Chapter Five examines interpretive questions that arise once investment tribunals are called upon to adjudicate for the first time on general exception clauses. Answers to these questions will be decisive in determining the extent to which States will be able to preserve their regulatory flexibility in the covered policy areas as well as in establishing the scope of investment protection guaranteed under current and future IIAs including a general exception provision.

Before embarking upon a Chapter which deals with the interpretation of international investment norms, it is important to recall that the interpretation of investment treaties is undertaken before ad hoc tribunals constituted for each particular case. In the absence of a doctrine of binding precedent in international investment law, these tribunals are not bound by previous arbitral decisions, although they usually discuss, rely on, or distinguish their case from previous rulings. While these specifics of the system of investor-State dispute resolution already complicate the task of identifying a common interpretative approach, the manifold formulations and variations of general exception clauses across the range of different IIAs make it even more difficult to establish a per se rule for their interpretation. However, in general, and as with the interpretation of any other rule of international law, one must bear in mind that their construction needs to be guided by the traditional customary rules of treaty interpretation as codified in Articles 31 and 32 VCLT.

533 See generally on the faithful codification of the customary rules on treaty interpretation in the VCLT Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, I.C.J. Reports 2010, p. 14, 36, ¶¶64-65. So acknowledged by investment tribunals in e.g. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008, ¶77; Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdic-
VCLT, a tribunal must invariably begin its enquiry in good faith with the ordinary meaning of the treaty text under review. Thereafter, this textual reading has to be considered in light of the context of the treaty terms and the object and purpose of the treaty clause in question. The context of the treaty encompasses not only its text, but also includes its preamble, annexes, subsequent agreements between the parties on the interpretation of the treaty, and other factors. Moreover, according to Article 31(3) lit. (c) VCLT, a treaty interpreter shall also take into account, together with the context, any relevant rules of international law applicable to the relations between the treaty parties. Lastly, under Article 32 VCLT the tribunal may also consider the preparatory work of the treaty provision and the circumstances under which it was concluded as supplementary means of interpretation either to confirm the meaning ascertained by the application of Article 31 VCLT or if that application led to an ambiguous or manifestly absurd or unreasonable result.

A. The Future General Interpretive Approach to General Exception Clauses by IIA Tribunals

To date, no investment award involving a general exception clause has been made publicly available. In the sparse literature on the topic, in particular Andrew Newcombe frequently raises the question of whether future tribunals will adopt a narrow, broad, or balanced interpretation of IIA general exception clauses. Indeed, in light of the current lack of pertinent case law, this question is of immediate relevance to investors and host...
States that are keen to know how general exception provisions in an applicable IIA are likely to be approached once a dispute arises. It should also be of interest to other States that are still considering whether or not to include general exception clauses in their future IIAs.

I. The Interpretive Approach to Investment Provisions in IIA

Jurisprudence

The first indication of how tribunals may approach general exceptions in the future may be inferred from their interpretive approach to investment provisions at large. As recalled above, together with the ordinary meaning of the treaty terms in their context, a treaty’s object and purpose is the primary guide for interpretation listed in Article 31(1) VCLT. Investment tribunals have thus frequently looked into the object and purpose of IIAs in order to interpret obligations assumed under them by host States and have given significant weight to their findings. In their examinations, one can identify a general tendency to postulate that the protection of the rights of foreign investors is the predominant purpose of IIAs and that IIA provisions have to be interpreted in compliance with this overarching objective. It is only in rare instances that tribunals have looked for the rationale of IIAs beyond the objectives of investment promotion and protection. The most noteworthy examples of this tendency in the relevant jurisprudence are depicted in more detail in the following.

The award in *Siemens A.G. v. The Argentine Republic* serves as an example. When discussing its general interpretive approach, the tribunal first made a show of arguing that the relevant BIT between Argentina and Ger-

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many should be interpreted neither liberally nor restrictively since neither interpretive method was mentioned in Article 31(1) VCLT, only to then explicitly state that the guiding purpose of the BIT is the protection and promotion of investments:

“The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty “to protect” and “to promote” investments […] The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative.”

More examples can be found in investment tribunals’ interpretations of the fair and equitable treatment standard. The tribunal in *Azurix Corp. v. The Argentine Republic*, for example, adopted an expansive interpretation with reference to the investment protection and promotion purpose of the BIT, rejecting the argument that bad faith or outrageous or egregious conduct on part of the host State is a necessary prerequisite for a FET violation:

“The standards of conduct agreed by the parties to a BIT presuppose a favorable disposition towards foreign investment, in fact, a pro-active behavior of the State to encourage and protect it. To encourage and protect investment is the purpose of the BIT. It would be incoherent with such purpose and the expectations created by such a document to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious.”

Similarly, in order to justify an FET interpretation that was favorable for the complaining investor, the tribunal in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* referred to the BIT’s preamble and considered that the FET standard should be understood to require

“treatment in an even-handed and just manner conducive to fostering the promotion of foreign investments. Its terms are framed as a pro-active statement ‘to promote’, ‘to create’, to ‘stimulate’ rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investor.”

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538 Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶372.

A similar pro-investor interpretive approach has been chosen in tribunals’ interpretations of BIT umbrella clauses. In *SGS Societe de Surveillance v. Republic of the Philippines*, the tribunal justified its expansive reading of such a clause by arguing that:

“[t]he object and purpose of the BIT supports an effective interpretation of [the relevant BIT provision]. The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended “to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other”. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”

The tribunal in *Noble Ventures, Inc. v. Romania* argued in the teleological interpretation of an umbrella clause:

“The object and purpose rule also supports such an interpretation. While it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified.”

