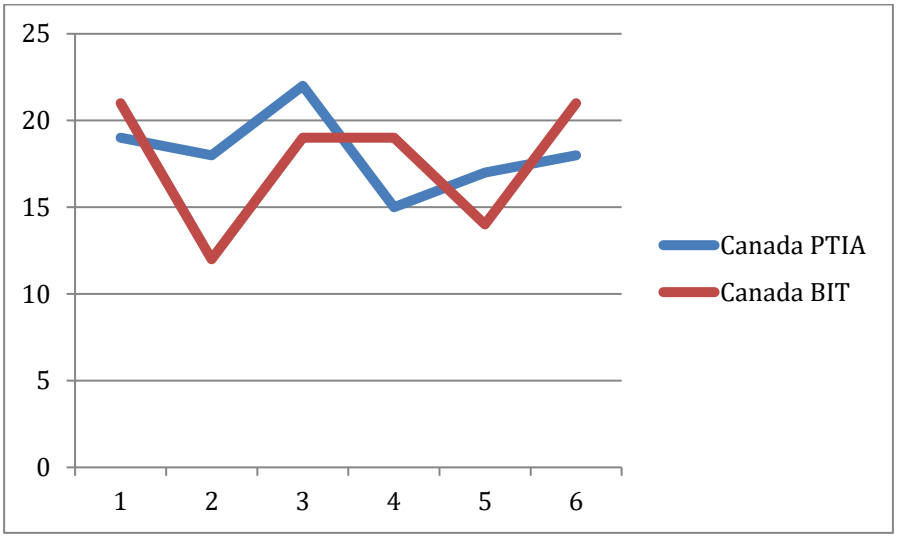
This section briefly considers levels of engagement for individual countries. Provisions evidencing engagement contained in the six most recent PTIAs and BITs of Japan, US and Canada are considered, and in each instance the PTIAs of these countries contain more provisions evidencing inter-regime engagement.

Graph 17: Japanese IIAs



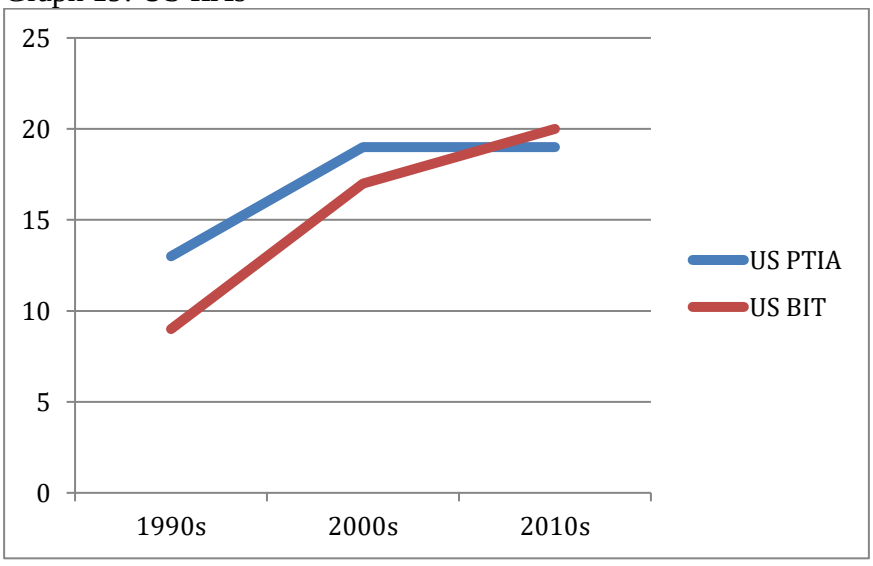
For Japan, in a comparison of six of its most recent PTIAs and BITs, the PTIAs show x% more provisions that provide for engagement.
The BITs selected included the Japan- Peru BIT '08, Colombia- Japan BIT '11, Iraq- Japan BIT '12, Japan- Myanmar BIT '13, Japan- Kazakhstan BIT '14 and Japan- Oman BIT '15.
The PTIAs selected included Japan- Malaysia EPA '05, Chile- Japan EPA '07, Japan- Thailand EPA '07, Brunei- Japan EPA '07, Indonesia- Japan EPA '07 and Japan- Switzerland FTA '09.
For this sample of agreements, the average BIT was concluded in 2012, while the average PTIA was concluded in 2007. It was shown above that there is evidence of increasing engagement between the regimes over time. However, even for this sample of agreements where the BITs were concluded on average later than the PTIAs, the sample of PTIAs contains more provisions evidencing inter-regime engagement.

Graph 18: Canadian IIAs



For Canada, in a comparison of six of its most recent PTIAs and BITs, the PTIAs show x% more provisions that provide for engagement.
The BITs selected included the Canada- Peru BIT '06, Canada- Slovakia BIT '10 Canada- Kuwait BIT '11, Canada- China BIT '12, Canada- Burkina Faso BIT '15 and the Cambodia- Russia BIT '15.
The PTIAs selected included Canada- Peru FTA '08, Canada- Colombia FTA '08, Canada- Panama FTA '10, Canada- Honduras FTA '13, Canada- Korea FTA '14 & TPP '16.

Graph 19: US IIAs



For the US, a BIT and PTIA were selected that were ratified in the 1990s, 2000s, and 2010s. The BITs include the US- Argentina BIT (1994), US- Uruguay BIT (2006) and the US-

Rwanda BIT (2012).[132] The PTIAs include NAFTA (1992), Peru-US FTA (2006) and TPP (2016).
Analysis shows that the number of overall provisions has increased over time. In terms of the three categories of provisions discussed so far, substantive provisions have not changed significantly over time, while agreements have included more provisions giving increased flexibility to the host state.

2.9. The 24 provisions used to operationalise engagement between the trade and investment law regimes

The 24 provisions that are deemed to evidence engagement across the trade and investment law regimes are divided into three categories (host state flexibility, dispute settlement and substantive provisions) which are now examined in turn. The 24 provisions, the reason for their selection, and how they impact upon engagement between the two regimes, are now considered. The six provisions identified as key provisions in section 7 are considered first before looking to the remaining 18 provisions which are separated into the three above-mentioned categories.

1) The six key provisions

This section looks at the reasons why these six IIA provisions of IIAs were identified as key drivers of engagement.

a. Preambles balancing investment promotion with other regulatory objectives

Part 2 of this thesis selects a series of provisions for in depth analysis and this provision is one of two chosen for the category 'host state flexibility'.

This section examines recognition in the preamble by the parties of the need to balance the promotion and protection of investment with the pursuit of other public policy objectives. For the purposes of this study, the need to balance these twin objectives is only considered in relation to the right to regulate, sustainable development and environmental preservation. Reference to other public policy objectives such as a general desire to “improve living standards”[133] or “reduce poverty”[134] are not considered in this section. One reason for this is that it is unclear whether raising living standards or reducing poverty is facilitated more by increasing investment protection or by giving the parties more regulatory space.

[132] This study has taken the signature date of BITs up until now, but takes the ratification date for the US-Rwanda BIT as no BIT was signed in the 2010s as of May 2016.
[133] E.g. Kazakhstan Macedonia FTA, "AGREEING that a stable framework for investment will maximize effective utilization of economic resources and improve living standard"
[134] E.g. Peru US FTA "PROMOTE broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production;"

The right to regulate,[135] sustainable development,[136] and environmental preservation[137] are shared concerns of trade and investment law. Tribunals have considered these concepts in WTO and investment law jurisprudence and may interpret them in establishing the object and purpose of an agreement. In doing so, they may have regard to how provisions with similar wordings have been interpreted in the trade or investment regimes if appropriate.

The 49 provisions (31/40 PTIAs and 18/40 BITs) that recognise in their preambles the need for a balance between investment protection and other regulatory objectives are characterised by a great diversity. Given the heterogeneous nature of the provisions in question, they are given individual scores on a scale of 0-5 for their potential impact upon engagement between the trade and investment law regimes based on the on the language used in each agreement.

The stronger the reference to the recognition of other regulatory objectives, the higher the score will be in this study as provisions with such references are more likely to result in cross-fertilisation of jurisprudence between the two regimes and impact upon engagement between the two regimes. Thus, one of the factors that influences an assessment of the strength of a reference is the likelihood that a tribunal would take the preamble into account in giving its decision.

By way of example, two provisions that refer to other regulatory objectives with wordings of different strength are those contained in the New Zealand- Thailand EPA (2005) and the New Zealand- Malaysia FTA (2009) which scored a 5 and a 1 respectively for their potential to impact upon engagement between the trade and investment law regimes.

The New Zealand- Thailand EPA contains a strong reference to other regulatory objectives. In relation to the subjects under consideration in this section, the preamble of the Agreement states*:*
"Affirming the rights of their governments to regulate in order to meet national policy objectives;

Aware that closer social and political relationships and economic partnerships can play an important role in promoting sustainable development;"

The New Zealand- Thailand EPA affirms the right to regulate but is merely "aware" of the role of relationships in promoting sustainable development. As the former statement is a stronger reference to the rights and obligations of the parties, this resulted in the Agreement receiving the highest score for impact upon engagement.

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[135] A typical phrasing of a reference to the promotion of sustainable development in a PTIA reads as follows: "REAFFIRMING their right to pursue economic philosophies suited to their development goals and their right to regulate activities to realise their national policy objectives;"- India Singapore Comprehensive Economic Cooperation Agreement (2005)

[136] A typical phrasing of a reference to the promotion of sustainable development in a PTIA reads as follows; "The Government of the United States of America and the Government of the Republic of Peru, resolved to: IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters;"-Peru US FTA, 2009

[137] A typical phrasing of a reference to the environmental preservation in a PTIA reads as follows; "IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters; PROTECT and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories;"- US Panama TPA (2007)

The New Zealand- Malaysia FTA contains a weak reference to other regulatory objectives, stating:
"Aware that economic development, social development and environmental protection are components of sustainable development and that free trade agreements can play an important role in promoting sustainable development;"

In this Agreement, the parties are merely "aware" that the Agreement can play a role in promoting sustainable development. As with the previous Agreement, such language does not constitute a strong reference to other regulatory objectives and as such is less likely to impact upon engagement between the two regimes.

The importance given to an objective in the preamble can be seen in the parties' choice of phrasing in outlining their level of commitment to it. There are many phrases used by the parties to indicate their level of commitment to an objective and each is factored into the score given for impact upon engagement. For example a stronger score would be given to a provision that resolves to "uphold" and objective of the treaty than one that resolves to be "mindful" of it. Some provisions may be differentiated only by this statement of the level of commitment of the parties to an objective. [138] Similarly, a phrasing that would indicate a strong level of commitment by the parties can be mitigated by the wording of the objective pursued.
A provision recognising the principle of sustainable development is usually a strong one. E.g. "Recognizing the need to promote investment based on the principles of sustainable development;" which is the wording contained in the Canada- China BIT (2012).
However this is not always the case.
E.g. Brunei- Japan states: "Recognising that (…) economic partnership can play an important role in promoting sustainable development;"
The level of commitment expressed can be weakened by phrases such as "can play a role".
For the reasons above, Tables 1 & 2 in Annex 2 give individual scores for each of the PTIAs and BITs considered in this study based on the specific treaty language used.

Reference to the right to regulate, sustainable development or environmental preservation featured in 31/40 PTIAs (77.5%) and 18/40 BITs (45%) surveyed as part of this study.

b. Incorporation of Treaty Exceptions

This provision is also one of the two provisions selected for in depth analysis in Part 2 of this thesis for the category 'host state flexibility'.

Treaty exceptions were selected as they are commonly found in WTO and investment treaties and they represent one of the clearest areas for potential interaction between the trade and investment law regimes. Investment treaties have incorporated WTO-based exceptions in a

[138] E.g. The preamble to Japan- Oman BIT states that the parties, "Recognising that these objectives can be achieved without relaxing health, safety and environmental measures of general application," while the Colombia- Turkey BIT states, "Convinced these standards can be achieved without relaxing health, safety environmental standards".

number of ways and the interpretation of these provisions is a fertile ground for cross-fertilisation of jurisprudence.

Treaty Exceptions featured in 36 of the PTIAs and 30 of the BITs surveyed as part of this study. Although exceptions feature in many of the Agreements, the level of interaction between the regimes varies significantly among the different agreements depending on the category of exception clauses included. Given the heterogeneous nature of these provisions, scores on a scale of 0-5 were attributed for their potential to impact upon inter-regime engagement based on the on the language used in each agreement.

Factoring in the weightings attributed to the various treaty exception provisions, the score given is 29.5/40 for PTIAs and 20.66/40 for BITs.[139]
Five categories of treaty exceptions with different weightings have been coded in this study. These categories include exceptions explicitly modelled on WTO law (1), exceptions implicitly modelled on WTO law (1), exceptions thinly connected to WTO law (0.66), provisions protecting against arbitrary and discriminatory measures (0.33), and exceptions within articles on performance requirements (0.25).

i. Exceptions Explicitly Modelled on WTO law

In this study, treaty exceptions explicitly modelled on WTO law were found in 18/40 PTIAs (45%) and none of the BITs.

A typical example of the phrasing of an exception explicitly modelled on WTO law is found in Chapter 16.1.2 of the Korea- Vietnam FTA (2015), which reads:
"2. For the purposes of Chapters 8 (Trade in Services) and 9 (Investment), Article XIV of GATS (including its footnotes) is incorporated into and made part of this Agreement, mutatis mutandis."[140]

The weighting assigned to exceptions explicitly modelled on WTO law is the maximum of 1. Not only does the direct incorporation of exceptions modelled on WTO law facilitate engagement between the regimes, it may require it.[141]

ii. Exceptions Implicitly Modelled on WTO Law

In this study, treaty exceptions explicitly modelled on WTO law were found in 9/40 PTIAs (22.5%) and in 12/40 BITs (30%).

A typical example of the phrasing of an implicit exception is found in Article 9.8 (General Exceptions) of the Australia- China FTA (2015), which reads as follows:
"1. For the purposes of this Chapter and subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between

[139] See Table 1 at the end of this section
[140] Chapter 16.1.2 of the Korea- Vietnam FTA (2015), Available at: investmentpolicyhub.unctad.org/Download/TreatyFile/3584 (last accessed 11 June 2018)
[141] See Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 198

investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:
(a) necessary to protect human, animal or plant life or health; (b) necessary to ensure compliance with laws and regulations that are not inconsistent with this Agreement; (c) imposed for the protection of national treasures of artistic, historic or archaeological value; or (d) relating to the conservation of living or non-living exhaustible natural resources.
2. The Parties understand that the measures referred to in subparagraph 1(a) include environmental measures to protect human, animal or plant life or health, and that the measures referred to in subparagraph 1(d) include environmental measures relating to the conservation of living or non-living exhaustible natural resources."

A variation of the implicit form of incorporation can be seen in the Canada- Panama FTA (2010). Under this Agreement, a measure must pass a necessity test "for the conservation of living or non-living exhaustible natural resources".[142] The investment chapter of the Korea-EFTA FTA contains exceptions implicitly based on GATT XX(a), (b) and (d) but excludes any reference to a GATT XX(g) equivalent.[143]

The incorporation of exceptions implicitly modelled on WTO law facilitates a high level of engagement between the two regimes. As such, the weighting assigned here is also the maximum of 1.

iii. Exceptions Thinly Connected to WTO law

In this study, treaty exceptions explicitly modelled on WTO law were found in none of the PTIAs and in four of the BITs (10%).

A "thin exception" typically covers subject matters such as national security or the preservation of public order. Such provisions may provide that any action by a host state that breaches a treaty obligation but which is necessary to preserve public order does not constitute derogations from the treaty.
A recent example of a thin exception is found in Article 13 (General Exceptions) of the BIT between the Republics of Kazakhstan and Macedonia (2012), which reads as follows:
"1. Nothing in this Agreement shall be interpreted as interfering to commit by the Parties of the actions necessary for protection of national security or measures necessary for maintenance of a public order, or measures in line with their obligations under the United Nations Charter for maintenance of international peace and security, provided that application of such measures would not mean unconditioned or unreasonable discrimination by the Party, or the latent restriction of investments."

The weighting assigned to exceptions thinly connected to WTO law is 0.66. The incorporation of exceptions thinly connected to WTO law facilitates engagement between the regimes albeit to a lesser extent than exceptions modelled on WTO law. This has been borne out in the jurisprudence on exceptions to date as outlined in Part 2 of this thesis.

[142] Article 23.02.3
[143] Article 20, Agreement on Investment Between the Republic of Korea and the Republic of Iceland, the Principality of Liechtenstein and the Swiss Confederation

iv. Provisions Protecting Against Arbitrary and Discriminatory Measures

In this study, provisions protecting against arbitrary and discriminatory measures were found in none of the PTIAs and 18 of the BITs (45%).

A recent example of a provision that protects against arbitrary and discriminatory measures is found in Article 4.1 (Protection of Investments) of the BIT between the Republic of India and the United Arab Emirates (2013), which reads as follows:
"Investments by Investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party in a manner consistent with the provisions of domestic laws of the host Contracting Party, this Agreement and applicable rules of international law. Neither Contracting Party shall in any way impair by arbitrary or discriminatory Measures, the management, maintenance, use, enjoyment, or disposal of Investments."

The weighting assigned to exceptions protecting against arbitrary and discriminatory measures is 0.33. The incorporation of these protections may potentially facilitate engagement between the trade and investment law regimes. There is a considerable jurisprudence in WTO law on what constitutes arbitrary and discriminatory treatment under the chapeau of GATT Article XX and the chapeau of GATS Article XIV although this has not been drawn upon in investment jurisprudence to date.

v. Exceptions Within Articles on Performance Requirements

Performance requirements are conditions imposed upon foreign investors that are often explicitly trade distorting (such as domestic content requirements). The WTO Agreement on Trade-Related Investment Measures (TRIMs) disciplines the use of performance requirements and many IIAs do likewise.
In this study, treaty exceptions found within articles on performance requirements were found in 9/40 PTIAs (22.5%) and none of the BITs.

A typical example of exceptions within articles on performance requirements is found in Article 10.9(c) of the US- Colombia FTA (2006), which reads as follows:
"Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and
(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."

The weighting assigned to exceptions within articles on performance requirements is 0.25. The incorporation of these exceptions facilitates engagement between the regimes albeit within the limited context of performance requirements which has not been litigated in investment jurisprudence to date.

Table 6 shows the levels of engagement in Treaty Exception provisions for PTIAs and BITs factoring in these weightings:

Table 6: Categories and Values of Engagement for Treaty Exceptions

	Explicit	**Implicit**	**Thin**	**Arbitrary**	**Perf Reqs.**	**Total**
Weighting	**1**	**1**	**.66**	**.33**	**.25**	
PTIAs	18	9	_	_	2.25	**29.25**
BITs	_	12	2.66	6	_	**20.66**

d. Provisions providing for appellate mechanism or contemplating one

Articles providing for the addition of an appellate mechanism featured in 11 of the PTIAs (27.5%) and none of the BITs surveyed as part of this study. Although none of the treaties in the sample of 80 provide for the establishment of an appellate mechanism, eleven of the treaties contain provisions contemplating the establishment of one.

As seen in the table in Annex 4, the wordings of nine of eleven of these provisions are very similar and closely resemble Article 28.10 of the United States Model BIT (2004).[144] Of the eleven agreements containing these provisions, the US is party to five of them. Three of the remaining six agreements involve Peru, in agreements concluded subsequent to the conclusion of the Peru- US FTA (2006). The final three include Taiwan- Nicaragua FTA (2006), Canada- Korea FTA (2014), and Australia- China FTA (2015).

Nicaragua concluded the first of these less than two years after signing CAFTA- DR (2004), a Free Trade Agreement between the nations of the Central American Common Market,[145] the

[144] See United States Model BIT (2004), Article 28.10: "If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 34 in arbitrations commenced after the multilateral agreement enters into force between the Parties."

[145] Members of the Central American Common Market (CACM) include Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.

United States and the Dominican Republic.
Korea and Canada concluded the second of these in the aftermath of the Korea- US FTA (2007). It contemplates setting up an appellate mechanism but with different wording.[146]
The only one of the eleven without a clear link to the US is the Australia- China FTA (2015), and the wording of this provision is similar to that of the Canada- Korea FTA.[147]

The Panama- US FTA (2007) contains wording almost identical to many of the other provisions inspired by the US Model BIT and states that if a multilateral agreement involving the two parties comes into force that establishes an appellate body, they shall "strive" to have such an "appellate body review awards rendered" under the FTA.[148]

Article 9.23 of Australia- China FTA (2015) is distinct from these provisions and provides: "Appellate Review: Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law."

This wording of the Australia- China FTA can be distinguished from the Canada- Korea FTA in a couple of ways: the former provides that the parties "shall commence negotiations" within three years whereas the latter provides that the parties "shall consider whether to establish a bilateral appellate body" within three years. The former also provides for bilateral negotiations, whereas the latter provides for a "bilateral appellate body or similar mechanism".[149]

As the Australia- China FTA is the only one that provides for the establishment of an appellate mechanism with certainty, the weighting assigned to it is 1. The other ten provisions are equally uncertain and do not involve a commitment from the parties to establish an appellate mechanism thereby facilitating inter-regime engagement, Thus the weighting attributed to the provisions for these ten Agreements is 0.33.

Although none of the treaties provide for the establishment of an appellate mechanism there have been PTIAs concluded in recent times that do so. The EU has included an appellate mechanism known as ICS (Investment Court System) in its two most recent PTIAs with Canada and Vietnam.[150] ICS marks a move away from ISDS due to a "fundamental and

[146] Canada- Korea FTA (2014), Annex 8-E: "Within three years after the date this Agreement enters into force, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered pursuant to Article 8.42 in arbitrations commenced after they establish the appellate body or similar mechanism."
[147] The Australia-United States FTA (2004) entered into force in 2005 but didn't contain a provision contemplating an appellate mechanism.
[148] Chapter 10, Article 10.20.10: "If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 10.26 in arbitrations commenced after the multilateral agreement enters into force as between the Parties."
[149] Annex 8-E, Possibility of a Bilateral Appellate Mechanism provides: "The Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards".
[150] CETA, Article 8.28 provides: "Appellate Tribunal:
1. An Appellate Tribunal is hereby established to review awards rendered under this Section.
2. The Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of

widespread lack of trust" in the system.[151] ICS hopes to be a "clear break" from ISDS by processing investment claims in a court rather than through arbitration.[152] This court includes a permanent rosters of tribunal members who shall possess the necessary qualifications for appointment to judicial office or else be jurists of recognised competence with expertise in PIL.[153] The European Commission received a mandate from the Council of the European Union to open negotiations towards the establishment of a Multilateral Investment Court (MIC) in March 2018.[154] Canada will co-sponsor these discussions and there is "broad agreement among numerous governments across the globe that ISDS needs reform."[155]

CETA provides for a bilateral appellate tribunal in Article 8.28 and that the parties shall pursue a "multilateral investment tribunal and appellate mechanism for the resolution of investment disputes" in Article 8.29. As seen with the above example of the US Model BIT, where influential actors on the global stage push for the inclusion of provisions such as this bilateral appellate tribunal, it can then become common practice for such provisions to be adopted even in agreements that don't include the original proponent of the provision.

Provisions providing for an appellate mechanism were selected given their great potential for facilitating engagement between the trade and investment law regimes. The appellate mechanism of ICS is modelled on the WTO's appeals system and the European Commission has described it as "operating on similar principles to the WTO Appellate Body;"[156] If treaty negotiators increasingly include appeal mechanisms, this will facilitate inter-regime engagement, particularly where such mechanisms are explicitly based on the WTO system.

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relevant domestic law; (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).
3. The Members of the Appellate Tribunal shall be appointed by a decision of the CETA Joint Committee at the same time as the decision referred to in paragraph 7.
4. The Members of the Appellate Tribunal shall meet the requirements of Articles 8.27.4 and comply with Article 8.30.
5. The division of the Appellate Tribunal constituted to hear the appeal shall consist of three randomly appointed Members of the Appellate Tribunal. (...)"

[151] Blog of EU Commissioner for Trade Cecilia Malmström, 'Proposing an Investment Court System,' 16 September 2015. Available at: https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en

[152] European Commission - Press release: 'CETA: EU and Canada agree on new approach on investment in trade agreement,' Brussels, 29 February 2016. Available at: http://europa.eu/rapid/press-release_IP-16-399_en.htm

[153] See CETA Article 8.27.4: "The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements."

[154] Council of the European Union- Press Release: Multilateral investment court: Council gives mandate to the Commission to open negotiations, Brussels, 20 March 2018: http://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/

[155] EU Commission Factsheet on the Commission's proposal for a Multilateral Investment Court, available at: http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf (last accessed 7 April, 2018)

[156] European Commission - Press release: Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations, Brussels, 16 September 2015: http://europa.eu/rapid/press-release_IP-15-5651_en.htm

c. Reference to arbitrators' knowledge of international law or international trade law

Two provisions from each of the categories were chosen as key provisions and reference to arbitrators' knowledge of international law or international trade law is the first one chosen for 'ISDS provisions'.

A typical example of the phrasing of a provision referring to arbitrators' knowledge of public international law and/ or international trade law is found in the Colombia- Singapore BIT (2013):
"5. Arbitrators shall: (a) have experience or expertise in public international law, international trade law or international investment law; "[157]

Articles referring to an arbitrator's knowledge of public international law or international trade law featured in 7 of the PTIAs (17.5%) and 7 of the BITs (17.5%) surveyed as part of this study. Although it is not as prevalent as some of the other provisions in the category 'ISDS provisions,' reference to such obligations is a clear way for parties to signal that the investment chapter is not self-contained and that engagement with the wider field of PIL is encouraged.

Chapter 11, Article 23.2 of AANZFTA (2009) is an example of a simple formulation of an article providing for an arbitrator's knowledge of public international law/ trade law:
"Arbitrators shall have expertise or experience in public international law, international trade or international investment rules, and be independent of, and not be affiliated with or take instructions from the disputing Party, the non-disputing Party, or disputing investor."

Other agreements such as the Korea- Vietnam FTA add another element to this formulation allowing for arbitrators that have experience of "the resolution of disputes arising under international trade or international investment agreements".

Finally, Article 30.4 of the Colombia- Japan BIT (2011) refers to an arbitrator's expertise in the specific subject matter of the dispute:
"In appointing the arbitrators, the disputing parties consider that arbitrators of a Tribunal should have expertise and competence in the fields of international public law, the law on foreign investment or the subject-matters of the investment dispute arisen between the disputing parties."
Such a formulation broadens the field of potential arbitrators for disputes. It is an alternative rather than a cumulative condition and increases the potential cross-fertilisation as trade law is one such area that could relate to the "subject-matters of the investment dispute".

Inter-regime engagement is facilitated by provisions such as these that recognise that investment agreements are situated within the wider context of public international law and require tribunals to resolve disputes in accordance with applicable rules of international law. These applicable rules of international law include Article 31.3(c) of the VCLT which provides for the taking into account of "any relevant rules of international law applicable in the relations between the parties".

[157] This is a translation from the original Spanish, which states: "5. Los árbitros deberán: (a) tener experiencia o expert1cta en derecho internacional publico, Derecho Comercial Internacional o derecho internacional de las inversiones;"

Provisions that require that a tribunal member should have knowledge of international trade law is an acknowledgement by the parties of the overlap and potential for engagement between the two regimes. As such, the inclusion of these references may be an expression of the desire of the parties for the possibility of trade principles to be included in the analysis of the chapter's provisions. The obvious implication of including arbitrators with knowledge of trade law is that this knowledge may be useful when deciding disputes and considering norms that overlap between the two regimes under the agreement.

Although there is increased legitimisation of inter-regime engagement where there is explicit reference to arbitrators' requiring knowledge of international trade law, even where a provision merely requires that an arbitrator has knowledge of public international law this is still counted as 1 for the purposes of this study. This is because even where only a knowledge of PIL is required, international trade law forms part of the wider field of PIL. Thus, all four of the above phrasings are counted as 1 in this study's weighting.

e. Most-favoured-nation treatment

Two provisions from each of the categories were chosen as key provisions and Most-favoured-nation treatment is the first one chosen for 'substantive provisions'.

Most-favoured-nation (MFN) treatment and National Treatment are the two core standards that aim to ensure non-discrimination in international trade and investment law. Similar to national treatment, the MFN standard is a relative one and investors and foreign exporters are compared to their domestic competitors to ensure treatment by the host state is not discriminatory.
MFN provisions are a shared legal norm of the trade and investment law regimes. The very presence of such shared provisions represents common ground between the two regimes and facilitates inter-regime engagement by tribunals.
The MFN standard featured in 37 of the PTIAs (92.5%) and all 40 of the BITs surveyed as part of this study.
As well as featuring in the vast majority of the agreements in this study, MFN provisions have been the subject of much litigation at the WTO and under IIAs. Tribunals may have regard to how these provisions have been interpreted in the other regime. Investors and tribunals can use MFN provisions to import provisions from other treaties that may facilitate inter-regime engagement. The potential for such engagement as a result of MFN provisions is even clearer where no exception for dispute settlement is contained in the MFN provision.

Some MFN provisions such as Article 4.2 of the Jordan- Thailand BIT (2005) combine MFN and National Treatment in a single provision.[158] Other MFN provisions are standalone and a typical example of the phrasing of such a provision is found in Article 12.4 of the China-Korea FTA (2015):
"1. Each Party shall in its territory accord to investors of the other Party and to covered

[158] Article 4.2 (Treatment of Investments): "Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investments, treatment not less favourable than that which it accords to its own investors or investors of any third State, whichever is more favourable."

investments treatment no less favourable than that it accords in like circumstances to investors of any non-Party and to their investments with respect to investment activities and the matters relating to the admission of investment in accordance with paragraph 2 of Article 12.2."

Many MFN provisions are subject to exceptions however and the China- Korea FTA provides exceptions for Regional Trade Agreements, dispute settlement in other investment agreements, as well as aviation, fisher and maritime matters.[159] These exceptions mean that the same treatment does not have to be extended to the other party where preferential treatment is accorded to a third party on the basis of such an arrangement. Taxation is another area that is frequently the subject of an exception in MFN provisions.
Although this study primarily focuses on MFN treatment with investment chapters of PTIAs, MFN treatment may feature in a variety of other chapters in PTIAs. For example, in the Canada- Korea FTA (2014), an MFN provision featured in chapters including those on Market Access For Goods (2), Cross-Border Trade In Services (9) and Financial Services (10).
To give an example of one such provision, the Trade in Services chapter of the India-Singapore FTA (2005) contains an MFN provision that allows the parties to request treatment no less favourable than that provided in any subsequent agreement with a non-Party on trade in services.[160]

A weighting of 1 is assigned to MFN provisions that do not contain exceptions and have a standard wording, such as Article 12.4.1 of the China- Korea FTA (above). Where RTAs are excluded from the scope of IIAs, or where there is an exception for dispute settlement, the potential for inter-regime engagement is lessened. Much of the potential of MFN provisions lies outside of such exceptions and so the weighting attributed to agreements containing one or more of them is 0.8, 0.6 or 0.4 depending on the specific wording of the provision.[161] Where more than three exceptions are included, the value of 0.4 is retained. A deduction may not necessarily be made if the exception is in one specific area with limited impact upon engagement (e.g. the aviation industry or small scale trade in border areas).

[159] See Article 12.4 of the China- Korea FTA (2015): "2. Paragraph 1 shall not be construed so as to oblige a Party to extend to investors of the other Party and covered investments any preferential treatment resulting from its membership of: (a) any customs union, free trade area, monetary union, similar international agreement leading to such union or free trade area, or other forms of regional economic cooperation; (b) any international agreement or arrangement for facilitating small scale trade in border areas; or (c) any bilateral and multilateral international agreements involving aviation, fishery and maritime matters including salvage.
3. It is understood that the treatment accorded to investors of any non-Party and to their investments as referred to in paragraph 1 does not include treatment accorded to investors of any non-Party and to their investments by provisions concerning the settlement of investment disputes between a Party and investors of any non-Party that are provided for in other international agreements."
[160] India- Singapore FTA (2005): "Article 7.6: Review Of Most Favoured Nation Commitments: "If, after this Agreement enters into force, a Party enters into any agreement on trade in services with a non-Party, it shall give consideration to a request by the other Party for the incorporation herein of treatment no less favourable than that provided under the aforesaid agreement. Any such incorporation should maintain the overall balance of commitments undertaken by each Party under this Agreement."
[161] Annex 1 lists the weightings assigned to each Agreement.

f. Like circumstances

Part 2 of this thesis selects a series of provisions for in depth analysis and this provision is one of two chosen for the category 'substantive provisions'.

Likeness is a shared concept of the trade and investment law regimes. This concept is shared terrain for the regimes featuring in 55/80 of the Agreements of this study and across the WTO Agreements. The concept is also frequently interpreted by tribunals at the WTO and under IIAs and so is a fertile ground for engagement between the two regimes. The concept of likeness appears in National Treatment provisions, MFN provisions and occasionally in the dispute settlement provisions of IIAs. To establish a breach of many national treatment and MFN clauses in trade and investment law, a complainant must show that their good, service or investment is receiving discriminatory treatment compared to a 'like' domestic producer, supplier of services or investor.
What constitutes 'likeness' varies across Agreements and regimes. Interpretations of likeness depend on the wording of the provision it is contained within and the context of the agreement as a whole. As such, tribunals must be careful when looking to interpretations of the standard under other agreements.

The concept of likeness featured in 39 of the PTIAs (97.5%) and 16 of the BITs (40%) surveyed as part of this study.
Article 10.3.1 of the Peru- US FTA (2006) is an example of how the concept of 'likeness' is included in the national treatment provision of an investment chapter:
"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."
Article 20 of the Korea- EFTA FTA (2005) provides an example of a test for like circumstances outside of non-discrimination provisions. The Agreement incorporates an exceptions clause, which draws strongly on the construction of GATT Article XX. The chapeau of the article is identical to that of GATT Article XX (mutatis mutandis) except instead of prohibiting discrimination "between countries where the same conditions prevail", it prohibits discrimination "between States where like conditions prevail".[162]
A second example of an atypical likeness test found in this study is found in Article II.2 of the St Vincent & the Grenadines- Taiwan BIT (2009) which grants establishment and acquisition rights "on a basis no less favourable than that which, in like circumstances, it permits such acquisition or establishment by: (a) its own investors or prospective investors; or (b) investors or prospective investors of any third state."[163]

All 55 of the Agreements in this study containing the concept of likeness feature it in a non-discrimination provision. These provisions tend to be quite homogenous referring to the obligation on parties to treat investors of the other Party no less favourably than the treatment accorded 'in like circumstances' to its own investors or to the investors of any non-Party.
A weighting of 1 is assigned to all of these likeness provisions even where the wording surrounding the concept of likeness varies slightly.

[162] Korea- EFTA FTA (2005), Article 20
[163] Both the Korea- EFTA FTA (2005) and the St Vincent & the Grenadines- Taiwan BIT (2009) also contain the concept of likeness in non-discrimination provisions.

One tribunal deemed the requirement of a similarly-situated comparator or one in a "like situation" to be "inherent" in the very definition of discrimination under general international law.[164] Thus, even the omission of the term 'in like circumstances' need not necessarily affect the interpretation of a non-discrimination provision.[165]

2) Host State flexibility

A further six elements are coded under the heading 'Host state flexibility' which evidence engagement between the two regimes. The elements refer to provisions for the following;

- Agreements referring to WTO law in their preamble
- Article providing an exception for health or environmental measures
- Expropriation Article features TRIPS exception
- Expropriation Article features reference to public objectives
- Performance requirements Article features reference to WTO law
- Capital withdrawal safeguard

a. Agreements referring to WTO law in their preamble

Preambles set out the object and purpose of a treaty. The Vienna Convention states that treaties shall be interpreted in good faith and in the light of its object and purpose.[166] The content of a preamble applies to the entirety of a treaty. In the case of a BIT, the content of the preamble is likely to be more specific to investment concerns than in a PTIA as the subject matter for BITs is more restricted than for PTIAs.

The rights and obligations of the parties under the WTO Agreement are expressly referred to in the preambles of some International Investment Agreements. The importance given to an objective in the preamble can be seen in the parties' choice of phrasing in outlining their level of commitment to it. The phrase most commonly used in relation to the WTO Agreement is that the parties, "Building on" these rights, have agreed as follows.

None of the BITs surveyed contain a reference to WTO law. Such a reference was however found in 39/40 (97.5%) PTIAs surveyed. Although it has not been the case that references to the WTO Agreement have been common in standalone investment agreements, this may change in the future.
Negotiations for the EU- Singapore Investment Protection Agreement[167] were concluded in April 2018[168] and its preamble refers to the parties respective rights and obligations under

[164] *Total v. Argentina*, Award & Dissenting Opinion, ICSID Case No. ARB/04/01 (2013) para. 210
[165] See Chapter 5.3
[166] Article 31.1 VCLT states that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its object and purpose" (emphasis added).
[167] Investment Protection Agreement Between The European Union And Its Member States, Of The One Part, And The Republic Of Singapore, Of The Other Part
[168] See European Commission Press Release of 18 April 2018: 'European Commission proposes signature and conclusion of Japan and Singapore agreements,' available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1826

the WTO Agreement.[169]
In the case of a PTIA, the inclusion of a reference to WTO law is more likely as there are trade chapters as well as investment chapters within the agreement. However, the inclusion of a reference to WTO law in the preamble may be seen as informing not only the trade chapters of an agreement but also the investment chapter.
Reference to the WTO Agreements in the preamble of a PTIA increases the potential for engagement between the trade and investment law regimes. This is because a party to an investment dispute can claim that building on WTO rights and obligations is one of the objects and purposes of the agreement.

The preamble to the China- Pakistan FTA (2006) contains a typical phrasing of a reference to the WTO Agreements in a PTIA;
"The Parties…Building on their respective rights and obligations under the WTO Agreement, other multilateral, regional and bilateral instruments of cooperation… Have agreed as follows;"

The only PTIA contained in this study that does not contain a reference to WTO law in its preamble is the China- Korea FTA (2015). Although the Agreement contains a reference to the WTO Agreement in its initial provisions this does not have an effect equivalent to including such a reference in the preamble to the Agreement.
Article 1.3 of the initial provisions states:
"The Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other existing agreements to which both Parties are party."
Given the potential of such references to facilitate inter-regime engagement, this is a clear example of an area where PTIAs exhibit greater potential engagement than BITs.

b. Article providing an exception for health or environmental measures

Articles providing general exceptions for environmental/ health measures are quite common in IIAs today featuring in 30/40 PTIAs (75%) and 14/40 BITs (35%) surveyed as part of this study. The wording of these exceptions can be quite broad and these provisions are often included in addition to General Exceptions explicitly or implicitly incorporating GATT Article XX/ GATS Article XIV.

Similarly to treaty exceptions, articles providing an exception for such measures represent a clear area for potential interaction between the trade and investment law regimes, given the wealth of jurisprudence in these areas in the trade regime.

Article 10.15 of the New Zealand- Malaysia FTA (2009) explicitly incorporates GATT Article XX and GATS Article XIV and contains a typical phrasing of an article providing an exception for health or environmental measures;
"Investment and Environment: Nothing in the 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

[169] "(...) 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(...) Have Agreed as follows: "

manner sensitive to environmental concerns."

This wording is quite strong in ensuring the right to regulate of the parties, and can particularly facilitate inter-regime engagement in agreements that do not incorporate GATT/GATS General Exceptions. This was the case for two of the PTIAs included in this study including the Central America- Mexico FTA (2011) and the Guatemala- Peru FTA (2011).[170]

The Canada- Honduras FTA (2013) contains a weaker phrasing of this exception whereby the parties merely recognise that it is inappropriate to relax regulatory standards;
"Article 10.15: Health, Safety and Environmental Measures
The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, those measures to encourage the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered this encouragement, it may request discussions with the other Party and the two Parties shall enter into discussions with a view to avoiding any such encouragement."

c. Expropriation Article features TRIPS exception

An exception for the issuance of compulsory licences that comply with the WTO's TRIPS Agreement featured in 29/40 PTIAs (72.5%) and 10/40 BITs (25%) surveyed as part of this study.

The New Zealand- Taiwan ECA (2013)[171] contains an example of an article that provides that expropriation provisions do not apply in relation to compulsory licences that are TRIPS compliant:
"This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter 10 (Intellectual Property)."

These provisions were given as an example in Chapter 1 of provisions that minimise conflict between the regimes. The inclusion of provisions of this sort in investment agreements shows that treaty drafters are cognisant of the effects IIAs can have on the parties' obligations in the trade regime. Provisions such as these have been described as tools for "managing potential conflicts" between investment treaty law and WTO law.[172]

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[170] Article 12.8 of Guatemala- Peru FTA is almost identical to Article 10.15 of the New Zealand- Malaysia FTA: "*2. Nada en este Capítulo se interpretará en el sentido de impedir que una Parte adopte, mantenga o haga cumplir cualquier medida por lo demás compatible con este Capítulo, que considere apropiada para asegurar que las inversiones en su territorio se efectúen tomando en cuenta inquietudes en materia ambiental*." Translated as: "2. Nothing in this Chapter shall be construed as preventing a Party from adopting, maintaining or enforcing any measure otherwise compatible with this Chapter, that it considers appropriate to ensure that investments in its territory are made in a manner sensitive to environmental concerns."

[171] See New Zealand- Taiwan ECA (2013), Chapter 12, Article 13 (5)

[172] See Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 11

d. Expropriation Article features reference to public objectives

The expropriation provision in investment agreements may feature an exception for measures taken in furtherance of public welfare in areas such as health or the environment.
Such an exception may be contained within the investment chapter itself or as an Annex to the Agreement. These exceptions featured in 21/40 PTIAs (52.5%) and 10/40 BITs (25%) surveyed as part of this study. Such an addition aims to protect the state from claims of expropriation where it has a legitimate regulatory purpose.

The following is an example of the phrasing of an article providing a public welfare exception for expropriation:
"A non-discriminatory measure or series of measures of a Party designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation, except in rare circumstances, such as when a measure or a series of measures is so severe in the light of its purpose that it cannot be reasonably considered as having been adopted and applied in good faith."
-Canada- Burkina Faso (2015) Annex I, 3

Annex 9B(c)(ii) of the Korea- Peru FTA (2010) provides a non-exhaustive list of policy objectives that may justify expropriation:
"Except in rare circumstances, such as, for example, when a measure or series of measures have an extremely severe or disproportionate effect in light of its purpose, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate policy measures (for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations[FN1]."
The footnote states: "For greater certainty, the list of "legitimate public welfare objectives" in subparagraph (c)(ii) is not exhaustive."

In providing exceptions in the case of *direct* expropriation, this approach risks going too far and potentially allowing states to avoid their obligation to pay adequate compensation in cases of expropriation.[173]

e. Performance Requirements Article features reference to WTO law

Articles on performance requirements that referred to WTO law featured in 26/40 PTIAs (65%) and 8/40 BITs (20%) surveyed as part of this study. These articles on performance requirements that refer to WTO law tend to contain exceptions that are specific to this article alone unlike many other exceptions seen above that are general exceptions and apply to the entire agreement.

[173] See Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 185

Expropriation is one of the fundamental protections provided in IIAs and such exceptions represent a clear area for potential interaction between the regimes, given the wealth of jurisprudence in these areas in the trade regime.

Most of the performance requirements articles featured in this study are based on Article 8.3 of US Model BIT which states:
"(a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage (...) in its territory (...) (c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and (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 Treaty;
(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."

This article draws heavily on the wording of GATT Article XX/ GATS Article XIV which could be drawn upon by tribunals. Although the wordings are similar, they are not identical and tribunals would have to be careful of these differences of wording and context.

Article 92 of the Malaysia- Pakistan FTA (2007) provides an alternative and succinct reference to WTO law in its Article on Performance Requirements:
“1. For the purposes of this Chapter, the Parties reaffirm their commitments to the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement (hereinafter referred to as “TRIMS”) and hereby incorporate the provisions of the TRIMS, as may be amended, as part of this Chapter.
2. A Party shall, upon notification by the other Party, promptly convene consultations with the other Party on any matter relating to this Article that affects the other Party’s investors and their investments.”

f. Capital withdrawal safeguard

Articles providing for capital withdrawal safeguards featured in 16/40 PTIAs (40%) and 16/40 BITs surveyed as part of this study. These articles allow host states to limit the transfer of funds in the case of balance of payments difficulties in a manner akin to that provided for in GATS Article XII and GATT Article XII (Restrictions to Safeguard the Balance of Payments). Tribunals in both regimes should have regard to the obligations of parties at the WTO as well as under IIAs when interpreting such provisions.

Many modern IIAs now contain capital withdrawal safeguard provisions. These are "best characterised as safeguard measures" rather than as general exceptions to provisions providing for the free transfer of funds.[174] They allow host states to restrict transfers in certain

[174] Newcombe & Paradell, ‘Law and Practice of Investment Treaties: Standards of Treatment,’ *Kluwer Law International* (2009) 415

circumstances, such as in the case of balance of payments difficulties. This approach of providing for an unrestricted right to transfer funds has been called into question as a result of Malaysia's success in imposing capital controls during the 1997-98 Asian Financial Crisis.[175]

Such provisions are a shared legal norm with the trade law regime and have the potential to facilitate engagement between the trade and investment law regimes.
The GATS requires the complete liberalisation of transfers and payments but for a few circumstances. GATS XI:1 provides that: "Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments."
WTO Members can however impose restrictions on capital flows in the case of balance of payment difficulties or at the request of the IMF.[176]
Article XII of the GATS allows for restrictions on capital flows in the case of "serious balance-of-payments and external financial difficulties or threat thereof". Any restrictions must comply with certain conditions, such as being carried out in a temporary and non-discriminatory manner.[177] Article XII: 2 (d) also provides that measures shall not exceed those that are "necessary" to deal with the relevant circumstances. As outlined above in the Section on Exceptions Thinly Connected to WTO law (10.1(b)(iii)), necessity tests have been the basis of inter-regime engagement under the US-Argentina BIT.

Pasini argues that the GATS offers the widest policy space for financial stability allowing Members to adopt a wide range of measures to protect their financial stability.[178] How broadly the concept of financial stability is to be determined in the trade and investment law regimes is another matter. Pasini argues for a broad interpretation as "any variation in the fundamentals of the economy" directly impacts the stability of the financial system.[179]

Some of the provisions, including Article 21.5 of the China- Korea FTA (2015), directly refer to the WTO Agreement:
“Where the Party is in serious balance of payments and external financial difficulties or threat thereof, it may, in accordance with the WTO Agreement and consistent with the Articles of *Agreement of the International Monetary Fund*, adopt measures deemed necessary.”
Article 100 of the Malaysia- Pakistan FTA (2007) also notes that "financial services" shall have the same meaning as in the Annex on Financial Services to the GATS.

Article 12 of the Canada- China BIT (2012) does not refer to the WTO, but like the WTO Agreement, provides for the need to be consistent with the Articles of Agreement of the IMF:

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[175] In response to this crisis, South Korea, Thailand and Indonesia followed IMF programmes which relied on liberalising financial markets and undergoing structural reforms. Malaysia imposed capital controls, which led to a hostile reaction from the IMF but ultimately to a quicker recovery. See Kaplan & Rodrik, 'Did the Malaysian Capital Controls Work?' *NBER Working Paper No. 8142* (2001)
[176] GATS Article XI: 2
[177] GATS Article XII: 2: "The restrictions referred to in paragraph 1: (a) shall not discriminate among Members; (b) shall be consistent with the Articles of Agreement of the International Monetary Fund; (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member; (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1; (e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves."
[178] Pasini, F.L., 'Movement of Capital and Trade in Services: Distinguishing Myth from Reality Regarding the GATS and the Liberalization of the Capital Account,' *Journal of International Economic Law* Vol. 15(2) (2013) 613
[179] Pasini, F.L., 'Movement of Capital and Trade in Services: Distinguishing Myth from Reality Regarding the GATS and the Liberalization of the Capital Account,' *Journal of International Economic Law* Vol. 15(2) (2013) 614

"4. (a) Nothing in the Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures that restrict transfers when the Contracting Party experiences serious balance of payment difficulties, or the threat thereof, provided that such measures:
o* (i) are of limited duration, applied on a good-faith basis, and should be phased out as the situation calling for imposition of such measures improves;
o (ii) do not constitute a dual or multiple exchange rate practice;
o (iii) do not otherwise interfere with an investor's ability to invest, in the territory of the Contracting Party, in the form chosen by the investor and, as relevant, in local currency, in any assets that are restricted from being transferred out of the territory of the Contracting Party;
o (iv) are applied on an equitable and non-discriminatory basis;
o (v) are promptly published by the government authorities responsible for financial services or central bank of the Contracting Party;
o (vi) are consistent with the *Articles of Agreement of the International Monetary Fund* done at Bretton Woods on 22 July 1944; and
o (vii) avoid unnecessary damage to the commercial, economic and financial interests of the other Contracting Party."

3) Dispute Settlement provisions

A further six elements are coded under the heading 'Dispute Settlement provisions' which evidence engagement between the two regimes. Inter-regime engagement is facilitated where the agreements of the two regimes contain provisions on core procedural rules that are somewhat harmonised.

The elements refer to provisions for the following;

- Amicus curiae submissions
- Transparency in proceedings
- Avoidance of any conflict of interest for arbitrators
- Provision providing for review of dispute settlement
- Reference to 'Applicable rules of international law'
- Binding Interpretations

a. Amicus curiae submissions

Provisions that authorise tribunals to accept amicus curiae submissions featured in 19/40 PTIAs (47.5%) and 5/40 BITs (12.5%) surveyed as part of this study. These provisions are examples of provisions that harmonise procedural rules between the regimes. WTO tribunals may look for information from relevant sources in line with Article 13 DSU.[180]

* The bullet points and roman numerals are represented in the same way as they feature in the Agreement

[180] Article 13: Right to Seek Information
1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

A typical phrasing of an article providing for amicus curiae submissions in investment disputes reads as follows:
"A Tribunal shall have the authority to consider and accept written submissions from a person or entity that is not a disputing party and that has a significant interest in the arbitration. The Tribunal shall ensure that any non-disputing party submission does not disrupt the proceedings and that neither disputing party is unduly burdened or unfairly prejudiced by it."
-Canada- Colombia FTA (2008), Article 831: Submissions by a Non-Disputing Party

b. Transparency in proceedings

Articles that provide for transparency in proceedings featured in 19/40 PTIAs (47.5%) and 5/40 BITs (12.5%) surveyed as part of this study. This is a further example of a provision that harmonises procedural rules between the regimes. Both regimes have been criticised for being closed and secretive in the past. Closed hearings are still the norm at the WTO and only recently have some hearings been opened to the general public via delayed broadcast at the request of the participants.[181]

For the purpose of this study, ISDS proceedings are deemed transparent if: 1) certain key documents have to be made available to the public; and 2) hearings are open to the public.

A typical phrasing of an article providing for transparency in investment disputes reads as follows:
"1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public: …(b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party…(e) orders, awards, and decisions of the tribunal.
2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure."
-Colombia- US FTA (2006), Article 10.21: Transparency of Arbitral Proceedings

c. Avoidance of any conflict of interest for arbitrators

Articles providing for the avoidance of a conflict of interest for arbitrators featured in 12 of the PTIAs (30%) and 6 of the BITs (15%) surveyed as part of this study.

Article 25.2 of the Canada- Côte d'Ivoire BIT (2014) gives a simple formulation of an article providing for the avoidance of any conflict of interest:

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2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Annex 4.

[181] See for example, WTO website 'Registration opens for public viewing of oral hearing in "US — Tax Incentives" appeal': https://www.wto.org/english/news_e/news17_e/hear_ds487_16jun17_e.htm

“They shall be independent of, and not be affiliated with or take instructions from, a Party.”

These provisions have been phrased differently in earlier BITs. Article 106.9 of the Japan-Thailand BIT (2007) provides:
“Unless the disputing parties agree otherwise, the third arbitrator shall not be of the same nationality as the disputing investor, nor be a national of the disputing Party, nor have his or her usual place of residence in the Area of either of the Parties, nor be employed by either of the disputing parties at the time of his or her appointment.”

These two provisions cover largely the same subject matter although the wording of the Japan- Thailand BIT is slightly more detailed. It allows the parties to waive the conflict of interest requirement for a potential arbitrator. It is also states that a “usual place of residence” is sufficient for an arbitrator to be deemed to be affiliated to a party.

Inter-regime engagement is facilitated by procedural rules such as these that are somewhat harmonised between the two regimes. The WTO also seeks to avoid any conflict of interest for tribunal members as provided for in Article 17.3 DSU:
"The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. (...) They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest."

d. Provision providing for review of dispute settlement

Articles providing for the review of dispute settlement featured in 29 of the PTIAs (72.5%) and 24 of the BITs (60%) surveyed as part of this study. The final provisions of IIAs often contain a provision for agreeing amendments to International Investment Agreements. These are counted as providing for review of dispute settlement.
Article 24.02 of the Taiwan- Nicaragua FTA (2006) states, “The Parties may agree on any amendment or addition to this Agreement.”

Some Agreements provide for the establishment of a Committee on Investment with functions including the ability “to review the implementation of this Chapter” and to “consider any other matters related to this Chapter”.[182]

Three Canadian Agreements are more specific concerning the powers of the Committee.[183]
Article 824.2 of the Canada- Peru BIT (2006) states:
“The Commission shall have the power to make rules supplementing the applicable arbitral rules and may amend any rules of its own making. Such rules shall be binding on a Tribunal established under this Section, and on individual arbitrators serving on such a Tribunal.”

The more detailed Agreements make it easier for review of dispute settlement by the parties through the creation of formal mechanisms for this process. Nonetheless, all of these textual constructions provide for review and are given a weighting of 1.

[182] AANZFTA, Chapter 11, Article 17.3(b) & (c)
[183] Canada- Honduras FTA (2013) Article 10.23.2, Canada Peru BIT (2006) Article 824.2, and Canada- Colombia FTA (2008) Article 822.2

e. Reference to ‘Applicable rules of international law’

Articles referring to ‘Applicable rules of international law’ as governing the agreement featured in 19 of the PTIAs (47.5%) and 17 of the BITs (42.5%) surveyed as part of this study.
These provisions typically provide that disputes should be decided in accordance with the text of the Agreement and rules of international law, while maintaining the right of the Contracting Parties to give authoritative interpretations on provisions.
A typical phrasing of an article referring to applicable rules of international law reads as follows:

“1. Subject to paragraph 2, when a claim is submitted to arbitration under this Section, a Tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."
-Chile- Japan EPA (2007), Article 93: Governing Law

Inter-regime engagement is facilitated by provisions such as these that recognise that investment agreements are situated within the wider context of public international law and require tribunals to resolve disputes in accordance with applicable rules of international law. These applicable rules of international law include Article 31.3(c) of the VCLT which provides for the taking into account of "any relevant rules of international law applicable in the relations between the parties".
Such provisions may be an expression of the desire of the parties for trade principles, as relevant rules of international law between the parties, to be included in the analysis of an investment chapter's provisions. However this is less clear than in instances where an explicit reference to trade law is made such as the requirement that a tribunal member should have knowledge of international trade law.

f. Binding Interpretations

Articles that give the parties the authority to issue ‘binding interpretations' as to their interpretation of a provision featured in 24/40 PTIAs (60%) and 7/40 BITs (17.5%) surveyed as part of this study. Some IIAs provide for the possibility for the parties to issue binding interpretations of the agreement. A classic example of this is NAFTA Article 1131(2)[184] and a more recent one is TPP.
This has the potential to impact upon engagement between the trade and investment regimes as the parties can either use such interpretations to encourage or discourage tribunals from interpreting provisions narrowly or expansively. Binding interpretations may then influence a tribunal's readiness to look across the aisle to the trade or investment regime when interpreting the provisions of an agreement.

[184] "Article 1131: Governing Law
(...) 2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

The NAFTA Free Trade Commission (FTC) issued a binding interpretation in 21 July 2001 in response to what it considered to be an expansive interpretation of the Fair and Equitable Treatment standard in *Pope & Talbot*.[185] The tribunal found that the fairness element adds to the minimum standard of treatment. The FTC then issued its interpretation equating the two standards.
Newcombe notes that although tribunals have accepted this binding interpretation, the approach has been criticised with claimants arguing that the interpretation amounted to an unauthorised amendment to NAFTA and was therefore beyond the FTC's authority.[186] The scope of the minimum standard of treatment remain ambiguous however and tribunals have noted that any differences between them "may well be more apparent than real".[187]

4) Investment Protection provisions

Six more elements (plus one additional element) are coded in the category 'Investment Protection provisions' as evidencing engagement between the trade and investment law regimes. Inter-regime engagement is facilitated where the agreements of the two regimes contain shared legal norms that are somewhat harmonised. Kurtz notes that states are not only safeguarding their ability to regulate in the public interest through the incorporation of exceptions and other flexibilities, but also doing so by "tightening substantive obligations" in areas such as expropriation.[188]
Shared legal norms and concepts make up the "unifying core" of trade and investment law.[189] Such norms and concepts may be largely homogenous or subject to great variation across the trade and investment law regimes. Section 9.1 categorises five different types of engagement in relation to general exceptions. Concepts such as 'likeness' and 'less favourable treatment' are largely homogenous across the regimes, particularly in terms of their wording, notwithstanding the fact that factual and contextual differences may lead to differences in their interpretation across the regimes.

The elements refer to treaties that provide for the following;

- National Treatment
- Less favourable treatment
- Fair and equitable treatment

[185] See Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) 273
[186] For discussion of this, see Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) 272-274
[187] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (2006) para 291, reads as follows: Whatever the merits of this controversy between the parties may be, it appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied."
[188] See Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 183-185
[189] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 24

- FET with a reference to Customary International Law
- Expropriation
- Free transfer of funds
- Additional norms

a. National Treatment

National treatment provisions aim to ensure that products, services, investment and items of intellectual property are not discriminated against once they have crossed a border. It is a relative standard whereby the treatment afforded to investors and foreign exporters is compared to that given to their domestic competitors.
A national treatment provision featured in all of the PTIAs and all of the BITs surveyed as part of this study. The following is an example of the phrasing of a simple provision for national treatment:
"Each Party shall accord to investments and activities associated with such investments by the investors of the other Party treatment no less favourable than that which it accords to the investments and associated activities by its own investors."
-China- Portugal BIT (2005), Article 3.2 (Treatment of Investment)

National Treatment is a shared legal obligation of the trade and investment law regimes and is one of only two provisions to features in all 80 agreements of this study. The second provision to feature in all agreements is the 'less favourable treatment' provision (below), a wording that features in nearly all National Treatment provisions.

Within PTIAs, the national treatment provision may feature across a variety of chapters. For example, in the China- Korea FTA (2014), a national treatment provision provided substantive rights for parties in four chapters including those on Market Access For Goods (2), Trade In Services (8), Financial Services (9), and Investment (12). It may also feature in Chapters on Intellectual Property.[190]
Unlike MFN provisions, National Treatment provisions tend not to be subject to exceptions for RTAs, in relation to tax matters etc. as the context often doesn't necessitate such exceptions.

b. Less favourable treatment

A second requirement for a complainant to demonstrate a breach of national treatment, MFN treatment *inter alia* is to show that their good, service or investment received less favourable treatment compared to their domestic equivalent.
While a likeness test is often contained in the wording of these provisions, less favourable treatment is nearly always contained in agreements across the trade and investment law regimes. The concept of less favourable treatment featured in all 40 of the PTIAs and all 40 of the BITs surveyed as part of this study. What constitutes 'less favourable treatment' varies across Agreements and regimes despite its largely homogenous wording across the regimes.

[190] Canada- Korea FTA (2014) Article 16.6

Two fundamentally different and inconsistent ways of identifying less favourable treatment have been used in the trade and investment law regimes.
The first is a "diagonal test," which tests whether there are any imports receiving less favourable treatment than any like domestic products. The second is called the "asymmetric impact test," which compares in aggregate both domestic sub-groups with both foreign sub-groups. The treatment received by imports is only less favourable than that accorded to like domestic goods if the burden arising from the measure is heavier for imports than for domestic goods.[191]

As Kurtz points out, some national treatment clauses refer to the obligation not to accord treatment less favourable to investments of the other party than "that which it accords to investments" of its own national or those of any third State. [192] The plural form of investment is "critical" here.[193]
The most favoured domestic investor reading doesn't work with such a text.
The text suggests that the tribunal must consider "the pattern and weighting as it falls across the groupings" of investors, rather than focusing on individual investors.[194]
This reading is not problem free however, as can be see in the case of NAFTA Article 1103 which provides for most favourable treatment from provinces although it previously referred to investments in the plural.
The most favoured investor standard has been affirmed in successive cases and is the prevailing approach "despite its highly questionable foundations". Absent a requirement for intent, it has been said to set a "very low burden" for breach in a system that already "confers broad rights"[195]

The following is an example of how the concept of 'less favourable treatment' is included in national treatment provision of an investment chapter:
"Each Party shall accord to investors of the other 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."
-Australia- Chile FTA (2008), Article 10.3.1 (National Treatment)

Article 3(2) of the Germany- Pakistan BIT (2009) gives the following examples of what may constitute less favourable treatment in national treatment and MFN provisions, subject to several public policy exceptions:
"The following shall, in particular be deemed 'treatment less favorable': unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials; of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed 'treatment less favorable'."

