BALANCING REGULATORY INTERESTS THROUGH AN EXCEPTIONS FRAMEWORK UNDER THE RIGHT TO REGULATE PROVISION IN INTERNATIONAL INVESTMENT AGREEMENTS

JULIE KIM*

INTRODUCTION

The primary purpose of the bilateral investment treaty (BIT) program has long been to provide foreign investment protection to the capital-exporting, developed countries.[1] In contrast, the capital-importing, developing countries entered into BITs to attract foreign investment without fully appreciating the legal consequences. [2] Free trade agreements (FTAs) with investment chapters such as the North American Free Trade Agreement (NAFTA) were concluded to achieve milestone objectives such as investment promotion and liberalization (in addition to investment protection) while not seriously considering the policy space of the contracting states.[3] Indeed, prior to NAFTA, carving out policy space in international investment agreements (IIAs) was not of utmost concern

* Research Associate, Asia Pacific Law Institute of Seoul National University (SNU). This article is from my J.S.D. dissertation which was completed at the SNU School of Law in 2017. I would like to express my gratitude to Professor Hi-Taek Shin, my advisor, for his invaluable guidance and support.

1. *See* ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 44–47 (2009); UNITED NATIONS CONFERENCE ON TRADE & DEV., INTERNATIONAL INVESTMENT RULE-MAKING: STOCKTAKING, CHALLENGES AND THE WAY FORWARD 12 (2008), http://unctad.org/en/Docs/iteiit20073_en.pdf ("The underlying assumption was that the treaty would protect investment from the developed country in the territory of the developing country and, in that way, attract additional investment from the developed country to the developing country.") [https://perma.cc/P3QA-HX8U].

2. *See* Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview, in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS xxvii (Karl P. Sauvant & Lisa E. Sachs eds., 2009). From the point of view of the capital-exporting country, the basic purpose of bilateral investment treaties (BITs) is to protect investors from political risks and instability and, more generally, safeguard the investments made by its nationals in the territory of the other state. This is why they were originally concluded primarily between developed and developing countries, as the former were virtually the only sources of foreign direct investment (FDI), and the latter were seen as often having risky and volatile business environments. *See id.*

3. *See* Trans-Pacific Partnership art. 9.15, Feb. 4, 2016, New Zealand Ministry of Foreign Affairs & Trade, https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership/ [hereinafter TPP]

under the international investment law climate. [4] However, the absence of a policy carve-out became known when investor-state arbitrations were brought against not only developing states but also developed states. [5] According to the July 2017 proposal on NAFTA, the United States requested the inclusion of a general exceptions provision to "allow for the protection of legitimate U.S. domestic objectives, including the protection of health or safety and essential security, among others."[6] This could possibly mark a new generation of IIAs in which carve-outs of the regulatory space of the contracting states will become a frequent and consistent IIA treaty-making practice.

During the early 2000s, International Centre for Settlement of Investment Disputes (ICSID) cases were brought against Argentina because it enacted emergency measures during a financial crisis that severely affected the country.[7] These cases were controversial because of the inconsistent interpretation of the non-precluded measure (NPM) provision in Article XI of the U.S.-Argentina BIT, which raised the question of what the limits of a host state's domestic regulatory authority are vis-à-vis the treaty obligations under IIAs.[8] ICSID had to determine whether the challenged measure

(limiting grants of benefits to investors in Parties if they meet certain qualifications) [https://perma.cc/SNF8-FECZ].

4. *See Aikaterini Titi, The Right to Regulate in International Investment Law 43 (*2014) (starting with the North American Free Trade Agreement (NAFTA), the United States began to favor "lengthy BITs and interpretive statements in an apparent attempt to better safeguard host state interests").

5. This issue relates to the investor-state dispute settlement (ISDS) procedure because it entitles foreign investors to directly challenge the domestic laws, including those measures providing for the regulatory public interest of a host state since an investor-state tribunal may find that a measure breaches the international investment agreements (IIAs) even if the act in question could be viewed as a reasonably legitimate exercise of public policy. *See* United Nations Conference on Trade & Dev., World Investment Report 2013: Global Value Chains: Investment and Trade for Development xxi, 101–02 (2013) [hereinafter WIR 2013].

6. Office of the U.S. Trade Representative, Summary of Objectives for the NAFTA Renegotiation 17 (2017), https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf [https://perma.cc/BN9N-54VD].

7. The five Argentine International Centre for Settlement of Investment Disputes (ICSID) cases considered in this Article are the *CMS*, *Continental Casualty*, *Enron*, *LG&E*, and *Sempra* cases (collectively referred here as the "Argentine ICSID cases"). *See generally* Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005).

8. *See* Titi, *supra* note 4, at 254.

was necessary for (i) the maintenance of public order (the public order carve-out), (ii) the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or (iii) the protection of its own essential security interests.[9] Despite this, the NPM provision in Article XI, which could have provided a justification for or exception to Argentina's emergency measure based on the interpretation of the ICSID tribunal, was not fully reviewed.[10] The ICSID tribunals in the Argentine cases skimmed over the issue of whether Argentina's emergency measure was legal under the public order carve-out of Article XI.[11] These experiences, however, have been helpful in unsealing the realization for both the developed and developing states that a significant legal consequence of concluding an IIA is that exercising their sovereign right to regulate various aspects of public interest could result in a breach of the IIA. [12]

What, then, is the "right to regulate" in international investment law? Since the ICSID cases against Argentina, questions of whether investor-state tribunals unreasonably restrain the regulatory acts of states or other reasonable exercises of regulatory public interest have plagued the international investment law system, and investor-state tribunals have been accused of creeping into the policy space of many developing countries.[13] This Article argues that the

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9. *See* Treaty of the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., Nov. 14, 1991, S. TREATY DOC. NO. 103-2. Article XI of the U.S.-Argentina BIT provides the following:

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

Id. art. XI.

10. *See CMS Gas Transmission*, ICSID Case No. ARB/01/8, ¶ 373; *Enron Corp.*, ICSID Case No. ARB/01/3, ¶ 339; *Sempra Energy Int'l*, ICSID Case No. ARB/02/16, ¶ 391. In deciding that Argentina did not meet the burden of proof under the customary law on necessity, the ICSID tribunals in *CMS*, *Enron*, and *Sempra* determined that there would be no need to analyze the non-precluded measure (NPM) provision of the U.S.-Argentina BIT.

11. *See* Jürgen Kurtz, *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, 59 Int'l & Comp. L.Q. 325, 353 (2010) [hereinafter Kurtz, *Adjudging Security*] (describing the primary/secondary and conflated approaches).

12. Jurgen Kurtz, *Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 257, 266 (Zachary Douglas et al. eds., 2014).

13. *See* SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 2 (2d ed. 2012) (stating that host states are compelled to "outsource" public policy matters to international arbitral tribunals); *see also* Andrea K. Bjorklund, *Improving the International Investment Law and Policy System: Report of the Rapporteur Second Columbia Inter-*

public order carve-out in NPM provisions, like in the U.S.-Argentina BIT, can be expanded to provide a doctrinal basis for the right-to-regulate provisions that have been included in recent IIAs. Moreover, when successfully invoked, the public order carve-out permits the cost that should have been absorbed by the host state to shift to the private investor, allowing the state to avoid liability in the case of a breach.[14] A sophisticated understanding of the public order carve-out can establish the groundwork for equipping host states with a flexible balancing tool that can meet the dynamic forms of today's IIAs while effectively enabling host states to preserve their regulatory space without breaching IIA commitments.

As briefly mentioned above, the closest that the ICSID tribunals ever came to analyzing the public order carve-out was during the 2007–2008 period when investor-state arbitration claims were made against Argentina due to its economic crisis.[15] After the 2008 analytical work of William Burke-White and Andreas von Staden, which extensively examined the interpretation and application of the NPM provision in BITs,[16] further study of the public order carve-out as a balancing tool for host states became inactive. However, almost a decade after the Argentine ICSID cases, we are now experiencing an increase in new drafting, yet unevaluated methods that bid to preserve the regulatory space of host states.[17] For example, recent investment chapters in FTAs replace the BIT-based

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national Investment Conference: What's Next in International Investment Law and Policy?, *in* The Evolving International Investment Regime: Expectations, Realities, Options 213, 217–18 (Jose Alvarez et al. eds., 2011) (stating that the perceived crisis in investor-state arbitration is a matter of open debate amongst scholars).

14. *See* 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, 314 (2008) [hereinafter Burke-White & von Staden, *Investment Protection*].

15. *See generally* William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 *Asian J. WTO & Int'l Health L. & Pol'y* 199, 205 (2008) [hereinafter Burke-White, *State Liability*] (explaining that the investor-state arbitration cases brought under the U.S.-Argentina BIT due to the 2001–2002 economic collapse in Argentina awoke "a long-dormant treaty clause"); *see also* Kurtz, *Adjudging Security*, *supra* note 11, at 333.

16. *See* Kurtz, *Adjudging Security*, *supra* note 11, at 365; *see generally* Burke-White, *State Liability*, *supra* note 15 (analyzing the ICSID tribunals' treatment of Argentina's defense arising out of the NPM clause); Burke-White & von Staden, *Investment Protection*, *supra* note 14 (providing a scholarly examination of the NPM provision in international investment law).

17. *See generally* Mavluda Sattorova, *International Investment Law, Renewable Energy, and National Policy-making: On 'Green' Discrimination, Double Regulatory Squeeze, and the Law of Exceptions*, *in* Yearbook on International Investment Law and Policy 2012–2013 415, 442 (Andrea K. Bjorklund ed., 2014) (contending that an expressly written exceptions clause "would prevent the interpretation of certain investment treaty obligations as abso-

NPM public order carve-out with the World Trade Organization (WTO)/General Agreement on Trade in Services (GATS)-style general exceptions provision to preserve the regulatory power of host states without owning a deep appreciation of the two types of carve-outs.[18] The goal of this Article is not to decide between these two types of treaty exceptions. Without any one stakeholder adequately addressing the evolutionary steps in between the huge leap from the NPM provisions in BITs to the WTO/GATS-style general exceptions in IIAs, current efforts to reclaim the regulatory space of host states to pursue public interest objectives after an IIA takes effect may not properly occur due to a systemic lack of understanding regarding the operation of the public order carve-out in the context of international investment law.

Most of the few thousand IIAs currently in force do not contain treaty exceptions because the bulk of these agreements were concluded during the period before the Argentine ICSID cases when providing for treaty exceptions was not a common drafting practice.[19] However, countries have since changed their stance and are now seeking to rebalance their rights and obligations by carving out exceptions in IIAs.[20] Present scholarship and practices in international investment law focus on non-traditional BIT areas such as the environment, human rights, and culture to establish limits on the substantive obligations under IIAs.[21] Of the eighteen IIAs concluded in 2016—all of which provide for the right to regulate as a

lute, non-derogable standards that always entail a form of compensatory or restitutionary redress").

18. *See, e.g.*, Andrew Newcombe, *The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?*, *in Improving International investment Agreements* 267, 277 (Armand de Mestral & Céline Lévesque eds., 2013) [hereinafter Newcombe, *Use of General Exceptions in IIAs*] ("The interpretation of [the General Agreement on Tariffs and Trade] GATT- and [General Agreement on Trade in Services] GATS-like general exceptions in IIAs raises many interpretive issues that to date have not been addressed in IIA jurisprudence.").

19. Kenneth J. Vandevelde, *Rebalancing Through Exceptions*, 17 *Lewis & Clark L. Rev.* 449, 451 (2013).

20. *See id.*

21. *See* Jeswald W. Salacuse, The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital 398–400 (2013) (providing a brief overview on treaty exceptions); United Nations Conference on Trade & Dev., *Bilateral Investment Treaties: 1995–2006: Trends in Investment Rulemaking* 81 (2007) [hereinafter UNCTAD, BITs] (noting that the various areas in public order and essential security, taxation, human health, natural resources, culture, prudential measures for financial services, and other miscellaneous topics have been the subject of general treaty exceptions in BITs during the ten-year span covered in this study); *see generally* Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections—Is a General Exceptions Clause a Forced Perspective?*, 39 *Am. J.L. & Med.* 332 (2013) (exploring the NPM provision as it relates to the intersection between international investment and domestic health protections).

sustainable development objective—nine contain general exceptions including the protection of human, animal or plant life or health; the conservation of exhaustible natural resources; a stipulation that health, safety, or environmental standards should not be compromised to attract investment; and/or a statement in the preamble that refers to sustainable development objectives, although in varying degrees.[22] Despite such efforts to reform investment treaty-making, the goal of investment protection should not be diminished[23] considering that the ultimate objective is to balance the diverse needs of the IIA stakeholders.

The European Commission identified the right to regulate host states as one of the major policy areas that require further improvement during the drafting of the Transatlantic Trade and Investment Partnership (TTIP).[24] The goal is to ensure that the investment protection guarantees of IIAs do not undermine the regulatory authority of host states.[25] However, current progress in defining the right to regulate and providing a standard of review has been stagnant. The February 2017 draft of the E.U.-Japan FTA investment chapter contained a public order carve-out, but used the same vague and abstract language from previous IIAs.[26] The April 2017 E.U. proposal of the investment chapter in the E.U.-Mexico FTA omitted the term "public order" and instead provided that the parties "affirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection, privacy and data

22. *See* UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY 119 (2017) [hereinafter WIR 2017].

23. *See* Ian Laird, *The Emergency Exception and the State of Necessity*, *in* INVESTMENT TREATY LAW: CURRENT ISSUES II: NATIONALITY AND INVESTMENT TREATY CLAIMS AND FAIR AND EQUITABLE TREATMENT IN INVESTMENT TREATY LAW 237, 238 (Federico Ortino et al. eds., 2007); *see also* UNCTAD, BITs, *supra* note 21, at 80 ("In this sense, a general exception is a mechanism enabling the contracting parties to strike a balance between investment protection, on the one hand, and the safeguarding of other values considered to be fundamental by the countries concerned, on the other hand.").

24. *See* EUROPEAN COMM'N, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: TRADE IN SERVICES, INVESTMENT AND E-COMMERCE: CHAPTER II – INVESTMENT (COMMISSION DRAFT TEXT TTIP – INVESTMENT) art. 3 [hereinafter TTIP (draft)], http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last visited Jan. 14, 2018) [https://perma.cc/L96A-GEND].

25. *See European Comm'n, Concept Paper on Investment in TTIP and Beyond – The Path for Reform,* 1 (2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf [https://perma.cc/TS9K-26W8].

26. *See* EUROPEAN COMM'N, CONSOLIDATED TEXTS OF THE EU-JAPAN FTA INVESTMENT CHAPTER art. [x8] (2017), http://www.bilaterals.org/IMG/pdf/eu_doc-eu-japan_fta_consolidated-investment-chapter-febr13-2017.pdf [https://perma.cc/RY6S-PZ2X].

protection, or the promotion and protection of cultural diversity."[27] The investment chapter of the E.U.-China FTA, which is currently under negotiations, will also most likely use similar language.[28] However, providing for the right to regulate using positive language rather than as a treaty exception is not without problems and does not better define or reduce the abstractness of the public order carve-out. Although host states increasingly realize that investment treaties carry significant legal ramifications and are attempting to achieve balance by including right-to-regulate provisions, the practices remain inconsistent and incomplete, creating uncertainties as to whether such provisions can adequately help preserve the regulatory space of a host state instead of being treated as mere hortatory language in an investor-state dispute.[29]

The fear that foreign investors will not make investments in developing countries should their substantive rights be reduced is undoubtedly a major concern, but not one that outstrips all other concerns including those held by the host states. Although IIAs may have been instrumental in liberalizing the foreign investment laws in some countries and protecting foreign investments, stakeholders in the current investment environment are also mindful of IIAs that restrain the sovereignty of host states.[30] Thus, this Article aspires to increase the awareness that the investment law system is no longer dominated by a single value and must make space for another competing value—preservation of the regulatory space of host states in IIAs. For example, although Argentina raised defenses under both the essential security and the public order

27. *European Comm'n*, EU-Mexico Free Trade Agreement: EU Textual Proposal art. 2.9.1 (2017), http://trade.ec.europa.eu/doclib/docs/2017/may/tradoc_155521.pdf [https://perma.cc/FPA9-VP5F].

28. *See European Comm'n, Sustainability Impact Assessment (SIA) in support of an Investment Agreement Between the European Union and the People's Republic of China* (Draft interim report) 109, 110 (2017), http://www.trade-sia.com/china/wp-content/uploads/sites/9/2017/03/SIA-EU-China-revised-draft-interim-report-publication.pdf [https://perma.cc/L4QL-AN3J].

29. *See* Lauge Skovgaard Poulsen & Emma Aisbett, Australian National Univ. Crawford School of Economics and Government, When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning 12 (2011), https://crawford.anu.edu.au/pdf/crwf_ssrn/crwfrp_1105.pdf (revealing through an empirical study that developing states had entered into investment treaties in the 1990s without fully appreciating their risks and effect on domestic economic policies) [https://perma.cc/RK2A-YQR8]; *see also* Nguyen Quoc Dinh, Patrick Daillier & Alain Pellet, Droit International Public 131 (7th ed. 2002); Peter Muchlinski, *Negotiating New Generational International Investment Agreements: New Sustainable Development Oriented Initiatives*, *in* Shifting Paradigms in International Investment Law: More Balanced, Less Diversified 41, 46 (Steffen Hindelang & Markus Krajewski eds., 2016).

30. *See* Subedi, *supra* note 13, at 2.

prongs of the NPM provision in Article XI, commentaries relating to the Argentine ICSID cases have one-sidedly focused on the essential security clause even though it is just one of the three prongs stipulated in the NPM provision of the U.S.-Argentina BIT.[31] Even for the ICSID tribunals that accepted Argentina's NPM defense, the public order carve-out in Article XI of the U.S.-Argentina BIT was not fully analyzed, leaving its legal potential unanswered at a time when states increasingly wanted to protect their right to regulate.[32] Therefore, to formulate a right-to-regulate framework of exceptions that can address the public interest demands of host states, the first step should be minimizing uncertainties while maximizing the concreteness and utility of such a treaty carve-out in IIAs.

This Article is organized into three sections. Part I observes that the emergence of the "right to regulate" language in IIAs did not occur overnight; rather, it was the by-product of a gradual shift in the perspectives of IIA stakeholders that the capital-importing, developed countries are no longer the only dominating actors. The *CMS* tribunal also considered whether an economic emergency falls under the purview of the essential security interest clause, but without any explicit acknowledgement of the relevance of the public order clause and that other participants can also exert powerful influence on the future direction of the international investment law regime. In particular, this Article evaluates the unique position of each of the six major IIA stakeholders—host states, home states, investor-state tribunals and their arbitrators, foreign investors, international organizations, and civil societies—in establishing a grounded understanding of the right to regulate in international investment law. Part II explores the nature of the trending concept of the right to regulate in international investment law and concludes that the objective it seeks to achieve is actually synonymous with the preexisting notion of the public order carve-out, which has been around since the days of Friendship, Commerce and Navigation (FCN) treaties. Examining the early concept of the public order carve-out and its role in international investment law can help define the right-to-regulate concept. Part III discusses some recommendations that can reduce the

31. *See, e.g.*, CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 359 (May 12, 2005) (the *CMS* tribunal also considered whether an economic emergency falls under the purview of the essential security interest clause, but without any explicit acknowledgement of the relevance of the public order clause).

32. *See* Kurtz, *Adjudging Security*, *supra* note 11, at 341.

abstractness of the right-to-regulate concept for practitioners and academics. Finally, this Article concludes that the recommendations in Part III can provide the fundamentals of a "right to regulate" exceptions provision that may become a fixed feature of future investment treaties to better address the growing aggregate community interests of IIA stakeholders.