From a policy perspective, it is questionable whether the insistence on a dominant purpose of investment protection really captures the objectives of IIAs exhaustively. On closer examination, there is sufficient evidence to suggest that the purpose of IIAs goes beyond the mere protection of foreign investment and encompasses broader State interests, such as economic cooperation and sustainable economic development. Moreover, the adopted interpretive methodology is open to criticism, as it appears to be at odds with the rules on treaty interpretation laid down in Article 31 VCLT that it purports to implement. The starting point of every inter-

541 *Noble Ventures, Inc. v. Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, ¶52.
543 For details see *supra* Chapter Four, Part A, II.
interpretation must be the text of the treaty according to its ordinary meaning, which only subsequently has to be considered in the light of its context and its object and purpose, as per Article 31(1) VCLT. Bypassing the treaty text and putting an alleged object and purpose first to shed light on the words would expose the interpretative process to the risk of favoring subjective conceptions as to how the system should work over objective expressions apparent in the text.545

However, it should not be forgotten that, in rare instances, tribunals acknowledge that IIAs also serve a development function. Among the frequently quoted examples is that of the tribunal in *Amco Asia Corporation and Others v. Republic of Indonesia*, which stated that:

“the [ICSID] Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries.”546

Similarly, the tribunal in *Joseph Charles Lemire v. Ukraine* used the preamble to explore object and purpose of the applicable IIA, arguing as follows:

“The object and purpose of the BIT – the third interpretive criterion – is defined in its Preamble: the parties “desir[e] to promote greater economic cooperation between them, with respect to investments by nationals and companies of one Party in the territory of the other Party” and recognize that the BIT “will stimulate the flow of private capital and the economic development of the Parties”. The main purpose of the BIT is thus the stimulation of foreign investment and of the accompanying flow of capital. But this main purpose is not sought in the abstract; it is inserted in a wider context, the economic development for both signatory countries. Economic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the ob-

545 See Franck, 73 Fordham Law Review 1521, 1578 (2004); Kurtz, 59 International and Comparative Law Quarterly, 325, 351 (2010). Similarly, the tribunal in *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶193 cautioned that it “is mindful of Sir Ian Sinclair's warning of 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.”.

546 *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 23 September 1983, 1 ICSID Reports 389, 400, ¶23.
The future general interpretive approach to general exception clauses

The object and purpose of the Treaty is not to protect foreign investment per se, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.”\(^{547}\) (emphasis in original).

Notwithstanding these instances, references to the development perspective of IIAs in investment awards remain scarce.\(^{548}\) The predominant interpretive approach of investment tribunals thus is one in favor of the protection of foreign investor’s rights that is skeptical of arguments that may comprise such protection.\(^{549}\) From this investor-friendly assumption follows the presumption that IIA provisions offering protection to foreign investors or investment should meet with an expansive, investor-friendly interpretation and, conversely, that exception clauses compromising this protection are preferably approached with skepticism and thus are to be accorded a narrow interpretation.\(^{550}\) In light of the above, one may therefore expect future tribunals to be more likely to adopt a restrictive rather than an expansive reading of general exception clauses.

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\(^{547}\) Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶272-273.

\(^{548}\) See Schill, 72 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 261, 292 (2012), who acknowledges though that references to development policies remain exceptional in investment jurisprudence.


\(^{550}\) In favor of a presumption of a restrictive interpretation of security exception see, e.g., Dolzer, in: Arsanjani, et al. (eds.), Looking to the Future 705, 709 (2011). See also the examination of the interpretation accorded to a security exception provision in the Argentine arbitrations as prime examples of the skepticism of investment tribunals towards exception clauses \textit{infra} Chapter Five, Part A, II, 1.
II. The Interpretative Approach to Exceptions to IIA Obligations in IIA Jurisprudence

Instructive for the future interpretive approach to general exceptions may also be the interpretive approach that tribunals have taken in relation to other exceptions to IIA obligations.

1. Interpretative Approaches to Security Exception Clauses – the Argentine Arbitrations

The Argentine arbitrations that arose in the aftermaths of Argentina’s financial crisis of 2000/2001 have been the first to expose the heavy burden placed upon IIA tribunals by the current IIA drafting, which largely does not offer host States defenses for alleged misconduct in pursuance of public welfare objectives. They provide context to the political backlash against the system of international investment protection. The arbitrations involve a virtually identical pattern of fact, which has been briefly and cogently summarized by Alec Stone Sweet as follows:

“After throwing off an oppressive military dictatorship (1973-85), Argentina sought both to democratize and to build a more market-oriented economy. In the early 1990s, it embraced the BIT regime, ratified the ICSID Convention, and began privatizing its extensive portfolio of State-run companies and utilities. By 1994, 90% of these holdings had been successfully privatized, virtually all of it with foreign participation. Argentina was able to attract foreign direct investment by, among other reforms, pegging its currency to the dollar, and promising that capital could move freely across borders. In addition, the various privatization laws and decrees gave investors the right to participate in decisions that would affect revenues, such as the fixing of utility rates, and the provision of certain services.

During the 1999-2002 period Argentina experienced an economic meltdown of cataclysmic proportions, precipitated by an exploding budget deficit, a balance of payments crisis, and mounting foreign debt. In 2001, Argentina began taking measures to meet the crisis, including: deep budget cuts; renegotiation of foreign debt (which did not stave off default); successive devaluations of the currency, which eventually ended in allowing the peso to float on the markets; draconian limits on withdrawals from bank accounts, and “Pesification,” the forced conversion of dollar deposits into pesos. December 2001 saw riot-
In response, the Argentine Government passed an Emergency Law that abrogated the ability to convert the peso, the Argentine currency, which immediately dropped in value by almost 70 percent. Two further elements that were introduced by this Emergency Law gave rise to dozens of later claims by foreign investors: First, it mandated that tariffs in certain utility sectors would no longer be calculated in U.S. dollars but in devalued pesos. In addition, the contractual right of the investor to adjust the tariffs in accordance with U.S. inflation was unilaterally terminated by Argentina. Foreign investors challenged these measures, claiming that the IIA expropriation provision, the fair and equitable treatment standard, the umbrella clause as well as the prohibition of arbitrary and discriminatory treatment and various other substantive commitments were violated.

Of particular interest for the present purpose are the arbitrations brought under the 1991 U.S. – Argentina BIT, which were concerned with a treaty security exception that had never been adjudicated upon before in investment arbitration. In all arbitral proceedings, Argentina has ultimately been unsuccessful in its jurisdictional challenges and proceeded to invoke defenses based on domestic Argentine constitutional law, customary international law and the BIT in the merits stages. Most interestingly for the present purposes, Argentina relied on Article XI – the BIT’s national security exception clause – which allows the host State to take emergency measure necessary for, *inter alia*, the “maintenance of public order” or for the protection of its “essential security interests.” Article XI reads:

> “ARTICLE XI
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.”