[191] See Ehring, Lothar, 'De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment – or Equal Treatment?' *Jean Monnet Working Paper* 12/01, 3-4
[192] See for example, UK Ethiopia BIT Article 3, Mexico Korea BIT Article 3, Switzerland Kenya BIT Article 4.2, Taiwan Grenadine BIT Article 3.1
[193] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016)112
[194] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016)113
[195] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016)115

c. Fair and equitable treatment

The standard of Fair and Equitable Treatment (FET) is widespread in investment agreements and featured in 36 of the PTIAs (90%) and 39 of the BITs (97.5%) surveyed as part of this study. Fair and equitable treatment is an absolute standard meaning investors do not need to seek a comparator to show breach of an Agreement.

Article 4.1 of the Bahrain- Mexico BIT (2012) is an example of a typical phrasing of the FET standard in an investment treaty:
"4.1. Each Contracting Party shall accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty: (a) 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;"

The drafting of FET provisions varies considerably across IIAs with some agreements including it as an independent standard while others provide for FET as part of the minimum standard of treatment. As seen above, articles may pair the FET standard with other standards, such as 'full protection and security'. The FET standard is often contained in a provision concerning the 'Minimum Standard of Treatment'.
The relationship between FET and the minimum standard of treatment can be a complicated one. Uncertainty as to the scope of FET led to the NAFTA Free Trade Commission issuing a binding interpretation of NAFTA Article 1105 equating FET with the minimum standard of the treatment.
The scope of the terms 'fair', 'equitable' and 'treatment' can be ambiguous when no other guidance is offered to tribunals. Article 2.4 of the EU- Singapore Investment Protection Agreement (2018) gives guidance to tribunals in relation to some of the key interpretative questions surrounding FET.[196] This Article elucidates on the meaning of FET by setting out

[196] Article 2.4 Standard of Treatment
1. Each Party shall accord in its territory to covered investments of the other Party fair and equitable treatment[8] 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[9] 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[10] 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[11].
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.
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[12] 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 authority[13] 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.

the types of measures that may result in a breach of FET and the factors a tribunal may take into account in determining whether there has been a breach.

While the FET standard does not have a direct trade law equivalent, it does impact upon engagement as it gives rise to considerations for tribunals that are shared legal concepts of the trade and investment law regimes. For example, a tribunal considering a case under Article 2.4 of the EU- Singapore Investment Protection Agreement could look to how concepts such as due process,[197] arbitrary conduct,[198] and legitimate expectations[199] have been dealt with in the trade regime.
Kurtz argues that the FET standard also has a "potential, albeit loose" commonality with WTO law[200] in cases where a state relies on scientific inquiry in assessing risk regulation. Unlike investment law, the WTO has advanced methodologies for dealing with claims based on scientific inquiry under the WTO's SPS Agreement.
Kurtz contends that certain types of measures could be examined using a science-based approach and that WTO law could be a useful comparator for investment tribunals in this respect.[201] Tribunals should offer a "structured, rigorous and process-driven methodology" when assessing breach and that a "baseline" that build on WTO law would do just that.[202]

d. FET with a reference to Customary International Law

The FET standard has been coupled with a reference to customary international law in many investment agreements including 30/40 PTIAs (75%) and 17/40 BITs (42.5%) surveyed as part of this study.
Where such a reference to customary international law is made, it limits the FET standard to

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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.

[8]Treatment in this Article includes treatment of covered investors which directly or indirectly interferes with the covered investors' operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of their covered investments
[9] For greater certainty, the sole fact that the covered investor's claim has been rejected, dismissed or unsuccessful does not in itself constitute a denial of justice.
[10] For greater certainty, representations made so as to induce the investments include the representations made in order to convince the investor to continue with, not to liquidate or to make subsequent investments.
[11] For greater certainty, the frustration of legitimate expectations as described in this paragraph does not, by itself, amount to a breach of paragraph 2, and such frustration of legitimate expectations must arise out of the same events or circumstances that give rise to the breach of paragraph 2.
[12] For the purposes of this paragraph, a "contractual written obligation" means an agreement in writing, entered into by a Party, itself or through any entity mentioned in paragraph 7 of Article 1.2 (Definitions), with a covered investor or a covered investment whether in a single instrument or multiple instruments, that creates an exchange of rights and obligations, binding both parties.
[13] For the purposes of this Article, a Party frustrates or undermines a commitment through the exercise of its governmental authority when it frustrates or undermines the said commitment through the adoption, maintenance or non-adoption of measures mandatory or enforceable under domestic laws.
[197] WTO law has considerable jurisprudence on due process. See 'Cook, G, 'A Digest of WTO Jurisprudence on Public International Law Concepts and Principles,' *Cambridge University Press* (2015) Chapter 6: Due Process.' Cook reports that "due process" has been referred to over 2,300 times in 189 different WTO reports, awards and decisions (p107).
[198] What constitutes arbitrary conduct is considered in WTO law in areas such as the chapeau of GATT Article XX/ GATS XIV which protects against measures applied in a manner which would constitute "arbitrary or unjustifiable discrimination".
[199] 'Legitimate expectations' were considered by the Panel and Appellate Body in *India- Patents (US)*. See AB Report para 45
[200] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016)137
[201] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016)144
[202] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 167

the type of treatment investors can expect under customary international law, thus reducing the potential for inter-regime engagement.

Some wordings, such as Article 4 of the Japan- Colombia BIT merely link FET to customary international law:
"1. Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

Other wordings are more restrictive such as Article 10.10 of the New Zealand- Malaysia FTA (2009) on the Minimum Standard of Treatment:
"1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security.
2. For greater certainty: (a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings; (…)
(c) 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 under customary international law, and do not create additional substantive rights."

Article 11.5 on the MST in KORUS (Korea- US FTA) (2007) makes this point even clearer:
"1. Each Party shall accord to covered investments treatment *in accordance with customary international law, 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 minimum 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(...)." (emphasis added)

e. Expropriation

Provisions protecting investors against expropriation are core elements that feature in the vast majority of investment agreements including 39/40 PTIAs (97.5%) and 39/40 BITs surveyed as part of this study.[203]

[203] Article 11 of the Japan- Iraq BIT (2012) is an example of a provision on Expropriation and Compensation:
"1. Neither Contracting Party shall expropriate or nationalise investments in its Area of investors of the other Contracting Party or take any measure equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation") except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) upon payment of prompt, adequate and effective compensation pursuant to paragraphs 2, 3 and 4; and (d) in accordance with due process of law and Article 5.
2. The compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.
3. The compensation shall be paid without delay and shall include interest at a commercially reasonable rate, taking into account the length of time until the time of payment. It shall be readily realisable and freely transferable, and shall be freely convertible into the currency of the Contracting Party of the investors concerned and into freely usable currencies, at the market exchange rate prevailing on the date of expropriation.
4. Without prejudice to the provisions of Article 17, the investors affected by expropriation shall have a right of access to the courts of justice or administrative tribunals or agencies of the Contracting Party making the expropriation to seek a prompt review of the investors' case and the amount of compensation in accordance with the principles set out in this Article."

Of the eight provisions in the category 'Substantive Provisions', expropriation is the only one to be attributed a weighting of 1/5, while the average of the eight is 3.25 (see Annex 1). Expropriation is not a shared legal norm of the trade and investment law regimes and unlike the Fair and Equitable Treatment standard, it does not have an equivalent by analogy in the trade regime.
However, two of the provisions in the category of 'Host State Flexibilities' depend on there being an expropriation provision in the agreement. As seen above, an increasingly common feature of expropriation provisions is to include an exception for: 1) TRIPS compliant compulsory licences; and 2) measures taken in furtherance of public welfare objectives. It is on this basis that the inclusion of expropriation provisions is deemed to facilitate inter-regime engagement.
Expropriation provisions typically protect against direct and indirect expropriation unless the expropriation: i) is for a public purpose; ii) is nondiscriminatory; iii) is compensated with prompt, adequate and effective compensation; and iv) conducted in line with due process. The compensation must also be equivalent to the fair market value, be paid without delay, and be convertible into freely usable currencies.

f. Free transfer of funds

It is a fundamental concern of foreign investors that they are able to transfer funds relating to their investment into and out of the host state. Provisions providing for the free transfer of funds are quite prevalent in IIAs and featured in 28/40 PTIAs and 38/40 BITs surveyed as part of this study.

Articles in early IIAs often provided for the unrestricted right to transfer funds. As seen above in the category on 'Host State Flexibilities', many modern IIAs now contain capital withdrawal safeguard provisions that allow host states to restrict transfers in certain circumstances, such as in the case of balance of payments difficulties.
Such provisions are a shared legal norm with the trade law regime and have the potential to facilitate engagement between the trade and investment law regimes. The GATS requires the complete liberalisation of transfers and payments but for a few circumstances. GATS XI:1 provides that: "Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments."
WTO Members can however impose restrictions on capital flows in the case of balance of payment difficulties or at the request of the IMF.[204]
Article XII of the GATS allows for restrictions on capital flows in the case of "serious balance-of-payments and external financial difficulties or threat thereof". Any restrictions must comply with certain conditions, such as being carried out in a temporary and non-discriminatory manner.[205]

[204] GATS Article XI: 2
[205] GATS Article XII: 2: "The restrictions referred to in paragraph 1: (a) shall not discriminate among Members; (b) shall be consistent with the Articles of Agreement of the International Monetary Fund; (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member; (d) shall not exceed those necessary to deal with the

Article 6 of the Guatemala- Russia BIT (2013) is an example of a provision on the Free Transfer of Payments:
"1. In accordance with the legislation of its State each Contracting Party shall guarantee to investors of the other Contracting Party a free transfer abroad of payments related to their investments, and shall include in particular: a) returns; b) funds in repayment of loans and credits recognized by both Contracting Parties as investments, as well as accrued interest; c) proceeds from the partial or full liquidation or sale of investments; d) compensation, indemnification or other settlements referred to in Articles 4 and 5 of the present Agreement; e) wages and other remunerations received by investor and nationals of the State of the latter Contracting Party who have the right to work in the territory of the State of the former Contracting Party in relation to the investments.
2. The transfer of payments referred to in paragraph 1 of this Article shall be made without undue delay in a freely convertible currency at the rate of exchange applicable on the date of the transfer pursuant to the foreign exchange legislation of the State of the Contracting Party in the territory of which the investments are made."

Articles covering free transfer of payments related to investments typically contain; 1) a list of items covered; and 2) that this be without undue delay in a freely convertible currency at the rate of exchange applicable on the date of the transfer. Other additional elements may include; 1) Exceptions allowing a delay where the host state is ensuring compliance with tax matters; and 2) an exception in the event of serious balance of payments, external financial difficulties, economic sanctions etc.

g. Additional norms

Additional norms that evidence increased engagement between the trade and investment law regimes were found in 14/40 PTIAs and 14/40 BITs.
These norms were not counted individually as a study of 24 provisions under three categories was favoured in terms of balance. Furthermore, some of these provisions were not very prevalent, some were not as strong indicators of engagement as the 24 provisions considered, while other were only included in a limited number of agreements or by a limited number of countries.

The additional norms found in the PTIAs & BITs considered in this study included;

1) Security exceptions

Article 15.3 of the New Zealand- Thailand EPA (2005) contained this provision, which is very similar to the security exceptions found in GATT, GATS and TRIPS. Such articles were found in several BITs and PTIAs and have clear potential for inter-regime engagement.
Article 15.3 states:
"Security Exceptions: Nothing in this Agreement shall be construed:
(a) to require any Party to furnish any information the disclosure of which it considers contrary to its essential security interests;

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circumstances described in paragraph 1; (e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves."

(b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests:
(i) relating to fissionable materials or the materials from which they are derived;
(ii) 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) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;
(iv) taken in time of war or other emergency in international relations; or
(c) to prevent any Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

2) Reference to full respect for the TRIPS Agreement:

Article 9.12.4 of the Korea- Vietnam FTA (2015) contained this provision, stating:
"Nothing in this Chapter shall be construed to derogate from the rights and obligations under international agreements in respect of protection of intellectual property rights to which the Parties are party, including the TRIPS Agreement and other treaties concluded under the auspices of the World Intellectual Property Organization."

3) Articles on non-conforming measures referring to TRIPS:

Article 12.7.3 of the Guatemala- Peru FTA (2011) contained this provision, stating:
" Articles 12.2 (National Treatment) and 12.3 (MFN Treatment) do not apply to any measure adopted under the exceptions under Articles 3, 4 and 5 of the WTO TRIPS Agreement."[206]

4) Exceptions allowing for a derogation where TRIPS & Art IX of the WTO respected

Article 10.9.4 of the Canada- Honduras FTA (2013) contained this provision, stating:
"In respect of intellectual property rights, a Party may derogate from Articles 10.4, (National Treatment) 10.5 (MFN Treatment) and subparagraph 1(f) of 10.7 (Performance Requirements- transfer technology) in a manner that is consistent with the TRIPS Agreement and with the waivers to the TRIPS Agreement adopted pursuant to Article IX of the WTO Agreement."

5) Articles providing that panels cannot add to or subtract from the party's rights

Article 64 on the 'Functions of Arbitral Panel (sic)' of the China- Pakistan FTA (2006) contained this provision which is reminiscent of Article 3.2 of the WTO's DSU,[207] stating:
"The arbitral panel, in their findings and recommendations, cannot add to subtract from or alter the rights and obligations provided in this Agreement."

[206] Article 12.7.3 of the Guatemala Peru FTA (2011): "Los Artículos 12.2 y 12.3, no se aplican a ninguna medida adoptada bajo las excepciones según los Artículos 3, 4 y 5 del Acuerdo ADPIC de la OMC."
[207] Article 3.2, DSU: "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. Recommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements*." (emphasis added)

6) Articles limiting level of commitment to WTO levels without prejudice to provisions on expropriation, compensation for losses and ISDS.

Article 3.5 of the Guatemala- Russia BIT (2013) contained this provision, stating:
"Without prejudice to the provisions of Articles 4 (Expropriation), 5 (Compensation for Losses) and 8 (ISDS) of the present Agreement, neither of Contracting Parties is committed by the present Agreement to accord a treatment more favourable than the treatment granted by each Contracting Party in accordance with their obligations under the Marrakesh Agreement establishing the World Trade Organization (the WTO Agreement) signed on 15 April 1994, including the obligations of the General Agreement on Trade in Services (GATS), as well as in accordance with any other multilateral arrangements concerning the treatment of investments to which the State of the both Contracting Parties are parties."

7) Articles providing for training activities in relation to conciliation and arbitral procedures

Article 15 of the Colombia- Turkey BIT (2014) provides for such training, which could facilitate inter-regime engagement in terms of procedure:
"The Contracting Parties will promote cooperation in training for an adequate representation in investor-State dispute settlement mechanisms. For that purpose, the Contracting Parties will promote specific training activities, and technical cooperation to participate in conciliation and arbitral procedures."

8) Articles reaffirming TRIMS obligations under Performance Requirements

Article 9 Canada- China BIT (2012) reaffirms the parties' TRIMS obligations:
"The Contracting Parties reaffirm their obligations under the WTO Agreement on Trade-Related Investment Measures (TRIMs), as amended from time to time. Article 2 and the Annex of the TRIMs are incorporated into and made part of this Agreement."
9) Articles referring to party/ investor rights under Article IX & X of WTO Agreement

Article IX.8 of the Canada- Slovakia BIT (2010) contains such a provision, stating:
"Any measure adopted by a Contracting Party in conformity with a decision adopted, extended or modified by the World Trade Organization pursuant to Articles IX:3 or IX:4 of the WTO Agreement shall be deemed to be also in conformity with this Agreement. An investor purporting to act pursuant to Article X (Settlement of Disputes between an Investor and the Host Contracting Party) of this Agreement may not claim that such a conforming measure is in breach of this Agreement."

10) Articles providing that more favourable investment provisions in future agreements with other parties can be invoked by investors

Article 10 on 'Application of Other Rules' of the BLEU (Belgium-Luxembourg Economic Union)- Oman BIT (2008) provided for such a provision, stating:
"If the laws of either Contracting Party Or their existing obligations under International Law at present or established hereafter by the Contracting Parties, in addition to the present Agreement, contain provisions whether general or specific entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such provisions to the extent that they are more favourable, shall prevail

over the present Agreement and the investors of the other Contracting Party shall be entitled to avail themselves of the provisions that are the most favourable to them."

11) Articles excluding the extension of favourable treatment accorded through multilateral Intellectual Property Agreements

Article 22 on Intellectual Property Rights of the Japan- Peru BIT (2008) is an example of such a provision, and provides:
"1. Nothing in this Agreement shall be construed so as to derogate from the rights and obligations under multilateral agreements in respect of protection of intellectual property rights to which the Contracting Parties are parties.
2. Nothing in this Agreement shall be construed so as to oblige either Contracting Party to extend to investors of the other Contracting Party and their investments treatment accorded to investors of a non-Contracting Party and their investments by virtue of multilateral agreements in respect of protection of intellectual property rights, to which the former Contracting Party is a party."

12) Articles providing that the agreement does not affect Intellectual Property Agreements already signed

Article 8.3 on the 'Application of other provisions' in the Libya- Spain BIT (2007) contains such a provision, stating:
"Nothing in this Agreement shall affect the provisions established through international agreements in relation to Intellectual Property Rights and industrial rights in force on the date of its signature."[208]

[208] Libya- Spain BIT, Article 8.3: "Aplicación de otras disposiciones. (...) 3. Nada de lo dispuesto en el presente Acuerdo afectará a las disposiciones establecidas mediante acuerdos internacionales en relación con los derechos de propiedad intelectual e industrial vigentes en la fecha de su firma."

2.10. Conclusion

This chapter examined some key questions in relation to this thesis, including: 1) whether there is more evidence of engagement between trade and investment in PTIAs than in BITs; 2) whether there is evidence of increasing engagement between the regimes over time; and 3) whether there is evidence of increasing engagement in the practice of individual countries over time.[209]

Section 2.4 & 2.6 tested four hypotheses; two of these considered whether PTIAs are increasing engagement between the trade and investment law regimes in relation to the set of Agreements as a whole (H1) and in relation to six key provisions (H3).
The second two of these hypotheses considered whether engagement is increasing over time in relation to the set of Agreements as a whole (H2) and in relation to six key provisions (H4).
For H1 and H3, it was demonstrated that there is more evidence of engagement in PTIAs than in BITs for the set of agreements as a whole, as well as in each individual category.
For H2 and H4, it was demonstrated that there is more evidence of engagement in T3 than in T2, and in T2 compared to T1 for the agreements as a whole, and in each individual category.

This chapter also looked at the six most recent PTIAs and BITs of Japan, US and Canada and found that in each case provisions evidencing inter-regime engagement were: 1) more common in PTIAs than in BITs; and 2) increased over time.

Six hypotheses were tested and each turned out to be correct.
To conclude, in general PTIAs tend to provide for greater levels of inter-regime engagement, but certain BIT provisions may do so to an even greater extent. The landscape of IIAs is marked mostly by diversity of agreements.

[209] This is tested specifically in relation to three time periods: 1) 2005-07; 2) 2008-11; and 3) 2012-15.

Part II

Chapter 3- Preambles & the right to regulate

Introduction

Engagement between trade and investment law was described in Chapter 1 as occurring wherever the content of one of the regimes has a parallel in the other or wherever there are cross-regime references in dispute settlement by the parties or the tribunal or parallels in the practices of tribunals.
Preambles are a part of this regime 'content' and this chapter looks at the extent to which engagement already exists between the two regimes (sections 1-3), whether this should influence tribunals (sections 4& 5), and whether PTIAs have any kind of an impact on this engagement (section 6).

This chapter considers the role of preambles within the trade and investment law regimes as well as in terms of engagement between the two regimes. The role of preambles is the subject of a full chapter in this thesis given its importance in either facilitating or excluding the possibility of inter-regime engagement. Preambles set out the object and purpose of a treaty, one of the primary considerations in treaty interpretation, and this is why they have such an important role in facilitating or excluding engagement.

Article 31(1) of the Vienna Convention on the Law of Treaties tells us that a treaty is to be interpreted in terms of its ordinary meaning in light of its object and purpose.[210] Article 31(2) tells us that preambles make up part of the context for the purposes of treaty interpretation.[211] Examples of these objects and purposes within the investment law context include affirming the government's right to regulate, reference to promoting investment, reference to promoting sustainable development, reference to building upon WTO commitments, and committing not to relax standards.

Preambles regularly guide tribunals in interpreting treaty obligations under IIAs and the WTO Agreements.[212] However, they generally do not provide legally enforceable rights in and of themselves. There is a general understanding that preambles do not create independent legal rights or obligations in international investment agreements.[213] The tribunal in *Bayindir* described it as "doubtful"[214] that, "in the absence of a specific provision in the BIT itself, the sole text of the preamble constitutes a sufficient basis for a self-standing fair and equitable treatment obligation under the BIT."[215] It has similarly been confirmed by a GATT Panel that objectives contained in the preamble generally do not generate substantive legal commitments.[216]
As preambles usually do not provide legally enforceable rights in and of themselves, states should exercise caution in including rights they wish to be legally enforceable exclusively within the preamble. If the parties wish to create a legally enforceable right, they can supplement a reference to a particular right in the preamble with a separate article covering the same right within the main body of the treaty text.[217] An example of this practice would be Agreements that refer to the right to regulate in the preamble as well as in a separate article elsewhere in the Agreement.[218]

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[210] Vienna Convention on the Law of Treaties, General rule of interpretation, Article 31.1: "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."
[211] Vienna Convention on the Law of Treaties, General rule of interpretation, Article 31.2: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes(…)"
[212] For an account of this in investment law, see Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) §3.5
[213] See, for example, Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) 124. See also Titi, Aikaterina, 'The right to regulate in international investment law,' *Hart Publishing* (2014) 115
[214] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, Award ICSID Case No. ARB/03/29 (2009) para 230
[215] The relevant section of the Turkey- Pakistan BIT's preamble reads as follows: "The Islamic Republic of Pakistan acting through its President and the Republic of Turkey (…) Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources".
[216] *US- Norwegian Salmon: United States- Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, Panel Report, 30 November 1992, ADP/87 (adopted by the Committee on Anti-Dumping Practices on 27 April 1994) para 369
[217] Article 12 of Norway Model BIT (2007) on the Right to Regulate contains such a provision: "Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate Draft version 191207 11 to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns."
[218] Titi, Aikaterina, 'The right to regulate in international investment law,' Hart Publishing (2014)
Van Damme, I, 'Treaty Interpretation by the WTO Appellate Body,' Oxford University Press (2009).
See Titi for discussion of the mixed results of this practice. Titi concludes that the inclusion of these provisions in their current formulations may have the reverse effect of narrowing host state policy space if due care is not taken. Titi notes that such provisions "fall short of their ambition to introduce this right" (page 115). Provisions such as Article 12 of Norway Model BIT (2007) include the wording that nothing shall prevent a party from adopting any measure "Otherwise consistent with" this agreement and that the result of this may be to "narrow policy space rather than the opposite." Investment treaties are neutral objects. Their contents reflect the choices of their drafters. While traditionally it may have been the case that investment treaties have overly focused on protecting the rights of investors, it can equally be the case that their design may be overly focused on protecting host states' right to regulate in any circumstance it deems appropriate. (Titi page 112)

Nonetheless, treaty makers are sovereign and in some exceptional instances a preamble can have legally binding clauses.[219] The legal status of such clauses "depends on various criteria," among which is the content of the preamble.[220]

PTIAs tend to cover a wider range of areas than BITs and this is reflected in their preambles which tend to be longer and broader than those found in BITs. The content of a preamble applies to the entirety of a treaty. This could affect how a tribunal interprets the object and purpose of the agreement. For example, references to the obligations of the parties under the WTO Agreements may facilitate inter-regime engagement and as seen in Chapter 2, these are far more frequent in PTIAs than in BITs. Other preambular references relevant to inter-regime engagement include reference to the right to regulate or to sustainable development. Section 5 discusses how these could all increase engagement between the trade and investment law regimes and potentially further the cross-fertilisation of jurisprudence.

The preamble of a treaty applies to its entirety and this fundamental notion has implications for one of the main subjects of this thesis— engagement between the trade and investment law regimes. The contents of PTIA preambles inform not only the trade chapters but also the investment chapter of the agreement. Thus, those elements included in the preamble which are designed to inform the object and purpose of the trade chapter may also inform the investment chapter. In the case of a BIT, the content of the preamble is likely to be more specific to investment concerns than in a PTIA given the more restricted subject matter of BITs.
The Appellate Body in *EC-Chicken Cuts* stated that the starting point for ascertaining the object and purpose of a treaty is "the treaty itself, in its entirety". It was clarified that this does not mean that individual provisions do not have an object and purpose but rather that when interpreting them they will be "informed by, and in consonance with, the object and purpose of the entire treaty of which it is but a component".[221]

In *SGS v. Philippines*, the tribunal deemed it "legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments." Preambles affect the interpretation of treaties and have consistently done so in investment law. While some authors express scepticism, the fact remains that even slight differences in the wording of preambles are ultimately clues for tribunals as to the objectives of the parties in concluding a given treaty. The parties may be concluding a treaty that aims to offer certain cast iron guarantees to the investors of a capital exporting state in a volatile, but potentially lucrative host state. The parties may alternatively be concluding a treaty with the simple aim of encouraging investment between them, guaranteeing certain minimum protections both parties can commit to upholding with a series of exceptions for areas of crucial importance to the public good. Different treaty contexts require different preambles and in terms of the area of interest for this thesis, careful selection of the wording of a preamble is the key to striking a balance between the interests of the investor and the host state.

[219] See Orgad, Liav on the French *Conseil Constitutionnel* recognising the preamble of the French constitution's binding force in: 'The preamble in constitutional interpretation,' International Journal of Constitutional Law, Volume 8, Issue 4 (2010) 727
[220] Orgad, Liav, 'The preamble in constitutional interpretation,' International Journal of Constitutional Law, Volume 8, Issue 4 (2010) 730. Orgad states that: "Preambles are more likely to grant substantive rights when they establish "concrete norms rather than abstract ideas, such as happiness or love".
[221] *EC-Chicken Cuts* AB/R Para 238

This chapter is structured as follows. Section 1 contains reflections on the empirical results from Chapter 2 on 'an Empirical Analysis of levels of engagement in PTIAs and BITs'. Section 2 considers the basic structure of preambles from the trade and investment law regimes. Section 3 then looks at how tribunals have interpreted the objects and purposes of trade and investment agreements and when engagement is appropriate, to what extent it is appropriate, and whether tribunals should have regard to how preambles under the other regime have been interpreted.
Section 4 considers the relative importance of the text and structure of an agreement compared to its object and purpose. Section 5 considers how the inclusion of certain provisions contained in the preambles of PTIAs that haven't traditionally featured in BITs may impact upon the interpretation of treaties. Finally, section 6 concludes.

3.1. Reflections on the empirical results

Chapter One demonstrated that for the sample of treaties chosen, the presence of preambles referring to the right to regulate was more common in PTIAs than in BITs.
Such a provision featured in 31/40 PTIAs (77.5%) and 18/40 BITs (45%) contained in this study.
This provision was not only more prevalent in PTIAs than in BITs, but the provisions found in PTIAs were also on average stronger than those found in the BITs. These provisions were given a score from 0-1 based on their strength and the findings are contained in Table 1:

Table 1:

Strength	**0**	**0.2**	**0.4**	**0.6**	**0.8**	**1**	**Total**
PTIAs	9	6	4	4	3	14	40
BITs	22	2	9	6	0	1	40
Weighted score PTIAs	0	1.2	1.6	2.4	2.4	14	21.6
Weighted Score BITs	0	0.4	3.6	3.6	0	1	8.6

The weighted score for PTIAs is significantly higher than that for BITs based on the findings. For the sample of Agreements analysed, the parties were more likely to include a stronger reference to the right to regulate in a PTIA than in a BIT. This may be for many reasons such as the fact that PTIAs apply to a wider range of subject matters.
The incidence of provisions referring to the parties' WTO obligations was 39/40 for PTIAs (97.5%) and 0/40 for BITs in this study's sample. The implications of the inclusion of provisions such as those referring to the parties' WTO obligations in PTIAs rather than in BITs are considered in section 5 below.

3.2. Preambles in the trade and investment law regimes

This section looks at how preambles are structured in the WTO Agreements, and across a series of investment agreements. BITs & PTIAs have a single preamble covering the entire treaty, whereas many of the WTO Agreements contain chapter specific preambles, individual provisions with wording that indicates their purpose, as well as the introductory preamble to the Marrakesh Agreement (the WTO Agreement) that applies not just to the Agreement itself, but to all of the WTO Agreements. This section considers the structure of preambles in the two regimes.

3.2.1. The WTO Agreements

The preamble to the Marrakesh Agreement sets out the objects and purposes of the WTO. These key objects include the "elimination of discriminatory treatment" as well as; "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising *standards of living, ensuring full employment* and a large and steadily *growing volume of real income* and effective demand, and *expanding the production of and trade in goods and services*, while allowing for the optimal use of the world's resources in accordance with the objective of *sustainable development*" (emphasis added).

The WTO legal texts are the result of the Uruguay Round of negotiations and are made up of close to twenty individual Agreements. Some of these Agreements have their own preambles that contain more specific language in terms of the aims of that particular agreement.
One example of a WTO Agreement that does not contain its own preamble is the Agreement on Subsidies and Countervailing Measures. This is the only Agreement in Annex 1 to the Marrakesh Agreement without its own preamble. This was noted by the Panel in *Canada-Aircraft* which deemed it "unwise to attach undue importance" to arguments concerning the object and purpose of the Agreement as a result.[222] This does not stop the panel from going on to give what it considers to be an appropriate summary of the object and purpose of the Agreement.[223] This is not an issue for any of the 80 PTIAs or BITs included in the empirical section of this thesis as none of them contain chapter specific preambles for investment.

The inclusion of the general preamble to the Marrakesh Agreement and chapter specific preambles raises the question of how tribunals should interpret the object and purpose of an Agreement where both are present. Tribunals may be guided by both the preambles in their interpretation of a provision. Indeed, some provisions within agreements such as GATT Article III: 1 on National Treatment also have sections that indicate the purpose of the specific provision in question and are also guided by this when interpreting the object and

[222] Panel Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted on 20 August 1999, para 9.119
[223] Panel Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted on 20 August 1999, para 9.119: "[w]e consider that the object and purpose of the SCM Agreement could more appropriately be summarised as the establishment of multilateral disciplines "on the premise that some forms of government intervention distort international trade, [or] have the potential to distort [international trade]".

purpose of the Agreement.[224]

3.2.2. Investment Law

The general aim of International Investment Agreements is to promote and protect foreign investment in host states. The emphasis on promotion and protection differs among treaties, particularly in relation to whether or not pre or post-establishment rights are granted to investors. As this is a key object and purpose of investment treaties, it must be noted that it has been contested that IIAs actually attract foreign investment.[225] There has been considerable debate in this area although two recent studies have suggested that there is such an effect.[226] Berger & Busse's 2013 study suggested that PTIAs that integrate trade and investment disciplines entail significant levels of increases in foreign investment.[227] The study found "strong evidence" that the granting of pre-establishment rights in BITs and PTIAs[228] promotes bilateral FDI. The study also found that where FTAs are limited to trade liberalisation, there is an increase in exports rather than FDI.[229] It should be kept in mind however that IIAs represent a "broader promise" to foreign investors that the state will extend and safeguard competitive opportunities to them.[230]

The landscape of investment agreements is characterised by heterogeneity and this characteristic holds true for the preambles of IIAs, the form of which varies significantly across treaties and the content of which has changed significantly over time. An additional element that adds to the diversity of the landscape of IIA preambles is the variations between the styles of preamble that appear in PTIAs compared to BITs.
This section compiles a brief survey of some of the most prominent types of preambles of the old and new styles, drawing from PTIAs and BITs, and featuring some of the most important preambular elements in IIAs that have been significant in litigation or are likely to be in the future.

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[224] See GATT Article III: 1 on National Treatment on Internal Taxation and Regulation states: “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.”
[225] See Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties attract foreign direct investment? Only a bit - and they could bite,' *World Bank Policy Research Working Paper WPS3121* (2003) 22, which finds "little evidence" that BITs have stimulated additional investment. See also Karl P. Sauvant and Lisa E. Sachs, 'The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows,' *Oxford University Press* (2009)
[226] BIICL et al., 'Risk and Return- Foreign Direct Investment and the Rule of Law,' (2015) page 47, available at www.biicl.org/documents/625_d4_fdi_main_report.pdf (last accessed 25 May 2018). In this study 83% of investors stated that the absence of any investment protection treaty in force between their home state and a state in which they were considering investing affected their decision to invest while 14% stated it had no impact. Berger & Busse, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box ' *International Economics and Economic Policy* (2013)
[227] Berger & Busse, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box ' *International Economics and Economic Policy* (2013)
[228] What is referred to as a 'PTIA' in this thesis, is referred to as a 'RTA with strong investment provisions' in Berger & Busse, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box ' *International Economics and Economic Policy* (2013)
[229] Berger & Busse, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box ' *International Economics and Economic Policy* (2013) 12
[230] See Kurtz, J, ‘The WTO and International Investment Law: Converging Systems,’ *Cambridge University Press* (2016) 85

3.2.2.1. Older style agreements

An example of an old style preamble is that of the US- Ecuador BIT (1997),[231] which reads as follows:
"The Preamble states the goals of the Treaty. The Treaty is premised on the view that an open investment policy leads to economic growth. These goals include *economic cooperation*, increased flow of capital, *a stable framework for investment*, development of respect for internationally-recognized worker rights, and maximum efficiency in the use of economic resources. While the Preamble does not impose binding obligations, its statement of goals may serve to *assist in the interpretation of the Treaty*." (emphasis added)

Preambles such as this one are notable in that they focus exclusively on investment promotion and protection and don't attempt to balance this with recognition of the host state's right to regulate. Preambles that do not make any explicit reference to preserving the host state's right to regulate were common in BITs in the 1990s.[232]

This style of BIT preamble is markedly different to that of some of the older style PTIAs some of which featured more balanced preambles that included a reference to the right to regulate etc. The preamble to the NAFTA (1994) refers to the parties who have resolved to: "Preserve their flexibility to safeguard the public welfare; Promote sustainable development; (…) Build on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation;".[233]

3.2.2.2. More recent agreements

This section considers preambles in more modern IIAs, and takes as examples the two most recent PTIAs and BITs contained in this study, which offer an interesting contrast in terms of the strength of the references to the right to regulate.

The two most recent PTIAs are the Australia- China FTA (2015) and the China- Korea FTA (2015), which in terms of the strength of the preambles in promoting the right to regulate scored a maximum of 1 and a more modest 0.2 respectively.
The Australia- China FTA contains strong, seemingly binding language upholding the right to regulate "to preserve their flexibility to safeguard public welfare".[234]
The China- Korea FTA does not contain such binding language as it is only "mindful" of the role of environmental protection et al. can play in promoting sustainable development.[235]

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[231] The Treaty Between The United States Of America And The Republic Of Ecuador Concerning The Encouragement And Reciprocal Protection Of Investment, With Protocol And A Related Exchange Of Letters, Signed At Washington On August 27, 1993
[232] Other examples of such a preamble include the heavily litigated US- Argentina BIT (1994), as well as the UK- Azerbaijan BIT (1996). The main body of the preamble of the UK- Azerbaijan BIT states: "Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State; Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;".
[233] NAFTA entered into force on 1 January 1994, one year prior to the establishment of the WTO, which explains why the parties refer to the GATT rather than the WTO.
[234] "Upholding the rights of their governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare;"

How these different nexus requirements will affect the parties and investors' rights and obligations is unclear. While some preambles state that the parties are "mindful of" the principle of sustainable development, others state that the parties: "Recognizing the need to promote investment based on the principles of sustainable development;". It is a stronger statement to *recognise* a principle than it is to be *mindful of* it, and naturally the stronger the language is, the more likely the tribunal will be to uphold the host state's right to regulate. As seen above, the preamble to the Marrakesh Agreement recognises that relations should be conducted "in accordance with the objective of sustainable development" and this has helped ground defences of measures by host states before the Appellate Body.[236]

When interpreting the nexus requirements of IIA preambles, tribunals could have regard to how nexus requirements have been interpreted at the WTO. Under GATT Article XX for example, the requirement that a measure is "necessary" to fulfil a certain goal under Article XX(b) is more onerous than the requirement that a measure is "relating to" the conservation of exhaustible natural resources under Article XX(g). The Appellate Body in *Korea- Beef* found that the factors to be taken into account by tribunals in establishing necessity included: 1) the importance of the objective; 2) the contribution of the measure to the objective; and 3) the impact of the law or regulation on imports or exports.[237]
To establish that a measure is "relating to" conservation, it suffices to show that a "substantial relationship" exists between the measure and the conservation effort. It is likely that a similarly less onerous standard of proof will be observed in relation to the preambles of IIAs that contain nexus requirements that are easier to satisfy.[238] Although these interpretations of the nexus requirements of GATT Article XX do not relate to preambles, the fact that these nexus requirements and the subtle differences between them have been considered at length by WTO tribunals could provide some guidance for investment tribunals.

The two most recent BITs are the Canada- Burkina Faso BIT (2015) and the Japan- Oman BIT (2015) which scored a 0.6 and a 0.4 respectively in terms of the strength of the preambles in promoting the right to regulate.
The Canada- Burkina Faso BIT scores a little higher as it: 1) Recognises the role of protecting investors and investments in promoting sustainable development; and 2) Recognises the right to adopt measures consistent with the Agreement, but gives priority to the agreement.[239]
The Japan- Oman BIT scores lower as it only refers to recognising the ability of the parties to achieve these objectives "without relaxing health, safety and environmental measures of general application;". This recognition is not as far reaching as a commitment to uphold measures currently in place.

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[235] "MINDFUL that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development and that closer economic partnership can play an important role in promoting sustainable development;"
[236] *United States - Import Prohibition Of Certain Shrimp And Shrimp Products*, Appellate Body Report (1998) at para 12 states: "An environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the *Marrakesh Agreement Establishing the World Trade Organization*33 (the "*WTO Agreement*") acknowledges that the rules of trade should be "in accordance with the objective of sustainable development", and should seek to "protect and preserve the environment"."
[237] See *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef,* WT/DS161/AB/R, WT/DS169/AB/R, para. 164
[238] For more on this see Chapter 6 on Treaty Exceptions
[239] "RECOGNIZING that the promotion and the protection of investments of investors of one Party in the territory of the other Party help (…) promote sustainable development, RECOGNIZING the right of each Party to adopt or maintain any measures that are consistent with this Agreement and that relate to health, safety, the environment, or public welfare, as well as the difference in the Parties' respective economies;".

Similarly worded preamble sections are found in the Kenya- Slovakia BIT (2011) and Switzerland- Trinidad & Tobago BIT (2010). In fact the wordings of the three Agreements are the exact same except for the nexus requirements. The Kenya- Slovakia BIT states that the parties "Agreeing that these objectives can be achieved", while the Switzerland- Trinidad & Tobago BIT states that the parties are "convinced that" these measures can be achieved. Of the three, "Agreeing" that these objectives can be achieved as per the Kenya- Slovakia BIT represents the strongest and most binding wording and tribunals should have regard to the nuanced wordings of these nexus requirements.

3.3. Interpreting the object and purpose of trade and investment agreements

This section looks at how preambles have been interpreted in the trade and investment law regimes, before section 4 considers the potential for cross-fertilisation of approaches to the interpretation of preambles.

3.3.1. Interpreting the preamble to the WTO Agreements- a textual or holistic approach?

Todd Weiler has characterised the hallmark of the WTO interpretative approach as a "preference for literalism, supported by the teleology of economic liberalism, along with some additional references to the preambular language of the WTO Agreements".[240] How preambles have been interpreted at the WTO and whether these "additional references" embody more of a textual or a holistic approach to treaty interpretation is now considered.

The Appellate Body has described treaty interpretation as an integrated operation, where interpretative rules and principles must be understood and applied as "connected and mutually reinforcing components of a holistic exercise".[241] The Appellate Body found that it is the role of the treaty interpreter to elucidate the relevant meaning of terms by having "recourse to context and object and purpose" in finding their ordinary meaning.[242] One of the benefits of the holistic approach is that it allows greater flexibility than the textual approach. This flexibility allows tribunals to recognise the "hermeneutic value to each individual dimension" of Article 31(1) of the Vienna Convention and to "accommodate broader policy considerations" in their interpretations.[243]
Tribunals and various commentators have underlined the importance of the holistic nature of treaty interpretation at the WTO. This recognition of its importance can be traced to *US—Shrimp I*.[244] The Appellate Body found that "light from the object and purpose" of the treaty may be looked to for guidance where there is ambiguity as to the meaning of a provision.[245]

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[240] Weiler, Todd, '2002 In Review: From Expropriation to Non-Discrimination,' *Yearbook of International Environmental Law*, Volume 12, Oxford: Clarendon (2003) 28
[241] *China— Audiovisuals* Appellate Body Report para 399
[242] *China— Audiovisuals* Appellate Body Report para 399
[243] Federico Ortino 'Treaty interpretation and the WTO- Appellate Body Report in US – Gambling: a critique,' *Journal of International Economic Law 9*(1) 148
[244] *United States - Import Prohibition Of Certain Shrimp And Shrimp Products*, Appellate Body Report (1998)
[245] *United States - Import Prohibition Of Certain Shrimp And Shrimp Products*, Appellate Body Report (1998), para. 114: "It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the

The Appellate Body also stated that preambular language reflects the intentions of negotiators of the WTO Agreement, and "must add colour, texture and shading to our interpretation."[246] The object and purpose may be looked to but the Appellate Body has found that the starting point for determining this "object and purpose" is the treaty itself *in its entirety* rather than the preamble.[247] The Appellate Body went on to say that it did not believe Article 31(3) of the VCLT "excludes taking into account the object and purpose of particular treaty terms, if doing so assists the interpreter in determining the treaty's object and purpose on the whole."[248]

In *US—Shrimp I*, the Appellate Body referred to the preamble to the WTO Agreement as evidencing the commitment of the signatories to environmental protection as it explicitly acknowledges "the objective of sustainable development". It was claimed in this case that the "exhaustible natural resources" protected by GATT Article XX(g) referred to "finite resources such as minerals rather than biological or renewable resources."[249] The Appellate Body found that while Article XX was not modified in the Uruguay Round, the treaty must be interpreted in light of contemporary concerns as reflected in the preamble to the WTO Agreement which informs not only the GATT 1994 but also the other covered agreements".[250]

The holistic approach to treaty interpretation at the WTO is not without checks. No interpretation of the object and purpose of the treaty can run contrary to the express terms of the text. This serves as a check on the holistic approach and mitigates the risk that holistic interpretation will give tribunals too much flexibility when interpreting the Agreements.[251] The Appellate Body has also found that a treaty term cannot be interpreted in a way that runs contrary to the purpose of the WTO Agreements, which serves as a check on the textual approach.[252] The Appellate Body's finding in *Japan—Taxes on Alcoholic Beverages* serves as a further check on overly emphasising the importance of the preamble where it was found that the preamble is to be referred to in determining the meaning of the terms of the treaty "and not as an independent basis for interpretation".[253] Ortino describes the Appellate Body as "trying to emancipate itself"[254] from a rigorous textual approach to treaty interpretation. Advocates of the textual approach contend that it has contributed to the consistency and coherence of Appellate Body reports though it places less of an emphasis on the object and purpose of the treaty. Ortino advances the argument that the textual approach must be qualified by giving meaning to treaty terms "in their context and in light of its object and purpose" as per the VCLT.

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correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."

[246] *United States - Import Prohibition Of Certain Shrimp And Shrimp Products*, Appellate Body Report (1998), para. 153

[247] *EC-Chicken Cuts* Appellate Body Report, para 47

[248] Federico Ortino 'Treaty interpretation and the WTO- Appellate Body Report in US – Gambling: a critique,' *Journal of International Economic Law 9*(1) 148

[249] Panel Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, adopted on 6 November 1998, para. 3.237.

[250] Panel Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, adopted on 6 November 1998, para 129

[251] See Federico Ortino 'Treaty interpretation and the WTO- Appellate Body Report in US – Gambling: a critique,' *Journal of International Economic Law 9*(1) 147, see also, as noted by Ortino, *US – Corrosion-Resistant Steel Sunset Review*, at paras 7.43–7.44, where the Panel noted that 'Article 31 of the Vienna Convention requires that the text of the treaty be read in light of the object and purpose of the treaty, not that object and purpose alone override the text.'

[252] *EC — Chicken Cuts*, para. 238: The object and purpose of a treaty provision is "informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component."

[253] See *Japan—Taxes on Alcoholic Beverages,* Appellate Body Report, page 12 including FN20

[254] See Federico Ortino 'Treaty interpretation and the WTO- Appellate Body Report in US – Gambling: a critique,' *Journal of International Economic Law 9*(1) 117

Others question whether the WTO is sufficiently engaging with the object and purpose of the WTO Agreements at all. In terms of the WTO's national treatment jurisprudence, Mitchell et al. criticise the failure to engage with the meaning of the treaty provision in light of its context and the treaty's object and purpose. This failure is described as the "fundamental difficulty" of the Appellate Body report in *Japan— Alcoholic Beverages* and those that followed its findings including *Philippines— Distilled Spirts*.[255]

Both trade and investment law cover the provision of services and this gives rise to a significant overlap in terms of treaty coverage and potential for crossfertilisation between the two regimes. The preamble to the GATS is closer to that of many IIAs than the WTO Agreement's preamble as it explicitly recognises "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." Future interpretations of the preamble to the GATS will be important in terms of engagement between the two regimes, though no major interpretations have been given to date.

3.3.2. Interpreting IIA preambles[256]

International Investment Agreements aim to promote and protect foreign investment in host states though this is not their sole aim. The underlying aim of investment policy is not merely the promotion and vindication of the rights of non-state actors, nor is it the provision of expedited remedies for non-state actors as some have claimed.[257] Van Aaken illustrates the broader goals of investment policy noting that the ICSID Convention was developed under the auspices of the World Bank whose primary aim is to foster sustainable development rather than the protection of private property.
The ultimate goal of the two regimes remains "the facilitation of economic efficiency through international economic activity".[258] Recent EU FTAs for example contain sustainable development chapters and a commitment to this principle in their preambles.[259] EU trade and investment strategy communiqués reiterate this commitment.[260]
The role of tribunals in interpreting the object and purpose of IIAs can however be a delicate one. Older BITs in particular can be succinct with titles and preambles that refer solely to the aim of promoting and protecting investment without balancing this against the right to regulate. This can make it difficult for tribunals to discern what kind of balancing of rights the parties had in mind when concluding the treaty.

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[255] Mitchell, Heaton & Henckels, 'Non-Discrimination and the Role of Regulatory Purpose in International Trade,' *Edward Elger Publishing* (2016) 174 & 53
[256] See also Chapter 1.4 of this thesis on 'Placing the Regimes within the context of Public International Law'
[257] See notably, Wu, Mark, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime,' in Douglas, Pauwelyn & Vinuales (eds.), 'The Foundations of International Investment Law,' *Oxford University Press* (2014). Wu makes the point that these are the fundamental purposes of the IIAs at 66 & 79 respectively.
[258] Broude, T, 'Investment And Trade: The "Lottie And Lisa" Of International Economic Law?' *International Law Forum of the Hebrew University of Jerusalem Law* (2011) 5
[259] See the EU- Canada Comprehensive Economic and Trade Agreement (CETA) and the EU-Singapore FTA
[260] See the EU Commission's October 2015 Communication, 'Trade For All; towards a more responsible trade and investment policy'

When interpreting international agreements, Article 32 of the VLCT recognises the preparatory work of the treaty as a supplementary means of interpretation for tribunals.[261] Alvarez argues that the US- Argentina BIT needs to be read in the light of the context and particular negotiating history of the treaty in question.[262] The primary source for tribunals in their interpretation of a treaty is the text of the treaty itself. The use of *travaux préparatoires* by tribunals has been scarce to date. One reason for this has been the lack of documentary evidence surrounding BIT negotiations.[263] Tribunals may give due regard to the specific context and background behind the formation of a treaty. However it is the drafters' duty to make sure this is reflected in the text of the treaty, which is the primary source for treaty interpretation.

The style of preamble found in older BITs can lead to favourable outcomes for investors as was seen in the cases *Siemens AG v. Argentina,*[264] *SGS v. Philippines,*[265] and *Enron. v. Argentina*.[266]
The *Siemens* case was taken under the Argentina- Germany BIT (1994)[267] and concerned the scope of the fair and equitable treatment (FET) standard.[268] The wording of the full title and preamble of this BIT is similar to the Argentina- US BIT (1994), under which the *Enron* case was taken.[269] Both preambles recognise the desire to promote "greater economic cooperation" and the titles recognise the reciprocal encouragement and protection of investment. The tribunal in *Siemens* replied to the respondent that it will not interpret the Treaty restrictively or broadly but shall adhere to the rules of the VCLT and "be guided by the purpose of the Treaty as expressed in its title and preamble."[270] The tribunal continued: "The intention of the parties is clear. It is to create favourable conditions for investments and to stimulate private initiative."[271] Despite the tribunal's claim to the contrary, this could be seen as a very restrictive reading of the purpose of the treaty. The tribunal in *Siemens* considered whether FET was akin to the minimum standard of treatment under customary international law or whether it gave a higher standard of protection "more in consonance with the objective of the treaty".[272] The tribunal found that it was bound to interpret terms such as FET "bearing in mind their ordinary meaning, the evolution of international law and the specific context in

[261] Article 32, VCLT: "Supplementary Means Of Interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."
[262] See Chapter 6.3.2 for discussion of this, see also Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' Yearbook on International Investment Law & Policy (2011) 351-52
[263] See Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) Section 2.28
[264] *Siemens A.G. v. The Argentine Republic*, Award ICSID Case No. ARB/02/8 (2007)
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, Award ICSID Case No. ARB (AF)/00/2 (2003)
[265] *SGS (Société Générale de Surveillance) S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction ICSID Case No. ARB/02/6 (2004)
[266] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award ICSID Case No. ARB/01/3 (2007)
[267] Treaty Between The Federal Republic Of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection Of Investments (1994)
[268] The tribunal in *Siemens* found that to find a breach of FET necessitated bad faith would be "inconsistent with such commitments and purpose and the expectations created by such a document".[268] Such a finding had been made by the tribunal in *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2*
[269] Treaty Between United States Of America and the Argentine Republic Concerning The Reciprocal Encouragement and Protection Of Investment (1994)
[270] *Siemens v. Argentina,* Decision on Jurisdiction, paragraphs 80 & 81
[271] *Siemens v. Argentina,* Decision on Jurisdiction, para 81
[272] *Siemens v. Argentina,* Award at para. 289

which they are used".[273] The tribunal derived the objective of the treaty from the title and preamble and presumably this is the "specific context" that led the tribunal to its finding for the higher standard of protection. This represents a purposive approach where the object and purpose of the treaty as derived from the title and preamble play a significant role in the treaty's interpretation. This approach lacks balance and nuance and could lead to findings unanticipated by the parties when concluding the treaty.
In a further reading into the objective of the parties, the tribunal referred to the nexus requirements of the preamble, which stated the parties desire to "promote" and recognition that investment protection "stimulate" flows of capital and economic development. This was found to indicate that it is "the intention of the parties to adhere to conduct in accordance with such purposes".[274] This reading by the tribunal is on the most restrictive end of the scale in terms of the scope of the host state's right to regulate.

The wording of a preamble may state that it is the aim of the parties to promote investment, but this preambular language should not give rise to concrete obligations for parties. There is a wide range of conduct that may be "in accordance with" promoting and stimulating investment that the parties may not wish to adhere to. It is unclear from the tribunal's interpretation what types of conduct the tribunal includes in this category and what legitimate regulation a party can take that runs contrary to this preambular language of promoting investment. It is the role of tribunals to interpret the text of the treaty and undue weight should not be given to protecting foreign investment against regulatory measures of a host state based on a teleological reading of a treaty title that states its aim as being the promotion and protection of investment.
Newcombe is of the view that the object and purpose of a treaty is "realized by its provisions"[275] and there are limitations to finding a treaty's purpose as being solely expressed in its title and preamble. The rights of investors have to be balanced against the host states right to regulate. If a treaty contains an exception for necessary actions to be taken by the host state in emergency circumstances, the title of the treaty should be secondary to the language of the exception provision itself.

Investment treaties aim to promote and protect investment but that does not mean there should be a general preference extended to investors over host states in interpreting these treaties. Nonetheless, this line of reasoning was followed by the tribunal in *SGS v. Philippines* in finding for the Swiss investor, with the tribunal stating:

> "The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended “to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other”. *It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments*."[276] (emphasis added)

[273] *Siemens v. Argentina,* Award at para. 291
[274] *Siemens v. Argentina,* Award at para. 290
[275] See Newcombe *supra* note 39 at Section 2.29
[276] *SGS (Société Générale de Surveillance) S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction ICSID Case No. ARB/02/6 (2004) at para. 116

The title of the Philippines- Switzerland BIT[277] describes it as a treaty "on the promotion and reciprocal protection of investments", but this does not absolve the tribunal of its task of balancing the rights of the investor and the host state.
Similarly in *Occidental v. Ecuador*, the preamble to the US- Ecuador BIT expressly refers to the importance of creating "a stable framework for investment".[278] The tribunal cited this as constituting an "essential element of fair and equitable treatment". The tribunal in *Occidental* refused to consider legitimate objectives at all as part of discrimination analysis or as a separate justification.
Article XI of the US- Argentina BIT has been interpreted as an exception to the host state's obligations under the treaty.[279] The tribunal in the *Enron* case interpreted this exception narrowly based on the object and purpose of the treaty which was for it to apply in situations of economic difficulty. The tribunals stated that:

> "[a]ny interpretation, resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory".[280]

Such purposive interpretations where the object and purpose of IIAs plays a determinative role and is cast in such a pro-investment manner is unsustainable. The approach of the tribunal in *Occidental* has been deemed "untenable" where IIA preambles include both protection of investments and key societal interests in their purposes.[281]

The decision in *Saluka v. Czech Republic* places a greater emphasis on the need to balance the rights of the investor with those of the host state in its assessment of the Agreement's object and purpose. In this case, the tribunal interpreted the Netherlands- Slovakia BIT (1992)[282] and noted:

> "[a]n interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations".[283]

The tribunal deemed the desire to extend and intensify relations as extending the aim of the Treaty beyond mere investment protection. Such a finding does indeed attempt to balance the protection of foreign investment with some consideration of a greater context within which the undermining of a host state's ability to take regulatory measures in the public interest will ultimately undermine the "overall aim" of intensifying economic relations.[284]

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[277] Agreement Between The Republic of The Philippines And The Swiss Confederation On The Promotion And Reciprocal Protection of Investments (1999)
[278] In their decision, the Occidental tribunal were drawing on a similar finding in *Ronald S. Lauder v. Czech Republic* (Final Award, 3 September 2001) at para. 292. This line of reasoning has been followed by subsequent tribunals as noted by Newcombe & Paradell.
[279]See Chapter 7.3 for a detailed analysis if this Article which reads: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests."
[280]*Enron Corporation Ponderosa Assets, L.P. v. Argentina Republic*, Award, para 331
[281] Mitchell, Heaton & Henckels, 'Non-Discrimination and the Role of Regulatory Purpose in International Trade,' *Edward Elger Publishing* (2016) 140
[282] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (1992)
[283] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (2006) para 300
[284] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (2006) para 300

The Netherlands- Slovakia BIT expressly mentions the desirability of fair and equitable treatment and extending and intensifying economic relations as one of the objectives in the main body of the preamble.[285] The treaties that formed the basis of the *Occidental* and *SGS* cases contained similar wordings in their preambles.[286] This underlines how similarly worded preambles can be interpreted differently by tribunals.
Is it correct to place such an emphasis on the rights of the host state based on a reference to the desire to "intensify economic relations" in the preamble? It may well be, when it is the tribunal's view that a pro-investment interpretation would have the long run effect of undermining the intensification of the parties' economic relations. What is important is that the tribunal recognises that there is some balance between investment protection and host state's right to regulate. It is for the parties to decide the level of protection they wish to accord to investors and how they wish this to be balanced against their own right to regulate. If parties disagree with the interpretations of the tribunals in *Occidental* or *Saluka*, they can re-examine the wordings of the preambles that grounded these interpretations, and amend them accordingly. In particular, careful preamble drafting is required to prevent arbitrators from focusing solely on investment protection.

When defending a measure under a BIT or PTIA, a host state is likely to refer to the object and purpose of the treaty as set out in the preamble, especially if the preamble contains some reference to the idea of striking a balance between the primary aim of concluding the treaty (ensuring the protection of investments) with safeguarding their policy space via the right to regulate etc. As preambles set out the aim and purpose of a treaty, it follows that some acknowledgement of the right to regulate contained within the preamble gives tribunals greater latitude in giving a balanced reading of the rights and obligations under the treaty. Preambles such as that of the Australia- China FTA (2015) make such narrow interpretations of the purpose of investment treaties more difficult to justify. The parties state as an objective of the treaty: "Upholding the rights of their governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare". The tribunal in *SGS v. Philippines* found that the object of the treaty was the "promotion and reciprocal protection of investments". It remains to be seen whether this kind of reasoning can be sustained under more modern preambles.

[285]Main body of the Netherlands- Slovakia BIT (1992): "Desiring to extend and intensify the economic relations between them particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party, Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable, Taking note of the Final Act of the Conference on Security and Cooperation in Europe signed on August, 1st 1975 in Helsinki".
[286]The cases were taken under the US- Ecuador BIT (1992) which states: "Desiring to extend and intensify the economic relations between them", and the Philippines- Swiss BIT (1999) which states: "Desiring to promote greater economic cooperation between them".

3.4. Cross-fertilisation and the object and purpose of trade and investment agreements

Section 4 looks at how similar the content of preambles in the trade and investment law regimes is, before considering whether tribunals in one regime should have regard to the interpretation of preambles in the other regime.

3.4.1. Comparing the content of preambles in the trade and investment law regimes

This section considers whether there are substantial differences in the objects and purposes of the WTO Agreements compared to those in PTIAs and BITs. As outlined in section 3, the preambles of older style investment agreements such as the US- Ecuador BIT have little in common with those of the WTO Agreements. This is because these preambles focus exclusively on the promotion and protection of investment, which doesn't feature in the preamble to the WTO Agreements.
The preamble to the WTO Agreements has much more in common with those of PTIAs of both the old and modern styles (e.g. NAFTA and the Australia- China FTA) in that these treaties make reference to objectives such as the right to regulate and promoting sustainable development. These treaties also frequently attempt to strike a balance between investment protection and ensuring the host state's right to regulate or recognising the importance of other societal interests. The wording of the preambles of more modern BITs such as the Canada- Burkina Faso BIT are closer in style to that of PTIAs and are thus more similar to the preamble of the Marrakesh Agreement/ WTO Agreement than their older counterparts.

Some argue that there do not appear to be significant differences between the objects and purposes of these sets of agreements.[287] This argument is grounded in the fact that trade and investment agreements share similar objects and purposes such as raising living standards, economic development, and sustainable development. While these instances of overlap can certainly be pointed to, this is not to say that the preambles of the WTO Agreements, PTIAs, and BITs are indistinguishable and ought to have a negligible influence on treaty interpretation in all instances.
Annex 2 highlights the diversity of IIA preambles giving a survey of the 80 preambles of the treaties considered as part of this study providing a taxonomy of the various wordings of these preambles and rating them in terms of the strength of the reference to the right to regulate. This thesis also makes the argument that the stronger references to the WTO Agreements and the right to regulate in the preambles of IIAs, the more this facilitates crossfertilisation between the trade and investment law regimes.[288] Chapters 4-6 consider how these references and the different purposes of agreements affect interpretations of national treatment, likeness, and treaty exceptions. In the absence of any such references in an agreement's preamble, tribunals have to be careful, particularly in relation to older style BITs, that they strike an

[287] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 3
[288] Although references to WTO law haven't traditionally featured in the preambles of BITs, tribunals cannot take their exclusion in all but the most recent investment agreements[288] as evidence that it is only included in PTIAs because of the trade chapters therein. A fundamental rule concerning preambles is that they have a single object and purpose and that they apply to the entirety of an agreement. As such, where such references are included, regard must be had to the fact that the parties are building on or reaffirming[288] their "rights and obligations under the WTO Agreement".

appropriate balance in their interpretations between the protection of investment and that the host state's right to regulate.

The preambles of the US Model BIT and the WTO Agreements both attempt to strike a balance between the competing objectives of economic gains and protecting the right to regulate. While both of these texts attempt to strike a balance between these competing objectives, the preambles of these agreements remain largely heterogeneous and their objects and purposes are not "essentially the same" as Cook claims.[289] Although many agreements strike some kind of balance between these competing objectives, the emphasis placed on the right to regulate versus the commitment to liberalise trade or protect investment can be very different among treaties and tribunals must carefully consider this balance when interpreting the object and purpose of each treaty.

Notwithstanding the fact that the wording of the preambles of trade and investment agreements may at times be quite similar, the view that there are no significant differences between their objects and purposes is not uncontested.[290] Alvarez distinguishes between the purposes of the regimes on the basis that the trade regime is not designed to provide remedies to individuals, calculate monetary recompense, or to discipline the behaviour of States "during periods of alleged economic crisis".[291] Along this line of thought, these fundamental differences between the objects and purposes of the two regimes are more important than a generalised approximation between the wordings of the preambles in the two regimes. As discussed in chapter 2.9 in relation to parties' WTO obligations, in some instances these approximations are due to the inclusion of investment chapters within PTIAs. Furthermore, even where the wordings of certain sections are similar, minor differences in the wording such as may be found in the nexus requirements may require different interpretations by tribunals. While one preambular provision may be "mindful of" a principle, others may recognise or undertake to protect or uphold it.