I. The Emergence of the "Right To Regulate" in IIAs

A. *Changes in IIA Trend*

The purpose of BITs is to provide foreign investment protection.[33] Before the inception of the BIT program with the conclusion of the Germany-Pakistan BIT in 1959, protection of foreign investment was partially addressed under the FCN treaties. However, FCN treaties could not persuade developing countries that they could provide investment protection guarantees and an effective dispute settlement mechanism because they also covered noncommercial areas such as consular relations, immigration, and religious and individual rights, while also harboring protectionist policies.[34] But the Germany-Pakistan BIT distinguished itself from the FCN treaties concluded during the post-World War II era by providing substantive investment protection provisions that are still being used in today's IIAs.[35] Since the conclusion of the first BIT, about twenty BITs have been concluded annually from the 1960s to the 1980s.[36] During this timeframe, many BITs were negotiated between a developed and a developing country and/or a transition economy.[37]

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33. *See, e.g.*, United Nations Conference on Trade & Dev., The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, at 55, U.N. Doc. UNCTAD/DIAE/IA/2009/5, U.N. Sales No. E.09.II.D.20 (2009).

34. *See* K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards*, 4 Int'l Tax & Bus. Law. 105, 108–09 (1986); R. Doak Bishop et al., Foreign Investment Disputes: Cases, Materials and Commentary 32 (2005); Jan Ole Voss, The Impact of Investment Treaties on Contracts between Host States and Foreign Investors 51–52 (2011); Salacuse, *supra* note 21, at 340.

35. *See* Monique Sasson, Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law 30 (2010) (explaining that the Germany-Pakistan BIT was the first convention to focus on investment instead of property—a concept that has carried over in modern BITs as well as the ICSID Convention).

36. *See* Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. Ill. L. Rev. 265, 269 (2006).

37. *See id.* at 269–70.

The negotiating pattern changed during the 1990s as developing countries concluded more BITs with other developing countries and transition economies than with developed countries.[38] During the golden years of the BITs from the 1990s to the 2000s, about 160 BITs were concluded annually.[39] The proliferation of BITs gained momentum during this era as developing countries incorporated BITs into their national economic development schemes for the promotion of foreign direct investment (FDI).[40] Then, under NAFTA, which was concluded in 1993, the primary goal of the BIT expanded from investment protection to cover investment promotion and market liberalization.[41] Perhaps more strikingly, these goals were no longer limited to the bilateral economic arrangements offered in BITs, but placed within the FTA framework so that detailed investment provisions would be available as a separate investment chapter alongside other chapters on trade.[42] The period after NAFTA through the 2000s saw an increase in the conclusion of FTAs, which led to the conclusion of FTAs with investment chapters, and, more recently, to mega FTAs involving greater regional blocs such as the Regional Comprehensive Economic Partnership which is an agreement between the ten member states of the Association of Southeast Asian Nations (ASEAN) and six other countries including China and India.[43] By the end of 2016, a total of 3,324 IIAs, comprising of 2,957 BITs and 367 treaties with investment provisions (TIPs) were concluded.[44]

B. *Shifting Perspectives of IIA Stakeholders*

Even though IIAs are engaging a more diverse group of stakeholders to transcend the relationship between states and foreign investors, the objective rooted in the early BITs—that they provide protection for foreign investors and investments—has been slow to adapt to the swift changes occurring in international investment

38. *See id.*

39. Daniel W. Drezner, The System Worked: How the World Stopped Another Great Depression 53 (2014).

40. *See* UNCTAD, BITs, *supra* note 21, at xi.

41. *See, e.g.*, Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. Davis J. Int'l L. & Pol'y 157, 179 (2005).

42. *See id.* at 180.

43. *See* United Nations Conference on Trade & Dev., World Investment Report 2012: Towards a New Generation of Investment Policies 84, 86 (2012) [hereinafter WIR 2012].

44. *See* WIR 2017, *supra* note 22, at 111 (noting that the top contracting state in 2016 was Turkey, which concluded seven IIAs, followed by Canada, Morocco, and the United Arab Emirates with four IIAs each, and Iran and Nigeria with three IIAs each).

law.[45] Carving out policy space in IIAs was not a priority for developed countries, but the NAFTA experience revealed that developed countries like the United States and Canada could become a respondent state in an investor-state dispute.[46] In hindsight, the phases of investment treaty evolution, such as the progression from FCNs to BITs, to regional FTAs with investment chapters, and to mega-regional agreements, might be understood as one phenomenon produced as a result of the struggles by the developed and developing countries to create a balanced framework that meets the "unique expectations and demands"[47] and "biases and interests"[48] of the various stakeholders in international investment law at a given point in time.

The main stakeholders during the BIT generation were the developed, home states, their investors, and the developing, host states. The FCN treaties and early BITs were not contracted between equals but rather were based on an unbalanced power relationship in which customary international law principles, like guarantee of minimum standard of protection and compensation for expropriation, were perceived negatively by developing countries as poverty-maintaining restrictions that ignored the needs of their countries.[49] Without genuine concern for the sustainable economic prosperity of developing countries, the investment climate of the time privileged the developed countries that had the advanced skills to monetize the natural resources in developing countries.[50] However, mega-regional TIPs and other modern IIAs

45. *See* NATHALIE BERNASCONI-OSTERWALDER & LISE JOHNSON, INT'L INST. FOR SUSTAINABLE DEV., COMMENTARY TO THE AUSTRIAN MODEL INVESTMENT TREATY 3 (2011), http://www.iisd.org/pdf/2012/austrian_model_treaty.pdf ("developments to adapt the treaties to modern realities nevertheless appear slow") [https://perma.cc/2H4Q-VB4H].

46. *See* Sunny Freeman, *NAFTA's Chapter 11 Makes Canada Most-Sued Country Under Free Trade Tribunals*, HUFFINGTON POST (Jan. 14, 2015, 12:27 PM), http://www.huffingtonpost.ca/2015/01/14/canada-sued-investor-state-dispute-ccpa_n_6471460.html [https://perma.cc/3UU2-4R39] (identifying Canada as the most sued among the NAFTA countries).

47. Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 726 (2008).

48. Rebecca M. Bratspies, *Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development*, 32 YALE J. INT'L L. 363, 369 (2007).

49. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 68–69 (2005).

50. *See* JOSE E. ALVAREZ ET AL., THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS 18–20 (discussing the impact of foreign investment on a host country); THEODORE H. MORAN, FOREIGN DIRECT INVESTMENT AND DEVELOPMENT: THE NEW POLICY AGENDA FOR DEVELOPING COUNTRIES AND ECONOMIES IN TRANSITION 22 (1998); Mark Tran, *Are Natural Resources a Blessing or a Curse for Developing Countries*, GUARDIAN (Oct. 25, 2012), https://www.theguardian.com/global-development/2012/oct/25/natural-resources-blessing-curse-developing-countries [https://perma.cc/NR4Z-8TL4]; *Poor Coun-*

concluded in recent years reflect public policies inputted by an increased variety of stakeholders that include international organizations, academics, civil society organizations, foreign investors, host states, and home states.[51] The cooperative effort of this diverse group of stakeholders form the basis of the ongoing IIA reform efforts so that modern IIAs may continue to provide standards of protection, promotion, and liberalization while also preserving the domestic regulatory space of host states. The international investment law-making process should not be restricted to legal instruments, such as court decisions and treaties, but should also acknowledge the social, economic, and political factors that affect stakeholders like developed and developing countries, private investors, and other stakeholders such as civil societies, academia, and individuals.[52]

1. Host States

As one of the principal participants in the international investment regime, host states may be brought before an investor-state tribunal by a foreign investor under the investor-state dispute settlement (ISDS) mechanism provided in IIAs.[53] For the international investment regime to endure, it is critical that host states are not subjected to making large, unanticipated payouts.[54] This can be achieved by carving out a public order exception and enabling host states to keep their domestic regulatory space. Recent IIAs have seen an expansion of their role to include non-traditional aspects of community life such as preservation of the environment (including protection of human, animal or plant life, or health and

tries, Rich Resources, N.Y. Times (Aug. 1, 2004), http://www.nytimes.com/2004/08/01/opinion/poor-countries-rich-resources.html?mcubz=1 [https://perma.cc/2M3H-U6RJ].

51. Further discussed below.

52. *See* Bratspies, *supra* note 48, at 369; *see also* Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. Legal Educ. 253, 253–58 (1967).

53. *See* Lise Johnson et al., Columbia Ctr. on Sustainable Inv., Investor-State Dispute Settlement, Public Interest, and U.S. Domestic Law 1 (2015), http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf [https://perma.cc/VU3V-A5AS]; *see also* José E. Alvarez, The Public International Law Regime Governing International Investment 54 (2011) [hereinafter Alvarez, Public International Law] (discussing impact of ISDS on host state sovereignty).

54. To illustrate, upon finding that Russia had breached the Energy Charter Treaty, the United Nations Commission on International Trade Law (UNCITRAL) arbitral tribunal demanded in July 2014 that Russia make a payment of $50 billion in compensation to the claimants. *See, e.g.*, Martin Dietrich Brauch, *Yukos v. Russia: Issues and Legal Reasoning Behind US$50 Billion Awards*, Inv. Treaty News (Sept. 4, 2014), https://www.iisd.org/itn/2014/09/04/yukos-v-russia-issues-and-legal-reasoning-behind-us50-billion-awards/ [https://perma.cc/6G4V-6YQZ].

conservation of exhaustible natural resources) and creation of jobs under conditions that support labor rights.[55] Host states are increasingly requiring that foreign investors conduct themselves in a socially responsible manner and make investments according to the sophisticated demands of the various actors in an intertwined global community.[56] However, this is much easier stated than practiced. Domestically, host states have the sovereign right to revoke their foreign investment law, including the provisions related to foreign investors and investment protection, while, internationally, host states may be directly challenged by private foreign individuals under the ISDS mechanism if an IIA obligation was violated.[57]

Historically, countries have been categorized as developing or developed based on their gross domestic product level as compared to other countries.[58] There is no internationally agreed upon criteria, even within the WTO.[59] One way to determine whether a country is developed or developing is to measure the international capital flow of the state.[60] A clear capital-exporting, developed state wants to ensure maximum protection of its citizens and therefore favors investment treaties that maximize investor protection.[61] In contrast, a clear capital-importing, developing

55. *See* WIR 2013, *supra* note 5, at 102.

56. For example, some host states like those in Africa additionally require that foreign investments make contributions that alleviate poverty, create goods and services for the poor, or associate with small- and medium-sized domestic enterprises. *See id.* at 43.

57. *See, e.g.*, Hi-Taek Shin & Julie A. Kim, *Balancing the Domestic Regulatory Need to Control the Inflow of Foreign Direct Investment Against International Treaty Commitments: A Policy-Oriented Study of the Korean Foreign Investment Promotion Act and the Korea-US FTA*, 19 Asia Pac. L. Rev. 177, 188 (2011) (demonstrating how South Korean foreign investment law allows direct challenges by private foreign individuals).

58. *See, e.g.*, Lorraine Eden, *The Rise of TNCs from Emerging Markets: Threat or Opportunity?*, *in* The Rise of Transnational Corporations From Emerging Markets: Threat or Opportunity? 333, 335 (Karl P. Sauvant ed., 2008) (using gross domestic product (GDP) to classify countries in emerging markets); *New Country Classifications by Income Level: 2017–2018*, World Bank: Data Blog (July 1, 2017), https://blogs.worldbank.org/opendata/new-country-classifications-income-level-2017-2018 (stating that the World Bank currently categorizes countries into four income groups based on gross national income which includes GDP) [https://perma.cc/5WFX-QAB4].

59. *See Least Developed Countries*, World Trade Organization, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Jan. 14, 2018) ("There are no WTO definitions of 'developed' or 'developing' countries.") [https://perma.cc/L4NZ-HUCW].

60. Other ways include the Human Development Index produced by the United Nations Development Programme (UNDP), which takes into account economic measures (such as national income) and social measures (like life expectancy and education). In 2015, the World Bank listed the median per capita (as opposed to the mean) and household income to rank the countries.

61. *See* Muthucumaraswamy Sornarajah, The International Law on Foreign Investment 167 (3d. ed., 2010).

state might conclude investment treaties that under-provide investor protection as exemplified by the first generation Chinese BITs.[62] But such classification is less relevant today with the rise of states, especially among the Asian countries that are taking on the dual role of recipient and provider of foreign investment.[63] With such development, the capital-exporting, developed countries are no longer the sole providers of foreign capital but are also recipients of foreign investments that could become a respondent host state in an investor-state arbitration.[64] Europe and the United States are major exporters, but are also recipients of substantial FDI.[65] From 2006 to 2013, the United States was the world's largest recipient of FDI.[66] Although the United States lost that position to China for the year 2014,[67] it reclaimed its status as the largest recipient of FDI in 2016.[68] Professor Alvarez explains that "irrespective of whether the host of FDI is a developed economy, a poor developing country, or a State that finds itself somewhere in between," a country that liberalizes its market to foreign investment will share similar economic, political, and national security concerns and a state's concern over who and under what circumstances may enter its borders "does not change merely because some of those seeking entry offer the prospect of considerable capital."[69] Hence, protec-

62. *See, e.g.*, Newcombe & Paradell, *supra* note 1, at 56–57; Nils Eliasson, *Investment Treaty Protection of Chinese Natural Resources Investments*, *in* Business Disputes in China 303, 309 (Michael J. Moser ed., 3d ed. 2011); Leon E. Trakman, *Geopolitics, China, and Investor-State Arbitration*, *in* China in the International Economic Order: New Directions and Changing Paradigms 268, 271 (Lisa Toohey et al. eds., 2015).

63. *See, e.g.*, Jeffrey D. Sachs, *The Context: Foreign Investment and the Changing Global Economic Reality*, *in* The Evolving International Investment Regime: Expectations, Realities, Options xliii, l (José E. Alvarez et al. eds., 2011) ("With the power shifting away from the United States and Europe toward Asia, it seems difficult to argue that Western law will maintain its international dominance going forward.").

64. *Id.*

65. *See* James K. Jackson, Cong. Research Serv., Foreign Direct Investment in the United States: An Economic Analysis 1 (2017) ("The United States occupies a unique position in the global economy as the largest investor and the largest recipient of [FDI] . . . ."); WIR 2017, *supra* note 22, at 10 (illustrating that in 2015 and 2016, Europe received the most FDI inflow, exceeding Asian countries and North America).

66. *See* Office of the Press Secretary, *New Report: Foreign Direct Investment in the United States*, White House (Oct. 31, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/10/31/new-report-foreign-direct-investment-united-states [https://perma.cc/K6E3-VL6W].

67. *See China Becomes World's Largest FDI Recipient Amid Mixed Global Outlook*, St. Council: China (June 25, 2015, 9:19 AM), http://english.gov.cn/news/top_news/2015/06/25/content_281475134110982.htm [https://perma.cc/Y87S-XRH5]; United Nations Conference on Trade & Dev., World Investment Report 2016: Investor Nationality: Policy Challenges 45 (2016) [hereinafter WIR 2016].

68. *See* WIR 2017, *supra* note 22, at 11.

69. Alvarez, Public International Law, *supra* note 53, at 19–21.

tion offered by IIAs should not be limited to private investors from capital-exporting, developed countries that invest in capital-importing, developing countries. Such an approach disregards the need of host states to incorporate sustainable development goals in IIAs and prevents host states from achieving a balance between their regulatory interests and investment treaty commitments.

Increasingly recognizing the complex nature of international investment law and the far-reaching implications of accepting the ISDS clause, host states are updating their IIA models to look for a way to effectively preserve the regulatory space necessary for the maintenance of public order.[70] At least fifty countries and regions across Africa, Asia, Europe, Latin America, and North America have already been engaged in the IIA reformation process.[71] One approach is to address the issue under the principle of sustainable development, which as a normative rule of international investment law has yet to be firmly rooted, although the United Nations Conference on Trade and Development (UNCTAD) released the Investment Policy Framework for Sustainable Development in 2012 to provide guidelines for achieving growth and sustainable development.[72] Although the right to regulate is considered a core element of the sustainable development reform efforts,[73] the impact of sustainable development provisions should not be overstated but should instead be viewed critically by host states to avoid another generation of investment treaties that seem to provide a balancing tool for host states but are ineffective or unreliable in effect. Host states must therefore recognize that sustainable development provisions "do not in themselves guarantee a positive development impact of the investment" because the investment environment and regulatory framework of a host state are important variables that affect how much of the positive development impacts of an

70. *See* UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE 108 (2015) [hereinafter WIR 2015]. Further discussion also provided in Part III.B and Part IV of this Article.

71. *See id.*

72. *See* Elisabeth Tuerk & Faraz Rojid, *Towards a New Generation of Investment Policies: UNCTAD's Investment Policy Framework for Sustainable Development*, INV. TREATY NEWS (Oct. 30, 2012), https://www.iisd.org/itn/2012/10/30/towards-a-new-generation-of-investment-policies-unctads-investment-policy-framework-for-sustainable-development [https://perma.cc/6NJE-SYJS]; *see also* UNITED NATIONS CONFERENCE ON TRADE & DEV., INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT 57 (2012) (Section 6.3 provides institutional and procedural guidelines under the ISDS framework).

73. *See* WIR 2012, *supra* note 43, at 89 ("In the IIA context, paying due regard to sustainable development implies that a treaty should . . . provide treatment and protection guarantees to investors without hindering the government's power to regulate in the public interest . . . .").

investment can be reaped while reducing the risks of safeguarding public interests.[74]

2. Home States

Another major participant in international investment law is the home state. The goal of the home state is to secure a favorable investment climate for its citizens.[75] The home state approaches this goal by persuading the other contracting state to implement policies that promote and liberalize foreign investment.[76] When IIA negotiations take place, a contracting state assumes the role of either the host or home state and is, at least in theory, equally obligated under the investment treaty. Whereas the first BIT generation provided considerable leeway to investor-state tribunals when interpreting treaties, the later IIAs reflect a rebalancing of power by including provisions that specify treaty obligations in greater detail, clarify the applicable review standard, and create exceptions aimed at preserving the regulatory public interest of the contracting states.[77] Such clarifications and specifications in IIAs enable the contracting states to shape the decision-making process more directly by lessening the interpretive authority of international arbitration tribunals while also reducing the risk that arbitrators will "draw on analogies with which they are familiar (such as private international law analogies) or sympathetic (such as analogies between investor rights and human rights)."[78] Moreover, unlike in the past when the capital-exporting countries were the main providers of foreign capital, home states are also engaged in this rebalancing of power because they are also recipients of foreign investments that can be brought to investor-state arbitration under the ISDS mechanism in their capacity as a host state.

Home states are in a rather unique position within the international investment law framework because even though IIAs are concluded between the states, only the host state is bound to a "one-way flow of obligations."[79] Suggestions have been made that

74. WIR 2015, *supra* note 70, at 105.

75. *See* Salacuse, *supra* note 21, at 22.

76. *See* Jonathan Bonnitcha et al., The Political Economy of the Investment Treaty Regime 16–18 (2017).

77. *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 *Am. J. Int'l L.* 45, 78 (2013).

78. *Id.* at 80; *see Jonathan Bonnitcha, Substantive Protection under Investment Treaties: A Legal and Economic Analysis* 46 (2014) (describing the criticism that tribunal members with expertise in commercial law may fail to bring in a balanced perspective).

79. *See, e.g., Nathalie Bernasconi-Osterwalder et al., Int'l Inst. for Sustainable Dev., Investment Treaties & Why They Matter to Sustainable Development: Questions & Answers* 36 (2012).

