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The Merging of International Trade and Investment Law

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"The whole is greater than the sum of its parts."
Aristotle

This Article presents an account of how and why international trade and international investment law are merging. It describes this phenomenon as resulting from the dynamics of the treaty-making process and the strategies employed by litigation parties at the time of the enforcement of treaty rules. The Article makes two separate, but interrelated claims: first, it argues that the combined use of trade and investment remedies allows litigants to go beyond seeking compliance and compensation, the two traditional types of relief available in international economic law. Like other areas of public law litigation, the strategic parallel, sequential or combined use of legal processes may be used to destabilize governments' regulatory activity, to shape the interpretation of rules outside an ordinary process, or to relitigate issues settled in one regime through the venue of another. Second, it argues that the merger at issue creates specific, yet not insurmountable, challenges for the development of international law and sketches the main legal tools available to address the most pressing matters. This analysis, based on four case studies, is a timely intervention given the current negotiations of the two most significant commercial

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agreements since the creation of the World Trade Organization. The Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership negotiations raise important questions about the design of international governance as well as the future of research in the field of international economic law.

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INTRODUCTION

In June 2013, President Obama announced the start of negotiations for a "far-reaching" Transatlantic Trade and Investment Partnership: "The U.S.-E.U. relationship is the largest in the world—it makes up almost half of global G.D.P.," Obama said regarding this potential deal with the current twenty-eight

European Union members.[1] In addition, the United States and eleven other countries bordering the Pacific Ocean are engaged in another monumental commercial negotiation.[2] The Trans-Pacific Partnership will set rules to regulate about one-third of global trade and investment. Combined, the two transoceanic deals promise to push *minilateralism*—or the rise of regional trade agreements (RTAs) as an alternative to global negotiations—further than ever before, undermining the World Trade Organization (WTO), the cornerstone of trade governance.[3]

The rise of minilateralism raises important questions about the relevance of the WTO and the design of international economic governance. With their limited number of participants, RTAs are easier to negotiate than advancing new agreements at the WTO—a quasi-universal organization that works on a consensus basis. RTAs also serve political goals and may better fit the new realities of global business, with its multifaceted supply chains and the growing importance of trade in services. Albeit permitted under the WTO, RTAs are by nature exclusionary, leaving countries outside their purview. RTAs lead to trade and regulatory divergence, resulting in the segmentation of markets and different rules across regions. Further, they increase jurisdictional conflicts between the bodies in charge of the interpretation of rules.

Consider these examples: Brazil recently filed a complaint before the WTO after an adverse ruling from a tribunal under MERCOSUR, a South American RTA, in relation to antidumping measures by Argentina on imports of poultry. The WTO exercised jurisdiction, despite both a prior ruling on the same matter and Argentina's objections.[4] In another case, Mexico maintained, fruitlessly,

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1. Stephen Castle & Jackie Calmes, *U.S. and Europe to Start Ambitious but Delicate Trade Talks*, N.Y. TIMES, June 17, 2013, http://www.nytimes.com/2013/06/18/business/global/us-europe-trade-talks-to-start-in-july.html?_r=0. *See also* Press Release, The White House Office of the Press Secretary, U.S., EU Announce Decision to Launch Negotiations on a Transatlantic Trade and Investment Partnership (Feb. 13, 2013), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2013/february/statement-US-EU-Presidents; Final Report of the U.S.-EU High Level Working Group on Jobs and Growth (Feb. 11, 2013), *available at* http://www.ustr.gov/sites/default/files/02132013%20FINAL%20HLWG%20REPORT.pdf.

2. Since 2008, the Trans-Pacific Partnership (TPP) agreement has been under negotiation by Australia, Brunei, Chile, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Ian E. Fergusson & Bruce Vaughn, Cong. Research Serv., R40502, The Trans-Pacific Partnership Agreement (2011), *available at* http://www.fas.org/sgp/crs/row/R40502.pdf.

3. Report of the Panel on Defining the Future of Trade, The Future of Trade: The Challenges of Convergence (April 2013), *available at* http://www.wto.org/english/thewto_e/dg_e/dft_panel_e/future_of_trade_report_e.pdf. Marrakesh Agreement Establishing The World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement or WTO Agreement]. For an excellent analysis of how global multilateralism is changing as a result of the new tools use to liberalize markets, see CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT (2014).

4. Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil,* WT/DS241/R (May 19, 2003). *See also* Olivos Protocol for the Settlement of Controversies in MERCOSUR art. 1(2), Feb. 2, 2002, 2251 U.N.T.S. 243 [hereinafter MERCOSUR].

that the WTO should not exercise jurisdiction over a dispute with the United States concerning sweeteners, arguing that the North American Free Trade Agreement (NAFTA) was the more appropriate forum.[5] More recently, the Dominican Republic was accused of relying on WTO agreements to increase tariffs on imports of bags and fabrics and circumvent its commitments under the Dominican-Republic-Central-America Free Trade Agreement (DR-CAFTA).[6] In all these cases, the panels formed to decide the disputes under the WTO faced a similar question: Who should decide, the WTO or the dispute settlement body under the RTA?

To add another layer of complexity, regulatory structures dealing with commerce have not kept pace with the new realities of global business. Traditional international trade meant selling goods made in one nation to another nation; now trade is mostly about making things internationally and selling them everywhere.[7] Traditional international investment meant establishing a factory abroad to supply a market or acquiring the rights of a concession to extract, exploit, and export raw materials. Today, corporations develop products in multiple countries and invest and trade globally to supply their subsidiaries.[8] Yet the two legal components of today's global business—trade regulation and foreign direct investment (FDI) protection—continue to be addressed by different regimes.[9]

The increasingly evident inseparability or, as referred by some legal scholars, *convergence* of trade and investment has specific effects on the relationship between different bodies of law.[10] It may increase situations of concurrent or simultaneous jurisdiction between trade and investment tribunals when States and private interests attempt to enforce rules; pressure parties

5. The WTO also exercised jurisdiction in this matter. Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005). *See also* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA].

6. Panel Report, *Dominican Republic—Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415-8/R (Jan. 31, 2012). *See also* Dominican Republic-Central America-United States Free Trade Agreement, Oct. 31, 2005, T.I.A.S. 05-1031.

7. *See* Gary Gereffi & Joonkoo Lee, *Why the World Suddenly Cares About Global Supply Chains*, J. OF SUPPLY CHAIN MGMT., July 2012, at 24 (explaining reasons for the increasing importance of the analysis of global value chains literature in international economic development institutions). *See also* LORENZO GUI, RESHAPING THE BOUNDARIES OF THE FIRM: GLOBAL VALUE CHAINS AND LEAD FIRM STRATEGIES 29–55 (2010) (explaining the new geography of value creation and capture are prompting the reconceptualization of global production and trade).

8. *See generally* R. Z. Lawrence, *Regionalism, Multilateralism and Deeper Integration: Changing Paradigms for Developing Countries*, *in* TRADE RULES IN THE MAKING: CHALLENGES IN REGIONAL AND MULTILATERAL NEGOTIATIONS 23 (Mendoza et al. eds., 1999).

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

10. *See* Tomer Broude, *Investment and Trade: The "Lottie and Lisa" of International Economic Law?*, Paper No. 10-11 INT'L LAW FORUM OF THE HEBREW UNIVERSITY OF JERUSALEM LAW FACULTY, 9 (2011). *See also* Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. INT'L L. 35, 55–60 (2013).

affected by government regulation to seek relief in different, often parallel fora; or provide more venues for parties to subsequently influence the development of law.[11] These consequences are evident in recent efforts on the part of five nations mobilized by tobacco producers to bring down Australia's restrictions of trademarks on tobacco products. In the ongoing cases before the WTO, these governments argue that an act adopted to decrease smoking limits the use of trademarks and thereby constitutes a breach of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).[12] At the same time, a subsidiary of one of the companies behind the claims before the WTO is using the arbitration mechanism under the Hong Kong-Australia bilateral investment treaty (BIT) to seek compensation for the same alleged violation of TRIPS.[13]

To ensure the goals of the two transoceanic deals, the negotiators of the treaties will need to resolve the matter of who will decide potential disputes. The authority will be entrusted to international dispute-settlement bodies, a sort of semipermanent or ad hoc authority with powers to decide specific legal issues and interpret treaty rules. These tribunals, often unsupervised by any superior entity, and whose decisions bind States and affect their citizens, will have the task of deciding important matters on a range of potential topics: are regulations requiring certain labeling on some products and not on others justified; do internet-use restrictions violate commitments regarding the free trade of services; or, are subsidies to clean technologies permissible under trade rules—just to list some examples.

The question is how should States respond to the rise of minilateralism and the intensification of trade and investment "convergence"? Will careful drafting of jurisdictional mandates or the inclusion of forum-selection clauses in new treaties suffice? Should the enforcement of trade and investment law be lumped together, within a single system? Should negotiators use "underride" clauses—treaty provisions establishing a hierarchy between adjudicatory bodies—giving prevalence to trade panels over investment tribunals or the other way around? Or should we get used to more conflicts when difficult issues interact across systems? The answers to these questions are not clear and promise to be a source of debate in current as well as future commercial negotiations.

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11. Joost Pauwelyn, *Dealing with the Increasing Complexity of Investment-Related Treaties: A Framework and Some Policy Guidelines*, INV. TREATY NEWS (Oct. 30, 2012), http://www.iisd.org/itn/2012/10/30/dealing-with-the-increasing-complexity-of-investment-related-treaties-a-framework-and-some-policy-guidelines/.

12. *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm (last visited Jan. 31, 2015).

13. Philip Morris Asia v. the Commonwealth of Australia, Philip Morris Asia Notice of Arbitration, ¶ 7.15–7.17 (Nov. 21, 2012), http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip%20Morris%20Asia%20Limited%20Notice%20of%20Arbitration%2021%20November%202011.pdf [hereinafter PM Asia Notice of Arbitration].

This Article is an effort to inform this debate. It describes how minilateralism and the convergence of trade and investment relate to each other and explores two major consequences of this evolving relation: First, how these two dynamics expand the interplay between economic treaties during the process of the enforcement of its rules. And, second, what the impact of these dynamics is on the effectiveness and long-term development of international law.

This Article makes two separate, but interrelated claims: First, it argues that among other consequences of the interplay identified, trade and investment law agreements look in practice more like what it is often described as a *regime complex*, or "an array of partially overlapping institutions governing a particular issue-area . . . among which there is no agreed upon hierarchy."[14] In this conglomerate of coupled elements, enforcement mechanisms can be used in traditional ways to force violators to comply with trade rules and compensate foreign investors for damages suffered as a result of excessive government interventions.[15] However, enforcement mechanisms can also be used more broadly to destabilize the regulatory activity of governments, to shape the interpretation of rules outside ordinary processes, and to relitigate issues settled in one regime through the venues of another.

Second, it argues that the merging at issue creates specific, yet not insuperable challenges for the appropriate development of international law. In fact, as I discuss in the last section, the main challenges are starting to be addressed by international agreements that include legal and institutional arrangements that help coordinate the increasingly intricate shared space between trade and investment provisions.

The Article proceeds as follows. After this introduction, Part I is about "upstream law production," or the creation of rules before disputes arise.[16] Here, I explain the relationship between the proliferation of RTAs or minilateralism and the convergence between trade and investment and how these distinct but related dynamics result in different treaties playing similar roles in constraining government regulation of transnational business. While scholars have not ignored the growth of nested, overlapping, and parallel systems, a constant blind spot is the impact on the effectiveness and long-term development of international law.[17]

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14. *See* Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L L. ORG. 277, 279 (2004). "Regime" is used as "a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge." *See also* S.D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983).

15. *See* Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005).

16. Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1586 (2011).

17. *See, e.g.*, Andrea Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 HASTINGS L.J. 101

Part II, in contrast, concerns "downstream law production" or the creation of rules in the process of adjudication.[18] Here, I present four case studies that evidence how nested, overlapping, and parallel systems are actually used. I also illustrate and conceptualize the myriad ways trade and FDI regulation can be combined by private interests seeking to enforce rules, awards, and decisions as well as by governments defending laws and regulations. I do so by categorizing the dynamics evident in the case studies into a framework of six strategies: two types of *intra-regime* shifts, two types of *inter-regime* shifts, and two forms of *transplantation* of concepts in the process of rule interpretation.[19] While other scholars have noted the growing issues resulting from the expansion of international tribunals addressing economic disputes, none have offered a conceptual analysis of the strategic appropriation of legal rules or systems for new purposes, or "law repurposing."[20]

Part III discusses how legal complexity impacts different attributes considered by scholars when evaluating dense international systems.[21] Without dismissing the importance of functional legal remedies, I show how the merging of regimes results in particular challenges for the successful enforcement, as well as appropriate development of, international law. However, as I explain, these challenges are not insurmountable and can be addressed in two different but complementary ways: first, with ex ante specification, or better, clearer drafting of international rules; and, second, with ex post control mechanisms that enhance coordination while leveraging the positive aspects of the shared regulatory space between trade and investment agreements. Finally, the conclusion provides thoughts on the implications of this work for ongoing transoceanic negotiations and the future of international economic governance.

(2007); Steven Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, AM. J. INT'L L. 102 (2008); Andrea Bjorklund & Sophie Nappert, *Beyond Fragmentation*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 439 (Todd Weiler & Freya Baetens eds., 2011).

18. Stephan, *supra* note 16, at 1587.

19. Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE INT'L L.J. 1, 16 (2004) (describing international law as a product of strategic use of venues situated within the same regime (intra-regime shift), and/or venues located in different regimes (inter-regime shift)).

20. Stephan, *supra* note 16, at 1587.

21. Jenny S. Martinez, *Toward an International Judicial System*, 56 STAN. L. REV. 429, 483 (2003) (discussing "structural issues" of coherence, compliance, expertise, and legitimacy). *See also* Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7, 8 (2011) (noting the following criteria: compliance, coherence, determinacy of rule and epistemic quality (expertise), and sustainability (or legitimacy)).

I.
UPSTREAM LAW PRODUCTION

A. Origin

The regulation and enforcement of the two main pillars of international economic law, investment protection law and international trade regulation, has been assigned to separate systems with specific characteristics.[22] A web of BITs establishing broad rules of government conduct, enforced by investor-State arbitration, has made private right of action by investors for damages routine. By contrast, trade rules are enforceable mainly through State-to-State dispute settlement where provisions for damages are absent but suspension of inter-State benefits serve as a remedy of last resort against violations.[23]

The origin of the two separate systems is largely a response to the bargains that followed World War II (WWII) and a function of the nature of international business at the time. The prevention of protectionist policies that led to WWII and the idea that international institutions could assist governments to liberalize trade guided the General Agreement on Tariffs and Trade (GATT) of 1947.[24] This multilateral institution created to negotiate import and export taxes (tariffs) and quantities (quotas) succeeded in bringing about dramatic reductions in trade barriers, at least as to manufactured products imported into advanced industrial countries. This was achieved by a simple exchange system: any reduction in a State's own barriers and the resulting reduction in the price of imports would be made available in return for equivalent concessions by a trading partner (a swap). If one country reneged on commitments, retaliation could mean suspending any of the benefits reciprocally granted. This system has proven effective for liberalizing what is often referred to as "traditional trade" (i.e., trade in goods).[25]

The GATT evolved from a reciprocal tariffs-and-quotas-reduction arrangement between twenty-three nations, focused almost exclusively on goods, into the WTO, which was brought about by the Uruguay Round of negotiations implemented in 1995.[26] Notably, the WTO introduced technical regulation, intellectual property rules, and services into the world trade system. This evolution reflected not only the growing importance of trade in services,

22. Steve Charnovitz, *What Is International Economic Law?*, 14 J. INT'L ECON. L. 1, 3–9 (2011) (discussing the term and meaning of international economic law).

23. Sykes, *supra* note 15, at 631. *See also* Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763, 811 (2000); Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 470 (2000).

24. John Jackson, *The Evolution of the World Trading System—The Legal and Institutional Context*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 31, 32–33 (Daniel Bethlehem et al. eds., 2009).

25. *See* Richard Baldwin, *WTO 2.0: Global Governance of Supply-Chain Trade*, 64 CEPR POL'Y INSIGHT 1, 19 (2012).

26. WTO Agreement, *supra* note 3.

but also that nontariff measures—administrative procedures, health and sanitary regulations, licenses, etc.—were becoming a significant source of economic distortion. Today, this quasi-universal organization has 160 members (counting Yemen, its most recent member) and multiple agreements addressing both tariff and nontariff barriers to trade, including technical standards, sanitary and phytosanitary regulation and intellectual property rules.[27]

To some extent the WTO adapted the GATT to a more globalized environment, albeit in limited fashion. Whether the result of political agendas or of the structure of the organization, these limitations have engendered polarizing negotiations under the WTO.[28] As a result, many countries have found in RTAs an alternative that better fits their liberalization needs and is more adaptable to current realities of global business, often called "supply-chain trade" (i.e., trade linked to "international production networks").[29]

International investment law, on the other hand, developed differently. The law of nations, including customary international law has been implicated in protecting the property of foreigners abroad since at least the eighteenth century, but a greater desire to formalize this field only emerged well into the postcolonial era.[30] Decolonization slowly brought calls for a system of protection that could limit the repossession of the property of former colonial powers and their nationals, including oil, gas, mineral, and other concessions. However, attempts at creating a multilateral treaty or other global instruments were met by the global South's increasing efforts to pioneer what eventually came to be known as a New International Economic Order (NIEO). This movement defended, among other positions, the application of a limited view of customary international law and championed domestic courts as the locale for disputes involving foreign investors.[31]

Foreseeing the collapse of the International Convention of Investments Abroad (at that time the most important attempt to create a multilateral

27. *Members and Observers*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 20, 2015). While the GATT included language relating to investment, it never found its way into binding rules until the WTO.

28. For an assessment of the negotiations, see Consultative Board, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, WORLD TRADE ORG., *available at* https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf.

29. *See* Baldwin, *supra* note 25, at 1 (terming new trade as supply-chain trade).

30. Kenneth J. Vandevelde, *A Brief History of International Investment Agreements,* 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 168–70 (2005) (providing a detailed history of investment agreements and discussing their emergence a response of developed countries to the threat of uncompensated expropriations of investments in developing countries).

31. Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. GAOR, 29th Sess., Supp. No. 1, U.N. Doc. A/Res/3201(S-VI) (May 1, 1974). *See also* Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437, 439 (1981). The NIEO also argued for broad government discretion to regulate and expropriate foreign capital to serve national interests. *See* Stephen M. Schwebel, *The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A. J. 463, 464 (1963).

framework on investment or "property of nationals" abroad), some nations took a different approach.[32] Within the World Bank, the industrialized countries endorsed the negotiation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[33] Instead of addressing the specific rights and obligations due to foreigners investing abroad—a highly contested matter—the Convention simply enabled a system of "private" enforcement of commitments via investor-State arbitration. ICSID, one of the five organizations of the World Bank, was born in 1967 and became a centralizing force for the adjudication of conflicts involving FDI, as well as the promoter of liberal investment policies.[34]

As a means of promoting FDI, ICSID initially supported the inclusion of arbitration clauses in investment contracts and legislations. A more favorable climate towards FDI supported, in part, by the Soviet collapse, led to a surge in BITs in the eighties and nineties.[35] Similar in content to one another, BITs often establish consent to investor-State arbitration, and regularly include obligations to compensate in case of expropriation, unfair treatment, or discrimination based on nationality. BITs with investor-State dispute-settlement provisions obviate the need for investors to negotiate arbitration clauses with host States on an individual basis and, in many instances, adjudicate disputes in local courts. Developing States, in turn, sign such treaties in hopes of attracting more and sustained fluxes of FDI as well as depoliticizing investment disputes.[36] BITs' practical utility to stimulate the flux of foreign investment continues to be fiercely debated.[37]

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32. *The Proposed Convention to Protect Foreign Investment: A Round Table*, 9 J. OF PUB. L. 115, 119–24 (1960).

33. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

34. Andreas F. Lowenfeld, *ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. L. 47, 51–52 (2009); ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 224 (1995). Broches referred to the relevant sections of the Convention as *loi de l'arbitrage*.

35. *See generally* ANTONIO R. PARRA, THE HISTORY OF ICSID (2012).

36. U.N. Conference On Trade & Dev., *Dispute Settlement: Investor-State*, 13, U.N. Doc. UNCTAD/ITE/IIT/30 (2003) ("[T]he willingness to accept internationalized dispute settlement on the part of the host country may well be motivated by a desire to show commitment to the creation of a good investment climate."); Ibrahim F.I. Shihata, *Toward a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, *in* INVESTING WITH CONFIDENCE: UNDERSTANDING POLITICAL RISK MANAGEMENT IN THE 21ST CENTURY 2, 23 (Kevin W. Lu, Gero Verheyen & Srilal M. Perera eds., 2009) (arguing that ICSID "provide[s] developing countries with a response which, compared to the Calvo Doctrine, is . . . more adequate in the depoliticization of disputes . . . without inviting the abuses of diplomatic protection"). *See also* Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L 639, 667–86 (1998).

37. For a summary of the multiple articles on this issue, see Christian Bellak, *How Bilateral Investment Treaties Impact on Foreign Direct Investment: A Meta-Analysis of Public Policy* (2013), *available at* http://www2.gre.ac.uk/__data/assets/pdf_file/0006/822705/Christian-Bellak-How-Bilateral-Investment-Treaties-Impact-on-Foreign-Direct-Investment-A-Meta-analysis-of-Public-

These historical factors, as well as the legacy of the original functions each regime was designed to serve, have had a long-lasting impact on the formal characteristics of the separate frameworks regulating trade and investment. Concerned mostly with inducing compliance with reciprocally negotiated benefits, international trade law is enforced at an inter-State level with suspension of benefits as a mechanism of last resort. Conversely, in an investor-State arbitration, investors can directly enforce their rights. While the main focus of investor-State arbitration is monetary compensation for affected investors and avoiding excessive reprisals by the home State of investors, compliance is often assumed to result from its deterrent effects. Although not the focus of this Article, the separation has implications for the expression, application, and interpretation of legal rules.[38]

B. Transformation

In spite of a formal separation and many differences, international trade and investment agreements have several common characteristics. Both regimes are concerned with global governance, economic integration and specialization of production, as well as managing the costs imposed by virtue of protectionism, opportunism, and capture.[39] Both seek to create economic benefits and opportunities as well as to limit disparate and unfair treatment by governments. Both share key legal concepts such as national treatment and most-favored-nation treatment. Overall, international trade and investment rules seek to promote transnational business and to facilitate globalization through economic interdependence—goals widely shared in the abstract but often criticized as insufficiently attentive to other policies, values, and interests.[40]

While the shared space between trade and investment frameworks was less apparent when trade and investment first emerged as separate systems, today's reality of modern business illuminates complementarities and overlaps as companies trade to supply their subsidiaries and invest globally to facilitate

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38. DiMascio & Pauwelyn, *supra* note 9, at 58–79 (explaining reasons to interpret investment standards with deference in contrast to trade rules).

39. The comparative advantage and specialization are not only theories of international trade (the international mobility of goods and services) but also theories of investment (the international mobility of capital and technology). *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776). *See also* DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (Electric Book Company ed., 2001). For an insightful explanation of the different political economy functions, see Sykes, *supra note* 23, at 648–54.

40. Public-interest lawyers and civil society organizations also view trade and investment law as closely tied. Both fields have raised similar anxieties regarding their linkages, effects, and overlaps with noneconomic interests and legal regimes such as human rights, labor rights, and environmental laws, just to mention a few. *See, e.g.*, *International Worker Rights, U.S. Foreign Policy and the International Economy, Before the Subcomm. on Terrorism, Nonproliferation and Trade and Subcomm. on Int'l Orgs, Human Rights and Oversight,* 111th Cong. (2009) (statement of Lori Wallach).

trade.[41] That shared space is evident as transnational corporations invest abroad and rely on global supply chains built through networks of foreign suppliers. That relationship is central to the current international character of business, where establishing the nationality of corporations becomes more difficult and services (where origin tends to be harder to determine) increase as a proportion of world trade. And that shared space is manifest as internal taxes and domestic regulations are increasingly used by government as distorting mechanisms equally affecting traders and investors as tariffs barriers fall to record lows.[42]

The legal frameworks have adapted—albeit slowly—to the "convergence" between trade and investment and the needs of supply-chain trade. In the WTO context, the agreements on Trade-Related Investment Measures (TRIMS),[43] on intellectual property rules under TRIPS,[44] and on services under the General Agreement on Trade in Services (GATS)[45] are good examples of arrangements explicitly bringing FDI into the trade fold. For instance, TRIMS prohibits trade-related investment measures, such as local content requirements that are inconsistent with basic provisions of GATT. Under TRIPS, intellectual property issues are no less relevant to investment than trade. In addition, "Mode Three" and "Mode Four" of GATS address the establishment of service providers abroad, and in essence constitute mild obligations to liberalize FDI.

Despite its efforts the WTO has (understandably) struggled to serve both as a quasi-universal framework for traditional trade and, at the same time, to evolve to regulate the modern business landscape in a politically charged environment.[46] Minilateralism has stepped into this vacuum, adding a new layer

41. FDI "has become more important than trade for delivering goods and services." *See* Karl P. Sauvant, *New Sources of FDI: The BRICs—Outward FDI from Brazil, Russia, India and China*, 6 J. WORLD INV. & TRADE 639, 639 (2005).

42. Baldwin, *supra* note 25, at 7–9. With international economic integration, the restriction and regulation of economic activity broadened to matters of general policy. As trade became more entangled with general areas of regulation, domestic reform and FDI regulation became more relevant to support liberalization, but also to limit competition or, for that matter, many socially worthy policies. For an insightful discussion, see Roger G. Noll, *The International Dimension of Regulatory Reform with Applications to Egypt* (1998), *available at* http://www.siepr.stanford.edu/workp/swp97041.pdf.

43. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 33 (1999), 1867 U.N.T.S. 410 [hereinafter TRIMS Agreement].

44. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299 [hereinafter TRIPS].

45. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183 [hereinafter GATS].

46. The WTO has long recognized that trade and investment are "two sides of the same coin." Press Release, WTO, Foreign Direct Investment Seen as Primary Motor of Globalization, Says WTO

to the complex regulatory environment of businesses. Enshrined in GATT Article XXIV (or, in some cases, the Enabling Clause),[47] RTAs have served at some points as alternatives to sluggish multilateral negotiations, and, at others, as ways of achieving deeper or more suitable integration, a difficult balance in the plural context of the WTO. Today almost all members of the WTO are parties to at least one of the more than 375 RTAs.[48]

As evidenced by the proliferation of RTAs, minilateralism and convergence are mutually reinforcing. A central reinforcing mechanism is grounded in modern RTAs' use of investment protection chapters, which make the relationship between trade and investment more explicit.[49] In many of these treaties, the protection of FDI has shifted in focus from solely postentry protection to trade style liberalization, or pre-establishment obligations.[50] RTAs frequently include obligations to limit "performance requirements," government-mandated activities, thresholds, or approvals that investors must undertake to trigger investment opportunities, usually connected with exports and use of local content or suppliers.[51] Consequently, under RTAs, both trade

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Director-General, Press Release No. 42 (Feb. 13, 1996).

47. Article XXIV of GATT lists the conditions under which the formation of a customs union or of a free-trade area are valid under the WTO. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT]. On the other hand, the Enabling Clause allows for "preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences"; "[d]ifferential and more favourable treatment . . . concerning non-tariff measures"; "[r]egional or global arrangements . . . amongst less-developed contracting parties for the mutual reduction or elimination of tariffs . . . [and] non-tariff measures, on products imported from one another"; and "[s]pecial treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries." Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903 (Nov. 28 1979).

48. *Regional Trade Agreements*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Nov. 10, 2014).

49. *See e.g.*, Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership, Japan-Sing., art. 83, Jan. 13, 2002, 2739 U.N.T.S. *See also* Comprehensive Economic Cooperation Agreement, India-Sing., arts. 6.10–6.12, Jun. 29, 2005, *available at* http://www.commerce.nic.in/ceca/toc.htm; Korea-Singapore Free Trade Agreement, S. Kor.-Sing., arts. 10.7(4), 10.12, 10.18, Aug. 4, 2005, *available at* http://www.fta.go.kr/webmodule/_PSD_FTA/sg/1/KSFTA.pdf. Certain other free trade agreements incorporate Article XX of GATT, *supra* note 47, and/or Article XIV of GATS, *supra* note 45, by reference. *See, e.g.*, Agreement between the Government of Japan and the Government of Malaysia for an Economic Partnership, Japan-Malay., art. 10, Dec. 13, 2005, 2758 U.N.T.S. 55; Panama-Taiwan Free Trade Agreement, Pan.-Taiwan, art. 20.02, Aug. 21, 2003, *available at* http://www.sice.oas.org/trade/panrc/panrc_e.asp; Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China, N.Z.-China, art. 200(1), Apr. 7, 2008, 2590 U.N.T.S. 101.

50. See for example Article 207(1) of the Treaty of Lisbon, which gives the EU authority over both FDI liberalization and investment protection. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 207(1), Dec. 13, 2007, 2702 U.N.T.S. 3.

51. See examples listed in United Nations Conference on Trade and Development, New York and Geneva, May 21–23, 2003, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, 21–29, UNCTAD/ITE/IIA/2003/7 (2003).

and investment rules may end up covering the same economic activity and regulatory actions with more frequency. In short, though minilateralism has been partly a response to the need for regulating a business environment where trade and investment are more interconnected, minilateralism has also propelled further convergence of the two fields.

The two dynamics have inevitably affected national lines and blurred the political economies that justified different regimes.[52] These two dynamics also partly explain why disputes that cross the boundary between the two regimes are also increasing.[53] Not only is enforcement of trade-related investment measures in inter-State formats becoming more common,[54] but investors (or their counsels) have realized they can convert trade matters into investment disputes, with the potential of winning hefty damage awards, often appointing arbitrators with trade-law backgrounds. As in other fields, the battleground of enforcement is testing traditional actors,[55] institutional forms,[56] and legal processes.[57] The

52. Broude, *supra* note 10, at 15. Broude gives the following example: a Finnish corporation (Nokia) invested in New York can ask the U.S. government to impose import restrictions against foreign goods imported by a U.S. corporation (Apple). U.S. labor unions can petition for safeguards to be imposed against imports from China produced by subsidiaries of their own American employers.

53. *See, e.g.*, Joost Pauwelyn, *Editorial Comment: Adding Sweeteners to Softwood Lumber: The WTO/NAFTA "Spaghetti Bowl" Is Cooking*, 9 J. INT'L ECON. L. 197 (2006); *see also* Bjorklund, *supra* note 17, at 132–35.

54. See for example Request for Consultations, *European Union—Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452/1 (Nov. 7, 2012), a complaint brought by China against the EU for the effects that the renewable-energy generation policy is having on competition and market access. *See also* Appellate Body Reports, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/AB/R, WT/DS426/AB/R (May 6, 2013). In that case, the Panel found that "mere participation" in that program requiring compliance with domestic content requirements was sufficient to confer an "advantage" on domestic beneficiary enterprise.

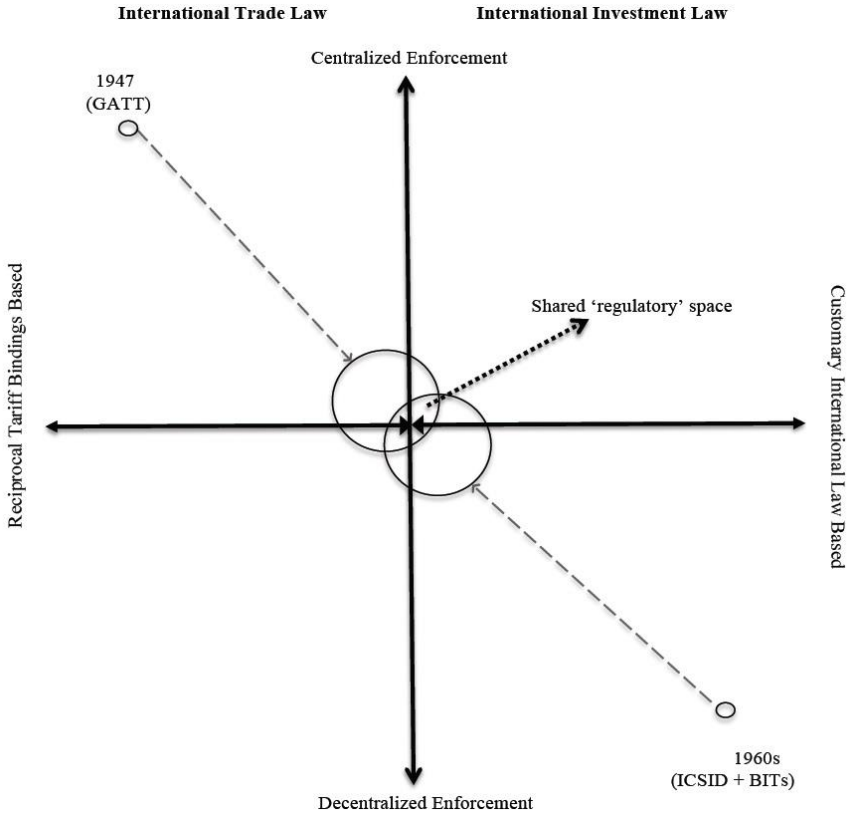
55. WTO judges and trade panelists often sit on investor-State arbitration proceedings. For example, Armand de Mestral, Donald McRae, Florentino Feliciano, Francisco Orrego-Vicuña, Georges Abi-Saab, Giorgio Sacerdoti, Guillermo Aguilar-Alvarez, Hugo Perezcano, Luiz Olavo Baptista, Merit Janow, Ricardo Ramírez have participated in WTO and ICSID cases. Information, author's own compilation. *See also* José Auguto & Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*, 1 OÑATI SOCIO-LEGAL SERIES 4 (2011); J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of the WTO Dispute Settlement*, 35 (2) J. WORLD TRADE 191, 193 (2001).

56. In some countries there has been the institutional consolidation of decision making within national governments and regional institutions. For example, bureaucracies like the Mexican, Canadian, and the Costa Rican International Trade Offices are involved in both trade and investment negotiations and litigation. For the European Union, see European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy* (July 7, 2010), http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf.

57. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 54 (2013) (dissecting changes in the field of investment law by reference to an underlying clash of paradigms including public law, trade law, and human rights law).

feedback loops between trade and investment have resulted in claims that make the analytical bifurcation "difficult to justify."[58]

FIGURE 1: EVOLUTION OF UPSTREAM LAW PRODUCTION



C. Effectiveness

Debating the effects of the proliferation of international treaties is not new.[59] For one, scholars agree that this expansion has resulted in an increase in

58. Broude, *supra* note 10, at 19. Some economists argue that thanks to multilocation production the traditional divide between trade in goods and services becomes blurred. *See, e.g.*, Anthony. J. Venables, *Economic Integration and the Location of Firms*, 85 AM. ECON. REV. 296, 296–300 (1995).

59. Wilfred Jenks, *Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 405 (1953) ("[T]he conflict of law-making treaties . . . must be accepted as being in certain circumstances an inevitable incident of growth . . . ."). *See also* YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 21 (2003) ("[J]urisdictions are deemed truly to compete

potentially applicable rules, in more venues to adjudicate disputes, and in more conflicts between different decision-making bodies. However, the resulting overlaps and conflicts within discrete systems, or *intra-regime* relations, have stimulated more interest than understanding the interactions between different systems.[60] In fact, in 2006, Martti Koskenniemi, acting as the Chairperson of the United Nations study group analyzing the difficulties arising from the diversification and expansion of international law, argued that the analysis of "the whole complex of *inter-regime* relations is a legal black hole."[61]

Whatever is inside this legal black hole upsets some international-economic-law scholars. It is often associated with redundancy, chaos, and the fragmentation of international law.[62] The weaknesses are cast in terms of efficiency (i.e., costs of multiple proceedings) and suboptimal compliance (i.e., the need to use multiple fora to be made whole), lack of coherence (i.e., rules suggesting different ways of dealing with a problem), or equality (i.e., gaining "multiple bites at the cherry").[63] Scholars adopting a negative viewpoint of this

with one another for business only if the involved parties can hope to achieve comparable results from the rival procedures.").

60. Trade law scholars have attempted to understand what factors determine the choice of forum. *See, e.g.*, Marc Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Tra*de, 61 INT'L ORG. 735, 735–61 (2007) (arguing that the complainant's choice of forum depends on whether it prefers to set a regional or multilateral precedent, or no precedent at all). Investment-law scholars are mostly concerned with doctrinal thinness. *See* L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19 ICSID REV.— FOREIGN INV. L. J. 293 (2004). *See also* Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 68 (2002) (critiquing "jurisprudential heterogeneity presumably unsustainable in the long run"); Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151, 236 (2004) (arguing that parties take "advantage from the absence of hierarchy and coordination among . . . international tribunals").

61. Rep. of the Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, at 253, May 1–June 9 and July 3–Aug. 11, 2006, U.N. Doc A/CN.4/L.682, 58th Sess. (Apr. 13, 2006) [hereinafter ILC STUDY] (emphasis added).

62. August Reinisch, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System, Some Reflections from the Perspective of Investment Arbitration*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: FESTSCHRIFT IN HONOUR OF GERHARD HAFNER 107, 116 (Gerhard Hafner et al. eds., 2008); Bjorklund, *supra* note 17 (presenting two case studies of forum shopping in order to facilitate a discussion of the problems resulting from poor coordination among fora and to propose solutions to what the author identifies as a "serious problem"); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101 (1998).

63. *See e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1559–68 (2005) (arguing against fragmentation on the basis of coherence); *see also* Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUSTL. Y.B. INT'L L. 191 (1999) (on the basis of simultaneous and sequential claims); John Yukio Gotanda, *An Efficient Method for Determining Jurisdiction in International Arbitrations*, 40 COLUM. J. TRANSNAT'L L. 11, 12–14 (2001) (on the basis of efficiency).

expansion frequently understate the benefits of the proliferation of international institutions.[64]

What is chaos for some is a virtue to those who "love" fragmentation.[65] Some scholars cast the benefits in terms of expertise (i.e., improving epistemic quality and decision making), predictability (i.e., precision on what law prohibits), accountability ("flexibility" to apply different political consensus) and sustainability (i.e., enhancing opportunities for conformance with unpopular decisions).[66] This view, in turn, may easily overlook some of the main problems resulting from this expansion, including how complexity can be unevenly advantageous. A welcomed exception to this trend is Professor Pauwelyn who has noted that the complexity of economic agreements "may end up costing dearly" to countries with fewer resources or turn into an "advantage" for countries with plenty of them.[67]

At the crux of this debate is whether the presence of nested, partially overlapping, and parallel international regimes of trade and investment law are a positive or negative development in international law. While insightful, the debate is not sufficiently productive from a policy perspective. Most issues raised cannot be answered in the abstract; the impact may be both positive and negative. It depends on multiple factors such as the interests, capacity, and resources of the parties involved, the specific point of time assessed, or the context and conditions of the conflict or legal dispute. Moreover, most scholars have overlooked the insights of political science and interdisciplinary legal scholarship that address "international regime complexity."[68] The State-centric bias of legal scholars, combined with a focus on the origin rather than the

64. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 405–37 (2006).

65. Ratner, *supra* note 17, at 475. *See also* Paul S. Berman, *Global Legal Pluralism*, 80 S. CALIF. L. REV. 1155 (2007).

66. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 367–68 (1997) (noting the community of law that grows around a particular tribunal and contributes to its effectiveness); Cesare P. R. Romano, *The Proliferation of International Judicial Bodies: The Piece of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999) (noting the benefits on developing tailored procedures through international judicial bodies); JOSEPH S. NYE, INTERNATIONAL REGIONALISM; READINGS (1968). *See also* Southern Bluefin Tuna Case, 23 R.I.A.A. 1, ¶ 52 (Arbitral Tribunal Under U.N. Convention on the Law of the Sea 2000) ("There is frequently a parallelism of treaties . . . . The universal range of international legal obligations benefits from a process of accretion and accumulation."). For the benefits of global pluralism, see BONAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE AGE OF THE PARADIGMATIC TRANSITION 114–38 (1995).

67. Pauwelyn, *Dealing with Increasing Complexity*, *supra* note 11, at 6. *See also* Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity Symposium,* 7 PERSP. ON POL. 33 (2009) (arguing that complexity in some respects may advantage the most well endowed actors who have the resources).

68. Alter & Meunier, *supra* note 67, at 13 (referring to international regime complexity to describe the presence of nested, partially overlapping, and parallel international regimes that are not hierarchically ordered).

application of rules by political scientists, has led to few useful policy prescriptions.[69]

In this project, my general interest is in understanding both the causes as well as the consequences of the proliferation of international economic agreements. It is increasingly necessary to provide a more nuanced description of how exactly the disaggregated nature of the international legal system (as evidenced by convergence and minilateralism) impacts its effectiveness.[70] While this analysis could be done from a range of vantage points, I limit the analysis to the impacts in the adjudicatory and the "norm-generating" functions of the bodies in charge of resolving disputes.[71] In doing so, it is not enough to review, for instance, the quality of the legal reasoning of decisions or cross-reference between tribunals. Instead, first it is necessary to understand the extent to which this expansion alters the enforcement processes or, in other words, how the complexity resulting from the expansion opens spaces for strategic considerations by litigants, judges, and lawyers. This could be followed by an assessment of the impact on specific indicators of effectiveness, such as coherence, determinacy of rule and epistemic quality (expertise), and sustainability (or legitimacy), a number of criteria that scholars often consider when evaluating dense international systems.[72]

Exploring how different strategies enabled by this proliferation make international law more functional or more dysfunctional is a fertile ground for research, both empirical and conceptual.[73] The answers to the questions posed may be most relevant for policymakers, as well as treaty drafters and negotiators, because they have the task of investing in initiatives that score well on effectiveness and, more relevantly, they can test treaty design features that reduce the negative consequences of such strategies. Moreover, these questions may help to provide a more concrete picture of what happens inside Koskenniemi's *inter-regime* "black hole."[74]

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69. *Cf.* Pauwelyn, *Dealing With Increasing Complexity*, *supra* note 11, at 6.

70. Laurence R. Helfer, *The Effectiveness of International Adjudicators*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464, 481 (Karen J. Alter, Cesare Romano & Yuval Shany eds., 2014).

71. *Id.* at 465–67, 476–68.

72. Martinez, *supra* note 21, at 523 (discussing "structural issues" of coherence, compliance, expertise, and legitimacy). *See also* Keohane & Victor, *supra* note 21, at 8 (noting the following criteria: compliance, coherence, determinacy of rule and epistemic quality (expertise), and sustainability (or legitimacy)).

73. Keohane & Victor, *supra* note 21, at 18.

74. ILC STUDY, *supra* note 61, at 18.

II.
DOWNSTREAM LAW PRODUCTION

This section is divided into two parts. First, it presents four case studies, each illustrating the varied ways private interests affected by legal and regulatory activity and governments defending their policies or espousing claims of private interests combine treaty elements within and across regimes. Collectively, the four cases speak volumes about the strategic use, growing tensions, and reinforcing dynamics affecting the expansion of international trade and investment agreements. Second, before assessing the consequences of convergence and minilateralism on the adjudicatory and norm-generating functions of international courts and tribunals, it is useful in both a descriptive and normative sense to classify the strategies employed to experiment with and combine different sources of law.[75] The topology presented consists of six strategies in which parties leverage aspects of different agreements such as rules, forms of relief, and litigation parties: two allow parties to choose among treaties within the same regime, or intra-regime shifting; two allow parties to experiment with different treaty features across regimes, or inter-regime shifting; and two strategies allow parties to import rules or legal concepts in the process of interpretation both within and across regimes.

A. Enforcement

1. United States—Trucking Services Restrictions

Prior to 1994, Mexican trucks were restricted to operating within specified "commercial zones" in the U.S.-Mexico border, preventing them from carrying shipments to final destinations in the United States.[76] Unlike Canadian trucks, which could carry shipments freely upon reaching the edge of a commercial zone (generally extending three to twenty miles from the border), Mexican trucks were required to transfer their cargo to a U.S. truck. The U.S. truck would then complete the delivery to the product's final destination, resulting in substantial transportation and warehousing costs.[77] When NAFTA became fully effective in 1994, allowing trucks of the three countries to cross freely from

75. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998). The term has been adopted by scholars analyzing international regimes and governance, with similar implications. *See* Charles F. Sabel & Jonathan Zeitlin, *Experimentalism in the EU: Common Ground and Persistent Differences*, 3 REG. & GOVERNANCE 410 (2012).

76. Motor Carrier Act of 1980, Pub. L. No. 96-296, § 5(b)(1), 94 Stat. 793, 793 (1980).

77. *Hearing on Cross-Border Trucking with Mexico, Subcomm. for Transp., Housing and Urban Dev., and Related Agencies*, 110th Cong. (2007) (statement of Mary E. Peters, Sec'y of Transp., & John H. Hill, Adm'r of the Fed. Motor Carrier Safety Admin.). *See also* Commercial Zones Determined Generally, With Exceptions, 49 C.F.RI § 372.241 (2009); Initial Submission, *In the Matter of Cross-Border Trucking Services*, ¶ 188, Secretariat File No. USA-Mex-98-2008-01.

Alaska to Chiapas and back to Labrador became a binding obligation for the relevant governments. The United States and Mexico also agreed to phase out all restrictions on cross-border passenger and cargo services by 2000.[78]

In 1995, however, the U.S. government announced it would not lift the restrictions on Mexican trucks, citing safety and environmental concerns.[79] It also refused to permit Mexican investment in U.S. companies that transport international cargo. In response, Mexico requested the formation of a NAFTA panel to decide whether the United States was in breach of the provisions of the agreement's chapters on investment and trade in services. Chiefly, Mexico argued that U.S. inaction was discriminatory and motivated not by safety and environmental concerns, but by political considerations relating to opposition by U.S. organized labor.[80] In defense, the United States argued that because Mexico did not maintain the same regulatory standards as the United States and Canada, service providers, trucks, and investors from Mexico could be treated differently.[81]

Early in 2001, the panel found the United States' actions to be in breach of NAFTA's commitments.[82] According to the tribunal, the United States was permitted to impose different regulatory requirements on Mexican truckers, but the United States failed to make such a decision in good faith with respect to the cited concerns, to rely on objective evidence, or to implement the decision in a way that fully conformed with NAFTA objectives.[83] The panel cited precedents from GATT to hold that Mexico could challenge the measures even if Mexico

78. NAFTA Annex I sets forth a two-step schedule: The first step required the United States to provide Mexican trucks with complete access to its roadways in the four border States by December 18, 1995. The second step called for Mexican trucks to be able to travel freely throughout the United States by January 1, 2000. NAFTA Annex I Schedule of the United States. *See also* U.S.-Mexico Border: Issues and Challenges Confronting the United States and Mexico (GAO/NSIAD-99-190, July 1, 1999).

79. David E. Sanger, *Dilemma for Clinton on NAFTA Truck Rule*, N.Y. TIMES, Dec. 17, 1995, http://www.nytimes.com/1995/12/17/us/dilemma-for-clinton-on-nafta-truck-rule.html. The Clinton administration asserted that when the problems associated with U.S. safety concerns were resolved, the NAFTA provisions could be implemented.

80. Final Report of the Panel, *In the Matter of* Cross-Border Trucking Services, ¶ 59 (Mex. v. U.S.), USA-MEX-98-2008-01 (NAFTA Arb. Panel 2001), *available at* http://www.worldtradelaw.net/nafta20/truckingservices.pdf [hereinafter *U.S.-Mexico Panel Decision*]. Teamsters President James P. Hoffa was among the main opponents to the lifting of restrictions, exclaiming, "[n]o longer will companies be allowed to use NAFTA to take our jobs and endanger our health and security." Steven Greenhouse, *U.S. Delays Opening Border to Trucks from Mexico,* N.Y. TIMES, Jan. 8, 2000, at Al0.

81. *U.S.-Mexico Panel Decision*, *supra* note 80, ¶ 38. The U.S. imposed onerous requirements such as the inspection of all Mexican motor carriers in Mexico by U.S. inspectors before qualifying for a U.S. operating license. *See* Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 108-87, § 350, 115 Stat. 864 (listing requirements).

82. U.S.-Mexico Panel Decision, *supra* note 80, ¶¶ 295–98.

83. *Id.* ¶ 301 ("[T]o the extent that the inspection and licensing requirements for Mexican trucks and drivers wishing to operate in the U.S. may not be 'like' those in place in the U.S., different methods of ensuring compliance with the U.S. regulatory regime may be justifiable.").

could not identify any nationals rejected from investing in the services sector.[84] The tribunal distinguished between trade in services and trade in goods, but treated the rules applicable to trade in services and FDI as analogous.[85]

While the U.S. government initially said it would comply with the decision, with time it became obvious that the executive branch was facing domestic opposition against compliance.[86] After years of negotiations, in the Fall of 2007 both countries agreed to cooperate on a pilot or "demonstration" program as a step towards full NAFTA implementation, allowing up to one hundred trucking firms from Mexico to transport international cargo beyond the commercial zones.[87] The report assessing the program showed that Mexican carriers participating in the program had no reportable crashes and collectively had safety and environmental-performance scores comparable to or better than American drivers.[88] In spite of such results, in March of 2009 Congress and the Obama administration cut off funding for this program,[89] largely in response to pressure from domestic interest groups, promising a plan to create a new program that would meet "legitimate concerns" of Congress and commitments under NAFTA.[90]

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84. *Id.* ¶¶ 289–91 (citing Japan—Taxes on Alcoholic Beverages, and United States—Taxes on Petroleum and Certain Imported Substances). It may be worth nothing that both Mexico and the United States cited various GATT and WTO decisions and provisions as being relevant to interpreting different provision of NAFTA. *Id.* ¶¶ 220–60.

85. *Id.* ¶ 292:

> A blanket refusal to permit a person of Mexico to establish an enterprise in the United States to provide truck services for the transportation of international cargo between points in the United States is, on its face . . . contrary to Article 1102. Where there have been direct violations of NAFTA, as in this case, there is no requirement for the Panel to make a finding that benefits have been nullified or impaired; it is sufficient to find that the U.S. measures are inconsistent with NAFTA.

86. In addition to the delays caused by Congress, a group of environmentalists and labor groups filed a lawsuit claiming that the DOT regulations were "arbitrary and capricious." *See* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 773 (2004). The U.S. Supreme Court ruled that the Federal Motor Carrier Safety Administration (FMCSA) did not have to perform a detailed environmental impact study because it was not a legally relevant cause of the environmental effect.

87. Demonstration Project on NAFTA Trucking Provisions Notice, 72 FED. REG. 23, 884 (May 1, 2007).

88. Federal Motor Carrier Safety Administration, *Status Report on NAFTA Cross-Border Trucking Demonstration Project,* Report No. MH-2009-034, 15 (2009), *available at* https://www.oig.dot.gov/sites/default/files/NAFTA_final_report_signed.pdf ("The panel also concluded, and we agree, that during the first year, project participants had safety performance measures comparable to or better than United States carriers."). The report also concluded that project participation was too low to make statistical inferences given the fact that other Mexican carriers are likely to seek long-haul authority in the future. *Id.* at 3.

89. *See* Omnibus Appropriations Act, Pub. L. No. 111-8, § 136, 123 Stat. 524 (2009) (cutting funding for any "demonstration program").

90. Klint W. Alexander & Bryan J. Soukup, *Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on U.S. Compliance under NAFTA*, 28 BERKELEY J. INT'L L. 313 (2010). *See also* MARK P. SULLIVAN & JUNE S. BEITTEL, CONG. RESEARCH SERV., MEXICO- U.S. RELATIONS: ISSUES FOR CONGRESS 1

Infuriated by the cancellation of the pilot program by the United States, Mexican President Felipe Calderon ordered retaliatory measures against its main NAFTA partner for the violation of trade *and* investment commitments.[91] The typical sanctions approach under trade agreements, including NAFTA, is to impose suspension of trade concessions on a limited number of products or services in the sector in which the harm has occurred. Mexico, however, imposed rotating sanctions across different sectors, applying pressure on several industry groups other than trucking services, focusing on commodities in key U.S. states facing contested elections.[92] Specifically citing the United States' breach of obligations under *both* the investment and trade-in-services NAFTA chapters of NAFTA, Mexico raised tariffs on eighty-nine different U.S. exports from forty states, ranging from agriculture to jewelry, valued at a total of $2.4 billion.[93]

In April 2009, one month after the sanctions were implemented, the *Camara Nacional del Autotransporte de Carga* (CANACAR), representing the independent trucking companies of Mexico, submitted a notice of arbitration against the United States for violation of NAFTA's investment commitments.[94] The companies sought $6 billion in compensation for direct losses they

(2009); Press Release, Obama for Am., Obama Asks United Auto Workers To Support the Candidate with a Record of Fighting for Them (Nov. 13, 2007), *available at* http://www.barackobama.com/2007/11/13/obama_asks_united_auto_workers.php:

> The only trade agreements I believe in are ones that put workers first—because trade deals aren't good for the American people if they aren't good for working people. . . . That's why I voted to block Mexican trucks from entering this country. And that's why we need to amend NAFTA.

91. For a list of the eighty-nine products and the applicable tariff on each, see Ley de Comercio Exterior [Law of Foreign Trade], as amended, Diario Oficial de la Federación [D.O.], Mar. 18, 2009 (Mex.). Symbolically, Mexico chose to retaliate on March 18, the anniversary of Mexico's oil industry expropriation. *See also* Chad MacDonald, *NAFTA Cross-Border Trucking: Mexico Retaliates After Congress Stops Mexican Trucks at the Border*, 42 VAND. J. TRANS'L L. 1631, 1632–38 (2010); Ioan Grillo, *Obama's "Trade War": No Truck with Mexico,* TIME, Mar. 25, 2009, http://www.time.com/time/world/article/0,8599,1887494,00.html (quoting Mexican Secretary of Economy as promising to "eliminate all the tariffs" if "the United States returns to its commitments").

92. Mark Drajem, *Mexico Imposes Tariffs on U.S. Amid Trucking Dispute,* BLOOMBERG, Mar. 17, 2009, http://www.bloomberg.com/apps/news?pid=20601086&sid=anFlZqfyNPgE. In the context of the WTO, Ecuador was the first test case for cross-sector retaliation. In an unprecedented decision, the arbitrators granted Ecuador the right to cross-retaliate against $201.6 million in EU goods, services, and intellectual property per year. Decision by the Arbitrators, Recourse to Arbitration by the European Communities, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB/ECU (Mar. 24, 2000) [hereinafter *EC—Bananas III*].

93. *See* Secretaría de Economía, *Unidad de Coordinación de Negociaciones Internacionales* (2012), *available at* http://www.economia.gob.mx/files/transparencia/informe_APF/memorias/8_md_transporte_transfronterizo_tlcan_sce.pdf.

94. Luke Engan, *Mexican Truckers File NAFTA Investor Claim; DOT Gives Proposal To NSC*, INSIDE U.S. TRADE, Apr. 10, 2009. *See also* Camara Nacional del Autotransporte de Carga's [CANACAR's], Notice of Arbitration (Apr. 2, 2009), *available at* http://www.state.gov/documents/organization/121599.pdf [hereinafter CANACAR Notice of Arbitration].

allegedly suffered since the U.S. government first imposed restrictions on Mexican trucks in 1995, arguing that the United States' actions breached national treatment and most-favored-nation treatment investment provisions.[95] CANACAR ended up not pursuing the investor-State claim,[96] mainly because Mexico's countermeasures under NAFTA had already generated pressure on the White House to finally comply with the panel's decision.[97]

In response to these pressures, in March 2011, Mexico and the United States agreed on a framework for settlement of the dispute.[98] In October 2011, the first Mexican truck entered the United States in "partial" (according to CANACAR's counsel) compliance with NAFTA, and Mexico restored the previously suspended trade benefits.[99] To date, there have been no further disputes over this matter and the two countries appear to view such partial compliance as an adequate resolution of the dispute.

2. Mexico—Soft-Drinks Tax

Protectionist agro-business policies in both Mexico and the United States, combined with a long-standing disagreement regarding the specific meaning of NAFTA's provisions, made the issue of market access for sweeteners one of the most contentious under this RTA.[100] In the adversarial context of competition between high-fructose corn syrup (HFCS) and sugar, which itself would require a separate article to flesh out, the Mexican Congress approved an excise tax on the use of HFCS in soft drinks.[101] By targeting the sale of soft drinks made with HFCS while exempting those made with sugar, the tax—which generated little to no revenue—indirectly forced soft-drink producers to use national sugar. The tax also discriminated against HFCS producers in Mexico, which at the time were almost exclusively owned or controlled by U.S. investors.[102]

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95. *See* CANACAR Notice of Arbitration, *supra* note 94, at 12–13 (claiming "discrimination").

96. According to Mr. Ojeda, the counsel for CANACAR, the claim is "on hold." Interview with Pedro Ojeda (July 2, 2013).

97. *See* Alexander & Soukup, *supra* note 90.

98. Memorandum of Understanding Between the Department of Transportation of the United States of America and the Secretaría de Comunicaciones y Transportes of the United Mexican States on International Freight Cross-Border Trucking Services (July 6, 2011), *available at* http://www.fmcsa.dot.gov/documents/Mexican_MOU_Eng.pdf.

99. Diario Oficial de la Federación [DO] [Mexican Official Gazette], October 12, 2011.

100. For a description of the evolution of this dispute, see William J. Davey, *Implementation of the Results of WTO Trade Remedy Cases*, *in* THE WTO TRADE REMEDY SYSTEM: EAST ASIAN PERSPECTIVES 33, 51–52 (Mitsuo Matsushita, Dukgeun Ahn & Tain-Jy Chen eds., 2006). *See also* GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 310–27 (2005).

101. Ley del Impuesto Especial Sobre Producción y Servicios [L.I.E.P.S.] [Law on the Special Tax on Production and Services], art. 32, Diario Oficial de la Federación [DO] [Mexican Official Gazette], Jan 1, 2002 [hereinafter HFCS TAX].

102. *Id.* arts. 2, 3, 8. The 20% tax on the soft drink translated into an estimated tax burden for

The soft-drink tax gave rise to three classes of enforcement actions, all triggered by HFCS producers with roots in the United States. First, foreign-controlled but locally incorporated subsidiaries of HFCS-producing companies challenged the measure before Mexican courts for violations of Mexican law.[103] These claims were initially dismissed by a Mexican court on a strict reading of standing rules that allow only persons legally and directly affected by the tax to pursue a claim, meaning companies involved in soft-drink production and distribution.[104] In a separate but related case, the Supreme Court of Mexico confirmed the legality of the tax, holding that its "extra-fiscal" objectives (i.e., protecting the domestic sugar industry from competition) were sufficient to justify its discriminatory character, evaporating any hope of success that HFCS producers had before Mexican courts.[105]

Second, the U.S. government brought a successful enforcement action before the WTO (by virtue of NAFTA's choice-of-forum clause), wherein the U.S. government argued that the tax, along with an import-permit requirement, discriminated against its nationals and was a violation of GATT and GATS's national-treatment provisions.[106] Mexico responded that the United States breached its own obligations by failing to cooperate with the establishment of a NAFTA panel to resolve the original disagreement over the NAFTA terms.[107] According to Mexico, the measures therefore fell within the scope of exceptions

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using HFCS of more than 400%, because the sweetener only amounts to 5% of the final cost of the soft drink.