Alvarez continues that the US- Argentina BIT needs to be read in the light of the context of the particular treaty in question. In this instance, it is claimed that the *raison d'être* of this BIT was precisely to protect investments during volatile economic times in a context where such crises had been invoked as an excuse by Argentina "to escape its obligations to foreign investors".[292] Alvarez expounds upon the specific purpose of the BIT saying that it was concluded by Argentina "precisely to provide a credible commitment" that this wouldn't occur again.[293]
These arguments advance the view that the assurance by the host state that it will protect US investments was the fundamental and overriding purpose of this treaty. As such, any

[289] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 3
[290] See Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 78, where the authors see the object and purpose of investment agreements as "greatly influencing" the test for determining "whether a measure treats a foreign investment less favourably than comparable domestic investments". See also Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina' *Yearbook on International Investment Law & Policy* (2011)
[291] See Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina' *Yearbook on International Investment Law & Policy* (2011) 343
[292] See Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina' *Yearbook on International Investment Law & Policy* (2011) 343
[293] A fuller discussion of this case can be found in Chapter 5 of this thesis on treaty exceptions and the necessity defence

derogation from the substantive protections should not be interpreted too generously by tribunals.

To what extent should tribunals factor into their interpretations the fact that a country has a history of defaulting and this is reflected in the negotiating history as being a key motivator for concluding the treaty? The preparatory work of the treaty remains a supplementary means of interpretation. The terms of the treaty in their context comes first as the general rule of interpretation and it is for the parties to ensure that the treaty text strikes the right balance in terms of investment protection and exceptions to these protections. Investment protection is the primary purpose of investment agreements[294] but even where this is the fundamental intention behind concluding the treaty, it does not fatally undermine treaty exceptions such as that found in Article XI of the US Argentina BIT. A balance must be found in the interpretation of investment treaties as to do otherwise would undermine the overall aim of intensifying economic relations
as was found by the tribunal in *Saluka Investments BV v. Czech Republic*.[295]

Each IIA has a specific purpose and background that led to its conclusion. Tribunals must give due consideration to this and caution should be exercised before concluding that trade and investment agreements have the same general objects and purposes or that any two investment agreements have the same objects and purposes.

3.4.2. Should tribunals have regard to the interpretation of object and purpose under other regimes?

In line with the text of the Vienna Convention, the preambles of trade and investment agreements may influence their interpretation in three ways:
1) A treaty and its terms are to be interpreted "in their context and in the light of its object and purpose." The preamble is the primary source where the parties set out statements of object and purpose (31.1 VCLT).
2) the preamble forms part of the text of a treaty and thus part of a holistic treaty analysis (31.2 VCLT).[296]
The first two statements apply to the preambles of both the trade and investment law regimes. Preambles may influence the interpretation of an agreement, but so too may preambles from the other regime. This third factor is added by Article 31.3(c) VCLT, whereby: "Any relevant rules of international law applicable in the relations between the parties". The agreements of the other regime *and their preambles* form a part of this body of relevant rules.
Although the preambles of the other regime, and how they have been interpreted, *can* be drawn upon when interpreting trade and investment agreements, it is noted that tribunals tend not to make external references when interpreting the object and purpose of agreements in the two regimes.

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[294] See Titi, Aikaterina, 'The right to regulate in international investment law,' *Hart Publishing* (2014) 119
[295] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (2006)para 300
[296] "Vienna Convention on the Law of Treaties, General rule of interpretation,
Article 31.1: 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.
31.2: The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes(…)"

As seen in Section 3.2, some investment tribunals have given very narrow interpretations of the object and purpose of IIAs, while others have placed a greater emphasis on the need to balance the rights of the investor with those of the host state.
For the four major investment cases considered in this chapter, in the paragraphs of the tribunals' reports dealing with object and purpose, only one of them referred to an interpretation given in another case.
In *SGS v. Philippines*, the tribunal referred to the ICSID Tribunal in *Salini Construttori SpA v. Kingdom of Morocco* (2001), but only to note that the two tribunals had reached the same conclusion.[297] In *Siemens AG v. Argentina*, the tribunal only referred to the text of the BIT itself and the Oxford English Dictionary.[298] The tribunal in *Enron. v. Argentina* only referred to the legal opinion of José E. Alvarez,[299] while in *Saluka v. Czech Republic*, no reference to an external source was made.[300]

Tribunals at the WTO have placed an emphasis on the holistic nature of treaty interpretation at the WTO. As per section 3.1, the Appellate Body has found that "light from the object and purpose" of the treaty may be looked to for guidance where there is ambiguity as to the meaning of a provision[301] and that the starting point for determining object and purpose is the treaty in its entirety rather than the preamble.[302]
Despite the emphasis on the holistic approach, no interpretation of the object and purpose of the treaty can run contrary to the express terms of the text.
For the cases considered in the trade part of this chapter, the paragraphs of the tribunals' reports dealing with object and purpose made many more references to interpretations of object and purpose in other trade cases than their investment law counterparts did to interpretations within the investment law regime. The trade cases considered in this chapter did not however refer to external sources from the wider field of public international law. In *EC-Chicken Cuts*, the Appellate Body made extensive references when interpreting the object and purpose of the GATT. It referred to the Appellate Body Reports in *EC– Computer Equipment, Argentina– Textiles and Apparel, US– Line Pipe,* and *Chile– Price Band System.* The tribunal also referred to Sir Ian Sinclair's book 'The Vienna Convention and the Law of Treaties,'[303] as well as evidence of the object and purpose provided by heading 02.10 of the

[297] *SGS (Société Générale de Surveillance) S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction ICSID Case No. ARB/02/6 (2004) paras 116-118, 135
[298] *Siemens A.G. v. The Argentine Republic*, Award ICSID Case No. ARB/02/8 (2007)
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, Award ICSID Case No. ARB (AF)/00/2 (2003) paras 289-293.
[299] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award ICSID Case No. ARB/01/3 (2007)paras 330-332
[300] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (2006)
SD Myers, Inc. v Government of Canada, NAFTA/ UNCITRAL Tribunal, 1st Partial Award and Separate Opinion, IIC 249 (2000) paras 299-301 were the relevant paragraphs of the report.
[301] *United States - Import Prohibition Of Certain Shrimp And Shrimp Products*, Appellate Body Report (1998), para. 114: "It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."
[302] Appellate Body Report, *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, adopted on 27 September 2005, para 47
[303] Sir Ian Sinclair's book 'The Vienna Convention and the Law of Treaties,' *Manchester University Press* (2nd Edn.) (1984). The Appellate Body also referred to the *EC-Chicken Cuts* panel report.

EC Schedule.[304] The tribunal in *US—Shrimp I* referred to the preamble of the WTO Agreement and to how object and purpose was determined in *US- Gasoline*.[305]

This analysis seems to indicate reluctance on the part of investment tribunals to consider interpretations given in other investment cases or external sources when interpreting the object and purpose of IIAs. The same can be said of WTO tribunals in relation to external sources although tribunals seem to be quite willing to consider interpretations given in other cases at the WTO.
What can be concluded about cross-regime references and when it is appropriate to look to another regime when interpreting the object and purpose of a trade or investment text?
Although tribunals have shown reluctance to make cross-regime references when interpreting the object and purpose of trade and investment agreements, this need not be the case. Tribunals are able to make such references in line with the VCLT and there are significant commonalities between preambles found in trade and investment agreements.

There are parallels between the objectives stated in the preamble to the Marrakesh Agreement and those stated in IIAs. Like the preamble to the Marrakesh Agreement, the preambles of many modern IIAs refer to raising living standards,[306] sustainable development, economic development, and the need to balance this with other societal interests.
The empirical chapter of this study focused on two preambular provisions as evidencing inter-regime engagement including those referring to: 1) the right to regulate; and 2) building on the parties' rights and obligations under the WTO. The right to regulate is commonly included in modern IIAs and thus shared ground between the two regimes.
References in IIAs to the rights and obligations under the WTO clearly facilitate engagement and were included in the vast majority of PTIAs contained in this study. Although such a reference wasn't contained in any of the BITs in this study, it has been contained in some recent BITs.[307] As the preambles of the trade and investment law regimes approximate, the argument to draw upon the experience of the other regime strengthens.

If tribunals were to make cross-regime references to the preambles of the other regime, what form would they take? In relation to treaty exceptions or national treatment provisions, tribunals draw upon the jurisprudence of the other regime in quite an explicit manner. Cross-regime references in relation to preambles need not be so explicit and wouldn't necessarily involve the development of new legal tests or the transplanting of jurisprudence.
In relation to preambles, cross-regime references could be limited to interpretations in areas such as nexus requirements. These references may still be fundamental to the interpretation of the object and purpose of a treaty. Conclusions as to the object and purpose based on the preamble may also affect the legal tests developed under other treaty provisions. Cross-fertilisation can still occur and investment tribunals can learn from trade tribunals' interpretative methods and vice versa.

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[304] Appellate Body Report, *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, adopted on 27 September 2005, paras 236-40
[305] Appellate Body Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted on 6 November 1998, paras 114-129
[306] On this point see for example the 2012 US Model BIT. The latter three objectives are more common across modern IIAs.
[307] See for example the Preamble of the Investment Protection Agreement Between The European Union And Its Member States, Of The One Part, And The Republic Of Singapore, Of The Other Part:
"(...) 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(...) Have Agreed as follows:"

Although cross-regime references haven't been seen yet, it may only be a matter of time. The Appellate Body in *EC- Chicken Cuts*, made extensive references when interpreting the object and purpose of the provisions. It referred to five other WTO reports, evidence of its object and purpose furnished by the EC as well as an academic work on the VCLT. If such comprehensive analysis of object and purpose becomes the standard for tribunals interpreting trade and investment agreements, it's only a matter of time before cross-regime references are seen.
What constitutes an appropriate cross-regime reference and the extent to which it is appropriate to draw upon the experience of the other regime when interpreting the object and purpose of trade and investment agreements remains to be seen.

3.5. Preambles and levels of engagement in PTIAs & BITs

This section considers whether PTIA preambles compared to BIT preambles *result in increased levels of engagement* between the trade and investment law regimes. Section 1 of this chapter looked at this question in relation to the empirical results of this study. This section considers this question of engagement and the effect of preambles in PTIAs compared to BITs taking this more holistic definition into account.
In terms of parallels in content, two provisions relating to preambles were included in this study of inter-regime engagement. These provisions included preambles referring to the WTO and preambles referring to the right to regulate and there was greater evidence of engagement in PTIAs for both provisions.
Preambles referring to the parties' WTO obligations featured in 39/40 PTIAs (97.5%) and 0/40 BITs in this study's sample.
Preambles referring to the right to regulate were also more common in PTIAs than in BITs, featuring in 31/40 PTIAs (77.5%) and 18/40 BITs (45%) contained in this study. Thus there are clearly greater parallels of content for the PTIAs featured in this study compared to the BITs.

Not only were preambles referring to the right to regulate more prevalent in PTIAs, but the references to this right tended to be significantly stronger than those found in BITs. This may be for many reasons such as the fact that PTIAs apply to a wider range of subject matters. The reasons for their inclusion is not considered here however as this section focuses on the prevalence and strength of such provisions.
References to the right to regulate were 72% more common in PTIAs, but the weighted score for provisions across the 80 Agreements was 151% higher for PTIAs than for BITs. By this measure also, for the set of Agreements contained in this study, the conclusion of PTIAs resulted in increased levels of engagement compared to the BITs.
The WTO Agreements are infused with the principle of 'embedded liberalism', where the GATT's contracting parties envisaged "targeted, if conditional, departures" from obligations.[308] IIAs have tended to place less of an emphasis on balancing investment protection with the state's right to regulate, particularly in older style BITs. As such, this

[308] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' Cambridge University Press (2016) 83

thesis makes the argument that a stronger reference to the right to regulate in IIAs facilitates engagement between the trade and investment law regimes. If we accept this argument, then based on the above data, PTIAs play a clear role in facilitating engagement between the two regimes.

Engagement was said to be a factor of cross-regime references as well as parallels in treaty content. Cross-regime references are the second measure for increased engagement and whether it is more likely to occur because of PTIA preambles compared to BIT preambles. Preambles referring to the WTO and the right to regulate were shown to be more common and stronger in PTIAs than in BITs for the sample taken in this study. Tribunals are more likely to draw upon these PTIA provisions for these reasons. However, there are additional considerations for tribunals when comparing legal norms or concepts between the systems.[309]

Tribunals must consider the contextual differences relating to PTIA and BIT preambles. BIT preambles refer to investment alone whereas PTIA preambles set out the purpose of broader agreements that often feature chapters in a wide range of areas. The recently concluded TPP features 30 chapters.[310] This broader context seems to be a factor in references to WTO law as such references are contained in 39/40 PTIAs and 0/40 BITs. Although references to the WTO Agreement haven't traditionally featured in standalone investment agreements, this may change in the future. Negotiations for the EU- Singapore Investment Protection Agreement[311] were concluded in April 2018[312] and its preamble refers to the parties respective rights and obligations under the WTO Agreement.[313]
It is unclear to what extent the inclusion of references such as those to the WTO Agreement should affect how IIAs are to be interpreted. However it is clear that a treaty can have only one purpose as expressed in its preamble, that references to the WTO Agreement are part of a PTIA's purpose, and that this could facilitate cross-regime references.

Tribunals must further consider differences in the wording of the agreements when interpreting the preambles of PTIAs and BITs. As noted above, references to the right to regulate were significantly more common in PTIAs (72%), and this disparity was heightened when weights were attributed based on the strength of the provisions (151%). Thus the wordings of PTIA preambles have been demonstrated to be stronger and thus more facilitative of engagement between the trade and investment law regimes than their BIT counterparts. This is the case for the average of the Agreements as a whole, but of course, the ability of any

[309] Chapter 1.6 outlines the five primary considerations when comparing legal norms or concepts between the systems for the purposes of this thesis, including; 1) textual differences; 2) contextual differences; 3) systemic differences; 4) remedy structures; and 5) the purposes of agreements.
[310] TPP for example contained a preamble and 30 chapters, including: 1. Initial Provisions and General definitions; 2. National Treatment and Market Access; 3. Rules of Origin and Origin Procedures; 4. Textiles and Apparel; 5. Customs Administration and Trade Facilitation; 6. Trade Remedies; 7. Sanitary and Phytosanitary Measures; 8. Technical Barriers to Trade; 9. Investment; 10. Cross Border Trade in Services; 11. Financial Services; 12. Temporary Entry for Business Persons; 13. Telecommunications; 14. Electronic Commerce; 15. Government Procurement; 16. Competition; 17. State-Owned Enterprises; 18. Intellectual Property; 19. Labour; 20. Environment; 21. Cooperation and Capacity Building; 22. Competitiveness and Business Facilitation; 23. Development; 24. Small and Medium-Sized Enterprises; 25. Regulatory Coherence; 26. Transparency and Anti-Corruption; 27. Administrative and Institutional Provisions; 28. Dispute Settlement; 29. Exceptions; and 30. Final Provisions.
[311] Investment Protection Agreement Between The European Union And Its Member States, Of The One Part, And The Republic Of Singapore, Of The Other Part
[312] See European Commission Press Release of 18 April 2018: 'European Commission proposes signature and conclusion of Japan and Singapore agreements,' available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1826
[313] "(...) 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(...) Have Agreed as follows: "

tribunal to make cross-regime references depends on the wording of the provision at hand, and some of the BITs were shown to have a very strong wording providing for the right to regulate.

Cook makes the case that instead of focusing on whether agreements have similar objects and purposes, analysis at the WTO has focused much more on the "underlying textual and structural features" of the provisions concerned.[314] Cook's argument is made in relation to GATT Article III and Article 2.1 of the TBT Agreement, which have the same legal test for like products as the provisions have "similar wording" and no relevant structural features to distinguish them.[315] This is not the case in relation to 'less favourable treatment' however, as the assessment under the GATT is impacted by the presence of GATT Article XX. Less favourable treatment is however interpreted under the GATS in a similar manner to GATT Article XX as it has a similar general exceptions provision in GATS Article XIV. Likeness has however been interpreted differently under the GATT and GATS given the textual difference of the Agreements.[316]
This reinforces this thesis' argument that the greater the similarity between provisions of the two regimes, the greater the scope there is for tribunals to draw upon the jurisprudence of the other regime.

In terms of differences in the purposes of the regimes, tribunals are of course attentive to these when interpreting the preamble of a PTIA or a BIT. A treaty is to be interpreted in light of "its object and purpose" which is to be found in the treaty's preamble, as well as in the text as a whole. It has been found at the WTO that individual provisions do not have an object and purpose but that they are informed by the object and purpose of the entire treaty.[317]
Nonetheless there may be elements of particular provisions that can guide a tribunal such as GATT Article III;1, and the chapeau of GATT Article XX.
It has been shown that preambles can facilitate crossfertilisation, particularly in relation to the two types of preambular provisions included in the empirical study of this thesis. One of these types of provisions was references to WTO law in the preamble. Such references appear in nearly all of the PTIAs in this study, but haven't traditionally featured in the preambles of BITs and featured in none of the BITs in this study.[318] How does this dichotomy between the two systems impact upon the interpretation of agreements?
Tribunals could take the exclusion of such a provision in all but the most recent investment agreements[319] as evidence that it is only included in PTIAs because of the trade chapters therein. However, a fundamental rule of preambles is that they have a single object and purpose and that this applies to the entirety of an agreement. As such, where such references

[314] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 7
[315] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 7
[316] To summarise: In terms of likeness, interpretations under the GATT are similar to those under the TBT and unlike those under GATS (GATT = TBT ≠ GATS). In terms of less favourable treatment, interpretations under the GATT are similar to those under the GATS and unlike those under TBT (GATT = GATS ≠ TBT).
[317] Appellate Body Report, *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, adopted on 27 September 2005, para 238
[318] Such a reference did however appear in the EU- Singapore Investment Protection Agreement, and its preamble refers to the parties respective rights and obligations under the WTO Agreement. Negotiations for this were concluded in April 2018.
[319] See EU- Singapore Investment Protection Agreement

are included, regard must be had to the fact that the parties are building on or reaffirming[320] their "rights and obligations under the WTO Agreement". This applies to the entirety of the agreement including the investment chapter and this alters the purpose of the agreement and how it should be interpreted.

Tribunals must also consider systemic differences and differences in the remedy structures between the two regimes when interpreting the preambles of PTIAs and BITs. Findings of breach under IIAs give rise to monetary damages and are not confined to the removal of measures as is the case in the trade law regime. A key systemic difference between the regimes is the lack of the possibility of appeal in the investment regime except on a very limited number of grounds.[321] These differences mean that there are potentially severe consequences if a tribunal reads the preamble of an older style BIT and takes the view that the treaty's purpose is focused primarily on the protection of investment and that the host state's right to regulate is an ancillary concern. Tribunals have to be mindful of these factors in their awards and in striking a balance that is appropriate for the investment regime, rather than following a test developed in line with a different set of considerations in the trade regime.

3.6. Conclusion

3.6.1. Why balanced preambles are a good thing

Preambles regularly guide tribunals in interpreting treaty obligations under IIAs and the WTO Agreements. The objects and purposes in trade and investment agreements are not "essentially the same"[322] and, as a starting point, it is important to acknowledge that preambles *can* guide a tribunal in developing a legal test. Some authors have expressed scepticism that the objects and purposes of trade and investment agreements, which frequently reflect similar concerns, could lead to the development of different legal tests in relation to similar provisions.[323] For others the general approximation between the wordings of preambles in the two regimes is less important than fundamental differences between the objects and purposes of the two regimes.[324]
Each IIA has a specific purpose and background that led to its conclusion. Tribunals must give due consideration to this and caution should be exercised before concluding that: 1) any two international investment agreements have the same objects and purposes; and 2) that trade and investment agreements have the same general objects and purposes.

[320] Japan- Malaysia EPA (2005) (Agreement Between The Government Of Japan And The Government Of Malaysia For An Economic Partnership)
[321] A more comprehensive right of appeal is included in recent IIAs of the EU such as CETA.
[322] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 2
[323] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 2
[324] See Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina' *Yearbook on International Investment Law & Policy* (2011) 343

The WTO Agreements provide for "targeted, if conditional, departures" from trade obligations as provided for in provisions such as GATT Article XX.[325] This notion of balancing has not been as central to the investment regime, particularly in older styles IIAs that often placed the emphasis on investment protection with little or no reference to the right of states to regulate. The panel in *Lemire v. Ukraine* found *obiter dicta* that some kind of balance had to be found as the state had an "inherent right to regulate its affairs and adopt laws in order to protect the common good of its people".[326]
Even slight differences in the wording of preambles are ultimately clues for tribunals as to the objectives of the parties in concluding a given treaty. Different treaty contexts require different preambles and careful selection of the wording of a preamble is the key to striking a balance between the interests of the investor and the host state. One such difference in wording may be the nexus requirements chosen by the parties. Whether the term "relating to" or "necessary" is included in a treaty exception affects the standard of proof.
Other examples of differences in the objects and purposes of IIAs include the emphasis that is placed on: the government's right to regulate; investment promotion and protection; sustainable development; building upon WTO commitments; and not relaxing standards. Other examples can be found in Annex 2 and the contents of these preambles are not by any means an exhaustive list. Drafters must then consider which of these, *if any*, they wish to include in an agreement or whether other objects and purposes may be more appropriate.

The degree of balance between the right to regulate and investment protection has been drafted in many ways with various degrees of strength in the wordings of IIA preambles as can be seen in this study. The Philip Morris cases taken under the Hong Kong- Australia BIT[327] and Switzerland- Uruguay BIT[328] have led to significant criticism of the investment law regime. The problem with the preambles in some older style BITs such as the Hong Kong- Australia BIT is the lack of any balance between investment protection and the right to regulate. As well as this, there is a lack of any exceptions for measures necessary for the protection of public health.
Section 3 outlined restrictive readings as well as a more balanced reading of the host state's right to regulate in the investment jurisprudence. Earlier readings such as *SGS v. Philippines* lacked balance and nuance and it is questionable whether such readings are sustainable, or indeed permissible under newer IIAs. While traditionally it has been the case that investment treaties have focused too narrowly on protecting the rights of investors, attempts to correct this can result in provisions that overly focus on protecting the host states' right to regulate in any circumstance it deems appropriate. Provisions concerning the Right to Regulate also inform the object and purpose of treaties and supplement preambular provisions. [329] The

[325] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 83
[326] *Lemire v. Ukraine,* Decision On Jurisdiction And Liability, ICSID Case No. ARB/06/18 (2010) para 505-507. This was stated in relation to Article II.6 of the US- Ukraine BIT (1996) which prohibits "performance requirements … which specify that goods or services must be purchased locally".
[327] *Philip Morris Asia Limited v. The Commonwealth of Australia*, Award on Jurisdiction and Admissibility, UNCITRAL, PCA Case No. 2012-12 (2015)
[328] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, Award ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay) (2016)
[329] It should also be noted that provisions such as Article 12 of Norway Model BIT (2007) include the wording that nothing shall prevent a party from adopting any measure "Otherwise consistent with" this agreement and that the result of this may be to "narrow policy space rather than the opposite." Investment treaties are neutral objects. Their contents reflect the choices of their drafters. (Titi, Aikaterina, 'The right to regulate in international investment law,' *Hart Publishing* (2014) 112). The focus of this chapter is preambles but the object and purpose these can be clarified and the right to regulate can be reinforced by a separate provision in this area.

parties should keep in mind that the main purpose of investment treaties is the promotion and protection of investment between the parties rather than the preservation of policy space. [330]

Parties should therefore consider what level of protection they wish to accord to investment and what kind of balance they wish to strike between this and the right to regulate. It is for the drafters to ensure that the preambles to IIAs reflect the parties' purposes in concluding an agreement. This study has considered the texts of many preambles and finds that in order to do this, parties should be careful to ensure that there is some balance expressed in treaty preambles between investment protection and the right to regulate to aid tribunals in their interpretations. This has been the case in many modern IIAs and at the WTO.

3.6.2. Concluding remarks on PTIAs & Engagement

Preambles can either facilitate or exclude the possibility of inter-regime engagement. Balanced preambles facilitate inter-regime engagement and it is for the parties to choose how they balance investment protection with the right to regulate.
This thesis makes the argument that a stronger reference to the right to regulate in IIAs facilitates engagement between the trade and investment law regimes. Based on the above data and analysis, PTIAs play a clear role in facilitating engagement between the two regimes.

This study featured two types of preambular references as evidencing inter-regime engagement. Where these references are stronger and more common, this should inform the interpretation of the treaty's object and purpose. In terms of preambles referring to the WTO Agreement, there was a clear divide between PTIAs and BITs with such references featuring in nearly all PTIAs and nearly no BITs. Preambles referring to the right to regulate were also significantly more prominent in the PTIAs of this study compared to the BITs.
In terms of references to the WTO Agreement, their presence in nearly all PTIAs indicates that the primary motivation for their inclusion is the trade chapters of these Agreements. This broader context for treaty negotiation is important and is part of the reason why references to the right to regulate also feature more prominently in the PTIAs of this study compared to the BITs.
Where a treaty includes stronger and more common references to the right to regulate, as well as to the parties' rights and obligations under the WTO Agreement, this alters the object and purpose of the agreement. This alteration should inform the interpretation of the treaty's object and purpose. For Cook it could be argued that the object and purpose of the trade and investment chapters of PTIAs "are identical".[331] This is indeed the case if it is accepted that PTIAs have a single object and purpose.
Ultimately preambular references to the WTO and the right to regulate tend to be stronger and more common in PTIAs compared to BITs. This results in greater scope for inter-regime

[330] Titi reminds us that regulatory space would ultimately be increased in the absence of an IIA. See Titi, Aikaterina, 'The right to regulate in international investment law,' *Hart Publishing* (2014) 119
[331] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 4

engagement insofar as these references affect tribunals' interpretations of the object and purpose of agreements.

The PTIAs and BITs that featured in this study tended to have different types of preambles. Many of the PTIAs had lengthier preambles taking into account a wider range of concerns largely because of the broader scope of these Agreements. This raises the question of how tribunals should interpret the object and purpose of an Agreement where there is a preambular reference that typically has more of a trade orientation (i.e. it would be unlikely to feature in a BIT between the parties) but it applies to the whole agreement. Each treaty has only one object and purpose, or at least one predominant object and purpose, and the VCLT's use of the singular is important where it states that the content of a preamble is to be interpreted in light of "its object and purpose". The implication of the word "its" is that there is a main or predominant object and purpose and that the treaty must be interpreted in such a way as to advance this main or predominant purpose.[332] This main object and purpose applies to the entirety of an agreement, including the investment chapter, regardless of whether a preambular reference was included primarily, or exclusively, with another chapter of the agreement in mind.

What can be concluded about cross-regime references and when it is appropriate to look to another regime when interpreting the object and purpose of a trade or investment text? Although tribunals have shown reluctance to make cross-regime references when interpreting the object and purpose of trade and investment agreements, this need not be the case. Tribunals are able to make such references in line with the VCLT and there are significant commonalities between preambles found in trade and investment agreements.
There are parallels between the objectives stated in the preamble to the Marrakesh Agreement and those stated in IIAs. Like the preamble to the Marrakesh Agreement, the preambles of many modern IIAs refer to raising living standards,[333] sustainable development, economic development, and the need to balance this with other societal interests. Other questions remain such as what constitutes an appropriate cross-regime reference, and whether tribunals will make such cross-regime references when interpreting the object and purpose of trade and investment agreements. This remains to be seen, but as the preambles of the trade and investment law regimes approximate, the argument to draw upon the experience of the other regime strengthens.

[332] Cook, G, 'The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence Without Interaction,' in Behn, Gáspár-Szilágyi and Langford (eds.), 'Adjudicating Trade and Investment Law: Convergence or Divergence?' *Cambridge University Press* (2018) 4
[333] On this point see for example the 2012 US Model BIT. The latter three objectives are more common across modern IIAs.

Chapter 4- National treatment

Introduction

Non-discrimination is a cornerstone of the trade and investment regimes and is expressed in the foundational concepts of national treatment and the Most-Favoured-Nation (MFN) principle. National Treatment provisions aim to prevent nationality-based discrimination. They ensure imported products are not discriminated *against* while the MFN obligation ensures Members don't discriminate *among* imported products.[334]
National treatment aims to ensure that products, services, items of intellectual property and investments are not discriminated against once they have crossed a border. It is a relative standard in that its compares the treatment given to foreign exporters and investors operating in the host state compared to the treatment afforded to their domestic counterparts. In trade law, national treatment aims to ensure that foreign products or services are treated no less favourably than their like domestic counterparts. In investment law, national treatment typically aims to ensure that investors are treated no less favourably than like domestic investors.

Engagement between trade and investment law was described in Chapter 1 as occurring wherever the content of one of the regimes has a parallel in the other or wherever there are cross-regime references in dispute settlement or parallels in the practices of tribunals. National Treatment is a shared legal obligation that features prominently across the trade and

[334] See, Van den Bossche, P, 'The Law and Policy of the World Trade Organisation, Text Cases and Materials' *Cambridge University Press, 2nd edition* (2008) Chapter 4, page 369

investment law regimes. This chapter looks at the extent to which engagement already exists between the two regimes (sections 1-3), whether this should influence tribunals (sections 4), and whether PTIAs have any kind of an impact on this engagement (section 5).

The steps in a national treatment claim were laid out by the tribunal in *Total v. Argentina* and are common to the trade and investment law regimes.[335] There are typically four stages when a tribunal treats a claim under a national treatment provision. Firstly, the claimant must identify a domestic comparator and then it must prove that they are in 'like circumstances'. Next, the *Total* tribunal found that the complainant must demonstrate that it received less favourable treatment "as compared to the treatment granted to the specific local investor or the specific class of national comparators." The fourth step, may involve the state attempting to justify the differences in its treatment of investors based on treaty exceptions.

National treatment was not initially as important as other standards in BITs. The idea was to go beyond the Calvo doctrine.[336] As standards raised and as developed countries began concluding investment agreements inter se, national treatment gained in importance in IIAs.[337] However the fact that protection from discrimination was included "from the very beginning" shows it was always a concern for parties as it tended to be included.[338]

National treatment provisions are found in all 80 treaties surveyed as part of this study. Within PTIAs, the national treatment provision may feature across a variety of chapters. For example, in the China- Korea FTA (2014), a national treatment provision provided substantive rights for parties in four chapters including those on Market Access For Goods (Chapter 2), Trade In Services (8), Financial Services (9), and Investment (12). National treatment provisions have also featured in Chapters on Intellectual Property.[339]

National treatment articles are found across the WTO Agreements[340] and are extremely common in IIAs. National treatment provisions in IIAs often feature elements such as the four mentioned by the tribunal in Total. Notwithstanding these features, national treatment provisions are still heterogeneous in IIAs and as a result it can be "difficult to distil general principles" about national treatment in the investment context[341] There are also instances of BITs that do not contain national treatment provisions.[342]

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[335] *Total v. Argentina*, Award, ICSID Case No. ARB/04/01 (2013)

[336] The Calvo was popularised in Latin American States in the late 19th and early 20th centuries. The doctrine provides that aliens should not receive treatment that is more favourable than that accorded to nationals. See Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) Chapters 1 & 4

[337] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 66-69

[338] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 68

[339] Canada- Korean FTA (2014) Article 16.6

[340] Agreements featuring National Treatment include: GATT Article III, GATS Article XVII, TRIPS Article 3, TRIMS Article 2, TBT Article 2.1, The SPS Agreement Annex C. 1(a) and in the Agreement on Implementation of Article VI of the GATT '94 (the Anti-Dumping Agreement) Article 2.6. The two plurilateral agreements that are still active both contain National Treatment provisions (Agreement on Public Procurement Article IV, Agreement on Trade in Civil Aircraft Article 4.3).

[341] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 66

[342] See for example, Argentina- Sweden BIT (1991)

Although national treatment provisions are common across trade and investment law, there are differences in how the national treatment provisions operate in the two regimes. National treatment in trade focuses on competition, which requires a broad comparison of groups of like products or services. If there is competition, differential treatment is then assumed to be based on nationality. Investment law focuses on the individual foreign investor. There is no need for a group-based evaluation between broader classes of foreign versus domestic investors. The national treatment standard is necessarily more abstract in trade law than in investment law and this is reflected in how the provisions have been interpreted. Investment law's focus is primarily on protecting investors whereas trade law focuses on trade liberalisation and market access. National treatment claims may be taken for a wider range of issues under the investment law regime as it "covers the entire lifecycle" of an investment.[343] Investment law is more case-by-case, where specific investors claim for breach regarding a specific investment. The type of review is also different, as damages should be specifically connected to measures of the host state. Government measures must 'relate to' investors, meaning there must be a significant connection between them resulting injury to the investor for a remedy to be provided. This is why you can't entirely import the criteria used in trade law into investment law. Nonetheless, there is a "convergence in functionality" between the systems.[344]
This chapter considers these commonalities and differences and the role of national treatment provisions within the trade and investment law regimes. It looks at how trade and investment tribunals have interpreted these provisions and how these interpretations facilitate engagement between the two regimes.

This chapter is structured as follows. Section 1 contains reflections on the empirical results from Chapter 2 on ‘an Empirical Analysis of levels of engagement in PTIAs and BITs’. Sections 2 & 3 examine how the national treatment standard has developed in the treaties and in the case law of the trade and investment law regimes. Section 2 considers how national treatment provisions have been formulated and interpreted in the trade regime, while Section 3 considers this in relation to the investment regime.
Section 4 looks at the degree of separateness, overlap and convergence between the two regimes in light of this examination. It consider how WTO law concepts have been applied and misapplied in investment law jurisprudence. It also considers the question of when cross-regime references are appropriate. It looks at when engagement is appropriate, to what extent it is appropriate, and whether tribunals should have regard to how national treatment provisions have been interpreted under the other regime. Section 5 looks at the scope for crossfertilisation of national treatment provisions in PTIAs as compared to BITs. Finally, section 6 concludes.

[343] Di Mascio & Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ *American Journal of International Law* (2008) 68
[344] Kurtz, J, ‘The WTO and International Investment Law: Converging Systems,’ *Cambridge University Press* (2016) 85

4.1. Reflections on the empirical results

Chapter Two demonstrated that for the sample of treaties chosen, national treatment provisions were present in all 40 PTIAs and all 40 BITs contained in this study. This is the only provision that had 100% coverage for the treaties considered underlining the fundamental importance of national treatment in both PTIAs and BITs. National treatment provisions were included in investment agreements for a variety of reasons. One factor contributing to the ever present nature of national treatment provisions in the trade and investment law regimes is the lack of a clear prohibition in customary international law regarding the differential treatment of nationals and non-nationals.
For Pauwelyn the primary reason for their inclusion was to protect individual foreign investors from targeted attacks.[345] Kurtz makes the point that for emerging economies, IIAs can be a way of showing their economic credentials by extending competitive opportunities to foreign investors [346]

National treatment provisions feature across trade and investment agreements. These provisions are often drafted in a similar manner across the regimes and this facilitates tribunals making cross-regime references. The extent to which national treatment is a fertile ground for engagement between the two regimes is a key question of this chapter.

4.2. The Trade Regime

4.2.1. The law

National Treatment features in the three main WTO Agreements— GATT, GATS and TRIPS and has been described as a "core discipline" of trade law.[347] It also features in the TBT Agreement, SPS Agreement, TRIMS Agreement, the Anti-Dumping Agreement and in both of the currently active Plurilateral Agreements. The varying National Treatment provisions have been treated slightly differently in dispute settlement at the WTO, which reflects the varied wordings found throughout the WTO Agreements.
This section examines GATT Article III and some of the differences in the construction of National Treatment provisions found across the WTO Agreements.
The multi-step analysis of national treatment that takes place under GATT Article III or GATS Article XVII etc., may be referred to with reference to just one of the Agreements (usually the GATT) throughout this chapter. Reference to the nuances of other Agreements are made where appropriate and this is for the sake of simplicity.

[345] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International* Law (2008) 81
[346] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 96
[347] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 48

The GATT

GATT Article III can be seen as a grandmother provision for national treatment in the WTO Agreements. This is because it has been the most litigated national treatment provision before the WTO's Dispute Settlement Body. When interpreting other national treatment provisions under the other WTO Agreements, tribunals have considered the jurisprudence under GATT Article III.[348]
GATT Article III's jurisprudence has been shaped by what Kurtz describes as its "complicated textual set-up".[349] GATT Article III:1 indicates the overall telos or purpose of Article III which is to prevent measures being applied that afford "protection to domestic production".
Subparagraphs 2 and 4 deal with the key areas of taxation and regulation but are constructed differently so that the way the Article's objective is implemented differs for the different provisions. For the purposes of this thesis, this chapter focuses solely on the structure of GATT Article III:4 and two cases taken under it— *EC- Asbestos* and *EC- Seals*. *EC- Asbestos* was selected as the national treatment test under GATT Article III:4 was articulated for the first time in this case. *EC- Seals* was selected for analysis as there were some pertinent recent developments concerning national treatment in this case.

GATT Article III:4— Regulation

To establish a breach of Article III: 4, a complainant must show that the product being discriminated against is 'like' a domestic product. Once likeness is established, the complainant must then show that the imported product receives less favourable treatment than its domestic comparator. The following two questions are central considerations of tribunals in national treatment cases: 1) the comparators relied upon in likeness analysis; and 2) what constitutes less favourable treatment under national treatment provisions.

In terms of the first of these questions, under the WTO Agreements, the word "likeness" is accorded many meanings. Its meaning in a given context depends on how the accordion is "stretched and squeezed" as it was put by the Appellate Body in the *Japan-Alcoholic Beverages* Case.[350]

In order to demonstrate less favourable treatment, the entire group of imported goods must be treated less favorably than the entire group of domestically produced goods.[351]
The Appellate Body has found that distinctions may be drawn between like products without this constituting less favourable treatment "for this reason alone."[352]

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[348] See, for example, Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted on 24 April 2012, Appellate Body Reports, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R and WT/DS386/AB/R, adopted on 23 July 2012, and Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted on 13 June 2012

[349] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *EJIL Volume 20* (2009) 754

[350] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, page 21

[351] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' American Journal of International Law (2008) 66

[352] Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS/135/AB/R, adopted on 5 April 2001

In *US- Section 337*,[353] the words "treatment no less favourable" were deemed to call for "effective equality of opportunities for imported products in respect of the application of laws, regulations…" In this case, less favourable treatment was found for importers as there were different administrative and court procedures for patent infringements were challenged. The Panel's interpretation was that non-discriminatory treatment required equal opportunities for importers to comply with laws or regulations. Since this case, panels and the Appellate Body have consistently interpreted 'treatment no less favourable' in the same way.[354]
One example of a measure being applied in a manner that accords less favourable treatment to importers is the *US- Gasoline* case.[355] In this case, domestic gasoline refiners were allowed to use individual baselines while importers were required to use the baseline prescribed by statute.[356] This was found not to provide equality of opportunity for importers to comply with the regulation laying down these baselines.

If a breach of a Member's national treatment obligations is established, the Member may then defend its measure under the General Exceptions of GATT Article XX.

General Exceptions

When a government measure is found to restrict trade, General Exceptions Articles such as GATT Article XX or GATS Article XIV may be invoked as a defence. A measure is analysed in two stages under these Articles in assessing whether it qualifies for protection. Firstly, it must be capable of being provisionally justified under one of the ten policy objectives contained in subparagraphs (a) – (j) of Article XX, or five policy objectives under GATS Article XIV. Secondly, a measure must comply with the chapeau, or introductory clauses, of Article XX or XIV. There are no general exceptions under the TRIPS Agreement or the TBT Agreement.

The separation between GATT Article III and Article XX has been the subject of much debate. Should the presence of Article XX impact upon the interpretation of Article III? The idea of considering the purpose of a measure under Article III can be seen as being expressly mandated in Article III:1. The fact that Article III:4 doesn't reference Article III:1 has been deemed significant by the Appellate Body in furthering the argument that Article III:4 is a standalone provision.[357]

Article III:1 states that measures "should not be applied to imported or domestic products so as to afford protection to domestic production." This is a statement of the aim of GATT's national treatment Article, which is to avoid protectionism. The Appellate Body has found

[353] Panel Report, *United States - Section 337 Of The Tariff Act of 1930*, L/6439 - 36S/345, adopted on 7 November 1989, paras. 5.11-5.14
[354] See for example Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted on 20 May 1996, paragraph. 6.10
[355] Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996
[356] An individual refinery baseline represents the average quality of gasoline produced and sold by that refinery. See Energy Information Administration, ' Refiners Switch to Reformulated Gasoline Complex Model,' page 4: https://www.eia.gov/outlooks/steo/special/pdf/rfg1.pdf

[357] See Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R, adopted on 18 June 2014. See also, Ming Du, 'Treatment No Less Favourable' and the Future of National Treatment Obligation in Article III:4 of the GATT 1994 after EC - Seal Products,' *World Trade Review* (2015)

that the test for this should be objective rather than subjective. In practical terms, this means that the Appellate Body has regard to the effects of internal measures and doesn't consider the purpose of the measure under Article III:1.

4.2.2. Interpreting national treatment at the WTO

EC- Asbestos

EC-Asbestos involved France's import ban of chrysotile, a known carcinogen and form of asbestos that was produced in Canada. The Panel concluded that France had violated Article III:4 of the GATT and that chrysotile and non-asbestos based construction products were like products. In their view, to consider health risks under Article III:4 was "not appropriate" and would be to "nullify" the effect of Article XX (b).[358] This approach would guarantee market access subject to the defendant being able to find a non-protectionist justification under Article XX.

The Panel in *EC-Asbestos* reiterated that the approach outlined in *The Report of the Working Party on Border Tax Adjustments* should be followed. This approach consists of applying the four classic criteria which include: (i) Properties, nature and quality of the products; (ii) End use of products; (iii) Consumers' tastes and habits; and (iv) The tariff classification of the products if this is sufficiently detailed. There are risks in using tariff bindings that are too broad as a measure of product "likeness".

The Appellate Body reversed the Panel's findings that the products (asbestos and cement-based products) were like and found it breached Article III:4. The Appellate Body reminded the Panel in its Report that Articles III and XX "are distinct and independent provisions" and so a measure may be deemed unjustifiable for public health reasons under both.[359] This may imply less frequent recourse to Article XX (b), but considerations of health reasons under Article III do not deprive Article XX (b) of its *effet utile.* Article XX(b) would only be deprived of its *effet utile* if it could not serve to allow a Member to "adopt and enforce" measures "necessary to protect human … life or health".[360] This is not the case as different inquiries are made under the different Articles.

EC- Seals: A Recent Controversy

The Appellate Body finally made it clear in *EC – Seal Products* that *"*treatment no less favorable" only refers to a detrimental impact on competitive opportunities for imported products. There is no need to consider the regulatory purpose of the measure in Article III:1 separately. Consideration of the purpose of a measure is now confirmed to be reserved exclusively for Article XX.
EC-Seals clarified that Article III:4 deals with the trade impact of measures only. Policy considerations are to be considered under Article XX only. As Ming Du put it "After *EC – Seal Products*, the long- standing controversy

[358] See Panel Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS/135/R, adopted on 5 April 2001, paras 3.450 and 3.512 for the respective quotation marks
[359] Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS/135/AB/R, adopted on 5 April 2001, para 115
[360] Appellate Body Report, European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS/135/AB/R, adopted on 5 April 2001, para 115

on whether Article III:4 itself affords policy space for a WTO Member to consider Article XX-like policy rationale is over."[361]

This is arguably a dangerous interpretative method to follow in WTO jurisprudence. With this method, it is easier to establish prima facie breach of Article III, and the purpose of a measure only comes into play during the defence of a measure under a General Exceptions provision. Firstly, the number of defences available under Article XX is limited and was drawn up in 1947. Secondly, the burden of proof is shifted to the defendant who must show they fall within the exception. Thirdly, Article XX is difficult to comply with. Indeed, in only two of the first twenty Article XX claims to come before the Appellate Body (*EC-Asbestos* & *US-Shrimp II*), were the measures taken deemed compliant with the WTO Agreements.[362] Lastly, WTO Agreements such as TRIPS and the TBT Agreement do not contain General Exceptions. As such the purpose of measures are considered under the National Treatment provisions, as was done in *EC-Asbestos.* Thus, if the purpose of a measure can only be considered under the General Exceptions to the GATT or GATS, this creates two separate strains of WTO jurisprudence for national treatment.

As the Appellate Body found in *EC-Asbestos,* Article III and XX "are distinct and independent provisions". The separation of Article III and XX is arguably fundamental to the sound operation of the national treatment principle in the GATT.

4.3. The Investment Regime

4.3.1. The law

The construction of national treatment provisions varies between different International Investment Agreements. The wording of these are not uniform and some of the elements that constitute the variety of national treatment clauses include the following:
(i) whether or not they grant establishment rights into the host state; (ii) whether they apply to investors as well as investments; (iii) whether some kind of comparator in a "like situation" or that is "similarly-situated" is specified; (iv) whether the national treatment clause appears in the same article as the MFN provision.

These differences in the wordings of national treatment provisions affect the coherence of the interpretation of this norm across international investment law.[363] Newcombe distils the

[361] Ming Du, 'Treatment No Less Favourable' and the Future of National Treatment Obligation in Article III:4 of the GATT 1994 after EC - Seal Products,' *World Trade Review* (2015)
[362] See Moran, N, 'The first twenty cases under GATT Article XX; tuna or shrimp dear?' in Adinolfi, Baetens, Caiado & Micara (eds), 'International Economic Law- Contemporary Issues,' *Springer, Cham* (2017) 3-21
[363] Another reason for a potential lack of coherence in the interpretation of national treatment under investment treaties is the lack of an Appellate Body, such as in the WTO system, whose role it is to give unity and coherence to the body of law as a whole. The establishment of a permanent multilateral investment court is a "medium-term goal" of the European Union (see https://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en (last accessed 5th June, 2015)) though this has met resistance from states like the US who favour the current system

common core of national treatment down to four elements of the OECD's 1976 definition. These include the prohibition of discrimination between foreigners and nationals, the need for 'like' situations, the need to show less favourable treatment, and the possibility for the host state to justify such measures.[364]

The granting of establishment rights is seen a major dividing line between different IIAs. The right of establishment remains within the discretion of the host state.[365] Early BITs signed by the US and Canada typically provided for rights for investors during the pre-establishment phase while the BITs of European countries tended not to include such a provision and concerned post-establishment investment protection only.[366]
States may or may not permit the admission of goods, services and people into their territory. While restrictions on the admission of goods have decreased considerably in recent decades, this has not happened to the case extent for investment. Restrictions on the admission of foreign investments can take many forms and one motivation for such restrictions is the potential harm of the ownership of a country's "productive resources by foreign investors".[367] This is still a cause for concern among EU Member States in 2017.[368]

BITs concluded by the US have often included pre-establishment rights which grant access to the host's market on the same terms as those enjoyed by national investors.
Article II of the US- Argentina BIT is an example of this approach, the opening words of which state: "Each Party shall permit and treat investment…".
The word "permit" guarantees pre-establishment rights. A notable feature of Article II and other pre-establishment treaties is that it is subject to the right of each Party "to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty".
Even for the US, the "champion of private initiative", their assurance to investors that they will not enjoy less rights than other investors is subject to a protocol with reservations and exceptions. Sacerdoti sees this as a strategy that could only be pursued by a country like the US and one that "requires" a list of exceptions".[369]
A second category of agreements include those concluded by European countries, inter alia, and only cover what are know as post-establishment or post-entry rights. These rights may only be exercised once an investment has already been established within a host state. In order for an investment to be established, it has to conform with and be "in accordance with domestic laws".[370]

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of ISDS (see http://www.euractiv.com/sections/trade-society/us-rejects-eu-proposal-investment-court-insists%20-on-retaining-isds-314501 (last accessed 5th June, 2015))

[364] See Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' Kluwer Law International (2009) Section 4.6- quoting from the 1976 Declaration on International Investment and Multinational Enterprises

[365] UNCTAD/ITE/IIT/2004/10 (Vol. I) 'International Investment Agreements: Key Issues' 9 Volume I

[366] See for example, Guerin, S.S., 'Do the European Union's bilateral investment treaties matter? The way forward after Lisbon,' *Centre for European Policy Studies Working Document* No. 333 (2010) 2

[367] Kurtz, J, 'A General Investment Agreement In The WTO? Lessons From Chapter 11 Of NAFTA and The OECD Multilateral Agreement On Investment,' *University of Pennsylvania Journal of International Law*, Vol. 23, Issue 4, Art. 3 (2002) 725

[368] Financial Times, 'Macron and allies head for EU clash on foreign takeovers—Leaders want powers to restrict buyouts in strategic sectors,' June 15, 2017. Available at: https://www.ft.com/content/73aadc3a-5118-11e7-bfb8-997009366969 (last accessed 298 May 2018)

[369] Sacerdoti, 'The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties,' *The Journal of World Investment, Vol. 1*. (2000) 109

[370] E.g. Article 2 of Bolivia - Netherlands BIT (1994): Either Contracting Party shall, within the framework of its law and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other

4.3.2. National Treatment Provisions in IIAs

a) National Treatment Provisions in Early IIAs

The national treatment provisions of an early BIT and PTIA are now compared: 1) The Ecuador-United States BIT; and 2) NAFTA.

The wordings of these two provisions have led to diverging approaches to interpreting national treatment in the first two of these treaties.[371] Tribunals have set different standards of comparison between domestic and foreign investors under the two treaties. A restrictive approach to the likeness test was found under the NAFTA in the Methanex case (considered below), while the tribunal in Occidental took a far broader approach where differential treatment in matters of tax was prohibited between different sectors of the economy.

The US- Ecuador BIT

Article II provides for non-discrimination both in relation to MFN treatment and national treatment. This provision is a standard draft for the US and is exactly the same as the text of the much-litigated US- Argentina BIT for example.
A core feature of this BIT is the guarantee of market access contained in Article II.
The word "permit" in relation to investment in the first sentence has been interpreted as a guarantee of market access for investors from the other party to the BIT. This has been a key motivating factor for the US in concluding BITs.
Under the WTO Agreements, Members subscribe to a positive listing system whereby they commit to liberalise in areas listed in their schedule of concessions. The US- Ecuador BIT operates a system of negative scheduling whereby everything is covered unless it is expressly excluded from the protocol. BITs concluded by the US can be seen as far-reaching and aggressive in terms of granting market access and liberalising domestic markets for its investors.
In terms of a test for national treatment, a broader interpretation has been found under the US-Ecuador BIT than under the NAFTA for example. Article II mentions treatment "no less favourable than that accorded in like situations to investment or associated activities of its own national or companies". Unlike the NAFTA, it contains no mention of "most favourable treatment" which makes it harder to satisfy the less favourable treatment criterion.

NAFTA

NAFTA's national treatment provision has been the subject of much litigation and can be a useful comparator to the trade law approach. A major difference between GATT Article III and Chapter 1102 of NAFTA is that there is no guide in the latter which tells us what type of discrimination tribunals should be looking for. Article III:1 states that measures "should not

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Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments. See also: Denmark- Argentina BIT (1995) & France- Argentina BIT (1993)

[371] See Schill, S, 'The Multilateralisation of International Investment Law,' *Cambridge University Press* (2009) 78

be applied to afford protection". There is no such guide, or limitations, on the purpose of Chapter 1102.

The national treatment jurisprudence developed under Chapter 1102 of NAFTA is analysed in the next section. This section considers the three different approaches to national treatment taken by the tribunals in *SD Myers v. Canada, Pope & Talbot v. Canada* and *Methanex v. USA.* Unlike the WTO system, there is no Appellate Body with the authority to consolidate the jurisprudence.
Paragraph 3 of Article 1102 refers to "treatment no less favourable than the most favourable treatment accorded" to a domestic investor. In cases such as Methanex, this has made it relatively easy to satisfy the less favourable treatment requirement as it suffices to find one domestic investor that has been treated differently and a breach of the Article is found.

b) National Treatment Provisions in Recent PTIAs

CETA

CETA contains the first investment chapter of a concluded PTIA negotiated by the EU. While the EU has not published a Model BIT, the investment chapter of CETA is instructive in illustrating the EU approach to BITs.

In terms of the above two approaches, CETA follows the NAFTA approach to national treatment and includes a provision for "treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors". Therefore, it seems likely that under EU investment chapters findings of less favourable treatment will be based on a comparison with any one domestic investor rather than the class of domestic investors as a whole.

The national treatment provisions of the two most recent PTIAs featured in this study are now considered to see how similarly these provisions are. The texts of the national treatment provisions for the China- Korea FTA (2015)[372] and the Australia- China FTA (2015)[373] are

[372] Article 12.3: National Treatment 1. Each Party shall in its territory accord to investors of the other Party and to covered investment treatment no less favorable than that it accords in like circumstances to its own investors and their investments with respect to investment activities. 2. Paragraph 1 shall not apply to non-conforming measures, if any, existing at the date of entry into force of this Chapter maintained by each Party under its laws and regulations, or - 119 - any amendment or modification to such measures, provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification. Treatment granted to covered investment once admitted shall in no case be less favorable than that granted at the time when the original investment was made. 3. Each Party shall take, where applicable, all appropriate steps to progressively remove all the non-conforming measures referred to in paragraph 2.
[373] ARTICLE 9.3: NATIONAL TREATMENT 1. Australia shall accord to investors of China 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. China shall accord to investors of Australia treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the expansion,1 management, conduct, operation and sale or other disposition of investments in its territory. 3. Australia shall accord to covered investments treatment no less favourable 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 in its territory. 4. China shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.

drafted quite differently. The former provision does not apply to non-conforming measures although it is agreed that steps will be taken to "progressively remove" any such measures. The latter provision is unusual and sets out separate clauses for Australia and China in terms of the scope of national treatment for investors and investments. The wording to these provisions is identical except for this scope. Australian investors and investments are covered in relation to "expansion,1 management, conduct, operation and sale or other disposition of investments in its territory." Chinese investors and investments are covered in relation to "establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory."
Despite these differences in wording, the typical four stages of national treatment provisions are present. Under both Articles an investor must identify a domestic comparator and show 'likeness', it must demonstrate less favourable treatment, and finally both Agreements contain treaty exceptions under which the host state can defend a measure.

The national treatment provisions in BITs and PTIAs considered thus far in this chapter are not far apart along the spectrum of potential national treatment provisions in IIAs.
This section introduces provisions contained in two draft Model BITs published by Norway and India in 2015.
It may be more instructive to look at the national treatment provisions of concluded IIAs rather than documents that are laid down as starting points for negotiations. Nonetheless, the provisions of these Model BITs are worthy of analysis as they illustrate the broad spectrum of what could be contained in the national treatment provisions of future IIAs.

c) National treatment provisions in recent Model BITs: The state strikes back?

Norway’s Draft Model BIT

The succinct Article 3 contains this Model BIT's national treatment provision referring to the three core concepts of likeness, less favourable treatment and the idea of the purpose of a measure. The purpose of a measure is contained in an annex which provides a list of policy exceptions to the national treatment clause including the "protection of public health, human rights, labour rights, safety and the environment". Discrimination may be justified by showing that it bears a “reasonable relationship to rational policies” in this vein.
The attachment of a list of policy exceptions to a national treatment clause in an investment treaty is a direction that this author views as favourable in terms of bringing a greater clarity to public policy exceptions envisaged by the contracting parties.
There is also a General Exceptions clause in Article 24, for discrimination necessary to the pursuit of public policy objectives including inter alia, public morals and compliance with laws and regulations.

India's Draft Model BIT[374]

The proposed text of Chapter I Article 4 of India's Model BIT dilutes the principle of national treatment to the point where it would be very difficult to see it being enforced.[375] Article 4 introduces three concepts in Article 4.2, 4.3 and 4.4 that are egregious to traditional notions of the national treatment principle in international law. It is also noted that the Model BIT contains no provision for fair and equitable treatment, which makes a strong national treatment provision all the more necessary.

Article 4.1 brings in the three core concepts of likeness, less favourable treatment and the purpose of a measure.

Article 4.3 provides that representatives of the government at a local and regional level would not be deemed to be representing the state of India and as such a national treatment claim couldn't be brought against their acts. This would be against principles of customary international law.[376]

Where a regional authority grants preferential treatment to investors from its region, this is more of a grey area concerning the standard of treatment to be accorded to a foreign investor.[377] Decisions of regional authorities within a state are often not covered by IIAs.

If the state of Florida grants special treatment to Floridian investors that is not extended to investors from other states, should this treatment be extended to foreign investors under the national treatment principle? One view is that less favourable treatment is unqualified. Furthermore, treaties should apply to an entire territory. The opposing view is that national treatment looks to nationality based discrimination which is not present here. NAFTA incorporates the former view while the 2004 US Model BIT incorporates the latter. Given the ambiguity here, negotiators should make their choice explicit within treaties.

Article 4.2 states that a breach of Article 4.1 will only occur if the challenged measure constitutes "intentional and unlawful discrimination" based on nationality. This has been described as overly vague[378] and would lead to enforcement issues.

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[374] Model Text for the Indian Bilateral Investment Treaty (2015) available at: https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (last accessed 28 May 2018)

[375] Article 4: National Treatment

"4.1 Each Party shall not apply to Investments, Measures that accord less favourable treatment than that it accords, in like circumstances,2 to domestic investments with respect to the management, conduct, operation, sale or other disposition of Investments in its territory.

4.2 A breach of Article 4.1 will only occur if the challenged Measure constitutes intentional and unlawful discrimination against the Investment on the basis of nationality.

4.3 This Article shall not apply to any Law or Measure of a Regional or local Government.

4.4 Exercises of discretion, including decisions regarding whether, when and how to enforce or not enforce a Law shall not constitute a violation of this Article provided such decisions are taken in furtherance of the Law of the Host State. 4.5 Extension of financial assistance or Measures taken by a Party in favour of its investors and their investments in pursuit of legitimate public purpose including the protection of public health, safety and the environment shall not be considered as a violation of this Article.

2 The requirement of "like circumstances" recognizes that States may have various legitimate reasons for distinguishing between investments including, but not limited to, (a) the goods or services consumed or produced by the Investment; (b) the actual and potential impact of the Investment on third persons, the local community, or the environment, (c) whether the Investment is public, private, or state-owned or controlled, and (d) the practical challenges of regulating the Investment. The factors and determinations used by the Host State to distinguish between Investors and Investments are to be given substantial deference by any tribunal constituted under Article 14.5 or Article 15.2."

[376] International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts Article IV

[377] See Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) S4.27 for a detailed account of this.

[378] The Society for Research in Law, 'Suggestions And Comments In Response To Model Text For The Indian Bilateral Investment Treaty,' *First SRIL International Research Initiative* (2015) 19

Enforcing an national treatment provision would not be helped by Article 4.4 which states that "decisions regarding whether, when and how to enforce or not enforce a Law shall not constitute a violation of this Article". Effectively the enforcement of laws would be at the discretion of the host state.

4.3.3. Interpreting national treatment in IIAs

National treatment is usually strictly linked to nationality-based discrimination. The tribunal in *Occidental v. Ecuador* focused on the disparate impact of the treatment rather than nationality-based discrimination, although this method is an outlier.[379]
The facts of three NAFTA cases are now expanded upon as they are considered in detail in the next section.

SD Myers, Inc. v Government of Canada, UNCITRAL Arbitration (2000)[380]

This was the first national treatment case under the NAFTA and is a standard setter in the same vein as *EC-Asbestos* is for the trade regime. This case endorses a competition-based approach to likeness and concerned an export ban on hazardous waste. SD Myers was an Ohio-based firm looking to expand into Canada. They moved from oil transportation into the remediation of polychlorinated biphenyl (PCB). The greatest inventories of PCB in Canada were concentrated in Ontario and Quebec. The nearest Canadian waste treatment facility was in Alberta which was considerably further away than Ohio. SD Myers started a marketing company operating in Canada but carried out the remediation of the PCB in Ohio as part of a business model that relied on an open border between the US and Canada.
An interim order was issued by the Minister of the Environment with the effect of banning the export of PCBs because of a significant danger to "the environment and human life".[381] SD Myers took a case and qualified as an investor under NAFTA Chapter 11. This was despite the fact that its investment in Canada was of the light variety and the actual economic activity relating to this investment took place in the US.