IIAs should also oblige home states to encourage FDI flows and to better fulfill the goal of promoting foreign investment.[80] For example, future IIAs could increase the role of the home state by requiring it to give its citizens information about international investment opportunity, technical and/or financial support, or insurance policies that could ease the burden of investing in a foreign country.[81] Investment treaties may also demand that the home state furnish legal records to verify that the domestic company is compliant or provide a forum where redress may be sought for the misconduct of its domestic companies that occur while doing business abroad.[82] These recommendations are available in the Model International Agreement on Investment proposed by the International Institute for Sustainable Development (IISD Model Agreement) concerning the rights and obligations of home states. Article 29 of the IISD Model Agreement stipulates that "[h]ome states with the capacity to do so should assist developing and least-developed states in the promotion and facilitation of foreign investment into such states, in particular by their own investors."[83] Article 31 of the IISD Model Agreement on the liability of investors in their home state requires the following:

> Home states shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors for damages resulting from alleged acts or decisions made by investors in relation to their investments in the territory of other Parties. The host state laws on liability shall apply to such proceedings.[84]

The objective of increasing the vested interest of the home state even after the IIA takes effect may be one direction to consider for the future of international investment law.[85] This effort is also evi-

80. *See* UNITED NATIONS CONFERENCE ON TRADE & DEV., *World Investment Report 2003: FDI Policies for Development: National and International Perspectives* 155 (2003) [hereinafter WIR 2003] ("In future IIAs consideration should especially also go to home countries . . . to encourage FDI flows to developing countries and help increase the benefits from them."); *accord Bernasconi-Osterwalder et al., supra* note 79, at 36; UNITED NATIONS CONFERENCE ON TRADE & DEV., *International Investment Agreements: Key Issues* VOLUME II 65–66 (2004) [hereinafter UNCTAD, IIA *Key Issues*].

81. *See Bernasconi-Osterwalder et al., supra* note 79, at 36; UNCTAD, IIA *Key Issues, supra* note 80, at 65–66.

82. *See, e.g., Bernasconi-Osterwalder et al., supra* note 79, at 36.

83. HOWARD MANN ET AL., *Int'l Inst. for Sustainable Dev.*, IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT art. 29 (2005) [hereinafter IISD MODEL AGREEMENT].

84. *Id.* art. 31.

85. *See* Elizabeth Boomer, *Rethinking Rights and Responsibilities in Investor-State Dispute Settlement: Some Model International Investment Agreement Provisions, in Reshaping the Investor-*

dent in the preamble of the IISD Model Agreement, which provides that the parties should "seek[ ] an overall balance of rights and obligations in international investment between investors, host countries and *home* countries."[86] Although less explicit than the recommendations of the IISD Model Agreement, some IIAs continue to seek the involvement of the home state even after they take effect.[87] For example, NAFTA and the Canada Model Fair Investment Protection and Promotion Agreement (2004) each provides that the home state shall not demand or penalize its investors regarding transfers.[88] Future IIAs may seek to strengthen the expectations of home states once the IIA goes into effect.

3. Foreign Investors

Foreign investors carry their own base of demands in the international investment law regime and are capable of exercising authority on the regulatory decision-making process of a host state.[89] For example, investors in the international investment law system are usually multinational enterprises (MNEs), and the nationality of a corporation is determined by its place of incorporation or main seat of business.[90] An investor's nationality determines which BIT is applicable,[91] but this may lead to opportunistic acts since tribunals typically do not scrutinize the nationality of a company's owner to determine whether an ulterior motive is at play.[92] Although not illegal in international investment law,[93] this enables investors to engage in "forum planning" or "treaty shopping," as demonstrated in the *Philip Morris* tobacco packaging

State Dispute Settlement System: Journeys for the 21st Century 183, 211 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

86. IISD Model Agreement, *supra* note 83, pmbl. (emphasis added).

87. *See Jeswald W. Salacuse, The Law of Investment Treaties* 289 (2d ed. 2015).

88. *See id.* (referring to the transfer provisions in Article 1109(3) of the NAFTA and Article 14(4) of the Canada Model Fair Investment Protection and Promotion Agreement).

89. *See* Salacuse, *supra* note 21, at 20.

90. *See* Christoph Schreuer, *Investments, International Protection, in Max Planck Encyclopedia of Public International Law*, ¶ 33 (Rüdiger Wolfrum ed., 2013), http://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf [https://perma.cc/NZ75-P5NH].

91. *See* Dolzer & Schreuer, *supra* note 35, at 44.

92. *See* Schreuer, *supra* note 90, ¶¶ 33–34.

93. *See* Dolzer & Schreuer, *supra* note 35, at 52; *see also* CME Czech Republic B.V. v. Czech Republic, 9 ICSID Rep. 121, Partial Award, ¶ 419 (UNCITRAL Arb. 2001) (rejecting the argument that claimant should be barred from treaty shopping because "a party may seek its legal protection under any scheme provided by the laws of the host country"); *but see* Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶¶ 204–07 (Oct. 9, 2014) (rebuking the abusive and manipulative practice of restructuring investments for the purpose of gaining access to ICSID arbitration).

case.[94] Furthermore, the complex ownership structures of corporations can conceal the "true" owner of the MNE by blurring investor nationality through direct shareholdings of affiliates, cross-shareholdings where affiliates own each other's shares, and shared ownerships like joint ventures.[95] Although MNEs do not create complex internal ownership structures for the purpose of receiving IIA protections or to engage in corporate malfeasance, affiliates far removed from the corporate headquarters may be able to seek the protections afforded under an investment treaty.[96] This problem provided the theme of the 2016 edition of the World Investment Report. [97]

To minimize opportunistic behavior, some IIAs may require foreign investors to abide by a code of behavior to reach the sustainable development objectives provided by the international standards of the U.N. Guiding Principles on Business and Human Rights, the updated Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises, and/or the Food and Agriculture Organization/World Bank/UNCTAD/ Individual Finance and Insurance Decisions Centre Principles on Responsible Agricultural Investment.[98] Calls to reform the ISDS system so that foreign investors are no longer given greater dispute settlement rights than domestic investors are also being contemplated.[99] Although foreign investors have relied on BITs and other IIAs to receive absolute protections such as the fair and equitable treatment (FET) standard, most favored nation (MFN) clause, and the expropriation provision, these substantive provisions are subjected to the current IIA overhaul because they affect the states' right to regulate for public interest.[100] Additionally, suggestions to limit the situations that foreign investors may initiate investor-state arbitration claims are being reviewed.[101] Under the broad defini-

94. *See* Philip Morris Asia Ltd. v. Austl., UNCITRAL, PCA Case No. 2012-12, Written Notification of Claim (June 27, 2011) (involving a claim for cessation and discontinuance of plain packaging legislation from an arbitral tribunal).

95. *See* WIR 2016, *supra* note 67, at 124–28.

96. *See id.* at 124, 171.

97. *See id.* at 127–28.

98. *See* WIR 2015, *supra* note 70, at 127.

99. *See id.* at 128.

100. *See id.* at 135.

101. *See, e.g.*, Jan Asmus Bischoff, *Initial Hiccups or More? Efforts of the EU to Find Its Future Role in International Investment Law*, *in* Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century 531, 556 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015); United Nations Conference on Trade & Dev., Investor-State Dispute Settlement and Impact on Investment Rulemaking 5 (2007).

tion of "investment" that permits indirect or minority shareholders to receive investment treaty protection,[102] the ISDS system has inadvertently provided foreign investors with a means to creep into the regulatory space of host states. Ironically, without the ISDS mechanism, foreign investors may become vulnerable to the discriminatory and arbitrary measures of a host state. But on the other hand, concerns exist that the ISDS mechanism has allowed foreign investors to be abusive and it has become necessary for host states to preserve regulatory space without breaching international treaty obligations.[103] Therefore, recommendations have been made to remove non-IIA based claims to prevent foreign investors from seeking recourse for investment contract breaches and to require consent from all the contracting states to investor-state arbitration.[104]

4. Investor-State Tribunals and their Arbitrators

Before the ISDS system, an injured foreign investor had to resort to diplomatic protection through the home government, which would then make the sole determination of whether to pursue a claim on behalf of its private individual.[105] However, establishment of the BIT regime and ICSID departed from the stance that diplomatic protection is a discretionary right of the state and allowed foreign investors to directly initiate an arbitration against the host state, bypassing their home states.

The nature of investor-state tribunals is perplexing because the standards of treatment and guarantees made in investment treaties are enforced in a decentralized dispute settlement mechanism characterized by a public international law/private commercial law divide. Public interest issues affecting the state are addressed in a dispute settlement mechanism in which interpretations that favor

102. *See* WIR 2016, *supra* note 67, at 124 (describing the complexity in multinational enterprises ownership structure and its impact on investment policymaking).

103. *See* European Comm'n, Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU agreements 9 (2013), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf [https://perma.cc/V7WT-KLXL]; *see also* Nicolette Butler & Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation?*, 64 Neth. Int'l L. Rev. 43, 58 (2017) (proposing a World Investment Organization to better balance stakeholders' interests and thereby minimizing "regulatory chill").

104. *See* WIR 2015, *supra* note 70, at 148.

105. *See Christopher F. Dugan et al., Investor-State Arbitration* 347 (2008); Salacuse & Sullivan, *supra* note 49, at 69–70. For more on diplomatic protection, *see generally Ian Brownlie, Principles of Public International Law* (7th ed. 2008); Yoram Dinstein, *Diplomatic Protection of Companies Under International Law, in International Law: Theory and Practice: Essays in Honour of Eric Suy* 505 (Karel Wellens ed., 1998).

private interest over public interest might hamper the legitimacy of international investment law.[106] The authoritative decision-making process is made in *ad hoc* tribunals (as opposed to standing courts) where arbitrators weigh between polarized paradigms and grapple between the respondent state's regulatory act and the private investor's investment contract to determine the proper standard of review.[107] International investment law is unique in this way. However, from an adjudicative standpoint, the overlapping jurisdiction results in a "clash of paradigms"[108] that makes it particularly difficult for the investor-state tribunals to produce a harmonized set of legal standards appeasable to the various stakeholders shaping international investment law.

In international investment law, the public/private tension starts from the treaty-making phase and is especially notable when an investor-state arbitration is initiated to challenge the regulatory act of a state.[109] Under public international law, investor-state tribunals examine the "interstate treaty relationship" of an IIA; whereas under private commercial law, the focus is on the "investor-state disputing relationship."[110] When principles of private law like party autonomy and confidentiality are at play during an investor-state arbitration, the domestic regulatory space of the host state is diminished, creating regulatory chills, especially when unanticipated payouts are awarded in an arbitration.[111] How the investor-state tribunal views a dispute—from a public standpoint or from a private standpoint—thus strongly affects the decision-making process and the final outcome. Creating jurisprudence on international investment law and maintaining host state policy harbors a power allocation problem, which needs to be addressed in a manner that does not cut down on the base values and dignity of the IIA stakeholders.[112]

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106. Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review Through Comparative Public Law* 2–3 (Soc'y of Int'l Econ. Law, Working Paper No. 2012/33), http://ssrn.com/abstract=2095334 [https://perma.cc/A2K2-ZC8N].

107. *See* Roberts, *supra* note 77, at 52.

108. *See id.* at 47. Roberts coins the term "clash of paradigms" to describe the phenomenon that occurs "in competing conceptualizations of the investment treaty system as a subfield within public international law, as a species of international arbitration or as a form of internationalized judicial review." *Id.*

109. Schill, *supra* note 106, at 8; *see* Bonnitcha, *supra* note 76, 26–28.

110. *See* Roberts, *supra* note 77, at 58.

111. *See generally* Gus van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 *Int'l Comp. Corp. L.Q.* 371, 381–87 (2007) (reviewing two forms of international arbitration that "straddle the public-private divide").

112. For the basic features of a policy-oriented approach to law under the New Haven School, see generally Harold D. Lasswell & Myres S. McDougal, *Jurisdiction in Policy-Oriented*

5. International Organizations

International organizations may not be contracting parties in IIAs but their support is important in creating and reinforcing a desirable investment environment. Since the mid-1970s, OECD countries have created the OECD Code of Liberalization of Capital Movements [113] and the OECD Declaration and Decisions on International Investment and Multinational Enterprises[114] to promote an open and transparent investment environment and to encourage positive economic and societal contributions from foreign investors. In the 1990s, the OECD countries attempted to form a multilateral organization that would keep pace with FDI developments, coordinate market liberalization movements, and provide a reliable investment environment through the Multilateral Agreement on Investment (MAI).[115] Despite setbacks, the OECD has continued work in this area and hosted a conference in March 2016 on investment treaties titled "The Quest for Balance between Investor Protection and Governments' Right to Regulate."[116] In July 2016, the G20 countries also adopted the Guiding Principles for Global Investment Policymaking to "reaffirm the right to regulate investment for legitimate public policy purposes."[117] The UNCTAD, which has a more universal membership than the OECD, regularly identifies emerging issues and trends regarding IIAs from a sustainable development perspective, and the findings are published for the benefit of policymakers, scholars, and other IIA stakeholders in the annual publication of the

Perspective, 19 U. *Fla. L. Rev.* 486 (1967); Harold D. Lasswell & Myres S. McDougal, *Trends in Theories About Law: Comprehensiveness in Conceptions of Constitutive Process*, 41 *Geo. Wash. L. Rev.* 1 (1972); Harold D. Lasswell & Myres S. McDougal, *Criteria for a Theory About Law*, 44 S. *Cal. L. Rev.* 362 (1971); Myres S. McDougal, *Jurisprudence for a Free Society*, 1 *Ga. L. Rev.* 1 (1966); Myres S. McDougal, *Law as a Process of Decision: A Policy-Oriented Approach to Legal Study*, 1 *Nat. L.F.* 53 (1956); Myres S. McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, 4 *S.D. L. Rev.* 25 (1959); W. Michael Reisman, *Myres S. McDougal: Architect of a Jurisprudence for a Free Society*, 66 *Miss. L.J.* 15 (1997).

113. OECD, *OECD Code of Liberalization of Capital Movements 3 (2017)*, http://www.oecd.org/daf/inv/investment-policy/Code-Capital-Movements-EN.pdf [https://perma.cc/6JKJ-YTFM].

114. OECD, The OECD *Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts* (2012).

115. *See* OECD, The Multilateral Agreement on Investment: Draft Consolidated Text, pmbl. (1998).

116. *Conference on Investment Treaties: The Quest for Balance Between Investor Protection and Governments' Right to Regulate* (Mar. 14, 2016), http://www.oecd.org/investment/2016-conference-investment-treaties.htm [https://perma.cc/2ZMW-EU5L].

117. OECD, *Annex III: G20 Guiding Principles for Global Investment Policymaking 1*, http://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf [https://perma.cc/Q5ZR-QGLF].

World Investment Report.[118] The U.N. Commission on International Trade Law (UNCITRAL) played a key role in updating its transparency rules, which can affect the regulatory balance between investors and host states.[119] The Mauritius Convention on Transparency, which opened for signature in March 2015, crystallizes the movement towards transparency.[120] Unlike the existing UNCITRAL Rules on Transparency, which apply only to UNCITRAL investor-state arbitrations dealing with treaties concluded on or after April 1, 2014, the Mauritius Convention is a groundbreaking step forward because it covers "any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules" and also applies to treaties concluded before April 1, 2014.[121]

International organizations can also shape international investment law jurisprudence on the right to regulate. For example, the International Institute for Sustainable Development (IISD) is an independent, non-profit research organization with a strong interest in sustainable development and provides its definition on the right to regulate in the IISD Model Agreement. [122] Article 25 provides the following:

> (A) Host states have, in accordance with the general principles of international law, the right to pursue their own development objectives and priorities.
> (B) In accordance with customary international law and other general principles of international law, host states have the right to take regulatory or other measures to ensure that development in their territory is consistent with the goals and principles of sustainable development, and with other social and economic policy objectives.[123]

The concept of right to regulate is described in paragraph (B); further, both paragraphs aim to provide a broad set of rights for states to meet their developmental goals including social, eco-

118. *See World Investment Report*, UNITED NATIONS CONFERENCE ON TRADE & DEV., http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/World_Investment_Report.aspx (last visited Jan. 14, 2018) [https://perma.cc/X2DT-QU2P].

119. *See, e.g.*, Lise Johnson & Nathalie Bernasconi-Osterwalder, *New UNCITRAL Arbitration Rules on Transparency: Application Context and Next Steps*, INV. TREATY NEWS (Sept. 18, 2013), https://www.iisd.org/itn/2013/09/18/new-uncitral-arbitration-rules-on-transparency-application-content-and-next-steps-2/ [https://perma.cc/3TTS-7ZFS]; Julia Salasky & Corinne Montineri, *Transparency in Investor-State Arbitration: the New UNCITRAL Rules on Transparency*, INV. POLICY BLOG (Mar. 26, 2014), http://investmentpolicyhub.unctad.org/Blog/Index/29 [https://perma.cc/RS24-DD4S].

120. *See* UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNITED NATIONS CONVENTION ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION, pmbl. (2015).

121. *Id.* art. 2.

122. *See* IISD MODEL AGREEMENT, *supra* note 83, art. 25.

123. *Id.*

nomic, and other policy objectives.[124] The commentary provided by the IISD acknowledges that it "reverses the trend among many arbitrators of interpreting [IIAs] based on the single objective of protecting investor and investment rights."[125] The UNCTAD also expressed that the "right to regulate in the public interest so as to ensure that IIAs' limits on the sovereignty of States do not unduly constrain public policymaking" should be safeguarded.[126] The areas of public policymaking envisioned by the UNCTAD, as well as other provisions that create exceptions for national security or public interests such as health, safety, labor rights, the environment, or sustainable development, can affect various provisions on MFN, FET, and indirect expropriation.[127]

6. Civil Societies

Especially after the NAFTA claims, the ICSID awards against Argentina, and the proliferation of IIAs, civil societies and other stakeholders have become active in developing sound investment policies.[128] External intervention by civil society organizations did not exist alongside the birth of BITs, but came into existence after the emergence of some early NAFTA claims, which triggered the thought that one way to achieve sustainable economic development would be to encourage healthy levels of civil involvement.[129] This incentivized NAFTA countries, like the United States and Canada, to move towards greater openness in certain areas of the international law regime, and civil societies focused on issues related to economic security including jobs and wages, democratic decision-making, the environment, health and food safety, and other areas of consumer well-being.[130]

Civil societies can be established as formal or informal organizations that are not affiliated to any particular country and can even

124. *See* Howard Mann, Int'l Inst. For Sustainable Dev., IISD Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook 38 (2d ed. 2006), https://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf [https://perma.cc/Q26R-5RN6].

125. *Id.*

126. WIR 2015, *supra* note 70, at xi.

127. *See id.* at xii.

128. *See* WIR 2013, *supra* note 5, at 92.

129. *See* Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership*, 54 U. Kan. L. Rev. 1339, 1364–69 (2006) (providing an overview of the tribunals' right to admit amicus participation in the context of early NAFTA Chapter 11 cases arising out of investment disputes).