103. *See e.g.*, Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1, Notice of Arbitration, ¶ 73 (Oct. 21, 2003), *available at* http://www.economia.gob.mx/files/comunidad_negocios/solucion_controversias/inversionista-estado/casos_concluidos/Corn_Products_International/Request_for_Institution_Arbitration.pdf [hereinafter Corn Products Notice of Arbitration].

104. Extraordinary Writ, Suprema Corte de Justicia de la Nación [SCJN] [Mexico's Supreme Court of Justice], Amparo en Revisión, Aug. 15, 2004, 1565/2004, Arancia-Corn Products SA de CV, *available at* http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/178/178539.pdf (decision confirmed as precedent).

105. Suprema Corte de Justicia de la Nación [SCJN], Diario Oficial de la Federación [DO], July 17, 2002, 32/2002, at 36, *available at* http://dof.gob.mx/nota_detalle.php?codigo=723656&fecha=17/07/2002 ("The legislator's intent when extending the aforementioned tax . . . was that of protecting the sugar industry."). *See also US Floats Temporary Sweetener Deal to Mexico, As HFCS Tax Revives*, INSIDE U.S. TRADE (Jul. 19, 2002).

106. *See* Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter Soft Drink Tax Appellate Body Report]; Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 4.72, WT/DS308/R (Oct. 7, 2005) [hereinafter Soft Drink Tax Panel Report]. The United States had the alternative of WTO dispute settlement by virtue of NAFTA Article 2005. NAFTA, *supra* note 5, art. 2005 ("[D]isputes regarding any matter arising under both [NAFTA] and the [GATT], any agreement negotiated there under, or any successor agreement may be settled in either forum at the discretion of the complaining Party.").

107. Soft Drink Tax Appellate Body Report, *supra* note 106, ¶ 2; Soft Drink Tax Panel Report, *supra* note 106, ¶¶ 4.72, 4.96, 4.11. Mexico argued that by delaying the appointment of its panelists, the United States had prevented Mexico from submitting the dispute over sugar access to the United States under Chapter 20 of NAFTA.

permitted under Article XX(d) of the GATT as "necessary" to secure compliance with other "laws or regulations"—in this case NAFTA, a self-executing treaty in Mexico.[108]

The WTO panel found that the tax was a breach of Mexico's national-treatment obligations under the WTO but unsurprisingly had no jurisdiction to address obligations under NAFTA. On appeal, the Appellate Body upheld the Panel's conclusions, holding that the term "laws or regulations" refers to the rules that form the domestic legal order of WTO Members and not an "international obligation of another WTO member."[109] As a result of this ruling, Mexico and the United States agreed on a framework for settlement of the long-standing dispute of market access for sweeteners, and Mexico removed the HFCS tax.[110]

Third, four U.S. companies started three separate investor-State proceedings for damages on behalf of their controlled and locally incorporated subsidiaries.[111] After Mexico's efforts to consolidate these claims in a single proceeding failed, the cases were addressed in three separate proceedings.[112] The claimants argued that the measure was, among other things, inconsistent

108. Soft Drink Tax Panel Report*, supra* note 106, ¶ IV(4)(e). *See also* General Exceptions, art. XX(d), GATT B.I.S.D. (1994) (allowing WTO members to take ten types of measures (listed in subparagraphs a-j) that would otherwise conflict with their WTO obligations, provided that specified conditions are met). Subparagraph (d) covers measures "necessary" to secure compliance with laws or regulations that are themselves consistent with the WTO.

109. Soft Drink Tax Appellate Body Report, *supra* note 106, ¶ 75; *see also* Soft Drink Tax Panel Report*, supra* note 106, ¶ 4.96. The Appellate Body, unlike the Panel, did not assume *arguendo* that "laws and regulations" could include international rules.

110. *See* Letter from Ambassador Richard T. Crowder, Chief Agric. Negotiator, Office of the U.S. Trade Rep., to Lic. Angel Villalobos Rodrigues, Undersec'y for Int'l Trade Negotiations, Secretariat of Economy (July 27, 2006) *available at* www.ustr.gov/archive/assets/Trade_Agreements /Regional/NAFTA/asset_upload_file694_10810.pdf.

111. Cargill Inc. v. United Mexican States (U.S. v. Mex.), ICSID Case No. ARB(AF)/05/2 (Sept. 18 2009), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0133_0 .pdf [hereinafter Cargill Award]; Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (U.S. v. Mex.), ICSID Case No. ARB(AF)/04/5, Award (Nov. 21, 2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH &actionVal=showDoc&docId=DC782_En&caseId=C43 [hereinafter ADM/TIA Award]; Corn Products International, Inc. v. Mexican States, ICSID Case No. ARB(AF)/04/1, 21 ICSID Rev. 364 (2006). The four different claimants argued that the tax was inconsistent with Articles 1102 (National Treatment), 1106 (Performance Requirements), and 1110 (Expropriation) of NAFTA. In addition, Cargill also claimed a violation to Articles 1103 (Most-Favored Nation Treatment) and 1105 (Minimum Standard of Treatment) for a series of measures prior to the tax.

112. See the discussion in Yulia Andreeva, *Corn Products v. Mexico: First NAFTA (Non)-Consolidation Order,* 8 INT. A.L.R. N 78-81 (2005); Corn Products Int'l, Inc. v. United Mexican States, ICSID Case No. Arb.(AF)/04/1 and Archer Daniels Midland Company v. United Mexican States, ICSID Case No. Arb(AF)/04/5, Order of Consolidation (May 20, 2005), *available at* http://ita.law.uvic.ca/documents/Corn_Archer_order_en.pdf [hereinafter ADM Consolidation Order].

with Mexico's national-treatment obligation under the investment provisions of NAFTA. In total, they sought damages for almost $550 million.[113]

In these proceedings, Mexico conceded the discriminatory nature of the tax but argued that it was innocent of any wrongdoing because it constituted a "legitimate countermeasure" in response to a prior violation of the United States' trade obligations under NAFTA.[114] Neither of the panels found this line of argument convincing, the three decisions concluding that the tax was discriminatory, in violation of NAFTA's national-treatment obligation, and that Mexico's actions entailed liability, citing as relevant but not determinative the WTO's analysis of the tax.[115] Moreover, the tribunals faced the question of whether a countermeasure for alleged U.S. violations of intra-State trade commitments could be directly applicable to investors. While the three tribunals reached the same practical outcome and found Mexico's defense inapplicable, each tribunal decided the case differently.[116] The first tribunal found that countermeasures could affect foreign investors[117] but that the tax did not meet the requirements for a valid countermeasure.[118] Conversely, the other two tribunals found that under NAFTA investment provisions, investors are shielded from the doctrine of countermeasures.[119] Among the three decisions, Mexico was condemned to pay more than $170 million in damages.[120] After years of

113. Amounts requested: in CPI, $325 million, *see* Corn Products Notice of Arbitration, *supra* note 103; in ADM/TLIA, $100 million, *see* Archer Daniels Midland Co. y Tate & Lyle Ingredients Americas, Inc. c. los Estados Unido Mexicanos, *available at* http://www.economia.gob.mx/files/comunidad_negocios/solucion_controversias/inversionistaestado/casos_concluidos/Archer_Daniels_Midland_Co/IIIArcher_Daniels_Midland.pdf (last visited Jan. 31, 2015); and Cargill, $123.8 million, *see* Cargill Inc. c. los Estados Unidos Mexicanos, *available at* http://www.economia.gob.mx/files/comunidad_negocios/comercio_exterior/solucion_controversias/EDO-INVER/Casos_Activos/Cargill%20Inc/ficha_cargill_0913.pdf (last visited Jan. 31, 2015).

114. *See e.g.*, ADM/TIA Award, *supra* note 111, at ¶¶ 110–80. The Mexican affirmative defense argued that the U.S. had breached NAFTA provisions: (i) Chapter Three and the Side-Letters on Sugar by denying market access for Mexico's sugar surplus to the U.S. market; and (ii) Chapter Twenty by frustrating the dispute settlement mechanism under such chapter by refusing to appoint an arbitrator in the State-to-State dispute. Mexico also responded individually to each of the claims made by the different investors.

115. ADM/TLIA Award, *supra* note 111, ¶ 304; Corn Products International, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/04/01 (NAFTA): Decision on Responsibility (redacted version), *available at* www.ita.org (last accessed June 6, 2009) [hereinafter CPI Decision on Responsibility], ¶ 193; and Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2 (NAFTA), Award, Sept. 18, 2009 [hereinafter Cargill Award], ¶ 554.

116. Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 EUR. J. INT'L L. 617 (2013).

117. ADM/TLIA Final Award, *supra* note 111, ¶ 123.

118. *Id.* ¶¶ 178–79 (explaining that NAFTA granted substantive rights to the treaty parties only, even if it granted procedural rights and substantive benefits to their investors).

119. CPI Decision on Responsibility, *supra* note 115, ¶¶ 165, 167, 169; Cargill Award, *supra* note 115, ¶¶ 420–28 (explaining that NAFTA granted investors substantive and procedural rights akin to the rights enjoyed by third states under public international law).

120. In Cargill, $77.3 million, *see* Cargill Award, *supra* note 115, ¶ 559; in CPI, $58.4 million, *see* Corn Products Int'l, Inc., Current Report, (form 8-K) (Jan. 24, 2011), *available at*

litigation and adverse findings by the different tribunals, Mexico settled the three claims and compensated the affected investors.

The decision in *Cargill v. Mexico* to compensate for the additional losses "relate[d] to" the investor in its capacity as producer and exporter of its product into Mexico raises an additional crossover between trade and investment law.[121] According to the tribunal, the tax (and regulatory scheme) "also constituted a legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico."[122] For Mexico, Cargill's decision sets a very bad precedent: it allows investors to convert losses suffered by production facilities in one NAFTA country into losses suffered in another, and goes beyond the jurisdictional authority of investor-State tribunals on investment into trade.[123]

3. Argentina—Economic Emergency Measures

In the fallout of Argentina's severe economic crisis of 2001, which resulted in widespread discontent and fatal public demonstrations, the Argentine government defaulted on its debts and adopted a series of emergency fiscal and monetary policy measures.[124] These measures included the *corralito* limiting cash withdrawals from bank accounts and prohibitions on transfers of funds out of the country, as well as *pesification* abolishing the preexisting convertibility regime (pegging Argentina's peso to the U.S. dollar) and forcing the conversion

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http://www.sec.gov/Archives/edgar/data/1046257/000110465911003108/a11-4663_18k.htm; and in ADM/TLIA $33.5 million, *see* ADM/TLIA Final Award, *supra* note 111, ¶ 304(4).

121. Mexico v. Cargill, Inc., 2011 O.A.C.622. According to Mexico's brief in the set-aside proceedings, the tribunal

> could only award damages to Cargill as an 'investor' (Article 1139) to compensate for losses suffered in connection with its 'investment' (Article 1139) in Mexico, which was Cargill de Mexico, and had no jurisdiction to award damages for losses suffered by the investor in another capacity, here as producer and exporter of its product into Mexico.

122. *Id.* ¶¶ 519–26:

> Claimant's intent was to enter the Mexican HFCS market and attain a significant share of that market. . . .Viewed holistically, Claimant was prevented from operating an investment that involved the sale into and distribution of HFCS within the Mexican market. The inability of the parent to export product to its investment is just the other side of the coin of the inability of the investment, Cargill de Mexico, to operate as it was intended to import HFCS into Mexico.

Cf. ADM/TLIA Final Award, *supra* note 111, ¶ 270 (addressing this issue and deciding that jurisdiction to award damages only included the loss of profits incurred by the subsidiary in Mexico).

123. Mexico v. Cargill, Inc., Court of Appeal File No. C52737, Memorandum of Argument, *available at* http://www.italaw.com/sites/default/files/case-documents/ita0924.pdf (see in particular section G, at 7–9).

124. Martin Feldstein, *Argentina's Fall: Lessons from the Latest Financial Crisis*, 81 Foreign Aff. 8 (2002). *See also* J.F. Hornbeck, Cong. Res. Serv., R43022, Argentina's Post-Crisis Economic Reform: Challenges for U.S. Policy (2013) (outlining some of the main policies adopted by Argentina and its effects on U.S. interests).

of all U.S. dollar–denominated financial instruments, debt, and contracts into pesos. With the exchange rate stabilized around three pesos to one U.S. dollar (as compared to one-to-one prior to the crisis), the government also prohibited utility companies from increasing rates and required the renegotiation of private and public agreements.[125]

From the perspective of foreign investors, these measures had grave impacts on the value, expectations, and legal security of their investments in Argentina. In fact, the measures resulted in the greatest number of investor-State claims against a single State, including the first ever investment mass claim (brought by 180,000 Italian holders of Argentine bonds). In this context, at least forty-four corporations (plus the bondholders) have argued a breach of obligations under BITs or contracts before ICSID tribunals, including the obligation to provide fair and equitable treatment and full protection and security, and failure to compensate for indirect or creeping expropriations.[126]

In its defense, Argentina has raised jurisdictional (e.g., investments not covered)[127] and admissibility (e.g., abuse of process)[128] challenges because the

125. Joaquin G. Gutierrez & Fernando Montes-Negrete, *Argentina's Banking System: Restoring Financial Viability* (World Bank, Policy Research Working Paper No. 2/04, 2004), *available at* http://documents.worldbank.org/curated/en/2004/01/3026408/argentinas-banking-system-restoring-financial-viability.

126. *See* Paolo Di Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 44 (2004). For a list of pending cases, see List of Pending Cases, INT'L CTR. FOR SETTLEMENT INV. DISP., https://web.archive.org/web/20140403051848/https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (accessed through Internet Archive on March 24, 2015). For a list of concluded cases, see *List of Concluded Cases*, INT'L CTR. FOR SETTLEMENT INV. DISP., https://web.archive.org/web/20131016003531/https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded (accessed through Internet Archive on March 24, 2015).

127. For example, CMS Gas Transmission Company and Azurix confirmed that ICSID tribunals had jurisdiction to hear the claim even if there had been or there currently was recourse to the local courts in case of treaty/contract breach. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 800 (July 17, 2003), http://www.italaw.com/sites/default/files/case-documents/ita0183.pdf; Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 48 (Dec. 8, 2003), http://italaw.com/documents/Azurix-Jurisdiction.pdf.

128. Tribunals like Siemens and Camuzzi agreed that the beneficiary of the most-favored nation clause could be dispensed with the use of local remedies for a period of time. *See* Siemens A.G. v. Arg. Republic (Ger. v. Arg.), ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶¶ 137–42 (Aug. 3, 2004), http://www.italaw.com/sites/default/files/case-documents/ita0788.pdf [hereinafter Siemens A.G. Decision on Jurisdiction]. Siemens was awarded over $200 million. However, it voluntarily abandoned the award in response to post-award revelations that Siemens had procured the investment through the systematic bribery of Argentine officials. *See also* Camuzzi International S.A. v. Argentine Republic (Lux. v. Arg.), ICSID Case No. ARB/03/7, Decisión del Tribunal de Arbitraje sobre Excepciones a la Jurisdicción [Decision of the Tribunal on Objections to Jurisdiction], ¶¶ 16–17, 28 (Jun. 10, 2005), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC643_Sp&caseId=C227 [hereinafter Camuzzi International S.A. Decision on Jurisdiction]. *Cf.* Wintershall Aktiengesellschaft v. Argentine Republic (Ger. v. Arg.), ICSID Case No. ARB/04/14, Award, ¶¶ 130–32 (Dec. 8, 2008),

claimants either did not bring their claims before Argentine courts or did not do so in a timely manner. In the proceedings on the merits, Argentina denied liability by invoking customary international law (state of necessity) and treaty law (nonprecluded measures, or actions necessary for its essential security) defenses.[129]

In early cases, tribunals took a rather critical view of Argentina's defenses and either fully or partially denied the *necessity* of Argentina's actions in response to the financial crisis.[130] In doing so, these early tribunals conflated the customary-international- and treaty-law defenses raised by Argentina, as well as the definition of "necessary" entailed in both. However, subsequent reviews by ICSID annulment committees refuted such analysis by arbitral tribunals. In particular, the CMS Gas Transmission Company annulment committee—the first to issue an annulment decision in this context—criticized the lower tribunals' treatment of Argentina's defenses, and suggested that the arbitrators should have considered treaty and customary-international-law defenses as distinct from each other.[131]

Subsequently, the investor-State tribunal in *Continental Casualty v. Argentina*, confronted with the need to analyze each defense separately, accepted Argentina's contention that the term "necessary" in the U.S.-Argentina BIT should be interpreted in line with WTO jurisprudence. The tribunal provided little explanation, and simply set out the WTO approach and applied it to the facts of the case. In other words, the tribunal considered whether Argentina's measures made a "material or decisive" contribution to protect the essential security interests of Argentina.[132] This approach has been defended by supporters as a wise balancing act[133] but also denounced by critics as an inappropriate transplantation of WTO law into investment law.[134]

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http://www.italaw.com/sites/default/files/case-documents/ita0907.pdf [hereinafter Wintershall Award].

129. William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 311 (2008). *See generally* Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Arg., Nov. 14, 1991, 31 I.L.M. 124 [hereinafter U.S.-Argentina BIT].

130. CMS Gas Transmission Co. v. Arg. Republic (U.S. v. Arg.), ICSID Case No. ARB/01/8, Award, 44 I.L.M. 1205, 1211 (2005).

131. CMS Gas Transmission Co. v. Arg. Republic (U.S. v. Arg.), ICSID Case No. ARB/01/8, Decision on Application for Annulment, ¶ 69 (Sept. 25, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0187.pdf. James Crawford, a member of the Ad Hoc Committee pointed out that such body "should have not wounded [the award] so severely." James Crawford, *Ten Investment Arbitration Awards That Shook the World: Introduction and Overview*, 4 DISPUTE RES. INT'L 71, 78 (2010).

132. Continental Casualty Co. v. Argentine Republic (U.S. v. Arg.), ICSID Case No. ARB/03/9, Award, 87 (Sept. 5, 2008), http://italaw.com/sites/default/files/case-documents/ita0228.pdf [hereinafter Continental Award]. Continental solely interpreted and applied Article XI of the U.S.-Argentina BIT and chose not to interpret the customary defense of necessity.

133. *See* Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW

As a result of the multiple arbitration proceedings, Argentina has been ordered to pay millions in compensation to affected investors.[135] For several years, however, Argentina has used various tactics to delay, to reduce, or possibly to renege on the payment of its pecuniary obligations resulting from the arbitral awards. In this process, Argentina has departed from the mainstream understanding of enforcement of ICSID awards by arguing that investors must solicit payments before Argentine courts.[136] For Argentina—absent any violation of the minimum standard of treatment under general international law—foreign investors seeking payment of ICSID awards should expect to be treated as creditors of final local judgments, even if this entails complying with local procedures.[137] While the doctrinal validity of Argentina's interpretation of the Convention is debatable,[138] the argument is not unreasonable.[139]

Argentina's bravado has led the United States (the State of nationality of investors affected by Argentina's position) to take unilateral reprisals.[140] It has

& ETHICS OF HUM. RTS. 48 (2014).

134. Jose Alvarez & Katherine Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, *in* THE YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008/2009 379 (Karl P. Sauvant ed., 2009).

135. Eric David Kasenetz, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity & the Current Fight in the ICSID*, 41 GEO. WASH. INT'L L. REV. 709, 745 (2010).

136. Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 28 GA. J. IT'L & COMP. L. 47, 53 (2009) (arguing "no more would home states of the investors be able to 'espouse' claims of their nationals" provided that the host abides and complies with the pecuniary obligations of the award as if it were a final judgment of a court in that state).

137. Gabriel Bottini, *Recognition and Enforcement of ICSID Awards*, TDM 1, 6 (2009), www.transnational-dispute-management.com/article.asp?key=1359 (arguing that "at least absent any violation of the minimum standard of treatment under general international law," foreign investors should expect to be treated like nationals for enforcement purposes). *See also 2001/2002 Crisis: Impact on Public Utilities Operators,* EMBASSY OF ARG. (Feb. 24, 2013), *available at* http://embassyofargentina.us/embassyofargentina.us/files/sitiowebciadiv8en.pdf. *Cf.* Irina Natacha Gedwillo, *The Enforcement of ICSID Awards Before Argentine Courts*, 8(2) TRANSNAT'L DISP. MGMT. 1, 19 (2011) ("[T]here is not a basis for reviewing a final judgment.").

138. Siemens A.G. v. The Argentine Republic (Ger. v. Arg.), ICSID Case No. ARB/02/8, Submission by the United States of America to the ad hoc Annulment Committee regarding Articles 53 and 54 (May 1, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0792.pdf ("Article 54 does not supersede or condition a Contracting State party's obligation under Article 53 in any way. Rather, Article 54 only applies after the losing State fails to pay an award pursuant to Article 53.").

139. *See, e.g.*, Aus. Gov't., Dep't of Foreign Aff. and Trade, Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity 14 (2011) [hereinafter Gillard Trade Policy Statement]. Australia's government rejected BITs conferring "greater legal rights on foreign businesses than those available to domestic businesses."

140. The suspension was in response to Argentina's purported failure to comply with the awards in Azurix and CMS Gas. Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006), 14 ICSID Rep. 374 (2009) [hereinafter Azurix Award] (awarding $165.2 million) and CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), 14 ICSID Rep. 158 (2009) (awarding $133.2 million). Arguably the dispute shall be referred to the International Court of Justice, *see* ICSID Convention *supra* note 33, art. 64 ("A

used its veto power with institutions such as the Inter-American Development Bank to block certain low-interest loans to Argentina.[141] More importantly, in May of 2012 the United States used trade measures to support U.S. investors' efforts to recover awards rendered against Argentina.[142] By suspending Argentina's designation as a beneficiary developing country under the U.S. Generalized System of Preferences (GSP), the United States assesses duties on about eleven percent of total imports from Argentina that previously had entered duty free. In short, the investment remedy has been complemented by an inter-State trade sanction. For the ICSID protection system, Argentina's case shows that the "automatic enforcement" of awards, considered an important advantage for foreign investors, "is [now] hard to gauge."[143]

4. Australia—Tobacco-Packaging Legislation

The final case takes place in the context of increasing efforts to decrease smoking,[144] chief amongst them the Framework Convention on Tobacco Control (FCTC), a widely ratified treaty negotiated at the World Health Organization, the most important transnational regulatory effort to reduce tobacco consumption.[145] Invoking the FCTC's goals, Australia adopted the

dispute . . . concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice.").

141. *U.S. Will Vote Against Loans to Argentina in World Bank and IDB*, MERCOPRESS, Sept. 29, 2011, http://en.mercopress.com/2011/09/29/us-will-vote-against-loans-to-argentina-in-world-bank-and-idb. *See also* Stanimir Alexandrov, Marc Palay & David Roney, *United States Suspends Argentina's Preferential Trade Status for Failure To Pay ICSID Arbitral Awards*, SIDLEY AUSTIN (Mar. 30, 2012), http://www.sidley.com/United-States-Suspends-Argentinas-Preferential-Trade-Status-for-Failure-to-Pay-ICSID-Arbitral-Awards-03-30-2012 (stating that Argentina "has not acted in good faith in enforcing arbitral awards in favor of United States citizens" or U.S.-owned companies).

142. *See* Proclamation No. 8788, 77 Fed. Reg. 18, 899 (Mar. 29, 2012). The suspension, which was made pursuant to 19 U.S.C. § 2462(b)(2)(E) and (d)(2), took place on May 28, 2012, sixty days after the presidential proclamation was published in the Federal Register. *See also* Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, 44 GEORGETOWN J. INT'L. L. 503, 504 (2013).

143. *See generally* Piero Bernardini, *ICSID Versus Non-ICSID Investment Treaty Arbitration,* Sept. 15, 2009, *available at* www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf. According to Professor Bernardini, the limited review and full compliance of the awards, in the past considered an advantage of the system, are no longer so evident. Thus, compared to system of enforcement of non-ICSID awards, ICSID awards are losing their attractiveness.

144. For a summary of the major tobacco control measures taken by the U.S. government during the second half of the twentieth century and the impact of lawyers in the antitobacco movement, see ROBERT L. RABIN & STEPHEN D. SUGARMAN, REGULATING TOBACCO 15–16 (2001). For more recent efforts, see Robert L. Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, 41 LOY. L.A. L. REV. 1721 (2008).

145. *See* WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 166 [hereinafter FCTC]. The FCTC contains tobacco control measures such as implementing pictorial health warnings (fifty percent minimum) on tobacco products packs; adopting a total ban on tobacco advertising, promotion and sponsorship; enforcing a complete ban on tobacco use in public places;

Tobacco Plain Packaging Act of 2011 (the Act), restricting the use of trademarks on tobacco products and imposing "plain packaging" requirements. A novel approach, the Act prohibits companies from printing logos, symbols, and other bright images on cigarette packets.[146] It requires "generic packaging," a particular shade of drab dark brown for all tobacco products. Marks and trademarks may continue to appear on packaging, but only in specified locations, and in a standard color, position, font, and size.[147]

Important tobacco companies have brought three widely publicized types of enforcement actions against the Act. At the domestic level, two of them challenged the Act before the High Court of Australia.[148] The plaintiffs argued that the provisions were invalid because they constituted a taking on "[un]just terms" of intellectual property (i.e., their trademark). The Court denied their claim, finding that the Act only controls the way tobacco is marketed and does not constitute a taking of the trademark.[149]

In the international trade arena, Ukraine, Honduras, the Dominican Republic, Cuba, and Indonesia filed five separate WTO cases against Australia.[150] While all countries are producers or manufacturers of tobacco products, with the exception of Cuba and Indonesia none are large exporters of such products,[151] and general trade flows between these countries and Australia have been low or nonexistent.[152] Some of these countries' espousal of claims can be partially explained by the reluctance of the United States, traditionally a large tobacco exporter and the country of origin of important tobacco interests,

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increasing tobacco prices to control access by young people; and continuing to monitor the epidemic and introduce tobacco dependence treatments.

146. *See* Tobacco Plain Packaging Act 2011 (Act No. 148) (Aus.).

147. *See id.* § 20(1), (2), (3). No marks and trademarks may appear anywhere on a tobacco product, other than as permitted by the regulations. In addition, the implementing regulations do not permit any trademark to be put on the tobacco product.

148. JT International SA v. Commonwealth (2012) 250 CLR 1 (Austl.).

149. *Id.* ¶ 2 (noting that plaintiffs argue the "Act effected an acquisition of their intellectual property rights and goodwill on other than just terms, contrary to [section] 51(xxxi) of the Constitution").

150. *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434 (Ukraine), WT/DS435 (Honduras), WT/DS441 (Dominican Republic), WT/DS458 (Cuba), WT/DS467 (Indonesia) [hereinafter Tobacco Packaging Legislation]. Consultations were held in the four cases but no settlement was reached. Hence, at request of plaintiffs, the DSB agreed to establish a panel to study the complaint furthering the procedures.

151. Int'l Trade Ctr., *List of Exporters for Various Products*, TRADE MAP, http://www.trademap.org/Country_SelProduct_TS.aspx (last visited Jan. 20, 2015) (select Product: 24).

152. In fact, in 2011 Dominican Republic ranked 26th on tobacco exports totaling $407 million, Ukraine was 36th with $232 million in exports and Honduras 58th with a value of $74 million in tobacco exports. According to data found in the International Trade Center, Dominican Republic only exported $78,000 to Australia in 2011 and $23,000 to Honduras, while Ukraine, which was the first country to file the claim does not register trade flows with Australia. *Id.* (select Product: 24 and Country: United States of America).

to directly engage in the case despite the industry's lobbying efforts. Under an unsympathetic Democratic administration with its hands full defending its restrictions on the sale of clove-flavored cigarettes at the WTO (a measure aimed at discouraging minors from smoking),[153] the United States chose to participate as a third party in these WTO cases.[154] Not surprisingly, the tobacco industry openly admitted that it is paying the complaining States' legal fees, arguably a standard practice in WTO disputes.[155]

The WTO complainants claim that the Act negatively impacts their domestic activities in the tobacco value chain and that it infringes TRIPS because it upsets their right to use trademarks and differentiate themselves from competition. Some experts have responded with concern and argue that the right to use trademarks is not expressly granted by the TRIPS Agreement. Trademark owners only have the exclusive right to prevent third parties from using their trademarks without their consent, or what is often referred as a negative right of "exclusion" of use.[156] Additionally, the complainants argue that the Act violates the WTO's Agreement on Technical Barriers to Trade (TBT) as the measures are more trade restrictive than necessary to achieve the stated objectives.[157] In

153. In the case Measures Affecting the Production and Sale of Clove Cigarettes, brought by Indonesia against the United States, the Panel found that the measure was inconsistent with the national treatment obligation of Article 2.1 of the TBT Agreement because it prohibited imported clove cigarettes from Indonesia, but did not prohibit "like" domestic menthol cigarettes. The Panel also found that the transitional period to implement the bill was too short, violating Article 12.2 of the TBT Agreement. Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406 (Dec. 12, 2012).

154. The United States joined other WTO members in doing so, including countries with interests in the industry and others that lean towards enacting strict regulation. For a detailed list of third parties in these cases, see Tobacco Packaging Legislation, *supra* note 150.

155. Some news services have reported that the industry is paying off the plaintiff country's claim related expenses. Myron Leving, *Tobacco Industry Uses Trade Pacts to Try to Snuff out Anti-Smoking Laws*, NBC NEWS, Nov. 29, 2012, http://openchannel.nbcnews.com/_news/2012/11/29/15519194-tobacco-industry-uses-trade-pacts-to-try-to-snuff-out-anti-smoking-laws?lite. *See also* Amy Corderoy, *Mystery over Ukraine Tobacco Law Challenge*, SYDNEY MORNING HERALD, Mar. 27, 2012, http://www.smh.com.au/opinion/political-news/mystery-over-ukraine-tobacco-law-challenge-20120326-1vunl.html; Bernard Kane, *WTO Case Quid Pro Quo to Big Tobacco by Ukraine*, CRIKEY (Mar. 15, 2012), http://www.crikey.com.au/2012/03/15/wto-case-quid-pro-quo-to-big-tobacco-by-ukraine/?wpmp_switcher=mobile; Sabrina Tavernise, *Tobacco Firms' Strategy Limits Poorer Nations' Smoking Laws*, N.Y. TIMES, Dec. 13, 2013, http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html?pagewanted=all&_r=0; Myron Levin, *As Nations Try to Snuff Out Smoking, Cigarette Makers Use Trade Treaties to Fire Up Legal Challenges*, FAIR WARNING, Nov. 29, 2012, http://www.fairwarning.org/2012/11/as-nations-try-to-snuff-out-smoking-cigarette-makers-use-trade-treaties-to-fire-up-legal-challenges/.

156. *See generally* Andrew D. Mitchell & Tania S. Voon, *Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging*, 22 PUB. L. REV. 218 (2011). *See also* Mark Davison & Patrick Emerton, *Rights, Privileges, Legitimate Interests, and Justifiability: Article 20 of TRIPS and Plain Packaging of Tobacco* (2014), *available at* http://ssrn.com/abstract=2322043.

157. *Panels Set Up on Australia's Tobacco Measures and on U.S. Duties on China's Exports*, WTO NEWS (Sep. 28, 2012), http://www.wto.org/english/news_e/news12_e/dsb_28sep12_e.htm. The challenged measures are the Tobacco Plain Packaging Act 2011, its implementing Tobacco

response, Australia also asserts that the measure is designed to achieve a legitimate objective, the protection of public health justified under the TBT and the general exceptions (Article XX) of GATT.[158]

The tobacco industry has also availed itself of investment-law mechanisms, as Philip Morris Asia Limited (PM Asia), a Hong Kong company and owner of Australian affiliate Philip Morris Limited (PM Australia), has filed a claim against Australia under the Hong-Kong-Australia BIT.[159] Interestingly, PM Asia only acquired its shares in PM Australia four months prior to filing this claim and just after Australia's announcement of a legislative proposal that later became the Act.[160] This creative solution circumvented Australia's decision to avoid including investor-State arbitration in the 2005 Australia-U.S. Free Trade Agreement, and Australia disputes the move as an "abuse of right."[161] This case is also atypical because it was filed against a prospective action—the Act was enacted six months after the notice of arbitration—and because it asked the tribunal to order the suspension of the measure (a remedy typically reserved for inter-State adjudication) or alternatively, to pay PM Asia compensatory damages.[162]

Plain Packaging Regulations 2011, the Trademark Amendment Act 2011, and other related measures, acts, policies, or practices adopted by Australia. The plaintiffs alleged violations to Articles 1.1, 2.1, 3.1, 15, 15.1, 15.4, 16, 16.1, 16.3, 20, 1, 27 of the TRIPS Agreement; Articles 2.1, 2.2 of the TBT Agreement; and Articles I, III and IV of the GATT. *See* Tobacco Packaging Legislation.

158. *See Summary of Australia's Involvement in Disputes Currently Before the World Trade Organization*, DEP'T FOREIGN AFF. & TRADE, http://www.dfat.gov.au/trade/negotiations/disputes/index.html (last visited Oct. 12, 2014). For a summary of the responses, see for example *Honduras Requests Panel on Australia's Tobacco Measures*, WTO NEWS (Nov. 9, 2012), http://www.wto.org/english/news_e/news12_e/dsb_19nov12_e.htm (last visited Oct. 16, 2014).

159. Agreement Between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments, H.K.-Austl., Sep. 15, 1993, 1748 U.N.T.S. 385; PM Asia Notice of Arbitration, *supra* note 13, at 1.1–1.3. Other current cases with analogous facts may have important implications in the tobacco plain packaging disputes, such as an investment case filed against Uruguay for a similar measure also based on the FCTC. The Uruguayan case is expected to be decided earlier than the Australian case. *See* Philip Morris Brands Sàrl et al v. Oriental Republic of Uruguay (Switz.-Uru.), ICSID Case No. ARB/10/7, http://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf.

160. *See generally* Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12 (2011); *see also* Australia's Response to the Notice of Arbitration 3 (Dec. 21, 2011), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0666.pdf (last visited Oct. 17, 2014) [hereinafter Response to PM Asia Notice of Arbitration].

161. Response to PM Asia Notice of Arbitration, *supra* note 160, ¶ 31 ("[T]here could be no 'investment' for the purposes of Article 10 of the BIT and any reliance on Article 10 of the BIT would constitute an abuse of right."). Historically, Australia has sought the inclusion of investor-State dispute resolution procedures only in trade agreements negotiated with developing countries, as well as Bilateral Investment Treaties. As a result of this policy, important treaties, such as the 2005 Australia-United States FTA, do not include investor-State dispute mechanisms. *See* William Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 22–26 (2006).

162. PM Asia Notice of Arbitration, *supra* note 13, ¶ 8.2–8.3. *See also* Ankita Ritwik, *Tobacco*

Before the investor-State tribunal, PM Asia argues that the prohibition on the use of tobacco trademarks infringes PM Asia's rights under the BIT and destroys its intellectual property given its inability to differentiate PM products from others, including illicit products.[163] PM Asia also argues that the broad BIT provisions (specifically, the "umbrella clause" and fair-and-equitable-treatment provisions) can be used to import Australia's other international obligations into the claim, including those enshrined in the WTO's TRIPS and TBT Agreements.[164] Australia strongly contests this jurisdictional contention and maintains that the measures' implementation constitute a legitimate exercise of the government's regulatory powers to protect the health of its citizens based on scientific evidence.[165]

The Australian government has publicly announced that it will no longer include investor-State arbitration in future treaties, adding a final note of intrigue to the saga.[166] According to some specialists, this purported policy shift was directly connected to the lawsuit brought by PM Asia.[167] Moreover, a "safe harbor" provision protecting nations that have adopted regulations on tobacco was reported to be included in a draft of the Trans-Pacific Partnership Agreement, raising the opposition of business interest groups.[168] At the time of the writing of this Article, neither the WTO panel nor the investor-State tribunal had issued a final decision.

Packaging Arbitration and the State's Ability to Legislate, 54 HARV. INT'L L.J. 523–38 (2013).

163. PM Asia Notice of Arbitration, *supra* note 13, ¶ 7.3–7.5.

164. *Id*. ¶ 7.6–7.8, 7.15–7.17. According to Philip Morris Asia, Article 2(2), which provides that each Contracting Party to the BIT has an obligation to "observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party" serves to invoke breaches of other treaties. This argument links the WTO agreements with the BIT protections. *See id.* para. 7.15.

165. Response to PM Asia Notice of Arbitration, *supra* note 160, ¶¶ 29–36, 38–39.

166. GILLARD TRADE POLICY STATEMENT, *supra* note 139, at 14. In response to similar concerns, the United States Trade Representative is considering a limited "carve-out" of anti-tobacco regulation in the TPP. *See Fact Sheet: TPP Tobacco Proposal*, OFFICE U.S. TRADE REP., https://web.archive.org/web/20130424183531/http://www.ustr.gov/about-us/press-office/fact-sheets/2012/may/tpp-tobacco-proposal (last visited January 20, 2015).

167. *See generally* Jurgen Kurtz, *Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication*, 27 ICSID REV. 65 (2012).

168. *USTR Informally Floats ISDS Tobacco Carveout with Some TPP Countries,* INSIDE U.S. TRADE, Oct. 10, 2014 ("U.S. trade officials have reached out to some other Trans-Pacific Partnership (TPP) countries to informally float the idea of excluding tobacco-related challenges from being brought under the deal's investor-State dispute settlement (ISDS) mechanism, according to informed sources."). *But see* Michael R. Bloomberg, *Op-Ed: Why Is Obama Caving on Tobacco?*, N.Y. TIMES, Aug. 22, 2013, http://www.nytimes.com/2013/08/23/opinion/why-is-obama-caving-on-tobacco.html ("The tobacco industry was joined by other business interest groups that were fearful that the safe harbor provision would lead to other products' being singled out in future trade accords.").

B. Repurposing

1. Intra-Regime Shifting

Within each regime—trade or investment—two types of strategies allow parties to choose among different treaties.[169] The first, *forum shopping*, describes strategies to move the enforcement action between fora. In the trade context, since levels of commitment and flexibility vary across treaties, a move to another forum may expand the scope of the obligations or reduce the cross-referencing to carve outs and thereby increase the prospects of success.[170] For instance, in the Soft-Drinks Tax case, the United States successfully moved the enforcement action from NAFTA's regional dispute forum to the WTO's multilateral forum by relying on NAFTA's choice-of-forum clause.[171] In investment, forum shopping takes place in a different modality. Most BITs contain "fork-in-the-road" clauses, which generally permit investors to choose between domestic and international enforcement options, not between different treaties.[172] In the economic emergency measures context, for instance, many affected investors concerned with having impartial justice before Argentine courts chose to avail themselves of investor-State arbitration even though they had the option to use Argentina's courts.[173]

Party shopping, on the other hand, describes when private parties strategically select the State party of an enforcement action in order to take advantage of a different, often more beneficial, rule.[174] Within trade, private parties engage in party shopping when they approach different States, seeking a State willing to bring a case to the WTO dispute settlement process. In most trade agreements, including the WTO, any State party to the treaty may initiate an enforcement action as the right to bring a claim is "largely self-

169. Helfer, *supra* note 19, at 16 (noting that an intra-regime shift moves "lawmaking venue situated within the same regime"). For a more detailed discussion, *see* Sergio Puig, *International Regime Complexity and Economic Law Enforcement,* 17 J. INT'L ECO. L. 491–516 (2014).