The tribunal considered competition (via the likeness test), disparate impact (via a test for less favourable treatment) and finally the purpose of the regulatory measure. The purpose of the measure was considered as part of the test under NAFTA Article 1102 as the investment chapter does not contain general exceptions. As such, differential treatment of a like product was not enough for breach, protectionist intent also needed to be shown.
In considering the purpose of the measure, the tribunal found it had to "take into account circumstances that would justify governmental regulations that treat foreign investors differently in order to protect the public interest".[382]
When proving that the purpose of the measure was protectionist, SD Myers found evidence of domestic lobbyists from the PCB industry putting pressure on the Minister to enact the ban. Ultimately, the purpose of the measure was easily proven as in July 1995 the Minister gave

[379] *Occidental Petroleum Corp. v. The Republic of Ecuador,* Award ICSID Case No. ARB/06/11 (2012) paras 550-570
[380] *SD Myers, Inc. v Government of Canada*, NAFTA/ UNCITRAL Tribunal, 1st Partial Award and Separate Opinion, IIC 249 (2000)
[381] *SD Myers, Inc. v Government of Canada*, NAFTA/ UNCITRAL Tribunal, 1st Partial Award and Separate Opinion, IIC 249 (2000) para 123
[382] *SD Myers, Inc. v Government of Canada*, NAFTA/ UNCITRAL Tribunal, 1st Partial Award and Separate Opinion, IIC 249 (2000) para 250

this response to a question in parliament:
"It is still the position of the government that the handling of PCBs should be done in Canada by Canadians."
Such a clear-cut and irrefutable statement of protectionist intent is a rarity in national treatment cases. The tribunal recalled that protectionist intent is not necessarily decisive and must be accompanied by "adverse effect" and that "a practical impact is required".[383] A practical impact was easily demonstrable in light of the export ban. The tribunal went on to say that Canada could have achieved its goal of supporting domestic industry through subsidies and through the granting of all government contracts in this area to domestic operators.
In SD Myers, the tribunal carefully considered the contextual difference between national treatment under the WTO Agreements and under the NAFTA, with regard to the fact that there are no general exceptions under Article XX in NAFTA.
The tribunal then found that SD Myers was in like circumstances with Canadian operators based on the competitive relationship between them. SD Myers were
"in a position to attract customers that might otherwise have gone to the Canadian operators".[384]
The tribunal found that: "The assessment of 'like circumstances' must also…take into account circumstances that would justify governmental regulations that treat foreign investors differently in order to protect the public interest." Schill describes this as a sophisticated approach "that marries adverse competitive impact with an assessment of impermissible regulatory purpose".[385]

Pope & Talbot Inc. v Government of Canada, UNCITRAL Arbitration (2001)[386]

Pope & Talbot's claim stemmed from Canada's implementation of the Softwood Lumber Agreement with the United States. The tribunal endorsed competition as a condition for likeness as well as looking to the purpose of a measure when checking for protectionism. Under this Agreement, regulatory measures were put in place to control lumber exports. These regulations required applying for export permits which entailed administration fees and quota allocations. This interfered with Pope & Talbot's Canadian subsidiary and they brought a claim for a violation of the national treatment principle.

This case introduced a more coherent "like circumstances" test in relation to competition. It was held that less favourable treatment could be demonstrated by showing that an investor has not received treatment that is the equivalent to that received by <u>any</u> like domestic investor.[387] If the investor is treated in the same way as 99% of domestic companies, it is irrelevant. The fact that one domestic company receives preferential treatment is sufficient to find a breach.

[383] *SD Myers, Inc. v Government of Canada*, NAFTA/ UNCITRAL Tribunal, 1st Partial Award and Separate Opinion, IIC 249 (2000) para 254
[384] *SD Myers, Inc. v Government of Canada*, NAFTA/ UNCITRAL Tribunal, 1st Partial Award and Separate Opinion, IIC 249 (2000) para 251
[385] Schill, S, 'The Multilateralisation of International Investment Law,*' Cambridge University Press* (2009) 273
[386] *Pope & Talbot Inc. v Government of Canada*, NAFTA/ UNCITRAL, Tribunal Damages Award IIC 195 (2002)
[387] *Pope & Talbot Inc. v Government of Canada*, NAFTA/ UNCITRAL, Tribunal Damages Award IIC 195 (2002) para 64

Where less favourable treatment was demonstrated, a rebuttable assumption was made under the test that this was down to nationality. To shift the burden of proof back to the complainant, the defendant had to show that a measure had:
"a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto,* between foreign-owned and domestic companies, and (2) do not otherwise... undermine the investment liberalizing objectives of NAFTA."[388]
The tribunal's decision considered the purpose of the measure and was similar to SD Myers in this respect. A final point is that under this test there can be no finding of likeness where discrimination is based upon a legitimate public policy goal.

Methanex v U.S.A (2005)[389]

This case involved the phasing out of the chemical methyl tertiary-butyl ether (MTBE) and a Canadian company with a methanol-producing plant in California. Methanol is primarily converted into MTBE which is used to fulfil the oxygenate requirements for gasoline in California. All gasoline in California has to be blended with an oxygenate as this makes it less of a pollutant.
Methanol and ethanol competed in this market. All ethanol in the US was made by domestic companies. Concerns about health risks arose in relation to the leaking of gasoline into the earth at filling stations. MTBE was one of the chemicals that caused problems in the earth. The University of California were commissioned to undertake a study of the risks associated with this leaking. The University said that MTBE couldn't be banned until it was checked whether ethanol (methanol's competitor) had the same effect. It was found that ethanol broke down naturally. The Governor agreed to phase out MTBE thereafter.
Methanex argued that this constituted a breach of national treatment as methanol and ethanol were in competition and were being treated differently. The question came before the tribunal whether there was a likeness relationship between the two products. This case gave a very narrow interpretation of likeness where only identical comparators were deemed 'like'. Ethanol and methanol were treated differently but it was found that this was not discriminatory as they were not identical products.
In this case, domestic producers of methanol constituted 47% of the market and as they were similarly discriminated against, the tribunal found there was no less favourable treatment with respect to this identical comparator. As pointed out by Newcombe & Paradell, this is a dangerous approach when it comes to preventing hidden discrimination on behalf of the host state.[390] So long as the host state can show one identical domestic company that has been affected in the same way as the foreign investor, even if it represents a small share of the market, there is no finding of less favourable treatment under this approach.

[388] *Pope & Talbot Inc. v Government of Canada*, NAFTA/ UNCITRAL, Tribunal Damages Award IIC 195 (2002) para 78
[389] *Methanex Corp. v U.S.A*, NAFTA/ UNCITRAL Final Award of the Tribunal on Jurisdiction and Merits (2005)
[390]Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) 169

4.4. Comparing the two regimes- separate, overlapping or converging treatment?

4.4.1 Has the WTO law concept of National Treatment been misapplied in investment law? Comments on the Kurtz- Howse exchange

This section considers the application, or misapplication, of WTO law concepts of national treatment in investment law. On this matter, a 2009 exchange between Professors Jürgen Kurtz and Robert Howse is critically examined.[391]
The thesis of Kurtz's 2009 article is that misuse of WTO law by investment tribunals is *the* controlling factor for critical inconsistency in the legal tests applied to national treatment.[392] Kurtz's article first praises early tribunals that engaged in comparisons with WTO law and endorsed competition as a condition of likeness. *SD Myers*, the first analysis of the national treatment obligation under an IIA, is deemed a "remarkable judgment" in disciplining purposeful protectionism. For the *SD Myers* Tribunal, 'likeness' is first and foremost an inquiry into the competitive relationship (akin to the test under WTO law) between domestic and foreign investors. Differential treatment alone would not suffice to justify breach; some form of protectionist intent would also be required.[393]
Kurtz primarily demonstrates his thesis in relation to the findings of the *Occidental* and *Methanex* tribunals. Kurtz disagrees with the interpretative methods employed by these tribunals as having led to inconsistencies in the jurisprudence and his article aims to "identify and chart interpretative flaws" by these tribunals.[394]
These two decisions are now considered with an emphasis on the shortcomings Kurtz identifies. This is followed by a section that considers the comments of Howse in his reply to the article, and also Kurtz's comments or rebuttals to these replies.

Occidental v. Ecuador
This tribunal was the first to clearly reject a role for competitive interactions in a national treatment inquiry under an IIA. In this case, the investor received less favourable treatment as VAT refunds were paid to domestic companies involved in other sectors such as flowers and seafood products. Occidental was denied VAT refunds, as was its 'like' domestic competitor. The tribunal noted that the purpose of national treatment is to *protect* investors, which cannot be done by "addressing exclusively the sector in which the particular activity is

[391] The exchange comprises the following articles: Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *The European Journal of International Law* Vol. 20 no. 3 (2009), Howse & Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz,' The European Journal of International Law Vol. 20 no. 4 (2010) 1087–1094, Kurtz, J, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents: A Rejoinder to Robert Howse and Efraim Chalamish,' *The European Journal of International Law* Vol. 20 no. 4 (2010) 1095–1098.
[392] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *The European Journal of International Law* Vol. 20 no. 3 (2009)
[393] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *EJIL Volume 20* (2009) 760
[394] Kurtz, J, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents: A Rejoinder to Robert Howse and Efraim Chalamish,' *The European Journal of International Law* Vol. 20 no. 4 (2010) 1096

undertaken".[395] Kurtz describes its ensuing analysis that a product "necessarily relates to competitive and substitutable products"[396] as being a "inutile and misleading comparison with selective parts of WTO law."[397] As seen in chapter 4 on likeness, this is but one of the meanings that likeness can have under WTO law.

Howse's reply to Kurtz's article counters that the tribunal in Occidental did not say competition is *irrelevant*, but rather that 'like situations' were not *limited* to competing investors. Howse agrees that the tribunal misread WTO law by only referring to the GATT conception of likeness. However this is not thought to be fatal to their underlying logic which is based on the fact that investment law is rooted in diplomatic protection and so discrimination is "in no way limited" and can "extend beyond" situations of competition.[398] Howse then cedes that such discrimination that is unrelated to competition can be caught by FET and that thus the "root" of the tribunal's error is not misreading WTO law but rather the failure to consider this division of labour between FET and national treatment.[399]
For Kurtz, such points are "strictly ancillary"[400] to his thesis, although he agrees that this division of labour must be taken into account, while emphasising that his thesis is not to make normative claims about how national treatment should be read.

Methanex v. U.S.A
The Methanex tribunal adopted a narrower reading of the national treatment obligation than would have been given had competition been a condition of likeness. The tribunal found that it would be "perverse to ignore identical comparators"[401] where they exist and to use comparators that were less 'like'. Kurtz describes this as an "exceedingly narrow reading" which would fail to capture typical embodiments of nationality-based discrimination.
The tribunal made reference to WTO law in justifying its ruling noting that the BIT referred to 'like circumstances' while the GATT referred to 'like products'. The term 'like products' was found to play a critical role in the application of GATT Article III. [402] The tribunal referred to these textual differentiations as evidence of the parties' intent to have "distinct regimes for trade and investment".[403] Kurtz argues that the need for a competitive relationship in the GATT context does not "flow from the use of the term 'like products'" but rather from

[395] *Occidental Petroleum Corp. v. The Republic of Ecuador,* Award ICSID Case No. ARB/06/11 (2012) para 173
[396] *Occidental Petroleum Corp. v. The Republic of Ecuador,* Award ICSID Case No. ARB/06/11 (2012) para 174
[397] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' The European Journal of International Law Vol. 20 no. 3 (2009) 765
[398] Howse & Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz,' The European Journal of International Law Vol. 20 no. 4 (2010) 1092. Howse also makes the point that the misapplication of WTO law is "more the symptom than the disease", the disease being shortcoming in tribunals' interpretative methods in investment law (page 1089)
[399] Howse & Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz,' The European Journal of International Law Vol. 20 no. 4 (2010) 1092
[400] Kurtz, J, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents: A Rejoinder to Robert Howse and Efraim Chalamish,' *The European Journal of International Law* Vol. 20 no. 4 (2010) 1096
[401] *Methanex Corp. v U.S.A,* NAFTA/ UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (2005) Part IV Chapter B, para 17
[402] *Methanex Corp. v U.S.A,* NAFTA/ UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (2005) Part IV Chapter B, para 29: "These provisions do not use the term of art in international trade law, "like products", which appears in and plays a critical role in the application of GATT Article III."
[403] *Methanex Corp. v U.S.A,* NAFTA/ UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (2005) Part IV Chapter B, para 35

the overall context of GATT Article III (in particular GATT Article III: 1).[404]

For Howse, the tribunal's narrow approach to likeness does not reject the role of competition; it merely found that likeness must be established by reference to a comparator with the closest competitive relationship.[405] Howse acknowledges Kurtz's critique that this could lead to discrimination. However, for Howse it is "hard to trace" this interpretation to a misreading of WTO law as the narrowing relates to the facts of the case. The relevant facts are that: 1) Methanex produces a product input rather than a product; and 2) the tribunal had already found the claimant's allegations of corruption to be groundless and the investor's 'crying wolf' may have shaped the tribunal's "frame of mind".[406]
In relation to point 1, Howse asks how remote or indirect should the competitive relationship be in establishing likeness? Methanex produces methanol, which is an input into MTBE. MTBE competes with ethanol.[407] Can it be said that methanol, an input into MTBE is 'like' ethanol?
Due to the presence of an identical comparator, the tribunal was able to sidestep the tricky task of "crafting a principled approach to remoteness."[408] However the tribunal "left the door open" to broader considerations of likeness where no such identical comparator is apparent.[409] Kurtz agrees that the door is open but points out that not all tribunals have recognised this "subtle invitation."[410] The tribunal in *Bayindir v. Pakistan* found that based on *Occidental*, *Methanex* and *Thunderbird v. Mexico*,[411] national treatment "must be interpreted in an autonomous manner independently from trade law considerations."[412]

Comments on the exchange
The likeness test in *Occidental* is extremely wide while the one in *Methanex* is extremely narrow. In the former, investors are deemed 'like' as they are both exporters of goods, while in the latter the comparator is set at the level of an 'identical' competitor.
For Howse, the "broad spirit" of investment protection under IIAs influences the approach in *Occidental*, while the narrower *Methanex* approach is due to the facts, which make a "direct competition analysis impractical".
For Kurtz, the tribunals in *Occidental* and *Methanex* reject or lack a full conception of competition as a condition of likeness. For Kurtz competition is rejected "solely because of

[404] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *The European Journal of International Law* Vol. 20 no. 3 (2009) 767
[405] Kurtz does not claim the tribunal competition as a condition of likeness, but rather advocates a test that sees a fuller conception of competition. See Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *The European Journal of International Law* Vol. 20 no. 3 (2009) 766
[406] Howse & Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz,' The European Journal of International Law Vol. 20 no. 4 (2010) 1092-93
[407] See Methanex Part II Chapter D, para 3. Note: Howse mistakenly labeled MTBE as the input and methanol as the product at p1092.
[408] Howse & Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz,' The European Journal of International Law Vol. 20 no. 4 (2010) 1093
[409] Howse & Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz,' The European Journal of International Law Vol. 20 no. 4 (2010) 1093
[410] Kurtz, J, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents: A Rejoinder to Robert Howse and Efraim Chalamish,' *The European Journal of International Law* Vol. 20 no. 4 (2010) 1098
[411] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL (2006)
[412] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, Award ICSID Case No. ARB/03/29 (2009) para 389

the misperception of its limitation or breadth" as applied in the WTO context.[413] He continues that a test using competition in its analysis as a necessary condition for breach would be better equipped to "ferret out" hidden forms of discrimination as such a test would force a host to explain its regulatory distinction.[414]

Howse warns against inferring inconsistency and incoherence from different outcomes and approaches to the interpretation of similar norms in a small sample of investment law cases. Differences in outcomes are even seen in WTO law where the tribunals interpret the same text.

It is not the role of investment tribunals to harmonise the interpretation of norms contained across the universe of BITs. Rather, Howse tell us that regard must be had to textual differences, structural differences, the particular facts and the subject matter of the dispute before them.[415]

For Kurtz the reasoning in *SD Myers* and *Pope & Talbot* represents "robust if imperfect interpretative methods" while *Occidental* and *Methanex* represent "ends-driven reasoning" embedded within superficial reliance on WTO law.

If Kurtz is correct that misuse of WTO law is the controlling factor for critical inconsistency in investment law jurisprudence, should this risk lead investment tribunals to be wary of drawing on the trade regime? In light of the above analysis, the tribunals in *Occidental* and *Methanex* misused WTO law because: 1) in *Occidental*, the tribunal narrowly interpreted likeness referring only to its meaning under the GATT; and 2) in *Methanex*, the tribunal incorrectly found that the need for a competitive relationship in the GATT context is due to use of the term 'like products', which plays a critical role in the interpretation of Article III. It is this author's view that these readings need not be repeated in the future. If future tribunals are aware of these potential misreadings they need not repeat them, but whether the practice of drawing on the jurisprudence of the other regime risks further, different misreadings remains to be seen.

On this point, Kurtz proposes potentially requiring "one or even two members" of tribunals to recognised authorities "in the increasingly specialized international economic law components of the broader field of public international law."[416] For Howse, it is not appropriate to "prejudge the mix of specialisations in international law that may be appropriate to any particular arbitral panel".[417]

4.4.2. Differences Between the Two Regimes

When considering whether the national treatment standard should be applied in a uniform manner across the two regimes, it is essential to consider the differences between the two

[413] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *The European Journal of International Law* Vol. 20 no. 3 (2009) 752

[414] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *The European Journal of International Law* Vol. 20 no. 3 (2009) 766

[415] Howse & Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz,' The European Journal of International Law Vol. 20 no. 4 (2010) 1094

[416] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *The European Journal of International Law* Vol. 20 no. 3 (2009) 771

[417] Howse & Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz,' The European Journal of International Law Vol. 20 no. 4 (2010) 1094

regimes that may justify different, tailored or nuanced approaches in the context of the particular regime where it is being applied. Some considerations for treating the trade and investment regimes differently include their different origins, goals, treaty texts, procedures and remedies. Any recommendations about treating national treatment as a uniform doctrine in the two regimes must take into account their fundamental differences.

The objectives of the two regimes are complementary and they have been referred to as being twins, two sides of the same coin and a variety of names reflecting this duality of purpose. The trade regime focuses on the liberalisation of trade and protecting market access for all investors. It is about "welfare, efficiency…and trade opportunities- not individual rights."[418] Investment treaties seek to protect individual investors and to stimulate FDI between the contracting states. They generally set minimum standards for nondiscrimination, protection from expropriation and the fair and equitable treatment of foreign investors. These differing aims have led to differences in how the national treatment principle has been interpreted in the two regimes.

Major textual differences considered above are that GATT Article III contains Article III:1 which indicates the telos of the Article. No such guidance is given in NAFTA Chapter 1102, the US- Ecuador BIT or in CETA.
Furthermore the GATT contains a list of General Exceptions in Article XX, which is another feature that Chapter 1102 does not have. Rather, tribunals have looked to find the purpose of the measure within Chapter 1102 and the broader context of the treaty. As such, when looking to the intent of a measure in NAFTA claims, it is considered within Chapter 1102 rather than at the WTO where a breach of Article III is determined before turning to Article XX where a measure may be defended on public policy grounds.

The trade and investment regimes jointly look to likeness (via a test for competition), less favourable treatment (via a test for disparate impact) and to other reasons that may justify a measure. In trade law, differential treatment (less favourable treatment) of competing products (like products) is enough to find a prima facie violation of the GATT/ GATS etc. Under PTIAs such as NAFTA, this is not enough as other policy justifications can be referred to.[419]
This is akin to the division of labour between GATT and the agreement where the latter has no general exceptions. Likewise, where an IIA has a general exceptions such as CETA, investment tribunals may be more likely to look to trade law or indeed to the case law under similarly worded investment agreements. If an inquiry into other policy justifications is carried out under the national treatment article itself, some fear that the exceptions in a trade and investment agreements may be redundant. This is not the case however as different inquiries are made under the different Articles.

[418] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 54
[419] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 72

4.4.3. Should tribunals have regard to the interpretation of national treatment provisions under other regimes?

In line with Article 31.3(c) of the Vienna Convention, tribunals may consider in their interpretations "Any relevant rules of international law applicable in the relations between the parties". National treatment provisions of the other regime form a part of this body of relevant rules and can thus be considered by tribunals.

Although the national treatment provisions of the other regime *can* be drawn upon when interpreting trade and investment agreements, it is noted that drawing upon the jurisprudence of the other regime has been unidirectional. While there have been several instances in the investment jurisprudence of tribunals considering WTO law and its applicability to the case at hand, WTO tribunals have tended not to make external references when interpreting the national treatment provisions under the WTO Agreements.

As seen in Sections 3.3 and 4.1, some investment tribunals have been very open to drawing on the WTO jurisprudence, while others have rejected any such comparisons outright. In the four investment cases considered in depth in this chapter,[420] when interpreting national treatment two of the tribunals adopted approaches that facilitated engagement while the other two excluded this possibility.

The *SD Myers* tribunal carefully considered the contextual difference between national treatment under the WTO Agreements and under the NAFTA, with regard to the fact that there are no general exceptions under Article XX in NAFTA.
The tribunal then found that SD Myers was in like circumstances with Canadian operators based on the competitive relationship between them. SD Myers were
"in a position to attract customers that might otherwise have gone to the Canadian operators".[421] Thus the tribunal endorsed a competition-based approach to likeness.
In *Pope & Talbot*, the tribunal also endorsed competition as a condition for likeness as well as looking to the purpose of a measure when checking for protectionism. This case introduced a new "like circumstances" test in relation to competition. It was held that less favourable treatment could be demonstrated by showing that an investor has not received treatment that is the equivalent to that received by any like domestic investor.[422] If the investor is treated in the same way as 99% of domestic companies, it is irrelevant. The fact that one domestic company receives preferential treatment is sufficient to find a breach.
The *Occidental* tribunal rejected a role for competitive interactions in a national treatment inquiry under an IIA. The tribunal noted that the purpose of national treatment is to *protect* investors, which cannot be done by "addressing exclusively the sector in which the particular activity is undertaken".[423] Kurtz notes that this general claim of 'protection' offers no real guidance as to whether competition should be a factor and describes its ensuing analysis as a

[420] *SD Myers, Inc. v Government of Canada*, NAFTA/ UNCITRAL Tribunal, 1st Partial Award and Separate Opinion, IIC 249 (2000), *Pope & Talbot Inc. v Government of Canada*, NAFTA/ UNCITRAL, Tribunal Damages Award IIC 195 (2002), *Methanex Corp. v U.S.A*, NAFTA/ UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (2005), *Occidental Petroleum Corp. v. The Republic of Ecuador*, Award ICSID Case No. ARB/06/11 (2012)
[421] *SD Myers, Inc. v Government of Canada*, NAFTA/ UNCITRAL Tribunal, 1st Partial Award and Separate Opinion, IIC 249 (2000) para 251
[422] *Pope & Talbot Inc. v Government of Canada*, NAFTA/ UNCITRAL, Tribunal Damages Award IIC 195 (2002) para 64
[423] *Occidental Petroleum Corp. v. The Republic of Ecuador*, Award ICSID Case No. ARB/06/11 (2012) para 173

misleading comparison with "selective parts of WTO law."[424]
The tribunal in *Methanex* was hostile to the idea of making references to WTO law. The tribunal noted that the BIT referred to 'like circumstances' while the GATT referred to 'like products'. The term 'like products' was found to play a critical role in the application of GATT Article III.[425] The tribunal referred to these textual differentiations as evidence of the parties' intent to have "distinct regimes for trade and investment".[426]

As per section 2, one of the major interpretative questions concerning national treatment at the WTO has centred on whether regulatory purpose should be considered under GATT Article III, or whether this should be reserved for when breach has been found, and a measure is being defended under GATT Article XX. This division of labour between GATT Article III and XX is repeated in certain PTIAs such as CETA. CETA incorporates General Exceptions based on those at the WTO and contains a national treatment provision under which an inquiry into regulatory purpose could be made. Although no "reverse-crossfertilisation" of WTO tribunals drawing on investment law jurisprudence has occurred yet, such reverse-crossfertilisation is a lot easier to imagine in the case of CETA where: 1) the structures of the Agreements are similar; and 2) where an appellate organ may be interpreting these provisions. Other WTO Agreements such as the TBT Agreement and TRIPS do not contain General Exceptions and reverse-crossfertilisation is again easier to imagine in relation to Agreements with similar structures such as the NAFTA for example.

What can be concluded about cross-regime references and when it is appropriate to look to another regime when interpreting the national treatment provision of a trade or investment text?
In terms of investment tribunals, this thesis does not endorse the approaches of the *Occidental* and *Methanex* tribunals that rejected competition as a condition for likeness.
The *Occidental* decision is seen as an outlier in the national treatment jurisprudence. This is mainly because the tribunal focused on the disparate impact of the treatment rather than nationality-based discrimination in its analysis.[427] The *Methanex* decision distinguished the wordings of the provisions in relation to likeness and deemed that this showed the parties' intent to have distinct regimes for trade and investment. This author does not view minor differences in wording to be insurmountable to making cross-regime references.
The approach endorsed by this thesis is that of the tribunal in *SD Myers* where the competitive relationship between investors was part of the likeness analysis. The tribunal in SD Myers had due regard to the contextual differences of the two regimes. Wu categorises regard to these differences as a "rejection of the WTO approach" in emphasising contextual differences between the regimes.[428]
Having regard to the specificities of an agreement or regime is a key part of drawing upon the jurisprudence of the other regime and does not constitute rejection. The SD Myers tribunal

[424] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *The European Journal of International Law* Vol. 20 no. 3 (2009) 765
[425] *Methanex Corp. v U.S.A*, NAFTA/ UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (2005) Part IV Chapter B, para 29: "These provisions do not use the term of art in international trade law, "like products", which appears in and plays a critical role in the application of GATT Article III."
[426] *Methanex Corp. v U.S.A*, NAFTA/ UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (2005) Part IV Chapter B, para 35
[427] *Occidental Petroleum Corp. v. The Republic of Ecuador,* Award ICSID Case No. ARB/06/11 (2012) paras 550-570
[428] Wu, Mark, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime,' in Douglas, Pauwelyn & Vinuales (eds.), 'The Foundations of International Investment Law,' *Oxford University Press* (2014) 64/82

were sensitive to the contextual differences between the GATT and NAFTA and this reinforces Kurtz's claim that the tribunal adopted a "sophisticated juridical approach" in this respect.
Tribunals must be attentive to textual and contextual differences between agreements, but deciding on, for example, whether competition plays a role in establishing likeness comes down to how the *telos* or the purpose of national treatment in investment law is understood. For Kurtz, the telos, or the purpose of such provisions is to prevent discrimination based upon nationality"[429] as opposed to discrimination for other reasons, much like under the WTO regime.

Although WTO tribunals have shown reluctance to make cross-regime references when interpreting national treatment provisions, this need not be the case. Tribunals are able to make such references in line with the VCLT. Furthermore, these provisions are quasi ubiquitous in the two regimes and there are significant commonalities between these provisions in trade and investment agreements.
National treatment provisions at the WTO mirror the structure of PTIAs such as CETA (in the case of the GATT & GATS) and NAFTA (in the case of the TBT Agreement & TRIPS). As the body of jurisprudence under these Agreements builds, the argument for WTO tribunals to draw upon the experience of the other regime strengthens.

When investment tribunals have made cross-regime references in relation to national treatment, they have done so in quite an explicit manner. They have drawn upon the jurisprudence of the other regime and this has helped them in developing legal tests.
Although cross-regime references haven't been seen at the WTO yet, it may only be a matter of time before such references are made. This could be in relation to the investment law regime, or to another regime in public international law.
That said, when interpreting the national treatment provision in *EC- Seals* (excluding analysis of GATT Article XX), the Appellate Body made 51 references in total. All of these references were to other WTO reports and to submissions of the parties to the dispute.[430] There is no reluctance on the part of the Appellate Body to refer to other authorities, it is merely external authorities that it shows reluctance to refer to.

4.5. The scope for crossfertilisation of national treatment provisions in PTIAs as compared to BITs

This section considers whether national treatment provisions in PTIAs *result in increased levels of engagement* between the trade and investment law regimes compared to their

[429] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008)72
[430] Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R, adopted on 18 June 2014, pages 122-129, see footnotes of the Appellate Body Report 1021-1071

counterparts in BITs. Engagement was said to occur in Chapter 1 wherever the content of one of the regimes has a parallel in the other or wherever there are cross-regime references in dispute settlement.

In terms of parallels in content, national treatment provisions featured in all 40 PTIAs and in all 40 BITs contained in this study. This is the only substantive provision that had 100% coverage across the Agreements. Thus it is not clear from a quantitative analysis alone whether there are greater parallels of content for the PTIAs compared to the BITs. What is clear however, is that for the sample, national treatment provisions are ubiquitous and potentially a catalyst for inter-regime engagement.

The second measure for increased engagement concerns cross-regime references and whether they are more likely to occur because of national treatment provisions in PTIAs compared to their counterparts in BITs. National treatment provisions were as prevalent in PTIAs as they were in BITs for the sample taken in this study. It is thus inconclusive whether tribunals would be more likely to draw upon these PTIA provisions on this basis alone. However, there are additional considerations for tribunals when comparing shared legal norms between the systems.[431]

Tribunals must consider the contextual differences relating to national treatment provisions in PTIAs and BITs. The context of the national treatment provision is different among IIAs just as it is different between the trade and investment law regimes. The context of the national treatment provision in the US- Ecuador BIT is different to that of NAFTA. NAFTA is a much larger agreement and has a more expansive preamble. The context of the national treatment provision of NAFTA is different to that of CETA. While inquiries into the purpose of a measure are carried out exclusively under Article 1102 of NAFTA, CETA incorporates General Exceptions which are applicable to the national treatment provision of its investment chapter.
In terms of crossfertilisation of jurisprudence, national treatment tests at the WTO have also been developed with a different context at hand than that facing an investment tribunal. This is easiest to see in relation to the GATT, which has a complicated textual set up, at least in relation to the other provisions looked at in this section.[432] Notwithstanding its textual set up, many tribunals at the WTO and in investment law still look to jurisprudence under the GATT because of its status as the grandmother provision of national treatment provisions at the WTO and the amount of litigation under it. Any attempt to draw upon GATT jurisprudence must be mindful of contextual differences which GATT Article III:1 and XX likely represent. GATT Article III:1 explicitly tells us that the purpose of the National Treatment provision is so that taxes and regulations "should not be applied to imported or domestic products so as to afford protection to domestic production." GATT Article XX also provides a list of General Exceptions which is not present in IIAs such as NAFTA.
The *Methanex* tribunal was dismissive of drawing upon GATT jurisprudence in its interpretation of national treatment under the investment chapter of NAFTA. Any such

[431] Chapter 1.6 outlines the five primary considerations when comparing legal norms or concepts between the systems for the purposes of this thesis, including; 1) textual differences; 2) contextual differences; 3) systemic differences; 4) remedy structures; and 5) the purposes of agreements.
[432] Note: this paragraph applies to both national treatment and likeness. As such it is repeated in Chapter 5.6, the section on levels of engagement in PTIAs & BITs in 'likeness' provisions.

attempt would have to be mindful not only of differences in the wordings of these provisions, but also of these key contextual differences.
The GATS refers to the obligation to provide treatment no less favourable than a Member accords to its own "like services and service suppliers".[433] The National Treatment Chapter of CETA states that the parties shall provide treatment no less favourable than the most favourable treatment accorded, "in like situations, by that government to its own service suppliers and services."[434] Aside from the provisions themselves, GATS is subject to a list of General Exceptions in Article XIV and this is incorporated into CETA in Article 28.3.2. The wordings and context of these provisions are almost identical and consequently the potential for crossfertilisation of jurisprudence seems very high.
Does it follow that the GATS would be a more appropriate starting point for an investment tribunal under NAFTA? Although GATS does not have some of the same complications as the GATT such as Article III:1, the contexts are still different as Chapter 11 NAFTA is not subject to General Exceptions. However the WTO's TBT Agreement contains a national treatment provision which is not subject to General Exceptions, although this Agreement refers to 'like products'.

A second consideration for tribunals when interpreting shared legal concepts such as national treatment is the wordings of agreements. As stated in the introduction, there are typically four stages in treating a national treatment claim: 1) identifying a domestic comparator; 2) proving 'like circumstances'; 3) demonstrating less favourable treatment; and 4) checking whether a claim can benefit from a treaty exception.
Tribunals have to be particularly attentive to differences in wording concerning 'likeness' and treaty exceptions (see chapters 5.6 and 6.6). Differences in wording are less fundamental to the rest of the four stages in a national treatment claim. The wording of 'less favourable treatment' is fairly homogenous and identifying a domestic comparator occurs at the likeness stage. Nonetheless there are other variations in the wordings tribunals have to take into account when interpreting national treatment provisions.
One such difference concerns whether or not national treatment applies to investors and investments pre or post establishment.
Article 11.3.1 KORUS states: "Each Party shall accord to investors of the other 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 in its territory."
Many national treatment provisions do not specify that pre-establishment rights apply and tribunals must consider this in determining the scope of the provision.

Tribunals must also consider the different purposes of the agreements when interpreting national treatment provisions under PTIAs and BITs. A treaty is to be interpreted in light of “its object and purpose” which is to be found in the treaty's preamble. This could affect an interpretation of a national treatment provision in a couple of key ways. Preambles can facilitate crossfertilisation based on: 1) a reference to WTO law in the preamble; and 2) the strength of any reference to the host state's right to regulate within the preamble. In the absence of any such provisions in the preamble, tribunals have to be careful, particularly in relation to older style BITs, that they strike an appropriate balance in their interpretations

[433] GATS Article XVII.1 on National Treatment
[434] CETA, Article 9.3 National treatment

between the protection of investment and that the host state's right to regulate.

Finally, tribunals must consider systemic differences and differences in the remedy structures between the two regimes when interpreting national treatment under PTIAs and BITs. These differences mean that there are potentially severe consequences if a tribunal gives an overly broad or narrow reading of national treatment, particularly if it gives rise to monetary damages. Findings of breach under IIAs and are not confined to the removal of measures as is the case in the trade law regime. For Kurtz, the inter-state character of the WTO acts as a "filter against improper or incautious invocation of rights,"[435] while such a filter does not exist in investor-state arbitration.
A key systemic difference between the regimes is the lack of the possibility of appeal in the investment regime except for a very limited number of grounds in all but the most recent IIAs such as CETA. Tribunals have to be mindful of these factors in their awards and in striking a balance that is appropriate for the investment regime, rather than following a test developed in line with a different set of considerations in the trade regime.

4.6. Conclusion

This chapter considered the differences in national treatment provisions of the trade and investment law regimes in relation to the WTO Agreements, as well as both early and recent IIAs.
At the WTO, interpretations of national treatment provisions have centred around: 1) the complicated textual and structural features of Articles such as GATT Article III; and 2) whether regulatory purpose should be consider under GATT Article III as well as under GATT Article XX.

This chapter examined Kurtz's view that poor interpretative methods employed by investment tribunals have led to "wildly inconsistent outcomes" and whether investment tribunals to be wary of drawing on the jurisprudence of the trade regime as a result.
The tribunals in *Occidental* and *Methanex* were deemed to have misused WTO law because: 1) in *Occidental*, the tribunal narrowly interpreted likeness referring only to its meaning under the GATT; and 2) in *Methanex*, the tribunal incorrectly found that the need for a competitive relationship in the GATT context is due to use of the term 'like products', which plays a critical role in the interpretation of Article III.
It is this author's view that these narrow readings need not be repeated in the future. If future tribunals are aware of these potential misreadings they need not repeat them, but whether the practice of drawing on the jurisprudence of the other regime risks further, different misreadings remains to be seen.

Howse warns against inferring incoherence and inconsistency from a small sample of investment law cases. Indeed given the lack of an Appellate Body and the principle of *stare decisis* in investment law, the existence of different interpretative approaches is unsurprising.

[435] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 92

Differences in outcomes are also seen in WTO law where the tribunals interpret the same set of Agreements. It is not the role of investment tribunals to harmonise the interpretation of norms contained across the universe of BITs. Rather, regard must be had to textual differences, structural differences, the particular facts and the subject matter of the dispute before them.[436]

The WTO jurisprudence on national treatment has been inconsistent and has seen at least six different phases of interpretation.[437] The reasoning has at times been artificial and very legalistic. Things may have been simplified to some extent in *EC- Seals* but this comes at a price given the abovementioned shortcomings of Article XX.
There argument for cross-regime references would benefit from greater consistency in the trade law jurisprudence.

Investment tribunals have been wiling to draw upon trade law jurisprudence but these cross-regime references have been unidirectional for national treatment provisions.
Although there has been no "reverse-crossfertilisation" of WTO tribunals drawing on investment law jurisprudence, such reverse-crossfertilisation is a lot easier to imagine in the case of agreements such as CETA where: 1) the structures of the Agreements are similar; and 2) an appellate organ may be interpreting these provisions.
WTO tribunals can make such references in line with the VCLT even if they have shown reluctance to do so to date. Furthermore, national treatment provisions are quasi ubiquitous in the two regimes and there are significant commonalities between these provisions in trade and investment agreements.
WTO tribunals tend to make an abundance of references to other WTO reports in this area but not to external authorities. Post *EC- Seals*, where regulatory purpose is no longer considered under GATT Article III, WTO tribunals may well find that agreements such as NAFTA provide useful reference points when interpreting national treatment. The argument for external references is all the more compelling when interpreting national treatment provisions under the WTO Agreements that do not have general exceptions (e.g. the TBT Agreement).

The purpose of national treatment in trade and investment law is the prevention of nationality-based discrimination. This purpose is very similar across the regimes despite the tribunal in *Occidental* describing approaches to its interpretation under investment law as being the "opposite" to its interpretation under the GATT.[438]
Despite the differences between the two regimes, the regimes share a common core in relation to national treatment. The fundamental task in the two regimes is to try to eliminate protectionism, facilitate legitimate domestic regulation and to recognise the difference between the two.

[436] Howse & Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz,' The European Journal of International Law Vol. 20 no. 4 (2010) 1094
[437] See Pauwelyn 62-65 for periods one to five. A sixth period has undoubtedly commenced post EC- Seals.
[438] *Occidental Petroleum Corp. v. The Republic of Ecuador*, Award ICSID Case No. ARB/06/11 (2012) para 175

Chapter 5- Likeness

Introduction

Engagement between trade and investment law was described in Chapter 1 as occurring wherever the content of one of the regimes has a parallel in the other or wherever there are cross-regime references in dispute settlement or parallels in the practices of tribunals. Likeness is a shared legal standard among the regimes and this standard is a part of the regimes' 'content'. This chapter looks at the extent to which engagement already exists between the two regimes (sections 1-3), whether this should influence tribunals (sections 4), and whether PTIAs have any kind of an impact on this engagement (section 5).

This chapter considers the concept of likeness in its various wordings, and how it has been interpreted in the trade and investment law regimes. Likeness is usually included in provisions that aim to prevent nationality-based discrimination. Breach of these provisions can be found where a claimant can show that it is in a like situation to a domestic investor or that its service or product is like a domestic counterpart.
The concept of likeness frequently appears in a variety of provisions across the two regimes including those on national treatment, Most-Favoured-Nation, and dispute settlement. The General Exceptions article in the EFTA-Korea Investment Agreement (2006) also covers discrimination between "States where like conditions prevail".[439]

Another example of a provision including likeness in IIAs is the article concerning

[439] EFTA-Korea Investment Agreement (2006), Article 20: "Exceptions- Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between States where like conditions prevail, or a disguised restriction on investors and investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; or the environment; or (c) necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement."

establishment rights in the St Vincent and the Grenadines- Taiwan BIT (2010). Under the Agreement, establishment rights are accorded on a basis no less favourable than that, which "in like circumstances" is granted, to the host state's nationals or those of any third state.[440] Likewise, the concept of likeness features across the WTO Agreements, appearing 76 times in the GATT, GATS, TBT, SPS and SCM Agreements.[441] Although the Agreements generally refer to 'like products' or 'like services', in Annex 2 to the Agreement on Agriculture, which concerns exemptions for reductions commitments for domestic support, reference is made in Article 8 to a "natural or like disaster".[442]

Despite likeness featuring in many types of provisions, this chapter focuses primarily on likeness in national treatment provisions and as such some of the conclusions build on those from Chapter 4. National treatment is a shared legal norm of the trade and investment law regimes, which aims to prevent nationality-based discrimination. National treatment is based on the idea that like cases should be treated in the same way and so the scope of likeness is fundamental to determining what constitutes a breach of the norm of national treatment. To make a prima facie claim for breach of national treatment, a complainant must identify a domestic investor in like circumstances compared to which it has received less favourable treatment. In some cases where likeness was not expressly mentioned in the treaty provision, the need for a comparator has been deemed to be inherent in national treatment provisions.[443]

'Likeness' features across the trade and investment law regimes and is a potentially fertile ground for engagement between the trade and investment law regimes.
This chapter looks at the scope for crossfertilisation in relation to likeness given investment law's focus on the individual over the group, and the fact that investment law considers competitors as well as non-competitors. The scope of application of likeness is much greater for IIAs & GATS, than the GATT, which only concerns measures affecting products. Enquiries under GATS and IIAs involve "broader comparisons" of the treatment of producers, individuals, companies etc. and might have a wider reach.[444]
Wherever a tribunal draws upon the jurisprudence of another regime, it must be sensitive to the particular characteristics of the dispute at hand and adapt its legal tests accordingly. The scope for crossfertilisation is thus considered in light of differences in the text, context, object and purpose, the nature of the litigants, institutional features, and remedy structures of the two regimes.

This chapter is structured as follows. Section 1 contains reflections on the empirical results of this study in relation to likeness. Section 2 & 3 consider likeness in the trade and investment

[440] Article II, 3: "Each Contracting Party shall permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors of the other Contracting Party on a basis no less favourable than that which, in like circumstances, it permits such acquisition or establishment by: (a) its own investors or prospective investors; or (b) investors or prospective investors of any third state."
[441] See Iacovides, Marios, 'A 'More Economic Approach' to WTO Law's Relevant Market Definition, Trade Harm, and Quantification of Trade Effects and Countermeasures,' *Uppsala University* (2016) 125, Table 3.1
[442] 'Like commodities' and 'like merchandise' are also referred to under the GATT 1947 in Article VI on Anti-dumping and Countervailing Duties and in Article VII on Valuation for Customs Purposes respectively.
[443] There is an inherent need for a comparator when interpreting national treatment provisions. However, this is not to say that the wording has no effect on interpretation. Indeed, tribunal in *Occidental v. Ecuador* viewed the wording as instructive in terms of differentiating the national treatment norm in the investment context from its trade context.
[444] Mitchell, Heaton & Henckels, 'Non-Discrimination and the Role of Regulatory Purpose in International Trade,' *Edward Elger Publishing* (2016) 36

law regimes, how it appears in the treaties and how it has been interpreted at the WTO and by investment tribunals.
Having looked at how likeness has been interpreted in the two regimes, section 4 considers what lessons, if any, can be drawn by tribunals in one regime when considering interpretations of likeness in the other regime. It examines when engagement between the regimes is appropriate, to what extent it is appropriate, whether the findings in one regime this should influence tribunals in the other regime.
Section 5 considers how likeness in PTIAs compared to BITs, and how and whether this contextual difference impacts upon the interpretation of treaties. Finally, section 6 concludes.

5.1. Reflections on the empirical results

Chapter Two demonstrated that for the sample of treaties chosen, provisions that referred to 'likeness' were significantly more common in PTIAs than in BITs.
These provisions were found in 39/40 PTIAs (97.5%) and 16/40 BITs (40%) contained in this study. Furthermore, all of the treaties in this study contained National Treatment provisions but less than half of the BITs surveyed referred to the need for a like comparator. References to likeness were however significantly more common in PTIAs compared to BITs.

One of the reasons likeness is not ubiquitous in national treatment provisions probably relates to the fact that it has been found by tribunals that there is an inherent need for a comparator in national treatment provisions. In the commentary of the Negotiating Group on the Multilateral Agreement on Investment, certain countries opposed those that oppose the inclusion of likeness have said that it is “unnecessary and open to abuse” while those advancing its inclusion in the MAI were of the view that “the comparative context should be spelled out”.[445]

Likeness appears across the trade and investment law regimes in a wide range of provisions, although the concept of likeness is often phrased in quite a similar manner, across the regimes. This chapter investigates whether the widespread presence of likeness and its similar wordings facilitate engagement between the two regimes and tribunals making cross-regime references.

The one PTIA that did not contain a reference to likeness was the China- Pakistan FTA (2007). National treatment is covered in Article 48.2 which states:
"Without prejudice to its laws and regulations, each Party shall accord to investments and activities associated with such investments by the investors of the other Party treatment not less favourable than that accorded to the investments and associated activities by its own investors."

[445] OECD, Negotiating Group on the Multilateral Agreement on Investment (MAI), DAFFE/MAI(98)8/REV1, 11

5.2. 'Likeness' in the trade regime

5.2.1. The law

During the discussions at the London session of the Preparatory Committee for the GATT Agreement in 1947, in relation to the ambit of 'like products' it was stated that "the expression had different meanings in different contexts of the Draft Charter".[446] Despite a steady stream of jurisprudence over the intervening years, this unconstrained interpretation has not evolved greatly. Those discussing the Draft Charter didn't know that leaving the matter to be defined by the International Trade Organisation was a flawed plan, as the ITO never became an international organisation. Little changed for decades and the concept of "likeness" remained ill-defined under the GATT Agreement of 1947.
The advent of the WTO and its Dispute Settlement Body could have been a catalyst for an authoritative interpretation of likeness though the Appellate Body has opted for more open-ended interpretations.

The flexible concept of "likeness" varies from Agreement to Agreement and from case-to-case. Likeness features across the WTO Agreements, appearing 76 times in the GATT, GATS, TBT, SPS and SCM Agreements.[447] Although the Agreements generally refer to 'like products' or 'like services', there is variation in its usage, including reference to a "natural or like disaster"[448] in the Agreement on Agriculture.
Likeness also appears in a variety of provisions including national treatment, MFN, and exceptions provisions.

This section mainly focuses on likeness as it appears in national treatment provisions under the GATT, GATS, TBT, and SPS Agreements, thus building upon the analysis in Chapter 4. As mentioned in Chapter 4, GATT Article III can be seen as a grandmother provision for national treatment provisions across the WTO Agreements. This is because it has been the most litigated national treatment provision at the WTO and tribunals have referred to the jurisprudence under GATT Article III when interpreting other national treatment provisions elsewhere in the WTO Agreements.[449] As such, emphasis is placed on GATT Article III and interpretations of this article.[450]

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[446] See Analytical Index of the GATT, Vol. 1, Article I - General Most-Favoured-Nation Treatment (EPCT/C.II65) p36
[447] See Iacovides, Marios, 'A 'More Economic Approach' to WTO Law's Relevant Market Definition, Trade Harm, and Quantification of Trade Effects and Countermeasures,' *Uppsala University* (2016) 125, Table 3.1
[448] 'Like commodities' and 'like merchandise' are also referred to under the GATT 1947 in Article VI on Anti-dumping and Countervailing Duties and in Article VII on Valuation for Customs Purposes respectively.
[449] See, for example, Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted on 24 April 2012, Appellate Body Reports, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R and WT/DS386/AB/R, adopted on 23 July 2012, and Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted on 13 June 2012
[450] GATT Article III: "National Treatment on Internal Taxation and Regulation
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.*

In the context of trade in goods, a complainant may establish 'likeness' by demonstrating that the measure at issue makes a distinction between products based exclusively on origin.[451] Scope for such a presumption has been found to be more limited under the GATS as there is "greater complexity" in trade in services for two reasons: 1) likeness under GATS involves consideration of both the service and the service supplier. Not only does it have to be shown that the origin-based distinction applies to the service, but also the service supplier; and 2) GATS Article XXVIII(f), (g), and (k) through (n) indicate the possible complexities of determining origin and whether a distinction is exclusively based on this reason.[452] These complexities limit the scope of presumption although it doesn't render it inapplicable.

The objective of GATT Article III: 1 is to prevent measures being applied so as to afford "protection to domestic production". The Paragraphs that follow Article III: 1 are construed differently so that the way the Article's objective is implemented differs for the different provisions. Article III: 1 states that "internal taxes" shouldn't be applied to imported products "so as to afford protection to domestic production".
Subparagraphs 2 and 4 concern taxation and regulation respectively but are constructed differently so that the way the Article's objective is implemented differs for the different provisions.
Article III: 2 expands on Article III: 1, saying that products imported into the territory shall not be subject to internal taxes in excess of those applied to "like domestic products". National treatment only applies once a product has entered the marketplace and so doesn't affect customs duties charged on imports. Customs duties are dealt with under the Most Favoured Nation Clause under Article I: 1 of the GATT.

To establish a breach of Article III: 4, a complainant must show that the product being discriminated against is 'like' a domestic product. Once likeness is established, the complainant must then show that the imported product receives less favourable treatment than its domestic comparator. If a breach of a Member's National Treatment obligations is established, the Member may then defend its measure under the General Exceptions of GATT Article XX. These three steps are now looked at in a bit more detail. The extent of the

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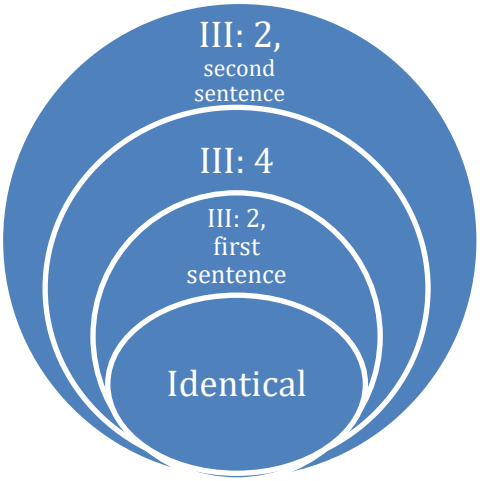
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*
3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.(…)"

[451] In relation to GATT Article III:2. see Panel Reports Argentina – Hides and Leather, para. 11.168; China – Auto Parts, para. 7.216. In relation to GATT Article III:4, see Panel Reports, *Argentina – Import Measures*, para. 6.274; *Canada – Autos*, para. 10.74; *Canada – Wheat Exports and Grain Imports*, para. 6.164; *China – Publications and Audiovisual Products*, para. 7.1447; *India – Autos*, para. 7.174; *Thailand – Cigarettes (Philippines)*, para. 7.661; *Turkey – Rice*, paras. 7.214-7.216; *US – FSC (Article 21.5 – EC)*, paras. 8.132-8.135.

[452] See Appellate Body Report, Argentina — Measures Relating to Trade in Goods and Services, WT/DS/453/AB/R, adopted on 9 May 2016, paras. 6.36-6.41

competitive relationship necessary between products for them to be considered 'like' "cannot be considered in the abstract"[453] and must be determined on a case-by-case basis.

Under the WTO Agreements, the word "likeness" is accorded many meanings depending on how the accordion is "stretched and squeezed". The relationship between these various meanings is laid out in the diagram below: [454]



These four concentric circles represent an interpretation of "likeness" in the GATT, with the size of the circle representing how narrowly the term is construed. The most narrow of these meanings is in the term "identical" founding in the Article 2.6 of the Anti-Dumping Agreement or in the standard for likeness laid down in *Methanex v U.S.A* under the NAFTA Agreement.
This is followed by Article III:2, sentence one, which was deemed to be "narrowly squeezed" by the Appellate Body in the *Japan-Alcohol* Case. The third circle represents Article III: 4 which was deemed by the Appellate Body in *EC-Asbestos* to be a larger group than that of "like" products under III: 2.
The last circle represents Directly Competitive or Substitutable (DCS) products in Article III: 2's second sentence which was deemed to be even larger a category than that of likeness under III: 4 in *EC-Asbestos*.
The Appellate Body found in the *Korea-Alcoholic Beverages*[455] that potential competition is relevant in determining whether two products are DCS, which would have the effect of further enlarging this circle. It deemed that evidence from overseas markets could be used in establishing potential sources of competition. This would particularly be the case where demand on the market had been stifled by barriers to trade. The Appellate Body held that "if another market displays characteristics similar to the market at issue, then evidence of consumer demand in that other market may have some relevance to the market at issue."

[453] Van den Bossche, P, 'The Law and Policy of the World Trade Organisation, Text Cases and Materials' Cambridge University Press, 2nd edition (2008) 356
[454] This diagram is articulated in Paragraph 99 of the Appellate Body Report in *EC-Asbestos*. Diagram inspired by Goco's article, 'Non-Discrimination, "Likeness", and Market Definition in World Trade Organization Jurisprudence.' Journal of World Trade (2006) 315-340. Note: Article I: 1 of GATT can fit any of the first three concentric circles.
[455] Korea- Taxes on Alcoholic Beverages Case: WT/DS75 and 84AB/R, 18 January 1999

It is important to note that although competition is a central element of the trade law analysis of likeness,[456] it is not the only element. The SPS Agreement[457] is "not concerned with the comparability of products but with the comparability of risks".[458] As a result, 'like' products causing dissimilar risks (externalities) are not subject to non-discriminatory treatment and can legitimately be regulated differently under the SPS.
Mitchell finds it "unduly narrow"[459] to focus on competition alone given the preamble to WTO Agreement, which refers to sustainable development and other non-market objectives behind the WTO Agreement. He states that if the Appellate Body recognises this, it "would enable the Appellate Body…to articulate a normative basis for its non-discrimination analysis".[460]

No elaboration of the indicia used to determine the competitive relationship or engagement with the purpose of national treatment obligation in light of the object and purpose generally- what is this purpose in light of promoting and protecting investment? Mitchell

5.2.2 Interpreting likeness at the WTO

Japan-Alcohol Beverages, EC-Asbestos and *EC- Seals* are cases that have clarified how the WTO interprets the concept of 'likeness' under the GATT.

5.2.2.1 Japan-Alcohol Beverages[461]

This E.C., Canada and the U.S. brought this claim in response to Japan's Liquor Tax Law, which established a system of internal taxes applicable to liquors at different tax rates based on the liquor's categorisation. Shochu, an indigenous and distilled Japanese beverage, was taxed at a lower rate than any of the complainants' products.
The flexibility of the concept of "likeness" was affirmed in this case, where the Appellate Body upheld the Panel's findings that the tax violated GATT 1994. The Appellate Body stated as already mentioned that there is no uniform definition of "like" products to be applied across the WTO Agreements.

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[456] See Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 64 where it is stated: The Appellate Body's approach to likeness analysis can be "summed up" by the word competition.
[457] The SPS Agreement refers to likeness in Annex C on Control, Inspection and Approval Procedures.
[458] WTO Panel Report, European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/R, 18 Aug. 1997, at para. 8.176. See also Schebesta & Sinopoli, 'The Potency of the SPS Agreement's Excessivity Test The Impact of Article 5.6 on Trade Liberalization and the Regulatory Power of WTO Members to take Sanitary and Phytosanitary Measures,' *Journal of International Economic Law*, 21 (2018) 125-126
[459] Mitchell, Heaton & Henckels, ' Non-Discrimination and the Role of Regulatory Purpose in International Trade,' *Edward Elger Publishing* (2016) 131
[460] Mitchell, Heaton & Henckels, ' Non-Discrimination and the Role of Regulatory Purpose in International Trade,' *Edward Elger Publishing* (2016) 132
[461] Japan - Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R, WT/DS11/R

The Appellate Body found that vodka and shochu have many of the same physical characteristics. They were also both subject to the same tariff in the Japanese tariff schedule. Furthermore Japan failed to produce any evidence that the two products were not like.
The Panel determined that vodka and shochu are “like products” under Article III: 2 of GATT which they construed in narrow terms.
The Appellate Body found that Panels must exercise their “best judgement in determining whether products are ‘like’”. As the Appellate Body acknowledged, this involves an “unavoidable element of individual, discretionary judgement”.[462]

Is this flexibility or a lack of clarity and predictability in international trade law?
The Appellate Body had a chance to lay down general criteria but didn't do so. More guidance could be given to future panels.

The Report of the Working Party on Border Tax Adjustments, adopted in 1970 by Contracting Parties of the GATT, first interpreted what is meant by “like” product and what criteria should be considered in its determination.[463] The criteria formulated was used as a reference in the Japan-Alcohol Case:

- The product’s end-uses in a given market
- Consumers' tastes and habits
- The product's properties, nature and quality

Tariff bindings were deemed by the Appellate Body to be potentially helpful but "not a reliable criterion for determining or confirming a product's likeness." The risk being that certain tariff bindings are too broad to be used as a measure of product “likeness”.
For Mitchell, the failure to engage with the meaning of the national treatment provision in light of the treaty's object and purpose was the "fundamental difficulty" with *Japan— Alcohol* and those that followed including *Philippines— Distilled Spirits*.[464]

5.2.2.2. EC-Asbestos[465]

This was a case brought by Canada against France’s ban on white asbestos which is used as building insulation. The Canadian government argued against France placing an outright ban when its use could merely have been restricted. Despite being a known human carcinogen, Canada brought a complaint as France’s ban didn’t extend to domestic noncarcinogenic products used to insulate buildings claiming this was a violation of GATT III: 4. If this reasoning is accepted, banning dangerous substances would be more difficult for Members. The Panel ruled in September 2000 that the ban was justified under Article XX(b) of GATT on the grounds that it was necessary “to protect human, animal or plant life or health”. This was upheld by the Appellate Body.

[462] Ibid FN 4, Paragraph 42, Korea- Taxes on Alcoholic Beverages Case: WT/DS75 and 84AB/R, 18 January 1999
[463] Report of the Working Party on Border Tax Adjustments adopted on 2 December 1970 (L/3464) Adopted by the GATT Council, Paragraph 18
[464] Mitchell, Heaton & Henckels, 'Non-Discrimination and the Role of Regulatory Purpose in International Trade,' *Edward Elger Publishing* (2016) 174 & 53
[465] Panel Report, European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS/135/R, adopted on 5 April 2001

The Appellate Body reversed the Panel's findings that the products (asbestos and cement-based products) were like and found it breached Article III: 4.

The existence of a "competitive relationship" between the products was deemed an important factor in the application of Article III:4. The Appellate Body also found that Canada hadn't adequately demonstrated the likeness of the products and thus that the measure was inconsistent with Article III:4.

The Appellate Body's found that "likeness" is determined by whether or not there exists a "close competitive relationship" between products. Thus it can be said that determining "likeness" under Article III:4 is fundamentally a question about the nature and extent of the competitive relationship between products
The Appellate Body also found that Canada hadn't adequately demonstrated the likeness of the products and thus that the measure was inconsistent with Article III: 4. This ruling was hailed by the European Commission. The then EU Trade Commissioner Pascal Lamy said: "This ruling shows the WTO is responsive to our citizens' concerns. Health issues can be put above trade concerns."[466] Canada maintained that it was a ruling that put affluent countries' concerns first pointing to the product's strong reputation in developing countries.
Asbestos reiterated that the approach outlined in The Report of the Working Party on Border Tax Adjustments should be followed. This approach consists of applying the four classic criteria which include; (i) Properties, nature and quality of the products, (ii) End use of products (iii) Consumers' tastes and habits and (iv) The tariff classification of the products if this is sufficiently detailed. There are risks in using tariff bindings that are too broad as a measure of product "likeness".

On the issue of tariff bindings, many LDCs (least-developed countries) have bindings in their schedules of concessions under GATT which include broad ranges of products. These categories don't represent similar products but rather the result of trade concessions agreed upon with the other WTO Members.
On the other hand there are tariff bindings which describe products in minute detail and which could be used to identify "like" products. Such determinations, are rightfully to be made on a case-by-case basis.
The Appellate Body's finding that "likeness" is determined by whether or not there exists a "close competitive relationship" as countries are only. Thus it can be said that determining "likeness" under article III: 4 is fundamentally a question about the nature and extent of the competitive relationship between products.

The Appellate Body didn't explicitly refer to purpose in *EC-Asbestos* but acknowledged that:
1) Article III:1 informs Article III:4; and
2) Health risks associated with a product may be relevant in a consideration of likeness under Article III:4.[467] Health risks can be considered part of the physical properties of a product in terms of 'likeness'. This is one way of bringing XX (b) into Article III without using the term 'purpose'. The Appellate Body reminded the Panel in its Report that Articles III and XX "are distinct and independent provisions" and so a measure may be deemed unjustifiable for public

[466] Commission Press Release IP/01/355, , Brussels, March 13, 2001
[467] Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS/135/AB/R, adopted on 5 April 2001, para 113

health reasons under both.[468]

5.2.2.3. EC-Seals[469]

Tribunals have engaged with regulatory purpose in analysis of less favourable treatment under the TBT Agreement but the tribunal in *EC- Seals* has set the jurisprudence on "diametrically opposed paths" under the GATT and the TBT Agreement.[470] Different interpretative paths are necessary in light of the absence of GATT Article XX. This does not mean an inquiry into the regulatory purpose can't be made under Article III.

The EU seal regime,[471] which sought to ban the importation of seal products into the EU, was contested in this case. Norway alleged certain exceptions to the ban were discriminatory and favoured products from the EU certain third countries.
The EU defended the ban under Article XX(a) and as expected, a ban on seal products came under the traditionally broad scope of moral questions. Proving it to be “necessary” to protect public morals was more difficult but the EU succeeded before the panel and at appeal.
The Appellate Body corrected the panel’s finding that applying the same legal test as was applied to Article 2.1 of TBT Agreement was appropriate in analysing Article XX’s chapeau. Ultimately however it found that the EU had not demonstrated that the EU seal regime complied with the chapeau and thus could not be justified under Article XX. The EU had not made “comparable efforts” to allow Canadian Inuits to qualify for the IC exception compared to the efforts it had made in relation to Greenlandic Inuits. Furthermore, to comply with the Regulation, a certificate from a recognised body is necessary. Such a body had been approved in Greenland but not in Canada. The Appellate Body deemed this burdensome. It has been noted[472] that the EU can comply by removing the Inuit exception, which would be more trade restrictive and would not necessarily benefit Canada or its Inuit population.

The Appellate Body found that closeness of competition is the "only purpose" of the likeness comparison but perhaps this is unsurprising given the dismissal of regulatory purpose as part of the analysis under Article III. Mitchell et al. feel that the Appellate Body could have underlined the broader benefits of ensuring the equality of competitive opportunities for imports.