130. *See* Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad and the Murky*, *in* Transparency in International Law 142, 152 (Andrea Bianchi & Anne Peters eds., 2013).

occur indigenously through street protests.[131] Civil societies may also refer to social movements and voluntary acts stemming from communities and citizen groups and may include domestic or international associations and non-governmental organizations, networks and campaigns, trade unions, and grassroots political forces.[132] The United Nations Development Program, for example, provides civil society activities focusing on international human rights, and collaborates with civil society organizations at the country, regional, and global levels to encourage civil participation and address problems related to poverty and gender equality.[133]

Civil societies self-designate themselves as promoters of transparency who help bring together the interests of the IIA stakeholders.[134] Foreign investment can set off negative public attitudes even in countries usually known for market liberalization.[135] Negotiations on the TTIP commenced in July 2013 through the cooperative efforts of U.S. and European banks, agribusinesses, and other influential industry sectors, but were opposed by civil societies who worried that TTIP would permit E.U. corporations to weaken U.S. safeguard regulations on the environment, health, and finance, as well as eventually harm the interests of consumers, the workforce,

131. For example, during the anti-U.S. beef import protest in Seoul in 2008, unions as well as parents and students held candlelight vigils to protest against the government's decision to re-allow U.S. beef, which was first banned in 2003 due to the mad cow disease outbreak in the United States. *See Anti-U.S. Beef Protest Draws 100,000 S. Koreans*, REUTERS (May 31, 2008), http://www.reuters.com/article/us-korea-protest-idUSSEO21734120080531 [https://perma.cc/22VC-HULT]; Choe Sang-Hun, *Beef Protest Turns Violent in South Korea*, N.Y. TIMES (June 30, 2008), http://www.nytimes.com/2008/06/30/world/asia/30korea.html?mcubz=1) [https://perma.cc/5ASW-9VX5].

132. *See* MARIO PIANTA, UNITED NATIONS RES. INST. FOR SOC. DEV., U.N. WORLD SUMMITS AND CIVIL SOCIETY: THE STATE OF THE ART 6 (2005).

133. UNITED NATIONS DEV. PROGRAMME, UNDP STRATEGY ON CIVIL SOCIETY AND CIVIC ENGAGEMENT (2012), http://www.undp.org/content/dam/undp/documents/partners/civil_society/publications/2012_UNDP_Strategy-on-Civil-Society-and-Civic-Engagement_EN_final.pdf [https://perma.cc/KGN9-RC2G].

134. *See* W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 107 (1981) (when law is understood to contain a communicative process of authoritative decision-making so that "any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior must be considered as functional lawmaking," the question of how civil societies can influence international investment decision-making becomes an important one); *see also* Manuel Castells, *The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 79 (2008) ("It is the interaction between citizens, civil society, and the state, communicating through the public sphere, that ensures that the balance between stability and social change is maintained in the conduct of public affairs.").

135. *See* ALVAREZ, PUBLIC INTERNATIONAL LAW, *supra* note 53, at 20.

and the environment.[136] The sentiment was mutually felt in Europe where many worried that U.S. corporate influence would undermine E.U. safety regulations.[137] The negotiations on the Trans-Pacific Partnership (TPP)[138] were also widely criticized by civil society organizations because the negotiations with major corporations occurred behind closed doors.[139] The draft of TPP was not officially released to the public despite the leaked version on the Internet.[140] Through communications to the international investment law community and the public at large, civil societies have created the awareness that some of the commitments in IIAs can force the surrender of national sovereignty in an imbalanced manner, especially when treaty obligations challenge the legitimacy or altogether prevent governments from making domestic legislations for the public good.[141]

II. The Nature of the Right to Regulate in IIAs

A. *The Public Order Carve-out as the Predecessor to the Right to Regulate Concept*

Long before the BIT program took place in the United States, public order provisions were available in the FCN treaties, but usually in the context of religion or movement of aliens. [142] After

136. *See, e.g.*, *The Transatlantic Trade and Investment Partnership (TTIP): U.S. and European Corporations' Latest Venue to Attack Consumer and Environmental Safeguards?*, Pub. Citizen, http://www.citizen.org/tafta (last visited Jan. 14, 2018) [https://perma.cc/H7LG-H8YX].

137. *See, e.g.*, Paul Gallagher, *TTIP: Big Business and US to Have Major Say in EU Trade Deals, Leak Reveals*, *Independent* (Mar. 17, 2016), http://www.independent.co.uk/news/business/news/ttip-big-business-and-us-to-have-major-say-in-eu-trade-deals-leak-reveals-a6937141.html [https://perma.cc/98Z9-7CHD].

138. TPP, *supra* note 3.

139. *See, e.g.*, Ailsa Chang, *A Trade Deal Read in Secret by Only a Few (Or Maybe None)*, Nat'l Pub. Radio (May 24, 2015), http://www.npr.org/sections/itsallpolitics/2015/05/14/406675625/a-trade-deal-read-in-secret-by-only-few-or-maybe-none (last visited Jan. 14, 2018) [https://perma.cc/F4QP-888F]; Mark Wu, *US Should Not Negotiate Free Trade Behind Closed Doors*, Fin. Times (May 26, 2015), https://www.ft.com/content/28432090-03b3-11e5-a70f-00144feabdc0 (last visited Jan. 14, 2018) [https://perma.cc/Z53Z-RNF3].

140. *See* Margot E. Kaminski, *Don't Keep Trans-Pacific Partnership Talks Secret*, N.Y. Times (Apr. 14, 2015), https://www.nytimes.com/2015/04/14/opinion/dont-keep-trade-talks-secret.html?mcubz=1 [https://perma.cc/QPS7-JZWK].

141. *See* Howard Mann, *The Right of States to Regulate and International Investment Law*, *in* The Development Dimension of FDI: Policy and Rule-making Perspectives 211, 211–22 (2003), http://unctad.org/en/Docs/iteiia20034_en.pdf [https://perma.cc/YD3X-RSUA].

142. *See, e.g.*, Treaty of Friendship, Commerce and Consular Rights, Austria-U.S., art. V, June 19, 1928, 47 Stat. 1876. The Treaty of Friendship, Commerce and Consular Rights states the following:

> The nationals of each of the High Contracting Parties in the exercise of the right of freedom of worship . . . may, without annoyance or molestation of any kind by reason of their religious belief or otherwise, conduct services either within their

World War II, the term "public order" continued to be included in the U.S. FCN treaties, but its scope was narrowed down to a carve-out invoked only out of necessity to protect an essential interest of the state.[143] For example, the 1954 Treaty of Friendship, Commerce and Navigation between Germany and the United States provides a public order carve-out in the context of movement of aliens, which is also limited by the term "necessary," as follows:

> 1. Nationals of either Party shall . . . be permitted to enter the territories of the other Party, to travel therein freely, and to reside at places of their choice . . . .
>
> . . .
>
> 5. The provisions of the present Article shall be subject to the right of either Party to apply measures that are *necessary* to maintain public order and protect the public health, morals and safety.[144]

The U.S. BIT practice seems to have also influenced international practice. In 1962, the OECD presented the Draft Convention on the Protection of Foreign Property.[145] Although the OECD Draft Convention did not use the term "public order," it specified the "derogations" permitted under Article 6, providing the following:

> A Party may take measures in derogation of this Convention only if:
> (i) involved in war, hostilities or other grave public emergency of a nation-wide character due to force majeure or provoked by unforeseen circumstances or threatening its essential security interests

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> own houses or within any appropriate buildings which they may be at liberty to erect and maintain in convenient situations, provided their teachings and practices are *not inconsistent with public order*. . . .

Id. (emphasis added); *see also* Treaty of Amity and Economic Relations, Eth.-U.S., art. VI(3), Sept. 7, 1951, 4 U.S.T. 2134; Treaty of Friendship, Commerce and Navigation, It.-U.S., art. I(4), Feb. 2, 1948, 63 Stat. 2255.

143. *See, e.g.*, Amity and Economic Relations Treaty, Thai.-U.S., art. XII(e), May 29, 1966, 19 U.S.T. 5843; Treaty of Friendship, Establishment and Navigation, Lux.-U.S., art. II(5), Feb. 23, 1962, 14 U.S.T. 251; Treaty of Friendship, Establishment and Navigation, Belg.-U.S., art. II(5), Feb. 21, 1961, 14 U.S.T. 1284; Treaty of Friendship, Commerce and Navigation, S. Kor.-U.S., art. II(3), Nov. 28, 1956, 8 U.S.T. 2217; Treaty of Friendship, Commerce and Navigation, Neth.-U.S., art. II(4), Mar. 27, 1956, 8 U.S.T. 2043; Treaty of Friendship, Commerce and Navigation, Ger.-U.S., art. II, Oct. 29, 1954, 7 U.S.T. 1839; Treaty of Friendship, Commerce and Navigation, Japan-U.S., art. I(3), Apr. 2, 1953, 4 U.S.T. 2065; Treaty of Friendship, Commerce and Navigation, Den.-U.S., art. II(3), Oct. 1, 1951, 12 U.S.T. 908.

144. Treaty of Friendship, Commerce and Navigation, Ger.-U.S., art. II, Oct. 29, 1954, 7 U.S.T. 1839 (emphasis added).

145. *See* OECD, Draft Convention on the Protection of Foreign Property (1967) [hereinafter OECD Draft Convention], https://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf [https://perma.cc/46JC-X72L].

> . . .
> Any such measures shall be provisional in character and shall be limited in extent and duration to those strictly required by the exigencies of the situation.[146]

The Commentary stresses that derogations may be permitted only when the public emergency satisfies certain conditions.[147] The public emergency must be grave to the point of causing nation-wide repercussions and must be due to *force majeure* (including, but not limited to, storm damage, earthquakes, and volcanic eruptions), be provoked by unforeseen circumstances, or threaten the essential security interest of the state.[148] The Commentary explicitly states that civil wars, riots, or any other kinds of civil disturbances may be a result of *force majeure* or unforeseen circumstances within the meaning of the first paragraph in Article 6.[149] The OECD Draft Convention was not formally adopted, but it has influenced the subsequent BITs.[150]

In the first U.S. BIT concluded between the United States and Panama in 1982, the public order carve-out was provided in isolation, not connected to any other substantive provision of the BIT, in the following manner:

> 1. This treaty shall not preclude the application by either Party of any and all measures *necessary for the maintenance of public order*, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests.[151]

Panama insisted on a clarification of the public order carve-out to which the United States rather unsatisfactorily replied that acts taken for the maintenance of public order are limited to domestic measures and that it does not authorize "either Party to take such measures in the territory of the other."[152] The U.S. practice of not defining the term "public order" since continued, although later

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146. *Id.* at 29.
147. *See id.* at 31.
148. *See id.*
149. *See id.*
150. *See Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 2* (1995).
151. Treaty Concerning the Treatment and Protection of Investments, Pan.-U.S., art. X, ¶ 1, Oct. 27, 1982, S. Treaty Doc. No. 99-14 (emphasis added).
152. Letter from Everett E. Briggs, U.S. Ambassador to Pan., to Jorge Aradia Arias, Pan. Foreign Rel. Minister (July 12, 1985), http://www.state.gov/documents/organization/43582.pdf [https://perma.cc/TQK7-NAYE]; *see also* Letter from George P. Shultz, U.S. Sec'y of State, to Ronald Reagan, U.S. President (Feb. 20, 1986), http://www.state.gov/documents/organization/43582.pdf (noting that "[b]ecause of political sensitivities in Panama, the Panamanians insisted on a separate exchange of notes (information copy attached) clarifying the standard provision in the BIT which exempts measures taken for public order.") [https://perma.cc/5P4W-RR9C].

documents have occasionally revealed the term to mean that the "maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety."[153] A handful of U.S. BITs including those with Morocco (1985),[154] Congo (1990),[155] Argentina (1991), [156] Ecuador (1993),[157] Haiti (1983),[158] Kyrgyzstan (1993), [159] Estonia (1994),[160] and Latvia (1995),[161] each contain a public order carve-out using similar language as that of the U.S.-Panama BIT. The U.S.-Poland BIT (1990)[162] also includes a public order carve-out but under the heading "Reservation of Rights" with an accompanying letter from the U.S. president that states: "[a]lso expressly reserved is a Party's right to take any measures that are necessary to protect public order or essential security interests."[163] In the Bangladesh-U.S. BIT (1986), Bangladesh demanded that protocol to the treaty explicitly reiterate that the right of nationals and companies to employ personnel of their choice shall be subject to the NPM provision in Article X, which includes the public order carve-out, due to "strong Bangladesh insistence that one of the principal benefits of foreign investment is the development of local employee skills."[164] The overall effect of such clarifications is unclear, but can be perceived

153. Letter from Warren Christopher, U.S. Sec'y of State, to William J. Clinton, U.S. President (Sept. 7, 1994), http://2001-2009.state.gov/documents/organization/43560.pdf (regarding the NPM provision in the Estonia Bilateral Investment Treaty, Est.-U.S., art. IX, Apr. 19, 1994) [https://perma.cc/GJS8-2ACQ].

154. *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Morocco-U.S., art. IX, ¶ 1, July 22, 1985, S. TREATY DOC. NO. 99-18.

155. *See* Treaty of the Reciprocal Encouragement and Protection of Investment, Congo-U.S., art. X, ¶ 1, Feb. 12, 1990, S. TREATY DOC. NO. 102-1.

156. *See* Treaty of the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., art. XI, Nov. 14, 1991, S. TREATY DOC. NO. 103-2.

157. *See* Treaty of the Encouragement and Reciprocal Protection of Investment, Ecuador-U.S., art. IX, ¶ 1, Aug. 27, 1993, S. TREATY DOC. NO. 103-15.

158. *See* Treaty of the Reciprocal Encouragement and Protection of Investment, Haiti-U.S., art. X, ¶ 1, Dec. 13, 1983, S. TREATY DOC. NO. 99-16.

159. *See* Treaty of the Encouragement and Reciprocal Protection of Investment, Kyrg.-U.S., art. X, ¶ 1, Jan. 19, 1993, S. TREATY DOC. NO. 103-13.

160. *See* Treaty of the Encouragement and Reciprocal Protection of Investment, Est.-U.S., art. IX, ¶ 1, Apr. 19, 1994, T.I.A.S. No. 97-216.

161. *See* Treaty of the Encouragement and Reciprocal Protection of Investment, Lat.-U.S., art. IX, ¶ 1, Jan. 13, 1995, S. TREATY DOC. NO. 104-12.

162. *See* Treaty of Business and Economic Relations, Pol.-U.S., art. XII, ¶ 3, Mar. 21, 1990, S. TREATY DOC. NO. 101-18.

163. Letter from Lawrence Eagleburger, U.S. Sec'y of State, to George H. W. Bush, U.S. President (June 8, 1990), http://www.state.gov/documents/organization/210528.pdf [https://perma.cc/MX6S-Q44E].

164. Letter from Michael H. Armacost, U.S. Under Sec'y of State for Pol. Aff., to Ronald Reagan, U.S. President (May 9, 1986), https://www.state.gov/documents/organization/43480.pdf [https://perma.cc/7E4Q-4HLB].

as one method for a party to enable itself to take measures and to hedge itself in case of an investor-state arbitration.

The 1994 U.S. Model BIT dropped the public order carve-out, which had been debated since drafting of the 1983 U.S. Model BIT.[165] Inclusion of the public order carve-out presented a conundrum for the United States because the NPM provision (containing the public order carve-out) was placed to justify economic sanctions (such as freezing foreigners' assets in the United States) against the contracting states so that its obligations under a particular BIT would not be breached,[166] and not necessarily to secure the U.S. regulatory space. [167] The public order carve-out was eventually excluded from the current 2012 U.S. Model BIT.[168] The exclusion, however, should not be interpreted as preventing states from exercising their regulatory authority. Rather, the exclusion may be better understood as one IIA stakeholder's emphasis on the value of investment protection in the international investment law system.

B. *The Right to Regulate Concept under Customary International Law*

Whereas the preceding Section provided a brief historical overview of the public order carve-out, this Section explores the concept of public order through the lens of customary international law. This is a complicated issue because the International Law Commission (ILC) Articles on State Responsibility (as a codification of customary international law) does not contain the concept of public order.[169] Yet, when the ICSID tribunals in the cases involving *CMS*, *Enron*, and *Sempra* were given the task to interpret the public order carve-out in Article XI of the U.S.-Argentina BIT, they inferred from the "necessary to maintain public order" lan-

165. An exception for public order existed in the 1982 U.S. Model BIT using the phrase "maintenance of public order and morals," but dropped the term "morals" to instead state "maintenance of public order" in the 1983, 1984, 1987, 1991, and 1992 U.S. Model BITs. Any mention of public order was deleted starting from the 1994 U.S. Model BIT and did not reappear in the subsequent updates made in 1998, 2004, and 2012. KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 200 (2009).

166. *See id.* (stating that the United States was increasingly using sanctions like the freezing of assets in the United States to implement its foreign policy objectives).

167. *See id.*

168. *See* 2012 U.S. MODEL BILATERAL INVESTMENT TREATY art. 18.

169. *See, e.g.*, Jorge E. Viñuales, *State of Necessity and Peremptory Norms in International Investment Law*, 14 *L. & Bus. Rev. Am.* 79, 79–80 (2008); *see also* Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT'L L. 447, 452–53 (2012) (arguing that International Law Commission (ILC) Article 25 should not be seen as the equivalent to the necessity doctrine under customary international law).

guage in Article XI that the public order carve-out should be interpreted under the rigid necessity doctrine of customary international law.[170] This debatable connection between the BIT public order carve-out and the customary international law necessity defense may have come from the ICSID tribunals' acceptance of Argentina's defense that the regulatory act should be excluded, if not under the BIT, then under customary international law.[171] In fact, this is how Argentina formed its defense in the *CMS*,[172] *Enron*,[173] *Sempra*,[174] *LG&E*,[175] and *Continental Casualty* cases.[176] However, was it legally convincing to permit the customary defense on necessity to provide the elements to the treaty-based public order carve-out?

The concept of public order is not in the ILC Articles on State Responsibility, which begs the question of how the connection between the public order carve-out in BITs and the necessity defense under customary international law came into being. Historical background of the necessity defense can offer some insight on whether its rigid application should be maintained in the interpretation of public order carve-outs. Hugo Grotius, considered to be the "Father of International Law," recognized that wartime demands may compel any one power to take control of neutral territory and that such an act would be justified under the right of necessity.[177] However, Grotius also emphasized that invoking the right of necessity had to be based on a real belief that the other power would do the same.[178] With Grotius's work serving as one of the several doctrinal foundations to the law of necessity, Burleigh Cushing Rodick, who authored a widely cited treatise on necessity in international law, extracted the following stipulations common

170. *See Andreas Kulick, Global Public Interest in International Investment Law* 138 (2012) (The interpretation of the "only way" requirement by the *CMS*, *Enron*, and *Sempra* Tribunals has been harshly criticized for instilling "an absurd threshold impossible to pass.").

171. *See generally* Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005).

172. *See CMS Gas Transmission*, ICSID Case No. ARB/01/8, ¶ 99.

173. *See Enron Corp.*, ICSID Case No. ARB/01/3, ¶ 93.

174. *See Sempra Energy Int'l*, ICSID Case No. ARB/02/16, ¶ 98.

175. *See LG&E Energy Corp.*, ICSID Case No. ARB/02/1, ¶ 202.

176. *See Continental Casualty Co.*, ICSID Case No. ARB/03/9, ¶ 88.

177. *See Hugo Grotius, On the Law of War and Peace* 77–80 (A.C. Campbell trans., 2001).

178. *See id.*

to the concept of necessity.[179] International law scholars of the 19th century unequivocally assumed that a state's fundamental rights included the right of self-preservation and existence so that acts based on necessity also became a right that states could resort to when defending themselves.[180] Of course, this triggers the question of whose right of self-preservation would be upheld when a dispute between states occur.[181] Modern international law addresses this conflict, to some extent, by employing the broader concept of "essential interests" to refashion the traditional idea that self-preservation is not a right, but one of several essential interests that a state may protect even in the face of a breach of an international commitment.[182]

In the 1970s, ILC Special Rapporteur Roberto Ago examined the international law concept of necessity by surveying the practice of international adjudicative bodies and his seminal work laid the groundwork for draft Article 33 which later became Article 25 of the ILC Articles on State Responsibility.[183] Ago not only rejected the theory of fundamental rights of states but also contended that the idea of a right of self-preservation distorted contemporary international legal reality.[184] Moreover, in declaring that "the idea of a subjective right of necessity . . . is absolute nonsense today," Ago rejected necessity as a state's right and instead argued that it be understood as an excuse.[185] In other words, when necessity is exercised as a right, the state declaring such a right would be granted a legal claim against the other state.[186] But when necessity

179. *See* BURLEIGH CUSHING RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW 6 (1928).