There were five initial awards in which the tribunals were called upon to decide on the applicability of the exception clause to the given pattern of

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facts, all within the ICSID system.\footnote{553} All five were also subjected to a subsequent annulment application.\footnote{554} Although the arbitrations involved the same security exception provision, the five tribunals were divided on the requirements for its invocation and their proper interpretation. Jürgen Kurtz has provided a useful categorization of these awards according to the dominant interpretive methodology employed as follows.\footnote{555}

\paragraph{a. The Initial Interpretive Approach in CMS, Enron, and Sempra}

Although the details in their legal reasoning differ, the tribunals in the \textit{CMS}, \textit{Enron} and \textit{Sempra} arbitrations shared the view that guidance for the interpretation of the security exception clause of Article XI of the U.S.–Argentina BIT should be taken from the customary international law requirements for reliance on the plea of necessity.\footnote{556} It is commonly agreed


\footnote{555} Kurtz, 59 International and Comparative Law Quarterly 325, 341-370 (2010).

\footnote{556} CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, \textsection{315, 317; Sempra Energy International v. Argentina Republic}, ICSID Case No. ARB/02/16, Award, 28 September 2007; \textit{Continental Casualty v. Argentine Republic}, ICSID Case No. ARB/03/9, Award, 5 Sep-
that the latter are reflected and codified in Article 25 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts,\textsuperscript{557} which reads as follows:

\textbf{“Article 25. Necessity”}

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
   (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   (a) the international obligation in question excludes the possibility of invoking necessity; or
   (b) the State has contributed to the situation of necessity.”\textsuperscript{558}

To satisfy the requirements of Article 25 ILC the State must thus prove that the breach of its international obligation is (1) “the only way for the State to safeguard an essential interest against a grave and imminent peril”; that the violation (2) “does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole”; (3) that the breached obligation does not “exclude the possibility of invoking necessity”; and (4) that “the State has [not] contributed to the situation of necessity.” Article 25 ILC acts as a general defense that is applicable to the breach of any international legal obligation that does not have the character of a peremptory norm of international law.\textsuperscript{559} Its application is thus not restricted to the investment

\textsuperscript{557} See \textit{Case Concerning the Gabčíkovo-Nagymaros Project} (Hungary v. Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997, 7, 40, ¶51 (on ILC Draft Article 33, the predecessor to Article 25 ILC).

\textsuperscript{558} ILC Draft Articles on State Responsibility, 80.

\textsuperscript{559} Article 26 ILC further specifies that a state of necessity cannot be used to preclude the wrongfulness of the breach of a peremptory norm of international law.
realm but extends to international law at large. Against the background of this expansive scope and given the ensuing potential for abusive invocation, the conditions for an application of the customary necessity defense are extremely strict. It is only applicable in exceptional circumstances and, as the ILC has noted, “will only rarely be available to excuse non-performance of an obligation.”

These considerations, however, did not deter the CMS, Sempra, and Enron tribunals from reading stringent customary international law requirements into the treaty defense. Thereby, the tribunals conflated the interpretation of the treaty with the customary necessity plea despite the clear textual differences between Article 25 ILC and Article XI of the BIT. The CMS tribunal first purported to analyze the requirements of the necessity plea separately from the treaty exception only to then draw extensively on customary principles in its interpretation of the treaty exception without offering any justification for this approach. The Sempra and Enron tribunals were more straightforward; after having established that Argentina did not meet the customary necessity standard, they reasoned that they did not need to undertake any further analysis of Article XI of the BIT because “the Treaty provision is inseparable from the customary law standard as the definition of necessity and the conditions for its operation are concerned” and “given that this Article does not set out conditions different from customary international law.”

This exceedingly narrow interpretive approach of conflating the treaty provision with the customary defense is apparent throughout the tribunals’ analyses: The wording of Article XI BIT first requires the host State to

561 See CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶315-352 and ¶353-378 respectively.
demonstrate that an “essential security interest” is at stake. In this respect, the tribunals initially adopted a seemingly broad definition of what qualifies as such an interest, rejecting the argument that the clause is limited to national security concerns of an international nature by arguing that customary international law does not exclude major economic crises from the definition. In their subsequent reasoning, however, the tribunals considerably narrowed the scope of Article XI with reference to Article 25 ILC. Based on the customary law requirement that the State may only safeguard its essential interests against a “grave and imminent peril”, the tribunals held that Argentina’s financial crisis would be insufficient to qualify as such. Instead, the tribunals required the existence of “profoundly serious conditions” such as “a major breakdown, with all its social and political implications”, a “total economic and social collapse” or a threat to the “very existence of the State and its independence” in order surpass the threshold of a “grave and imminent peril” and thereby qualify as essential security interest under Article XI. This was presented as the first reason for rejecting Argentina’s treaty-based defense.

Moreover, in determining whether the governmental measures were “necessary” under Article XI the tribunals imported another decidedly restrictive condition of Article 25(1)(a) ILC, which demands that the State measure must have been the “only way” to safeguard its interests, again despite there being no such requirement in the text of Article XI BIT. Determining that Argentina had alternative and less onerous means at its disposal to address its financial breakdown, this is presented as the second reason for refusing the application of the treaty defense. In particular, the tribunals found that Argentina had “a variety of alternatives, including

dollarization of the economy, granting direct subsidies to the affected populations or industries and many others” 568 and that “there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case.”569 The problem with this approach is that there are always multiple conceivable responses to any given emergency, especially with the advantage of hindsight. This overly restrictive reading of Article XI BIT has thus already rendered the treaty exception effectively redundant.570

Secondly, the condition under Article 25(2)(b) ILC that the State must not have “contributed to the situation of necessity” was imported into the interpretation of Article XI BIT – again despite there being no textual point of reference – and formed an additional reason to reject Argentina’s defense based on its allegedly “substantial” contribution to its financial crisis.571 Drawing on customary rules embodied in Article 27(b) ILC, the tribunals lastly found that compensation would be due even where Argentina’s violations of the BIT were justified by virtue of Article XI BIT, even though such a residual duty to pay compensation is not envisaged by Article XI.572

568 CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶323.  
None of these requirements derived from customary international law as codified in Articles 25 and 27 ILC finds an equation, a reflection or an obvious point of reference in the text of Article XI of the BIT. Nonetheless, the interpretation adopted by the tribunals in CMS, Sempra, and Enron is heavily informed by these prerequisites. It therefore constitutes an exceedingly restrictive interpretative approach to an exception provision with the imposed conditions making it highly unlikely that the treaty exception will ever apply. Even if it applied, it would actually be ineffective given that the obligation to pay compensation for violations of the BIT would persist in any event.