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[468] Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS/135/AB/R, adopted on 5 April 2001, para 115
[469] WTO doc. WT/DS401/AB/R, Appellate Body Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, 22 May 2014.
[470] Mitchell, Munro & Voon, 'Importing WTO General Exceptions Into International Investment Agreements: Proportionality, Myths And Risks,' Yearbook on International Investment Law & Policy 2016–2017, *Oxford University Press* (2018) 174
[471] See Regulation 1007/2009 of 16 September 2009 on trade in seal products, OJ 2009 L 286/36.
[472] Catti de Gasperi, G, ‘Case Note and Comment on European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,’ WTO case law in 2014, It. YIL 24:395–430 (2015)

5.3. 'Likeness' in the Investment Regime

Where reference is made to a comparator in the national treatment provisions of IIAs, 'in like circumstances' is the most common phrasing found. Variations such as 'in like situations' are also found.[473] Other IIAs contain no such phrasing and it has been found that the need for a comparator is inherent in the concept of discrimination.[474]
As seen in the commentary to the Draft Consolidated Text of the Negotiating Group on the Multilateral Agreement on Investment, those that oppose the inclusion of the concept of likeness have said that it is "unnecessary and open to abuse" while those advancing its inclusion in the MAI were of the view that "the comparative context should be spelled out" and comparisons should be "on the basis of characteristics that are relevant for the purposes of the comparison".[475]

As with Section 2 on trade, this section mainly focuses on likeness as it appears in national treatment provisions under IIAs. The aim of national treatment provisions is to eliminate discrimination based upon nationality, which necessarily involves a comparison of investors in similar circumstances. How a tribunal defines likeness is central to "mapping the ambit of the operation" of national treatment provisions.[476]
The omission of the term 'in like circumstances' need not necessarily affect the interpretation of a national treatment provision given the inherent need for a comparator. What is likely to be more important, is "how tribunals characterise the subjects". [477] This is more likely to be determinative than the presence or absence of terms such as 'like', 'similar' etc.
This is not to say that where included, the chosen wording does not affect how the treaty is to be interpreted. Indeed, in *Occidental v. Ecuador*, the claimant argued that the standard of national treatment wasn't qualified by reference to 'in like situations' in the Ecuador- Spain BIT and that under the MFN provision of the Ecuador- United States BIT it was entitled to this "less restrictive treatment".[478] The tribunal found the claimant was right and that "its arguments are convincing".[479]

The requirements for an investor claiming breach of an IIA to discharge their burden of proof were summarised by the tribunal in *Total v. Argentina*. The complainant "has to identify the local subject for comparison; (ii) has to prove that the claimant-investor is in like circumstances with the identified preferred national comparator(s); and (iii) must demonstrate that it received less favourable treatment."[480] This sequence of analysis was employed in this

[473] E.g. Article 87 of the Agreement On Free Trade And Economic Partnership Between Japan And The Swiss Confederation: "Each Party shall accord to investors of the other Party and to their investments, in relation to their investment activities, treatment no less favourable than that it accords, in like situations, to its own investors and to their investments." (emphasis added) See also US Argentina BIT (1994)
[474] See the tribunal's award in Total, see also Non-Discrimination and the Role of Regulatory Purpose in International Trade- Mitchell p65
[475] OECD, Negotiating Group on the Multilateral Agreement on Investment (MAI), DAFFE/MAI(98)8/REV1, 11
[476] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' EJIL Volume 20 (2009) 752
[477] Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) §4.11
[478] *Occidental Petroleum Corp. v. The Republic of Ecuador*, Award ICSID Case No. ARB/06/11 (2012), para 170
[479] *Occidental Petroleum Corp. v. The Republic of Ecuador*, Award ICSID Case No. ARB/06/11 (2012), para 173
[480] *Total v. Argentina*, Award & Dissenting Opinion, ICSID Case No. ARB/04/01 (2013) para 212:

case under the France- Argentina BIT (1993) and a similar sequence of analysis can be observed under other IIAs. At this point, the burden of proof shifts to the defendant, and there is a fourth step in the analysis where the host state may attempt to justify the differences in its treatment of investors.
Likeness plays a role for elements one, two and four, which are the focus of this section.[481]

5.3.1. Three approaches to interpreting likeness

Determining likeness has proved to be a complex interpretive question for tribunals. In national treatment claims, an investor must typically make a prima facie case that it is in like circumstances with a domestic investor and that it has received less favourable treatment from the host state.
Various investment tribunals have given readings into the concept of likeness. Tribunals have found that the elements that make up likeness depend upon the "facts of a given case"[482], the "legal context and the specific circumstances of any individual case",[483] and taking into account "all the circumstances of each case".[484] These differing formulations have led to a range of different domestic comparators being included in likeness analyses of tribunals. Mitchell has criticised the approaches to determining the relevant comparator as "scant, brief and barely reasoned".[485]
This section examines this claim in relation to three approaches employed by tribunals in establishing the relevant comparator are These approaches are called by the author: 1) the narrow approach; 2) the broad approach; 3) the economic sector or competition-based approach.

1. The Narrow approach

The tribunal in *Methanex v U.S.A*[486] employed what can be labelled as a 'narrow approach' to identifying the proper comparator. In this case, methanol and ethanol were competing products that were treated differently. This was not deemed to be discriminatory however, as there was a domestic investment that was deemed to be identical to Methanex that also received less favourable treatment. The US proposed a methodology that looked to comparators that were close to the foreign investment "in all relevant respects".[487]

[481] The thirds element is considered in Chapter NT. The fourth element is also considered in Chapter Exc
[482] *Pope & Talbot Inc. v Government of Canada*, NAFTA/ UNCITRAL, Tribunal Damages Award IIC 195 (2002) Award on Merits para 75
[483] *Total v. Argentina*, Award & Dissenting Opinion, ICSID Case No. ARB/04/01 (2013) para 210
[484] *SD Myers, Inc. v Government of Canada*, NAFTA/ UNCITRAL Tribunal, 1st Partial Award and Separate Opinion, IIC 249 (2000) para 244
[485] Mitchell, Heaton & Henckels, ' Non-Discrimination and the Role of Regulatory Purpose in International Trade,' *Edward Elger Publishing* (2016) 66
[486] *Methanex Corp. v U.S.A*, Final Award of the Tribunal on Jurisdiction and Merits (UNCITRAL, 3 August 2005)
[487] *Methanex Corp. v U.S.A*, Final Award of the Tribunal on Jurisdiction and Merits (UNCITRAL, 3 August 2005) Part IV- Chapter B- page 9- paragraph 16

The tribunal followed this methodology and deemed this comparator to be identical to Methanex and that it would be "perverse" to ignore such an identical comparator and to use comparators that were less 'like'.[488]

It may seem that there are many situations where the requirement of an identical comparator is overly burdensome given the many possible differences between operators in terms of their size and how they are structured especially in the context of operators based in different countries. However, the tribunal in Methanex found that "where there is no identical domestically-owned counterpart to the foreign-owned investment. In such a case, a tribunal may look farther afield and expand the scope of domestically-owned comparators."[489]
Even if an investor is identical to a domestic counterpart, it will not necessarily be in like circumstances, particularly under agreements where assessing the purpose of the measure is a key component to determining like circumstances. Depending on the measure, differential treatment of identical investors may still be justified.[490] In terms of regulatory treatment, two investors with different characteristics may be in an identical situation.[491]
The narrow approach employed in Methanex does however fail to capture certain types of discrimination[492] and "runs the risk of excluding swathes" of discriminatory conduct from the scope of national treatment.[493] This would occur where less favourable treatment is accorded to an investor and a minor, identical domestic firm. A non-identical competitor receives preferential treatment but is not deemed like as the more identical competitor is the one in like circumstances. This is a problem it is hard to get away from when looking for identical comparators.

2. The Broad approach

The tribunal in *Occidental v. Ecuador*[494] applied a 'broad approach' in identifying the proper comparator. Ecuador argued that the appropriate comparator was other oil producers that were not entitled to receive a VAT refund. The purpose of national treatment provisions is to combat discrimination based on nationality and as the domestic oil producer Petroecuador was treated in a similar manner, Ecuador argued that the policy was applied in a nondiscriminatory manner. The purpose of VAT refunds is to ensure unchanged conditions of competition, a goal that is only relevant to producers in the same sector. Occidental claimed however that other companies involved in the export of goods were the appropriate comparator.

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[488] *Methanex Corp. v U.S.A,* Final Award of the Tribunal on Jurisdiction and Merits (UNCITRAL, 3 August 2005) Part IV- Chapter B- page 9- paragraph 17
[489] *Methanex Corp. v U.S.A,* Final Award of the Tribunal on Jurisdiction and Merits (UNCITRAL, 3 August 2005) Part IV - Chapter B, Para 15
[490] Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) S4.16
[491] See Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) §4.11, footnote 77
[492] See Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' *Kluwer Law International* (2009) end of 4.15, Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' American Journal of International Law (2008) 85, and Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' Cambridge University Press (2016)100
[493] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' EJIL Volume 20 (2009) 769
[494] *Occidental Petroleum Corp. v. The Republic of Ecuador,* Final Award (ICSID Case No. ARB/06/11)

The tribunal rejected Ecuador's arguments as the purpose of national treatment "is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken."[495]
The tribunal never addressed the question of whether or not the discrimination was nationality based. The tribunal stated that it compared Occidental to all domestic exporters as "no exporter ought to be put in a disadvantageous position as compared to other exporters".[496]

At issue here, is the question of whether competition is a necessary condition for likeness. When allowing for such broad comparators in likeness analysis, the result can be "seemingly absurd"[497] with flowers and oil being considered together. This said, Pauwelyn finds that the test applied in Occidental was "truer to the objectives" of national treatment in investment than the test in Methanex. This is because it focused on the "absence of any legitimate reason to distinguish" between investments in the different sectors (E.g. the oil and flower sectors).[498]

The reasoning in the award assumes that the *de facto* discrimination between Occidental and other exporters was based on nationality, without considering whether the flower and seafood exporters in question were foreign or domestically owned. A further consideration is the fact that Petroecuador was state owned and as such any tax rebate would be revenue neutral.[499]

Pauwelyn finds that where competition is not the core test, assessments of national treatment in investment treaties may also "lead to comparisons between investors that are not even competitors, so long as the regulatory circumstances in which they find themselves are sufficiently alike."[500]
Although this section criticises the broad test employed in the Occidental award, this is not to say that in certain regulatory circumstances, investors from different sectors shouldn't be treated in the same way. E.g. a clothes and toy manufacturer could expect the same treatment under a chemical regulation. There is also a question of whether such claims should be taken under national treatment provisions or as a breach of fair and equitable treatment.

3. The Economic Sector or Competition-based approach

The tests employed by the tribunals in *Occidental* and *Methanex* are on opposite ends of the spectrum in terms of the risk of being construed in an overly broad or narrow manner, while the economic sector test considered in this section is somewhere in the middle. An example of this test is found in *Pope & Talbot Inc v. Canada*,[501] where the tribunal stated that the first step in national treatment analysis is essentially a comparison of whether the investments are

[495] *Occidental Petroleum Corp. v. The Republic of Ecuador,* Final Award (ICSID Case No. ARB/06/11) para 173
[496] Occidental para 176
[497] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 85
[498] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 85
[499] See Mitchell
[500] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 89
[501] *Pope & Talbot Inc. v Government of Canada,* Tribunal Report, Award on the Merits of Phase 2, (UNCITRAL, 10 April 2001)

in the same business or economic sector.

The tribunal in *SD Myers* endorsed a competition-based approach to likeness. It referred to WTO jurisprudence in its interpretation while taking contextual differences between the regimes into consideration. The tribunal found:
"The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor. The tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector"."[502]

This test was applied in *Levy de Levi v. Peru,*[503] which involved a bailout programme administered by Peru which Levy, a shareholder of BNM bank, claimed was implemented in a discriminatory manner violating several principles including the national treatment standard of the France- Peru BIT (1996).[504] No likeness standard was contained in this national treatment provision however the tribunal looked to identify domestic entities in similar circumstances to BNM to see whether discrimination had occurred.
The tribunal acknowledged that the banks cited by the claimant were in the same sector and were regulated by a common entity.[505] However the tribunal noted that the banking sector is a sensitive one and that the market segment in which a bank is "primarily engaged" determines those entities in similar circumstances.

The tribunal accepted the following facts as proof that BNM was not in like circumstances with Banco Wiese, BCP, and Banco Latino as claimed by Levy de Levi. BCP and Banco Wiese were the first and second-largest banks in Peru accounting for 44% of loans and 51% of deposits in the country. BNM represented 4% of loans and 2% of deposits. This finding raises the question of whether and in what situations the size of an investment should be a decisive factor in determining likeness.[506] The tribunal commented on the "different versions" of BNM's categorisation of itself which ranged from being a bank that entailed "systemic risk" to being one of the "smaller banks", underlining that claimants should avoid making contradictory statements.[507]
Banco Latino was similar in size than BNM but the tribunal distinguished Banco Latino from BNM because "in terms of its far-reaching network of individual depositors, which was not the case of BNM, whose clients mainly comprised companies, other banks, and State-owned enterprises."
The dissenting Opinion of Prof. Joaquín Morales Godoy described this as "grotesque"[508] as the banks "performed the same functions as the other identified banks, that is, they provided

[502] *SD Myers, Inc. v Government of Canada*, NAFTA/ UNCITRAL Tribunal, 1st Partial Award and Separate Opinion, IIC 249 (2000) para 250
[503] Agreement concluded between the Republic of Peru and the Republic of France on the Promotion and Reciprocal Protection of Investments (1996)
[504] Article 4: Chaque Partie contractante applique, sur son territoire et dans sa zone maritime, aux nationaux ou sociétés de l' autre Partie, en ce qui concerne leurs investissements et activités liées à ces investissements, un traitement non moins favorable que celui accordé aux nationaux ou sociétés, ou le traitement accordé aux nationaux ou sociétés de la Nation la plus favorisée, si celui-ci est plus avantageux. A ce titre, les nationaux autorisés à travailler sur le territoire et dans la zone maritime de l'une des Parties contractantes doivent pouvoir bénéficier des facilités matérielles appropriées pour l'exercice de leurs activités professionnelles.
[505] Final Award, *Levy de Levi v. Republic of Peru*, (ICSID Case No. ARB/10/17) para 396
[506] *Levy de Levi v. Republic of Peru*, (ICSID Case No. ARB/10/17) Final Award, Para 398
[507] *Levy de Levi v. Republic of Peru*, (ICSID Case No. ARB/10/17) Final Award, Para 400
[508] *Levy de Levi v. Republic of Peru*, (ICSID Case No. ARB/10/17) Dissenting Opinion of Prof. Joaquín Morales Godoy, para 186

similar financial services, had a similar growth rate, and took similar risks. In addition, they also had the same corporate clients as well as individual customers". The defendant submitted that the "most comparable" bank was NBK Bank and that this would be the appropriate reference for comparing the treatment of BNM.[509] The tribunal did not address this point. The market segment in which the banks participated, including their size and portfolios, were decisive for the tribunal in determining entities in similar circumstances.

Levy de Levi presents similar problems to those seen with the first two tests. Comparators may have to come from the same economic sector but this was arguably drawn too narrowly in this case where BNM bank was not deemed to be like other Argentinian banks because of its size and portfolio composition. It is also possible to imagine the economic sector test being drawn in an overly wide manner.

In *Mercer v. Canada (2018)*,[510] the investor established that it was treated differently to other self-generating pulp mills in the same sector. However, the different treatment was not proven to be "discriminatory treatment". The tribunal found that other pulp mills "whilst ostensibly comparators, none were "in like circumstances" for the purposes of NAFTA Articles 1102 and 1103; and their different treatment can best be explained on the basis of their individual circumstances under BC Hydro's consistent application of its GBL methodology."[511]
The tribunal asked whether the treatment applying to Howe Sound and Tembec was "in like circumstances" to the treatment applying to Celgar; and, if so, was either "more favourable"?[512]
The tribunal thus employed a test for likeness that asked whether the treatment applying to the investors was 'like'. The tribunal agreed with Canada's expert witness that differences in the baselines were the result of differences in the mills' individual circumstances. Thus the different calculation of the mill's baselines was due to the different and unique circumstances of the mills.[513]
The tribunal found that British Columbia Hydro could enter into arrangements with mills but this "does not mean that every investor is entitled to precisely the same arrangements relating to the treatment of its investment as are agreed with every other investor relating to the treatment of its investment, whatever the particular circumstances relevant to both investments."[514]

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[509] *Levy de Levi v. Republic of Peru*, (ICSID Case No. ARB/10/17) Respondent's Counter-Memorial on the Merits, ¶ 379 to 385.
[510] *Mercer International Inc. v. Government of Canada*, Award ICSID Case No. ARB(AF)/12/3 (2018)
[511] *Mercer International Inc. v. Government of Canada*, Award ICSID Case No. ARB(AF)/12/3 (2018) para 7.45
[512] *Mercer International Inc. v. Government of Canada*, Award ICSID Case No. ARB(AF)/12/3 (2018) para 7.29
[513] Dr Rosenzweig confirmed that: "This difference, however, does not constitute an inconsistent methodology, but rather reflects the differences in contractual obligations of the mills. The critical difference is that, during the years leading up to the 2009 EPA, Skookumchuck's operational decisions were influenced by its contract that committed it to sell generation from its plant. Because the obligations under the 1997 EPA would be disappearing, actual generation at Skookumchuck would have been an inappropriate baseline for its GBL as it would not have accurately represented what was truly incremental generation to be incentivized in the 2009 EPA. It was therefore necessary to base Skookumchuck's GBL on a model of the amount of [redacted] as the parties agreed it would, considering the economic conditions at the time absent an EPA. In contrast, Celgar never had a contract with BCH, [i.e. BC Hydro] it self-supplied essentially all of its load, and its operations in 2007 represented current normal self-generation in the absence of a contract.
In conclusion, both Celgar's and Tembec's GBLs were set following a consistent BCH methodology. The differences in the details of how each mill's GBL was calculated are explained by the unique circumstances of the mill (such as a prior EPA with BCH), and reflect a consistent application of BCH's GBL methodology."
[514] *Mercer International Inc. v. Government of Canada*, Award ICSID Case No. ARB(AF)/12/3 (2018) para 7.37

Thus, although investors may be operating within the same industry, for the purpose of a specific regulatory treatment, differences in the individual circumstances of the investors may entitle the regulator to treat them differently.

In *Pope & Talbot Inc v. Canada*, the tribunal found that if a difference in treatment between investors in the same economic sector is established, there is a presumptive violation of national treatment. The existence of a competitive relationship has been deemed to establish prima facie that investments are in like circumstances. Newcombe has criticised this as establishing too low a threshold to establish a prima facie case.[515] Investors may be in the same economic sector but this approach often fails to reflect the regulatory differences between the investments or investors. Newcombe suggests that it would be preferable that the claimant must find an appropriate comparator and "demonstrate how it is in comparable circumstances in light of the purpose of the measure at issue."[516]

Kurtz advocates that competition should be a condition of likeness. Kurtz's view is that the aim of investment agreements is to facilitate capital flows and that while operating in a host state investors are "usually and naturally operating in some form of competition with domestic actors."[517] Any tribunal that ignores competition should "address the serious risk of political failure" in constructing their preferred approach.[518]
For Pauwelyn every major interpretation has rejected the trade law emphasis on "alteration of the conditions of competition" in favour of one that focuses on whether discrimination is based upon nationality rather than some other policy reason ("the regulatory context test").[519] Kurtz disagrees that investment tribunals have rejected the competition-based approach.

5.3.2. Regulatory Purpose and Host State Justification

If a measure distinguishes between investors based on legitimate regulatory purposes those investors may not be in like circumstances. The burden shifts to the host state to show there was a legitimate regulatory purpose behind the discrimination and to reverse the finding of likeness.
If a measure distinguishes between investors based upon a legitimate policy, those investors cannot be said to be in 'like circumstances'. Likeness based on economic sector can be rebutted where there is a reason to distinguish investors for regulatory purposes.[520]

Pauwelyn states that there are circumstances that warrant "discrepant regulation" of competitors just as there are circumstances that would warrant "equal regulation" of

[515] Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' Kluwer Law International (2009) 163
[516] Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' Kluwer Law International (2009) 163
[517] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 96-97
[518] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 97
[519] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 75-76
[520] See for example, *Windstream Energy LLC v. Government of Canada*, Award PCA Case No. 2013-22 (2016)

noncompetitors. This is because investment goes deeper and has a "much broader impact on society" given the broad array of regulations that may affect investment.
When identifying the relevant subject for comparison, tribunals must take into account the regulatory purpose of the treatment. E.g. if a measure aims to reduce urban pollution, the applicable comparator may be "other emitters in the geographical area, rather than a direct competitor in the same sector that operates in a less environmentally sensitive area".[521]

The regulatory purpose of the treatment must be taken into account in establishing breach of national treatment provisions in investment agreements. In *Feldman v. Mexico,*[522] the company was found to be in like circumstances with cigarette reseller-exporters but not cigarette producer-exporters as there were "rational bases" for treating them differently.[523] The tribunal found that firms reselling/exporting cigarettes were in like circumstances while those that merely produced cigarettes were not. It was acknowledged that there are "at least some rational bases for treating" these investors differently including discouraging smuggling, protecting intellectual property rights inter alia.[524]

The tribunal in *Cargill v Mexico* found that like circumstances is not determined in the abstract but rather "by reference to the rationale for the measure that was being challenged." Indeed "it is possible that in respect of other, different measures, the mills in GAMI and the lumber producers in Pope & Talbot could have been found to be in 'like circumstances'." Thus the question is whether investors are in "like circumstances" *with respect to the particular measure in question*.[525]
Like circumstances has allowed investment tribunals to "balance investor interests with an unlimited list of legitimate government concerns-a list far *broader* than the exceptions in GATT Article XX."[526] Pauwelyn uses interesting language here that compares likeness analysis under investment agreements to Article XX defences at the WTO.

The regulatory objectives of a measure have been brought within the text of certain recent IIAs. The recently concluded TPP provided a clarificatory footnote to the National Treatment provision of the Agreement's Investment Chapter, stating:
"For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." The Investment Chapter of TPP contains no General Exceptions and this clarification introduces an assessment as to the state's regulatory purpose to the test for likeness.[527]

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[521] Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' Kluwer Law International (2009) 163
[522] *Marvin Feldman v. Mexico*, (ICSID Case No. ARB(AF)/99/1)
[523] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 74
[524] *Marvin Roy Feldman Karpa v. Mexico*, NAFTA Tribunal Award, ICSID Case No. ARB(AF)/99/1 (2002) paras 170-71
[525] See *Mercer International Inc. v. Government of Canada*, Award ICSID Case No. ARB(AF)/12/3 (2018) para 7.21
[526] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 83
[527] Kurtz refers to this as a "purpose-based test", see ' Kurtz, J, 'Balancing Investor Protection and Regulatory Freedom in International Investment Law: the Necessary, Complex and Vital Search for State Purpose,' in Bjorklund, A (ed.), 'Yearbook on International Investment Law & Policy 2013-14,' *Oxford University Press* (2014) 276-277

5.4. Comparing the two regimes

5.4.1. Is Competition a Necessary Condition of Likeness?

While the existence of competition between investors is not sufficient to show like circumstances, is it necessary? This section considers this question of whether competition should be a necessary component of likeness analysis.
Competition is the central but not the only element of the trade law analysis of likeness. Whether this is also the case in investment law requires looking at the purpose of national treatment provisions in IIAs. There is a conflict between the views of Pauwelyn and Kurtz as to the purpose of national treatment provisions in investment treaties.

The conflict is between Kurtz's view that the investment regime aims to extend competitive opportunities and that the two regimes are "mechanisms to embed economic transitions and extend competitive opportunities" to foreign traders and investors. Pauwelyn views the aim of national treatment provisions as being to protect individual foreign investors against discrimination taking regulatory purpose into consideration rather than looking at conditions of competition in the wider economy.

In support of his view, Kurtz outlines the multiplicity of aims behind the US BIT programme in the 1990s, which included the encouragement of "market-oriented domestic policies that treat private investment fairly" as well as investment protection.[528] Kurtz cites Deputy US Trade Representative Lang's speech, which explicitly ties the national treatment standard to ensuring US companies are treated "as favorably as their competitors". This may only be evidence of the practice of one state, but the US has been a leader in the conclusion of BITs and so the interpretation of the US as to the purpose of national treatment provisions is of some influence.
Kurtz then traces the history of BITs as a mechanism used by states to signal a "credible commitment" to foreign investors that their markets are open and that this will not easily be reversed. A pattern is traced linking the signing of BITs to economic and political reforms in the developing world and post Cold War era.

Kurtz sees a test that would see "a fuller conception of competition and adverse competition effects as necessary but not sufficient conditions of breach" as a starting point in combatting hidden forms of discrimination.[529]
To Kurtz competition has a "natural role" in flushing out protectionism and where interests conflict, nondiscrimination becomes most important. The idea that competition has no role to play is "implausible" and "at odds with the clear historical evidence" that states have entered

[528] Lang, Jeffrey "Keynote Address," Cornell International Law Journal: Vol. 31 : Iss. 3 , Article 1. (1998)
[529] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' EJIL Volume 20 (2009) 766, described elsewhere as: A test which used competition in its analysis as a necessary condition for breach would be better equipped to deal with hidden forms of discrimination.

into investment treaties to: 1) bolster their economic credentials; and 2) extend competitive opportunities to foreign investors as mentioned above.
Kurtz continues that investors are "usually and naturally operating in some form of competition" with domestic actors who may be lobbying for protectionist policies that would favour them over their foreign competitors.

For Pauwelyn, calling products 'like' because they're in competition at the WTO "makes eminent sense in this context".[530] However investment doesn't look to competition but rather to the "circumstances giving rise to governmental choices."[531]
Pauwelyn states that history demonstrates the purpose of national treatment provisions in BITs was to: "protect individual foreign investors from targeted attacks by their host governments. BITs traditionally focus on the security and fairness for individual investors rather than on economy-wide efficiency or competition. The objective of protecting individual investors from discrimination has appropriately led investment tribunals to focus upon the circumstances giving rise to governmental choices concerning the regulation of investments."[532]

If it is accepted that BITs aim both to protect investment and to extend competitive opportunities to investors, does this necessitate competition being a condition for likeness? Pauwelyn does not think so and points out that competition is not the core test when assessing national treatment provisions in IIAs and that it may be necessary to compare investors from different sectors "so long as the regulatory circumstances in which they find themselves are sufficiently alike."[533]
While competition may be a factor, this need not necessarily be the case. For Pauwelyn, there are circumstances that warrant different regulation of competitors and similar regulation of non-competing investors. This is because investment goes deeper and has a "much broader impact on society"[534] given the broad array of regulations that may affect investment. When identifying the relevant subject for comparison, tribunals must take into account the regulatory purpose of the treatment. In particular regulatory circumstances, investments should be treated the same as investments from another sector. E.g. a clothes and toy manufacturer could expect the same treatment under a chemical regulation.[535]

Newcombe makes the point that a breach of national treatment could be found in sectors that are 100% foreign-controlled where less favourable treatment can be shown in relation to domestic utilities in other sectors and the state is unable to justify such distinctions on legitimate regulatory grounds.[536]

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[530] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 79
[531] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 81
[532] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 81
[533] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 89
[534] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 81
[535] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 85
[536] "However, the absence of a competitive relationship between the investments in question does not conclude the analysis. For example, consider a situation where a separate domestic court system is established for debt collection by foreign investors in the electrical distribution sector (which is 100% foreign-controlled) and that collection procedures, including

When identifying the relevant subject for comparison, tribunals must take into account the regulatory purpose of the treatment. E.g. if a measure aims to reduce urban pollution, the applicable comparator may be "other emitters in the geographical area, rather than a direct competitor in the same sector that operates in a less environmentally sensitive area".[537]A defendant should be able to rebut the presumption by proving that the discrepant treatment resulted from a factual difference related to the products that has important regulatory consequences.[538]

Competition is often a condition for likeness, but certain situations require equal regulation of non-competing investors. As such, competition is not requisite for likeness to be found in these situations. Kurtz warns that the risk of overreach is "exponentially higher" in relation to the broad application of a disparate impact test.[539] Therefore IIAs must "pay closer attention to regulatory context and alternative policy justifications" before finding a violation.[540]

5.4.2. Comments on the Interpretation of Likeness in the Two Regimes

The approach to national treatment followed in *EC-Asbestos* allowed health risks to form a part of the characteristics of a product. In this way, the purpose of a measure was incorporated into Article III and breach wasn't found. Based on *EC-Seals*, the purpose of a measure cannot now be considered as part of the analysis into whether or not breach of the GATT has occurred. Defending a measure such as France's ban on asbestos on health grounds will now have to be done under Article XX. As Van Aaken points out, there is an exhaustive list of exceptions for likeness under Article XX, unlike investment law. As well as this, the burden of proof lies with the defendant, and the limited grounds for justification were drawn up in 1947. Article III was complicated before *EC-Seals*, but its simplification risks coming at too high a price.
Regulatory goals are likely to reveal relevant differences between products and thus have an "evidential role"[541] E.g. regulation may treat high and low alcoholic beers differently for health reasons, a difference that is relevant to determining likeness
"Considering regulatory purpose under Article III will not render Article XX inutile and the Appellate Body is already logically committed by its own doctrine to considering regulatory purpose under Article III:4."[542]

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filing fees, procedural protections and timelines for court decisions, were less favourable than those available to domestic utilities in other sectors, such as water or gas. Assuming the state could not justify the differential treatment, it may well be that there would be a breach of national treatment notwithstanding there was no direct competition between the utilities in question. Systemic nationality-based discrimination against foreign investors of this type would likely breach national treatment." Indeed, a foreigner may have to pay more for some services but the host state must be able to justify it.

[537] Newcombe & Paradell, 'Law and Practice of Investment Treaties: Standards of Treatment,' Kluwer Law International (2009) 163

[538] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 84

[539] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 125

[540] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 81

[541] Mitchell, Heaton & Henckels, 'Non-Discrimination and the Role of Regulatory Purpose in International Trade,' *Edward Elger Publishing* (2016) 38

[542] Regan, Donald H. "Regulatory Purpose and 'Like Products' in Article III:4 of the GA (With Additional Remarks on Article II:2)." *J. World Trade 36*, no. 3 (2002): 443-78

The Appellate Body appears to have "backed itself into a corner"[543] with *EC—Seals* as this reading necessitates different outcomes under the TBT and GATT where competitive detriment stems exclusively from a legitimate regulatory distinction.
Appellate Body's response that asymmetrical outcomes are a matter for the Members is unconvincing.[544] This exclusion of legitimate regulatory purpose under the GATT is critiqued by Mitchell as it "entails unjustifiably asymmetrical outcomes" under the GATT and TBT Agreements.[545]

Under the NAFTA, early tribunals such as SD Myers endorsed a competition-based approach to likeness similar to that seen at the WTO. The tribunal took contextual differences between the regimes into consideration in interpreting Article 1102. Subsequent decisions such as that in Methanex diverge from the SD Myers approach and give cause for concern. The approach taken in Methanex has been replicated in recent years. Given the ad hoc nature of investment tribunals, the lack of an Appellate Body and the principle of *stare decisis* in investment law, the existence of a multitude of possible approaches and interpretations is more of a problem.

The tribunal's interpretation of national treatment in Methanex is problematic as it doesn't do enough to stop hidden discrimination on behalf of the host state. So long as the state can show one "identical comparator" or domestic company affected by the measure, there is no breach of Chapter 1102 under the Methanex approach.
This is relatively easy for the host state to defend and could facilitate protectionism in circumstances where there is a domestic company with a minor share in an industry with a competing, substitutable domestic product. In terms of a comparison between the two regimes, in Methanex the tribunal is hostile to WTO law and resists the central role competition had previously played in determining like products.

Finally, the tribunal in Pope & Talbot found that the investor is entitled to the best treatment of any like domestic investor.[546] Under this approach, it doesn't matter if the vast majority of domestic investors are treated in the same way as the foreign investor. It's enough that the investor can show that one domestic investor is treated favourably.
In WTO terms, this is like the diagonal approach to less favourable treatment that the Appellate Body rejected in *EC-Asbestos*. This is problematic as it lowers the burden of proof on the complaining investor and increases their incentive to look for illegality.

[543] Mitchell, Heaton & Henckels, 'Non-Discrimination and the Role of Regulatory Purpose in International Trade,' *Edward Elger Publishing* (2016) 132
[544] Mitchell, Heaton & Henckels, 'Non-Discrimination and the Role of Regulatory Purpose in International Trade,' *Edward Elger Publishing* (2016) 133
[545] Mitchell, Munro & Voon, 'Importing WTO General Exceptions Into International Investment Agreements: Proportionality, Myths And Risks,' *Yearbook on International Investment Law & Policy* 2016–2017, Oxford University Press (2018) 99
[546] *Pope & Talbot Inc. v Government of Canada*, Tribunal Report, paragraph 64

5.5. Likeness and levels of engagement in PTIAs & BITs

This section considers whether the concept of likeness in PTIAs *results in increased levels of engagement* between the trade and investment law regimes compared to its counterpart in BITs. Engagement was said to occur in Chapter 1 wherever the content of one of the regimes has a parallel in the other or wherever there are cross-regime references in dispute settlement.

In terms of parallels in content, likeness featured in 39/40 PTIAs (97.5%) and 16/40 BITs (40%) in this study's sample. Thus there are clearly greater parallels of content for the PTIAs compared to the BITs.

The second measure for increased engagement concerns cross-regime references and whether they are more likely to occur because of how the concept of likeness is construed in PTIAs compared to its counterpart in BITs. The concept of likeness was shown to be more common in PTIAs than in BITs for the sample taken in this study. Tribunals are more likely to draw upon these PTIA provisions for these reasons. However, there are additional considerations for tribunals when comparing legal norms or concepts between the systems.[547]

Tribunals must consider the differences of wording relating to likeness in PTIAs and BITs. The WTO Agreements refer to ‘like products’ and ‘like services’ in the GATT and GATS. When incorporating the concept of likeness, drafters of PTIAs and BITs typically refer to the need for investors to be 'in like situations'[548] or 'in like circumstances'[549] for investment and services chapters. For chapters concerning trade in goods, the drafters of PTIAs refer to 'any like, directly competitive or substitutable goods'[550] or just 'like, directly competitive or

[547] Chapter 1.6 outlines the five primary considerations when comparing legal norms or concepts between the systems for the purposes of this thesis, including: 1) textual differences; 2) contextual differences; 3) systemic differences; 4) remedy structures; and 5) the purposes of agreements.

[548] See for example, CETA, Article 8.6: National treatment

"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, treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of Canada in its territory and to investments of such investors.

3. The treatment accorded by a Party under paragraph 1 means, 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 the EU in its territory and to investments of such investors." (emphasis added)

[549] See for example, KORUS, Article 11.3: National treatment

"1. Each Party shall accord to investors of the other 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 in its territory.

2. Each Party shall accord to covered investments treatment no less favorable 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." (emphasis added)

[550] Chapter 3 NAFTA on national treatment and market access for goods, Article 301 states:

"1. Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the *General Agreement on Tariffs and Trade* (GATT), including its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.

2. The provisions of paragraph 1 regarding national treatment shall mean, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part." (emphasis added)

substitutable goods.'[551]
Although the differences in these wordings may seem to be slight, their inclusion is deliberate by the drafters. To what extent should similarities and differences in the wordings of likeness provisions of the types above facilitate or exclude the possibility of crossfertilisation?
The tribunal in *Methanex v. U.S.A* noted that while NAFTA referred to 'like circumstances', the GATT referred to 'like products'.[552] It then constructed a hypothetical wording of NAFTA Article 1102 that would reflect if the drafters "had wanted to incorporate trade criteria in its investment chapter". Such a wording would have read: "Each Party shall accord to investors [or investments] of another Party treatment no less favorable than that it accords its own investors, in like circumstances *with respect to any like, directly competitive or substitutable goods*".[553] The tribunal acknowledges that such a wording would be "incongruous, indeed odd".
Such arguments miss the point and value of crossfertilisation and how lessons can be taken from across the field of public international law. Lessons can be taken from the experience of other regimes and the fact that trade or investment language isn't incorporated into a certain chapter does not exclude its potential relevance. Kurtz disputes that the term 'like products' itself had played a critical role in the jurisprudence of the GATT and that the likeness test developed thereunder does not "flow from the use of the term 'like products'" but rather from the overall context of GATT Article III.[554]
Differences in the wording of the likeness standard have however been used by tribunals such as *Methanex* and *Bayindir* as a basis for ruling out crossfertilisation of jurisprudence and for deducing that it is the intent of the drafter "to create distinct regimes" for trade and investment. While being attentive to differences in wording, tribunals could also look to the overall context of the likeness tests developed across the trade regime and perhaps elements of the analysis or tests developed thereunder could be useful. An alternative, less restrictive reading of Article 1102 was employed by the tribunals in *SD Myers* and *Pope & Talbot*.

A second consideration for tribunals when interpreting shared legal concepts is the contextual differences in agreements. Tests at the WTO in relation to likeness may have been developed with a different context at hand than that facing an investment tribunal.
This is easiest to see in relation to the GATT, which has a complicated textual set up, at least in relation to the other provisions looked at in this section.[555] Notwithstanding its textual set up, many tribunals at the WTO and in investment law still look to jurisprudence under the

[551] Chapter 2 CETA on national treatment and market access for goods, Article 2.3 states:
"1. Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of the GATT 1994. To this end Article III of the GATT 1994 is incorporated into and made part of this Agreement.
2. Paragraph 1 means, with respect to a government in Canada other than at the federal level, or a government of or in a Member State of the European Union, treatment no less favourable than that accorded by that government to like, directly competitive or substitutable goods of Canada or the Member State, respectively." (emphasis added)
[552] *Methanex Corp. v U.S.A*, NAFTA/ UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (2005): "It may also be assumed that if the drafters of NAFTA had wanted to incorporate trade criteria in its investment chapter by engrafting a GATT-type formula, they could have produced a version of Article 1102 stating "Each Party shall accord to investors [or investments] of another Party treatment no less favorable than it accords its own investors, in like circumstances with respect to any like, directly competitive or substitutable goods". It is clear from this constructive exercise how incongruous, indeed odd, would be the juxtaposition in a single provision dealing with investment of "like circumstances" and "any like, directly competitive or substitutable goods".
[553] *Methanex Corp. v U.S.A*, NAFTA/ UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (2005) Part IV Chapter B, para 34
[554] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *The European Journal of International Law* Vol. 20 no. 3 (2009) 767
[555] Note: this paragraph applies to both national treatment and likeness. As such it is repeated in Chapter 4.6, the section on levels of engagement in PTIAs & BITs in national treatment provisions.

GATT because of its status as the grandmother provision of national treatment provisions at the WTO and the amount of litigation under it. Any attempt to draw upon GATT jurisprudence in the area of likeness must be mindful of contextual differences which GATT Article III:1 and XX likely represent. GATT Article III:1 explicitly tells us that the purpose of the National Treatment provision is so that taxes and regulations "should not be applied to imported or domestic products so as to afford protection to domestic production." GATT Article XX also provides a list of General Exceptions which is not present in IIAs such as NAFTA.

The *Methanex* tribunal was dismissive of drawing upon GATT jurisprudence in its interpretation of national treatment under the investment chapter of NAFTA. Any such attempt would have to be mindful not only of differences in the wordings of these provisions, but also of these key contextual differences.

The GATS refers to the obligation to provide treatment no less favourable than a Member accords to its own "like services and service suppliers".[556] The National Treatment Chapter of CETA states that the parties shall provide treatment no less favourable than the most favourable treatment accorded, "in like situations, by that government to its own service suppliers and services."[557] Aside from the provisions themselves, GATS is subject to a list of General Exceptions in Article XIV and this is incorporated into CETA in Article 28.3.2. The wordings and context of these provisions are almost identical and consequently the potential for crossfertilisation of jurisprudence seems very high.

Does it follow that the GATS would be a more appropriate starting point for an investment tribunal under NAFTA? Although GATS does not have some of the same complications as the GATT such as Article III:1, the contexts are still different as Chapter 11 NAFTA is not subject to General Exceptions. However the WTO's TBT Agreement contains a national treatment provision which is not subject to General Exceptions, although this Agreement refers to 'like products'.

Another significant contextual difference was seen in the recently concluded TPP, which provided a clarificatory footnote to the National Treatment provision of the Agreement's Investment Chapter, stating:

"For greater certainty, whether treatment is accorded in “like circumstances” under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."

The Investment Chapter of TPP contains no General Exceptions and this clarification introduces an assessment as to the state's regulatory purpose to the test for likeness.[558]

Tribunals must also consider the different purposes of the agreements when interpreting likeness under PTIAs and BITs. The object and purpose of the investment agreement could feed into the tribunal’s analysis of the regulatory purpose of a measure in its likeness analysis. A strong reference in the preamble to the right to regulate could affect a tribunal’s interpretation of what constitutes a legitimate regulatory purpose and how broadly it could distinguish between investors.

[556] GATS Article XVII.1 on National Treatment

[557] CETA, Article 9.3 National treatment

[558] Kurtz refers to this as a "purpose-based test", see ' Kurtz, J, 'Balancing Investor Protection and Regulatory Freedom in International Investment Law: the Necessary, Complex and Vital Search for State Purpose,' in Bjorklund, A (ed.), *Yearbook on International Investment Law & Policy* 2013-14, *Oxford University Press* (2014) 276-277

A treaty is to be interpreted in light of "its object and purpose" which is to be found in the treaty's preamble. This could affect an interpretation of likeness in a couple of key ways. Preambles can facilitate crossfertilisation based on: 1) a reference to WTO law in the preamble; and 2) the strength of any reference to the host state's right to regulate within the preamble. In the absence of any such provisions in the preamble, tribunals have to be careful, particularly in relation to older style BITs, that they strike an appropriate balance in their interpretations between the protection of investment and that the host state's right to regulate.

Finally, tribunals must consider systemic differences and differences in the remedy structures between the two regimes when interpreting likeness under PTIAs and BITs. These differences mean that there are potentially severe consequences if a tribunal gives an overly broad or narrow reading of likeness, particularly if it gives rise to monetary damages. Findings of breach under IIAs and are not confined to the removal of measures as is the case in the trade law regime. A key systemic difference between the regimes is the lack of the possibility of appeal in the investment regime except for a very limited number of grounds in all but the most recent IIAs such as CETA. Tribunals have to be mindful of these factors in their awards and in striking a balance that is appropriate for the investment regime, rather than following a test developed in line with a different set of considerations in the trade regime.

5.6. Conclusion

This chapter considered likeness as it has been interpreted in the trade and investment law regimes in relation to the WTO Agreements, as well as both early and recent IIAs. There have been differences in interpretations given investment law's focus on the individual over the group, and the fact that investment law considers competitors as well as non-competitors. The Appellate Body has found however that the scope for the presumption of likeness is more limited under the GATS as there is "greater complexity" in trade in services. Likeness is interpreted differently across the WTO Agreements as the accordion is "stretched and squeezed".
It is also important to note that although competition is a central element of the trade law analysis of likeness, it is not the only element. The SPS Agreement is "not concerned with the comparability of products but with the comparability of risks".
Mitchell finds it "unduly narrow" to focus on competition alone given the preamble to WTO Agreement, and its reference to sustainable development etc.

The recent exclusion of legitimate regulatory purpose under GATT Article III in *EC- Seals* entails a worrying divergence of outcomes for cases taken under the GATT and TBT Agreements. Where regulatory purpose can form part of likeness analysis, it allows states like France to defend public health measures such as this ban on asbestos. In line with *EC- Seals*, consideration of regulatory purpose has to be done under Article XX where the burden of proof lies with the defendant, there are limited grounds for justification, and these grounds were drawn up in 1947. Article III was complicated before *EC-Seals,* but its simplification risks coming at too high a price.

This chapter looked at several approaches to interpreting likeness in investment law. The tribunal's approach in *SD Myers* endorses a competition-based approach to likeness similar to that seen at the WTO. This approach was deemed to be the best equipped to combat nationality-based discrimination as it forces host states to explain their regulatory distinctions.[559] The tribunal interpreted the national treatment provisions with reference to WTO law while taking contextual differences between the regimes into consideration. Other approaches such as those adopted by the tribunals in *Methanex, Occidental* and *Pope & Talbot* were deemed less suitable as their search for a comparator was either too broad or too narrow.[560]
The tribunal's findings in *Methanex* "runs the risk of excluding swathes" of discriminatory conduct from the scope of national treatment. A non-identical competitor receives preferential treatment but is not deemed like as the more identical competitor is the one in like circumstances.

This chapter also considered whether competition is a necessary condition for likeness. It looked at Kurtz's view that the investment regime aims to extend competitive opportunities and Pauwelyn's views that protection of the individual foreign investor is paramount. Although competition is often a condition for likeness, certain situations require the equal regulation of non-competing investors. As such, competition is not requisite for likeness to be found in these situations. Kurtz warns that the risk of overreach is "exponentially higher" in relation to the broad application of a disparate impact test. Therefore IIAs must "pay closer attention to regulatory context and alternative policy justifications" before finding a violation.

The flexible concept of "likeness" varies from Agreement to Agreement and from case-to-case. Whether that is satisfactory is for IIA drafters and WTO Members to decide. The concept of "likeness" has been somewhat developed in the jurisprudence but unpredictability has dominated. One way to change that would be for an amendment or more authoritative interpretation to be taken by an IIA Committee or at Ministerial Conference or General Council under Article IX: 2 of the Marrakech Agreement.
When a tribunal considers "likeness", rules or authoritative interpretations would increase predictability in the system in line with Article 3.2 of the DSU, which states that the aim of the system is to provide "security and predictability".[561] Perhaps the provision of such clarity would come at too great a cost. WTO dispute settlement has been a success and if there are shades of grey in some areas, perhaps giving tribunals a degree of manoeuvrability allows it to function without courting the controversy that giving greater predictability to proceedings may attract. Giving a clear definition of "likeness" could be hard to agree upon and lead to discontent among certain Members and limit the discretionary power of tribunals, which is perhaps of greater importance than leaving "likeness" as an undefined concept.

Likeness was more prevalent in PTIAs than in BITs but is not ubiquitous in either type of treaty. Some states prefer to exclude likeness and some tribunals have also found that there is an inherent need for a comparator.
The recent findings in *EC—Seals*, in which it was found that differential treatment based on

[559] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *The European Journal of International Law* Vol. 20 no. 3 (2009) 766
[560] The approaches in Pope & Talbot and Methanex are problematic, namely the best treatment of "any like investor" approach in Pope & Talbot and the "identical comparator" approach in Methanex, and this last approach has been replicated in later cases.
[561] WTO Agreement Annex 2

legitimate regulatory purposes was discriminatory under GATT III: 4, lessen the scope for crossfertilisation with IIAs. Analysis under the TBT Agreements is perhaps more fruitful in terms of crossfertilisation as inquiries into regulatory purpose may be taken under this Agreement. Ultimately inconsistency in the jurisprudence such as that seen at the WTO undermines crossfertilisation.

While there may be textual differences between 'like products' under GATT and 'in like circumstances' under IIAs, it is not thought that this is a signal from the drafters "to create distinct regimes" for trade and investment.[562]

[562] Methanex Corp. v U.S.A, NAFTA/ UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (2005) paras 34-37

Chapter 6- Treaty Exceptions

Introduction

Where a state is prima facie in breach of its treaty obligations, it may defend a measure using treaty exceptions. Treaty exceptions allow for derogations from treaty obligations where there is a legitimate regulatory purpose, which is the purpose objectively manifested in the measure. Mitchell defines regulatory purpose as "the actual effects and the intended effects that are objectively ascertainable and rational".[563] Exceptions come in a myriad of forms in international economic law and are distinguished from treaty carve-outs which exclude entire subject matters from the scope of a treaty. Carve-outs may cover sensitive areas such as taxation, public procurement or tobacco control measures.[564] Exceptions are also distinguished from reservations, which are akin to unilateral carve-outs, and usually only apply to one of the parties.[565]

[563] Mitchell, Heaton & Henckels, ' Non-Discrimination and the Role of Regulatory Purpose in International Trade,' *Edward Elger Publishing* (2016) 17

[564] See the Agreement to Amend the Singapore-Australia Free Trade Agreement (2016), Article 22: Tobacco Control Measures: "No claim may be brought under this Section in respect of a tobacco control measure19 of a Party."

[565] See for example the Iceland - Lebanon BIT (2004), Article 3.5 on National and Most-Favoured-Nation Treatment: "The provisions of paragraphs 1 and 2 of this Article shall not be construed so as to oblige Lebanon to extend to the investors and investments of the other Contracting Party the treatment granted to its own investors regarding ownership of real estate and other real rights. "- Agreement Between The Lebanese Republic and The Republic Of Iceland on the Promotion and Reciprocal Protection of Investments

Engagement between trade and investment law was described in Chapter 1 as occurring wherever the content of one of the regimes has a parallel in the other or wherever there are cross-regime references in dispute settlement or parallels in the practices of tribunals. Treaty exceptions are a shared legal norm in trade and investment law and this chapter looks at the extent to which engagement already exists between the two regimes (sections 1-4), whether this should influence tribunals (sections 3-5), and whether PTIAs have any kind of an impact on this engagement (section 6).

Treaty exceptions may be of general application to an entire treaty, or may be of specific application to certain parts of a treaty. An example of a general exceptions provision can be found in GATS Article XIV as the exceptions contained therein apply to the entirety of the Agreement. Article 10 of the US- Colombia FTA (2006) contains an example of a specific exception as it only applies to the treaty's article on performance requirements.[566] Where a chapter contains both, specific exceptions should generally prevail.[567] In addition to exceptions expressly included within treaties, there are a number of circumstances that under customary international law preclude a state's actions from being wrongful including self-defence, *force majeure* and necessity *inter alia*.

General exceptions common features in modern and balanced IIAs. Titi reminds us that regulatory space would ultimately be increased in the absence of an IIA.[568] Nonetheless, when concluding an IIA, general exceptions increase regulatory autonomy for host states when incorporated correctly. One of the benefits of including general exceptions when concluding an IIA is that it counteracts legitimate expectation of investors that such regulation wouldn't happen.[569]
There is a question as to the relevance of the omission of general exceptions where they feature in other chapters of PTIAs, e.g. NAFTA.[570] This absence of exceptions may affect the interpretation of the obligations to which they do not apply, and may diminish the flexibility of the host state.

This chapter examines how exceptions have developed in the law and jurisprudence of the trade and investment law regimes. It looks at the interpretation of exceptions in the trade regime, and their incorporation and interpretation in the investment regime. The degree of separateness, overlap and convergence between the two regimes is then considered in light of this examination. In a further section, the application, or misapplication, of appropriateness of

[566] Article 10.9(c) of the US- Colombia FTA (2006): "Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and
(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."
[567] E.g. Clarificatory annexes in provisions such as expropriation.
[568] Titi, Aikaterina, 'The right to regulate in international investment law,' *Hart Publishing* (2014) 119
[569] Mitchell, Munro & Voon, 'Importing WTO General Exceptions Into International Investment Agreements: Proportionality, Myths And Risks,' Yearbook on International Investment Law & Policy 2016–2017, *Oxford University Press* (2018) 15
[570] Mitchell, Munro & Voon, 'Importing WTO General Exceptions Into International Investment Agreements: Proportionality, Myths And Risks,' Yearbook on International Investment Law & Policy 2016–2017, *Oxford University Press* (2018) 36

drawing on WTO law for guidance in deciding investment law disputes and vice versa is considered.

Sections 2- 4 look at how treaty exceptions have been formulated and interpreted in the trade and investment law regimes. In terms of the trade regime, section 2 traces the evolution of interpretations of exceptions articles across the WTO Agreements and examines the low success rate for cases concerning general exceptions before the WTO's Dispute Settlement Body. It considers why measures have failed the necessity test or failed to comply with Article XX's chapeau as well as the functioning of the two-tier test. The role of the Appellate Body when interpreting general exceptions in striking the right balance between Members' substantive rights and Members' rights to pursue public policy objectives is further considered.
Section 3 considers some of the methodologies that have been used to give a framework for interpreting whether a measure is "necessary" within the context of investment agreements. It first looks at the jurisprudence for exceptions based on early IIAs such as the US-Argentina BIT (1994), before looking at more modern exceptions clauses in recently signed IIAs. This first section looks at the merits and demerits of two of the methodologies for interpreting exceptions that have been employed by tribunals, as well as proposals for further interpretative methodologies from commentators.

The rest of the chapter is structured as follows. Section 4 looks at the wording and interpretations of exceptions in recent IIAs. Section 5 examines the possibilities for building on the interpretative approaches explored in Section 3. Section 6 considers the scope for crossfertilisation of treaty exceptions in PTIAs compared to BITs. Finally, section 7 concludes.

6.1. Reflections on the empirical results

Treaty Exceptions featured in 36/40 PTIAs (90%) and 30/40 BITs (75%) surveyed as part of this study. Although exceptions feature in many of the Agreements, the level of interaction between the regimes varies significantly among the different agreements depending on the category of exception clauses included. Chapter 2.8 attributed weights to the five types of treaty exceptions found in the IIAs in this study. These provisions were given a score from 0-1 based on their strength and the findings are contained in Table 1:

Table 1: Categories and Values of Engagement for Treaty Exceptions

	Explicit	Implicit	Thin	Arbitrary	Performance Requirements	**Total**
Weighting	1	1	0.66	0.33	0.25	
PTIAs	18	9	_	_	9 (2.25)	**29.25**
BITs	_	12	4 (2.66)	18 (6)	_	**20.66**

Factoring in the weightings attributed to the various treaty exception provisions, PTIAs 29.25/40 and BITs had 20.66/40. Table 1 shows that overall there is over 40% more engagement in PTIAs than in BITs for weighted provisions.[571]

Five categories of treaty exceptions with different weightings have been coded in this study. These categories include exceptions explicitly modelled on WTO law (which were given a score of 1), exceptions implicitly modelled on WTO law (1), exceptions thinly connected to WTO law (0.66), provisions protecting against arbitrary and discriminatory measures (0.33), and exceptions within articles on performance requirements (0.25).
As outlined in Chapter 2.9, the stronger the provision, the greater the engagement between trade and investment. It can thus be said that the stronger the treaty exception, the greater the level of engagement between the trade and investment regimes. The presence of treaty exceptions was more common in PTIAs than in BITs for the 80 Agreements considered as part of this study.
The forms they take tend to be different. The only type with overlap is type 2.
What are certain provisions more common in BITs and other provisions more common in PTIAs? This question is considered throughout the rest of this chapter.

6.2. Treaty Exceptions in the Trade Regime

Treaty exceptions provide a defence to a party in breach its treaty obligations and may apply in sensitive areas such as national security. An exception may be specific to a certain part of an Agreement or may be of general application to the Agreement.
Exceptions are found in a variety of forms and feature in many investment treaties and across the WTO Agreements. The WTO Agreements contain exceptions provisions that aim to find a balance between the rights of investors and governments' right to regulate.

This section features cases taken under the GATT, GATS, TBT and SPS Agreements. GATT Article XX is the most frequently invoked exception before the WTO's Dispute Settlement Body and the central focus of this section. The evolution of interpretations of exceptions at the WTO is considered including why measures have failed the necessity test or failed to comply with Article XX's chapeau. The low success rate for cases concerning general exceptions is analysed as well as the functioning of the two-tier test. This chapter then considers whether the Appellate Body is striking the right balance between Members' substantive rights and Members' rights to pursue public policy objectives under the general exceptions.

[571] 41.5779% to be more precise.

6.2.1. The law

In August 2014, the Appellate Body issued its twentieth report concerning General Exceptions in the *China- Rare Earths* case.[572] When the General Exceptions have been invoked under Article XX of the GATT,[573] it has only been deemed a legitimate defence in two cases since the inception of the WTO and its Dispute Settlement Body (DSB) in 1995. The General Exceptions address the conflict between trade and other legitimate policy objectives of Members. There are ten such objectives including public morality, the protection of life and the conservation of exhaustible natural resources.

This section aims to analyse recent cases involving Article XX defences and whether a new interpretation of Article XX is needed in light of this low success rate of Article XX defences.[574] Is this low success rate attributable to systemic reasons present in WTO dispute settlement or is it indicative of a priority being given to market access over public policy objectives? This paper considers this question and whether the Appellate Body is striking the right balance between Members' rights to market access and Members' rights to pursue public policy objectives under the general exceptions.

Article XX allows tribunals to strike a balance between free trade and other public policy goals. Since the *Shrimp/Turtle* case in 2001, no measure defended under Article XX has been deemed compliant with the WTO Agreements.

This section considers whether the Appellate Body is striking the right balance between Members' rights to market access and Members' rights to pursue public policy objectives under the General Exceptions.

In assessing whether a revised way of interpreting Article XX is needed, this paper considers how well the Appellate Body is striking this balance.

The 2014 *EC-Seals*[575] case illustrates recent developments under Article XX. The interpretative evolution of Article XX is considered in light of this case in Section 3. In particular, the nature of Article XX's two-tier test, the "rational connection" test and the distinction between a measure and its application are considered. The rest of the paper is structured as follows. Section 2 introduces Article XX and its two-tiered test for qualifying as a general exception. Section 3 looks at some of the issues raised under Article XX in the aftermath of *EC-Seals*. Section 4 examines why measures defended under the General Exceptions have infringed Article XX. Section 5 considers whether or not a revised interpretation of Article XX is needed given the low success rate for defences. Finally, section 6 concludes.

1. Introducing the General Exceptions

When a government measure is found to restrict trade, Article XX may be invoked as a defence. A measure is analysed in two stages under Article XX in assessing whether it qualifies for protection. Firstly, it must be capable of being provisionally justified under one

[572] Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO doc. WT/DS431/AB/R, 7 August 2014.

[573] The general exception clause is also found under Article XIV of GATS, which has an identical wording to the GATT in the parts considered here. As the vast majority of cases in this area have been taken under the GATT, for the sake of simplicity the general exceptions clauses are referred to as being under GATT Article XX throughout this paper.

[574] See Annex 1 for a table showing the case-by-case success rate of Article XX defences.

[575] Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO doc. WT/DS401/AB/R, 22 May 2014.

of the ten policy objectives contained in subparagraphs (a) – (j) of Article XX. Secondly, a measure must comply with Article XX's chapeau, or introductory clauses. The chapeau's primary purpose is prevention of abuse of the exceptions listed in the subparagraphs.[576]
It has been the traditional view in WTO dispute settlement, that before turning to the chapeau, the Panel or Appellate Body must consider whether a measure is; (let a) necessary to protect public morals (let b) necessary to protect human, animal or plant life or health (let d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement (...)(let g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.
Article XX (a), (b), (d) and (g) are the only subparagraphs that have formed the basis of cases that have come before the Appellate Body. Article XX(a), (b) and (g) concern moral and environmental issues, which is where the focus of this paper lies. Article XX(d) is thematically different, dealing with measures necessary for compliance with laws in areas such as customs enforcement. For this reason the content of these cases is not analysed here.
In determining whether a measure is "necessary" under Article XX(a) and (b), the Appellate Body balances factors including the contribution of a policy to its objective, the importance of the objective and its impact on international trade.[577] If confirmed as necessary preliminarily, the measure is then compared to less restrictive alternative measures. On whether a measure is "relating to the conservation of exhaustible natural resources" under Article XX(g), a "substantial relationship" must exist between the measure and the conservation effort.
To comply with the chapeau, *inter alia*, a measure must not be applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade". It is a flexible tool provided by the Agreements to provide for the balancing of rights based on the facts of the case. Given that it is a tool for balancing, the Appellate Body has a degree of freedom in attributing weight to the various concerns of the parties. Factors considered by the Appellate Body in its balancing have included a measure's design, flexibility, rationale and whether it has been exercised in good faith.
Article XX functions as a two-tier test, a sequence that has been deemed by the Appellate Body to be logical and fundamental to the Article.[578] Interpreting the chapeau without this sequence of investigation has been deemed by the Appellate Body to be difficult "if...possible at all".[579] The idea is that the specific exception should be examined first to set the context before turning to the delicate balancing that is to be undertaken under the chapeau. This logic of interpreting the provisions before the chapeau has been disputed and labelled as "arbitrary" by Bartels (2014) though he cedes that a two-tier test is appropriate on the grounds of judicial economy.[580]
Whether an examination of the application of a measure under the chapeau is needed at all has been questioned. Davies (2009) believes "the nexus requirements in the heads of provisional justification provide ample protection" against the abuse of Article XX.[581] Along this line of thinking, if something is "necessary" to protect life or "related to"

[576] Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO doc. WT/DS401/AB/R, 22 May 2014, para 5.327.
[577] See https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (accessed 30th January 2016).
[578] Appellate Body Report, US – Import Prohibition of Certain Shrimp and Shrimp Products, WTO doc. WT/DS58/AB/R, 12 October 1998, para 119.
[579] Appellate Body Report, US – Import Prohibition of Certain Shrimp and Shrimp Products, WTO doc. WT/DS58/AB/R, 12 October 1998,, para 120.
[580] Bartels (2014), p. 7.
[581] Davies (2009), p. 32.

the conservation of exhaustible natural resources" it should automatically qualify for an Article XX exemption. The impact of removing the chapeau from Article XX's two-tier structure would be to restrict tribunals to solely looking at the nature of a measure without regard to discriminatory treatment in place resulting from the measure. The contribution of the two-tier test and interpreting the chapeau to the low success rate of Article XX defences is considered in the next sections.