180. *See* Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 *Yale Hum. Rts. & Dev.* L.J. 1, 6 (2000) (citing Amos S. Hershey and Charles G. Fenwick who emphasize the right of self-preservation as the fundamental right of States); Sloane, *supra* note 169, at 455.

181. *See* Boed, *supra* note 180, at 6.

182. *See id.* at 6–7.

183. *See* Int'l Law Comm'n, Addendum – Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur – the Internationally Wrongful Act of the State, Source of International Responsibility (Pt. 1), U.N. Doc. A/CN.4/318/Add.5-7, at 16 (1980) [hereinafter Ago Report], http://legal.un.org/ilc/documentation/english/a_cn4_318_add5_7.pdf [https://perma.cc/J96R-8UBC].

184. *See id.*

185. *Id.* at 18; *but see Jan Kittrich, The Right of Individual Self-Defense in Public International Law 46 (2008) (*"After the adoption of the Draft Articles in 1980, some members of the international community disapproved of the [ILC's] notion of the criterion *essential interest.* According to some nations its meaning was too vague as to invite potential abuse and to cause more problems.").

186. Ago Report, *supra* note 183, at 18.

is invoked as an excuse, the acting state implicitly acknowledges the legitimacy of whatever is being denied to the other side.[187]

The modern trend has been to widen the scope of necessity to include essential interests other than preservation of a state's existence.[188] The modern understanding of necessity covers the concept of essential interest rather than the notion of self-preservation, as affirmed in the 1997 the International Court of Justice (ICJ) case between Hungary and Czechoslovakia (later Slovakia).[189] In the Gabèíkovo-Nagymaros dispute, Czechoslovakia brought a claim against Hungary twelve years after both countries signed a treaty agreeing to construct dams that would produce electricity, improve watercourse, and protect against flooding along the Danube River that bordered both nations.[190] Hungary sought to temporarily abandon parts of the project due to financial hardship and environmental concerns, which were intensified by negative public attention.[191] When the two countries failed to reach a new agreement to address these growing concerns, Czechoslovakia retaliated by engaging in a river diversion that extracted most of the water from the riverbed and dropped the overall water level.[192] Hungary's main argument was that its breach of treaty was justifiable due to ecological necessity.[193]

This case is significant because even though the ICJ found that Hungary had not satisfied the conditions to establish necessity, the Court accepted the premise that a breaching state may take acts to

187. *See id.*; Boed, *supra* note 180, at 7, n.24.

188. *See* Ago Report, *supra* note 183, at 28 ("A case which occurred in our own times and which may be regarded as typical from the standpoint of fulfilment of the conditions we consider essential in order for the existence of a 'state of necessity' to be recognized is the '*Torrey Canyon*' *incident.*"); *but see* Sloane, *supra* note 169, at 455 (disagreeing with Special Rapporteur Roberto Ago's emphatic view that "the concepts of self-preservation and state of necessity are in no way identical, nor are they indissolubly linked in the sense that one is merely the basis and justification of the other").

189. *See* Gabèíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶¶ 49–58 (Sept. 25) (hereinafter Gabèíkovo-Nagymaros Project); *see also* Aaron Schwabach, *Diverting the Danube: The Gabèíkovo-Nagymaros Dispute and International Freshwater Law*, 14 Berkeley J. Int'l L. 290, 292–304 (1996) (providing background information to the Gabèíkovo-Nagymaros dispute). *See generally* Heiko Fürst, Inst. For Peace Research & Sec. Policy, The Hungarian-Slovakian Conflict over the Gabèíkovo-Nagymaros Dams: An Analysis, http://www.columbia.edu/cu/ece/research/intermarium/vol6no2/furst3.pdf [https://perma.cc/HKG5-2ZPF] (explaining the conflict between Hungary and Czechoslovakia).

190. *See* Gabèíkovo-Nagymaros Project, *supra* note 189, ¶¶ 15–20.

191. *See id.* ¶¶ 22–40 (describing the Hungarian claim of state of ecological necessity in justification of abandoning the project); Fürst, *supra* note 189, at 2.

192. *See* Gabèíkovo-Nagymaros Project, *supra* note 189, ¶ 23.

193. *See id.* ¶ 40.

respond to a threat of environmental catastrophe and that it may be excused if necessity can be validly established.[194] By accepting the existence of a state of necessity defense in customary international law,[195] the ICJ contributed to establishing a linkage between the concept of necessity and the Draft Article 33 (which is now equivalent to Article 25) of the ILC. The ICJ permitted necessity to be a ground for precluding wrongdoing by a state in breach of its international obligations when it stated the following:

> The [ICJ] considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft.[196]

The modern concept of necessity is no longer bound to the preservation and existence of a state, but opens up the possibility that a state may be excused from international breach when an essential state interest is at stake. The Section below examines some of the current approaches of preserving regulatory space in IIAs.

C. *Recent Applications of Providing for the Right to Regulate in IIAs*

The meaning of public order might also be considered together with the broader "right-to-regulate" term that frequently appears in current discussions on investment treaty-making, but there still lacks a concrete definition of the right to regulate. The right to regulate is somewhat alien to the existing BITs, and while presumably broader than the public order carve-out in the NPM provisions of BITs, it is unclear whether it creates a right, exception, reservation, justification, or carve-out.[197] This Article assumes that the

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194. *See id.* ¶ 57; Boed, *supra* note 180, at 12.

195. *See* Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration:* CMS *and* LG&E, 20 *Leiden J. Int'l* L. 637, 640 (2007) ("Necessity as a circumstance precluding state responsibility is well rooted in customary international law.").

196. *See* Gabèíkovo-Nagymaros Project, *supra* note 189, ¶ 51; Massimiliano Montini, *The Necessity Principle as an Instrument to Balance Trade and the Protection of the Environment, in Environment, Human Rights & International Trade* 135, 139 (Francesco Francioni ed., 2001) ("The most important instrument in which the concept of necessity as a general principle of international law has crystallized in contemporary international law is the instrument of the *state of necessity*, as defined by the International Law Commission.").

197. *See J. Anthony VanDuzer et al., Commonwealth Secretariat, Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* 238–39 (2012) (suggesting that the right-to-regulate concept is too open-ended to succeed in IIA negotiations).

public order carve-out such as the one in Article XI of the U.S.-Argentina BIT provides the foundation to the current concept of the right to regulate. It is from this standpoint that this Section examines the right to regulate provisions in IIAs.

1. Preamble

Modern IIAs that were concluded after the 2000s have experimented with various ways to engage the aggregate community interests of the IIA stakeholders to better balance the various interests in IIAs.[198] One such attempt has been to secure regulatory space for host states in the preambles of IIAs.[199] The preambles of some recent IIAs appeal to a broader range of public interest concerns that goes beyond investment protection and promotion.[200] Describing shared objectives of the contracting parties without creating substantive obligations, preambles are nevertheless important because they contribute to the interpretation of the overall treaty.[201] By intentionally placing non-economic objectives on the same platform as investment objectives, language in the preamble aiming to preserve regulatory space can prevent investor-state tribunals from giving investment protection guarantees an overly broad interpretation that creeps into the policy space of host states.[202] For example, the preamble in the Canada-E.U. Comprehensive Economic and Trade Agreement (Canada-E.U. CETA) preserves regulatory space by stating that the contracting states retain the right "to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity."[203] In the preamble of the China-Australia FTA, the contracting parties promise to "[u]phold[ ] the rights of their governments to regulate in order to meet national

198. *See* WIR 2017, *supra* note 22, at 119, 122.

199. *See* J. Anthony VanDuzer, *Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?*, *in Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* 142, 149 (Steffen Hindelang & Markus Krajewski eds., 2016).

200. *See* Vid Prislan & Ruben Zandvliet, *Labor Provisions in International Investment Agreements: Prospects for Sustainable Development*, *in Yearbook on International Investment Law & Policy* 2012–2013 357, 385 (Andrea K. Bjorklund ed., 2014).

201. *See* VanDuzer, *supra* note 199, at 149.

202. *See* Prislan & Zandvliet, *supra* note 200, at 385.

203. Canada-European Union Comprehensive Economic and Trade Agreement, Can.-E.U., pmbl., Oct. 30, 2016, Gov't of Canada, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng [hereinafter Canada-E.U. CETA] [https://perma.cc/FW47-FQT7].

policy objectives, and to preserve their flexibility to safeguard public welfare."[204] However, not all recently concluded IIAs include such language in the preamble as does the E.U.-Vietnam FTA.[205]

These preambles of modern IIAs might provide some idea of what the right to regulate entails, as interpreted by investor-state tribunals according to the generally established rules of treaty interpretation. The Vienna Convention on the Law of Treaties (VCLT) provides the seminal interpretative authority for IIAs. [206] Article 31(1) of the VCLT instructs that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." [207] Many investor-state tribunals refer to Article 31 of the VCLT as the "first point of reference"[208] to determine the ordinary meaning of the words contained in a treaty. Moreover, Article 31(2) of the VCLT states that the preamble may be used to identify the object and purpose of a treaty.[209] Investor-state tribunals may thus consider the extent of the binding force of the preamble when interpreting the preambles in the more recent generation of IIAs that contain statements on safeguarding certain public interests. On one hand, the preamble is considered not to have any actual binding authority, whose sole function is to set the contextual stage for the rest of the agreement.[210] On the other hand, some tribunals have referred to the preamble in practice to fill interpretative gaps in the treaty.[211] In 1952, the ICJ dealt with a similar issue and concluded that the language in the preamble was

204. China-Australia Free Trade Agreement, Austl.-China, pmbl., June 17, 2015, Australia Dep't of Foreign Affairs and Trade, http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx [https://perma.cc/HAG8-RZMK].

205. *See, e.g.*, European Union-Vietnam Free Trade Agreement, E.U.-Viet., Jan. 20, 2016, European Comm'n, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 [https://perma.cc/KH73-5E34].

206. *See* Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

207. *Id.*

208. *See, e.g.*, Sempra Energy Int'l v. Argentina, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, paras. 188-89 (June 29, 2010) [hereinafter Sempra Annulment].

209. *See* Vienna Convention, *supra* note 206, art. 31(2).

210. *See* Muchlinkski, *supra* note 29, at 46; *see* J. Anthony VanDuzer, *Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?*, *in* Shifting Paradigms in International Investment Law 142, 149 (Steffen Hindelang & Markus Krajewski eds., 2016).

211. *See* Nguyen, Daillier & Pellet, *supra* note 29, at 131; *see also* Muchlinkski, *supra* note 29, at 46 ("The preamble is a key element in the interpretation of a treaty . . . .").

clearly intended to be binding.[212] The question of whether the preamble has a legally binding effect may arise given that the preambles of recent IIAs increasingly provide specified regulatory interests. But more importantly, the language regarding the right to regulate in the preambles of investment treaties invites investor-state tribunals to consider competing values that arise out of a host state's regulatory interests together with investment protection.

Investor-state tribunals and foreign investors may be pressed to acknowledge the evolving purpose of IIAs and the right to regulate when the preamble expressly provides for various regulatory interests relating to legitimate public welfare objectives, environment, public health and safety, culture, human rights, and sustainable development. It is a noticeable departure from the single-minded goal of IIAs on investment protection.[213] Without expressing intent to preserve its right to regulate in the preamble, a host state may not be able to secure its regulatory space when the object and purpose of an investment treaty is tested in an investor-state dispute. This might occur when an investor-state tribunal engages in a teleological method of interpretation that overly emphasizes the "object and purpose" element of Article 31(1) of the VCLT.[214] For example, the ICSID tribunal in *Siemens v. Argentina* tried to determine the object and purpose of the Germany-Argentina BIT by examining the preamble and concluded that the parties had intended "to create favorable conditions for investments and to stimulate private initiative."[215] In *SGS v. Philippines*, based on the preamble language that stated that the parties agreed to create and maintain favorable conditions for investments, the ICSID tribunal

212. *See Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. 176, 184 (Aug. 27)* (concluding on the basis that the preamble of the Algeciras Act provided for the guarantee of equality of treatment in the preamble that "it seems clear that the principle was intended to be of a binding character and not merely an empty phrase.").

213. *See* Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. *Int'l Econ.* L. 1037, 1065 (2010); VanDuzer, *supra* note 199, at 172; *but see* Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 *Harv. Int'l L.J.* 353, 373 (identifying investor protection and the de-politicization of investor-state disputes as the two main objectives of IIAs).

214. *See* Plama Consortium Ltd. v. Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 193 (Feb. 8, 2005) (quoting Sir Ian Sinclair's cautionary statement that the "risk that the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties"); *see also* Newcombe & Paradell, *supra* note 62, at 115.

215. Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 81 (Aug. 3, 2004).

concluded that "[i]t is legitimate to resolve uncertainties in its interpretation so as to favor the protection of covered investments."[216] In both of these cases, the narrowly drafted object and purpose of the investment treaty operated to tip the balance in favor of investors since regulatory objectives were not specified in the preamble.[217] When regulatory interests are established in the preamble of an IIA, the tone is set for the rest of the agreement and will also direct investor-state tribunals to interpret the object and purpose of the treaty in light of the regulatory space carved out by the host state. Without such right-to-regulate language in the preamble, investor-state tribunals may be inclined to follow the presumption created in favor of investment protection, and the substantive obligations of the IIAs will be broadly applied while exceptions restrictively reviewed.[218] However, language aiming to preserve regulatory space must also be present as a substantive provision in the IIA to create a legally enforceable right since the preamble merely offers an "interpretative device."[219]

2. The Right to Regulate in European IIAs

The European Commission released a fact sheet in November 2013 outlining the urgent need to strike a better balance between investor protection and the states' right to regulate.[220] According to the Commission, the right to regulate "reaffirm[s] the right of the Parties to regulate to pursue legitimate public policy objectives."[221] Consistent with the E.U. FTAs, the Commission also promised to establish as a standing principle in IIAs that a state retains the right to regulate when in pursuit of legitimate public policy objectives affecting the environment, public health and safety, protection and promotion of cultural diversity, society, and security.[222] The reason for choice of the phrase "right to regulate" is not clear, but it may be an attempt to distinguish the modern IIAs that consciously strive to rebalance investor rights by preserv-

216. SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004).

217. *See id.*; *Siemens A.G.*, ICSID Case No. ARB/02/8, ¶ 81.

218. *See, e.g.*, Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 373 (Sept. 28, 2007); Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 331 (May 22, 2007).

219. *Titi, supra* note 4, at 122.

220. *See* European Comm'n, Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements 1 (2013), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf [https://perma.cc/7GNL-5P5F].

221. *Id.* at 2.

222. *See id.* at 7.

ing a host state's right to regulate from the older BITs.[223] It may also operate as a buzz word that represents the widely-held belief of IIA stakeholders regarding the future direction of international investment law.[224]

The European Union also proposed an independent investment court to enable states to better preserve their right to regulate just like in the Canada-E.U. CETA, which created a permanent tribunal and an appeals tribunal.[225] Moreover, the Canada-E.U. CETA limited the scope of investment disputes to breaches of a certain few investment protection provisions such as non-discrimination, expropriation, and FET.[226] Claims arising out of regulatory measures can be expected to decrease because the Canada-EU CETA does not consider an investor's loss of expected profits to be a breach of obligation.[227] Although conclusion of the TTIP is unlikely to happen in the immediate future, its framework on public policy under the heading "Investment and Regulatory Measures/Objectives" is noted as follows:

> 1. The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.
>
> 2. For greater certainty, the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits.
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> . . . .[228]

The takeaway from the above provision is that the IIAs concluded by the European Union in recent years have demonstrated a growing sensitivity to states' desire to retain their regulatory authority and have attempted to meet their demands by creating a

223. *See* Stephan W. Schill & Marc Jacob, *Trends in International Investment Agreements, 2010–2011: The Increasing Complexity of International Investment Law, in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2011–2012 141, 143 (Karl P. Sauvant ed., 2013).

224. *See id.*

225. Canada-E.U. CETA, *supra* note 203, arts. 8.27, 8.28, 8.29.

226. *See id.* arts. 8.10, 8.12, 8.18.

227. *See id.* art. 8.9.

228. TTIP (draft), *supra* note 24, art. 2.

positive framework that enumerates the possible legitimate public policy objectives.[229]

3. Borrowing the Concept of Public Order from WTO Jurisprudence

WTO decisions do not have binding authority on ISDS decisions, but the recent generation of IIAs often contain general exceptions provisions that resemble the General Agreement on Tariffs and Trade (GATT) Article XX or the General Agreement on Trade in Services (GATS) Article XIV.[230] WTO/GATS-inspired general exceptions provisions first showed up in IIAs in the 1988 draft MAI.[231] While presence of WTO/GATS-inspired general exceptions provisions in IIAs is not prevalent when taking into account the entire BIT/IIA universe,[232] these provisions have become increasingly popular within the IIAs concluded over the last several years.[233] According to the 2017 World Investment Report, fifty-six percent of the BITs concluded from 2011 to 2016 referred to public interest concerns in the preamble and forty-three percent of BITs from those years included public policy exceptions.[234] While the practice is infrequent in BITs, other IIAs, particularly in the Asian region—such as the Japan-Singapore New Age Economic Partnership Agreement (2003), India-Singapore CECA (2005),

229. *See* Lars Markert, *The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States*, *in* International Investment Law and EU Law 145, 159 (Marc Bungenberg et al. eds., 2011).

230. *See* Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 *Santa Clara J. Int'l L.* 35, 39–40 (2013) (explaining that states seek FTAs with investment chapters because the trade part of such agreements enable multinational corporations to access supply chain inputs that are comparatively cheaper while the investment chapter provides investments with specific guarantees like those on non-discriminatory treatment and expropriation); Joshua P. Meltzer, *Investment, in Bilateral and Regional Trade Agreements: Commentary and Analysis 245, 294* (Simon Lester et al. eds., 2015).

231. *See* OECD, The Multilateral Agreement on Investment: Commentary to the Consolidated Text art. VI, ¶ 1.3 (1998), http://www1.oecd.org/daf/mai/pdf/ng/ng988r1e.pdf ("The majority view was that the MAI should provide an absolute guarantee that an investor will be compensated for an expropriated investment.") [https://perma.cc/5JYV-KD27].

232. *See* Newcombe, *The Use of General Exceptions*, *supra* note 18, at 276–77 (commenting that most IIAs do not incorporate WTO-like general exceptions provisions and is not representative of a consistent drafting practice of the states); Levent Sabanogullari, *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*, Inv. Treaty News (May 21, 2015), https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/ (commenting that in the current universe of more than 3,200 IIAs, those with general exceptions "still constitute a minority in the ocean") [https://perma.cc/6D4L-37KF].

233. *See* WIR 2017, *supra* note 22, at 122.