170. *See generally* David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025 (1999).

171. Soft Drink Panel Report, *supra* note 106, ¶ 7.10-7.18.

172. Under international law, parties should exhaust their domestic remedies before bringing an international claim. *See generally* Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, at 41–42. BITs provide different exceptions to the rule. *See also* Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231 (2004); William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 357, 373–76 (2000).

173. *See*, *e.g.*, Compañiá de Aguas del Aconquija S.A. v. Argentine Republic (Vivendi Annulment), ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 113 (July 3, 2002) (discussing fork-in-the-road clause); Azurix Award, *supra* note 140, ¶¶ 87–90 (stating that the identity of parties, object, and cause of action were required to trigger the fork-in-the-road provision).

174. Some scholars term this conduct "diplomatic espousal shopping." Alford, *supra* note 10, at 50.

regulating."[175] States tend to exercise restraint in the initiation of proceedings and bring actions that advance the complainant's immediate or systemic interest. This calculation includes a careful balance between the likely benefits, including market access or a potentially good precedent, and the costs of bringing an action, including financial and possible damage to diplomatic relations.[176] The espousal by some countries with no particular interest in the Australian domestic market of the Tobacco Packaging Legislation case, however, is an example of an arguably more opportunistic behavior where some States are willing to capitalize on the benefits provided by private interests searching for a proxy.[177]

Party shopping is more common in the investment context as a result of the private right of standing. A subsidiary incorporated in a country that is party to a BIT with an allegedly offending State may help an investor gain the nationality requirement to access investor-State arbitration.[178] As corporations become more versatile, with subsidiaries in many locations, investor party shopping is becoming more common because BITs' properties often grant greater control over remedy and have permissive nationality requirements.[179] If private interests anticipate policy changes the way Philip Morris did in the Tobacco Packaging Legislation context, we may see more investors attempting to open enforcement possibilities by strategically incorporating business entities during political deliberation (but prior to the formal enactment) of a measure.

In short, private economic interests are able to choose among treaties due to choice-of-forum clauses and the way their corporate structures and supply chains are established in different locations for economic benefit and/or political

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175. Appellate Body Report, *Mexico—Corn Syrup*, ¶¶ 73–74, WT/DS132/AB/RW (Oct. 22, 2001):

> Given the 'largely self-regulating' nature of the requirement in the first sentence of Article 3.7, panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgment as to whether recourse to that panel would be 'fruitful.'

176. Krzysztof Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547, 563 (2014) (showing that "precedent is perceived as holding sufficient authority for countries to file trade disputes accordingly").

177. It may also be true, as the Appellate Body has asserted, "with the increased interdependence of the global economy, . . . Members have a greater stake in enforcing [trade rules]." *See EC—Bananas III*, *supra* note 92, ¶¶ 136–38. In this case, the United States was the lead complainant even though it did not export bananas; however, Chiquita, in particular, had large investments in Latin America. The bilateral(-isable) and reciprocal obligations in international economic law generate a scope of possibilities for transitional moves. *See generally* Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT. L. 907 (2003).

178. Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 BRIT. Y.B. INT'L L. 264, 316–17 (2008).

179. Outside of the general distrust towards claims by nationals against their home States, there is a trend among investor-State tribunals to permit forum shopping. *See generally* Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L. L. 121, 131 (2009).

advantage. At the same time, the relaxation of rules of international law regarding diplomatic protection or "injury" tests reduces the importance of the State bringing the action, placing more emphasis on stakeholders such as the transnational interests affected by a government intervention or the domestic interests affect by its reversal. These strategies are encouraged by the embedded flexibility in treaties and buoyed by the general desire on the part of private interests to maintain autonomy.

2. Inter-Regime Shifting

Two types of inter-regime strategies allow parties to experiment with features of enforcement systems across trade and investment legal frameworks.[180] Usually, States are the complainants trying to enforce trade agreements, while in BITs private interests generally have the right to bring claims on their own behalf.[181] Recent years, however, have seen increased attempts by States to directly enforce investment-law breaches and conversely, attempts by private actors to enforce trade-related investment breaches. Hence, I term this strategy *party shifting* as the experimentation is with the entity bringing the enforcement action. This strategy has become more prevalent because under many recent trade agreements, provisions aimed at protecting FDI can be enforced by States, at an inter-State level as part of larger liberalization commitments.[182] In addition, as more trade-related obligations such as performance requirements have been included in RTAs, ostensible trade breaches may be enforced by private parties in investment arbitration.[183]

In the Trucking Services Restrictions case, Mexico enforced investment rules in a State-to-State context, demonstrating that this format may offer more precision towards achieving one of the main objectives of the treaty, in this case, liberalizing a particular economic sector.[184] The other side of the coin is even

180. Helfer, *supra* note 19, at 16 (stating that an inter-regime shift moves "to a venue located in an entirely different regime").

181. Sykes, *supra* note 23, at 636.

182. *See, e.g.,* Panel Report, *India—Measures Affecting the Automotive Sector*, ¶ 7.57–7.65, WT/DS146/R, WT/DS175/R (Dec. 21, 2001) (concerning the indigenization requirement or "local-content" requirement, a paradigmatic example of measures covered by the TRIMs agreement). *See also* Panel Reports, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector / Canada—Measures Relating to the Feed in Tariff Program*, WT/DS412/R /WT/DS426/R (Dec. 19, 2012) (finding that "mere participation" in that program requiring compliance with domestic content requirements was sufficient to confer an "advantage" on domestic beneficiary enterprise.); Request for Consultations by China, *European Union—Certain Measures Affecting the Renewable Energy Generation Sector,* WT/DS452/1 (Nov. 7, 2012) (complaining of the effects that the EU renewable energy generation policy is having on competition and market access).

183. *See, e.g.*, Pope & Talbot, Inc. v. Canada, Award on Damages (NAFTA Arb. Trib May 31, 2002); S.D. Myers, Inc. v. Canada, Second Partial Award (NAFTA Arb. Trib. Oct. 21, 2002); ADF Group, Inc. v. United States, Award (NAFTA. Arb. Trib. Jan. 9, 2003).

184. *U.S.-Mexico Panel Decision*, *supra* note 80, ¶ 294 ("[T]he deprivation of the right to obtain operating authority to U.S. companies owned or controlled by Mexican nationals . . . violates

more common, namely the challenging of trade restrictions that affect FDI by relying on investment-law procedures. As government measures increasingly affect both trade and investment, lawyers have become better at characterizing trade matters as investment-law violations.[185] Tribunals have found most of these crossovers to be unmeritorious for lack of jurisdiction when no clear investment exists in the territory of the offending party.[186] However, the tribunal in *Cargill*—in the soft-drinks tax context—found that a series of actions, including an import-permit requirement directly breached the investment provisions of NAFTA.[187]

A second inter-regime strategy is *relief shifting*. Typically, trade panels have jurisdiction to determine whether a State has violated its legal obligations and if the failure to comply can lead to the suspension of trade benefits.[188] Investor-State tribunals, on the other hand, do not have the authority to order compliance (with some exceptions) but can order the payment of retrospective compensation when governments breach international law.[189] Failure to comply with an arbitral award may result in private efforts to seize that government's assets or potentially a diplomatic clash between the home and the host State of the investor.[190] In relief shifting, however, parties experiment with enforcement across trade and investment regimes.

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the straight-forward provisions of NAFTA.").

185. In the Canadian Cattlemen for Fair Trade case, the Claimants (Canadian livestock and beef exporters) maintained that a decision by the United States to close the border to certain meat products following the discovery of BSE in Canada breached the obligation to accord national treatment to Canadian investors with respect to their investments in Canada. Canadian Cattlemen for Fair Trade (CCFT) v. United States, Award on Jurisdiction (NAFTA Arb. Trib. 2008), *available at* http://italaw.com/sites/default/files/case-documents/ita0114.pdf [hereinafter CCFT]. *See generally* Gaetan Verhoosel, *The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. INT'L ECO. L. 493 (2003).

186. Arwel Davies, *Scoping the Boundary between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?*, 15 J. INT'L ECO. L. 793, 795 (2012). *See also, e.g.*, CCFT, *supra* note 185, ¶ 112 ("'[I]nvestors' do not exist . . . in isolation, but are explicitly linked to their investments.").

187. Cargill Award, *supra* note 115, ¶ 175.

188. Money damages are always an additional option to settle trade disputes*, see, e.g.,* Framework for a Mutually Agreed Solution to the *Cotton* Dispute in the World Trade Organization Between the United States and Brazil, *United States—Subsidies on Upland Cotton*, WT/DS267 (June 25, 2010). *See also* Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach,* 94 AM. J. INT'L L. 335, 343–44 (2000).

189. In some cases, arbitration tribunals can order the restitution of property. *See generally* NAFTA, *supra* note 5, art. 1135.

190. ICSID Convention, *supra* note 33, art. 26. *See generally* G.R. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L. L. 784 (1983). *See also* The "ARA Libertad" Case (Arg, v. Ghana), Case No. 20, Order of Dec. 15, 2012 (Int'l Trib for the Law of the Sea 2012), http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15.12.2012.corr.pdf. In the "ARA Libertad Case," a local Ghanaian court granted an application for an injunction, which prevented an Argentine vessel from taking on the fuel needed to reach Argentina, posting $20 million with the court, in partial satisfaction of the judgment in *NML Capital Ltd v Republic of Argentina*, [2010] EWCA (Civ), *aff'd*, [2011] UKSC 33 (Eng.).

For instance, States can suspend trade benefits at the inter-State level to induce compliance with investment rules or awards resulting from investor-State arbitration. The increased trade tariffs by Mexico in the trucking services restrictions case was specifically aimed at inducing the United States to comply with investment rules.[191] Conversely, in the economic emergency measures context, the United States' suspension of GSP benefits against Argentina was aimed at inducing the South-American country to pay investor-State arbitration awards.[192]

This strategy can also take the opposite form: the suspension of investment obligations to force States to comply with trade obligations. In the soft-drinks tax context, Mexico argued that the tax at issue was aimed at American investors as a countermeasure for a prior breach of inter-State trade obligations.[193] One tribunal held that such a reprisal targeting investors was potentially permissible.[194] This may open the door to attempts by States to suspend investment provisions or even access investor-State arbitration in order to enforce trade violations.[195]

Even when the remedies operate primarily as mechanisms of dispute settlement, the types of relief available under each regime (i.e., prospective relief for trade, retrospective for investment) have interacting functions and complementary goals (i.e., compliance for trade, compensation for investment).[196] These relationships may be maximized by actors and, in the event of noncompliance, used to send a message that recalcitrant respondents, or their nationals, will suffer uncertainty until they decide to comply with their international obligations or tribunal rulings.

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191. Here I use the same distinction applied by Rachel Brewster:

> [A] breach refers to a deviation from the substantive terms of a treaty: an action contrary to the first-order rules of an agreement is a breach. . . . [A] violation of a treaty is a deviation from the dispute resolution rules: an action that is contrary to the treaty's second-order rules.

Rachel Brewster, *Reputation in International Relations and International Law Theory*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 524, 538–89 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

192. For the authority to designate a country a beneficiary of GSP benefits, see 19 U.S.C. § 2462(b)(2) (2013) ("The President shall not designate any country a beneficiary developing country under this subchapter if any of the following applies . . . ."). For the goals of the suspension, see Matthew Pountney, *Obama Tells Argentina to Pay Up*, GLOBAL ARBITRATION REV., Nov. 16, 2011, http://globalarbitrationreview.com/news/article/29956/obama-tells-argentina-pay-up/%3B. *See also* Rosenberg, *supra* note 142.

193. *See supra* note 114 (including accompanying text).

194. ADM Consolidated Order, *supra* note 112, ¶¶ 110–50.

195. As Roger Alford concludes, ironically, "the most effective tool to secure compliance with WTO obligations may trigger investment arbitration." Alford, *supra* note 10, at 48.

196. *See generally* Brooks E. Allen, *The Use of Non-Pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners*, *in* PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION 281 (Michael E. Schneider & Joachim Knoll eds., 2011).

3. Transplantations

In theory, the applicable law in trade and investment is distinct. Trade panels decide if a government measure is consistent with the trade agreement rules that grant them jurisdiction. In an investor-State arbitration, the applicable rules are those of the investment instrument. Nonetheless the cases reveal at least two strategies to apply rules across systems or adopt legal concepts that approach the normative content of a different treaty: the former I term *importations* and the latter has been referred to as *cross-fertilization*.[197]

To advance their litigation interests, parties may import a rule from one trade treaty to another trade treaty, from one investment treaty to another investment treaty or, more audaciously, across trade and investment treaties. These strategies often relate to the scope of a rule and raise the issue of how broadly to read an obligation.[198] For one, parties have used most-favored-nation clauses of BITs for some time to import rules from other BITs their host State has entered into with a third State. In the economic emergency measures context, for example, several investors relied on this strategy to dispense with the obligation to use local remedies prior to submitting a claim for arbitration.[199] In the tobacco-packaging legislation context, Phillip Morris is using this strategy to argue that provisions in the BIT between Hong Kong and Australia can be used to import obligations formalized in the WTO's TRIPS and TBT agreements.[200] While seemingly aggressive, from a doctrinal standpoint it is true that broad and expansive BIT clauses may serve as a vehicle for attempts to enforce rules adopted in the trade (or other) context via investor-State arbitration, especially when the clause at issue makes reference to the enforceability of other general commitments under international law.[201]

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197. Helfer & Slaughter, *supra* note 66, at 323 (arguing that judicial bodies, through "cross-fertilization," "enhance each other's authority by referring to one another's decisions").

198. Soft Drink Tax Appellate Body Report, *supra* note 106, ¶ 45 ("Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction."). *See also* Rio Grande Irrigation & Land Co., Ltd. (Gr. Brit. v. U.S.), 6 R. INT'L ARB. AWARDS 131, 135–36 (1923).

199. *See* Siemens A.G. Decision on Jurisdiction, *supra* note 128, ¶¶ 135–44 (awarding Siemens over $200 million). However, the company voluntarily abandoned the award in response to post-award revelations that Siemens had procured the investment through the systematic bribery of Argentine officials. *See also* Michael A. Losco, *Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction*, 63 DUKE L. J. 1201, 1202–24 (2013); Camuzzi International S.A. Decision on Jurisdiction, *supra* note 128, ¶¶ 16, 17, 28; *cf.* Wintershall Award, *supra* note 128, ¶¶ 130–32.

200. PM Asia Notice of Arbitration , *supra* note 13, ¶ 7.1–7.7 (stating that Article 2(2), which provides that each Contracting Party to the BIT has an obligation to "observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party," serves to invoke breaches of other treaties).

201. Metalclad Corp. v. Mexico, Award, 40 I.L.M. 36, 70–99 (NAFTA Ch. 11 Arb. Trib. 2000) (allowing the import of other obligations on "transparency" under NAFTA through the "international law" gateway). Importations are in fact a bigger possibility in *intra* BITs but not in trade thanks to the exception for RTAs.

A final strategy, common to many legal practice areas, results from the cross-pollination of legal concepts and analogical interpretations between treaties, or *cross-fertilization*. BITs, like trade agreements, include similarly worded prohibitions against discrimination.[202] Hence, in interpreting BIT provisions to determine whether foreign investors were given no less favorable treatment than other investors, parties have used, and tribunals have often considered, WTO jurisprudence.[203] Conversely, while some examples exist, there is less reliance on BIT case law at the WTO, or for that matter at other inter-State dispute-settlement bodies dealing with trade cases.[204]

What the Soft-Drinks Tax and Trucking-Services Restrictions case studies show is that cross-fertilization commonly occurs when tribunals interpret treaty language that requires the use of comparisons such as "like products" or "like circumstances," terms associated with the scope of application such as "affects" or "relate to," and terms establishing the conditions of competition such as "less favorable treatment."[205] Some argue that this type of transplantation has a legal

202. Domestic and foreign goods, services, investments, and intellectual property rights should be treated equally under the National-Treatment Principle encompassed in different international treaties. For instance, Article 2 of Chapter 11 of NAFTA contains a standard provision of national treatment in the investment context. *See* NAFTA, *supra* note 5. Similarly, the three main agreements of the WTO (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS) also comprise the national-treatment principle. Even though the main principle is similar, some elements differ in these agreements. *See* DiMascio & Pauwelyn, *supra* note 9, at 58 ("National treatment provisions take various forms, but their basic requirement is that nations treat foreign individuals, enterprises, products, or services no less favorably than they treat their domestic counterparts.").

203. *See* S.D. Myers, Inc. v. Government of Canada, Partial Award, ¶¶ 234–52 (NAFTA/UNICTRAL Trib. 2000), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf. Pope & Talbot, Inc. v. Government of Canada, Award on Merits Second Phase, ¶¶ 45–102 (NAFTA Ch. 11 Arb. Trib. 2001), http://italaw.com/sites/default/files/case-documents/ita0678.pdf (considering several WTO cases to address the national treatment principle in 1102 of NAFTA, including the Bananas and the Asbestos cases). Beyond NAFTA disputes, the same analysis has been followed regarding the National-Treatment Principle, *see* Occidental Exploration and Production Company v. The Republic of Ecuador (U.S. v. Ecuador), LCIA Case No. UN3467, Final Award, ¶ 174 (London Ct. of Int'l Arb. 2004), http://italaw.com/sites/default/files/case-documents/ita0571.pdf; Methanex Corp. v. United States (Can. v. U.S.), Final Award, 44 I.L.M. 1345, 1446–49, ¶¶ 29–38 (NAFTA/UNICTRAL Trib. 2005), http://www.state.gov/documents/organization/51052.pdf (concluding that "like circumstances" could not be interpreted to mean "like products"). For a more complete analysis, see generally Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EUR. J. INT'L L. 749 (2009).

204. *Cf.* Appellate Body Report, *US—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WT/DS344/AB/R, (Apr. 30, 2008) (citing the ICSID case of Saipem S.p.A. v. Bangladesh for the proposition the WTO "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").

205. *See e.g.*, Cross-Border Trucking Services Final Decision, *supra* note 81, at 260 (transposing "in like circumstances" language from GATT/WTO). *See also* Methanex Final Award, *supra* note 203, pt. IV, ch. E, ¶ 22 (analyzing the term "relate to" under NAFTA); Corn Products Notice of Arbitration, supra note 103, ¶¶ 121–25 (referencing WTO decision for analyzing "like circumstances"). For "like products," see also Occidental Exploration & Prod. Co. v. Republic of Ecuador, Award, ¶ 173 (London Ct. Int'l Arb. 2004). For "like circumstances" see also Parkerings-

basis.[206] The Vienna Convention on the Law of Treaties gives tribunals authority to rely on "a relevant rule of international law applicable in the relation between the parties."[207] Another, more sociological explanation is, of course, the growing overlap between trade and investment lawyers, treaty negotiators, and arbitrators and panelists, who are often trained in international business and commercial law.[208]

It is worth noting that private interests can rely on importations and cross-fertilization without worrying too much about the long-term consequences for resulting case law. States, on the other hand, may advance opportunistic defenses as Argentina did in cross-referencing the WTO carve outs through the state-of-necessity standard of a BIT to expand its policy space.[209] For States, however, such approaches may come with more consequences as a litigation position may be used by future tribunals to construe the meaning of a treaty in future cases, 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.[210]

In any event, rule transplantations may become more common as trade and investment law continue to converge, especially since private interests engaging in international economic law use every tool available, regardless of how it is labeled. Such strategies are facilitated by the overlapping potential of trade and investment rules. As shown in these cases, downstream law production is not simply a declaration of rights in a vacuum separate from efforts to actualize

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Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, ¶ 371 (Sept. 11, 2007), http://ita.law.uvic.ca/documents/Pakerings.pdf. *See generally* Greg Tereposky & Morgan Maguire, *Utilizing WTO Law in Investor State Dispute Settlement, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010 247 (Arthur Rovine ed., 2011).