In fact, strict criteria for invocation are comprehensible as a feature of the customary international law necessity defense, which is applicable to virtually all international obligations, save peremptory norms. Their seemingly casual adoption into the interpretation of the treaty defense of Article XI, however, begs a question regarding its appropriateness. It is therefore unsurprising that the tribunals’ legal methodology has attracted harsh criticism in scholarship but also in subsequent annulment rulings. In a particularly pointed manner, the ad hoc Committee constituted in the CMS annulment proceedings held obiter dicta that conflating Article XI of the U.S.–Argentina BIT with the customary international law defense of necessity constituted a “manifest error of law” (albeit not “a manifest excess of power”) on part of the CMS tribunal. It then annulled the award for the failure to state reasons in the context of the tribunal’s umbrella clause


574 CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment, 25 September 2007, ¶130, noting however at ¶136 that, while the CMS tribunal applied Article XI “cryptically and defectively”, there is no manifest excess of power and thus no reason for annulment. Interestingly, the ad hoc Committee was composed of distinguished members of the legal professional such as Judge A. The Future General Interpretive Approach to General Exception Clauses
Likewise, the *ad hoc* Committee in the *Sempra* annulment proceedings explicitly reasoned that customary international law on the state of necessity differed materially from Article XI of the BIT and therefore could not guide the latter’s interpretation. Since the *Sempra* tribunal conflated the two standards, the *ad hoc* Committee decided that the tribunal “made a fundamental error in identifying and applying the applicable law” and annulled the award for an excess of powers. Finally, it was also one of the reasons given by the *ad hoc* Committee in *Enron* to annul the award that the tribunal’s analysis of the applicable customary international law on necessity appeared so “unclear” as to constitute a failure to apply the applicable law or a failure to state reasons. The *Enron* annulment committee also remarked that host States should be allowed to favor a more effective measure of achieving the objective, even if this measure

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*Gilbert Guillaume* (former President of the International Court of Justice), Judge *Nabil Elaraby* (former Judge at the International Court of Justice), and Professor *James Crawford* (ILC Special Rapporteur on State Responsibility).

575 *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment, 25 September 2007, ¶97. Note that this means that the Committee did not annul the original award on the tribunal’s interpretation of the security exception provision.

576 *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010, ¶¶208-209. The decision to annul the award has been harshly criticized in the literature, which accuses the tribunal of having acted *ultra vires* as an appellate body in reviewing the merits of the case and annulling the award because it disagreed with the tribunal’s interpretation of the law. See for instance *Lamm*, Internationalization of the Practice of Law and Important Emerging Issues for Investor-State Arbitration, The Hague Academy of International Law, Opening Lecture, Private International Law Session 2011, 354 Collected Courses, 9, 53. The claimants have submitted the dispute to a new tribunal under Article 52(6) ICSID Convention.

577 *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶¶384, 393-394. This annulment decision is also subject of considerable criticism for allegedly overstepping its role in unduly embarking upon appellate review of the *Enron* award. See for instance *Lamm*, Internationalization of the Practice of Law and Important Emerging Issues for Investor-State Arbitration, The Hague Academy of International Law, Opening Lecture, Private International Law Session 2011, 354 Collected Courses, 9, 55. As in the other cases, the claimants have submitted the dispute to a new tribunal in accordance with Article 52(6) ICSID Convention.
has a greater negative impact on foreign investors, over less effective measures, in spite of their lesser impact on foreign investors.\footnote{578} 

b. The Interpretive Approach in LG&E 

Faced with very similar facts, the decision in \textit{LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic}\footnote{579} diverged from the rulings in \textit{CMS, Enron and Sempra}, finding that Argentina may, at least for a defined time period, avail itself of the treaty exception of Article XI.\footnote{580} One reason for this outcome was the adoption of a different methodology in the interpretation of the security exception clause, treating it as a distinct defense. 

Unlike its peers, the \textit{LG&E} tribunal applied the BIT’s essential security provision first as a separate treaty-based defense and only thereafter resorted to customary international law as a subsidiary means to support its prior findings.\footnote{581} Similarly to its peers, it adopted a broad reading of what constitutes “essential security interests” and reasoned that the application of Article XI BIT is not confined to situations involving military action or war but may also involve economic emergencies.\footnote{582} In distinction from the above awards, the tribunal took the “necessity” nexus requirement to mean that the State must have had “no choice but to act” and that the adopted measures were appropriate in addressing the problems at hand,

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\begin{itemize}
\item \footnote{578} \textit{Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets L.P. v. Argentine Republic}, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶371.
\item \footnote{579} \textit{LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic}, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.
\item \footnote{580} \textit{LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic}, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶229.
\item \footnote{581} \textit{LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic}, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶204, 245.
\item \footnote{582} \textit{LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic}, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶237-238.
\end{itemize}
even though other alternatives might have existed.\textsuperscript{583} It rather cursorily stated that Argentina’s measures were “necessary and legitimate” under Article XI, taking into account the urgency of the measure, their expedited drafting process and Argentina’s consideration of the interests of foreign investors.\textsuperscript{584} One looks in vain for further reasoning as to the alleged legitimacy and necessity of Argentina’s measures.\textsuperscript{585} Instead, having satisfied itself that the requirements of Article XI of the BIT were fulfilled, the tribunal continued to rule that Argentina was also excused from liability under the customary necessity plea, finding that “an economic recovery package was the only means to respond to the crisis”\textsuperscript{586} although “a number of ways to draft the economic recovery plan” were conceivable, giving ample leeway to host States to choose among several reactions to economic crises.\textsuperscript{587} On the question of compensation, the tribunal also departed from the other rulings and rejected the application of Article 27 lit. (b) ILC, deciding that the investor should instead bear the losses it encountered during the state of emergency.\textsuperscript{588} The decision thus represents a less stringent reading of the security exception clause that shows more deference to the host State’s decisions.

\textsuperscript{583} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶239.

\textsuperscript{584} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶239-241.


\textsuperscript{586} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶257.

\textsuperscript{587} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶257-259.