234. *See id.*

Japan-Malaysia Economic Partnership (2005), and Korea-Singapore FTA (2005)—contain general exceptions provisions in their investment chapters.[235]

In addition to providing the public order carve-out, recent IIAs also rely on various other aspects of the WTO/GATS general exceptions provisions.[236] The chapeau in GATT Article XX or GATS Article XIV is sometimes imported into IIAs without a comprehensive appreciation of each of these provisions in international investment law.[237] The chapeau of Article XX of the GATT states the following:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . .[238]

Although the purpose of the chapeau in GATT Article XX is well-settled in the WTO as preventing abuse of the exceptions, how it will be applied by investor-state tribunals remains unclear.[239]

In investment treaty practice, the chapeau language may be modified to better fit the IIA context. The Colombia-Japan BIT (2011) changes some of the language while still closely following the model of GATS Article XIV, which unlike GATT Article XX,

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235. *See* Free Trade Agreement, Sing.-S. Kor., art. 21.2, Aug. 4, 2005, Int'l Enterprise Singapore, https://www.iesingapore.gov.sg/~/media/IE%20Singapore/Files/FTA/Existing%20FTA/Korea%20Singapore%20FTA/Legal%20Text/KSFTA20Legal20Text1.pdf [https://perma.cc/RX89-E4X3]; Comprehensive Economic Cooperation Agreement, India-Sing., art. 6.11, June 29, 2005, Int'l Enterprise Singapore, https://www.iesingapore.gov.sg/~/media/IE%20Singapore/Files/FTA/Existing%20FTA/CECA%20India/Legal%20Text/India20CECA20FTA20Legal20Text.pdf [https://perma.cc/576A-WHNW]; Agreement for a New-Age Economic Partnership, Japan-Sing., art. 83, Jan. 13, 2002, Ministry of Foreign Affairs of Japan, http://www.mofa.go.jp/region/asia-paci/singapore/jsepa-1.pdf [https://perma.cc/S8W8-65CW]; *see also* Andrew Newcombe, *General Exceptions in International Investment Agreements*, *in Sustainable Development in World Investment Law* 355, 359 (Marie-Claire Cordonier Segger et al. eds., 2011) [hereinafter Newcombe, *General Exceptions*].

236. *See* Newcombe, *The Use of General Exceptions*, *supra* note 18, at 275.

237. *See id.* at 276.

238. General Agreement on Tariffs and Trade, art. XX, Apr. 15, 1994, 1867 U.N.T.S. 187.

239. *See* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 116, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 23–24, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996).

contains a public order carve-out.[240] Article 15 of the Colombia-Japan BIT provides as follows:

> 1. Subject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of that other Contracting Party in the Area of the former Contracting Party, nothing in this Agreement . . . shall be construed to prevent that former Contracting Party from adopting or enforcing measures, including those to protect the environment:
>
> . . .
>
> (b) *necessary* to protect public morals or *to maintain public order* . . . .[241]

A truncated version of GATS Article XIV is also provided in the Macedonia-Morocco BIT (2010), providing only a portion of the language used in the chapeau as follows:

> 6. Nothing in this Agreement shall be construed to prevent a Contracting Party from taking any action that is *considered as necessary for the protection of* public security, *order* or public health or protection of environment, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.[242]

In this case, the term "public" does not immediately precede the term "order" and the commas are placed so that "order" is parallel to "public health" and "protection of environment." Whether this is indicative of the contracting states' desire to control the scope of the public order carve-out remains to be determined.

Similarly, the 2016 Azerbaijan Model BIT states in Article 5 (titled "General Exceptions") the following:

> 2. Nothing in this Agreement shall be construed to prevent a Contracting Party from taking any action that is *considered as necessary for the protection of* national security, *public order* or public health, morality, or protection of environment, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.[243]

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240. *See* Agreement for the Liberalization, Promotion and Protection of Investment, Colom.-Japan, art. 15, ¶ 1(b), Sept. 12, 2011 [hereinafter Colom.-Japan BIT], http://investmentpolicyhub.unctad.org/Download/TreatyFile/797 [https://perma.cc/6Z8C-YKYT].

241. *Id.* (emphasis added).

242. Agreement on the Reciprocal Promotion and Protection of Investments, Maced.-Morocco, art. 2, ¶ 6, May 11, 2010, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1934 (emphasis added) [https://perma.cc/S6WU-B3YB].

243. Model Agreement on the Promotion and Reciprocal Protection of Investments, Azer., art. 5, ¶ 2, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4787 [https://perma.cc/39TH-W9ZM].

The placement of the commas is interesting because it appears to group the concept of public order with public health. Future investor-state tribunals may have the opportunity to decide whether such categorization narrows the scope of the public order carve-out.

The term "public order" has been used in some IIAs, but it still remains a vague concept with little jurisprudence in international investment law to aid its clarification.[244] Moreover, the broadness of the term raises the question of whether it also covers threats to national security or whether it should be limited to domestic civil disorder.[245] Although most IIAs do not provide a definition of public order, some IIAs are influenced by the language in GATS Article XIV, which provides a clarification note for the term "public order."[246] Immediately after the chapeau, GATS Article XIV enumerates public order as a measure that may be adopted or enforced by any Member when necessary, as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . . .
>
> (a) *necessary* to protect public morals or *to maintain public order* [footnote five]
>
> (*footnote original*) 5 The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.[247]

A less common variation is available in the ASEAN-China Investment Agreement (2009), which retains the Article XIV phrase "like conditions" as follows:

> 1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties, their investors or their investments where like conditions prevail, or a disguised restriction on investors of any Party or their investments made by investors of any Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:

244. *See* UNITED NATIONS CONFERENCE ON TRADE & DEV., THE PROTECTION OF NATIONAL SECURITY IN IIAS 74 (2009).

245. *See id.*

246. *See* General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, 1869 U.N.T.S. 183.

247. *Id.* (emphasis added).

> (a) *necessary* to protect public morals or *to maintain public order* [footnote ten] . . . .[248]

Footnote ten of the ASEAN-China Investment Agreement has the same meaning as footnote five of Article XIV of the GATS, which states that: "For the purpose of this Sub-paragraph, footnote 5 of Article XIV of the GATS is incorporated into and forms part of this Agreement *mutatis mutandis*."[249]

The Singapore-India Comprehensive Economic Cooperation Agreement (Singapore-India CECA) implements an entirely different framework in the "Measures in the Public Interest" provision which states the following:

> Nothing in this Chapter shall be construed to prevent:
> (a) a Party or its regulatory bodies from adopting, maintaining or enforcing any measure, on a non-discriminatory basis; or
> (b) the judicial bodies of a Party from taking any measures;
> consistent with this Chapter that is in the public interest, including measures to meet health, safety or environmental concerns.[250]

A provision on general exceptions modeled after GATS Article XIV is successively placed in Article 6.11 of the Singapore-India CECA and provides for the public order carve-out without a clarification note in the following form:

> 1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party or its investors where like conditions prevail, or a disguised restriction on investments of investors of a Party in the territory of the other Party, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:
>
> (a) *necessary* to protect public morals or *to maintain public order* . . . .[251]

In a more unusual example, the "General Exceptions" article of the 2015 Norway Model BIT provides a provision that resembles Article XIV of the GATS but contains a footnote identifying the applicable standard of review for interpretation purposes and

248. Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation, Association of Southeast Asian Nations (ASEAN)-China, art. 16, ¶ 1(a), Aug. 15, 2009, Ministry of Foreign Affairs of the People's Republic of China, http://fta.mofcom.gov.cn/inforimages/200908/20090817113007764.pdf (emphasis added) [https://perma.cc/KS6D-24RW].

249. *Id.* art. 16, ¶ 1(a), n.10.

250. Comprehensive Economic Cooperation Agreement, India-Sing., art. 6.10, June 29, 2005, Ministry of Commerce and Industry of India, http://www.commerce.nic.in/trade/international_ta_framework_ceca.asp [https://perma.cc/7U8D-BD5Z].

251. *Id.* art. 6.11 (emphasis added).

another footnote defining the meaning of the public order exception.[252] Article 24 provides, in relevant part, the following:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international [trade or] investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures *necessary* [footnote six]:
>
> i. to protect public morals or *to maintain public order* [footnote seven] . . . .[253]

This version is noteworthy because footnote three provides that "[f]or greater certainty, the concept of 'necessity' in this Article shall include measures taken by a Party as provided for by the precautionary principle, including the principle of precautionary action."[254] It also appends to the term "public order" footnote four, which states that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."[255] These two clarification notes seem to underscore Norway's priority on the preservation of regulatory space and is consistent with the stance taken in the 2007 Norway Model BIT.[256] A commentary issued by the Norwegian government in respect to the 2007 Norway Model BIT expressed the following:

> The main condition on concluding investment agreements is that the agreements shall be able to fulfill their economic and political functions without intervening unnecessarily in Norwegian exercise of authority. . . . A prerequisite for Norway on concluding investment agreements must be that the agreements do not intervene in the state's legitimate exercise of authority where major public interests are affected.[257]

The approach taken by the Norway Model BIT is atypical. As such as the Korea-Japan BIT (2002),[258] the Colombia-Japan BIT

252. *See* Model Agreement for the Promotion and Protection of Investments, Nor., art. 24, Kingdom of Norway, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2873 [https://perma.cc/U6XJ-N3BX].

253. *Id.*

254. *Id.* art. 24, n.6.

255. *Id.* art. 24, n.7.

256. *See* COMMENTS ON THE MODEL FOR FUTURE INVESTMENT AGREEMENTS (NOR.) § 3.3 (2007), http://www.italaw.com/sites/default/files/archive/ita1029.pdf [https://perma.cc/62F3-2PZ2].

257. *Id.*

258. *See* Agreement for the Liberalisation, Promotion and Protection of Investment, Japan-S. Kor., art. 16, ¶ 1(d), Mar. 22, 2002, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1727 ("[E]ach Contracting Party may: . . . (d) take any measure

(2011),[259] and the E.U.-Singapore FTA[260] usually only provide a clarification note akin to footnote five of the GATS Article XIV. Nevertheless, Norway's intent to control a certain aspect of the interpretation process normally delegated to the investor-state tribunals is strongly evident.

4. Other Examples

As states continue to look for the best way to preserve regulatory public interest even after concluding investment treaties, variations in the scope of public order carve-outs, the nexus linking the means taken, and the objective sought are tested. Putting aside the fate of TPP and TTIP, the language of their provisions regarding the right to regulate can be studied.[261] One issue is whether the public order carve-out should operate as a self-judging clause. Presumably not intended to be self-judging, the right-to-regulate provision in Article 2 on "Investment and Regulatory Measures/ Objectives" of the TTIP aims to preserve the right of a state to regulate "through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity."[262] In contrast, Article 9.16 of TPP titled "Investment and Environmental, Health and other Regulatory Objectives" incorporates the self-judging clause, as demonstrated by the following:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter *that it considers appropriate* to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[263]

An even broader version of this provision is found in the general exceptions provision of the 2016 India Model BIT, as follows:

> 1. Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general

necessary for the maintenance of public order. The public order exception may be invoked only where genuine and sufficiently serious threat is posed to one of the fundamental interests of society.") [https://perma.cc/6RT8-AU3S].

259. *See* Colom.-Japan BIT, *supra* note 240, art. 15, ¶ 1(b).

260. *See* Free Trade Agreement, E.U.-Sing., art. 9.3, ¶ 3(a), n. 10, Oct. 17, 2014, European Comm'n, http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 [https://perma.cc/EN5K-7KBM].

261. *See* TTIP (draft), *supra* note 24, art. 2(1); TPP, *supra* note 3, art. 9.16.

262. TTIP (draft), *supra* note 24, art. 2(1).

263. TPP, *supra* note 3, art. 9.15 (emphasis added).

> applicability applied on a non-discriminatory basis *that are necessary* to:
> (i) protecting public morals or *maintaining public order*;
> . . . .[264]

Not only is this provision self-judging as indicated by the phrase "that are necessary," but it also conveys the desire to cover a wide range of regulatory acts through the phrase "general applicability."[265] Moreover, the treaty states that it shall not apply to "any measure by a local government."[266] Unlike the 2003 India Model BIT, which did not provide a public order carve-out, the 2016 India Model BIT shows a strong desire to preserve the regulatory space, but it remains to be seen how India's contracting parties will react.

In some cases, the public order carve-out may limit the adjudicatory scope of investor-state tribunals. For example, the Colombia-Panama FTA (2013) states that measures taken to preserve or maintain public order are non-justiciable by an investor-state tribunal.[267] The 2015 Brazil Model BIT prohibits adjudication on public order measures by providing in the ISDS provision the following:

> 1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures *aimed at* preserving its national security or *public order* . . . .
> 2. Measures adopted by a Party under paragraph 1 of this Article or the decision based on national security laws or *public order* that at any time prohibit or restrict the realization of an investment in its territory by an investor of another Party *shall not be subject to the dispute settlement mechanism* under this Agreement.[268]

These variations do not represent the mainstream drafting practice of investment treaties, but are noteworthy because they reflect the shifting priorities of the contracting states and their efforts to find a balance between fulfilling IIA obligations and preserving regulatory space.

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264. Model Bilateral Investment Treaty, India, art. 32.1, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560 (emphasis added) [https://perma.cc/299M-PSNW].

265. *Id.*

266. *Id.* art. 2.4(i).

267. Colombia-Panama Free Trade Agreement, Colom.-Pan., annex 14-D, ¶ 3, Sept. 20, 2013, http://investmentpolicyhub.unctad.org/IIA/treaty/3401 [https://perma.cc/Z7HT-U7R8].

268. Model Bilateral Investment Treaty, Brazil, art. 13 (2015).

III. The "Right to Regulate" Provision as an IIA Exceptions Provision

A. *The Importance of Determining Scope*

Determining the scope of public order carve-outs is crucial to the interpretative process in investor-state tribunals because it helps to reduce the adjudicative burden on investor-state tribunals while enabling host states to preserve their regulatory space in a consistent manner. Language like "when the measure bears a reasonable relationship to important rational policies" might be considered in the future as right-to-regulate provisions and a preagreed review standard will apply should an investor-state dispute arise. A state's regulatory act that allegedly caused the breach of an international obligation must be important and rational in order to be justified to prevent abuse of the public order carve-out and to discourage an overly broad application of the carve-out.

Broadening the interpretative scope of the public order carve-out allows states to preserve their regulatory power, but it can also be problematic because the public order carve-out should not function as a catch-all basket that justifies every sort of regulatory act. Scholars such as Professor Alvarez caution that permitting an overly broad reading of the public order carve-out may create the undesired assumption that "its object and purpose now includes the right of host states to regulate as they please."[269] Professor Sourgens hypothesizes that moving towards such a liberal direction would destabilize the investment treaty regime by shifting the jurisdiction of investor-state tribunals into the domestic sphere of host states.[270] While broadening the carve-out can widely capture the concept of right to regulate, it can also cause troubles in balancing the interests of IIA stakeholders. Therefore, this Article recommends that the public order carve-out include words like "important" and "reasonable" to limit the types of regulatory policies that can be pursued by the states, thus providing a safety feature against an overly broad interpretation that may inadvertently dilute the goal of investment protection.

Alternatively, the public order carve-out might be narrowly construed as done by a few of the ICSID tribunals against Argentina, or worse, ignored. The ICSID tribunals gave little or no analysis to

269. José E. Alvarez, *The Return of the State*, 20 Minn. J. Int'l L. 223, 237 (2011).

270. *See* Frédéric Gilles Sourgens, A Nascent Common Law: The Process of Decisionmaking in International Legal Disputes between States and Foreign Investors 39–40 (2015).

the public order carve-out during the process of interpreting the NPM provision in Article XI of the U.S.-Argentina BIT.[271] Without reviewing each of the prongs in Article XI, the possibility that the public order carve-out could yield a different result when interpreted under its own standard of review was dismissed.[272] Such an approach undermines the potential of public order carve-outs to operate as a balancing tool for host states.

The states' understanding of the concept of public order is admittedly difficult to know and legally vague.[273] Argentina tried to offer its understanding of public order when it unsuccessfully argued that its civil law understanding of public order ought to be distinguished from the way the term is understood under the common law tradition of the United States.[274] Even if a footnote is appended to clarify that the public order carve-out can be invoked only for a genuine and sufficiently serious threat against the fundamental interests of a society, the element of indeterminacy nonetheless persists. Rather than viewing derogation provisions like the public order carve-out as creating problems of indeterminacy, the better alternative for the international investment regime is a structural recognition that a rule-exception relationship exists from which a general model of exception should be formulated.[275] While concerns relating to the coherence of international investment law are valid, the conflicting rules, purposes, and principles that result from different interpretations of the public order carve-out can foster the growing body of international investment law while recognizing the different objectives and interaction points of IIA stakeholders.[276]

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271. *See* William W. Burke-White, *The Argentine Financial Crisis: Under BITs and the Legitimacy of the ICSID System*, PENN L.: LEGAL SCHOLARSHIP REPOSITORY 1, 11 (2008) (noting that Tribunals interpreted public order provisions broadly enough to cover economic emergencies, with no further discussion of public order provisions).

272. *See* Kurtz, *Adjudging Security*, *supra* note 11, at 338.

273. *See id.* at 23.

274. *See* José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008–2009 379, 450 (Karl P. Sauvant ed., 2008).

275. *See* SAVERIO DI BENEDETTO, INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT 224 (2013).

276. *See* UNITED NATIONS CONFERENCE ON TRADE & DEV., INTERNATIONAL INVESTMENT ARRANGEMENTS: TRENDS AND EMERGING ISSUES 57 (2006) (explaining different interaction points of IIAs); *see also* Jonathan Ketcheson, *Investment Arbitration: Learning from Experience*, *in Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* 97, 121 (Steffen Hindelang & Markus Krajewski eds., 2016) (stating that although the higher goal of attaining greater consistency in the investment treaty regime should be aspired to, a "limited amount of inconsistency may not be a negative feature of a system").

Determining the scope for the interpretation of public order carve-outs is an overwhelming undertaking. A jurisprudence that expansively widens the interpretation of the public order carve-out may set the clock backwards by removing the substantive guarantees of IIAs that provide investment protection. On the other hand, an overly narrow interpretation of the public order carve-out may prevent host states from taking regulatory acts not only during times of non-emergencies but also during times when states need to deal with important issues such as the phasing out of nuclear plants in the *Vattenfall* case, legislation for public health in the *Philip Morris* case, protection of an ecological coastal system in the *Bilcon* case, or even observation of international climate change commitments in the pending *TransCanada* case where the claimant has demanded more than $15 billion.[277] These are problems that the VCLT cannot answer straightforwardly because Article 31 does not demand the public order carve-out to be interpreted narrowly or broadly.[278] Thus, when interpreting public order carve-outs, investor-state tribunals must avoid imposing an exaggerated sense of equilibrium that includes cases that should have been excluded and *vice versa*. Such an interpretative approach will ultimately weaken rules and "compel[ ] the move to 'discretion' which it was the very purpose to avoid."[279] The future interpretative goal of public order carve-outs requires that investor-state tribunals utilize their decision-making competencies to adjust for a certain level of balance that is neither overly restrictive as seen in Article XI of the U.S.-Argentina BIT nor overly broad as the recently emerging concept of right to regulate.[280]

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277. *See* Bilcon v. Canada, Case No. 2009-04, Dissenting Opinion of Professor Donald McRae (Perm. Ct. Arb. Mar. 10, 2015); TransCanada v. United States, Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of NAFTA (Jan. 6, 2016); Marc Bungenberg & Catherine Titi, *Developments in International Law, in European Yearbook of International Economic Law 2013 441, 453 (* Christoph Herrmann et al. eds., 2013) (discussing *Philip Morris* and *Vattenfall* cases); *see also* Kate Miles, *Investor-State Dispute Settlement: Conflict, Convergence, and Future Directions, in European Yearbook of International Economic Law* 2016 273, 277 (Marc Bungenberg et al. eds., 2016) (explaining that old model BITs will likely lead to further claims similar to *Philip Morris* and *Vattenfall*).

278. *See, e.g.*, Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 81 (Aug. 3, 2004) ("The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention.").

279. *Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument* 591–92 (2005).