206. Alford, *supra* note 10, at 42; *see generally* Verhoosel, *supra* note 185, at 503–04.

207. *See* Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Of course, nations may "opt out" of this presumption by providing specific instructions to the contrary.

208. *See* Roberts, *supra* note 57, at 17–42.

209. Continental Award, *supra* note 132, at 172–75.

210. The Tribunal in Glamis v. U.S. concluded that "the NAFTA State Parties agree that, at a minimum, the fair and equitable treatment standard is that as articulated in Neer," citing the position of the NAFTA parties in different cases. *See* Glamis Gold Ltd v. United States (Can. v. U.S.), Final Award, ¶612 (NAFTA/UNCITRAL Trib. 2009), http://italaw.com/sites/default/files/case-documents/ita0378.pdf. In the Canadian Cattlemen case, the Tribunal considered the consistent position of the NAFTA State Parties as "suggestive of something approaching an agreement." Canadian Cattlemen Award, *supra* note 185, ¶ 187. It was precisely Argentina's endorsement of the importation of most-favored-nation clauses in the Maffezini case that eased the use of the precedent to allow the importation of dispute-settlement clauses in its disputes with investors after the crisis. *See* Emilio Agustín Maffezini v. The Kingdom of Spain (Arg. v. Spain), ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 69 (Jan. 25, 2000), http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf. *See also* HICEE v. The Slovak Republic (Neth. v. Slovk.), PCA Case No. 2009-11, Partial Award, ¶¶ 130–47 (Perm. Ct. Arb. 2011), http://www.italaw.com/sites/default/files/case-documents/ita0404_0.pdf.

them in specific circumstances.[211] Ambiguities are exploited; rule importations and rule cross-fertilization are just two ways of doing so that result in the repurposing of law.

TABLE 1: TAXONOMY OF REPURPOSING STRATEGIES IN INTERNATIONAL ECONOMIC LAW

Basis	*Intra-Regime*	*Inter-Regime*
PARTY	Party-shopping (Litigation parties strategically select the party of an enforcement action in order to avail themselves of a more favorable rule)	Party-shifting (States directly enforce investment-law breaches or, conversely, private actors enforce trade-related investment breaches)
RULE	Forum-shopping (Litigation parties move the enforcement action from a multilateral to a regional or domestic forum or vice-versa by relying on "choice-of-forum" or "fork-in-the-road" clauses)	
	Transplantations: Importations & Cross-fertilization (Litigation parties use, and judges apply, rules across trade and investment or adopt legal concepts that approach the normative content of a different treaty or bodies of law)	
RELIEF		Relief-shifting (States suspend trade benefits at the inter-State level to induce compliance with investment rules or awards, or States suspend investment rights to induce another State to comply with inter-State trade obligations)

211. This positivistic view ignores the practical dimension of international adjudication and how a remedy arises from a reflective effort to give meaning to broad international obligations. *See, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

III.
ASSESSING AND CONTROLLING THE MERGING

Before concluding, I explore the main effects of the merging of trade and investment law and how, if at all, governments should respond to the challenges posed.

A. Adjudicatory Lawmaking and Policy

The four cases illustrate that for States, private interests, or even adjudicators trying to resolve concrete problems, the initial conditions and bargains of treaties are of only limited importance. While conserving distinct attributes, actors, and constituencies, trade and investment agreements are often experienced as a conglomerate of related agreements with functional relations but without a clear hierarchy.[212] Not surprisingly, the complementarities are exploited, leading to more strategic behavior including the repurposing strategies summarized in the previous section.[213]

The interplay between economic agreements has as much to do with the complementariness of the legal fields that deal with two inseparable sides (trade and investment) of the process of globalization as with the recent growth and success of international economic governance.[214] The incorporation of regulatory issues into trade negotiations was inevitable once "border barriers" fell. As international regulation became more entangled with domestic regulation, internal "behind-the-border" barriers increased in importance to frustrate competition and economic liberalization.[215] Moreover, with the increase in WTO membership, competing RTAs harmonizing regulation became an alternative for economic integration. Many of these RTAs included FDI protection and liberalization provisions.

The strategic linkage, however, also heralds the rise of an increasingly pluralistic international legal environment; an ecology in which private interests have been granted a bigger role in "public" law enforcement and international lawmaking more generally. Specifically, the new trends in enforcement evidence how treaty bargains are challenged and contested more often, in

212. Keohane & Victor, *supra* note 21, at 18.

213. *See also* Busch, *supra* note 60, at 735 (describing the phenomena of "moving a regulatory agenda from one organization to another; abandoning an organization; or pursuing the same agenda in more than one organization").

214. As put by a former Director-General of the WTO, "trade and investment are not merely increasingly complementary, but also increasingly inseparable as two sides of the coin of the process of globalization." Press Release, WTO, Foreign Direct Investment Seen as Primary Motor of Globalization, Says WTO Director-General, Press Release No. PRESS/42 (Feb. 13, 1996).

215. For an excellent discussion, see generally Noll, *supra* note 42.

different ways, and by globally diversified interests. The trends illustrate how the available legal remedies serve larger, more common goals than seeking compliance with rules and compensation for treaty violations. These goals include the promotion and protection of transnational economic affairs by allowing commercial interests to liberalize areas that may be insulated from ordinary domestic legal or political challenges. Hence, the strategic use of the enforcement actions may have effects beyond an individual case that destabilize government regulatory activity, shape the interpretation of rules outside ordinary processes, or to relitigate issues settled in one system through the venue of another.

This strategic use of remedies is best illustrated with the Australian tobacco case. While private interests like tobacco companies do not have direct access to the WTO, some firms may see the stakes of a government's measure as high enough to expend effort lobbying political representatives across the globe, with interests as divergent as those of Ukraine or Honduras. Considering that the commercial interests who seek compliance actions supply legal assistance in developing analysis and drafting briefs, it is conceivable that such interests could influence legal interpretations about the limits imposed by the WTO agreements.[216] Moreover, a component of these commercial interests, Phillip Morris, relies on its network of subsidiaries (e.g., PM Asia) to stimulate litigation under a more favorable framework (Hong-Kong-Australia BIT) before an investor-State tribunal—a setting where some arbitrators have interpreted treaties as severely constraining the regulatory actions of governments. In addition to seeking compensation, such interests request to have the TRIPS and TBT agreements interpreted, the very same treaties at issue under the WTO. These strategies afford the industry, or at least Phillip Morris, an opportunity to shape the interpretation of rules and relitigate limits on the regulation of tobacco marketing, and perhaps even chill the effects of the World Health Organization framework on tobacco under the somewhat-questionable argument that the WTO universally protects something along the lines of "commercial speech."[217]

This strategic use of legal remedies may have some negative consequences. It can subject governments to constant pressure, particularly given the destabilizing strain that accompanies parallel, sequential or combined legal actions. The need to defend "policy space" more frequently, often in strategically staged proceedings, may result in risk aversion, rights accretion or regulatory chill.[218] Other negative effects of these crossovers are far-reaching

216. Sykes, *supra* note 15, at 637.

217. *See supra* Part II-A(iv).

218. *See, e.g.*, James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007). In addition, the destabilizing pressures resulting from linking and sequencing domestic and international remedies may also have had a disruptive effects and backlashes. For instance, as a result of the Tobacco Act litigation the government of Australia has pledged to stop signing BITs with investor-State arbitration clauses. *See* GILLARD TRADE POLICY STATEMENT, *supra* note 139.

rulings with potential policy consequences. At least three examples are evident in the case studies surveyed.

First, in the Mexican Soft-Drink Tax case, the decision of the Cargill tribunal to allow damages resulting from intercompany trade in investor-State proceedings may expose NAFTA governments to large compensatory damages disconnected from the policy goal of promoting and protecting FDI. It implies that any investment in the territory of a member State may be sufficient to protect the integrity of a supply chain, even when the component parts of the chain are located in different territorial jurisdictions and are subjected to different regulatory regimes. In the Argentinian context, the decision of the Continental tribunal to import the analysis of necessity without the requirements of the introductory clause of Article XX of GATT (the Chapeau), which emphasizes the manner in which the measure in question is applied, "may well be both an invitation to abuse and imprudent as international policy."[219] This lack of contextual sensitivity may disrupt the balance between the right of a State to invoke reasonable public policy and the economic rights of investors.[220] Finally, the decision of the panel in the American trucking-services restrictions case perhaps rightly decided that a violation of the national-treatment obligation might be "harder" to establish with respect to services than to goods, but made no effort to distinguish between services and investment.[221] This may confuse the conditions-of-competition test necessary to find a breach by applying the national-treatment test to a group of like service providers instead of comparing such conditions to a single, similarly situated foreign investor. These are only some examples disrupting important bargains in international economic law, but they represent a sample of issues resulting from the crossovers of trade and investment that will probably arise in the future with more frequency.

What is more relevant, however, is that by looking at international law enforcement in these terms, we can also appreciate how international courts and tribunals make law and affect important policies in the context of adjudicating discrete disputes.[222] Viewed through this lens, the merger of trade and investment law is revealed to be more than simply a "problem" of inefficient competing authorities, but rather as part of an intricate and more organic law-production process.[223] Law enforcement is, in some ways, a downstream

219. Robert Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT'L L. 447, 505 (2012). Sloane also argues "the focus of any necessity plea . . . should be on human beings as the fundamental unit of normative analysis, not on the states as such or for their own sake." *Id.* at 504.

220. *Id*. *But see* Sweet, *supra* note 133, at 51.

221. U.S.-Mexico Panel Decision, *supra* note 80, ¶ 249.

222. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 942, 948–52 (2005) (contending that because States are keenly aware of the effect of the outcomes they "fine-tune their influence over the tribunal and its jurisprudential output using a diverse array of structural, political, and discursive controls").

223. Stephan, *supra* note 16, at 1589 ("Law can be seen as a form of information about the

extension of the upstream treaty-negotiation process and is also affected by strategies to actualize rules to specific circumstances (repurposing).

B. Norm-Generating and Control

As the boundaries between issue areas have become less rigid and international governance has expanded, a new legal environment has arguably emerged with a different political terrain where the norm-generating function is more difficult to control.[224]

While difficult to assess with the limited evidence presented here, one can speculate about the distributional effects of this new, more complex legal environment.[225] Of course most commercial interests do, in theory, benefit from more rules and venues, the relaxation of nationality requirements, and diplomatic protection. In the past, strict nationality and standing requirements resulted in arbitrariness on the part of States, who had the exclusive ability to control access to international justice by choosing to represent more influential parties and declining to represent others. Today, political access and influence may be less important in accessing international enforcement than institutional capacity, coalition building and, of course, legal and economic resources. Guatemalan coffee growers and U.S.-based tobacco distributors may be similarly positioned, from a legal perspective, to contest protectionist government interventions, questionable regulation or subsidies, or even good-faith efforts to add transparency or limit the damaging externalities of their products or production methods. But in reality their capacity to achieve their goals is drastically different because of, among other reasons, differential economic and institutional resources. Moreover, the ability to ensure compliance with the resulting decisions of adjudicatory bodies may be limited if their respective governments have limited flexibly or leverage to implement reprisals.

Controlling the norm-generating function is arguably also more challenging. Not only is the flow of relevant information between adjudicatory bodies difficult to guarantee, exposing tribunals to inaccuracies and conflicts, but also less rigid boundaries allow more opportunities for the transformation of law. As in evolution, where not all mutations are predictable or harmful, not all these transformations can be anticipated nor do they necessarily merit equal concern. What can be understood, however, are the main mechanisms that propel these transformations and their potential on the broader goals of international law, such as coherence, expertise, and legitimacy.

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probabilistic outcomes of contemplated future states. The significance of law. . . turns on the quality of the information provided.").

224. *See also* Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 909, 942 (2004).

225. As Pauwelyn has argued, the resulting fluidity may support the power positions of already empowered interests. *See* Pauwelyn, *supra* note 11.

Whatever the distributional effects, or the impact on the norm-generating function, some may question the wisdom of trying to roll back the process that has granted private interests a bigger role in international law enforcements or international law making more generally. For good or for bad, a thinner, "softer," and decentralized lawmaking is here to stay. Governments can adapt by giving better guidance to those who have the extraordinary task of maintaining the balance between stakeholders.

For sure, the use of judicial techniques can relieve some of the resulting pressures.[226] However, States can rely on a variety of other different actions to control international adjudication.[227] Here, I focus on two groups: the first involves actions to clarify treaty rules and the relationships between mandates, in the upstream process. This "ex ante," or specification, approach has its limits, however, as treaties are based on consent and reciprocity and thus often produce rules articulated with a very high level of generality.[228] Moreover, the reticence of governments to surrender authority and flexibility to international bodies often translates into strategic ambiguity or general "standards." The second is through design features rooted in signaling, deliberation, and reputational considerations, or "ex post" control structures.[229] Such features help to control the tribunals' ability to make and apply its decisions. They can serve to calibrate the adjudicatory authority and lawmaking process from the pressures exerted by repurposing strategies. This approach enables adaptation to changing conditions while averting the limitations of ex ante specification.[230]

In this context, one can analogize ex post control structures with mechanisms used in administrative law practice to coordinate the regulatory space among agencies, such as interaction requirements, joint decision making, and special delegation arrangements.[231] Such control mechanisms are important

226. Michael Waibel, *Coordinating Adjudication Processes*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 499, 522–27 (Zachary Douglas et. al eds., 2014).

227. *See* Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 420 (2008) (providing a taxonomy for controlling international courts (internal and external) and five categories of external controls over court's: 1) mandates; 2) rules it can apply; 3) staffing; 4) budget; and 5) ability to make and apply decisions). *See also* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR (1992).

228. Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 342 (1999).

229. HERCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 9–25, 43–35, 162 (1982).

230. Laurence R. Helfer, *Why States Create International Tribunals: A Theory of Constrained Independence*, *in* INTERNATIONAL CONFLICT RESOLUTION 253, 253 (Stefan Voigt et al. eds., 2006) (discussing control in international courts).

231. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1155 (2012) (identifying a topology of mechanisms to deal with similar problems in agency practice: interaction requirements, informal or special arrangements, centralized review, and joint policymaking). Increasingly, proposals to improve international law effectiveness

not only because adjudicators deciding matters have limited opportunities to evaluate the analysis of similar issues by other tribunals,[232] but also because justiciability in the international scene is often "quite far-reaching," creating practical "policy" consequences as a result of limited political revision.[233] This is commonly referred to as international law's "missing legislator" problem.[234] Hence, I finish by sketching some of the main ex ante and ex post tools available to address the particular challenges imposed by each of the six strategies on the development of international law. My aim is to provide insight into the specific impacts of strategic choices and how the impact in the norm-generating function can be moderated with more targeted actions.

1. Coherence

Party-shopping and party-shifting strategies are relevant in creating enforcement opportunities and, more generally, improving compliance. On the other hand, excessive litigation before decentralized, uncoordinated tribunals may result in conflicting rulings that undermine coherence which can affect the long-term sustainability of international adjudication.

From a structural point of view, the main problem with party-based strategies is that they affect and sometimes even preclude coherence. Coherence in this context is not convergence of opinion but a "certain degree of connection and engagement"; it is important because decisions "become part of a greater whole" of international law.[235] This is more problematic in investment-law enforcement since—unlike the WTO—no appeal mechanisms exercise this sort of control. It is fair to say, however, that governments are becoming better at clarifying the meaning of broad standards and anticipating or limiting excessive litigation, as well as at establishing treaty provisions aimed at coordinating tribunals when claims arise out of the same events or circumstances. For instance, States are increasingly aware of how broad jurisdictional clauses may expose them to the risks of large compensatory damages disconnected from the

are rooted in domestic administrative law as the global administrative law movement has popularized this analysis. *See also* Benedict Kingsbury & Nico Krisch, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. OF INT'L L. 1 (2006); Richard Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 455–60 (2003).

232. *See generally* Curtis J. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L. J. 202 (2010) (arguing in favor of opt-out rights in international law).

233. *See* Ian Brownlie, *The Justiciability of Disputes and Issues in International Relations*, 42 BRIT. Y.B. INT'L L. 123, 142 (1967) ("Ultimately justiciability is a matter of policy and this may be measured, but is not necessarily limited, by the standard assumptions of the legal persons most closely affected."). *See also* Jason Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L. J. 391, 397 (2012) (comparing international investment arbitration to an "agency" that "legislates, administers, and adjudicates the rules of the international investment game").

234. Armin von Bogdandy, *Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK Y.B. UNITED NATIONS L. 609, 651 (2001).

235. Martinez, *supra* note 21, at 482.

policy goals of promoting FDI. To address this matter, jurisdictional and admissibility requirements (e.g., "substantial" business activities, "continuous-nationality," "covered investments," or "relate to" clauses) have been included in newer investment agreements.[236] Some terms could use further clarification to prevent the use of these strategies for the sole purpose of stimulating litigation or collecting damages in spite of limited roots to the host State.[237] Moreover, procedures mandating the consolidation of claims of related parties or determining if the consolidation of common claims of unrelated parties is in the interest of "fair and efficient" resolution have proven helpful and accordingly are becoming routine in BITs and investment chapters of RTAs.[238]

Party-based strategies in the trade context are less of an issue. The lack of a private right of standing and the availability of an appeal mechanism under the WTO makes coordination less of a concern. De facto consolidation allows tribunals to hear disputes that arise out of the same events or circumstances in multilateral forums.[239] While "diplomatic-espousal shopping," used in the Australian case, does not seem to be a systemic problem, any limiting of this strategy should consider an important trade-off: demanding a stronger connection between standing and a direct economic injury for initiating proceedings may diminish the value of trade obligations as credible promoters of long-term commitments and general welfare enhancers when violations are enforced only by directly injured parties.[240]

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236. *See, e.g.*, German Model Investment Treaty art. 8 (2008), *available at* http://www.italaw.com/investment-treaties (clarifying scope of application); Norway Draft Model Bilateral Investment Treaty arts. 2–16 (2007), *available at* http://www.italaw.com/investment-treaties [hereinafter Norway Draft Model BIT] (clarifying Right to Regulate and abuse of rights under this agreement); U.S. Model Bilateral Investment Treaty arts. 1, 2, 29 (2012), *available* at http://www.italaw.com/investment-treaties (clarifying scope and coverage, "relating to," consolidation, etc. as well as the annexes).

237. *See, e.g.*, Fact Sheet, Public Citizen et al, Key Elements of Damaging U.S. Trade Agreement Investment Rules that Must Not Be Replicated in TPP, 14–15 (2012), *available at* http://www.citizen.org/documents/tpp-investment-fixes.pdf (recommending strategies to define "substantial business activities," so as to avoid opportunistic "nationality planning").

238. *See* NAFTA, *supra* note 5, art. 1126 (allowing the consolidation of proceedings with "a question of law or fact in common . . . in the interests of fair and efficient resolution of the claims"). So far, two tribunals have decided consolidation claims. The Corn Products/ADM-TTLIA consolidation tribunal, on the one hand, focused on the unfairness to investors of a consolidation that the investors did not agree to and which would have negatively affected their procedural interests. ADM Consolidation Order, *supra* note 112. The Softwood consolidation tribunal, on the other hand, focused on efficiency to the resolution of the claims in terms of procedural economy. *See generally* Canfor Corp. v. United States, Tembec et al. v. United States, and Terminal Forest Prod., Ltd. v. United States, Order of the Consolidation Tribunal (NAFTA Arb. Trib. 2005), http://www.italaw.com/sites/default/files/case-documents/ita0115.pdf.