\textsuperscript{588} LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶264.
Lastly, the reasoning found in the subsequent decision *Continental Casualty Company v. The Argentine Republic*\(^{589}\) differs significantly from the reasoning in *CMS, Sempra, Enron* as well as from the one found in *LG&E*. Amid the backdrop of the *CMS* annulment ruling, the *Continental* tribunal began by considering Argentina’s necessity defense instead of assessing the claims of treaty breach. It particularly stressed the differences between the treaty and the customary law defenses, arguing that Article XI U.S. – Argentina BIT is a primary norm of international law whose successful invocation would remove the relevant State action from the scope of the BIT, while Article 25 ILC constituted a secondary norm of international law whose operation would merely justify an existing breach of the underlying BIT obligation.\(^{590}\) As a consequence of these differences, the tribunal concluded that the conditions for successful application of the two defenses could not be identical, also emphasizing that the strict conditions in Article 25 ILC are explained by the fact that it is applicable “in any context against any international obligation.”\(^{591}\) Subsequently, the tribunal confirmed that economic emergency situations generally qualify both under the concept of “public order” and under the term “essential security interest” used in Article XI.\(^{592}\) Notably, the tribunal then went on to reject an objective review and acknowledged the existence of a “significant margin of appreciation for the State applying the particular measure” in the assessment because “a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight.”\(^{593}\)

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590 *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶¶162-166; acknowledging, however, at ¶168 that the practical result of applying Article XI or the customary plea of necessity is the same.


592 *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶174 and ¶178 respectively.

The tribunal continued to evaluate whether Argentina’s measures were “necessary” for the maintenance of public order or the protection of its essential security interests. Here, the tribunal borrowed heavily from WTO jurisprudence in order to interpret Article XI of the U.S. – Argentina BIT. After recalling its view that the treaty norm and the customary plea are distinct defenses, the tribunal argued that Article XI BIT originated from parallel exception clauses in U.S. FCN treaties, which in turn reflected the formulation of Article XX GATT. Because of these commonalities between the BIT, the GATT, and the preceding network of bilateral treaties of friendship, commerce, and navigation the tribunal found reliance on WTO jurisprudence on the concept of “necessity” “more appropriate” than reference to customary international law. Applying principles derived from WTO Appellate Body jurisprudence, the decisions in Korea Beef, US – Gambling, Brazil – Retreated Tyres, among others, the tribunal went on to enquire as to whether Argentina’s emergency measures were the least restrictive means reasonably available in order to establish whether they were necessary to achieve the legitimate aims within the meaning of Article XI. In the determination of whether Argentina had reasonably available alternatives at its disposal that would have been equivalently effective, the tribunal stressed that it would go beyond its mandate “to pass judgment upon Argentina’s economic policy during 2001-2002”, “to make any political or economic judgment on Argentina’s policies and of the measures adopted to pursue them” or “to censure Argentina’s sovereign choices as an independent state.” It further held that “a margin of discretion and appreciation” should be afforded to autho-

599 Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶199.
rities to determine the necessity of a measure. Moreover, the tribunal deemed it immaterial for its decision whether Argentina itself had contributed to the state of necessity. This broad discretion in mind, the tribunal determined that Argentina’s emergency measures materially contributed to the protection of its economy. The tribunal found this sufficient to uphold most, albeit not all, of the measures as necessary to protect Argentina’s essential security interests, absolving Argentina of all liability. It was explicitly deferential with respect to Argentina’s measures, stating that it could not substitute its judgment for Argentina’s, but would only determine whether other reasonable alternatives were available.

d. Preliminary Conclusions

From the different interpretive methodologies presented above, the one apparent in the rulings in CMS, Enron, and Sempra constitutes the narrowest approach to the interpretation of security exception clauses, conflating the customary necessity defense with the treaty exception and importing the former’s exceedingly strict requirements into the latter.

One likely reason for this rigid interpretation probably is the tribunals’ assumption that the protection of the rights of investors even in times of economic emergencies is the dominant purpose of IIAs and that only a narrow interpretation of the security exception clause, as a possible escape route for the host State from its IIA obligations, would comply with that

600 Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶233, fn. 351.
602 Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶304. The argumentation of the tribunal was upheld by the subsequently established annulment committee, see Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, ¶¶110-143.
603 For other possible reasons for the tribunals’ approach see Kurtz, 59 International and Comparative Law Quarterly 325, 348-350 (2010).
alleged purpose. In this context, the award in the Enron arbitration is particularly revealing, in which the tribunal openly acknowledged that

“the object and purpose of the Treaty is, as a general proposition, to apply in situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of its beneficiaries. To this extent, any interpretation, resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.”

This teleological approach to the interpretation of security exceptions faces the same methodological difficulties as the expansive readings of substantive IIA provisions by investment tribunals discussed above. Nevertheless, it still represented the dominant interpretive methodology when tribunals were first called upon to decide on the proper invocation of a security exception clause. Seen individually, it therefore reveals a certain tendency of investor-State tribunals to initially approach exceptions to investment obligations, including future general exception clauses, with considerable skepticism.

The awards in LG&E and Continental Casualty feature a more deferential approach that permits greater discretion to the host State.


605 Enron Corporation Ponderosa Assets L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶331; also note the logical flaw in the tribunal’s reasoning: As Kurtz, 59 International and Comparative Law Quarterly, 325, 350-351 (2010) rightly points out: “The Enron Tribunal begins by asserting its own claim as to the dominant purpose of the treaty, being one of protection of the rights of investors. This remains a key, untested assumption in the jurisprudence of investor-State arbitral tribunals. The Tribunal then fashions a default, restrictive interpretative preference to comply with that claimed purpose.” (emphasis in original). See also Kurtz, in: Calamita, et al. (eds.), The Future of ICSID and the Place of Investment Treaties in International Law 165, 170 (2013) for the same criticism.

606 See supra Chapter Five, Part A, I.
A large number of cases are still pending against Argentina in relation to the measure taken during the economic crisis and it remains to be seen which interpretive approach will prove to be dominant.\textsuperscript{607} What is clear, in particular from the CMS, Sempra and Enron annulment decisions, is that IIA security exception clauses must be interpreted as independent defenses to liability with requirements that differ from the narrow prerequisites of the necessity defense under customary international law. Therefore, while the current state of the jurisprudence does not necessarily mean that future tribunals will adopt a particularly deferential interpretation of security exceptions, it rules out the continuation of an extremely narrow reading of security exception clauses with recourse to customary law. Having said this, it is noteworthy to recall that three out of the initial five tribunals that were endowed with the task of interpreting an IIA security exception provision for the first time adopted an extremely narrow interpretive approach. It took the initiation of subsequent annulment proceedings on part of the host State to rectify this narrow interpretation.

Another tribunal has considered Article XI subsequent to the above arbitrations, holding that Argentina was not able to avail itself of the treaty defense because it contributed to the economic crisis, thus following an approach that narrows the availability of the security exception in economic crises.\textsuperscript{608} An impulse of investor-State tribunals to approach exceptions to investment obligations with skepticism is thus clearly discernable in the jurisprudence of security exceptions and may well also play a role once tribunals are called upon to apply the first IIA general exception provisions.