2. The Objective of a Measure and the two-tier test

One ongoing question concerning Article XX and its interpretation is whether the reasons for preliminary justification need to be the same as those provided for satisfying the chapeau. This question as to whether the reason for discriminating has to be the same as the reason for restricting trade was addressed *EC-Seal*s.
In *Brazil – Retreaded Tyres*, the Appellate Body found that it would be difficult to find any discrimination compliant with the chapeau where it "does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX".[582] The same paragraph tells us that it is an abuse of the exceptions where there is "no rational connection" between the objective pursued under the first part of the two-tier test and the discrimination seeking to be justified under the chapeau.
The WTO website endorses the idea of there being a "rational connection test" for a trade restrictive measure to be justifiable under the chapeau: "WTO jurisprudence has highlighted some of the circumstances which may help to demonstrate that the measure is applied in accordance with the chapeau. These include . . . an analysis of the rationale put forward to explain the existence of a discrimination (the rationale for the discrimination needs to have some connection to the stated objective of the measure at issue)".[583] Other circumstances listed include a measure's design, flexibility and coordination and cooperation activities undertaken by the defendant.

Bartels suggests that the rational connection test should be viewed as an error[584] and that it was overturned in *EC – Seals*. The Appellate Body found in *EC-Seals* that the "relationship of the discrimination to the objective" is one of the most important factors but not the sole test for compliance with the chapeau. The Appellate Body's finding in *EC – Seals* that the objective for discrimination is not the sole test but that there are additional factors that may be relevant does not necessarily run contrary to *Brazil – Retreaded Tyres* which itself acknowledges one such factor in assessing compliance with the chapeau. The additional factor considered was whether the discrimination was being applied in a manner that would "go against that objective" cited under Article XX's subparagraph. When considering the test laid down in *Brazil – Retreaded Tyres*, this second element of the analysis must be borne in mind. These two elements are; (1) that a measure may not discriminate where it is not rationally connected to the objective pursued under the subparagraph; (2) where not rationally connected, the discrimination must not run contrary to the initial objective. In Bartels's example of the medical use of narcotics, it is not necessarily an affront to public morality to

[582] WTO doc. WT/DS332/AB/R, Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, 3 December 2007, para 227.
[583] https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (accessed 30 January 2016).
[584] Bartels (2014), p. 15.

allow the use of a narcotic for public health reasons. If the two elements of the test are considered, it is difficult to find that the *Brazil – Retreaded Tyres* dictum has been overturned in *EC – Seals*.

The exception to the EU Seal Regime was for seal products derived from hunts by Inuit or indigenous communities. The EU submitted that IC hunts were distinguishable from commercial hunts as they contributed to the subsistence and identity of Inuit. IC hunts were of significance for Inuit "culture and tradition as well as for their livelihood".[585] The EU contested the panel's finding that there was no rational connection between the public morals objective and the exception to it for Inuit communities.[586] The EU submitted on appeal that an integral part of legislating based on a moral standard was to have a "balancing of interests" as reflected in the IC exception, which was the outcome of "the application of that moral doctrine to the specific circumstances of seal hunting".[587]

The Appellate Body's assessment of whether the Inuit exception supported Inuit communities (IC) is seen by Bartels as evidence that *Brazil –Retreaded Tyres* has been overturned. Bartels deems that such an analysis would be "impossible" under it as there is no rational connection between supporting Inuit communities and the public morals objectives of the EU seal regime.[588] Far from being impossible, under the *Brazil- Retreaded Tyres* dictum, the protection of traditional hunting methods of indigenous communities can be "rationally connected" to protecting public morals. Protecting traditional methods is part of a broader public morality of upholding ethical standards even if this is not the same specific moral concern that is expressed when banning the importation of seal products. If this rational connection is accepted, the *Brazil-Retreaded Tyres* dictum cannot be said to have been overturned.

Whether or not the rational connection dictum is desirable in the context of the general exceptions is another question. Considering the case in which it was laid down, if a retreaded tyre ban's objective is to protect the environment, is it unreasonable to say that the reason for discrimination should be connected to this objective or at least not run contrary to it?

While this test fits the facts of *Brazil – Retreaded Tyres* well enough, its shortcomings are more apparent in a scenario more like the *US – Shrimp* cases. Conserving sea turtles may be a conservation objective under Article XX(g) but discrimination in this measure's application could be grounded in a moral concern. E.g. a WTO Member may give a waiver of a particular fishing requirement enacted for environmental reasons to a small island if this would facilitate the sustainability of a traditional way of life. The exception is not rationally connected to the objective pursued, runs contrary to it but may be a justified form of discrimination based on the balancing of interests concerned.

While there may be some instances where an exception is not rationally connected to an objective pursued and even runs contrary to it, it is questionable whether justifications under the subparagraphs and chapeau need to be delinked in a general manner. As per *EC – Seals*, additional factors may be considered but the relationship of the discrimination to the objective of a measure is one of the most important factors and will be in the majority of cases.

The traditional basis for the two-tier test is the distinction between a measure and its application. Bartels claims that *EC- Seals* has abolished this distinction as regard was had to

[585] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, (AB-2014-1, 2/DS400, DS401), Other Appellant Submission by the European Union, 29 January 2014, para 142.
[586] Ibid., para 16.
[587] Ibid., paras 110–11.
[588] Ibid.

the content of a measure in considering its application. The Appellate Body cited *Japan-Alcoholic Beverages*, a national treatment case, in finding that it may be "relevant to consider the design, architecture and revealing structure of a measure" (para 5.302).[589]
In *EC – Asbestos*, the Appellate Body reminded the panel in its report that Articles III and XX "are distinct and independent provisions".[590] The case involved considerations of the health reasons behind an Article III measure which was not deemed to deprive Article XX(b) of its *effet utile* as different inquiries were made under the different Articles. GATT Articles III and XX are separate provisions, which require separate inquiries.
The reference to *Japan – Alcoholic Beverages* does acknowledge that the chapeau does not exclusively concern the application of a measure and that the substantive content of a measure may also be an element. Such an interpretation widens the scope for interpreting the application of a measure but while the Appellate Body may consider an element used in an Article III analysis, such a consideration does not constitute a fundamental re-evaluation of the two-tier test.
As such, it is pre-emptive to say that the two-tier test's fundamental distinction has been abolished. In applying the two-tier test, regard is still fundamentally split between the consideration of a measure under the subparagraphs and the application of the measure under the chapeau albeit with a widened interpretation of the term "application", which may include additional factors. The question of whether or to what extent the reference to *Japan – Alcoholic Beverages* and the design of a measure will impact upon compliance with the chapeau in future Appellate Body reports remains to be seen.

The Appellate Body found that in considering the design, architecture and structure of a measure, its "actual or expected application" is relevant in determining whether a measure infringes the chapeau.[591] This is the first time the "expected application" of a measure was referred to in an Appellate Body report (it was repeated by reference to *EC – Seals* in *China – Rare Earths*, later in 2014).[592] Given the implications of paragraph 5.302 for future interpretations of the chapeau, the implications of each word must be considered.
Traditionally, a Member does not have to show that damage has actually occurred to satisfy the chapeau and has only needed to show a measure to be discriminatory. As such, the need to introduce the term "expected application" is questionable when damage does not need to be shown. Paragraph 5.302 refers to how a measure is "applied" three times before introducing this distinction between actual and expected application. It is this author's opinion that the words "actual or expected" add no value to the concept of what constitutes application under the chapeau and should be avoided in future reports.

3. Why measures have failed Article XX

This section looks at the reasons why measures have failed the necessity test or failed to comply with Article XX's chapeau.[593] The success rate for all Article XX claims has been two

[589] WTO doc. WT/DS401/AB/R, *supra*, n. 4 (emphasis added).
[590] WTO doc. WT/DS135/AB/R, Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos – Containing Products, 12 March 2001, para 115.
[591] WTO doc. WT/DS135/AB/R, Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*, 12 March 2001, para 115.
[592] WTO doc. WT/DS431/AB/R, supra, n. 1, fn 625.
[593] Annex 2 provides a more detailed outline of these decisions.

out of twenty (10%). However, for measures relating to public morals and the environment under Article XX(a), (b) and (g) the success rate is one in six (16.6%).
Under WTO dispute settlement, an Article XX(a) defence has failed on each of the three occasions it has been invoked. While *China- Audiovisual* failed the necessity test, *US-Gambling* and *EC- Seals* failed to satisfy the chapeau.
In relation to Article XX(b) and (g), since 1995 two defences have failed the necessity test (*China- Rare Earths, EC- Tariff Preferences*) and five have failed to comply with the chapeau (*US-Gasoline, EC- Tariff Preferences, Brazil- Retreaded Tyres, US-Shrimp (1998 & 2008)*).
The necessity test was failed because of the availability of alternatives (*China- Audiovisual*), the "piece-meal" [594] manner of its application *(China- Rare Earths*) and the fact that there was no relationship between the objectives stated and the measures put in place (*EC- Tariff Preferences*).
Reasons why measures have been deemed not to comply with Article XX's chapeau have included the application of a prohibition to foreign but not domestic service suppliers (*US-Gambling*), the lack "comparable efforts" in enabling one group to qualify for an exception to a ban (*EC- Seals*) and the existence of an exception to a ban for neighbouring countries which ran contrary to the objective invoked for provisionally justifying the measure (*Brazil-Retreaded Tyres).*
Despite the low success rate of Article XX defences, many measures designed to protect the environment and public morals have been deemed provisionally justifiable, satisfying the first part of the two-tier test. For Article XX claims, 9/20 have been deemed provisionally justifiable (45%). This paper has excluded Article XX(d) from its analysis for thematic reasons. All eight defences under XX(d) have failed the necessity test and in the only case where an analysis of the chapeau was carried out, it was also deemed non- compliant (*US-Thai Cigarettes*). Taking XX(d) out of an analysis of provisional justification, nine out of twelve of the measures defended under XX(a), (b) and (g) have been found to be provisionally justifiable (75%). Whether this represents a silver lining for public policy makers is considered in the next section.

6.2.2. Interpreting treaty exceptions at the WTO

1. Has the right balance been struck?

This section asks whether the right balance has been struck in Article XX's first twenty cases. It considers whether a revised Article XX, or way of interpreting Article XX, is needed given the low success rate for defences. Areas considered include the adequacy of the two-tier test and whether *EC-Seals* has shifted the "line of equilibrium" in interpreting Article XX. In terms of the two-tier test, the necessity test is looked at before turning to the chapeau and whether there is room for improving how it operates.

The *US – Tuna* case (1991) challenged the view that an appropriate balance had been struck between trade and public policy considerations under free trade agreements when an ostensibly environmental measure taken by the US was deemed to be inconsistent with the GATT. Following the inception of the WTO in 1995,

[594] WTO doc. WT/DS431/AB/R, supra, n. 1, para 5.116.

greater weight appeared to be given to environmental concerns in 2001 with the *US – Shrimp I* case. This was largely viewed as a positive development but was criticised by Bhagwati claiming the Appellate Body bowed to international environmental pressure.[595]
In *US – Shrimp I*, it was found that to ensure a measure is compliant with the chapeau, a Member must make efforts to find a cooperative solution to the problem. Secondly, a Member needs to consider the conditions in other territories when designing measures. This finding appeared to strike a greater balance and it seemed that in future cases, measures would be able to comply with these standards. This has not transpired and there has not been a successful Article XX defence since 2001, the year of *US-Shrimp II*.
On the face of it, the low success rate of Article XX defences may indicate a priority being given by tribunals to market access over concerns such as environmental protection. Other reasons that are systemic to the functioning of the DSB may be put forward in explanation. One reason may be that the environmental measures may be acceptable under GATT Article XX by themselves, but their discriminatory application of measures under the chapeau may not be. Thus even if it is a loss for a specific Member in a case, it may be a win for the public policy objective overall.
Other reasons may be that cases involving discriminatory measures are more likely to be resolved at the consultation stage or may not be appealed to the Appellate Body. Furthermore, for diplomatic reasons Members tend to take cases they believe they have a good chance of winning. The paper seeks to analyse Article XX defences once they come before the Appellate Body and does not analyse the steps preceding this.
While successful defences have been uncommon, the two-tier test has been passed in *EC – Asbestos* and *US – Shrimp II*. This represents two of the twenty cases where an Article XX exception was invoked and the case went to the Appellate Body. In *US-Shrimp II* discrimination was not found once "similar opportunities" were provided to all exporters. This was the case regardless of the outcome of these negotiating opportunities. In *EC-Asbestos,* this decision rightly affirmed the large degree of discretion Members have when regulating public health issues. This case shows that when it comes to measures concerning a grievous potential harm to the health of Members' citizens and a measure is applied consistently, it has no difficulty being exempted under Article XX.
As seen in Part IV, there has been a 75% success rate for measures under Article XX(a), (b) and (g) in terms of being found to be preliminarily justifiable. This reflects the fact that the Panels and Appellate Body are often willing to deem measures necessary when the aim is to protect life, the environment and public morals. As the Appellate Body stated in their *Korea-Various Measures on Beef* report: "The more vital or important the common interests or values pursued, the easier it would be to accept as 'necessary' the measures designed to achieve those ends."[596]
Environmental and public moral defences may often be deemed preliminarily justifiable. Whether this is of any consolation when the balancing of interests under the chapeau has gone against a Member is another question.
Perhaps some of these losses can be reframed as wins for public policy where it was far from certain whether they would constitute a permissible restriction on trade under the subparagraphs in the first place. Although the EU and Brazil's measures on the importation of seal products and retreaded tyres failed to comply with the chapeau, the fact that such measures have been deemed provisionally justifiable under WTO law shows that the

[595] Bhagwati (2001), pp. 15–29.
[596] WTO doc. WT/DS161/AB/R, Appellate Body Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, 11 December 2000, para 162.

Appellate Body has acknowledged a broad range of public policy concerns that permit restrictions on trade.
The *Brazil – Retreaded Tyres* case shows the Appellate Body's willingness to accept environmental and health risks as legitimate and complex concerns that can be tackled by a wide range of measures. When a measure infringes Article XX's chapeau on the basis of discriminatory treatment, it is primarily a question of fairness in the accordance of rights equally to all WTO Members than one of favouring trade over public policy interests. A concern of Members in allowing derogations from the WTO Agreements in environmental matters is that these measures will become a new form of protectionism. In enacting environmental or moral measures, ensuring that these measures are not discriminatory in their application should be a starting point for Members in demonstrating that the aim of a measure is environmental rather than protectionist. Showing that a measure is non-discriminatory is a necessary but not sufficient condition for a measure to comply with Article XX.
Seven of the twelve cases brought under Article XX(a), (b) and (g) have failed to comply with the chapeau. Two have complied (*EC-Asbestos* and *US-Shrimp II),* while in three cases the second tier of Article XX's test wasn't reached (*US-Audiovisual, China- Rare Earths* and *China- Raw Materials).* Given the difficulty Article XX defences have had in complying with the chapeau, the suitability of its current formulation has been questioned.
To discard the chapeau would be to deprive the Appellate Body of its ability to balance competing rights and to look at the discriminatory effects of measures. Removing the chapeau would render the first twenty years of jurisprudence on Article XX questionable in its applicability to future cases. This is not to mention the uncertainty that would surround measures previously found incompatible with the chapeau.

A more plausible proposition would be to relax the requirements of the chapeau and what constitutes arbitrary or unjustifiable discrimination. One way of doing this is to delink the objective for a trade restriction and the reason behind discriminatory treatment under the chapeau. Another way would be for the Appellate Body to look at other "additional factors" that may be considered which would allow it more room in its considerations under the chapeau. This was done in *EC – Seals* where for the first time reference was made to the design, architecture and revealing structure of a measure which was deemed "relevant to consider". GATT Article III has regard to the application of a measure like Article XX, but a differentiated analysis is necessarily applied as the Article has no chapeau.

The fact that the Appellate Body referred to *Japan – Alcoholic Beverages*, a GATT Article III case, perhaps shows that they are trying to widen the scope for interpretation under the chapeau. In terms of other additional factors that may be considered in future Appellate Body reports, guidance may be drawn from disputes under the TBT Agreement. In US – COOL,26 the even-handedness of measures was determined based on whether or not they were applied in a manner that "constitutes a means of arbitrary or unjustifiable discrimination". This wording largely resembles the chapeau test and future interpretations of GATT Article XX may make reference to the jurisprudence developed under the TBT Agreement and vice versa.[597]
The difficulty with taking *EC-Seals* as an example of a progressive interpretation of Article

[597] Asmelash (2013), p. 36.

XX's chapeau is that the infringement of the chapeau was less clear-cut here than in other cases.[598] In certifying products that would qualify under the Inuit exception, establishing a recognised body was deemed burdensome as was the "broad discretion" of recognised bodies in deeming products compliant with the Inuit exception.[599] If the EU aims at protecting subsistence hunting, the establishment of a body to recognise products as such is reasonable even if "cooperative arrangements" have not been actively pursued.[600] It has been noted that one way for the EU to comply with the chapeau is by removing the Inuit Exception, which would be more trade restrictive and wouldn't necessarily benefit Canada or its Inuit population.[601] Removing the Inuit Exception would be to enact a more trade-restrictive measure to comply with the chapeau, which is not the ideal outcome for trade or public policy. If a case were to be made to relax interpretation of the chapeau, *EC- Seals* could be a starting point.

6.3. Interpreting Treaty Exceptions in Early IIAs

This section considers some of the methodologies that have been used to give a framework for interpreting whether a measure is "necessary" within the context of investment agreements. This section looks at the jurisprudence on necessity under the US-Argentina BIT (1994). A series of cases were taken under this BIT in the aftermath of the Argentinian economic crisis in 2001-02.[602] This BIT is selected as tribunals have employed differing methodologies when interpreting necessity under the treaty. This disagreement has been extensively discussed in the literature and has led to the proposal of further interpretative methodologies. The methodologies employed by tribunals and proposed by commentators have ranged from decisions entirely removed from the influence of WTO law to a decision that borrows heavily from it. This has led to much discussion on the subject of fragmentation within international economic law and the desirability of crossfertilisation of jurisprudential choices. This section examines this question of the appropriateness of investment tribunals taking into account principles developed under WTO law in interpreting the various types of exceptions found in investment law.
The two approaches seen in the jurisprudence under the US- Argentina BIT include what are called here the Orrega Vicuña approach and the Common Derivation approach. The former looks to customary international law in interpreting the concept of necessity in Article XI US-Argentina BIT. Article XI reads:

> "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the

[598] In *EC-Seals*, the EU was found not to have made "comparable efforts" to allow Canadian Inuits to qualify for the IC Exception compared to efforts made in relation to Greenlandic Inuits. This aim of this measure was to support hunts for subsistence, an objective different to the one claimed to provisionally justify the measure. To comply with the Regulation, a certificate from a recognised body was necessary which the Appellate Body deemed to constitute arbitrary and unjustifiable discrimination.
[599] WTO doc. WT/DS401/AB/R, supra, n. 4, para 5.326.
[600] Ibid., para 5.337.
[601] Catti de Gasperi (2015), p. 17.
[602] For an account of this crisis, see Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 317-18

> maintenance or restoration of international peace or security, or the Protection of its own essential security interests."

The state of necessity in customary international law was codified by the ILC in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001). Article 25 of the Draft Articles reads:

> "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (*a*) the international obligation in question excludes the possibility of invoking necessity; or (*b*) the State has contributed to the situation of necessity."

The latter approach was taken by the tribunal in *Continental Casualty v. Argentina* which drew on WTO case law in its interpretation of necessity. The tribunal in this case found that as Article XI is derived from the non-precluded measures article in US FCN Treaties, which themselves reflect the formulation of the GATT, that it would be more appropriate to draw upon jurisprudence under the GATT than the customary international law. The US- Nicaragua FCN treaty (1956) is an example of a non-precluded measures article, which states:

> "1. The present treaty shall not preclude the application of measures:…(d) necessary to fulfil the obligations of a party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests;"

The first two of these approaches have attracted considerable praise and criticism. This section attempts to outline the main points for and against each approach. Two other methodologies have been proposed by commentators and these are examined in Section 5. One of these methodologies is based on general principles of law and this can either be viewed as a supplement to the second method, or else as a stand-alone methodology. The other methodology proposed involves separating primary and secondary applications and has been proposed by Professor Jürgen Kurtz.[603]

6.3.1. The Orrega Vicuña approach

a. The approach

The Orrega Vicuña approach involves interpreting the Customary International Law defence of necessity as being "synonymous"[604] with exceptions enunciated in provisions such as Article XI of the US- Argentina BIT.

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[603] Kurtz, J, 'Adjudging The Exceptional At International Law: Security, Public Order And Financial Crisis,' International and Comparative Law Quarterly, Vol. 59. (2010) 35

[604] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 329

CMS, Enron and *Sempra* were three of the early tribunals to conduct a necessity analysis under the US- Argentina BIT. The tribunals, which were all chaired by Professor Orrega Vicuña, placed the customary international law defence of necessity at the heart of their interpretations of the concept of necessity.[605]
In interpreting the customary international law defence of necessity, all three tribunals determined that: 1) an essential interest was not threatened; 2) this was not the "only means" at Argentina's disposal; and 3) that Argentina had contributed to the state of necessity.

The CMS tribunal was chaired by Orrega Vicuña and it found that Article 25 "adequately reflect (sic) the state of customary international law on the question of necessity."[606]
José Alvarez has endorsed this approach in several articles. He also gave opinions defending the customary international law approach as the claimant's expert in *CMS* (not public) and *Sempra* (public). Alvarez suggests they should have looked to the ordinary meaning under Article 31 VCLT in light of the object and purpose of the treaty.
The litigation strategy of Argentina may have been a contributory factor leading to what Annulment Committees would later term this conflation between Article XI of the BIT and Article 25 of the ILC's Draft Articles. It claimed that the right to invoke Article XI was self-judging despite the lack of words such as "it considers" as found in other agreements.

As seen in the last section, the textual set up of Article 25 is different to Article XI and makes it much more difficult to satisfy in several ways. The first difference between Article 25 and Article XI is that former applies to wrongful acts of states, which makes it contextually different.
Secondly, a State claiming necessity under customary international law must demonstrate that it is protecting an "essential interest against a grave and imminent peril".
Thirdly the response of the State must be the "only way" to protect its interest.
Lastly the defence is precluded if the State has contributed to the situation of necessity.

Alvarez has objected where tribunals have adopted another methodology that avoids the "only means test" which he deems the most appropriate.[607] Alvarez is a proponent of the customary international law approach. It is his view that the Continental tribunal avoided the "only way" test laid down under customary international law.

b. Criticism of the approach

The Annulment Committees in *CMS, Enron* and *Sempra*[608] were unanimously critical of the Orrega Vicuña approach.[609]

[605] For an account of the early cases under Article XI US-Argentina BIT and the diffusion of proportionality analysis, see Stone Sweet & Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez,' 10-19
[606] *CMS Gas Transmission Company v. Argentine Republic*, Award ICSID Case No. ARB/01/08, IIC 303 (2005) paragraph 315
[607] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011)324
[608] The Committee found that the failure to separately analyse and apply Article XI BIT constituted a "total" failure to apply the law and thus a "manifest excess of powers."
[609] It is further noted that Orrega Vicuña was disqualified from serving as an arbitrator in *CC/Devas (Mauritius) Ltd, Devas Employees, Mauritius Private Limited & Telcom Mauritius Limited v Republic of India, PCA Case No. 2013-09*. This

The Committees in *Enron* and *Sempra* annulled the awards, though the Committee in *CMS* could not. The CMS Committee was composed of two members of the ICJ (one of whom was a former President of that Court), as well as Professor James Crawford, who drafted the articles in question in his capacity as Special Rapporteur on State Responsibility at the ILC from 1997–2001.[610] Stone Sweet describes this decision as "the most significant of the three."[611]

When considering the grounds for annulment, the Committee reminded the parties that an "*ad hoc* committee is not a court of appeal" and that annulment could only be granted in line with Article 52 of the ICSID Convention.[612] To be clear, it stated that it had no jurisdiction to consider whether the Tribunal had "made any error of fact or law."[613]

Nonetheless the Committee gave its view on "certain points of substance" where the Tribunal had made errors as multiple claims had been made which covered similar subject matter. The Committee found that the Tribunal made two manifest errors of law that had a decisive impact on the award. The first involved conflating Article 25 of the ILC's Draft Articles and Article XI of the US- Argentina BIT. The second involved not taking a position on the relationship between the two texts and assuming they were "on the same footing".[614] The Committee stated that if it was "acting as a court of appeal, it would have to reconsider the Award on this ground."[615] Although these errors were not sufficient for annulment, the findings offer a "cogent taxonomy" for understanding the relationship between treaty and customary norms.[616] Thus all three Annulment Committees found this conflation highly

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decision was taken by Judge Peter Tomka President, International Court of Justice. The case involved interpretation of "essential security interests" under Article 11.3 of the Mauritius India BIT (2000) which reads as follows:
"The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pests and animals or plants."
This provision is markedly different to Article XI of the US- Argentina BIT (1994) but nonetheless Orrega Vicuña was precluded from serving in the proceedings. This decision was largely based on an academic article written by Orrega Vicuña, which was the fourth time he had expressed himself on the subject of "essential security interests" and where he defended his approach to interpreting it. This was despite three separate annulment committees criticising and overturning his approach as it had failed to separately analyse and apply Article XI of the US- Argentina BIT. In the article, he wrote:
"While the interlinking of treaty and customary law requirements in respect of necessity has been held to be a manifest error of law in the context of a particular case [referring to the decision of the CMS annulment committee], one may respectfully wonder whether the error of law might not lie with the approach suggesting that a rather vague clause of a treaty might be able to simply do away with the obligations established under the same treaty.[...] In this light the discussion about whether the availability of the defense should first be examined under the treaty and, only if unsuccessful, examined next under customary international law, *appears to be somewhat circular*. If the treaty precludes the defense there is no second shot at it under customary law. If it provides for an exception and this is not defined, its examination under customary international law will be the first and only shot supplementing the treaty vacuum. It is the two shots that would appear to run counter to the strictness of the requirements of international law." (emphasis added)

[610] His views can also be found in: Crawford, J, 'The International Law Commissions Articles on State Responsibility: Introduction, Text and Commentaries' (Cambridge, Cambridge University Press, 2002)

[611] Stone Sweet & Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez,' *New York University Journal of International Law and Politics* (JILP), Vol. 46, No. 3 (2014) 13

[612] Article 52 (1) provides for annulment on five 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.

[613] *CMS Gas Transmission Company v. Argentine Republic*, Annulment Decision ICSID Case No. ARB/01/08, IIC 303 (2005) para 121

[614] *CMS Gas Transmission Company v. Argentine Republic*, Annulment Decision ICSID Case No. ARB/01/08, IIC 303 (2005) para 131

[615] *CMS Gas Transmission Company v. Argentine Republic*, Annulment Decision ICSID Case No. ARB/01/08, IIC 303 (2005) para 135

[616] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 268

problematic, and Stone Sweet describes these findings as having "destroyed the Orrega Vicuña approach".[617]

Beyond this conflation, states may find it very difficult in investment claims to satisfy the test for necessity under Article 25 of the ILC's Draft Articles. A State claiming necessity under customary international law must demonstrate that it is protecting an "essential interest against a grave and imminent peril". The plea is thus reserved for "rare emergencies" as opposed to how necessity analysis operates under GATT Article XX where no such imminent threat needs to be demonstrated.
Secondly where a state acts through necessity, it must be the "only way" to protect its interest. In an instance such as a financial crisis, there are inevitably many ways for the state to respond and it may be difficult to prove that any action is the only way to respond.[618] Kurtz describes this as an "exceedingly stringent" test, which was conceived in relation to the use of force.[619]
Lastly the defence is precluded if the State has contributed to the situation of necessity. In terms of the response of Argentina to the economic crisis of 2001 some degree of contribution may always be attributed to a government vis-à-vis its economic situation.
In terms of this question of contribution, the Enron annulment committee found that:
"The tribunal did not in fact apply Article 25(2)(b) of the ILC Articles…but instead applied an expert opinion on an economic issue." The tribunal continued that while an economist may regard policies as misguided, this does not mean that as a matter of law that the state has contributed to its state of necessity.[620]

6.3.2. The Common Derivation Approach

a. The approach

The *Continental* award came in the aftermath of the CMS Annulment Committee, which characterised the conflation of Art XI and Article 25 ILC as a "manifest error in law".[621] In this context, it is perhaps understandable that the tribunal was looking for a different source for a necessity test. In interpreting Article XI, the tribunal in *Continental Casualty v. Argentina* drew on WTO case law and how it has dealt with necessity. The Continental Annulment Committee emphasised the point that the tribunal is "clearly not purporting to

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[617] Stone Sweet & Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez,' *New York University Journal of International Law and* Politics (JILP), Vol. 46, No. 3 (2014) 14
[618] The LG&E tribunal found that Argentina took "the only means to respond to the crisis" in its report. See *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, Award ICSID Case No. ARB/02/1 (2007) para 257
[619] Kurtz, J, 'Adjudging The Exceptional At International Law: Security, Public Order And Financial Crisis,' *International and Comparative Law Quarterly*, Vol. 59. (2010) 17
[620] The Annulment Committee stated that the Tribunal's process of reasoning should have been as follows: "First, the Tribunal should have found the relevant facts based on all of the evidence before it, including the Edwards Report. Secondly, the Tribunal should have applied the legal elements of the Article 25(2)(b) to the facts as found (having if necessary made legal findings as to what those legal elements are). Thirdly, in the light of the first two steps, the Tribunal should have concluded whether or not Argentina had "contributed to the situation of necessity" within the meaning of Article 25(2)(b). For the Tribunal to leap from the first step to the third without undertaking the second amounts in the Committee's view to a failure to apply the applicable law. This constitutes a ground of annulment under Article 52(1)(b) of the ICSID Convention." See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award ICSID Case No. ARB/01/3 (2007) para 393
[621] *CMS Gas Transmission Company v. Argentine Republic*, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, para 130

apply" WTO law but merely taking it into account as relevant to interpreting Article XI.[622] This was deemed to be a more appropriate approach than drawing on customary international law, particularly in the aftermath of the findings of the CMS Annulment Committee.

The tribunal explained that WTO jurisprudence was taken into account as Article XI of the US- Argentina BIT was derived from the FCN treaties which reflect the formulation of GATT Article XX. The justification was as follows:

> "Since the text of Art. XI derives from the parallel model clause of the U.S. Friendship, Commerce, and Navigation treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law."[623]

The principles the tribunal was guided by were drawn from the GATT 1947. This is because Article XI was derived from provisions which reflect the formulation of the GATT, such as those found in FCN treaties like the US- Nicaragua FCN treaty (1956).[624]
The tribunal found that although the US- Argentina BIT is structurally very different to GATT Article XX, the BIT is derived from non-precluded measures articles in the US' FCN Treaties such as Article XX (d) of the US- Nicaragua FCN treaty, which were inspired by GATT Article 1947. Article XX (d) states:

> "1. The present treaty shall not preclude the application of measures:…(d) necessary to fulfil the obligations of a party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests;"

Article XX of the US- Nicaragua FCN treaty reflects Article XX of the GATT. Both articles contain a list of non-precluded measures with nexus requirements including "relating to" and "necessary to".
Thus, the link between the FCN treaty and the GATT is deemed to be enough for the tribunal to consider the jurisprudence developed under the GATT as a source of guidance when interpreting a norm common to all three of the treaties.

The tribunal in *Continental Casualty* referred to GATT jurisprudence in its development of its necessity analysis and was "guided by the principles" enunciated in *Korea—Beef*.[625] One of the principles in question was proportionality analysis, which is an adjudicative process used

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[622] Decision on the Application for Partial Annulment of Continental Casualty Company, and the Application for Partial Annulment, para 133
[623] *Continental Casualty Company v. The Argentine Republic*, Award ICSID Case No. ARB/03/9, IIC 511 (2008) para 192
[624] According to the Treaties in Force section of the US Department of State website, the US only concluded one Friendship, Commerce and Navigation treaty in the 20th century prior to the signing of the GATT in 1947. In line with the idea that Article XI of the US Argentina BIT (1994) was derived from the GATT 1947, there is no non-precluded measures clause in the US Liberia FCN treaty (1939) unlike FCN treaties such as the US Nicaragua FCN Treaty (1956) concluded after the conclusion of the GATT. US Liberia FCN Treaty available at 'tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005851.asp', last accessed July 2016
[625] *Continental Casualty Company v. The Argentine Republic*, Award ICSID Case No. ARB/03/9, IIC 511 (2008) para 198

by tribunals to settle competing rights claims.[626] In particular, the tribunal looked to the part of proportionality analysis that involves "process of weighing and balancing of factors" in determining whether a measure that is not indispensable may be deemed necessary.[627] Proportionality analysis is used in assessing the balance between the restrictiveness of a measure and the severity of the nature of the prohibited act. Alvarez agrees that proportionality balancing has an important role in interpreting IIAs but questions the rationale of its application in this instance.

In *Continental Casualty*, the process was used to resolve a conflict between a rights claim and a non-precluded measures provision. The tribunal elicited one positive principle regarding necessity, which was that the necessity of a measure should be determined by the weighing and balancing of (usually) three factors including the importance of the measure, its contribution to the ends pursued and the restrictiveness imposed by the measure. The tribunal further elicited one negative principle regarding necessity, which was that a measure would not be deemed necessary if a "less inconsistent alternative measure, which the member State concerned could reasonably be expected to employ is available".[628] The tribunal was guided by these principles in assessing the contribution of the measure and whether there was a reasonably available alternative measure or measures available to the government.

b. Criticism of the approach

Alvarez has been very critical of the common derivation approach in his articles 'Beware: Boundary Crossings' (2014) and 'Revisiting the Necessity Defense' (2011), which was co-authored by Tegan Brink. Alvarez is of course one of the key proponents of the customary international law methodology.

This section assesses Alvarez's assessment that the tribunal in Continental Casualty "simply reached for an off-the-shelf model of balancing"[629] and in doing so "appeared to ignore text, context, object and purpose, *and* relevant negotiating history".[630]

For Alvarez, the tribunal in *Continental Casualty* should have looked to the ordinary meaning of Article XI in light of the object and purpose of the treaty in line with Article 31 VCLT.[631]

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[626] In its fully developed form, proportionality analysis contains four steps; the first concerns whether the government has the legitimacy to take such a measure; the second considers the suitability of the means in attaining the ends; the third step looks at the necessity of the measure where the "core" is an LRM test; if the first three criteria are fulfilled, the last step involves balancing by the judge where she weighs the benefits of the act against the cost of the infringement. This is a condensed description of Stone Sweet's description of Proportionality Analysis in 'Proportionality Balancing and Global Constitutionalism,' Stone Sweet, Alec, 'Proportionality Balancing and Global Constitutionalism,' *Columbia Journal of Transnational Law*, Vol. 47 (2008) 76

[627] The tribunal cited various WTO Reports, including: Panel Report, EC Tyres, para. 7.104, summing up the Appellate Body case law in Korea-Beef, para. 164; EC- Asbestos, para. 172; US-Gambling, para. 306; Dominican Republic-Cigarettes, para. 70, also stating: "Within this weighing and balancing of those various factors, the WTO case law stresses the assessment of the importance of the interests or values furthered by the challenged measure."

[628] *Continental Casualty Company v. The Argentine Republic*, Award ICSID Case No. ARB/03/9, IIC 511 (2008) para 195

[629] Alvarez describes the reasoning behind this as being "presumably because it was familiar- at least to the president of that tribunal." This is a reference to the fact the President of the Tribunal, Professor Giorgio Sacerdoti, was previously Chairperson of the WTO's Appellate Body.

[630] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 351-52

[631] Article 31 VCLT concerns the 'General rule of interpretation' and states:

"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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the

He contends that this approach would have led the tribunal to the customary international law methodology.
Art. 31(3)(c) of the VCLT provides that "any relevant rules of international law applicable in the relations between the parties" may be looked to as a source for interpreting treaties. For Alvarez, WTO law is not a relevant rule under the VCLT.

In their article 'Revisiting the Necessity Defense', Alvarez & Brink categorise the importing of GATT Article XX jurisprudence as a mistake. They disagree with the 'application' of GATT Article XX in *Continental Casualty.* However, as confirmed by the annulment committee, "the Tribunal was clearly not purporting to apply that body of law, but merely took it into account as relevant to determining the correct interpretation and application of Article XI of the BIT".[632] Alvarez & Brink offer five reasons for their disagreement with the "inadequate and flawed reasoning" of *Continental Casualty*, which are now briefly examined.[633]

1) Failure to state reasons

It is Alvarez's view that the tribunal failed to state the reasons for its award and there is no explanation of the interpretive steps set out in Article 31 and 32 of the VCLT, which look at the object and purpose of a treaty as well as the *travaux préparatoires.*
Alvarez deems it to be a major weakness in the tribunal's methodology that there is no consideration of why the GATT Article XX approach should be applied to interpret Article XI. For Alvarez, any interpretation should apply VCLT principles.[634]
This premise seems questionable as the Annulment Committee has been clear that GATT Article XX was not applied but rather that the tribunal drew upon a principle elucidated in WTO jurisprudence.
Alvarez notes that *Continental* does not tell us how the trade rule is "relevant" to an investment treaty dispute as would be necessary under Article 31(3)(c) VCLT. The tribunal does however justify its reference to WTO case law by stating that it sees it as "more appropriate…than to refer to necessity under customary international law". It says that this is due to the fact that Article XI is derived from the model clause for US FCN treaties which reflects the formulation of Article XX of GATT 1947.[635] Although Alvarez may not agree with the reasons given, this is a different matter to a tribunal failing to give reasons.

Alvarez then invokes the separate matter of the partial annulment of the *CMS* decision where

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text, including its preamble and annexes: a. Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; b. Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
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.
4. A special meaning shall be given to a term if it is established that the parties so intended."

[632] *Continental Casualty Company v. The Argentine Republic*, Decision on the Application for Partial Annulment, ICSID Case No. ARB/03/9, IIC 511 (2011) para 133

[633] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011)

[634] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 344

[635] *Continental Casualty Company v. The Argentine Republic*, Award ICSID Case No. ARB/03/9, IIC 511 (2008) para 192

the tribunal was deemed to have failed to state its reasons.[636] When discussing the umbrella clause under Article II(2)(c) of the Treaty, the Tribunal stated that it "will not discuss the jurisdictional aspects involved in the Respondent's argument, as these were dealt with in the decision on jurisdiction."[637] CMS had argued that Article II(2)(c) allowed it to invoke certain obligations under Argentine law. The tribunal accepted that this may have been implicit within its reasoning "But the Tribunal nowhere addressed this point expressly."[638] The Annulment Committee later states *obiter* that "There is no discussion in the award of the *travaux* of the BIT on this point, or of the prior understandings of the proponents of the umbrella clause as to its function."
Firstly, the *CMS* Annulment Committee was addressing the application of an umbrella clause rather than a non-precluded measures clause. Secondly, Alvarez may have preferred discussion of the *travaux* in *Continental*, but the fact that the tribunal did not discuss the *travaux* does not lead to a conclusion that the tribunal failed to state its reasons.

2) Erroneous reading of history

The main charge in this section is that the tribunal in *Continental* ignored fundamental differences between the three provisions in question.
Alvarez tells us that Article XI is based on part of the FCN derogation clause and bears "no resemblance" to GATT Article XX, which covers "entirely different subject matter".[639] Alvarez strongly disagrees with the finding that the term "maintenance of public order" embraces the French legal concept of *ordre public,* which the tribunal found to be a "broad synonym" for public peace.[640] He tells us that if the US drafters had wanted to exempt a raft of government measures, they had tools at their disposal to do so which wouldn't include "resort to a foreign civil law concept".[641]
The context in which the term *ordre public* is raised is in the following paragraph of the *Continental* award:

> "This is the ordinary and principal meaning of "orden publico" in the Spanish text of the BIT, corresponding to the same meaning in the French legal concept of "ordre public" in public and criminal law."[642]

It is unclear why Alvarez only addresses the French concept as the award first refers to the Spanish language concept of *orden publico*. The treaty was concluded in English and Spanish

[636] In *CMS*, damages were awarded based on independent findings of breach of Article II(2)(a) and (c) of the BIT and so the Committee's finding "does not entail the annulment of the Award as a whole" but rather the annulment of certain provisions of the operative part of the Award.
[637] *CMS Gas Transmission Company v. Argentine Republic*, Annulment Decision ICSID Case No. ARB/01/08, IIC 303 (2005) para 86
[638] *CMS Gas Transmission Company v. Argentine Republic*, Annulment Decision ICSID Case No. ARB/01/08, IIC 303 (2005) para 94
[639] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 334
[640] Decision on the Application for Partial Annulment of Continental Casualty Company, and the Application for Partial Annulment, Para 174
[641] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 336
[642] Decision on the Application for Partial Annulment of Continental Casualty Company, and the Application for Partial Annulment, Para 174

and the Spanish version is equally authentic as per Article XIV.4 of the BIT.[643]

Alvarez reminds us that the US continues to resist the inclusion of a GATT Article XX like article in its PTIAs and asks why the drafters of the BIT did not include a broad list of exceptions such as those found in the GATT or the FCN treaties?[644] The drafters saw a distinction between relative and absolute guarantees under BITs and deliberately excluded the application of a host of public policy exceptions applying to them as they were "not regarded as appropriate".[645]
Alvarez notes that in the 2004 US Model BIT, a provision that mirrors GATT Article XX is included as part of Article 8 which deals with performance requirements.
Alvarez argues that the US includes them where it sees appropriate and that consequently their absence in Article XI denotes their intentional absence. A list of exceptions is included under Article 8 but this not a general exception to all obligations under the treaty.

Alvarez then makes the point that necessity hasn't been interpreted under the GATT in relation to essential security interests but rather under Article XX (a), (b), (d) and (g), subjects which are "nowhere to be found" under Article XI.
The similarity isn't between the GATT and Article XI however, it is between Article XI and FCN exceptions clauses. Only specific sectoral exemptions were included in US BITs, which was an "alternative solution" to the list of policy exemptions such as those pursued in GATT Article XX.

The first point of response is that the tribunal did not apply GATT Article XX (see the Decision of the Annulment Committee)[646] but rather drew upon a principle elucidated in WTO jurisprudence.
Article XI and the FCN derogation clause also have a common genesis (GATT 47). Article XI is derived from a trade and investment agreement (FCN), which is derived from a trade agreement (the GATT). GATT Article XX and Article XI of the BIT are far from identical but are provisions from two branches of international economic law. These branches were previously negotiated within one agreement, and in their separate forms both still deal with shared legal norms such as the concept of necessity. This is an area where the GATT has built a rich jurisprudence and this is sufficient reason to draw upon a principle elucidated in WTO jurisprudence.

3) Failure to consider Article XX text and jurisprudence

Alvarez argues that the chapeau must be considered in the tribunal's analysis and thus it failed to give adequate consideration to the content of GATT Article XX. He claims that the tribunal

[643] Article XIV.4: "…DONE in duplicate at Washington on the fourteenth day of November, 1991, in the English and Spanish languages, both texts being equally authentic."
[644] For Alvarez, FCN treaties only contain a necessity test with respect to the obligation of international peace and security and essential security. E.g. the necessity test contained in Article XXI (d) of the US- Nicaragua FCN. Article XI most closely resembles this clause which has little to do with the right to regulate and everything to do with preserving States' customary law defences.
[645] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 338
[646] Decision on the Application for Partial Annulment of Continental Casualty Company, and the Application for Partial Annulment, para 133

ignored Article XX's chapeau and its impact on the necessity test as applied to Article XX's subparagraphs.

Although Alvarez acknowledges the nature of the two-tier test, he says the exceptions are grounded in a balancing test i.e. the chapeau, which is absent from the US- Argentina BIT. Alvarez reminds us that in *US- Shrimp I* the Appellate Body found Article XX's general exceptions to be "limited and conditional,"[647] but this merely means that they are "subject to the compliance by the invoking Member with the requirements of the chapeau."[648] The Appellate Body did not say that the necessity test, which makes up the first part of the two-tier test under subparagraphs (a), (b) and (d), is carried out with reference to the chapeau. The implication of it being a two-tiered test is that the analyses are conducted separately and independently, which is why if the necessity test is failed the Appellate Body may refrain from completing its analysis under the chapeau. This was the case in *China—Audiovisual Services* (2009),[649] where the Appellate Body found that China's measures were not necessary to protect public morals due to the existence of at least one other reasonably available alternative.

The Appellate Body has deemed this two-tier sequence to be both logical and fundamental to the operation of the Article.[650] It has found interpreting the chapeau without this sequence of analysis to be difficult "if...possible at all".[651]

Giorgio Sacerdoti, president of the tribunal in *Continental* has responded to this point by Alvarez saying, "the definition of 'necessity' in WTO case law is not affected by the presence of the chapeau."[652] Sacerdoti cites *US- Shrimp I*[653] which discusses the sequence of steps to be taken which are not "random choice, but rather the fundamental structure and logic of Article XX".[654]

Alvarez maintains that the chapeau has "subtly affected" how the subparagraphs have been interpreted.[655] As measures still have to be compliant with the chapeau, tribunals may give more leeway, as it provides a second level to combat for discriminatory or protectionist intent. However, this is not the view taken at the WTO, as cases taken under the TBT & SPS Agreements (which does not contain a chapeau) have drawn upon jurisprudence under other WTO Agreements such as GATT and GATS.[656] While the chapeau may have influenced the

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[647] Decision on the Application for Partial Annulment of Continental Casualty Company, and the Application for Partial Annulment, Para 157

[648] Decision on the Application for Partial Annulment of Continental Casualty Company, and the Application for Partial Annulment, Para 157

[649] WT/DS363/AB/R, Appellate Body Report, China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, 21 December 2009

[650] WT/DS58/AB/R, Appellate Body Report, US – Import Prohibition of Certain Shrimp and Shrimp Products, 12 October 1998, paragraph 119

[651] WT/DS58/AB/R, Appellate Body Report, US – Import Prohibition of Certain Shrimp and Shrimp Products, 12 October 1998, paragraph 120

[652] Sacerdoti, G, 'BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity,' ICSID Review (2013) p32, FN120

[653] Appellate Body Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted on 6 November 1998, Para 115ff

[654] Appellate Body Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted on 6 November 1998, Para 119

[655] Wagner views the argument that the two-tiered analysis affects the interpretation of necessity as "valid". See Wagner, Markus, 'Regulatory Space in International Trade Law and International Investment Law,' *University of Pennsylvania Journal of International Law*, Volume 36:1 (2014) 73

[656] Alvarez continues that to apply a GATT Article XX necessity analysis without consideration of the chapeau "suggests that what *Continental* applied as "WTO law" does not even accurately reflect trade law much less investment law." As the Annulment Committee tell us, the tribunal did not apply WTO law in *Continental*.

development of the jurisprudence under the GATT & GATS, the test is "wholly capable of standing on its own".[657]
This view also ignores the fact that where a test fails the chapeau, once the discriminatory element of the measure is removed, the measure may then be permissible.

4) Differing purposes

Alvarez's central point in this section is that necessity analysis should be carried out in light of the object and purpose of the treaty in question. Alvarez distinguishes the fundamental purposes of the regimes: while the GATT seeks to reduce tariffs, barriers to trade and discriminatory treatment, the US- Argentina BIT provides a recourse for individuals to seek remedies while disciplining State behaviour in times of crisis *inter alia*.
Alvarez notes that the purpose of the GATT is reflected in its preamble but doesn't mention the preamble to the US- Argentina BIT. The latter preamble focuses on economic cooperation and the encouragement and protection of investment, without mention of state behaviour in times of crisis.[658]
Nonetheless, Alvarez asserts that the purpose of the US- Argentina BIT is to discipline State behaviour in times of crisis. He laments the fact that the tribunal in *Continental* didn't further examine the nature of the exception and whether it operates as a "blanket excuse from liability" no matter what the action is so long as for actions taken during a period of economic crisis.
Presumably it is for the tribunal to determine whether the measure taken by a state is "necessary for the maintenance of public order" and this does not operate as a blanket excuse.

For example, the tribunal in *Continental* found that a measure is not deemed necessary where a reasonably available alternative measure exists and cited *US- Gambling* on this matter.
Alvarez takes further exception to this definition of what constitutes a reasonably available alternative measure, which is one that "must…preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".
Alvarez contends that the term "desired level of protection" is ill fitted to the investment law context. The GATT is categorised as a negative integration agreement (based on combatting protectionism etc.) while the purpose of investment treaties is to provide actionable rights to private actors.
However, in *US- Gambling* when the term "desired level of protection" is used, it refers to the state's right to take measures to protect the environment and public health rather than protectionism. The idea is that there are various levels of protection in relation to the

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Alvarez's point however is that drawing on a necessity test in the context of GATT Article XX without taking the chapeau into account is not an accurate reflection of trade law, an approach that can be discounted given that necessity tests which do not contain a chapeau have been interpreted with reference to other WTO Agreements which contain the chapeau.

[657] Mitchel & Henckels, ' Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law,' *Chicago Journal of International Law*, Vol. 14, Number 1 (2013) 137

[658] Preamble to US Argentina BIT (1994): "The United States of America and the Argentine Republic, hereinafter referred to as the Parties; Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party; Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties; Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources; Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights; and having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment; Have agreed as follows:"

upholding of public morals, the objective in question in *US- Gambling*. If the tribunal is to find that there is a reasonably available alternative measure, it must be at least as effective as the one enacted by the US.
In the context of Article XI of the US- Argentina BIT, the maintenance of a "desired level of protection" is in relation to the "maintenance of public order". Alvarez feels that this terminology needs to be adapted to fit the investment context.

5) Structural differences

For Alvarez it is not clear why treaty exceptions involving different obligations, for different reasons, with different remedies "should be viewed as comparable".[659] The structural differences identified include the fact that ISAs give rights to third parties with the prospect of damages, the lack of an appellate mechanism or legal secretariat. These differences may lead to WTO dispute settlers being more deferential (given the limited remedies available) while Investor state arbitrators might not be so deferential as they have to protect the rights of their third party beneficiaries. However it could also be argued that because BITs involve large settlements and the claimants are third parties that a tribunal would be more inclined to show deference to the state.

The potential for exit from ICSID and termination of BITs is another structural difference between the two regimes. These possibilities "need to be considered when deciding how flexibly these treaties ought to be interpreted- and may suggest caution about drawing facile conclusions from regimes where the possibility of exit/ voice is far more constrained."[660]
Alvarez acknowledges that states can amend and issue binding interpretations for BITs. However it can also be argued that if non-precluded measures clauses are interpreted in an overly restrictive way and states have to pay out for necessary actions taken in times of emergency where there was no reasonable alternative, then this will make exit from ICSID even more likely.

6.4. Treaty Exceptions in Recent IIAs

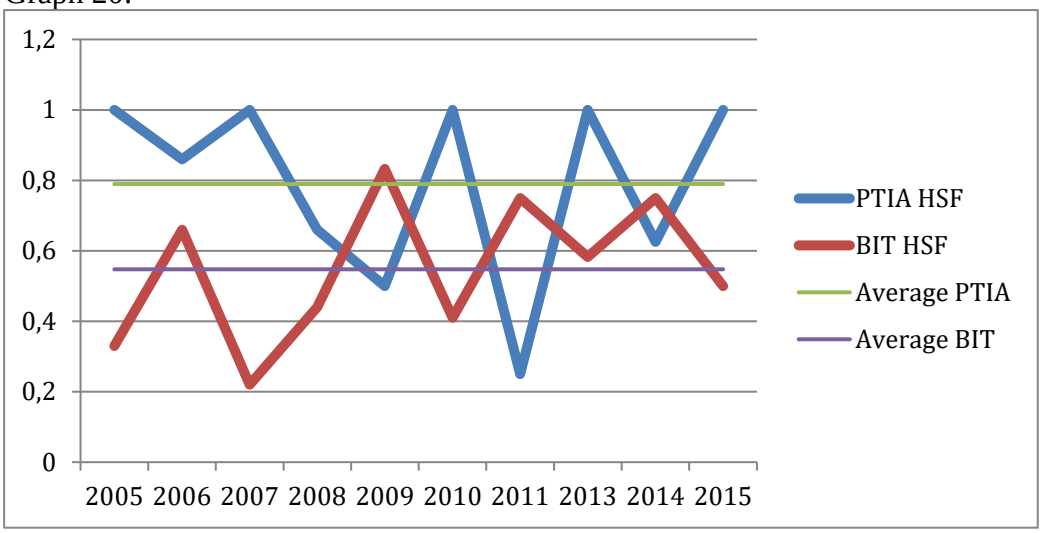
6.4.1. The Wording of Treaty Exceptions in Recent IIAs

Treaty exceptions in recent agreements follow the model of heterogeneity that characterises much of the investment law regime.
Chapter 2 measured the frequency of provisions in the category of host state flexibility occurring each year from 2005-15, excluding 2012 for the 80 Agreements included in the study.[661]

[659] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 346
[660] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 347
[661] The category of Host State Flexibilities covered not only Treaty Exceptions, but also Agreements referring to WTO law and the right to regulate in their preamble, Articles providing an exception for health or environmental measures,

The following graph shows the strength of the average Treaty Exceptions provision for each year from 2005-15, excluding 2012, for the 80 Agreements included in the study:

Graph 20:



Although this represents a relatively small sample of treaties (80), it is instructive to see that: 1) progress in terms of the strengthening of Treaty Exceptions has not been linear; and 2) one of the peak years for the strength of the average Treaty Exceptions was 2005, at least in the case of PTIAs.

Exceptions provisions are found in the five forms outlined in Chapter 2 including those that are explicitly or implicitly based on the General Exceptions of the WTO Agreements, as well as exceptions that are thinly connected with provisions in the trade regime.[662] Although not considered in detail here, it is also noted that certain provisions on the Right to Regulate, such Article 9 of the recent Rwanda- UAE BIT (2017), have begun to approximate to treaty exceptions provisions.[663]

The EU has concluded four PTIAs in recent times including CETA, the EU-Vietnam FTA, the EU- Singapore Investment Protection Agreement and the recently updated EU- Mexico FTA. However, the Treaty Exceptions provisions of these Agreements contain significant differences. Such differences may hamper the expectations of some for a coherent body of investment jurisprudence under the EU's recently launched Investment Court System.

Expropriation Articles featuring a TRIPS exception, Expropriation Articles features reference to public objectives, Performance requirements Articles featuring a reference to WTO law, and a Capital withdrawal safeguard.

[662] Five categories of treaty exceptions with different weightings were coded in Chapter 2. These include exceptions explicitly modelled on WTO law (1), exceptions implicitly modelled on WTO law (1), exceptions thinly connected to WTO law (0.66), provisions protecting against arbitrary and discriminatory measures (0.33), and exceptions within articles on performance requirements (0.25).

[663] Article 9 Rwanda- UAE BIT (2017), provides:

"Right to Regulate

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the applicable public health, security, environmental and labour law of the Contracting Party, such measures should not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments and investors."

This section now considers the exceptions provisions of these agreements in relation to non-discrimination provisions.
CETA, the EU's recent PTIA with Canada includes two General Exceptions provisions, both of which apply to Section C (Non-discrimination) of its Investment Chapter *inter alia*.[664] Article 28.3.1 of CETA's Exceptions chapter directly incorporates GATT Article XX into the Agreement. Article 28.3.2 implicitly incorporates GATS Article XIV.[665] Article 28.3.2 is more relevant one for investment tribunals as it covers services, while Article 28.3.1 is not incorporated *mutatis mutandis*. The subparagraphs of Article 28.3.2 do not contain nexus requirements as it is stated in the chapeau of the Article that measures must be 'necessary' for the policy objectives contained in the subparagraphs.
The recently concluded EU- Mexico FTA also directly incorporates General Exceptions from the WTO but in a different manner. GATT Article XX is incorporated into and made part of this Agreement, but this time it is *mutatis mutandis*.
The EU-Singapore Investment Protection Agreement contains a list of specific exceptions in the national treatment provision of the investment chapter. These are modelled on WTO law, although the language in the chapeau is adapted and refers to 'covered investments.'
As regards the EU-Vietnam FTA, Chapter 8 covers investment protection, services and e-commerce and includes a section on exceptions covering the entire chapter. These exceptions are implicitly based on GATS Article XIV including the same nexus requirements. The chapeau is however adjusted to refer to 'cross-border supply of services' rather than 'trade in services' as per GATS.
As a last example, the Investment Chapter of TPP contains no General Exceptions. It does however provide a series of specific exceptions and clarifications in relation to its provisions on fair and equitable treatment, expropriation and non-discrimination.[666]

6.4.2. Interpreting Treaty Exceptions in Recent IIAs

Section 3 considered two approaches taken by tribunals to interpreting exceptions in IIAs that are thinly connected to WTO law and how these approaches can be developed. This section considers how the interpretation of agreements is affected when the investment chapter of an IIA directly incorporates GATT Article XX or GATS Article XIV *mutatis mutandis*. This section also examines whether the potential for cross-fertilisation in recent IIAs goes beyond such provisions and whether it extends to exceptions in IIAs that are thinly connected to WTO law.

[664] Chapter 8 on Investment and Chapter 28 on Exceptions are the relevant Chapters of CETA for this analysis
[665] It has been noted by Mitchell that the language of 28.3.1 fails to adapt the trade specific language of GATT to the investment context by not including the words *mutatis mutandis*. This issue is resolved however if note is taken of the contents of Article 28.3.2.
[666] A footnote to the National Treatment and MFN provisions of the Agreement's Investment Chapter, states:
"For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."
This clarification introduces an assessment as to the state's regulatory purpose to the test for likeness.

Alvarez is not alone in viewing the potential for cross-fertilisation as being limited. Wu states that the usefulness of trade jurisprudence "may be only in instances where the text of the provision was itself directly influenced by the nearly-identical wording" of a trade provision.[667] Such a criterion that a provision must be "directly influenced" seems to limit crossfertilisation to general exceptions provisions that are explicitly or implicitly modeled on General Exceptions at the WTO. Where provisions such as general exceptions are based on Articles from the WTO Agreements, there would be an expectation if not an obligation for arbitrators to refer to WTO case law and to draw on interpretative guidance from the Dispute Settlement Body in settling disputes.

Alvarez is one of the chief opponents of cross-fertilisation, at least as it was carried out in *Continental Casualty*. Most of Alvarez's five objections[668] do not apply in the context of articles incorporating GATT Article XX/ GATS XIV explicitly or implicitly.[669] Parts of points four and five may still apply and are now addressed in relation to; 1) an investment tribunal drawing upon the jurisprudence of the trade chapter of a PTIA; and 2) an investment tribunal drawing upon WTO jurisprudence.

1) Point 4 primarily concerns the differing purposes of the GATT and the BIT. In the context of a PTIA, the differing purposes is no longer a factor if the chapters are part of the same agreement. Treaties only have one purpose in line with a standard reading of Article 31 VCLT. If the tribunal is looking to a report issued under the trade chapter of another PTIA in the context of an article explicitly or implicitly based on the General Exceptions of the GATT/ GATS, the tribunal should be able to draw upon the jurisprudence of this PTIA (which constitutes a part of the trade regime) and look to how it has been interpreted. One of the considerations a tribunal might have is how the tribunal under the other PTIA regarded WTO law when interpreting the provision in question.
For point 5, in relation to the structural differences underlined by Alvarez, there are no major structural differences (such as a permanent tribunal) between the operation of two chapters of a single PTIA such as NAFTA. The structural differences between the various types of IIAs also tend to be relatively minor in terms of the functioning and composition of panels, although this is changing in light of the Dispute Settlement chapter of the EU- Singapore Investment Protection Agreement.

2) The WTO Agreements and IIAs do have differing purposes as Alvarez outlined in his fourth point. However, in the context of an article explicitly or implicitly based on the General Exceptions of the GATT/ GATS, there can be little doubt that the tribunal is able to draw upon the jurisprudence of the WTO and look to how it has been interpreted.
Similarly, in relation to Alvarez's fifth point, structural differences between the trade and investment law regimes would not impede cross-fertilisation in the case of articles explicitly or implicitly based on the General Exceptions of the WTO Agreements.

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[667] Wu, M, ''The "China, Inc." Challenge To Global Trade Governance,' 57 *Harvard International Law Journal* 1001 (2016) 75/82

[668] Chapter 6.3 goes through the five objections in some detail. To read the objections in full, see: Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011)

[669] Objections 1 & 2 are specific to *Continental's* interpretative method (failure to state reasons & viewing the reference to FCN treaties as an erroneous reading of history). Objection 3 doesn't apply where there is a chapeau

Although there does not seem to be significant impediments for the cross-fertilisation of jurisprudence in the case of articles explicitly or implicitly based on WTO exceptions, it is less clear that this is the case for exceptions in recent IIAs that are thinly connected with provisions in the trade regime. These include treaty exceptions in BITs with similar features to the WTO Agreements such as a necessity test. Alvarez's five objections were aimed at one tribunal's interpretation of such a provision (Article XI of the US- Argentina BIT). Objections 1 & 2 are specific to the *Continental's* interpretative method and not considered here.[670]
Alvarez's third point is that the tribunal failed to consider GATT Article XX's text and jurisprudence, as it didn't analyse Article XX's chapeau. It has since been clarified by WTO adjudicators and commentators that the two analyses are separate and that the necessity test is "wholly capable of standing on its own".[671]
Alvarez's fourth point relates to the different purposes of the trade and investment law regimes. If the tribunal is looking to a report issued under the trade chapter of another PTIA, the more similar the purposes of the agreements, the easier it will be for tribunals to reference the other agreement. There would for example be substantial overlap between the purposes of recent IIAs such as CETA and TPP, whereas the case may be harder to make between an older style BIT and CETA.
The WTO Agreements and IIAs do have differing purposes and it is more difficult for a tribunal to draw upon WTO jurisprudence in an older style BIT than in a modern PTIA. Tribunals have of course drawn upon WTO jurisprudence under many older style BITs, but such references are facilitated by the language in modern BITs which make it clear that the purpose of the agreement goes beyond mere investment protection. For example, the EU-Singapore Investment Protection Agreement is a standalone agreement and its preamble states:

"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;

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,"

In relation to Alvarez's fifth point, there are structural differences between the WTO and IIAs. The WTO has a permanent Appellate Body while IIAs have an increased possibility for parties to exit, renegotiate or issue binding interpretations of IIAs. The parties to many recent IIAs do have a lot of power under them and if a tribunal makes a reference to another regime that goes too far or that the parties hadn't anticipated, the parties may indeed react. Alvarez seems to suggest that the reaction of the parties may well be to exit the treaty but an optimistic reading would be that they would have recourse to the treaty's joint interpretation facility (where such a possibility exists) or to amend the treaty.