239. There is a de facto consolidation process in the WTO. Article 9 of the DSU, which states that a single panel should examine complaints related to the "same matter." *See* Dispute Settlement Rules: Understanding on Rules art. 9.1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401.

240. Claus D. Zimmermann, *Rethinking the Right To Initiate WTO Dispute Settlement Proceedings*, 45 J. WORLD TRADE 1057, 1063–66 (2011) (arguing against the idea that the fact

In future agreements, governments could envision the consolidation of proceedings that join trade and investment claims. Unless governments are ready to grant more participation or private standing for trade violations[241] or dispose of this feature in investment,[242] which, in my view, are unsatisfactory solutions, as I explain below, the consolidation of these proceedings would involve incommensurable technical and political challenges.[243] A simpler and more plausible option to improve control over the adjudicatory process of related or parallel proceedings is the inclusion of provisions that would stay proceedings for a reasonable period of time if a State party to the dispute showed that another proceeding could impact such proceeding, even if such proceeding arose under a different agreement. An alternative is to include these provisions within an investor-State arbitration mechanism. While substantiating the procedure may affect the speedy disposition of the investment claim, the retroactive relief of investment plus including protections against indefinite suspension could help balance systemic interests with those of the claimant in the dispute. In fact, procedures to give more time to another international decision are not so rare.[244] Even without direct provisions, tribunals could decide to do so under their inherent powers. However, given the growing overlap, a "stay and underride" process can give more clarity to the standard, normalize the process, and help guide the interaction of tribunals in such cases.

WTO members may renounce on bringing claims that are politically unprofitable in a short-term perspective is contrary to several long-term interests of the global trading system).

241. *Cf.* Claus D. Zimmermann, *The Neglected Link Between the Legal Nature of WTO Rules, the Political Filtering of WTO Disputes, and the Absence of Retrospective WTO Remedies*, 4 TRADE L. & DEV. 251, 267 (2012) (arguing for more participation before the WTO and a "centralised dispute initiation" process). *See also* Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT'L L.J. 221, 235–37 (2003) (discussing the possibility of allowing private-party litigation of WTO resolutions as an alternative mechanism for enforcement).

242. *Cf.* Comment from Kate Horner et al. to Wesley S. Scholz & Jonathan S. Kallmer (Jul. 31, 2009), *available at* http://wetlandspreserve.org/phpUpload/uploads/Comment_from_Kate_Horner,_Friends_of_the_Earth%20%281%29.pdf (arguing that BITs should provide for State-to-State rather than investor-State dispute settlement).

243. Agreement Concerning Softwood Lumber, U.S.-Can., Sept. 12, 2006, as amended Oct. 12, 2006, *available at* http://treaty-accord.gc.ca/text-texte.aspx?id=105075&lang=eng. In the Lumber disputes, a conflict involving trade and investment disputes between Canada and the United States was managed by a combination of political settlement and modification of delegation authority. The Softwood Lumber Agreement (SLA 2006) established a managed trade regime based on export quotas and export taxes. It ended the trade cases before both trade and investment tribunals and created a special arbitration system administrated by the LCIA to deal with future claims.

244. *See, e.g.*, Corn Products Notice of Arbitration, *supra* note 115 (rejecting a stay request by Mexico); MOX Plant Case (no. 3) (Ir. v. U.K.), Suspension of Proceedings on Jurisdiction and Merits, 42 I.L.M. 1187 (Perm. Ct. Arb. 2003) (opting for a stay until further clarification of the issue).

2. Expertise

Forum shopping resulting from reliance on clauses that allow alternative venues, as well as strategies that rely on the ambiguities embedded in rules ("importations" or "cross-fertilization") have a greater impact on expertise. That is, these strategies may affect the consistency between rules and scientific knowledge or result in rules with less ascertainable normative content. For example, the use of fork-in-the-road provisions included in BITs may limit domestic courts from adjudicating difficult, politically charged disputes in ways that support the development of domestic institutions. On the other hand, contextual sensitivity may be lost if choice-of-forum clauses result in the adjudication of a regional trade dispute before the WTO. Also, States may rely on conflict clauses to use the carve-outs, or exceptions in overlapping treaties "to avoid or limit responsibility or minimize damages or other remedies."[245] These strategies may result in lower levels of effectiveness and affect rule bindingness as nations may avoid substantive commitments and tribunals interpret rules outside of their purview.[246]

Much has been written on how to solve conflicts between rules of international law.[247] Obvious ways to do so are to improve precision in treaties and mandate the use by tribunals of judicial techniques or general principles such as res judicata, lis pendens, or forum non conveniens (useful to accommodate related procedures).[248] However, in addition to the explained difficulties with ex ante specification, there are other reasons why these solutions yield only limited potential. Conflict cases are about deciding boundaries between different entities' lawmaking authority.[249] In international law, questions of hierarchy are not well settled and conflict rules, which emphasize connections, interests, and expectations rather than bright lines, tend to be difficult to apply. Even if a tribunal is prepared to yield and exercise restraint, there is no guarantee that the parties will raise objections to

245. Pauwelyn, *supra* note 11, at 6.

246. Sloane, *supra* note 219, at 505 (concluding that the expansive interpretation of exceptions under economic treaties "may well be both an invitation to abuse and imprudent as international policy").

247. Andrea K. Bjorklund & Sophie Nappert, *Beyond Fragmentation*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE 489 (Todd Weiler & Freya Baetens eds., 2011); Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 886–87 (2005); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 538 (2001).

248. Vienna Convention, *supra* note 207, arts. 30–41. *See, e.g.*, Norway Draft Model BIT, *supra* note 236, art. 16 ("The Tribunal shall, as appropriate, take into account the principles of *res judicata* and *lis pendens* . . . .").

249. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 177 (Nov. 6) ("Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."). *See also* Panevezys-Saldutiskis Railway (Est. v. Lith.), 1939 P.I.C.J. (ser. A/B) No. 76, at 16 (Feb. 28).

admissibility (a necessary condition for their operation),[250] or that tribunals will apply rules outside of the treaty that gives them jurisdiction (as evidenced in the WTO Soft-Drink dispute). Moreover, the conditions for the application of principles is often strict, especially the requirement that the "cause of action" be the same.[251]

To improve and harness the relative substantive expertise of more technical, specialized bodies, ex post mechanisms, such as requirements to consult with stakeholders throughout the lifespan of the dispute, can limit the effects of rule-based strategies. Such mechanisms include processes for soliciting input from stakeholders who may not have a full right to participate.[252] For instance, allowing State parties to make submissions to a tribunal "on a question of interpretation" of the agreement has been widely successful in guiding investment tribunals under NAFTA investor-State practice.[253] The same can be said about provisions that allow third-party governments with a "substantial" or "systemic" interest to deliver written and oral testimony before the panels or the Appellate Body in the WTO.[254] More

250. *See, e.g.*, Cass. Ch. Mixte [Supreme Court for Judicial Matters], May 8, 2003, Poiré v. Tripier et al., J.C.P 2003, 810 (Fr.) *cited in* JAN PAULSSON, *Jurisdiction and Admissibility*, INTERNATIONAL LAW, COMMERCE & DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 613 (2005).

251. Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L.J. 77 (2009).

252. *See, e.g.*, Agreement Among the Government of Japan, the Government of the Republic of Korea, and the Government of the People's Republic of China for the Promotion, Facilitation, and Protection of Investment, Japan-S. Kor.-China, art. 17(6), May 30, 2012, *available at* http://www.mofa.go.jp/mofaj/press/release/24/5/pdfs/0513_01_02.pdf; Canada Model Bilateral Investment Treaty art. 35 (2004), *available at* http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf.

253. NAFTA, *supra* note 5, art. 1131(2). *See also* U.S. Model BIT (2012), *supra* note 236, arts. 28–29 (allowing access by nondisputing State to proceedings, including a right to commentary on draft awards); U.S. Model Bilateral Investment Treaty arts. 28–29 (2004) (allowing access by nondisputing State to proceedings, including a right to commentary on draft awards); Christina Knahr, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, 23 ARB. INT'L 327, 328 (2007) (explaining the lack of a codified process for *amicus curiae* participation in NAFTA tribunals under UNCITRAL Arbitration Rules); Loukas A. Mistelis, *Confidentiality and Third Party Participation*, 21 ARB. INT'L 211, 221–23 (2005) (observing that "amicus curiae briefs" are not always welcome by tribunals).

254. *See*, e.g., Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003) and Appellate Body Report, WT/DS246/AB/R (Apr. 7, 2004); Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998); *See also* Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (May 31, 1999) and Appellate Body Report, WT/DS34/AB/R (Oct. 22, 1999). *See also* Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 283–84 (2003) (describing the controversy over allowing amicus briefs in the WTO context); Nick Covelli, *Member Intervention in World Trade Organization Dispute Settlement Proceedings After EC—Sardines: The Rules, Jurisprudence, and Controversy*, 37 J. WORLD TRADE 673 (2003); Chad Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders*, 19 WORLD BANK ECON. REV. 287 (2005); Friedl Weiss, *Third Parties in*

robust mechanisms include requiring tribunals to circulate a draft copy of the tribunal's decisions and allowing for written comments to review precise aspects of the proposed decision. The 2004 U.S. Model BIT, for example, established such a process, characterized by some authors as a species of notice-and-comment.[255] This practice, useful as a way to roll back interpretations that result in suboptimal policy outcomes, is also used at the WTO.[256]

Other "soft" policymaking instruments, including jointly issued binding statements,[257] or annexes with substantive guidelines and a directive to tribunals to interpret provisions in accordance to such directives, may serve as mechanisms for controlling expertise.[258] These instruments can help tribunals as they reduce the ambiguity of key treaty terms. Negotiators can even envision a more robust regime in which tribunals are directed to give special consideration to evolving State views or the work produced by specialized bodies such as the United Nations Commission on International Trade Law.[259] While the use of this latter process is limited, governments can rely on bureaucratic or political discretion to identify rule interpretations that are more consistent with the policy goals of the agreement in extraordinary situations.[260] In fact, in some investment agreements, governments are now reserving the right to unilaterally determine certain sensitive issues[261] or give bureaucracies the authority to decide important policy issues prior to international adjudication.[262]

GATT/WTO Dispute Settlement Proceedings, *in* REFLECTIONS ON INTERNATIONAL LAW FROM THE LOW COUNTRIES 458 (Erik M. G. Denters & Nico Schrijver eds., 1998).

255. U.S. Model BIT (2004), *supra* note 236, arts. 28–29 (allowing access by nondisputing State to proceedings, including a right to commentary on draft awards); Yackee, *supra* note 233, at 434–40 (describing this process as a notice and comment type of requirement).

256. Under Article 15 of the DSU rules and procedures, a panel shall issue an interim report to the parties. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report. NAFTA also provides for a similar proceeding. NAFTA, *supra* note 5, art. 2016(2).

257. *See, e.g.*, Free Trade Agreement Between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland), art. 28, Jan. 26, 2008, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/efta.aspx?lang=eng; United States-Chile Free Trade Agreement, art. 21.1, Jun. 6, 2003, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text.

258. For instance, Articles 5 and 6, on minimum standard of treatment and expropriation, respectively, shall be interpreted in light of the Annexes. U.S. Model BIT (2012), *supra* note 236.

259. Yackee, *supra* note 233, at 437.

260. *See, e.g.*, ASEAN Comprehensive Investment Agreement art. 36(7), Jul. 24, 1998; Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union art. 19(3), May 13, 2008, 2008 O.J. (C 115) 47 ("The Court of Justice of the European Union shall, in accordance with the Treaties . . . give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions.").

261. For instance, some States are specifying in international economic agreements that exceptions clauses to protect their essential security interests are self-judging. *See, e.g.*, U.S. Model BIT (2012), *supra* note 236, art. 18; Canada Model BIT, *supra* note 252, art. 10(4); ASEAN Comprehensive Investment Agreement (ACIA), art. 18, Feb. 26, 2009, *available at* http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20

3. Legitimacy

Although helpful and at times even necessary to induce compliance, relief shifts may be suboptimal with respect to promoting the legitimacy of international law. One reason to include dispute-settlement mechanisms in economic agreements is to manage conflicts and to constrain excessive responses to prior breaches of law. In other words, dispute-settlement mechanisms ensure the proportionality of measures taken when another State breaches an international obligation.[263] However, relief shifts may open the door to arbitrariness and abuses in the application of reprisals against investors, disrupting an important equilibrium. They can also be used to coerce, cajole, fine, bully, etc. to produce results against States facing political difficulties to comply with arbitral awards or WTO decisions.

The easiest and most plausible way to limit the effects of these strategies is to clarify the nature of rights of investors in economic agreements. Even though the host State may in principle apply reprisals by suspending investment obligations, their effect and limits depend on the nature of the investors' rights. If investors are granted direct rights, reprisals are opposable only against the home State, not investors.[264] This solution is not as simple as it sounds as it has vast political and economic implications. If reprisals were unavailable, investors and their investments would be insulated from the politics inherent in dealings between States and even protected from sanctioned countermeasures.[265] Not all nations would agree to treat investors as entities with this important carve-out from inter-State politics for economic gains. For instance, some nations with limited import markets, and therefore reduced ability to impose a countermeasure that "causes pain" on other parties, may remain interested in imposing reprisals, such as suspending investment obligations directly against investors.[266]

Investment%20Agreement%20(ACIA)%202012.pdf; United States-Peru Trade Promotion Agreement, art. 22.2 n.2, Apr. 12, 2006, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text. *See also* Anthea Roberts, *Recalibrating Interpretive Authority*, 113 COLUM. FDI PERSPECTIVES 2 (2014).

262. For instance, under the NAFTA a tax veto applies to fiscal measures in claims of improper expropriation under NAFTA Article 1110. The NAFTA does not suggest that tax matters cannot be arbitrated. Rather, the treaty says that fiscal authorities in host and investor States together may block the arbitral proceedings. *See generally* William Park, *Arbitration and the Fisc: NAFTA's Tax Veto*, 2 CHI. J. OF INT'L L. 231 (2001).

263. Case Concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, 18 R.I.A.A., 417, 431 (1978) ("Counter-measures . . . [are] a wager on the wisdom, not on the weakness of the other Party.").

264. Paparinskis, *supra* note 116, at 29.

265. *Id.*

266. *See e.g.*, CPI Decision on Responsibility, *supra* note 115, ¶ 137 (citing Professor James Crawford, now ICJ Judge, arguing on behalf of Mexico: "the model countermeasure is one that causes pain").

The changing landscape resulting from minilateralism and the inseparability of international trade and investment will continue to call into doubt the appropriateness of the separate structure of their legal remedies. However, this work shows important reasons for maintaining public enforcement in trade and private enforcement in investment. With the former, governments can have better control over the development of international trade law. Alan Sykes has persuasively argued that States, by limiting standing in trade dispute to themselves, can prevent interpretations that may return to "haunt" them.[267] In this sense, public enforcement in trade allows States to filter the excessive uses of trade adjudication and assess which actions are in the public interest.

On the other hand, despite the recent concern about socially excessive litigation in international investment law, a rollback of the process that has granted private interests a bigger role in enforcement is also questionable. Especially at a time when international economic institutions are fighting to remain relevant, limiting investment-law enforcement to States by reintroducing the rules of diplomatic protection seems to be deeply inconvenient. It may result in arbitrariness in the exercise of diplomatic protection, in the application of reprisals against a State (and its nationals) found in violation, and in the allocation of eventual retaliation benefits to compensate an investor for its losses.[268] The ability to use international institutions to keep governments accountable continues to be a key legitimizing factor of international law. Before a dramatic change of this nature, we should consider the benefits of decentralized enforcement as holding potential for improving problems derived from global economic interdependence.

Recognizing the appropriateness of separate enforcement does not mean denying that trade and investment remedies are often used simultaneously or in combination for "public law" type of litigation.[269] It means, instead, a tacit acknowledgment that today the forces behind enforcement are often globally diversified and use trade and investment agreements to pursue traditional goals like compliance with obligations and compensation for violations, as well as other, more strategic ends. Hence, there is a need to enhance dispute-settlement systems that respond to this growing phenomenon. For example, future agreements could include special delegation arrangements to provide flexibility

267. Sykes, *supra* note 15, at 648–54. *Cf.* Marco Bronckers, *Private Appeals to the WTO: An Update*, 42 WORLD TRADE 245 (2008) (covering the position of private parties on WTO matters before the WTO, before their own government and before domestic courts).

268. Sykes, *supra* note 15, at 648–54. To be sure, the moves by, among others, Australia, South Africa and in some ways Germany in the context of Transatlantic Trade and Investment Partnership negotiations to reject investor-State arbitrations are at least a sign that some States are worried about socially excessive litigation in international investment law.

269. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (coining the term "public law litigation"). *See also* Harold Koh, *The Palestine Liberation Organization Mission Controversy*, 82 AM. SOC'Y INT'L L. PROC. 534, 546–50 (1988) (all noting the existence of transnational public law litigation).

to adjudicators to recommend the succession of different proceedings when the interpretation of both trade and investment obligations are at stake. Perhaps limiting this process to the issuance of nonbinding proposals would permit States to discard the recommendation if it fundamentally undermines an interest or right.[270] If treaty parties wish to maintain the "direct rights" of investors formulation, this type of special delegation arrangements could also explicitly release States from obtaining the consent of claimants in investor-State proceedings to overcome potential vetoes. Such measures could create a more orderly dispute-resolution process and allow for the hearing of trade and investment procedures under the same agreement in a more organized fashion.

CONCLUSION

International trade and investment law are merging. This has resulted, in part, from the inseparability of the two fields and a constantly adapting global business environment (*convergence*), and from alternative approaches to pursuing economic integration (*minilateralism*). The merger is further propelled by the strategies used by litigants to take advantage of different bodies during the application and enforcement of treaty rules. This article has identified the basic strategies used for that purpose (i.e., party and forum shopping, rule importation and cross-fertilization, and party and relief shifting) and what States might want to do about them. With a more nuanced picture of the specific effects of such strategies, negotiators of future commercial agreements may be better equipped to respond to the challenges posed with targeted actions (i.e., ex ante and ex post controls).

The challenges are not inconsequential. From health regulations in the tobacco case to safety regulations in the trucking-services case and from taxation in the Soft-Drinks Tax case to monetary policy in the emergency-measures case, international economic agreements can affect important regulatory domains. Hence, like other areas of public-law litigation, the strategic parallel, sequential, or combined use of legal remedies may be used to destabilize governments' regulatory activity, to shape the interpretation of rules outside an ordinary process, or to relitigate issues settled in one regime through the venue of another.

The exploration of the evolving shared space between international trade and FDI regulation helps to move the debate beyond the traditional focus on investigating how individual regimes function, to an understanding of how the interactions between different fields shape international adjudication. In this sense, institutions and policy makers who wish to maintain control over the evolution of legal regimes should consider not only clarifying rules and jurisdictional mandates, but also instituting mechanisms that can work to

270. For recommendation of these procedures, see generally Freya Baetens, *Procedural Issues Relating to Shared Responsibility in Arbitral Proceedings*, 4 J. INT'L DISP. SETTLEMENT 2 (2013).

accomplish coordination and collaboration among different adjudicatory bodies by institutionalizing participation and collaborative communication.

Finally, this Article presents a more general statement about international law. By addressing international regime complexity in action, this Article shows how ambiguity is exploited to shape the evolution of legal systems. The pressures that shape the development of international law are both slow and iterative; top-down and bottom-up. These pressures, in turn, produce feedbacks loops that shape creativity and risk taking among different actors and stakeholders and can result in the mutation and recombination of different bodies of laws.