\textsuperscript{607} See the list of pending cases at https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rntly=ST4 (last visited 12 November 2017).

2. Interpretive Approaches to Other Exceptions in IIA Jurisprudence

a. United Parcel Service of America, Inc. v. Government of Canada

In the arbitration in *United Parcel Service of America, Inc. v. Government of Canada*, the tribunal had to decide on the applicability and breadth of the cultural industries exception of NAFTA. The claimant alleged that a postal subsidy program – the Publications Assistance Program (PAP) – provided by the Canadian government to eligible Canadian magazines and non-daily newspapers sent by mail in Canada for delivery in Canada accorded preferential treatment to Canada Post in violation of the national treatment obligation of Article 1102 NAFTA since publishers had to use Canada Post in order to receive federal assistance under the program.\(^\text{609}\) Canada countered that even if UPS were in like factual circumstances to those of Canada Post and treated differently, there would be no violation of Article 1102 NAFTA since the subsidy program would fall under the cultural industries exemption of Article 2106 and Annex 2106 NAFTA. In response, UPS asserted that the exception applied only to cultural industries themselves, *i.e.* the magazines and non-daily newspapers publishers, but not to the delivery mechanism, which would be a “discrete and essentially severable” aspect of the subsidy scheme.\(^\text{610}\) Any other interpretation, it is contended, would unduly expand the bounds of cultural industries. Article and Annex 2106 NAFTA provide that:

**“Article 2106: Cultural Industries**

Annex 2106 applies to the Parties specified in that Annex with respect to cultural industries.

**Annex 2106: Cultural Industries**

Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access – Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada – United States Free Trade Agreement. The rights and obligations between Canada and

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610 *United Parcel Services, Inc. v. Canada*, Award on the Merits, 24 May 2007, ¶159.
any other Party with respect to such measures shall be identical to those applying between Canada and the United States.”

The tribunal rejected UPS’s claim and emphasized the breadth of the cultural industries exception. In particular, the expansive language of Article and Annex 2106 NAFTA as well as the State Parties’ clear intentions to exclude domestic cultural policies from the ambit of NAFTA were held to require only that the measure be “in connection with cultural industries” to qualify under the exception. The tribunal went on to stress that application of the cultural industries exception to the delivery aspect of an otherwise valid and exempt measure would not unreasonably extend the exception’s scope. For these reasons, the tribunal found that the subsidy scheme fell within the scope of the cultural industries exception and was therefore excepted from the NAFTA investor-State dispute settlement procedures. It thus adopted what may be considered an expansive interpretation of the exception.

b. Canfor and Terminal Forest v. United States of America

In the Decision on the Preliminary Question by the tribunal in Canfor and Terminal Forest v. United States of America the tribunal had to decide on its jurisdiction and assess whether Article 1901(3) NAFTA acts as an exception to NAFTA Chapter Eleven and bars the claimant investor from initiating arbitration under the investment chapter with respect to a State

613 United Parcel Services, Inc. v. Canada, Award on the Merits, 24 May 2007, ¶172.

Note, however, the Separate Statement of Dean Ronald A. Cass who opinioned that the Canadian Publications Assistance Program is not excluded from discipline under Article 1102 NAFTA by virtue of either the cultural industries exception of Article and Annex 2106 NAFTA or the subsidies exception of Article 1108(7)(b) NAFTA, see United Parcel Services, Inc. v. Canada, Award on the Merits, Separate Statement of Dean Ronald A. Cass, 24 May 2007, ¶¶154 and 164 respectively.
Party’s anti-dumping and countervailing duty law. Article 1901(3) NAFTA provides:

“Article 1901: General Provisions

(...) 

3. Except for Article 2203 (Entry into Force), no provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party’s antidumping law or countervailing duty law.”

Approaching this question, the tribunal deemed it necessary to underline that, as a general rule, exception provisions are to be interpreted narrowly. Developing this interpretative assumption further, the tribunal thus suggested that the express exclusion of Article 1901(3) NAFTA should generally be approached restrictively, which would make its application more unlikely in the given case. Having considered that, however, the tribunal ultimately found sufficient evidence to rule that, even on the basis of a narrow interpretation of Article 1901(3) NAFTA, the provision was still triggered in the present case to the effect that it excluded a Party’s anti-dumping and countervailing duty law from challenges under NAFTA Chapter Eleven.

IV. Digression: The Interpretative Approach to General Exception Clauses in GATT/WTO Jurisprudence

Since the majority of IIA general exceptions are modeled on WTO provisions, it seems worthwhile to also have a look at the evolution of the interpretative approach to exception clauses in GATT/WTO jurisprudence.

While GATT 1947 and early WTO jurisprudence leaned towards a restrictive interpretation of exceptions, the WTO Appellate Body has subsequently dismissed this interpretation and adopted a more nuanced approach to the issue. This development may be indicative for the route that investment jurisprudence may take. Highlighting it in advance may enable investment tribunals to avoid the early pitfalls befallen by the GATT/WTO dispute settlement system.

Initially, GATT Panels tended to favor a restrictive standard of exceptions provisions, referencing the general interpretive principle according to which exceptions to treaty obligations must be construed narrowly.617 This restrictive approach was also supported in contemporary scholarship, which agreed that exceptions to the GATT should generally meet with a narrow interpretation.618 Any broad interpretation, it was put forward, would frustrate the GATT’s primary object and purpose of trade liberalization.619

In the course of time, however, the WTO Appellate Body rejected this narrow interpretation by the earlier GATT Panels. According to the AB, the mere characterization of a provision as an “exception” in and of itself neither warrants a stricter nor a more expansive interpretation than accorded to any other treaty provision. Instead, the interpretive process should solely be guided by the applicable customary rules of treaty interpretation as required by Article 3.2 DSU, examining the ordinary meaning of the treaty language, in its context, and in light of the treaty’s object and purpose. Nothing in the rules of treaty interpretation stipulates a presumption that treaty exceptions must be interpreted more narrowly than other treaty


619 See Klabbers, Jurisprudence in International Trade Law: Article XX of GATT, 26 Journal of World Trade 63, 88 (1992), who discerns “a large consensus that Article XX calls for a restrictive interpretation.”
provisions. After this, WTO Panels and the AB itself have frequently recalled this statement of the WTO AB.