Alvarez does acknowledge however that "mixed agreements" (PTIAs) may provide more opportunities for "cross-pollination" for adjudicators facing trade or investment questions.[672]
"present more complex questions of object and purpose"

[670] See Chapter 6.3 for analysis of all five objections.
[671] Mitchel & Henckels, ' Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law,' *Chicago Journal of International Law*, Vol. 14, Number 1 (2013) 137
[672] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 357

PTIAs may discourage cross-referencing[673]

6.5. Comparing the two regimes- separate, overlapping or converging treatment?

The spirit of the WTO is infused with the principle of 'embedded liberalism', where the GATT's contracting parties envisaged 'targeted, if conditional, departures' from obligations.[674] This notion of balancing has not been as central to the investment regime, particularly in older styles IIAs which often placed the emphasis on investment protection with very little to balance this against the right of states to regulate.
This section first considers two methodologies proposed by commentators as means of supplementing or replacing the Common Derivation. It then turns to the question of cross-fertilisation of jurisprudence and whether tribunals should have regard to the interpretation of exceptions provisions of other regimes.

6.5.1. Building on the Common Derivation Approach

Section 3 looked at two of the methodologies employed by tribunals in interpreting necessity under the US- Argentina BIT. Two other methodologies have been proposed by commentators. It is now considered whether these proposed methodologies build upon the previous ones as well as the effect they would have on inter-regime engagement.
One of these methodologies is based on general principles of law and this can either be viewed as a supplement to the Common Derivation Approach, or else as a stand-alone methodology. The other methodology proposed involves separating primary and secondary applications and has been proposed by Professor Jürgen Kurtz.[675]
The analysis in Section 3 comes down in favour of the Common Derivation approach over the Orrega Vicuña approach. The common derivation approach takes account of WTO jurisprudence as Article XI of the US- Argentina BIT was derived from the FCN treaties which reflect the formulation of GATT Article XX. Although this does not mean that the common derivation approach is appropriate in other scenarios, it does represent a starting point for interpreting exceptions in IIAs that is explored further in this section.

1) General principles of law (including Proportionality Analysis)

The tribunal in *Continental* made no reference to general principles of law. Stone Sweet is of the view that the tribunal could have strengthened its position by appealing to general principles of law:

[673] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 357
[674] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 83
[675] Kurtz, J, 'Adjudging The Exceptional At International Law: Security, Public Order And Financial Crisis,' 35

> "General principles are a recognized source of international law (Article 38 of the Statute of the ICJ); second, under the Vienna Convention on the Law of Treaties (Art. 31(3)(c)), judges are to take into account the 'relevant rules of international law applicable in the relations between the parties' when they interpret treaties, and proportionality may well be a 'relevant rule.'" [676]

States have traditionally concluded IIAs as incomplete contracts and have left terms such as fair and equitable treatment undefined. Stone Sweet states that in order to resolve disputes, judges are "all but required" to turn to general principles of law. Proportionality analysis has been used by tribunals around the world and has diffused across a variety of jurisdictions to ECJ, ECHR and WTO Appellate Body.[677]

One of the major interpretative questions concerning treaty exceptions centres around the role of Proportionality Analysis (PA). Proportionality analysis is a means of balancing competing rights. PA has been described as entailing an "inherent power shift" towards tribunals.[678] Schill finds that investment tribunals in recent years have shown "increasing sensitivity" to the principle of proportionality.[679] Alvarez was of the view in 2011 that PA is unlikely to oust the customary international law approach to necessity, as few BITs will trigger it.[680] This view is less credible given recent developments in the structure of IIAs.

PA has its opponents. Kurtz is not in favour of balancing due to the lack of an appellate mechanism and the "institutional absence" in investment law compared to WTO Law. Kurtz also views the Less Restrictive Means (LRM) as a "better institutional fit".[681]

The use of proportionality analysis is described by Mitchell as "significantly restricts host States' ability to determine and prioritise their own policy objectives and implementation."[682] Mitchell does acknowledge that the flexibility provided by PA has been described as greater "than may be suggested" by the low success rate at the WTO.[683]

Alvarez contests that proportionality is a general principle of law. Alvarez tells us that the "least restrictive alternative" balancing test which *Continental* imports from the WTO is not, as that tribunal itself appears to acknowledge, either a rule of customary law, or, "absent considerable broadening of the concept…a genuinely general principle of law".[684] Alvarez views this as a case of regime-borrowing or boundary crossing that cannot be justified by the traditional gap-filling interpretative rules in the VCLT or by the gap-filling interpretative

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[676] Stone Sweet, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez' (2014) 18

[677] Stone Sweet, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez' (2014)

[678] Wagner, Markus, 'Regulatory Space in International Trade Law and International Investment Law,' University of Pennsylvania Journal of International Law, Volume 36:1 (2014) 68

[679] Schill, Stephan W. and Djanic, Vladislav, International Investment Law and Community Interests,' *Society of International Economic Law* (SIEL), Fifth Biennial Global Conference, Online Proceedings, Working Paper No 2016/01 (2016) 18

[680] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 353

[681] Kurtz, J, 'The WTO and International Investment Law: Converging Systems,' *Cambridge University Press* (2016) 202

[682] Mitchell, Munro & Voon, 'Importing WTO General Exceptions Into International Investment Agreements: Proportionality, Myths And Risks,' Yearbook on International Investment Law & Policy 2016–2017, Oxford University Press (2018) 48

[683] Mitchell, Munro & Voon, 'Importing WTO General Exceptions Into International Investment Agreements: Proportionality, Myths And Risks,' Yearbook on International Investment Law & Policy 2016–2017, Oxford University Press (2018) 49

[684] Alvarez, J, 'Beware: Boundary Crossings,' Public Law & Legal Theory Research Paper Series, New York University (2014) 28

canons outlined by the ILC in its Study on Fragmentation.[685] As such, Alvarez does not consider the WTO's balancing test to be a relevant rule under Art. 31(3)(c). Alvarez ultimately fears that leaps to trade may inspire an all-purpose necessity defence where arbitrators address the most critical questions at the heart of State sovereignty where such decisions are not necessary.
Stone Sweet responds to Alvarez, stating: "Proportionality, which includes a LRM test at the "necessity" stage, is a widely-recognized general principle of law that judges in the most powerful international courts use to adjudicate derogation clauses."[686]
Although the tribunal in *Continental* was guided by the approach of WTO tribunals, the LRM employed is not a WTO test per se. As confirmed by the annulment committee, the tribunal was not applying WTO law but "took it into account" in interpreting necessity analysis under the US- Argentina BIT.
Alvarez does not say that there is no place for balancing rights, it's about where and how. In his view, the tribunal in National Grid "balanced implicitly". It is clear from this that Alvarez's view of balancing is confined to weighing up interests rather than the multi-step process advocated by Stone Sweet.

2) Separating Primary and Secondary Applications

This approach is proposed by Jürgen Kurtz and involves looking to legality under the treaty provisions then having recourse to a potential defence under customary international law if the treaty is breached. Kurtz generally agrees with the common derivation approach describing the Continental award as being characterised by "careful and sophisticated use of WTO exceptions jurisprudence."[687]

This approach can be seen by tribunals as a possible addendum to the Common Derivation Approach and/ or the General Principles of Law Approach. Under this approach, the treaty is considered first and if breach is found, the state may then be able to fall back on a customary international law defence. Kurtz suggests that this approach "overcomes the inherent deficiencies" of the other approaches.[688]
The customary international law approach is however constructed to provide relief in a very narrow set of circumstances. This is certainly the case in relation to the exceptions provisions typically found in modern IIAs, and so this recourse to the customary international law defence of necessity after necessity has been considered under an IIA provision may give rise to limited success.

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[685] 'Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law,' A/CN.4/L.682 (2006)
[686] Stone Sweet, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez' (2014) 18
"There is no prescribed method for identifying and applying (general principles)…The ECJ, the ECtHR, and the WTO AB use PA—in particular, LRM testing—to adjudicate provisions that allow states to claim derogations from their obligations under the treaty's law, for measures that are "necessary" to achieve public policy purposes….states have proved unwilling or unable to produce treaties that are relatively "complete" contracts that could potentially constrain judicial lawmaking. Instead, states routinely leave crucial terms undefined, an example being the FET standard in BITs, or the necessity clause in Article XI of the U.S.-Argentina BIT. Judges are thus all but required to develop general principles in order to resolve disputes effectively;'
[687] Kurtz, J, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents,' *The European Journal of International Law* Vol. 20 no. 3 (2009) 771
[688] Kurtz, J, 'Adjudging The Exceptional At International Law: Security, Public Order And Financial Crisis,' *International and Comparative Law Quarterly,* Vol. 59. (2010) 6

Kurtz pre-empts the criticism that going to the treaty first will render the customary law defence redundant. If the scope of the treaty provision is broader than the customary international law provision, then recourse to the customary international law approach will "always" preclude custom. Kurtz reminds us that it is not a flaw of the methodology if in certain circumstances the customary approach in rendered inutile as it is designed to apply across the entirety of international law.

6.5.2 Cross-fertilisation and Proportionality Analysis: should tribunals have regard to the interpretation of exceptions provisions of other regimes?

In line with Article 31.3(c) of the Vienna Convention, tribunals may consider in their interpretations "Any relevant rules of international law applicable in the relations between the parties". Treaty exceptions of the other regime form a part of this body of relevant rules and can thus be considered by tribunals.
The potential for crossfertilisation within the treaties however depends on how closely the content of one regime mirrors the other. The closer the content of the two regimes, the higher the level of engagement between trade and investment, and the higher the potential for crossfertilisation. This closeness is affected by the similarity of the wordings in provisions across the two regimes.
The appropriateness of crossfertilisation needs to be considered on a case-by-case basis. Two provisions that are largely similar may have less potential for crossfertilisation than two provisions that share the word "necessary". Chapter One of this study attributed values for the degree of closeness of provisions in various categories including "treaty exceptions".
Under the GATT, differential treatment of competing products is enough to find violation. In investment law, generally speaking this is not enough, as other policy justifications can be referred to in justifying a measure.[689] .
Likewise, where an IIA has a general exceptions such as CETA, investment tribunals may be more likely to look to trade law or indeed to the case law under similarly worded investment agreements. If an inquiry into other policy justifications is carried out under the national treatment article itself, then there is potential for crossfertilisation in relation to similarly worded provisions in the trade regime, such as Article 2.1 of the TBT Agreement.
Generally, investment tribunals have been open to "any legitimate policy objective" in contrast to the closed list of GATT Article XX.[690] Investigate these legitimate policies for the exceptions chapter etc. Standard of review is also easier- reasonable connection rather than necessary.
Although exceptions of the other regime *can* be drawn upon when interpreting trade and investment agreements, it is noted that drawing upon the jurisprudence of the other regime has been unidirectional. While there have been several instances in the investment jurisprudence of tribunals considering WTO law and its applicability to the case at hand, WTO tribunals have tended not to make external references when interpreting treaty exceptions under the WTO Agreements.
As seen in Section 3, some investment tribunals such as in *Continental Casualty v. Argentina*

[689] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 72
[690] Di Mascio & Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *American Journal of International Law* (2008) 76

have been very open to drawing on the WTO jurisprudence, while others such as the tribunal in *CMS v. Argentina* have rejected any such comparisons outright. The difference between these two approaches is the finding of the CMS Annulment Committee which Stone Sweet describes as having "destroyed the Orrega Vicuña approach".

Increasing engagement and crossfertilisation is a lot easier to imagine in the case of IIAs such as CETA where: 1) WTO General Exceptions provisions are directly incorporated; 2) the structures of the Agreements are similar; and 3) an appellate organ may be interpreting these provisions. Other WTO Agreements such as the TBT Agreement and TRIPS do not contain General Exceptions and reverse-crossfertilisation is again easier to imagine in relation to Agreements with similar structures such as the NAFTA for example.

Although no "reverse-crossfertilisation" of WTO tribunals drawing on investment law jurisprudence has occurred yet, such reverse-crossfertilisation may well be facilitated in light of the above conditions. Nevertheless, given the reluctance of WTO tribunals to make external references, it may be optimistic to envisage such references being made to the findings of tribunals in relation to provisions that have directly or indirectly incorporated the General Exceptions provisions of the WTO Agreements. Tribunals may however make such references in line with the VCLT and may be encouraged by the fact that these provisions are increasingly common in IIAs and there are significant commonalities between these provisions in trade and investment agreements.

6.6. The scope for crossfertilisation of treaty exceptions in PTIAs compared to BITs

This section considers whether treaty exceptions in PTIAs *result in increased levels of engagement* between the trade and investment law regimes compared to BITs. Engagement was said to occur in Chapter 1 wherever the content of one of the regimes has a parallel in the other or wherever there are cross-regime references in dispute settlement.

In terms of parallels in content, treaty exceptions featured in 36/40 PTIAs (90%) and in 30/40 BITs (75%) contained in this study. Thus there are clearly greater parallels of content for the PTIAs compared to the BITs.
Not only were treaty exceptions more prevalent in PTIAs, but the references to them tended to be significantly stronger than those found in the BITs in this study.
Treaty exceptions were 20% more common in PTIAs, but the weighted score for provisions across the 80 Agreements was 42.9% higher for PTIAs than for BITs. By this measure also, the conclusion of PTIAs has resulted in increased levels of engagement as compared to BITs.

The second measure for increased engagement concerns cross-regime references and whether they are more likely to occur because of treaty exceptions in PTIAs compared to BITs.
Treaty exceptions were shown to be more common in PTIAs than in BITs for the sample

taken in this study. Tribunals are more likely to draw upon these PTIA provisions for these reasons. However, there are additional considerations for tribunals when comparing legal norms between the systems.[691]

Tribunals must be attentive to the wordings of treaty exceptions in PTIAs and BITs and how such textual differences may impact upon the interpretation of agreements. References to treaty exceptions were 20% more common in PTIAs, but the weighted score was 42.9% higher for PTIAs than for BITs for the Agreements as a whole. Thus the wordings of treaty exceptions in PTIAs have been demonstrated to be stronger and thus more facilitative of engagement between the trade and investment law regimes than their BIT counterparts. This is the case for the average of the Agreements as a whole, but of course, the ability of any tribunal to make cross-regime references depends on the wording of the provision at hand, and some of the BITs were shown to treaty exceptions that were strongly facilitative of crossfertilisation.
Chapter 2 attributed weightings based on the type of treaty exceptions found across the 80 Agreements. It divided treaty exceptions into five broad categories,[692] although it didn't attribute a weighting based on the specific wordings of the provisions (unlike the section on preambles).
These five provisions include exceptions that are explicitly and implicitly based on WTO law, as well as those that are thinly connected to WTO. For provisions that are explicitly based on WTO law, it is unlikely that an investment tribunal would disregard WTO law. For those implicitly based on WTO law, tribunals must take into account how the treaty drafters have deviated from the text the provision is based on. For example, Article 22.1.3 of the Canada-Korea FTA (2014) incorporates General Exceptions that are implicitly based on GATT Article XX. However a key difference compared to the wording of Article XX is that the nexus requirement is contained in the Article's chapeau.[693] For treaty exceptions that are thinly connected to WTO law, the potential for crossfertilisation depends on the provision at hand. Such provisions may contain elements such as a necessity or Least Restrictive Measures test and facilitate engagement between the regimes albeit to a lesser extent than exceptions modelled on WTO law.[694]

Tribunals must consider the contextual differences relating to treaty exceptions in PTIAs and BITs. As described in Section 5, the tribunal in *Continental* drew upon WTO jurisprudence

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[691] Chapter 1.6 outlines the five primary considerations when comparing legal norms or concepts between the systems for the purposes of this thesis, including: 1) textual differences; 2) contextual differences; 3) systemic differences; 4) remedy structures; and 5) the purposes of agreements.
[692] These five categories included: 1) Exceptions Explicitly Modelled on WTO law; 2) Exceptions Implicitly Modelled on WTO Law; 3) Exceptions Thinly Connected to WTO law; 4) Provisions Protecting Against Arbitrary and Discriminatory Measures; 5) Exceptions Within Articles on Performance Requirements.
[693] Article 22.1.3 of the Canada- Korea FTA (2014):
"For the purposes of Chapter Eight (Investment), subject to the requirement that those measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, this Agreement is not to be construed to prevent a Party from adopting or enforcing measures necessary:
(a) to protect human, animal or plant life or health;
(b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
(c) for the conservation of living or non-living exhaustible natural resources."
[694] See for example Article 5.2 of the Czech Republic- Saudi Arabia BIT: "This Agreement shall not preclude the application by either Contracting Party of measures necessary for the maintenance of public order, 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 which may include interests deriving from its membership of a customs, economic or monetary union, a common market or a free trade area."

when interpreting Article XI of the US- Argentina BIT as this article was derived from the FCN treaties which reflect the formulation of GATT Article XX. The tribunal was guided by principles drawn from the GATT in analysing Article XI of the BIT. This is because Article XI was derived from provisions which reflect the formulation of the GATT, such as those found in FCN treaties like the US- Nicaragua FCN treaty (1956). This common derivation of the texts makes up part of the 'context' of Article XI, although typically in this section context refers to the structure of agreements.

Tribunals must be wary of contextual differences when drawing on the jurisprudence of the other regime. Tests at the WTO in relation to treaty exceptions may have been developed with a different context at hand than that facing an investment tribunal. Any attempt to draw upon the treaty exceptions contained in GATT Article XX or GATS Article XIV must be mindful of these contextual differences.

The EU- Singapore Investment Protection Agreement contains a list of specific exceptions that are modelled on GATT Article XX and contained within the national treatment provision in the investment chapter. These are modelled on WTO law, although the language in the chapeau is adapted and refers to 'covered investments.'[695] This contextual difference of having exceptions contained within the article itself rather could affect its interpretation.

One way of minimising potential contextual issues is to incorporate the WTO Agreements directly into the agreement *mutatis mutandis*. The recently updated EU- Mexico FTA directly incorporated GATT Article XX, *mutatis mutandis*. This gives some latitude to tribunals where certain concepts from the GATT need to be adapted to the investment context.[696]

Tribunals must also consider the different purposes of the agreements when interpreting treaty exceptions under PTIAs and BITs. A treaty is to be interpreted in light of "its object and purpose" which is to be found in the treaty's preamble.

Consideration of the different purposes of agreements could affect an interpretation of treaty exceptions in a couple of key ways; preambles can facilitate crossfertilisation based on: 1) a reference to WTO law in the preamble; and 2) the strength of any reference to the host state's right to regulate within the preamble. Stronger references in these two areas facilitate crossfertilisation.

In the absence of any such provisions in the preamble, tribunals have to be careful, particularly in relation to older style BITs, that they strike an appropriate balance in their interpretations between the protection of investment and that the host state's right to regulate. Necessity analysis is a feature of the majority of exceptions provisions featured in this study and for Alvarez, this should be carried out in light of the object and purpose of the treaty in question.[697]

Finally, tribunals must consider systemic differences and differences in the remedy structures between the two regimes when interpreting treaty exceptions under PTIAs and BITs. These

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[695] See EU- Singapore trade and investment agreements (authentic texts as of April 2018), Brussels, 18 April 2018. Available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (last accessed 11 May 2018)

[696] See New EU- Mexico agreement: The Agreement in Principle and its texts, Brussels, 26 April 2018. Available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833 (last accessed 11 May 2018)

[697] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 343-344. Alvarez gives a very narrow reading of the purpose of the US- Argentina BIT as being to "discipline the behaviour of States during periods of alleged economic crisis". Alvarez further states that the purpose of the GATT, as reflected in its preamble and in the chapeau of Article XX, is sufficiently different to that of the US- Argentina BIT to prevent any cross-regime borrowing. The purpose of the BIT in question as per its preamble is to encourage economic cooperation and protection of investment, which is closer to that of the trade regime than in Alvarez's characterisation.

differences mean that there are potentially severe consequences if a tribunal interprets treaty exceptions in an overly broad or narrow manner, particularly if it gives rise to monetary damages. Findings of breach under IIAs and are not confined to the removal of measures as is the case in the trade law regime. A key systemic difference between the regimes is the lack of the possibility of appeal in the investment regime except for a very limited number of grounds in all but the most recent IIAs such as CETA. Tribunals have to be mindful of these factors in their awards and in striking a balance that is appropriate for the investment regime, rather than following a test developed in line with a different set of considerations in the trade regime.

Even Alvarez acknowledges that PTIAs or "mixed agreements" may provide more opportunities for "cross-pollination" for adjudicators facing trade or investment questions.[698] He sees this as being the case because PTIAs "present more complex questions of object and purpose". Alvarez also acknowledges that PTIAs may also discourage cross-referencing.[699]

6.7. Conclusion

6.7.1. Interpreting Exceptions at the Trade Regime

One of the most delicate tasks faced by the Dispute Settlement Body is striking the right balance between enforcing Members' rights under the WTO Agreements and ensuring derogations for public policy objectives can be defended under the General Exceptions. The twenty Article XX cases considered in Section 2 are a small, but vital sample for policy makers wishing to comply with WTO law.

Compliance with Article XX's chapeau has proved a sticking point in some cases, but applying measures in a discriminatory manner without justification is anathema to the WTO system. The chapeau remains integral in obliging Members to show that environmental or moral measures do not discriminate between Members in an unjustified way. The Appellate Body has shown itself willing to deem Article XX(a), (b) and (g) defences provisionally justifiable in most of its cases and where there is no discrimination, such as in *EC-Asbestos* and *US-Shrimp II*, measures have been found to be compliant.

The Appellate Body has shown willingness in recent jurisprudence to consider factors other than the relationship between the reasons for discrimination under the chapeau and the objective of a measure under the subparagraphs. *EC – Seals* shows the Appellate Body will consider additional factors and in this case referred to the design, architecture and revealing structure of a measure when looking at its application. Ultimately it is for the Appellate Body to find the correct balance in interpreting the chapeau and recent jurisprudence is a testament to the fact that its interpretative role is not carried out in an overly rigid manner.

The success rate for Article XX defences may be low, but it is not the aim of WTO dispute settlement to achieve a 50% compliance rate. In terms of the cases that have appeared before

[698] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 357

[699] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 357

the Appellate Body, to increase the compliance rate to 50% would require a dismantling of Article XX and its two-tier test. If the chapeau were removed from Article XX, such a compliance rate would be achieved. However this is not desirable as to ignore the way in which the exceptions are applied would be to greatly dilute the substance of the WTO Agreements. Allowing measures to be applied differently to different Members runs contrary to the foundational principles of the WTO.
Measures aiming to protect the environment and public morality can respect WTO law and come under the Article XX exceptions. If the system is to be changed to make it easier for measures to be defended under Article XX, this will come through the DSB, its jurisprudence and the balancing performed by the Appellate Body. If this doesn't develop in a satisfactory manner, change must come multilaterally from the Members themselves, however unlikely this appears to be. This sensitive area involves conflicting values, which are inherent to the WTO system. An attempt to move away from the balancing conducted by the Appellate Body towards a more codified, rules-based approach to deciding the General Exceptions would be counterproductive.

6.7.2. Interpreting Exceptions at the Investment Regime

The Orrega Vicuña approach involves interpreting the Customary International Law defence of necessity as being "synonymous"[700] with exceptions provisions such as Article XI of the US- Argentina BIT. The tribunal in *CMS v. Argentina* followed this approach which was found to be problematic by the CMS Annulment Committee, and this approach has been described by various commentators as being "unlikely to be repeated".[701]
An alternative approach followed in *Continental Casualty* which has been criticised by Alvarez, a proponent of the Orrega Vicuña approach. The tribunal in *Continental Casualty* followed the approach of the CMS Annulment Committee although this point is ignored by Alvarez. There are a couple of points at the core of the differences between these methodological approaches. Firstly the Orrega Vicuña approach denies that Article XI is *lex specialis*. Secondly there are questions of the appropriateness of investment tribunals taking into account principles developed under WTO law in interpreting exceptions in investment law. This chapter rejected Alvarez's five criticisms of the Common Derivation Approach employed in *Continental Casualty* on the following grounds:
1) The tribunal did not fail to state reasons for considering the trade regime to be a "relevant rule". This reading ignores the tribunal's statement that it sees it as "more appropriate…than to refer to necessity under customary international law" and this is because Article XI is derived from the model clause for US FCN treaties which reflects the formulation of Article XX of GATT 1947;
2) The award is deemed to be an erroneous reading of history as it ignored fundamental differences between the three provisions in question in applying GATT Article XX. This central charge can be rebutted as firstly the tribunal did not apply Article XX, and secondly, Article XI is derived from a trade and investment agreement (FCN), which is derived from a trade agreement (the GATT);

[700] Alvarez & Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina,' *Yearbook on International Investment Law & Policy* (2011) 329
[701] Henckels, Caroline, Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses (October 7, 2016). Federica Paddeu and Lorand Bartels (eds), Exceptions in International Law (OUP, 2017) ; *Society of International Economic Law (SIEL), Fifth Biennial Global Conference,* 7

3) The charge that the tribunal failed to consider GATT Article XX's text and jurisprudence is based on the fact that the tribunal didn't analyse Article XX's chapeau. The president of the tribunal clarified that "the definition of 'necessity' in WTO case law is not affected by the presence of the chapeau."[702] This is reflected in WTO case law as cases taken under the TBT & SPS Agreements (which does not contain a chapeau) have drawn upon jurisprudence relating to necessity tests under other WTO Agreements such as GATT and GATS;
4) Alvarez's states that the tribunal ignored the differing purposes of the regimes (reducing barriers to trade versus disciplining State behaviour in times of crisis) and that necessity analysis should be carried out in light of the object and purpose of the treaty in question. Analysis should be carried out in this manner (although WTO law wasn't actually applied), and sensitivity should be had to the purposes of regimes. The purpose of the BIT as per its preamble is to encourage economic cooperation and protection of investment, which is closer to that of the trade regime than in Alvarez's characterisation;
5) Alvarez's point that the tribunal failed to consider structural differences such as the status of tribunals and possibility of exit. Such factors should be considered by tribunals but do not block investment tribunals drawing on trade jurisprudence and vice versa.

6.7.3. Regulatory Space in the Trade and Investment Law Regimes

Wagner describes the regulatory space afforded to states under IIAs as being in a "state of flux".[703] There is stronger recognition of public policy considerations in investment law which Wagner describes as being similar to the developments that started at the WTO in 1995.[704] The expanded definition of necessity has resulted in a "wider regulatory space" for WTO Members.[705] At the WTO, exceptions such as those found under GATT Article XX are considered to be affirmative defences.[706] Whether this is the case under investment treaties is not so clear.
Mitchell warns that the inclusion of general exceptions in IIAs "risks undermining" policy objectives in unintended ways.[707] When incorporated correctly, general exceptions do however increase regulatory autonomy for host states concluding IIAs.[708] The parties can also amend the agreement or issue a binding interpretation if they feel public policy is undermined.

Puig cautions that states "may advance opportunistic defenses as Argentina did in cross-

[702] Sacerdoti, G, 'BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity,' *ICSID Review Volume 28, Issue 2* (2013) 32, FN120
[703] Wagner, Markus, 'Regulatory Space in International Trade Law and International Investment Law,' University of Pennsylvania Journal of International Law, Volume 36:1 (2014) 70
[704] Wagner, Markus, 'Regulatory Space in International Trade Law and International Investment Law,' University of Pennsylvania Journal of International Law, Volume 36:1 (2014) 85
[705] Wagner, Markus, 'Regulatory Space in International Trade Law and International Investment Law,' University of Pennsylvania Journal of International Law, Volume 36:1 (2014) 68
[706] US — Shrimp (Thailand) / US — Customs Bond Directive, paras 307, 310, 316–317, 319 (WT/DS343/AB/R WT/DS345/AB/R)
[707] Mitchell, Munro & Voon, 'Importing WTO General Exceptions Into International Investment Agreements: Proportionality, Myths And Risks,' Yearbook on International Investment Law & Policy 2016–2017, *Oxford University Press* (2018) 1
[708] Titi, Aikaterina, 'The right to regulate in international investment law,' *Hart Publishing* (2014) 119

referencing the WTO carve outs...to expand its policy space."[709] It is for tribunals to interpret IIAs and the parties can amend the treaties if necessary. States must also be careful in how they plead as future tribunals may rely on a previous pleading in construing the meaning of a treaty provision. Such pleadings may also be used by litigants as a form of collateral estoppel, or by tribunals based on general principles of law such as good faith or abuse of process."[710]

Ultimately it is for the drafters to ensure that the texts of agreements reflect the appropriate balance between investment protection and the right to regulate. The tribunal in *Occidental v. Ecuador* refused to consider legitimate regulatory objectives at all. For Mitchell, this is "untenable" under modern agreements where the purpose expressly includes the protection of key societal interests.[711] Indeed, even where the purpose is less clear, an argument that there is an implied purpose of promoting economic development and prosperity can be made.

Drafters must be careful when including exceptions based on those contained in the WTO Agreements. It was remarked upon in Section 4 that Article 28.3.1 of CETA's Exceptions Chapter directly incorporating GATT Article XX does not contain the wording *mutatis mutandis*. It is not suggested that this is a drafting error, but drafters should be careful of the implications of including and excluding such terms.
Henckels points out that exceptions with nexus requirements such as that of GATT Article XX(g) where a measure must be "related to" a particular objective "hardly imposes" more discipline than the language of carve-outs and reservations. Yet, the Appellate Body has found that a "substantial relationship" must exist between the measure and the conservation effort and so this requirement is hardly perfunctory. The drafters of investment treaties must consider whether this weak nexus requirement is appropriate in the investment context or whether it would be more appropriate to diverge from WTO law in this regard.

IIA exceptions are often broader than their WTO equivalents and as such policy space may be lesser under IIAs than under the WTO Agreements. Although WTO exceptions are narrower than their IIA equivalents, they are often deeper, meaning that it is easier for breach to be found. States should proactively set out their desired policy space in these fields.
Schill argues that frictions between IIAs and non-economic community interests can be alleviated by: 1) changes to treaty texts; and 2) reinterpreting existing treaties and dispute settlement mechanisms in light of a public law, rather than private law paradigm.[712] Perhaps a move in this direction is being seen with the advent of the EU's Investment Court System.
In this vein, Mitchell advocates the "careful use" of general exceptions by drafters, which is best combined with modern clarifications to ensure treaty parties achieve what they intend.[713] An example of this can be seen in the EU- Singapore Investment Protection Agreement.

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[709] Puig, Sergio, 'The Merging of International Trade and Investment Law,' *33 Berkeley Journal of International Law, Vol. 1* (2015) 43
[710] Puig, Sergio, 'The Merging of International Trade and Investment Law,' *33 Berkeley Journal of International Law, Vol. 1* (2015) 43
[711] Mitchell, Munro & Voon, 'Importing WTO General Exceptions Into International Investment Agreements: Proportionality, Myths And Risks,' Yearbook on International Investment Law & Policy 2016–2017, *Oxford University Press* (2018) 140
[712] Schill, Stephan W. and Djanic, Vladislav, 'International Investment Law and Community Interests,' *Society of International Economic Law (SIEL), Fifth Biennial Global Conference, Online Proceedings, Working Paper No 2016/01* (2016) 14
[713] Mitchell, Munro & Voon, 'Importing WTO General Exceptions Into International Investment Agreements: Proportionality, Myths And Risks,' Yearbook on International Investment Law & Policy 2016–2017, *Oxford University Press* (2018) 50

6.7.4 Concluding remarks on PTIAs & Engagement

There is great potential for engagement in the area of treaty exceptions given how closely the treaty texts can mirror each other, the fact that agreements increasingly provide for exceptions, and the fact that this had led to engagement between the two regimes in the jurisprudence. These types of engagement also reinforce each other. The more similar the content of treaties, the more likely tribunals are to draw upon the jurisprudence of the other regime for guidance. Given the possibility of a tribunal drawing upon the jurisprudence of another regime, it is for the parties to adapt the content of treaties as appropriate to encourage or discourage this practice.

Sections 2 & 3 considered how necessity analysis has been carried out by tribunals in the trade and investment law investment regimes. As seen in the trade section, necessity analysis features throughout the WTO Agreements. The meaning of the term necessary was examined by the Appellate Body in *Korea—Various Measures on Beef* where it found that necessary is "not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable'." Necessity has a range, with "indispensable" at one end of the continuum and "making a contribution to" at the other.[714] The investment tribunal in *Continental Casualty* drew upon this interpretation of necessity in its interpretation of Article XI of the Argentina- US BIT. This interpretation has been subject to criticism, but is likely to be built upon by future tribunals that may buttress the approach in Continental with the other methodologies outlined in Section 5. If this approach were to be built upon, it would unquestionably facilitate engagement between the trade and investment law regimes.

Modern IIAs contain balance between investment protection and the right to regulate and exceptions are an essential part of this balance. Treaty exceptions facilitate inter-regime engagement and it is for the parties to choose how they strike this balance. This thesis makes the argument that the more similar legal norms are between the regimes, the more this facilitates inter-regime engagement. Based on the above data and analysis, PTIAs play a clear role in facilitating engagement between the two regimes.

This study featured five types of exceptions as evidencing inter-regime engagement. Where these references are stronger and more common, this should result in increased engagement. Ultimately exceptions tend to be stronger and more common in PTIAs compared to BITs. This results in greater scope for inter-regime engagement insofar as these references affect tribunals' interpretations of treaty exceptions.

What can be concluded about cross-regime references and when it is appropriate to look to another regime when interpreting the treaty exceptions of a trade or investment text? Although tribunals have shown reluctance to make cross-regime references when interpreting the treaty exceptions of trade and investment agreements, this need not be the case. Tribunals

[714] *Appellate Body Report, Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R and WT/DS169/AB/R, adopted on 10 January 2001, para 161. The Appellate Body went on to state that the necessity of a measure may be assessed in relation to the "relative importance of the common interests or values" being protected,(para 162) "the extent to which the measure contributes to the realization of the end pursued,"(para 163) and "the extent to which the compliance measure produces restrictive effects on international commerce". (para 163) For further analysis of necessity in WTO law, see Cook, 'A Digest of WTO Jurisprudence on PIL Concepts and Principles' 345

are able to make such references in line with the VCLT and there are significant commonalities between the exceptions provisions found in trade and investment agreements. Other questions remain such as what constitutes an appropriate cross-regime reference, and whether tribunals will make such cross-regime references when interpreting the object and purpose trade and investment agreements. This remains to be seen, but as the exceptions provisions of the trade and investment law regimes approximate, the argument to draw upon the experience of the other regime strengthens.

Chapter 7- Normative conclusions & suggestions

1. Overview of the Study and its Findings
2. The future for PTIAs and engagement: will the tendency towards increased engagement continue?
   2.2. PTIAs in the age of faltering globalisation
   2.3. ICS: a vehicle for accelerated engagement between the trade and investment regimes?
3. Should states focus on PTIAs and is increased engagement a good thing?

7.1. Overview of the Study and its Findings

The primary research question of this thesis was phrased as follows:
Based on the findings of this study's empirical and comparative law analysis of PTIAs, BITs, and the trade and investment law regimes, can it be concluded that the conclusion of PTIAs as compared to BITs has results in increased levels of engagement between the trade and investment law regimes?

For the purposes of this thesis, this question was broken down into the following sub-parts:
1) for the sample of IIAs contained in this study, is there evidence that the conclusion of PTIAs as compared to BITs has resulted in increased levels of engagement between the trade and investment law regimes? (Chapter 2)
2) is there evidence of increased levels of engagement between the trade and investment law regimes in relation to key areas such as preambles, national treatment, likeness, and treaty exceptions? (Chapters 2-6)
3) is there evidence that the conclusion of PTIAs as compared to BITs gives greater scope to tribunals to draw upon the jurisprudence of the other regime and make cross-regime references? (Chapters 3-6)

In order to answer these questions, engagement between trade and investment was defined as occurring "wherever the content of an investment treaty has a parallel in the trade regime or vice versa. The term 'content' can cover a treaty's preamble, definitions, substantive provisions, exceptions etc. Engagement also occurs in dispute settlement whenever there are cross-regime references by the parties or the tribunal or parallels in the practices of tribunals. Engagement does not imply convergence and may fall short of this in a given area between the two regimes."

The above questions were examined throughout this thesis and conclusions were drawn from the empirical evidence and comparison between the trade and investment law regimes. The following are some of the normative conclusions drawn in this thesis:

Chapter 1 introduced this study and set out some of its main research questions, as well as its structure and methodology. It also defined and explored some of the key concepts examined in this thesis.

Chapter 2 conducted an empirical analysis of levels of engagement in PTIAs and BITs and

examined some of the main questions of this thesis. These questions were tested against a sample of 80 IIAs (40 PTIAs and 40 BITs) and included: 1) whether there is more evidence of engagement between the trade and investment law regimes in PTIAs than in BITs; 2) whether there is evidence of increasing engagement between the regimes over time.
These hypotheses were tested against the set of Agreements in relation to 24 provisions evidencing engagement and again against six provisions that were identified as being of particular importance to inter-regime engagement. In each instance, it was demonstrated that for the set of 80 Agreements in this study, there is more evidence of engagement in PTIAs than in BITs for the set of agreements as a whole, as well as in each of the three main categories.
Chapter 2 demonstrated that the conclusion of PTIAs as compared to BITs has resulted in increased levels of engagement between the trade and investment law regimes. The normative conclusions that can be drawn from this empirical evidence were examined in Chapters 3-6.

Chapter 3 considered Preambles and the Right to Regulate noting that preambles can either facilitate or exclude the possibility of inter-regime engagement. Chapter 3 concluded that each IIA has a specific purpose and background that led to its conclusion. Tribunals must give due consideration to this and caution should be exercised before concluding that: 1) any two international investment agreements have the same general objects and purposes; and 2) that trade and investment agreements have the same general objects and purposes.
Different treaty contexts require different preambles and careful selection of the wording of a preamble is the key to striking a balance between the interests of the investor and the host state. This is because even slight differences in the wording of preambles are ultimately clues for tribunals as to the objectives of the parties in concluding a given treaty. Chapter 3 concluded that balanced preambles facilitate inter-regime engagement and that it is for the parties to choose how they balance investment protection with the right to regulate. Older style BITs such as the Hong Kong- Australia BIT lack of any balance in the preamble between investment protection and the right to regulate and treaty drafters should reconsider such wordings in future.

Chapter 4 considered National Treatment, one of the key shared legal norms of the trade and investment law regimes. It concluded that the purpose of national treatment in trade and investment law is very similar across the regimes despite the tribunal in *Occidental* describing approaches to its interpretation under investment law as being the "opposite" to its interpretation under the GATT.[715]
Chapter 4 examined Kurtz's claim that poor interpretative methods employed by investment tribunals have led to "wildly inconsistent outcomes" and whether investment tribunals should be wary of drawing on the jurisprudence of the trade regime as a result.
The tribunals in *Occidental* and *Methanex* were deemed to have misused WTO law because: 1) in *Occidental*, the tribunal narrowly interpreted likeness referring only to its meaning under the GATT; and 2) in *Methanex*, the tribunal incorrectly found that the need for a competitive relationship in the GATT context is due to use of the term 'like products', which plays a critical role in the interpretation of Article III.
Chapter 4 concluded that these narrow readings need not be repeated in the future. If future tribunals are aware of these potential misreadings, they need not repeat them. Whether the

[715] *Occidental Petroleum Corp. v. The Republic of Ecuador*, Award ICSID Case No. ARB/06/11 (2012) para 175

practice of drawing on the jurisprudence of the other regime risks further, different misreadings remains to be seen.
Chapter 4 further concluded that the WTO jurisprudence on national treatment has been inconsistent and that the argument for cross-regime references would benefit from greater consistency in the trade law jurisprudence. Investment tribunals have been wiling to draw upon trade law jurisprudence but these cross-regime references have been unidirectional for national treatment provisions.
Although there has been no "reverse-crossfertilisation" of WTO tribunals drawing on investment law jurisprudence in this area, such reverse-crossfertilisation is a lot easier to imagine in the case of agreements such as CETA where: 1) the structures of the Agreements are similar; and 2) an appellate organ may be interpreting these provisions.

Chapter 5 examined likeness, a shared concept of the trade and investment law regimes. It looked at *EC- Seals*, in which it was found that differential treatment based on legitimate regulatory purposes was discriminatory under GATT Article III: 4. It concluded that the exclusion of legitimate regulatory purpose under GATT Article III entails a worrying divergence of outcomes for cases taken under the GATT and TBT Agreements. In line with *EC- Seals*, consideration of regulatory purpose has to be done under Article XX where the burden of proof lies with the defendant, where there are limited grounds for justification, and where these grounds were drawn up in 1947. Article III was complicated before *EC-Seals*, but its simplification risks coming at too high a price.
Chapter 5 concluded that findings in *EC—Seals* lessen the scope for crossfertilisation with IIAs. Analysis under the TBT Agreements is perhaps more fruitful in terms of crossfertilisation as inquiries into regulatory purpose may be taken under the National Treatment provisions of this Agreement. Inconsistency in the jurisprudence such as that seen at the WTO in relation to national treatment was also found to undermine crossfertilisation, which is facilitated by a consistent line of jurisprudence. The more fragmented the jurisprudence is in one of the regimes, the less appealing it is for tribunals of the other regime to draw upon their findings.
In terms of the jurisprudence under IIAs, Chapter 5 concluded that the competition-based approach adopted by the tribunal in *SD Myers* was the best equipped to combat nationality-based discrimination as it forces host states to explain their regulatory distinctions. Other tribunals' findings such as those in *Methanex* risk excluding discriminatory conduct from the scope of national treatment, where a non-identical competitor receives preferential treatment but is not deemed 'like' as there is an identical competitor.
This chapter also considered whether competition is a *necessary* condition for likeness. It concluded that although competition is often a condition for likeness, certain situations require the equal regulation of non-competing investors. As such, competition is not requisite for likeness to be found in these situations.

Chapter 6 considered Treaty Exceptions and found that although the success rate for GATT Article XX defences is low, it is not the aim of WTO dispute settlement to achieve a 50% compliance rate. In terms of the cases that have appeared before the Appellate Body, to increase the compliance rate to 50% would require a dismantling of Article XX and its two-tier test. If the chapeau were removed from Article XX, such a compliance rate would be achieved. However this is not desirable as to ignore the way in which the exceptions are applied would be to greatly dilute the substance of the WTO Agreements. Indeed one of the most delicate tasks faced by the Dispute Settlement Body is striking the right balance between

enforcing Members' rights and ensuring derogations for public policy objectives can be defended under the General Exceptions.
In terms of the jurisprudence under IIAs, Chapter 6 rejected the Orrega Vicuña approach, which involves interpreting the Customary International Law defence of necessity as being synonymous with exceptions enunciated in treaty provisions. It endorsed the Common Derivation Approach employed in *Continental Casualty v. Argentina* and addressed Alvarez's five criticisms of this approach.
Chapter 6 concluded that modern IIAs contain balance between investment protection and the right to regulate and exceptions are an essential part of this balance. It is for the drafters to ensure that the texts of agreements reflect the appropriate balance between investment protection and the right to regulate. Some authors caution that states may advance "opportunistic defences" by referring to WTO law in order to expand their policy space. However it is for tribunals to interpret IIA provisions and the parties can amend the treaties if they deem this to be necessary.
Chapter 6 concluded that drafters must be careful in their choice of wording when including exceptions based on provisions of WTO law. For example, it was remarked upon in Section 6.4 that one Article in CETA directly incorporating GATT Article XX does not contain the wording *mutatis mutandis*, while the following Article directly incorporating GATS Article XIV does contain this wording. It is not suggested that this is badly drafted (as has been concluded elsewhere)[716] but rather that parties should be careful of the implications of the inclusion or omission of such phrases.
There is great potential for engagement in the area of treaty exceptions given how closely the trade and investment law texts can mirror each other, the fact that these texts increasingly provide for exceptions, and the fact that this has led to cross-regime references between the two regimes in the jurisprudence. These types of engagement also reinforce each other. The more similar the content of treaties, the more likely tribunals are to draw upon the jurisprudence of the other regime for guidance. Given the possibility for tribunals to draw upon the jurisprudence of the other regime, it is for the parties to adapt the content of treaties as appropriate to encourage or discourage this practice.

7.2. The future for PTIAs and engagement: will the tendency towards increased engagement continue?

This section looks at current trends in the trade and investment law regimes and whether they will be likely to lead to increased inter-regime engagement or a continuation of the post-war separation of the regimes.

7.2.1. PTIAs in the age of faltering globalisation

The Trump presidency and Brexit vote were dual blows to globalisation in 2016. They have ushered in a new era of faltering globalisation with some even referring to it as "post-

[716] Mitchell, Munro & Voon, 'Importing WTO General Exceptions Into International Investment Agreements: Proportionality, Myths And Risks,' Yearbook on International Investment Law & Policy 2016–2017, *Oxford University Press* (2018)

globalization".[717] Globalisation has been faltering in the face of withdrawal,[718] renegotiation[719] and alleged violations of trading obligations and retaliations thereto.[720] These votes have impacted upon the trade and investment law regimes with the United States withdrawing from TPP and renegotiating the terms of NAFTA with Mexico and Canada. The United States has also increased tariffs on steel and aluminium for trading partners such as Mexico, Canada and the European Union. This has been combined with a continuation of the policy began by the Obama administration of blocking the appointment/ reappointment of Members of the WTO's Appellate Body.[721] This policy of blocking the appointment of Members will lead to "paralyzing appellate proceedings", which "would have profound implications on *panel* proceedings as well."[722] If WTO dispute settlement proceedings were to be paralysed, one avenue for claimants would be to take claims under the dispute settlement mechanisms of PTIAs. Whether the EU's proposed Investment Court System could act as a vehicle for accelerated engagement between the trade and investment regimes is examined in the next section.

It is a preference of the current US administration to conclude bilateral deals rather than deals such as TPP.[723] It is too early to say whether this will have an effect beyond the behaviour of the United States. A signal that this may not be the case was sent however with the signature of the renegotiated Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) on 8 March 2018. The US administration proposed language making ISDS an "opt-in" in NAFTA talks.[724] This concern didn't make it to the renegotiation of KORUS meaning that a re-evaluation of ISDS is taking place. A hostile attitude to ISDS could however mean that it is unlikely to see PTIAs or BITs concluded during the current US administration.

A final issue on the horizon for international economic law is the implications of Brexit. The United Kingdom will leave the EU on March 29, 2019. Whether or not the UK has the capacity to negotiate its own PTIAs post Brexit will affect the creation of new PTIAs. If the UK leaves the EU Single Market and Customs Union it will be free to pursue an independent trade and investment policy and negotiate PTIAs with other nations. Should the UK leave the EU Single Market and Customs Union, the idea of a PTIA with the United States could soon

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[717] Carlo de Stefano, ' Reforming the Governance of International Financial Law in the Era of Post-Globalization,' *Journal of International Economic Law*, Volume 20, Issue 3 (2017) 509

[718] Office of the United States Trade representative, 'The United States Officially Withdraws from the Trans-Pacific Partnership,' January 30, 2017: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP

[719] Office of the United States Trade representative, ' USTR Releases Updated NAFTA Negotiating Objectives,' November 2017: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/november/ustr-releases-updated-nafta

[720] Financial Times, 'US to impose tariffs on steel and aluminium imports from EU, Canada and Mexico from Friday,' May 31, 2018: https://www.ft.com/content/f96320c6-64d1-11e8-90c2-9563a0613e56
Financial Times, 'Mexico retaliates against steel levies with tariffs on US imports,' June 5, 2018: https://www.ft.com/content/7a95ea1c-68c8-11e8-8cf3-0c230fa67aec

[721] See Inside US Trade, 'U.S. Slammed At DSB For Blocking Korean Appellate Body Reappointment,' May 23, 2016. See also Charnovitz, Steve, 'The Obama Administration's Attack on Appellate Body Independence Shows The Need for Reforms,' International Economic Law and Policy Blog, September 22, 2016: http://worldtradelaw.typepad.com/ielpblog/2016/09/the-obama-administrations-attack-on-appellate-body-independence-shows-the-need-for-reforms-.html

[722] WTO website, Farewell speech of Appellate Body Member Ricardo Ramírez-Hernández: 'Appellate Body chair calls for "constructive dialogue" on addressing dispute settlement concerns,' 3 May 2018. Available at: https://www.wto.org/english/news_e/news18_e/ab_07may18_e.htm

[723] The Washington Examiner, 'Trump says bilateral deals are better than TPP,' April 18, 2018. Available at: https://www.washingtonexaminer.com/news/white-house/trump-says-bilateral-deals-are-better-than-tpp

[724] Inside US Trade, 'USTR sticks to ISDS opt-in proposal while stakeholders eye other options,' May 3, 2018. Available at: https://insidetrade.com/daily-news/ustr-sticks-isds-opt-proposal-while-stakeholders-eye-other-options

be closer than it ever was during the TTIP negotiations.
If the United Kingdom stays within the EU Single Market and Customs Union this may affect future EU PTIAs. The Labour Party would accept a new UK customs union with the EU provided that the UK has a say in future trade deals.[725] Such an outcome is one eventuality given the complications of leaving the Single Market and Customs Union without necessitating a hard border in Northern Ireland.

Another trend that is growing in recent times is the competing jurisdiction between the WTO and the Dispute Settlement Mechanisms of IIAs. IIAs provide a remedy for States and parties that can be an alternative to proceedings at the WTO. This competing jurisdiction is the result of the proliferation of trade and investment treaties in recent years.
While new MRTAs among the world's major economies have the potential to undermine WTO dispute settlement, they also have the potential to draw on its jurisprudence and increase its authority and importance. NAFTA has been the most well known dispute settlement mechanism in a PTIA over the past twenty years and its effect of detracting from the attractiveness of WTO dispute settlement has been negligible.

Where investors have rights under more than one PTIA, they may take their case under the agreement that they view is most favourable to them. An example of parties having rights under more than one PTIA is the rights of Mexico and Canada under NAFTA and CPTPP. Article 28.4 of TPP contains a Choice of Forum clause, which provides;

> "1. If a dispute regarding any matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute."

As of 2018, no MRTA has been ratified and whether the dispute settlement mechanism of such an Agreement could impact the WTO remains to be seen. The current empty chair crisis at the WTO's Appellate Body and this competing jurisdiction could result in a decline in the prominent role of WTO dispute settlement that has emerged over the past two decades. Understanding and addressing the limits and potential for cross-regime cooperation between the dispute settlement mechanisms of IIAs and that of the WTO will only become more important if we want to construct an international legal order with institutions capable of dealing with the challenges of international trade and investment in today's global economy.

Faltering globalisation in the face of the crisis at the Appellate Body and the withdrawal, renegotiation and violation of international trading obligations will be a key topic in international economic law in the coming years. The effect that this faltering globalisation will have on PTIAs is unclear. This current flux can however be turned to the advantage of actors such as the EU, particularly in light of the clarity brought about by the EU- Singapore decision.

[725] Financial Times, 'Corbyn's customs union plan — what it might mean,' February 26, 2018. Available at: https://www.ft.com/content/d7673a26-1af2-11e8-956a-43db76e69936

7.2.2. ICS- a vehicle for accelerated engagement between the trade and investment regimes?

Dispute settlement under IIAs has undergone a legitimacy crisis in recent years.[726] There has been a perceived lack of transparency and openness surrounding some parts of the system and this has been compounded by jurisprudence that is apparently contradictory and at times inconsistent. Contributing factors to this are the lack of a unifying court of appeal and the fact that there are thousands of IIAs in existence.

At the multilateral level, the potential revival of the Multilateral Investment Agreement has been described as lacking the "champion"[727] needed to renew efforts. If a MAI with substantive protections is to become a reality, negotiators need to start small and address those protections for which a consistent body of jurisprudence has emerged.
Further progress at the WTO also remains a distant prospect with the failure of the Doha Round calling into question the WTO's effectiveness as a negotiating forum. It seems as though negotiating priorities are focused towards the regional level as Members believe more gains can made there amid frustration about the lack of progress at the multilateral level. It is this author's view that the potential of the WTO as a negotiating forum is unrealised in the current format of a biannual Ministerial Conference. RTAs can see a dozen weeklong rounds of negotiations within the space of one year with inter-round sessions for difficult chapters. This level of intensity is hard to imagine at the WTO and perhaps with good reason. However there are inevitably consequences to this slower pace of negotiations.

Outside of the traditional multilateral level, one of the possible engines for driving increased engagement is the EU's proposed Investment Court System (ICS). ICS is a proposed model for the future of dispute settlement in the investment regime. It features a dispute settlement system that is explicitly based on the WTO system, with a standing appellate mechanism. The European Commission has proposed an Investment Court System to address "the inadequacies of ISDS including regarding human rights, the rule of law, democracy and national sovereignty."[728] The inclusion of an appellate mechanism with a fixed roster of panellists would have great potential for engagement between trade and investment, which is why it is considered here.

The EU has included ICS in four of its recent Agreements including CETA,[729] the EU-

[726] See Charles N. Brower & Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' *Chicago Journal of International Law* (2009) 471; Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions,' *Fordham Law Review* (2005) 73
[727] Wu, Mark, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime,' in Douglas, Pauwelyn & Vinuales (eds.), 'The Foundations of International Investment Law,' Oxford University Press (2014) 32/82
[728] Speech of Cecilia Malmstrom to Wojciech Sawicki, Secretary General of the Parliamentary Assembly of the Council of Europe (27 March 2017) https://ec.europa.eu/carol/index-iframe.cfm?fuseaction=download&documentId=090166e5b1460763&title=1348033_CM%20Letter%20COE.pdf
[729] See CETA, Section F on the Resolution of investment disputes between investors and states of Chapter 8, DG TRADE website: http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

Vietnam FTA,[730] the EU-Singapore Investment Protection Agreement[731] and the recently updated EU- Mexico FTA.[732] ICS has not been included in the outcome of the Japan-EU Economic Partnership Agreement (JEEPA).
All four of these Agreements include provisions "anticipating the transition" from ICS to a permanent Multilateral Investment Court (MIC).[733] One such provisions is contained in Article 3.12 of the EU-Singapore Investment Protection Agreement:
Multilateral Dispute Settlement Mechanism:

"The Parties shall pursue with each other and other interested trading partners, the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of international investment disputes. Upon establishment of such a multilateral mechanism, the Committee shall consider adopting a decision to provide that investment disputes under this Section will be resolved pursuant to that multilateral mechanism, and to make appropriate transitional arrangements."

ICS has encountered significant challenges already and whether it can bring together two systems that up until now have been "remarkably different" remains to be seen.[734]

In May 2017, the ECJ delivered Opinion 2/15 on whether the provisions of the EU-Singapore Free Trade Agreement fell under EU competence, shared competence, or the exclusive competence of the Member States. Unlike state-to-state dispute settlement, the ECJ found ISDS to be a shared competence: “Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot (…) be established without the Member States’ consent.”[735]
Opinion 2/15 could lead to the separation of ICS from the rest of PTIAs. This could also lead to the EU concluding agreements that exclude investment chapters or dispute settlement from their investment chapters. This has not been the case with the EU- Singapore Investment Protection Agreement or the EU- Mexico FTA. If this did transpire in future agreements however, it would undermine the potential for inter-regime engagement represented by the inclusion of an appellate level in the investment chapters of PTIAs.
ICS may be more difficult to pursue outside of the wider context of PTIAs and the removal of ISDS/ ICS from the larger deal would affect the balance of future EU agreements. Removing a major element of any agreement affects cross-issue linkages and the bargaining chips that can be employed during negotiations. In a 2015 study on US investment treaty practice, it was found that while smaller economies accepted high US demands in BITs, investment agreements were only reached with the US’ six largest trading partners as part of a PTIA. The author found that trade affects investment formation by “offering bargaining chips”.[736]

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[730] See EU-Vietnam Free Trade Agreement, Section 3 on the 'Resolution of Investment Disputes' of Chapter 8: Trade in Services, Investment and E-Commerce, DG TRADE website: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437
[731] See EU-Singapore Investment Protection Agreement, Article 3 of Chapter 3 on Dispute Settlement, DG TRADE website: http://trade.ec.europa.eu/doclib/press/index.cfm?id=961
[732] See Chapter 19 on Investment dispute resolution: 'New EU-Mexico agreement: The Agreement in Principle and its texts,' DG TRADE website: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833
[733] See DG TRADE website, 'The Multilateral Investment Court project,' last updated 20 March 2018 http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.
[734] Wagner, Markus, 'Regulatory Space in International Trade Law and International Investment Law,' *University of Pennsylvania Journal of International Law, Volume 36:1* (2014) 75
[735] Opinion 2/15, Para 292
[736] Wu, Mark, ‘The Scope and Limits of Trade’s Influence in Shaping the Evolving International Investment Regime,’ in Douglas, Pauwelyn & Vinuales (eds.), 'The Foundations of International Investment Law,' *Oxford University Press* (2014) 40/82

The EU recently included ICS in its updated PTIA with Mexico. It had been reported that the two sides were "likely to drop this legal process from the initial accord to accelerate a deal," illustrating the potential to make progress in the face of doubters.[737]
Parties wish to negotiate with certainty and expediency. As such, the EU will likely to separate those parts that it can ratify as an exclusive competence from those parts that are a shared competence with the Member States. .
In June 2017, the European Parliament adopted an amendment to the modernisation of the EU-Chile Association Agreement which proposed:
"to negotiate with Chile two separate agreements clearly distinguishing between a trade and investment agreement only containing issues under EU exclusive competence and a second agreement including the subjects for which the competences are shared, as deducible from the opinion of the Court of Justice on the EU-Singapore FTA (…);"[738]
Opinion 2/15 could thus lead to the negotiation of two separate agreements and so enable the Union to proceed with or without the agreement of national parliaments and others. Having a separate agreement that lies exclusively within EU competence would take the power out of the hands of national and regional parliaments to filibuster wider agreements. This could lead to the sidelining of investment and result in FTA style EU agreements. It could also potentially make it easier to ratify an investment chapter with dispute settlement provisions. If the power of the veto is diminished, assemblies may be less likely to use it, particularly where such provisions are included in a host of other agreements that have already been ratified.
A recent EU report declared that as far as it's concerned, ISDS is dead.[739] It would appear that reports are greatly exaggerated. Japan and Canada, the EU's partners in two of its recent flagship agreements, have recently (re-) agreed the TPP Agreement with ISDS provisions therein. It would seem that not everyone is converted to ICS and that agreements containing ISDS like TPP represent a counterforce to the emergence of ICS.

The Investment Court System does however face significant challenges. These challenges include the composition of the various Appeal Tribunals. The Appeal Tribunal under the EU-Vietnam FTA shall be composed of six Members "of whom two shall be nationals of a Member State of the European Union, two shall be nationals of Vietnam and two shall be nationals of third countries. The Appeal Tribunal under the EU-Singapore Investment Protection Agreement[740] and the EU- Mexico FTA[741] are similarly composed. The fact that the Appeal Tribunal for each Agreement will be composed differently impacts upon the uniformity and coherence of its jurisprudence. It is of course possible that these differences will be minimised by the same Members appearing under multiple agreements. E.g. The same six Members could be nominated to make up the tribunals under the EU- Vietnam FTA, EU-Singapore Investment Protection Agreement and the EU- Mexico FTA.
A further challenge for ICS relates to the lack of consensus that an appellate mechanism is needed as mentioned above, as well as the fact that ICS Appeals Tribunals will interpret a

[737] Giulia Paravicini, 'EU and Mexico make big push for trade deal,' 18 December 2017, available at: https://www.politico.eu/article/eu-and-mexico-make-big-push-for-trade-deal-in-coming-days/amp/
[738] European Parliament, Committee on International Trade, 2017/2057(INI) Amendment 33, Daniel Caspary, Gabriel Mato, 22 June, 2017
[739] EU Commission Factsheet on A new EU trade agreement with Japan, 1 July 2017: available at http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf (last accessed 17 November 2017)
[740] Article 3.10: "(...)(a) The EU Party shall nominate two Members; (b) Singapore shall nominate two Members; and (c) The EU Party and Singapore shall jointly nominate two Members, who shall not be nationals of any Member State of the Union or of Singapore."
[741] Article 12.2. "The Appeal Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of Mexico and two shall be nationals of third countries."

variety of IIAs. As seen in Chapter 6, there are differences in the Exceptions provisions in the four abovementioned EU Agreements. These differences in key provisions of the texts tribunals will interpret could impact upon the uniformity and coherence of its jurisprudence. Broude asks whether the international community should "ambitiously reconceive (for lack of a better word) the two fields as one"? Engagement between the regimes has been piecemeal and unplanned, lacking a unifying logic"[742] and this may remain the case unless initiatives such as the Investment Court System can bring greater coherence and consistency to investment law jurisprudence. Despite the challenges the Investment Court System faces, it represents a major hope for increased and accelerated engagement between the trade and investment law regimes.