280. *See* Newcombe & Paradell, *supra* note 80, at 116 (stating that no principle of restrictive interpretation of treaties exists based on the classic authority established in the *Wimbledon Case*).

B. *The Significance of Separating from the WTO General Exceptions Jurisprudence*

The inclusion of general exception clauses in IIAs can provide a safety feature that deters investor-state tribunals from forming sweeping interpretations of IIA obligations and may also encourage tribunals to be more deferential to states' policy objectives. Whereas in *Continental Casualty*,[281] Argentina successfully defended its emergency measure as necessary for maintaining public order and protecting essential security interests as provided for in Article XI of the U.S.-Argentina BIT, the ICSID tribunal in *Total v. Argentina*[282] decided against Argentina because the relevant BIT with France did not have an exceptions provision. Thus, investor-state tribunals are more inclined to weigh in policy objectives when an IIA explicitly contains an exceptions provision.[283] However, the recent practices of incorporating WTO/GATS-type general exceptions into IIAs should be subjected to a rigorous process of evaluation when drafting future public order carve-outs.[284] The reasons are stated in the following Sections.

1. Status

The first concern relates to the status of the public order carve-out in IIAs and the general exceptions clause in the WTO/GATS jurisprudence. Should the act conducted under the public order carve-out lie outside the scope of the IIA, or would it provide a justification to an otherwise unlawful conduct? This Article proposes that future public order carve-outs be applied as a treaty exception and not a justification. Classifying the status of the public order carve-out as a treaty exception is consistent with the goal of rebalancing IIAs by preserving the regulatory space of host states.

Furthermore, the mechanic and structure of the exception provided in Article XX of GATT should be different from the way pub-

281. *See* Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶¶ 231–33 (Sept. 5, 2008).

282. *See* Total S.A. v Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶¶ 224–30 (Dec. 27, 2010).

283. *See* Sattorova, *supra* note 17, at 442 (contending that an expressly written exceptions clause "would prevent the interpretation of certain investment treaty obligations as absolute, non-derogable standards that always entail a form of compensatory or restitutionary redress").

284. *See* Newcombe, *General Exceptions*, *supra* note 235, at 357 (acknowledging there is "significant uncertainty" surrounding how investment tribunals would interpret WTO/GATS-inspired general exception clauses).

lic order carve-outs are applied in IIAs. The WTO/GATS general exceptions clause is an affirmative defense that places the burden of proof on the host state to prove that its *prima facie* breach should be exempted under GATT Article XX.[285] The defending state has the initial burden of showing that the challenged measure is justified because it falls within one of the exceptions enumerated under Article XX.[286] The respondent state then proceeds to make the prima facie case based on the weighing and balancing test rearticulated in the *United States – Gambling* case, arguing that it took the least restrictive means available.[287]

Unlike the WTO/GATS general exceptions provision, a public order carve-out should not operate as an affirmative defense. The function of the public order carve-out is to allow an exception in IIAs for measures necessary for the maintenance of public order. Accepting the view held by the *CMS* annulment committee, [288] the *Continental Casualty* tribunal held that a state does not commit a breach for measures properly taken to maintain public order under Article XI of the U.S.-Argentina BIT.[289] Likewise, the *Sempra* annulment committee also shared the view that the substantive obligations of the U.S.-Argentina BIT does not apply where Article XI applies.[290]

Future drafting of public order carve-outs could expressly put the initial burden of proof on the claimant, rather than the host state, to show that the measure was necessary for the maintenance of public order. Such placement of the burden of proof on the claimant is consistent with the position long established in international law.[291] The burden can then shift to the host state who will

285. *See* Emily C. Barbour, Cong. Research Serv., R41306, Trade Law: An Introduction to Selected International Agreements and U.S. Laws 10 (2010).

286. *See id.*

287. *See* Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.477, WTO Doc. WT/DS285/R (adopted Nov. 10, 2004) [hereinafter U.S. – Gambling].

288. *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ¶¶ 129–30 (Sept. 25, 2007).

289. *See* Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 164 (Sept. 5, 2008).

290. Sempra Annulment, *supra* note 207, ¶ 200.

291. *See Mojtaba Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* 85 (2006) (stating that the rule with respect to the burden of proof applied by the International Court of Justice (ICJ) has been the "basic rule according to which the party who asserts a fact is responsible for providing proof thereof"). For more international law case examples, see *id. See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction of the Court and Admissibility of the Application, 1984 I.C.J. Rep. 437, ¶ 101 (Nov. 26) ("Ultimately, however, it is the litigant seeking

bear the majority of the burden of raising the exception. The burden of production would be borne by both the host state and claimant, while the burden of persuasion is on the host state. The process of identifying the bearer of the burden when interpreting the public order carve-out in an investor-state dispute provides a useful guide to claimants and respondent states because the investor-state tribunal expresses the relevant burden of proof needed for the interpretation of the public order carve-out. This should be highlighted as an important objective for the arbitrators to make the authoritative decision-making process in an investor-state dispute more predictable and transparent.

2. Remedies

The second concern relates to the remedies available under the two systems. The remedies available in the WTO system may sometimes be inapplicable in the international investment regime.[292] Despite the "strong textual affinities"[293] in the WTO/GATS exceptions and the suggestion by the exceptions provisions of some of the current IIAs that the general exceptions jurisprudence established by the WTO regime also apply in the interpretation of IIAs,[294] how would investor-state tribunals actually interpret the exceptions provisions provided in the TIPs? Unlike in the WTO, where the breaching state can be pressured to modify or withdraw its unlawful activity, neither investor-state tribunals nor investors can compel the offending state to change or withdraw the regulatory act.[295] Moreover, the term "public order" and the necessity

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to establish a fact who bears the burden of proving it . . . ."); Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 18 (Apr. 9) (stating that Britain owed the burden of proof since it asserted the claim); *see generally Robert Kolb, The Elgar Companion to the International Court of Justice* 235 (Edward Elgar 2014); *Nagendra Singh, The Role and Record of the International Court of Justice* 196 (1989).

292. *See* Daniel Kalderimis, *Exploring the Differences between WTO and Investment Treaty Dispute Resolution*, *in Trade Agreements at the Crossroads* 46, 57 (Susy Frankel & Meredith Kolsky Lewis eds., 2014) (providing a detailed account of the differences in remedies available in the WTO and investment regime).

293. Newcombe, *The Use of General Exceptions*, *supra* note 18, at 275.

294. *See Continental Casualty Co.*, ICSID Case No. ARB/03/9, ¶ 192 (stating that "the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity"); *cf.* Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 Eur. J. Int'l L. 749, 751 (2009) (arguing that the use of WTO law by investor-state tribunals contributes to inconsistent jurisprudence on national treatment in the field of international law).

295. *See* Di Benedetto, *supra* note 275, at 200.

principle have already been addressed in WTO decisions.[296] For example, after noting the tension between international trade and regulatory interests pertaining to public health and environment, the Appellate Body in *Brazil – Retreaded Tyres* declared that the WTO member states have a fundamental right to decide the level of protection to be provided for regulatory interests if there is a genuine relationship between the means taken and the objective sought.[297] This Appellate Body further stated that the measure taken for the maintenance of public order under GATT Article XX does not have to be indispensable to be necessary.[298] The situation is not alike in the international investment regime where treatment of the challenged measure is significantly different.[299] The absence of a public order carve-out may cause a host state to breach its IIA and compel an exorbitant amount of compensation. Despite thematic similarities, "[e]ach agreement has its own architecture, objectives and cultural and legal specificity" which produce different interpretations even for provisions that highly resemble each other.[300]

3. Language

The third concern takes issue with the language used in the WTO/GATS-style general exception clauses. The general exceptions provision in IIAs copies or resembles the GATT Article XX, [301] GATS Article XIV, [302] or provides a combination.[303] The combi-

296. *See* U.S. – Gambling, *supra* note 287, ¶ 6.467 (first WTO panel to construe the term "public order"); Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Dec. 11, 2000) (first WTO case to interpret the term "necessary" in the GATT Article XX).

297. *See* Appellate Body Report, *Brazil – Measure Affecting Imports of Retreaded Tyres*, ¶ 210, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007).

298. *See id.*

299. *See* Simon Lester, Investment Treaty News, Improving Investment Treaties through General Exceptions Provisions: The Australian Example 8, 9 (2014), http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf [https://perma.cc/X2SB-W8MQ].

300. Marie-France Houde & Katia Yannaca-Small, *Relationships between International Investment Agreements* 3 (OECD, Working Papers on Int'l Investment No. 2004/01, 2004), http://www.oecd.org/investment/internationalinvestmentagreements/WP-2004_1.pdf [https://perma.cc/3UGT-6HVZ].

301. *See, e.g.*, Ass'n of Southeast Asian Nations [ASEAN] Comprehensive Investment Agreement art. 17, Feb. 26, 2009.

302. *See, e.g.*, Korea-Singapore FTA, *supra* note 235, art. 21.2; Free Trade Agreement, Pan.-Taiwan, art. 20.02(2), Aug. 21, 2003, http://www.sice.oas.org/Trade/PanRC/PAN_TWN_Full_text_e.pdf [https://perma.cc/5G24-VMVD].

303. *See, e.g.*, Free Trade Agreement, Austl.-S. Kor., art. 22.1, Apr. 8, 2014, http://dfat.gov.au/trade/agreements/kafta/official-documents/Pages/default.aspx [https://perma

nation method is peculiar not only because of the obvious difference that GATT relates to goods whereas GATS covers services, but also because WTO/GATS agreements aim to protect against discrimination on the basis of national origin while IIAs obligate parties to investment protection whether it is against discrimination, expropriation, or any other factors.[304] Moreover, the public order clause under GATS Article XIV is not included in GATT Article XX while some of the legitimate policy objectives under GATT Article XX and GATS Article XIV are not always useful for preserving the regulatory power of a host state under IIAs.[305] Although the GATT Article XX and GATS Article XIV share a similar structure,[306] their limited relevance to international investment law raises a significant interpretive issue for investor-state tribunals who must now grapple with fairly new and complex questions such as whether and to what extent to borrow from WTO jurisprudence, and how to make it work in the international investment regime.[307]

The investment chapter of the Canada-E.U. CETA adopts the GATS Article XIV and provides that measures necessary to protect human, animal or plant life or health also extends to "environmental measures that are necessary to protect human, animal or plant life or health"[308] in a footnote created to clarify the scope of the general exceptions provision. In other cases, an exceptions *chapter* modeled after the GATS Article XIV, like in the Korea-Singapore

.cc/UH33-EVPU]; Free Trade Agreement, China-N.Z., art. 200, Apr. 7, 2008, https://www.mfat.govt.nz/assets/FTAs-agreements-in-force/China-FTA/NZ-ChinaFTA-Agreement-text.pdf [https://perma.cc/769A-HKLQ]. *See generally* Levent Sabanogullari, *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*, Inv. Treaty News (May 21, 2015), https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/ ("On occasion, IIAs also make reference to both provisions, contain a custom-tailored combination of the two, or feature a unique exception provision.") [https://perma.cc/8ECV-UHUQ].

304. *See* Peter Van den Bossche, The Law and Policy of the World Trade Organization: Text, Cases and Materials 321 (2nd ed. 2008) (explaining that the two main non-discrimination principles in the WTO arise out of the most favored nation (MFN) and national treatment (NT) obligations).

305. *See* Andrew Newcombe, *General Exceptions in International Investment Agreements* 8–9 (BIICL Eighth Annual WTO Conference, Draft Discussion Paper, 2008) https://www.biicl.org/files/3866_andrew_newcombe.pdf [https://perma.cc/6LMN-ZK66].

306. *See generally Peter Van den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization: Text, Cases and Materials* (3d ed. 2013) (highlighting similarities between many of the provisions present in both of the agreements).

307. *See* Roberts, *supra* note 78, at 46 ("Investment treaties have traditionally been short and vaguely worded, while the system as a whole is new and undertheorized. As a result, participants routinely draw on comparisons with other legal fields when seeking to fill gaps, resolve ambiguities, or understand the system's nature.").

308. Canada-E.U. CETA, *supra* note 203, art. 28.3 n.32.

FTA[309] and the Panama-Taiwan FTA,[310] applies to their respective investment chapters. The exceptions chapter in the China-New Zealand FTA[311] uses a combination of both the GATT and GATS exceptions provisions that also covers the investment chapter. In the Korea-Australia FTA, the general exceptions chapter, which closely resembles GATT Article XX, provides that a party will not be prevented from adopting or enforcing necessary measures unless done in an arbitrary or discriminatory manner.[312] Although the examples cited here are not exhaustive, they offer a glimpse into the inconsistent manner in which states have drafted the exceptions provisions. Although WTO jurisprudence might be customizable for international investment law,[313] the nuance of using the WTO/GATS general exceptions provision in IIAs has not been thoroughly examined to date.[314] A more realistic goal would be for the public order carve-out in IIAs to employ language that is specific to international investment law, thus encouraging consistent investor-state arbitral outcomes.

4. Sporadic IIA Practice

A fourth concern arises due to the sporadic inclusion of general exceptions provisions in IIAs because their presence is still being tested in international investment law practice. Contracting parties such as Australia, Canada, China, India, Japan, Korea, and Singapore have sporadically included general exceptions provisions in their investment chapters, resulting in inconsistent treaty practices.[315] Professor Newcombe predicts that inclusion of general exceptions is unlikely to have much practical significance and that the apparent merit of importing it into investment treaties is that they explicitly identify the legitimate objectives in IIA jurisprudence and provide a check on the tribunals' interpretive scope.[316]

309. *See* Korea-Singapore FTA, *supra* note 235, art. 21.2.

310. *See* Panama-Taiwan FTA, *supra* note 302, art. 20.02(2).

311. *See* China-New Zealand FTA, *supra* note 303, art. 200(1).

312. *See* Korea-Australia FTA, *supra* note 303, art. 22.1.3.

313. *See* Sabanogullari, *supra* note 232 (arguing that "treaty drafters can not only custom tailor the WTO exceptions to their regulatory needs in the investment realm, but also codify and thereby endorse WTO jurisprudence in the IIA drafting process.").

314. *See* Brooks E. Allen & Tommaso Soave, *Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration*, 30 Arb. Int'l 1, 3 (2014). In practice, however, literature that jointly examines these two bodies of laws is sparse.

315. For example, compare Korea-Singapore FTA, *supra* note 235, art. 21.2, which contains an exceptions chapter modeled after GATS Article XIV, with the general exceptions chapter in the Korea-Australia FTA, *supra* note 303, art. 22.1.3, which closely resembles the GATT Article XX.

316. *See* Newcombe, *General Exceptions*, *supra* note 235, at 369.

However, other commentators are more optimistic about the contributory role that the WTO/GATS general exceptions can have in shaping the exceptions model in IIAs.[317] For instance, Professors Sappideen and He believe that states can reduce the cost and improve the efficiency of negotiations when a "modified GATT Article XX and GATS Article XIV that will apply specifically to investment" is considered during the IIA negotiation phase.[318] Other commentators acknowledge the interaction that occurs between trade and investment for substantive provisions on general exceptions, but maintain a bystander perspective, stating that this is a "fairly limited"[319]and "not common"[320] practice that remains to be seen. As the demand for preserving regulatory space increases, however, the existence of exceptions in IIAs ought to be embraced because, without it, investor-state tribunals would face enormous pressure as they search for the appropriate balance between "legal restraint and flexibility."[321] The public order carve-out provides the groundwork for the creation of a "right to regulate" exceptions provision that can become a fixed feature of IIAs.

C. *The Right to Regulate Exceptions Provision*

By examining prior case studies and current trends that elucidate the legitimate policy objectives considered in IIAs, the concept of right to regulate can be better defined. Although the public order carve-out provides the fundamentals, IIAs may consider adopting a broader right to regulate that is not drafted in positive language, but as an exceptions provision providing for the protection of public safety and human, animal, plant life, public health, and/or the environment. The 2016 decision by the German Constitutional Court in the *Vattenfall* case is foretelling of how future investor-state tribunals may address such regulatory

317. *See* David Collins, *The Line of Equilibrium: Improving the Legitimacy of Investment Treaty Arbitration Through the Application of the WTO's General Exceptions*, 32 Arb. Int'l 575, 582, 586 (2016); Markert, *supra* note 229, at 169; *see also* Lester, *supra* note 299, at 8.

318. Razeen Sappideen & Ling Ling He, *Dispute Resolution in Investment Treaties: Balancing the Rights of Investors and Host States*, 49 J. *World Trade* 85, 114–15 (2015).

319. Mark Wu, *The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime*, *in* The Foundations of International Investment Law: Bringing Theory into Practice 169, 201 (Zachary Douglas et al. eds., 2014).

320. Newcombe & Paradell, *supra* note 1, at 500.

321. *Id.*; *see also* Sappideen & He, *supra* note 318, at 112 (arguing for the creation of a public interest exceptions clause); David Collins, *The Line of Equilibrium: Improving the Legitimacy of Investment Treaty Arbitration through the Application of the WTO's General Exceptions*, 32 Arb. Int'l 575, 586.

issues.[322] The German Constitutional Court acknowledged that the government's decision to completely shut down the operation of nuclear plants without any compensation came as a response to the Fukushima nuclear disaster brought upon a tsunami in 2011.[323] The Court also affirmed the regulatory authority of the state to determine whether the nuclear plants pose a safety risk to the public despite that the measure was adopted shortly after the government had significantly extended the existing nuclear plant permits.[324] The approach of the German Constitutional Court runs consistently with the recent investor-state arbitration awards which reveal a strong trend towards recognizing the host state's right to regulate.

In an ICSID case dealing with public health, the tribunal in *Philip Morris v. Uruguay* found that Uruguay possessed the regulatory authority to enact tobacco control measures under the state's sovereign police power to protect public health under both domestic and international laws.[325] This dispute is differentiable from the *Vattenfall* case where the German parliament exercised regulatory authority to address a purely domestic concern.[326] In *Philip Morris v. Uruguay*, Uruguay had enacted domestic measures on tobacco control to comply with the international obligations arising out of Uruguay's ratification of multilateral conventions including the World Health Organization Framework Convention on Tobacco Control and the International Covenant on Economic, Social and Cultural Rights.[327] Furthermore, crucial details can be

322. *See The Thirteenth Amendment to the Atomic Energy Act is for the Most Part Compatible with the Basic Law*, BUNDESVERFASSUNGSGERICHT (Dec. 6, 2016), [hereinafter *Thirteenth Amendment*] http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-088.html;jsessionid=D6A15080C9CF34604A8541E39DB17146.2_cid361 [https://perma.cc/AL5B-FBL3].

323. *See id.* ("As a result of the tsunami of 11 March 2011 and of the meltdown of three reactor cores this brought about at the Fukushima nuclear power plant in Japan, the legislature, for the first time, statutorily set down fixed end dates for the operation of nuclear power plants in the 13th AtG Amendment . . . .").

324. *See id.* ("The legislature is pursuing a legitimate regulatory objective in accelerating the nuclear phase-out with the underlying intent of thus minimising, in time and scope, the residual risk associated with nuclear energy, and thereby protecting the life and health of the people as well as the natural foundations of life.").

325. *See* Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, Concurring and Dissenting Opinion of Gary Born, Arbitrator, ¶¶ 89–90 (July 8, 2016) (making clear that nothing in the award or the dissenting opinion challenges Uruguay's sovereign authority).

326. *See generally* Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/09/6, Request for Arbitration (Mar. 30, 2009).