With regard to Article XX GATT, the AB refined this general approach to exception provisions in *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, criticizing the Panel’s narrow interpretation of the *chapeau* clause as follows:

“The consequences of the interpretive approach adopted by the Panel are apparent in its findings. The Panel formulated a broad standard and a test for appraising measures sought to be justified under the chapeau; it is a standard or a test that finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States. The Panel, in effect, constructed an *a priori* test, that purports to define a category of measures which, *rationae materiae*, fall outside the justifying protection of Article XX’s chapeau.”

In the following, the AB went on to stress:

“the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX... and the substantive right of the other Members under the GATT 1994... Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of the exceptions is not to be rendered illusory.”

In *United States–Standard for Reformulated and Conventional Gasoline*, the AB advocated a similar kind of balancing between the general pro-

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visions of the GATT and the exception of Article XX GATT, explaining that:

“The context of Article XX(g) includes the provisions of the rest of the General Agreement, including in particular Articles I, III, and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phase ‘relating to the conservation of exhaustible natural resources’ may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively emasculating Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitment set out in, e.g. Article I, III and XI, and the policies and interests embodied in the ‘General Exceptions’ listed in Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.”624 (original emphasis).

Therefore, instead of focusing on a doubtful legal principle that exceptions shall always be interpreted restrictively, the AB reflected upon the proper function of Article XX GATT within the overall treaty structure and its interrelationship with the substantive obligations of the GATT. This approach recognizes the legitimate purpose that exceptions for societal welfare considerations fulfill to achieve the overall goal of increasing economic liberalization and balances them against the trade liberalization objective on a case-by-case basis.625 It is therefore to be commended as a good example for investment tribunals.

V. Conclusion

The selected examples from investment jurisprudence show a clear disposition of investment tribunals towards an investor-friendly interpretation of IIA norms. Looking at the interpretation of investment provisions in general, it cannot be denied that tribunals have a certain tendency to overstate the investment protection and promotion objectives to justify an expansive interpretation of investment obligations to the benefit of foreign investment. The same impulse is readily apparent in the early jurispru-

625 See Zleptnig, Non-Economic Objectives in WTO Law, p. 109 (2010).
dence on security exceptions, although subsequent (annulment) decisions suggest that future tribunals might adopt a more nuanced interpretive approach. This has, in principle, also been confirmed by investment tribunal decisions on other exception provisions in IIAs. Although these examples do not purport to be exhaustive, they are sufficient to illustrate the point that investment tribunals are drawn towards an expansive interpretation of IIA standards favoring investors and, correspondingly, to a restrictive interpretation of exception provisions that allow deviations from IIA obligations. The adoption of a wide interpretation of general exception clauses by tribunals therefore seems unlikely. On the contrary, a narrow interpretation of general exceptions in the first arbitrations involving general exceptions is a very real possibility.626

Were tribunals to adopt such a deliberately narrow interpretative approach of general exceptions this would be open to legitimate contestation. Apart from finding no reflection in the Vienna Convention on the Law of Treaties, presumptions about the interpretation of treaty obligations or exceptions are also more generally to be taken with a pinch of salt.627 A presumption of a broad (presumably “effective”) interpretation of treaty obligations (and consequently a narrow reading of exceptions to these obligations) can be countered by a similar presumption available in international adjudication in favor of a narrow reading of obligations as derogations from State sovereignty (and conversely a broad interpretation of exceptions as provisions safeguarding State sovereignty).628 The best interpretive approach therefore is to abandon such interpretive presumptions and to instead closely follow the customary rules of treaty interpretation as reflected and codified in the VCLT. This means to interpret general exception provisions in good faith according to the ordinary meaning of their terms, in their context and in the light of their object and purpose.

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626 Lévesque, 44 Canadian Yearbook of International Law 249, 274 (2006) points out that especially foreign investors are likely to argue that general exception provisions, as exceptions to treaty obligations, should meet with a narrow interpretation.


B. The Case for a Cross-Regime Fertilization between the jurisprudence of the WTO and the International Investment Law Regime

In discussions on whether a cross-regime fertilization between the jurisprudence of the WTO and international investment law is feasible and advisable, the existence of a profound legal separation between the two systems of international trade and investment law is frequently taken as a given among investment lawyers and introduced as a counter-argument. Indeed, the assumption of a clinical separation of both legal regimes possesses some superficial appeal: After all, foreign direct investment and cross-border trading activities are regulated in discreet treaties with distinct characteristics, specialized dispute settlement systems, and different stakeholders. Notwithstanding, several factors – both legal and non-legal – indicate that this gap is not as insurmountable as is often believed and that one can, in fact, witness a growing convergence between the two legal systems.\(^{629}\)

First, international trade and international investment law share a common history that dates back to the time immediately after the Second World War.\(^{630}\) At a specially convened conference in Havana in 1947, the UN Conference on Trade and Employment presented a draft Charter for an International Trade Organization, which would have regulated and liberalized trade and investment in one comprehensive treaty.\(^{631}\) When the at-
tempt failed, the international community agreed on the creation of the GATT 1947 as a comprehensive multilateral trade agreement, while foreign investment was consciously left out and later became regulated in a series of bilateral treaties. For this reason, international trade and investment law have been characterized as “twins separated at birth”.

The historical attempt to regulate trade and investment in a single comprehensive agreement after the Second World War does not come as a surprise from a practical point of view. Cross-border trade and foreign direct investment are sometimes alternative, but increasingly complementary and interdependent ways of servicing foreign markets. In the age of globalization, multinational enterprises effortlessly cross borders and invest in foreign countries to subdivide their production so as to minimize the overall production costs and export the final products back into their home country. They may also create subsidiaries abroad to facilitate their market access in foreign countries. And they export and import goods within the firm in order to supply their affiliates. These activities are often part of a single commercial operation. The separation of cross-border trade and foreign direct investment across the boundary of international trade and investment law is thus a legal fiction that is hard to sustain in today’s globalized economy. Governments have recognized this inseparability and fre-

632 See Broude, in: Echandi/Sauvé (eds.), Prospects in International Investment Law and Policy 139, 139 (2013). While the “Lottie-and-Lisa”- analogy is an intriguing one, one should add that trade and investment resemble more fraternal than identical twins.