7.3. If PTIAs increase engagement compared to BITs, should states focus on PTIAs?

This thesis makes the argument that references to the 24 provisions outlined in Chapter 2.9 facilitate engagement between the trade and investment law regimes.
This thesis demonstrated that for the sample of IIAs contained in this study, PTIAs led to increased engagement as compared to BITs. The data and analysis in Chapter 2 showed the role of PTIAs in facilitating engagement between the two regimes. Preambular references to the WTO and the right to regulate tend to be stronger and more common in PTIAs compared to BITs. This is also the case for provisions such as General Exceptions and this results in greater scope for cross-regime references insofar as these shared provisions affect tribunals' interpretations of agreements.

Although there were higher levels of engagement in the sample of PTIAs compared to BITs in this study, this does not mean that not PTIAs are *necessary* for high levels of inter-regime engagement. Certain BITs contained in this showed far higher levels of engagement than certain PTIAs and the results of this study reflect the averages for provisions across the 80 Agreements.
Although these provisions *could* be contained in BITs, this does not change the outcomes and the positive outcomes in terms of engagement that come from concluding PTIAs. These agreements tend to contain more provisions that evidence inter-regime engagement for many reasons.
Chapters 3-6 looked at this question in relation to provisions that represent shared or similar norms between the regimes and concluded that for PTIAs compared to BITs, there is evidence of increased levels of engagement between the regimes in relation to key areas such as preambles, national treatment, likeness, and treaty exceptions.

Six other factors driving engagement (aside from shared or similar norms) were also identified in Chapter 1, including:
1) Provisions that minimise conflict between the regimes;
2) Provisions that harmonise procedural rules between the regimes;
3) Provisions that refer to the applicability of rules of international (economic) law and the

[742] Broude, T, 'Investment And Trade: The "Lottie And Lisa" Of International Economic Law?' International Law Forum of the Hebrew University of Jerusalem Law (2011) 12

suitability of arbitrators with knowledge of international (trade) law;
4) Overlapping jurisdiction between the regimes;
5) Interdependence between the regimes; and
6) Sociological factors.

In terms of these six additional factors, it's even easier to make the case that PTIAs increase engagement between the two regimes. Increased engagement erodes the claim that the trade and investment law regimes must be fundamentally separate. As provisions approximate, and cross-regime references increase, it becomes increasingly difficult to argue that the approach to interpreting national treatment under investment law should be the "opposite" to its interpretation under the GATT.[743]
This thesis does not make the argument for convergence between the trade and investment law regimes. Chapter 1 stated that although the factors that increase engagement are the same as those that drive convergence, the difference being the end point described by the two terms. Convergence is not a relative term and it is difficult to speak of degrees of convergence. Full convergence is not possible in some areas and when authors speak of partial convergence, the implication remains that full convergence is the destination. This is why the more open concept of engagement is preferred throughout this thesis with some references to points of convergence between the two regimes.

One of the main findings of the empirical section of this thesis was that PTIAs evidence more engagement between the trade and investment law regimes than BITs. This thesis defined engagement as occurring wherever the content of an investment treaty has a parallel in the trade regime or vice versa, as well as whenever there are cross-regime references in dispute settlement.
Engagement was found to be a good thing when it is appropriate and this was found to be when the structure and wording of provisions lend themselves to engagement in light of the purpose of the treaties at issue.
As Howse says, the textual contexts, complex jurisprudence and institutional differences should all be considered by any scholarship that would attempt "to create a cohesive international economic law."[744] Thus a tribunal considering a national treatment provision under the TBT Agreement may have greater recourse to findings in NAFTA cases than in cases under the GATT given the textual and structural natures of these provisions. Proximity counts, in terms of these Agreements being part of the WTO Agreements, but so too do context, structure and wording.

This thesis does not recommend that as a result of the findings of this thesis treaty negotiators should focus on concluding PTIAs instead of BITs. Rather, based on the above findings, it finds that there are certain matters treaty negotiators could reflect upon, including:
1) when engagement between the trade and investment law regimes is appropriate and to what extent it is appropriate;
2) whether inter-regime engagement should influence their decision to conclude agreements as BITs, FTAs, or PTIAs;
3) the extent to which PTIAs facilitate engagement compared to BITs;

[743] *Occidental Petroleum Corp. v. The Republic of Ecuador*, Award ICSID Case No. ARB/06/11 (2012) para 175
[744] Howse & Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz,' The European Journal of International Law Vol. 20 no. 4 (2010) 1087–1094

4) the lessons on inter-regime engagement to be taken from this analysis when drafting the architecture of a standalone BIT.

When is it appropriate to look to another regime and make cross-regime references when interpreting a provision of a trade or investment text? This author agrees with Alvarez that the message is not "no trespassing", but rather to proceed with caution.
In terms of investment law, cross-regime references should continue to be made and such engagement is appropriate when the structure and wording of provisions lend themselves to engagement in light of the purpose of the treaties at issue. Such references should take differences in remedies and institutional structures into account.
Although WTO tribunals have shown reluctance to make cross-regime references, this need not be the case. WTO tribunals are able to make such references in line with the VCLT and there are significant commonalities between many of the provisions considered here that are common to the trade and investment law regimes.
Other questions remain such as what constitutes an appropriate cross-regime reference, as well as whether, and to what extent, tribunals will make such cross-regime references when interpreting trade and investment law agreements in the future. This remains to be seen, but as the provisions of the trade and investment law regimes approximate, the argument to draw upon the experience of the other regime strengthens.

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International Investment Agreements (IIAs) considered in the empirical chapter of this thesis:

Preferential Trade and Investment Agreements (PTIAs) 2005-15 considered in the empirical chapter of this thesis:

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2. China–Australia Free Trade Agreement '15 (ChAFTA)
3. China- Korea FTA '15 (Free Trade Agreement Between The Government Of The People's Republic Of China And The Government Of The Republic Of Korea)
4. Eurasia- Vietnam FTA '15 (Free Trade Agreement Between The Eurasian Economic Union And Its Member States, Of The One Part, And The Socialist Republic Of Viet Nam)
5. The Pacific Alliance Framework Agreement '14 (Chile, Colombia, Mexico, Peru)
6. Canada- Korea FTA '14 (Free Trade Agreement Between Canada And The Republic Of Korea)
7. Canada- Honduras Free Trade Agreement '13
8. New Zealand- Taiwan ECA '13 (Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation)
9. Free Trade Agreement between Central America and Mexico '11
10. Guatemala- Peru FTA '11 (Tratado De Libre Comercio Entre La República Del Perú y La República De Guatemala)
11. Korea- Peru FTA '10 (Free Trade Agreement between the Republic of Korea and Peru)
12. Costa Rica- Singapore FTA '10 (Free Trade Agreement between Costa Rica and Singapore)
13. Canada- Panama FTA '10 (Free Trade Agreement between Canada and Panama)
14. New Zealand- Malaysia FTA '09 (New Zealand- Malaysia Free Trade Agreement)
15. China- Peru FTA '09 (Free Trade Agreement Between The Government Of The People's Republic Of China And The Government Of The Republic Of Peru)
16. AANZFTA '09 (Agreement Establishing The ASEAN-Australia New Zealand Free Trade Area)

17. Japan- Switzerland FTA '09 (Agreement On Free Trade And Economic Partnership Between Japan And The Swiss Confederation)
18. Canada- Colombia FTA '08 (Free Trade Agreement between Canada and Colombia)
19. Australia- Chile FTA '08 (Australia-Chile Free Trade Agreement)
20. Peru- Singapore FTA '08 (Free Trade Agreement between Singapore and Peru)
21. Malaysia- Pakistan FTA '07 (Agreement Between The Government Of The Islamic Republic Of Pakistan And The Government Of Malaysia For A Closer Economic Partnership)
22. Indonesia- Japan EPA '07 (Agreement Between Japan And The Republic Of Indonesia For An Economic Partnership)
23. KORUS '07 (Korea- US FTA)
24. Panama- US '07 (Free Trade Agreement between the United States and Panama)
25. Brunei- Japan EPA '07 (Agreement Between Japan And Brunei Darussalam For An Economic Partnership)
26. Japan- Thailand EPA '07 (Agreement Between Japan And The Kingdom Of Thailand For An Economic Partnership)
27. Chile- Japan EPA '07 (Agreement Between Japan And The Republic Of Chile For A Strategic Economic Partnership)
28. Colombia- US FTA '06 (Free Trade Agreement between the United States of America and Colombia)
29. China- Pakistan FTA '06 (Free Trade Agreement Between The Government Of The Islamic Republic Of Pakistan And The Government Of The People's Republic Of China)
30. Chile- Peru FTA '06 (Acuerdo de Libre Comercio entre el Gobierno de la República del Perú y el Gobierno de la República de Chile)
31. Taiwan- Nicaragua FTA '06 (Free Trade Agreement Between The Republic Of China (Taiwan) And The Republic Of Nicaragua)
32. Peru- US FTA '06 (Peru - United States Trade Promotion Agreement)
33. Singapore- Panama FTA '06 (Free Trade Agreement Between The Republic Of Singapore And The Republic Of Panama)
34. Oman- US FTA '06 (Free Trade Agreement between the United States and Oman)

35. Korea- EFTA Investment Agreement '05 (Agreement On Investment Between The Republic Of Korea And The Republic Of Iceland, The Principality Of Liechtenstein And The Swiss Confederation)
36. Japan- Malaysia EPA '05 (Agreement Between The Government Of Japan And The Government Of Malaysia For An Economic Partnership)
37. Guatemala- Taiwan FTA '05 (Tratado De Libre Comercio Entre La República De Guatemala y La República De China (Taiwán))
38. Korea- Singapore FTA '05 (Free Trade Agreement Between The Republic Of Korea And Singapore)
39. India- Singapore CECA '05 (Comprehensive Economic Cooperation Agreement Between The Republic Of India And The Republic Of Singapore)
40. New Zealand- Thailand EPA '05 (Thailand-New Zealand Closer Economic Partnership Agreement)

Bilateral Investment Treaties (BITs) 2005-15 considered in the empirical chapter of this thesis:

1. Japan- Oman BIT '15 (Agreement Between Japan And The Sultanate Of Oman For The Reciprocal Promotion And Protection Of Investment)
2. Denmark- Macedonia, Former Yugoslav Republic BIT '15 (Agreement between the Macedonian Government and the Government of the Kingdom of Denmark on the Promotion and Reciprocal Protection of Investments)
3. Canada- Burkina Faso BIT '15 (Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments)
4. Cambodia- Russia BIT '15 (Agreement Between The Government Of The Russian Federation And The Government Of The Kingdom Of Cambodia On Promotion And Mutual Protection Of Capital Investments)
5. Canada- Cote d'Ivoire BIT '14 (Canada - Côte d'Ivoire Foreign Investment Promotion and Protection Agreement)
6. Japan- Kazakhstan BIT '14 (Agreement between Japan and the Republic of Kazakhstan for the Promotion and Protection of Investment)

7. Colombia- Turkey BIT '14 (Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments)
8. Russia- Azerbaijan BIT '14 (Agreement Between The Government Of The Russian Federation And The Government Of The Republic Of Azerbaijan on the Promotion And Mutual Protection Of Investments)
9. Japan- Myanmar BIT '13 (Agreement Between The Government Of Japan And The Government Of The Republic Of The Union Of Myanmar For The Liberalisation, Promotion And Protection Of Investment)
10. India- UAE BIT '13 (Agreement Between The Government Of The Republic Of India And The Government Of The United Arab Emirates On The Promotion And Protection Of Investments)
11. Guatemala- Russia BIT '13 (Agreement Between The Government Of The Republic Of Guatemala And The Government Of The Russian Federation On Promotion And Reciprocal Protection Of Investments)
12. Colombia- Singapore BIT '13 (Acuerdo Entre El Gobierno De La Republica De Singapur Y El Gobierno De La Republica De Colombia Sobre Promocion y Proteccion De Inversiones)
13. Bahrain- Mexico BIT '12 (Agreement Between The Government Of The Kingdom Of Bahrain And The Government Of The United Mexican States On The Promotion And Reciprocal Protection Of Investments)
14. Canada- China BIT '12 (Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments)
15. Iraq- Japan BIT '12 (Agreement Between Japan And The Republic Of Iraq For The Promotion And Protection Of Investment)
16. Kazakhstan- Macedonia FYR BIT '12 (Agreement Between The Government Of The Republic Of Macedonia And The Government Of The Republic Of Kazakhstan On The Reciprocal Promotion And Protection Of Investments)
17. Canada- Kuwait BIT '11 (Agreement Between Canada And The State Of Kuwait For The Promotion And Protection Of Investments)

18. Colombia- Japan BIT '11 (Agreement Between Japan And The Republic Of Colombia For The Liberalization, Promotion And Protection Of Investment)
19. Kenya- Slovakia BIT '11 (Agreement Between The Government Of The Slovak Republic And The Government Of The Republic Of Kenya For The Promotion And Reciprocal Protection Of Investments)
20. India- Nepal BIT '11 (Agreement Between The Government Of India And The Government Of Nepal For The Promotion And Protection Of Investments)
21. Switzerland- Trinidad BIT '10 (Agreement between the Swiss Confederation and the Republic of Trinidad and Tobago on the Promotion and Reciprocal Protection of Investments)
22. Canada- Slovakia BIT '10 (Agreement Between Canada And The Slovak Republic For The Promotion And Protection Of Investments)
23. Austria- Tajikistan BIT '10 (Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan)
24. Congo- Germany BIT '10 (Federal Republic of Germany and the Republic of the Congo on the requirements and mutual protection of capital investments)
25. Germany- Pakistan BIT '09 (Agreement Between the Islamic Republic of Pakistan and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments)
26. St Vincent & the Grenadines- Taiwan BIT '09 (Agreement Between The Government Of The Republic Of China (Taiwan) And The Government Of Saint Vincent And The Grenadines For The Reciprocal Promotion And Protection Of Investments)
27. Ethiopia- UK BIT '09 (Agreement Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Federal Democratic Republic Of Ethiopia For The Promotion And Protection Of Investments)
28. Czech Republic- Saudi Arabia BIT '09 (Agreement Between The Czech Republic And The Kingdom Of Saudi Arabia For The Encouragement And Reciprocal Protection Of Investments)
29. Congo- Spain BIT '08 (Accord Entre La République Du Congo et le Royaume d'Espagne Sur La Promotion Et La Protection Réciproques Des Investissements)

30. BLEU (Belgium-Luxembourg Economic Union)- Oman BIT '08 (Agreement between the Belgium-Luxembourg Economic Union on the one hand, and the Sultanate of Oman, on the other hand, on the Promotion and Reciprocal Protection of Investments)
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38. Jordan- Thailand BIT '05 (Agreement Between The Government Of The Kingdom Of Thailand And The Government Of The Hashemite Kingdom Of Jordan For The Promotion And Protection Of Investments)
39. Guyana- Switzerland BIT '05 (Agreement between the Swiss Confederation and the Republic of Guyana on the Promotion and Reciprocal Protection of Investments)
40. China- Portugal BIT '05 (Agreement Between The People's Republic Of China And The Portuguese Republic On The Encouragement And Reciprocal Protection Of Investments)

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EU-Singapore FTA '18 (Free Trade Agreement Between The European Union And The Republic Of Singapore)
EU-Singapore Investment Protection Agreement '18
TPP '16 (Trans-Pacific Partnership)
CPTPP '18 (Comprehensive and Progressive Trans-Pacific Partnership)
RCEP (Regional Comprehensive Economic Partnership) (not signed)
TiSA (Trade in Services Agreement) (not signed)
TTIP (Transatlantic Trade and Investment Partnership) (not signed)
China- Pakistan FTA '06 (Free Trade Agreement between the government of the Islamic Republic of Pakistan and the Government of the People's Republic of China)
US- Argentina BIT '91 (Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment)
US- Uruguay BIT '05 (Treaty Between The United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment)
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Lebanon- Iceland BIT '04 (Agreement Between The Lebanese Republic and The Republic Of Iceland on the Promotion and Reciprocal Protection of Investments)
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Sweden- Argentina BIT '92 (Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments)
France- Argentina BIT '93 (L'accord entre le Gouvernement de la République française at le Gouvernement de la République Argentine sur l'encouragement et la protection réciproques des investissements)
Netherlands- Bolivia BIT ' 94 (Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia)
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Annexes

Annex 1: Key National Treatment provisions referred to in this chapter

Annex to Chapter 4: National Treatment

GATT Article III: National Treatment on Internal Taxation and Regulation

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.*
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*
3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

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.

4. For greater certainty, no Party may:

> (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
>
> (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

US-Ecuador BIT/ US-Argentina BIT

ARTICLE II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

CETA: Article X.6: National Treatment

1. Each Party shall accord to investors of the other Party and to covered investments, 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 European Member State, 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.

Indian Model BIT

Article 4: National Treatment

4.1 Each Party shall not apply to Investments, Measures that accord less favourable treatment than that it accords, in like circumstances,[2] to domestic investments with respect to the management, conduct, operation, sale or other disposition of Investments in its territory.

4.2 A breach of Article 4.1 will only occur if the challenged Measure constitutes intentional and unlawful discrimination against the Investment on the basis of nationality.

4.3 This Article shall not apply to any Law or Measure of a Regional or local Government.

4.4 Exercises of discretion, including decisions regarding whether, when and how to enforce or not enforce a Law shall not constitute a violation of this Article provided such decisions are taken in furtherance of the Law of the Host State.

4.5 Extension of financial assistance or Measures taken by a Party in favour of its investors and their investments in pursuit of legitimate public purpose including the protection of public health, safety and the environment shall not be considered as a violation of this Article.

[2] The requirement of "like circumstances" recognizes that States may have various legitimate reasons for distinguishing between investments including, but not limited to, (a) the goods or services consumed or produced by the Investment; (b) the actual and potential impact of the Investment on third persons, the local community, or the environment, (c) whether the Investment is public, private, or state-owned or controlled, and (d) the practical challenges of regulating the Investment. The factors and determinations used by the Host State to distinguish between Investors and Investments are to be given substantial deference by any tribunal constituted under Article 14.5 or Article 15.2.

Norway Model BIT

ARTICLE 3: NATIONAL TREATMENT

1. Each Party shall accord to investors of the other Party and to their investments, treatment no less favourable than the treatment it accords in like situations[1] to its own investors and their investments, with respect to the establishment, acquisition, expansion, management, conduct, operation and disposal of investments.

[1] The Parties agree/ are of the understanding that a measure applied by a government in

pursuance of legitimate policy objectives of public interest such as the protection of public health, human rights, labour rights, safety and the environment, although having a different effect on an investment or investor of another Party, is not inconsistent with national treatment and most favoured nation treatment when justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment.

*The Norwegian Model BIT also has a list of General Exceptions contained in Article 24.

Annex 2: Coding the Strength of Preambles

Annex to Chapter 3: Preambles & the right to regulate

Table 1: BITS

BITS	Provision	Impact on engagement [745]	Reasoning	
Japan Oman (2015)	Recognising that these objectives can be achieved without relaxing health, safety and environmental measures of general application;	2	Refers only to ability of parties to promote investment protection without needing to relax current measures. Not broad (2)	
Canada Burkina Faso (2015)	RECOGNIZING that the promotion and the protection of investments of investors of one Party in the territory of the other Party help (…) promote sustainable development, RECOGNIZING the right of each Party to adopt or maintain any measures that are consistent with this Agreement and that relate to health, safety, the environment, or public welfare, as well as the difference in the Parties' respective economies;	3	1) Recognises role of protection in promoting sustainable development. 2) Recognises the right to adopt measures consistent with the Agreement, but gives priority to the agreement	(3) (0)
Canada Côte d'Ivoire (2014)	Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually	3	Recognises role of investment protection in promoting sustainable development (3)	

[745] The stronger the reference to the right to regulate, the higher its score will be in this study as provisions with such references are more likely to affect the rights and obligations of the parties and result in crossfertilisation of jurisprudence between the two regimes and impact upon engagement between trade and investment.

	beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development,		
Japan Kazakhstan (2014)	Recognising that these objectives can be achieved without relaxing measures and standards applicable in the Areas of the Contracting Parties in the field of health, safety and environment;	2	Refers only to ability of parties to promote investment protection without needing to relax current measures. Not broad (2)
Colombia Turkey (2014)	Convinced these standards can be achieved without relaxing health, safety environmental standards	1	"Convinced" is not as strong as "recognising". Doesn't rule out that standards may be relaxed through investment protection. (1)
Japan Myanmar (2013)	Recognising that these objectives can be achieved without relaxing health, safety and environmental measures of general application	2	Refers only to ability of parties to promote investment protection without needing to relax current measures. Not broad (2)
Canada China (2012)	Recognizing the need to promote investment based on the principles of sustainable development;	3	Recognises role of investment protection in promoting sustainable development (3)
Iraq Japan (2012)	Recognising that these objectives can be achieved without relaxing health, safety and environmental measures of general application;	2	Refers only to ability of parties to promote investment protection without needing to relax current measures. Not broad (2)
Canada Kuwait (2011)	RECOGNIZING that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development,	3	Recognises role of investment protection in promoting sustainable development (3)

Colombia Japan (2011)	Recognizing that these objectives and the promotion of sustainable development can be achieved without relaxing health, safety and environmental measures of general application;	2	Refers only to ability of parties to promote investment protection without needing to relax current measures. Not broad (2)
Kenya Slovakia (2011)	AGREEING that these objectives can be achieved without relaxing health, safety and environmental measures of general application;	2	Refers only to ability of parties to promote investment protection without needing to relax current measures. Not broad (2)
Switzerland Trinidad & Tobago (2010)	Convinced these standards can be achieved without relaxing health, safety environmental measures of general application	1	"Convinced" is not as strong as "recognising". Doesn't rule out that standards may be relaxed through investment protection. (1)
Austria Tajikistan (2010)	COMMITTED to achieving these objectives in a manner consistent with the protection of health, safety, and the environment;	3	Refers to the commitment of the parties to promoting investment protection in a sustainable way. Broad (3)
Congo Spain (2008)	Reconnaissant que ces objectifs peuvent être atteints sans nuire aux mesures d'application générale en matière de santé, de sécurité et d'environnement[746]	2	Refers only to ability of parties to promote investment protection without needing to relax current measures. Not broad (2)
Japan Peru (2008)	Recognising that these objectives can be achieved without relaxing health, safety and environmental measures of general application;	2	Refers only to ability of parties to promote investment protection without needing to relax current measures. Not broad (2)
Libya Spain (2007)	Teniendo en cuenta la preocupación que comparten por el medio ambiente, las Partes Contratantes están de acuerdo en	2	Refers only to ability of parties to promote investment protection without needing to

[746] "Recognising that these objectives can be attained without relaxing health, safety and environmental measures of general application"

	que esos objetivos pueden lograrse sin detrimento de las medidas de aplicación general en materia de salud, seguridad y medio ambiente, y Reconociendo que la promoción y protección de inversiones en virtud del presente Acuerdo estimulará las iniciativas en este ámbito,[747]		negatively affect current measures. Not broad (2)	
Luxembourg Korea (2007)	Reconnaissant que chaque Partie contractante a le droit de fixer son propre niveau de protection de l'environnement, de définir ses politiques et priorités en matière de développement et ses propres normes de protection du travail, ainsi que d'adopter ou de modifier en conséquence sa législation en matière d'environnement et de travail, Considérant qu'aucune des Parties contractantes ne modifiera ou n'assouplira sa législation nationale en matière d'environnement ou de travail d'une manière qui porte atteinte aux droits universellement reconnus des travailleurs aux fins d'encourager les investissements ou l'entretien ou l'expansion des investissements qui seront réalisés sur son territoire[748]	5	Recognises that each party can set its own level of environmental protection and define its policies and development priorities. The strongest language found in a BIT so far Commitment to not weaken environmental legislation to encourage investment	(5) (3)
Canada Peru (2006)	RECOGNIZING that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable	3	Recognises that promoting investment is conducive to sustainable development (3)	

[747] "Given the concern for the environment shared the Contracting Parties, they agree that these objectives can be achieved without detriment to health, safety and environmental measures of general application, and Recognising that the promotion and protection of investments under this Agreement will stimulate initiatives in this area"

[748] "Recognising that each Contracting Party has the right to set its own level of environmental protection, define its policies and priorities for development and its own labour protection standards and consequently, to adopt or modify its legislation concerning work or the environment,
Considering that neither of the Contracting Parties will alter or soften its national legislation concerning labour or environmental law in a way that violates the universally recognised rights of workers to encourage investment or maintenance or expansion of investments to be made in its territory

	development		

Table 2: PTIAs

PTIAs	**Provision**	**Impact on engagement**	**Reasoning**
Australia China FTA (2015)	"Upholding the rights of their governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare;"	5	Strong, seemingly binding language upholding the right to regulate (5)
China Korea FTA (2015)	MINDFUL that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development and that closer economic partnership can play an important role in promoting sustainable development;	1	"Mindful" is not as strong as "recognising" and only acknowledges that investment can play a role in promoting sustainable development (1)
Pacific Alliance (2014)	RATIFICAR su voluntad de construir un espacio común con el propósito de profundizar la integración política, económica, social y cultural, así como de establecer compromisos efectivos de acción conjunta para mejorar el bienestar y niveles de vida de sus habitantes y promover el desarrollo sostenible en sus respectivos territorios;[749]	3	Reference to improve welfare and living standards is open to interpretation (0) Reaffirm will to promote sustainable development (3)
Canada Korea FTA (2014)	The parties resolve to: UNDERTAKE each of the preceding in a manner that is	5	Strong, seemingly binding language undertaking to protect investment in a (5)

[749] "Reaffirm their will to build a common space in order to deepen political, economic, social and cultural integration and establish effective commitments for joint action to improve the welfare and living standards of its people and promote sustainable development in their respective territories;"

	consistent with environmental protection and conservation, reflecting their desire to enhance the enforcement of environmental laws and regulations, and strengthen cooperation on environmental matters; PROMOTE sustainable development;		way consistent with environmental protection Recognises role of investment protection in promoting sustainable development	(3)
Canada Honduras FTA (2013)	Undertake each of the preceding in a manner consistent with environmental protection and conservation;	5	Strong, seemingly binding language undertaking to protect investment in a way consistent with environmental protection (5)	
New Zealand Taiwan ECA (2013)	RECOGNISING their right to regulate, and to introduce new regulations on the supply of goods, services and investment in order to meet government policy objectives;	5	Recognises the right to regulate in a broad manner (5)	
Guatemala Peru FTA (2011)	PRESERVAR su capacidad para salvaguardar el bienestar público;[750]	1	Recognises the parties' right to safeguard public welfare. This seems to mean via the right to regulate but public welfare could also be served by protecting investment so it is unclear (1)	
Korea Peru FTA (2010)	Resolve to: IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation and basic human and fundamental rights protection and promote sustainable development;	4	The parties resolve to protect the environment and promote sustainable development. Not as broad as other provisions (4)	
Costa Rica Singapore FTA (2010)	*Seeking* to implement this Agreement in a manner consistent with environmental protection and conservation, and sustainable development, have agreed…	2	Seeks to protect the environment and promote sustainable development. Not binding (2)	
Canada Panama FTA	Resolve to: Enhance and enforce environmental laws and regulations, and	5	Resolve to enhance environmental laws	(2) (3)

[750] "PRESERVE their ability to safeguard public welfare"

(2010)	strengthen their cooperation on environmental matters; Promote sustainable development; Preserve their flexibility to safeguard the public welfare;		Promote sustainable development Preserve their flexibility to safeguard the public welfare. The word "flexibility" means the right to regulate is contained in this provision	(3)
New Zealand Malaysia FTA (2009)	Aware that economic development, social development and environmental protection are components of sustainable development and that free trade agreements can play an important role in promoting sustainable development; have agreed…	1	"Aware" is not as strong as "recognising" and only acknowledges that investment can play a role in promoting sustainable development (1)	
China Peru FTA (2009)	Resolve to: RECOGNIZE that this Agreement should be implemented with a view toward raising the standard of living, creating new employment opportunities, reducing poverty and promoting sustainable development in a manner consistent with environmental protection and conservation; PROMOTE AND PRESERVE their ability to safeguard public welfare;	5	Recognises Agreement should be implemented in a manner consistent with environmental protection and conservation Recognises the parties' right to safeguard public welfare. This seems to mean via the right to regulate but public welfare could also be served by protecting investment so it is unclear	(4) (1)
AANZFTA (2009)	CONFIDENT that this Agreement establishing an ASEAN Australia-New Zealand Free Trade Area will strengthen economic partnerships, serve as an important building block towards regional economic integration and support sustainable economic development;	1	"Confident" is not as strong as "recognising". Supports sustainable economic development	
Japan Switzerland FTA (2009)	DETERMINED, in implementing this Agreement, to seek to preserve and protect the environment, to promote the optimal use of natural resources in accordance with the objective of	3	Commitment expressed to protecting the environment in line with sustainable development (3)	

	sustainable development and to adequately address the challenges of climate change; have agreed			
Canada Colombia FTA (2008)	Resolve to: Enhance and enforce environmental laws and regulations, and strengthen their cooperation on environmental matters; Promote sustainable development; Preserve their flexibility to safeguard the public welfare;	5	Resolve to enhance environmental laws Promote sustainable development Preserve their flexibility to safeguard the public welfare. The word "flexibility" means the right to regulate is contained in this provision	(2) (3) (3)
Australia Chile FTA (2008)	IMPLEMENT this Agreement in a manner consistent with sustainable development and environmental protection and conservation;	4	Recognises Agreement should be implemented in a manner consistent with sustainable development, environmental protection and conservation (4)	
Malaysia Pakistan FTA (2007)	MINDFUL of the need to uphold the their rights to regulate in order to meet national policy objectives;	1	"Mindful of" is not as strong as "recognising". Right to regulate is mentioned, but language not binding (1)	
KORUS (2007)	Desiring to strengthen the development and enforcement of labor and environmental laws and policies, promote basic workers' rights and sustainable development, and implement this Agreement in a manner consistent with environmental protection and conservation;	3	"Desiring" is not as strong as "recognising". Recognises Agreement should be implemented in a manner consistent with environmental protection and conservation (3)	
US Panama TPA (2007)	Resolve to: IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters; PROTECT and preserve the environment and enhance the means for doing so, including through the conservation of	5	Resolves to implement in manner consistent with environmental protection Resolves to protect the environment Preserve their flexibility to safeguard the public welfare. The word "flexibility" means the right to	(2) (1) (3)

	natural resources in their respective territories; PRESERVE their flexibility to safeguard the public welfare		regulate is contained in this provision	
Brunei Japan EPA (2007)	Recognising that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development and that the economic partnership can play an important role in promoting sustainable development;	2	Recognises that environmental protection and economic development are interdependent. Only recognises that investment can play a role in promoting sustainable development (2)	
Chile Japan EPA (2007)	Convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable development and that the strategic economic partnership can play an important role in promoting sustainable development;	1	"Convinced" is not as strong as "recognising". Only recognises that economic partnership can play a role in promoting sustainable development (1)	
Colombia US FTA (2006)	Resolve to: IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters; PRESERVE their ability to safeguard the public welfare;	5	Resolves to implement in manner consistent with environmental protection, conservation and sustainable manner Recognises the parties' right to safeguard public welfare. This seems to mean via the right to regulate but public welfare could also be served by protecting investment so it is unclear	(4) (1)
China Pakistan (2006)	Recognizing that this Agreement should be implemented with a view toward raising the standard of living, creating new job opportunities, and promoting sustainable development in a manner consistent with environmental protection and	4	Recognises Agreement should be implement in a way that promotes sustainable development and protects the environment (4)	

	conservation;			
Chile Peru (2006)	Emprender todo lo anterior de manera congruente con la protección y la conservación del medioambiente:[751]	2	Undertakes to protect investment in a way that is consistent with the protection and conservation of the environment. Unspecific as to the level of protection to be given to the environment (2)	
Taiwan Nicaragua (2006)	Resolve to: PROTECT and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories; PRESERVE their flexibility to safeguard the public welfare;	5	Resolve to protect and preserve the environment Preserve their flexibility to safeguard the public welfare. The word "flexibility" means the right to regulate is contained in this provision	(3) (3)
Peru US (2006)	Resolve to: IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters; PRESERVE their ability to safeguard the public welfare;	5	Resolves to implement Agreement in a way that protects the environment and promotes sustainable development Recognises the parties' right to safeguard public welfare. This seems to mean via the right to regulate but public welfare could also be served by protecting investment so it is unclear	(4) (1)
Oman US FTA (2006)	Desiring to strengthen the development and enforcement of environmental laws and policies, promote sustainable development, and implement this Agreement in a manner consistent with the objectives of environmental protection and conservation;	2	"Desiring" is not as strong as "recognising". References promoting sustainable development and being consistent with environmental protection and conservation (2)	

[751] Undertake to complete all of the above in a manner consistent with the protection and conservation of the environment;

Korea EFTA (2005)	RECOGNISING that trade liberalisation should allow for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment;	3	Recognises liberalisation should be in accordance with the objective of sustainable development and environmental protection (3)	
Guatemala Taiwan (2005)	PROMOVER el desarrollo económico de manera congruente con la protección y conservación del medio ambiente, así como con el desarrollo sostenible; PRESERVAR su capacidad para salvaguardar el bienestar público;[752]	5	Promotes economic development in a way that is consistent with environmental protection and sustainable development Recognises the parties' right to safeguard public welfare. This seems to mean via the right to regulate but public welfare could also be served by protecting investment so it is unclear	(4) (1)
India Singapore Comprehensive Economic Cooperation Agreement (2005)	REAFFIRMING their right to pursue economic philosophies suited to their development goals and their right to regulate activities to realise their national policy objectives; RECOGNISING that economic and trade liberalisation should allow for the optimal use of natural resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment;	5	Reaffirms the right to regulate strongly Recognises that liberalisation should be in accordance with sustainable development	(4) (3)
New Zealand EPA (2005)	*Affirming* the rights of their governments to regulate in order to meet national policy objectives; 5 *Aware* that closer social and political relationships and economic partnerships can play an important role in promoting sustainable development; 1	5	Affirms the right to regulate strongly Acknowledges that economic partnerships can play a role, although "aware" is not as strong as "recognising"	(4) (1)

[752] "Promote economic development in a manner consistent with the protection and conservation of the environment and sustainable development; PRESERVE their ability to safeguard the public welfare"

Annex 3: The Success Rate of General Exceptions Defences at the WTO

Annex to Chapter 6: Treaty Exceptions

Cases where Article XX invoked by defendant	**Article XX defence rejected by Appellate Body**
US – Gasoline (1996)	X
Canada – Periodicals (1997)	X
US – Shrimps I (1998)	X
Korea – Beef (2000)	X
EC – Asbestos (2001)	
US – Shrimp II (2001)	
EC – Tariff Preferences (2004)	X
Canada – Wheat Exports (2004)	X
Dominican Republic – Cigarettes (2005)	X
US – Gambling (2005)	X
Mexico – Soft Drinks (2006)	X
Brazil – Tyres (2007)	X
US – Custom Bond (2008)	X
US – Shrimp I (2008)	X
China – Auto Parts (2008)	X
China – Audiovisual Services (2009)	X
Thailand – Cigarettes (2011)	X
China – Raw Materials (2011)	X
EC – Seals (2014)	X
China – Rare Earths (2014)	X

The 20 cases considered here constitute a relatively small sample. If Panel reports which are not appealed to the Appellate Body are included, a similar trend of non-compliance can be observed. In *Tuna – Dolphin* (1991) the Article XX exception was of course rejected by the panel. In *Tuna – Dolphin II* (2012) the case was taken under the Technical Barriers to Trade Agreement

Annex 4: Defences under WTO General Exceptions Provisions

Annex to Chapter 6- Treaty Exceptions

Falling Foul of Article XX

In this section, the reason why defendants have unsuccessfully invoked GATT Article XX during WTO dispute settlement is considered.

Article XX(a)

US – Gambling (2005)[753]

A US measure affecting the cross-border supply of gambling and betting services was contested in this case. The ban was defended under GATS Article XIV(a) and was found to be designed to protect public morals by both the panel and Appellate Body. Unlike the panel, the AB considered the measure was "necessary" as the US had made a prima facie case of necessity and Antigua had failed to give a reasonably available alternative measure.[754] The fact that the US had not entered into consultations did not render the measure invalid. On appeal, it was found that the US prohibition was only applied to foreign and not to domestic service suppliers and so it fell foul of Article XIV's chapeau.

China – Audiovisual Services (2009)[755]

A Chinese measure seeking to reserve the importation of various forms of media solely for certain Chinese State-owned enterprises was contested in this case. The ban was defended under Article XX(a). The panel and AB determined that because there was at least one other reasonably available alternative, China's measures were not "necessary" to protect public morals. The AB did not complete an analysis of the chapeau.

EC – Seals (2014)[756]

The EU seal regime,[757] which sought to ban the importation of seal products into the EU, was contested in this case. Norway alleged certain exceptions to the ban were discriminatory and favoured products from the EU certain third countries.
The EU defended the ban under Article XX(a) and as expected, a ban on seal products came under the traditionally broad scope of moral questions. Proving it to be "necessary" to protect public morals was more difficult but the EU succeeded before the panel and at appeal.
The AB corrected the panel's finding that applying the same legal test as was applied to Article 2.1 of TBT Agreement was appropriate in analysing Article XX's chapeau. Ultimately however it found that the EU had not demonstrated that the EU seal regime complied with the chapeau and thus could not be justified under Article XX. The EU had not made "comparable efforts" to allow Canadian Inuits to qualify for the IC exception compared to the efforts it had made in relation to Greenlandic Inuits. Furthermore, to comply with the Regulation, a certificate from a recognised body is necessary. Such a body had been approved in Greenland but not in Canada.

[753] WTO doc. WT/DS285/AB/R, Appellate Body Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 7 April 2005.
[754] See para 336.
[755] WTO doc. WT/DS363/AB/R, Appellate Body Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, 21 December 2009.
[756] WTO doc. WT/DS401/AB/R, supra, n. 4, p. 3.
[757] Regulation 1007/2009 of 16 September 2009 on trade in seal products, OJ 2009 L 286/36.

The AB deemed this burdensome.
It has been noted[758] that the EU can comply by removing the Inuit exception, which would be more trade restrictive and would not necessarily benefit Canada or its Inuit population.

Article XX(b) and (g)

US – Gasoline (1996)[759]

This case concerned a US measure seeking to regulate the effects of gasoline on clean air. The measure was contested as it treated imported gasoline less favourably but the US invoked Article XX(g) in its defence. The measure was deemed to be provisionally justifiable and "related to" conserving exhaustible natural resources. It fell foul of the chapeau however, as it was applied in a way that discriminated between domestic and imported products.

EC – Tariff Preferences (2004)[760]

An EC measure seeking to combat drug production and trafficking was contested in this case. India deemed the treatment received by 12 countries to be preferential and that its "design, structure and architecture" showed no relationship between the objectives stated and the Drug Arrangements. The ban was defended under Article XX(b) but the EC failed to show the measure was "necessary" for the protection of human life or health or that it complied with the chapeau. The EC did not appeal on this point.

Brazil – Retreaded Tyres (2007)[761]

This case involved a measure banning the import of retreaded tyres for environmental and health reasons. The EC contested it under GATT Article XI while Brazil claimed Article XX(b) as a defence. When considering Article XX(b), the panel found that none of the less trade-restrictive alternatives suggested by the European Communities constituted "reasonably available" alternatives to the ban. The measure passed the necessity test at first instance and appeal as its objective was deemed to outweigh its trade-restrictiveness.[762] The measure was also deemed appropriate to achieving its objectives. The Appellate Body acknowledged the difficulty of isolating the contribution of a single policy towards an overarching goal such as tackling climate change. It recognised that the evaluation of such policies can only be done in the long term in some instances.
When the chapeau of Article XX was considered, it was found that the ban on imported tyres didn't extend to Mercosur Members. In light of this exemption, the

[758] Catti de Gasperi (2015), p. 17.
[759] WTO doc. WT/DS2/AB/R, Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, 29 April 1996.
[760] WTO doc. WT/DS246/AB/R, Appellate Body Report, European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, 7 April 2004.
[761] WTO doc. WT/DS332/AB/R, supra, n. 11, p. 6.
[762] Ibid., para 151.

ban was deemed arbitrary and to infringe Article XX's chapeau. The AB found that whether or not discrimination is arbitrary depends on a measure's rational connection to its objective or whether it would go against that objective.[763] As an exemption for Mercosur tyres would "go against the objective that was provisionally found to justify a measure," the measure was deemed arbitrary. Once again, it is not the measure itself that infringes but the inconsistent manner of its application.

China – Raw Materials (2011)[764]

Chinese export restraints on materials such as magnesium and zinc were at issue in this case. China claimed it could derogate from its Accession Protocol obligations based on Article XX exceptions in furtherance of its aim of conserving an exhaustible natural resource. The panel and AB found that there was no basis for appending GATT Article XX (b) and (g) to the Accession Protocol. Finally, the AB underlined the mutually exclusive natures of Articles XI and XX of GATT.

China – Rare Earths (2014)[765]

Like the above case, this case relates to restrictions on the export of raw materials (in this case tungsten and molybdenum). China sought to defend its measure under Article XX(b) saying it was "necessary to protect human, animal or plant life or health". The US argued that the measures were not necessary for this purpose but more importantly that Article XX was inapplicable to China's Accession Protocol. One panelist took the view that the Article XX exceptions are available to all trade in goods except where this is stated to not be the case. This view seems controversial given the legal maelstrom that would result from its application. Considering Article XX(b) on an arguendo basis, the panel found the measure to fail the necessity requirement.
The panel found China's export quotas did not amount to conservation within its traditional understanding of Article XX(g). China's interpretation of conservation was tantamount to Chinese control of the international market.
China's appeal primarily sought clarification of the relationship between its Accession Protocol and the WTO Agreements.
The AB found that the panel was correct in focusing on the measures' "design and structure" rather than on their effects on the marketplace.

The (Only) Two Successful Claims Under Article XX

US – Shrimp II (2001)[766]

The initial US – Shrimp I (1998)[767] case was unsuccessful in invoking Article XX

[763] Ibid., para 227.
[764] WTO doc. WT/DS394/AB/R, Appellate Body Report, China—Measures Related to the Exportation of Various Raw Materials, 30 January 2012.
[765] WTO doc. WT/DS431/AB/R, supra, n. 1, p. 3.
[766] WTO doc. WT/DS58/AB/R, Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, 22 October 2001.
[767] WTO doc. WT/DS58/AB/R, supra, n. 7.

and so analysis is given before turning to this second dispute, which concerned its implementation. A joint complaint was brought in this case regarding shrimp imports and their impact upon sea turtles, which were considered an endangered species. The Act required trawlers to use turtle excluder devices (TEDs) when in waters containing such turtles. Imports were also prohibited[768] unless it could be shown that the importing nation had a similar regulatory programme and turtle incidental take-rate to the US or that the environment didn't contain such risks. This had a "coercive" effect obliging other Members to enforce the same measures as the US to ensure compliance. The measure also constituted "arbitrary" discrimination because of the inflexibility in its application.
The US defended its measure under Article XX(g) but was found to have discriminated in applying the measure as advantages were accorded to Caribbean countries that weren't accorded to the complainants thus violating Article XX's chapeau. The US had failed to engage in negotiations towards an international agreement for the conservation of sea turtles with the complainants and was instructed to do so.
In US – Shrimp II (2001), the US measure was now deemed to satisfy the chapeau. The US had undertaken negotiations in "good faith" and as the conclusion of these negotiations wasn't a condition of the original report, the implementation panel and Appellate Body deemed the US compliant.
Regarding the "arbitrary" nature of the discrimination, the US amended the measure so that programmes were required to be "comparable" rather than "essentially the same". All exporting countries had been provided with "similar opportunities" and as "comparable

EC – Asbestos (2001)[769]

In EC – Asbestos, the EU successfully defended its ban on asbestos under Article XX(b) and both the panel and Appellate Body upheld its claim that no reasonable "alternative measure" could be adopted. This shows that WTO rules can be used to challenge domestic measures protecting citizens against the most dangerous of materials. France placed a ban on both imported and domestically produced asbestos and so the measure complied with Article XX's chapeau. Canada claimed that the measures used by France were more trade-restrictive than necessary and that if used in a safe manner, chrysotile (the type of asbestos it produces) does not pose health risks.[770] Thus chrysotile was "like" other construction products and should be protected under the national treatment clause.
The panel concluded that France had violated Article III.4 of the GATT and that chrysotile and non-asbestos based construction products were like products. In their view, to consider health risks under Article III.4 was "not appropriate" and would be to "nullify" the effect of Article XX(b).[771] This approach would guarantee market access subject to the defendant being able to find a non-protectionist justification

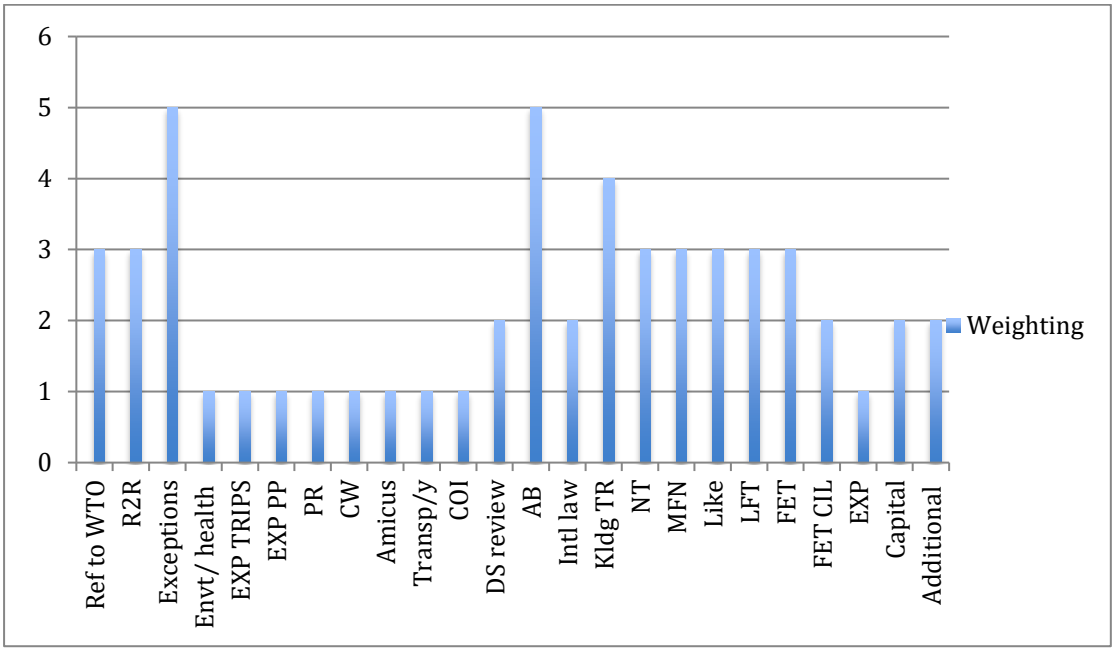
[768] US Public Law 101–102 (1989), section 609.
[769] WTO doc. WT/DS135/AB/R, supra, n. 19, p. 8.
[770] Chrysotile is considered a human carcinogen by the WHO's cancer agency (IARC), as per its 1998 Monograph: 'WHO IARC Monographs on the Evaluation of Carcinogenic Risks to Humans Overall: Evaluations of Carcinogenicity: an Updating of IARC Monographs,' Volumes 1 to 42, Supplement 7 (1998).
[771] WTO doc. WT/DS135/R, Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, 18 September 2000, paras 3.450 and 3.512 for the respective quotations.

under Article XX.
The Appellate Body reminded the panel in its report that Articles III and XX "are distinct and independent provisions" and so a measure may be deemed unjustifiable for public health reasons under both.[772] Considerations of health reasons under Article III do not deprive Article XX(b) of its *effet utile* as different inquiries are made under the different Articles.

Annex 5: Attributing Weightings to the 24 provisions

Annex to Chapter 2: An empirical analysis of levels of engagement in PTIAs and BITs

Table 1: the weighting attributed to each of the 24 provisions considered as part of this study



[772] WTO doc. WT/DS135/AB/R, supra, n. 19, para 115.

Annex 6: Coding IIA provisions

Annex to Chapter 2: An empirical analysis of levels of engagement in PTIAs and BITs

	Host State Flexibility								
PTIAs 2005-15: Area covered v. legally enforceable	Preamble Reference to WTO law	Preamble & right to regulate	Exceptions- explicit 1, implicit 2, thin 3 arbitrary 4, PR 5	Article on environmental/ health	Expropriation referring to TRIPS	Expropriation reference to public	Performance requirements reference to	Capital withdrawal safeguard	Total provisions
Korea Vietnam FTA '15		0	1						5
Australia China FTA '15		5	2		0	0	0		3
China Korea FTA '15		1	1 GATT XXI mutatis						5
Eurasia Vietnam FTA '15		0	1					2	4
Pacific Alliance '14 (Chile Col Mex Peru)		3	5						5.25
Canada Korea FTA '14		5	2						6
Canada Honduras FTA '13		5	2					2	7
New Zealand Taiwan ECA '13		5	1						7
Central America Mexico '11		*	5						6.25
Guatemala Peru FTA '11		1	5						5.25
Korea Peru FTA '10		4	1+5						7
Costa Rica Singapore FTA '10		2	1+5						6
Canada Panama FTA '10		5	2						6
New Zealand Malaysia FTA '09		1	1						7
China Peru FTA '09		5	2 (XXI)						2
AANZFTA '09		1	2 (XXI) + 2 national treasures/ creativ						5
Japan Switzerland FTA '09		3	1 (XX + XXI mutandis) + 5						5
Canada Colombia FTA '08		5	2						5
Australia Chile FTA '08		4	2 (XXI)						5
Peru Singapore FTA '08		0	1						6
Malaysia Pakistan FTA '07		1	1						6
Indonesia Japan EPA '07		0	1 (XIV + XX + XXI mutandis)						4
Korea US '07		3	2 (XXI) + 5						4.25
Panama US '07		5	2 (XXI) + 5						6.25
Brunei Japan EPA '07		2	1 (XIV + XX + XXI mutandis)						6
Japan Thailand '07		0	1 (XIV + XX + XXI mutandis)						6
Chile Japan EPA '07		1	1 (XIV + XX + XXI mutandis)						7
Colombia US FTA '06		5	2 (XXI) + 5						6.25
China Pakistan '06 ('07)		4	0						2
Chile Peru '06		2	2 (XXI) + 5						6.25
Taiwan Nicaragua '06		5	1						8
Peru US '06 ('09)		5	2 (XXI) + 5						6.25

Singapore Panama '06		0	1						6
Oman US FTA '06		2	2 (XXI) + 5						7
Korea EFTA '05		3	2						6
Japan Malay '05		0	1 (XIV + XX + XXI mutandis)						5
Guatemala Taiwan '05		5	1 (XX) + 5						5
Korea Singapore '05		0	1 (XIV) + 5						6
India Singapore '05		5	2 (GEs within Invst CH)						7
NZ Thailand EPA '05		5	2 (GE listed relating to INSVT)						4
Number of provisions	39	21.6 (31)	29.5 (36)	30	29	21	26	16	
Average no. of provisions									5.55

Number of provisions	0	8.6 (18)	20.66 (30)	14	10	10	8	16	
BITS 2005-15: Area covered v. legally enforceable	Preamble Reference to WTO law (1)/	Right to regulate reference in Preamble to Agt/	General Exceptions- explicit 1, implicit 2, thin 3 necessity +	Article on environmental/ health	Expropriation referring to TRIPS	Expropriation reference to public	Performance requirements reference to	Captial withdrawal safeguard	Total provisions
Japan Oman '15		2	2 (XXI) + 4	1					3.33
Denmark Macedone FYR '15		0	0						0
Canada Burkina Faso '15		3	2 (GEs) + 2 (XXI)	1				1	7
Cambodia Russia '15		0	0						0
Canada Cote d'Ivoire '14		3	2 (GEs) + 2 (XXI)						4
Japan Kazakhstan '14		2	2 (XXI) + 4						2.33
Colombia Turkey BIT '14 no ctrl f		1	2 (GEs) + 2 (XXI)						6
Russia Azerbaijan '14		0	0						0
Japan Myanmar BIT '13		2	2 (GEs) + 2 (XXI)						4
India UAE '13		0	4						0.33
Guatemala Russia '13		0	0						0
Colombia Singapore '13		0	2 (GEs) + 2 (XXI)						4
Bahrain Mexico '12		0	0						0
Canada China BIT '12		3	2 (GEs) + 2 (XXI)						6
Iraq Japan BIT '12		2	4						3.33
Kazakhstan Macedonia FYR '12		0	der, not self judging)						3

Canada Kuwait BIT '11	3	2 (GEs) + 2 (XXI)					6
Colombia Japan BIT '11	2	5 + 2 (GEs) + 2 (XXI)					6
Kenya Slovakia '11	2	4 + 3 (last part of A14)					3
India Nepal '11	0	neither modelled on					1
Switzerland Trinidad '10	1	4 (Art 4)					1.33
Canada Slovakia '10	0	2 (GEs) + 2 (XXI)				2	3
Austria Tajikistan '10	3	0					3
Congo Germany '10	0	4 (Art 2.3)					0.33
Germany Pakistan '09	0	4 (Art 2.3)					0.33
St Vincent & the Grenadines Taiwan BIT '0	0	2 (XXI) + 2 (GEs with self judging language)					1
Ethiopia UK '09	0	3 (A7.1) & 4 (A2.2)					2
Czech Saudi Arabia '09	0	3 (A5.2) 4 (A2.2)					1
Congo Spain '08	2	4 (A3.2)					1.33
BLEU Oman '08	0	0					1
Japan Peru '08	2	2 (GEs) + 2 (XXI)	1				4
Libya Spain '07	2	ouldn't find anything					2.33
Djibouti France '07	0	0					0
Lux Korea '07	5	4 (Art 2.3)					1.33
India Jordan '06	0	Security clause but n .					0
Canada Peru '06	3	2 (GEs) + 2 (XXI)	1				6
Switzerland Kenya '06	0	4 (A4.1)					0.33
Jordan Thailand '05	0	4 (A3.2)					0.33
Guyana Switzerland '05	0	4 (A4.1)					0.33
China Portugal '05	0	4 (Art 2.3)					1.33
Average no. of provisions							2.2405

	ISDS provisions								
PTIAs 2005-15: Area covered v.	Amicus curiae submissions	Transparency proceedings	Conflict of interest for arbitrators *not being a	Provision for review of DS (1) Agreement in	Provision contemplating appellate	Reference to 'applicable rules of international	Reference to arbitrators knowledge of law:	Binding Interperp/n	Total Provisions
Korea Vietnam FTA '15			1				1 & 2		2
Australia China FTA '15									5
China Korea FTA '15				2					1
Eurasia Vietnam FTA '15				2					1
Pacific Alliance '14 (Chile Col Mex Peru)									5
Canada Korea FTA '14									5
Canada Honduras FTA '13				1 & 2					6
New Zealand Taiwan ECA '13									2
Central America Mexico '11				2					4
Guatemala Peru FTA '11				2			2		6
Korea Peru FTA '10									0
Costa Rica Singapore FTA '10									4
Canada Panama FTA '10									3
New Zealand Malaysia FTA '09									2
China Peru FTA '09									0
AANZFTA '09				1			1 & 2		4
Japan Switzerland FTA '09									1
Canada Colombia FTA '08				1					5
Australia Chile FTA '08			1						5
Peru Singapore FTA '08									0
Malaysia Pakistan FTA '07									1
Indonesia Japan EPA '07									2
Korea US '07									4
Panama US '07									5
Brunei Japan EPA '07									0
Japan Thailand '07			2						2
Chile Japan EPA '07									1
Colombia US FTA '06									5
China Pakistan '06 ('07)									5
Chile Peru '06				2					5
Taiwan Nicaragua '06				1&2					5
Peru US '06 ('09)									5

Singapore Panama '06				2					2
Oman US FTA '06				2					5
Korea EFTA '05				2					1
Japan Malay '05				2					2
Guatemala Taiwan '05				2					2
Korea Singapore '05				2					2
India Singapore '05				2					1
NZ Thailand EPA '05				2					2
No. provisions	19	19	12	29	11	19	7		
Average no.									2.95

No. provisions	5	5	6	24	0	17	7		39
BITS 2005-15: Area covered v. legally	Amicus curiae submissions	Transparency proceedings	Conflict of interest for arbitrators *not being a	Provision for review of DS (1) Agreement in	Provision contemplating appelate	Reference to 'applicable rules of international	Reference to arbitrators knowledge of	Binding Interpretation	Total Provisions
Japan Oman '15				2					2
Denmark Macedone FYR '15				2					2
Canada Burkina Faso '15									6
Cambodia Russia '15									0
Canada Cote d'Ivoire '14			1	2					4
Japan Kazakhstan '14									2
Colombia Turkey BIT '14 no ctrl f			1	2			2		3
Russia Azerbaijan '14				2					1
Japan Myanmar BIT '13									2
India UAE '13				2					2
Guatemala Russia '13				2					1
Colombia Singapore '13				2			1		3
Bahrain Mexico '12				2					2
Canada China BIT '12			1						5
Iraq Japan BIT '12				2					1
Kazakhstan Macedonia FYR '12				2					1

	Investment Protection Provisions										
PTIAs 2005-15: Area covered v.	NT	MFN	Like circumstances ND 1,	Less favourable treatment	FET	FET ref to int'l law/ CIL	Expropriation	Free movement of capital	Additional shared norm e.g.	Total Provisions	Overall Provisions
Korea Vietnam FTA '15									Ref to full res	9	15
Australia China FTA '15					0	0	0	0		4	11
China Korea FTA '15									Term party d	9	15
Eurasia Vietnam FTA '15										8	12
Pacific Alliance '14 (Chile Col Mex Peru)									Non-conform	9	19
Canada Korea FTA '14										7	17
Canada Honduras FTA '13									Exception wh	9	21
New Zealand Taiwan ECA '13										7	14
Central America Mexico '11										8	18
Guatemala Peru FTA '11									Non-conform	9	20
Korea Peru FTA '10										7	13
Costa Rica Singapore FTA '10										7	13
Canada Panama FTA '10										7	14
New Zealand Malaysia FTA '09										7	15
China Peru FTA '09										7	8
AANZFTA '09		0								7	15
Japan Switzerland FTA '09										6	11
Canada Colombia FTA '08										7	16
Australia Chile FTA '08										8	16
Peru Singapore FTA '08										8	13
Malaysia Pakistan FTA '07									GATS	7	12
Indonesia Japan EPA '07										7	12
Korea US '07										8	16
Panama US '07										8	19
Brunei Japan EPA '07									GATS	9	14
Japan Thailand '07										8	15
Chile Japan EPA '07									ND measures	9	16
Colombia US FTA '06										8	19
China Pakistan '06 ('07)			0						64.4: cannot	7	13
Chile Peru '06										8	19
Taiwan Nicaragua '06										8	20
Peru US '06 ('09)										8	19

Singapore Panama '06									ND measures	9	16
Oman US FTA '06										8	19
Korea EFTA '05			2 (General Exceptions)							7	13
Japan Malay '05									ND measures	8	14
Guatemala Taiwan '05										8	13
Korea Singapore '05		0							No derogatio	8	15
India Singapore '05		2			0	0			Security exce	6	14
NZ Thailand EPA '05					0	0			Security exce	7	12
No. provisions	40	37	39	40	37	31	39	29	14		
Average no.										7.65	15.15

No. provisions	39	40	16	40	39	17	39	38	14		
BITS 2005-15: Area covered v. legally	NT	MFN	Like circumstances ND 1,	Less favourable treatment	FET	FET ref to int'l law/ CIL	Expropriation	Free movement of capital	Additional shared norm e.g.	Total Provisions	Overall Provisions
Japan Oman '15									Security exce	9	14
Denmark Macedone FYR '15										6	7
Canada Burkina Faso '15										8	20
Cambodia Russia '15									3.5. Not com	7	6
Canada Cote d'Ivoire '14										7	13
Japan Kazakhstan '14										6	10
Colombia Turkey BIT '14 no ctrl f									15. Training f	9	17
Russia Azerbaijan '14									3.5. Not com	7	7
Japan Myanmar BIT '13									Temporary S	8	13
India UAE '13										6	8
Guatemala Russia '13									3.5. Not com	7	7
Colombia Singapore '13									Security exce	9	14
Bahrain Mexico '12										7	8
Canada China BIT '12									Reaffirm TRI	8	18
Iraq Japan BIT '12										7	11
Kazakhstan Macedonia FYR '12										6	9

Canada Kuwait BIT '11						Art IX waiver	9	18
Colombia Japan BIT '11							8	16
Kenya Slovakia '11							6	9
India Nepal '11							6	7
Switzerland Trinidad '10							6	7
Canada Slovakia '10						Art IX waiver	9	11
Austria Tajikistan '10							5	8
Congo Germany '10							6	6
Germany Pakistan '09						Ref to full re:	8	7
St Vincent & the Grenadines Taiwan BIT '09	2 (est)	nt & est					8	9
Ethiopia UK '09							6	7
Czech Saudi Arabia '09							6	7
Congo Spain '08						Ref to full re:	8	11
BLEU Oman '08						Any more fa\	7	7
Japan Peru '08						Ref to full re:	9	14
Libya Spain '07						8.3. Nothing	7	11
Djibouti France '07							6	5
Lux Korea '07							6	7
India Jordan '06							6	5
Canada Peru '06						ND measure:	9	20
Switzerland Kenya '06							6	6
Jordan Thailand '05							7	9
Guyana Switzerland '05							6	6
China Portugal '05							6	7
Average no.							7.075	10.05