327. The World Health Organization (WHO) Framework Convention on Tobacco Control was adopted on May 21, 2003, which Uruguay ratified on September 9, 2004; Inter-

set apart to explain their different outcomes regarding the expropriation issue. The German Constitutional Court, which was faced with the task of determining the constitutionality of a measure that would require the shutdown of nuclear plants without any compensation, held that the measure violated the constitutional right to property.[328] However, in *Philip Morris v. Uruguay*, the ICSID tribunal specified that regulatory measures are not expropriatory, but are legitimate exercises of police powers if they are "taken *bona fide* for the purpose of protecting the public welfare, . . . non-discriminatory and proportionate."[329] This clear expression of the non-expropriatory nature of regulatory measures can be traced back to the award in *Saluka v. Czech Republic*, where the UNCITRAL tribunal affirmed that "[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when . . . they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[330]

Similar to how the tobacco control measures were enacted in Uruguay to meet its international obligations, a right-to-regulate exceptions provision in IIAs should address how to deal with regulatory measures aimed at environmental protection because this is no longer a domestic matter and measures are often enacted to comply with international commitments arising from multilateral treaties such as the Paris Agreement within the U.N. Framework Convention on Climate Change (Paris Agreement) signed by 195 states and the European Union in December 2015.[331] The Paris Agreement will incentivize states to adopt a collection of new regulatory measures to meet emission reduction targets on carbon dioxide and methane.[332] Climate change actions may also be further

national Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316, art. 12.1 (Dec. 16, 1966) ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."). The *amicus curiae* submissions by major international organizations like the WHO, the Pan American Health Organization, FCTC Secretariat also strengthened the case on behalf of Uruguay.

328. *See Thirteenth Amendment*, *supra* note 322 ("The 13th AtG Amendment does, however, violate the constitutionally guaranteed right to property . . . .").

329. *Philip Morris*, ICSID Case No. ARB/10/7, ¶ 305 (citing Tecmed v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 122 (May 29, 2003)).

330. Saluka Invs. BV v. Czech Republic, UNCITRAL, Partial Award, ¶ 255 (Perm. Ct. Arb. Mar. 17, 2006).

331. *See generally* Framework Convention on Climate Change, Adoption of the Paris Agreement, Twenty-First Session, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (2015).

332. *See Paris Agreement*, European Comm'n, https://ec.europa.eu/clima/policies/international/negotiations/paris_en (last visited Jan. 14, 2018) (detailing the emission reduction targets for the E.U.) [https://perma.cc/N2P2-W5L7]; *2020 Country Emissions*

facilitated through adoption of fiscal policy measures such as carbon taxes.[333] These new regulatory measures may even place a higher environmental standard than what had existed at the time of initial investment. In the pending interim decision in *Perenco v. Ecuador*, the ICSID tribunal held that more stringent environmental regulations may be adopted so long as it does not apply retrospectively.[334]

A right-to-regulate exceptions provision should provide for the protection of cultural diversity or assets. In *Parkerings-Compagniet v. Lithuania*, a Lithuanian city rejected the foreign investor's proposal to develop car parks in the Old Town, a UNESCO historical site.[335] The ICSID tribunal held that Lithuania's refusal of the car park proposal was justified for reasons of historical and archaeological preservation.[336] In affirming the state's "undeniable right and privilege to exercise its sovereign legislative power," the *Parkerings* tribunal also expressed that the "[s]tate has the right to enact, modify or cancel a law at its own discretion"[337] because any investor would know that laws evolve over time. The caveat is that the state must not have acted "unfairly, unreasonably or inequitably in the exercise of its legislative power."[338] Moreover, another consideration for the legitimacy of the policy on cultural protection is that it may be broadly interpreted to include the promotion of cultural diversity to expansively cover the distribution of publications and the publications themselves.[339]

Regardless, while investor-state tribunals and foreign investors increasingly have to respect a host state's "inherent right to regu-

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Targets, Ctr. for Climate & Energy Solutions, https://www.c2es.org/international/history-international-negotiations/2020-targets (last visited Jan. 14, 2018) (the 2020 emissions targets for countries) [https://perma.cc/KUL8-X5PC].

333. *See* Mai Farid et. al., Int'l Monetary Fund, After Paris: Fiscal, Macroeconomic, and Financial Implications of Climate Change 14–15 (2006), https://www.imf.org/external/pubs/ft/sdn/2016/sdn1601.pdf [https://perma.cc/C59V-RAUY].

334. *See* Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, ¶ 357 (Aug. 11, 2015) (". . . the basic legal standards against which Perenco was to conduct itself cannot later be changed and applied retroactively to impose liability where none existed under the then-applicable standard.").

335. *See* Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶ 142 (Sept. 11, 2007).

336. *See id.* ¶ 396.

337. *Id.* ¶ 332.

338. *Id.*

339. *See* United Parcel Service of America, Inc. v. Can., ICSID Case No. UNCT/02/1, Award on the Merits, ¶¶ 156–72 (May 24, 2007).

late," the exercise of such a right is not without limits.[340] More significantly, however, IIAs that explicitly contain the legitimate policy objectives under a right-to-regulate exceptions provision will better publicize the intent of the states to limit the scope of some substantive obligations to the other IIA stakeholders and stand a better chance of preserving the states' regulatory space.

D. *The Future of IIAs without the Right to Regulate Exceptions Provision*

The bulk of IIAs do not contain the public order carve-out or a right-to-regulate provision to preserve policy space, largely due to the fact that most IIAs were concluded in the 1990s before the need arose.[341] As previously examined in the discussion on the perspective shifts of the IIA stakeholders in Section One, the need for a public order carve-out in investment treaties was minimal for at least two reasons. First, BITs were usually concluded between a developing country/host state and a developed country, whose nationals it had to protect when doing business in a foreign country. Second, the public order carve-out lost appeal when it was realized that the developing country/host states could just as easily reverse the situation to use the carve-out against nationals of the home state. However, given that the traditional roles are no longer distinct and that states nowadays often take on both roles as providers and recipients of foreign investment, the omission of a right-to-regulate exceptions provision that enables the contracting states to enact certain policy acts is no longer recommendable.

Arguably, a right-to-regulate exceptions provisions may not be necessary if IIAs already implicitly contain the right to regulate considering that treaties must be interpreted in accordance with general international law, which recognizes the sovereign right to regulate. Further, IIAs must be interpreted together with other relevant international law including international human rights and environmental law, which requires states to regulate for the society and the environment.[342] However, without an explicit right-to-regulate exceptions provision that carves out regulatory space, investor-state tribunals may be inclined to rely on the familiar but strict

340. *See* ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, ¶ 423 (Oct. 2, 2006).

341. For a description of BIT trend, refer to Section I.A. of this Article. *See generally* WIR 2013, *supra* note 5, at 102 ("New IIAs illustrate the growing tendency of policymakers to craft treaties in line with sustainable development objectives.").

342. *See* Spears, *supra* note 212, at 1046.

conditions under the customary international law standard on necessity as codified in ILC Article 25. Not only would important social values be degraded,[343] but it would also foster a situation of "universal privileging"[344] in which investor protection is treated as if it can override other competing interests related to the preservation of a host state's regulatory space. The consequence of IIAs without a right-to-regulate exceptions provision can overwhelm the stakeholders in the international investment law system.

Apart from the newer generation of IIAs, the vast number of agreements in the 3,000-plus IIA universe do not contain explicit provisions permitting states to derogate from their international commitments for policy reasons.[345] How should investor-state tribunals interpret a public order carve-out from an earlier BIT when a later IIA does not include a public order carve-out? Although investor-state tribunals usually only refer to Article 31 of the VCLT to guide treaty interpretation, [346] Articles 30 and 59 on the principles to be applied for successive treaties on the same subject matter may offer some initial guidance.[347] Article 31 on the "Application of Successive Treaties Relating to the Same Subject Matter" states as follows:

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty

343. *See Christina Voigt, Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* 336 (2009).

344. *Id.*; *see also* Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 *Wash. & Lee L. Rev.* 1407, 1449 (1992) (author coining the term "universal privileging").

345. *See* Saverio Di Bendetto, International Investment Law and the Environment 211 (Andrea K. Bjorklund & August Reinisch eds., 2014) ("No general model of exception has thus been developed in state and tribunal practice.").

346. *See* Moshe Hirsch, *Interactions between Investment and Non-investment Obligations, in* The Oxford Handbook of International Investment Law 154, 162 (Peter Muchlinski et al. eds., Oxford Univ. Press 2008) ("This practical disregard may appear even more puzzling in light of the fact that contemporary international investment law does not include a coherent body of rules in this sphere."). *See generally* Houde & Yannaca-Small, *supra* note 301.

347. *See* Vienna Convention, *supra* note 206, arts. 30, 59.

applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:
   a. As between States parties to both treaties the same rule applies as in paragraph 3;
   b. As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

. . . .[348]

Article 59 of the VCLT on the "Termination or Suspension of the Operation of a Treaty Implied by Conclusion of a Later Treaty" provides the following:

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
   a. It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
   b. The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.[349]

In addition to the existing BITs, some states have also subsequently entered into regional and/or bilateral comprehensive FTAs, which add another dimension to the problem of how to interpret the public order carve-out. In the relatively straightforward circumstance in which parties to the earlier and successive treaty are identical, two scenarios would be possible. Article 59(1) of the VCLT provides that the earlier treaty will be terminated based on the parties' intent to do so or if the two treaties cannot be reconciled.[350] For the parties that overlap in both treaties, Article 30(4)(a) of the VCLT redirects the parties to the rule described above in paragraph three.[351] But if the parties to a later treaty do not include the same member states, "the treaty to which both states are parties govern their mutual rights and obligations."[352] Where the treaties are incompatible, the state which is a party to both treaties may owe an obligation towards the other party state

348. *Id.* art. 30.
349. *Id.* art. 59.
350. *See id.* art. 59(1).
351. *See id.* art. 30(4)(a).
352. *Id.* art. 30(4)(b).

which is a member to the later treaty.[353] But the VCLT does not instruct how incompatible treaties should be prioritized with respect to each other.[354] A rigorous interpretation of this situation may compel a party that undertook legal duties in the inconsistent treaties to breach one treaty in favor of another. Alternatively, this situation can be avoided if the treaties deemed incompatible are interpreted so that one treaty does not override the other.[355] Even under a harmonious approach, the practical effect of applying one rule to the exclusion of other incompatible treaties may, however, remain the same. [356]

The situation in which an earlier, but not a later-concluded IIA, contains the public order carve-out is conceivable because of mega-regional trade agreements.[357] The TPP includes the MFN clause,[358] but not a public order carve-out, which may allow foreign investors to challenge a state that has enacted a public order measure under different playing grounds.[359] The public order carve-out exists in the investment chapter of the Japan-Singapore New-Age Economic Partnership Agreement[360] and the Agreement between New Zealand and Singapore on a Closer Economic Part-

353. *See id.* art. 30(5).

354. *See generally id.*

355. *See* Hirsch, *supra* note 346, at 162 ("Such an approach strives to interpret one treaty in light of the other treaty . . . .").

356. *See id.*

357. *See, e.g.*, Ruben van den Hengel, EU Centre, The Rise of Mega-FTAs (2013), http://www.eucentre.sg/wp-content/uploads/2013/10/Fact-Sheet-Mega-FTAs-October-2013.pdf [https://perma.cc/E2C4-7YLF]; *see also Seoul International Trade Conference to Examine the Rise of Mega FTAs, Korea Herald* (Nov. 10, 2015), http://www.koreaherald.com/view.php?ud=20151110000234 (policy institutes around the world, including Korea, have already initiated studies on the rise of mega-FTAs) [https://perma.cc/QS32-594B].

358. *See* TPP, *supra* note 3, art. 9.5.

359. *See, e.g.*, Jess Hill, *TPP's Clauses that Let Australia be Sued are Weapons of Legal Destruction, Says Lawyer*, *Guardian* (Nov. 9, 2015), http://www.theguardian.com/business/2015/nov/10/tpps-clauses-that-let-australia-be-sued-are-weapons-of-legal-destruction-says-lawyer (lawyer for the Australian government arguing that including the MFN clause in the TPP was a "major mistake" because it still leaves Australia susceptible to being sued under the ISDS system even if Australia had opted out of ISDS under the TPP) [https://perma.cc/46FZ-M5SR]; *see also* Alicia Nicholls, *Trans-Pacific Partnership Agreement in Review Part I: The Investment Chapter, Caribbean Trade Law & Development* (Nov. 10, 2015), https://caribbeantradelaw.wordpress.com/category/trans-pacific-partnership-agreement ("The biggest concern is the MFN clause which if a liberal interpretation by an arbitral tribunal is given may ultimately undo a lot of the improvements made in the TPP by allowing investors to rely on more favourable provisions in other agreements concluded by the host state.") [https://perma.cc/R4ER-3R8W].

360. *See* Japan-Singapore New Age Economic Partnership Agreement, *supra* note 235, art. 83.1.

nership,[361] while alluded to in the Malaysia-Japan Economic Partnership Agreement.[362] Moreover, these contracting states are also parties to the TPP. However, the public order carve-out is not specifically provided for in the investment chapter of the TPP but instead covered by a more general provision titled "Investment and Environmental, Health and other Regulatory Objectives."[363] The relevant Article 9.16 of the TPP investment chapter states the following:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[364]

Article 9.16 of the TPP does not provide reference to a public order carve-out.[365] However, Chapter 25 titled "Regulatory Coherence"[366] allows TPP States to preserve their right to regulate for "covered regulatory measures" publicly identified within one year after entry into force.[367] The term "regulatory coherence" is understood as the states' "use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures" so that domestic policy goals may be realized while being mindful of the international effort "to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment."[368] This chapter grants considerable leeway to the parties in that each TPP state is entitled by sovereign right to determine its regulatory priorities and to establish and implement mea-

361. *See* Closer Economic Partnership, N.Z.-Sing., art. 71, Nov. 14, 2000, 2203 U.N.T.S. 129.

362. Economic Partnership Agreement, Malay.-Japan, art. 10, Dec. 13, 2005, 2758 U.N.T.S. 55.

363. *See* TPP, *supra* note 3, art. 9.16.

364. *Id.*

365. *See id.*

366. *See id.* ch. 25. However, the investment chapter of the TPP contains a provision on relation to other chapters in Article 9.3 that would permit the chapter on regulatory coherence to prevail in the case of an inconsistency between it and the investment chapter. *See id.* art. 9.3.

367. *See id.* art. 25.3. Article 25.3 provides for the scope of covered regulatory measures and states the following:

> Each Party shall promptly, and no later than one year after the date of entry into force of this Agreement for that Party, determine and make publicly available the scope of its covered regulatory measures. In determining the scope of covered regulatory measures, each Party should aim to achieve significant coverage.

Id.

368. *Id.* art. 25.2.1.

sures to give effect to those priorities "at the levels that the Party considers appropriate."[369] It also encourages that the regulatory proposals undergo an impact assessment during the development phase.[370] A regulatory impact assessment should ideally evaluate the need for the proposed regulation, perform due diligence to find feasible alternatives, and justify how the selected regulatory proposal efficiently achieves the desired policy objective.[371] The implementing state should ensure that the covered regulation uses easy-to-understand language that is clear and concise and accessible to the public, and if possible, make the information viewable online.[372] Moreover, the TPP states should review their covered regulatory measures at intervals specified by the implementing state to determine the continued effectiveness in achieving the state's policy goals.[373] The states are also encouraged to provide annual public notice of the regulatory measures it expects to enact for the following year.[374]

To a certain extent, the TPP expands the public order carve-out seen in previous BITs. Rather than providing an enumerated list of what would fall under a public order carve-out, the Regulatory Coherence chapter focuses on developing a process that could later be established as a firm practice to balance the domestic regulatory space of the states with their international investment obligations. However, the concern remains that the chapter on regulatory coherence is generally laden with soft language like "in a manner [the Party] deems appropriate,"[375] "each Party shall endeavor to ensure,"[376] and "should generally have as overarching characteristics."[377] Some critics of the TPP also contend that the essence of Article 9.16 has been eliminated due to the inclusion of the phrase "unless otherwise consistent with this chapter."[378] So while the TPP features a promising system through which states can retain a flexible degree of regulatory power, the actual impact of this chapter remains to be tested. Although only the TPP has

369. *Id.* art. 25.2.2(b).
370. *See id.* art. 25.5.1.
371. *See id.* art. 25.5.2.
372. *See id.* arts. 25.5.4, 25.5.5.
373. *See id.* art. 25.5.6.
374. *See id.* art. 25.5.7.
375. *Id.* art. 25.5.7.
376. *Id.* art. 25.4.1.
377. *Id.* art. 25.4.2.
378. Hill, *supra* note 359; *see* Nicholls, *supra* note 359 (arguing that the phrase acts as a "loophole which potentially negates the efficacy of this carve-out").

been discussed here, a similar set of problems may emerge in future mega-regional trade agreements.

In contrast, the newly concluded Canada-E.U. CETA completely avoids this issue because it replaces existing BITs between individual E.U. member states and Canada.[379] The investment chapter of the Canada-E.U. CETA provides a framework of modified right to regulation.[380] The preamble "preserve[s] the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity."[381] This commitment is reaffirmed in the article on "Investment and regulatory measures," which elaborates the scope of a state's right to regulate.[382] Moreover, the Canada-E.U. CETA provides for sustainable development[383] and specifically creates a linkage with the environment by stating that "the environment is a fundamental pillar of sustainable development and recognize the contribution that trade could make to sustainable development."[384] Given that foreign investment can have a significant role in sustainable development, the next step may be to draft a similar chapter dedicated to establishing the linkage between investment and sustainable development so that IIA treaty-making continues to be relevant.[385] However, sustainable development goals should not serve as a substitute for right-to-regulate exceptions provision in IIAs. To this, Professor Bjorklund comments that investor-state tribunals would be reluctant to allow a host state to derogate from its specific treaty obligations in order to realize its sustainable development goals, which are broad policies of a general nature.[386]

379. *See generally* Canada-E.U. CETA, *supra* note 203.

380. *See id.* ch. 8.

381. *Id.* pmbl.

382. *See id.* art. 8.9.

383. *See id.* pmbl. ("Reaffirming their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions . . . ."); *Id.* ch. 22 (Trade and Sustainable Development).

384. *Id.* art. 24.2.

385. *See* Markus Gehring & Andrew Newcombe, *An Introduction to Sustainable Development in World Investment Law, in Sustainable Development in World Investment Law* 3, 9–10 (Marie-Claire Cordonier Segger et al. eds., 2011).

386. *See* Andrea K. Bjorklund, *The Necessity of Sustainable Development?, in Sustainable Development in World Investment Law 373, 377 (*Marie-Claire Cordonier Segger et al. eds., 2011).

Conclusion

Under international investment law, the policy of preserving regulatory space is guided by the needs of its stakeholders in changing times. Current efforts toward reinforcing the right to regulate in international investment law took place on an *ad hoc* basis and have not been a consistently established IIA drafting practice among states. However, to establish right-to-regulate exceptions provision as a consistent IIA treaty-making practice that is capable of adding substance to the broadly conceived notion of right to regulate, support is needed from all IIA stakeholders. In this way, the newfound equilibrium among the host states, home states, foreign investors, investor-state tribunals, international organizations, and civil societies can contribute to a healthy improvement in the predictability and legitimacy of the international investment environment without regressing the advancements made for the protection of foreign investors and investments.

In conclusion, the recommendations and considerations undertaken in this Article provide a starting point for increased discussion among IIA stakeholders regarding the process of the authoritative decision-making of IIAs. Important progress is evident as IIA stakeholders experiment with various drafting techniques to better balance competing interests through the right-to-regulate provisions. Where the correct equilibrium lies at the moment is not obvious and will most likely evolve in the coming generations of IIAs, but a carefully defined formulation of a right-to-regulate exceptions provision can provide what has been missing in international investment law—an overarching concept of IIA exceptions that can serve as the basis of the right to regulate interest of states.