635 See Kalderimis, 7 Transnational Dispute Management, p. 1 (2010).
quently design their measures with both trade and investment objectives in mind.636

In fact, the close relationship between trade and investment in real world practice is reflected by the fact that the two regimes partially cover the same subject matter. The Agreement on Trade-Related Investment Measures (TRIMS)637 is probably the most obvious example of this overlap. Another is the provision of services through the commercial presence of a foreign supplier, which is not only regulated by the WTO GATS (also known as “mode 3” services) but also constitutes a classical investment scenario that is protected by IIAs. Intellectual property rights usually fall under the definition of investment in IIAs, but are also covered by the WTO TRIPS Agreement. This may give rise to complicated cases in which one measure may be expressly allowed by a WTO agreement, but potentially prohibited by an equally applicable BIT. The grant of compulsory licenses is one example of this substantive intersection of the two treaty regimes. It is expressly allowed under Article 31 TRIPS, but may be considered an indirect expropriation of an investor’s intellectual property rights, which fall within the definition of investment of most IIAs, since the economic value of the patent is effectively hollowed out.638 In light of the substantive overlap, some commentators and investors have contemplated the idea of bringing violations of WTO law directly before investment tribunals, arguing either that investors may have standing to bring a claim against host States for a breach of WTO law by invoking fair and equitable treatment provisions that guarantee “treatment in accordance

636 See Steger, in: Echandi/Sauvé (eds.), Prospects in International Investment Law and Policy 156, 159-160 (2013) giving the examples of attracting foreign investment in the automobile industry by providing exemptions on imports of automobiles from the same company abroad and special tariff programs that are designed to attract foreign investment in renewable energy generation projects.


638 For a closer examination of this intersection between WTO and investment law see Gibson, 25 American University International Law Review 357 (2010).
with international law” or that the breach of WTO obligations may fall under the protective umbrella of an observation of undertakings clause.

Considering the above, it is also not surprising that the same State measure may come within the jurisdiction of both legal systems. This overlapping of jurisdictions has resulted in the institution of parallel proceedings in several cases. However, investors’ attempts to challenge genuine trade measures before investment tribunals have not been successful thus

639 See Sabanogullari, Kölner Schriften zum Wirtschaftsrecht 176, 178-179 (2011); Leal-Arcas, International Trade and Investment Law, p. 4 (2011); Ewing-Chow, 30 University of New South Wales Law Journal, 548, 567-568 (2007); Verrill, 11 ILSA Journal of International & Comparative Law 287 (2005); Verhoosel, 6 Journal of International Economic Law 493, 496 (2003). However, investment tribunals have so far declined to equate a violation of WTO law with a violation of the FET standard, see Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶121.


641 See, e.g., Mexico – Tax Measures on Soft Drinks and Other Beverages, Appellate Body Report, WT/D308/AB/R, 6 March 2006 for the trade dispute and Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007 and Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008 for the investment claims, all challenging a Mexican tax on high-fructose corn syrup as a soft drinks sweetener. See also Phillip Morris Asia Ltd. v. The Commonwealth of Australia, Notice of Arbitration under the UNCITRAL Arbitration Rules, 21 November 2011 and the requests for the establishment of a panel by the Dominican Republic, Honduras and the Ukraine (Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Request for the Establishment of a Panel by Ukraine, WT/DS434/11, 17 August 2012; Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Request for the Establishment of a Panel by Honduras, WT/DS435/16, 17 October 2012; Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Request for Consultations by Dominican Republic, WT/DS441/15, 14 November 2012) as a further example of parallel proceedings challenging the same State measure under trade and investment agreements.
Interestingly, States have also started using trade benefits to enforce investment awards. More conscious of the inseparability of trade and investment, States have also increasingly negotiated preferential trade and investment agreements that cover trade and investment issues comprehensively as opposed to specialized trade or investment treaties that deal with the subjects separately. By the end of 2016, 367 PTIAs have been concluded and it is generally expected that this treaty category will become more important in the future while the numbers of newly concluded BITs per year are witnessing a gradual decrease.

In light of the above, it does not come as a surprise that general exception clauses would not be the first examples of a cross-regime fertilization of international trade and investment jurisprudence. In fact, the reference to WTO decisions in IIA adjudication is more widespread than investment commentators tend to acknowledge.

I. The Use of WTO Jurisprudence in Past IIA Adjudication

1. The Use of WTO Jurisprudence in the Interpretation of the Investment National Treatment Standard

Investment tribunals have mostly been occupied with cross-references to WTO jurisprudence in the context of the national treatment standard, which is one of the most important substantive standards that is shared across the two regimes. The pertinent jurisprudence offers a mixed picture.


643 On the U.S. attempt to suspend Argentina’s trade benefits for Argentina’s purported failure to comply with ICSID awards see Rosenberg, 44 Georgetown Journal of International Law 503 (2013). With reference to this case and further examples see also Tietje, in: Echandi/Sauvé (eds.), Prospects in International Investment Law and Policy 166, 169 (2013).

644 See supra Chapter Two Part A, II, 2.

ture. While some tribunals have been open to draw on WTO jurisprudence in interpreting investment national treatment provisions as a guide to determining when investors or investments are in “like circumstances”, others have been more hesitant to do so.

The first tribunal to refer to WTO law in its consideration of the investment national treatment standard was the one in *S.D. Myers, Inc. v. Government of Canada*. It found interpretive guidance on the meaning of “like circumstances” in Article 1102 NAFTA in the WTO Appellate Body’s decision on “like products” in *Japan–Alcoholic Beverages*, particularly emphasizing that it was necessary “to keep in mind the overall legal context in which the phrase appears.” Interestingly, the tribunal held that a notable systematic difference between the two regimes is the absence of Article XX GATT in NAFTA Chapter Eleven.

Half a year later, the *Pope & Talbot, Inc. v. Canada* tribunal considered at length several WTO decisions on likeness in its interpretation, but ultimately dismissed Canada’s proposition to use what Canada advocated to be the WTO test for the purpose of determining discrimination in the investment context. At the outset of its national treatment analysis the tribunal in *Martin Roy Feldman Karpa v. United States of Mexico* tribunal was also open to consider WTO case law and remarked that the language in Article 1102 NAFTA is “analogous” to that found in Article III GATT.

650 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 165. Interestingly, the tribunal in ¶ 177 also cited the WTO Appellate Body Report in *United States–Measures Af
Other tribunals have been less enthusiastic. The tribunal in *Occidental Exploration and Production Company v. Ecuador*, although “mindful of the discussion of the meaning of like products in respect of national treatment under GATT/WTO”, eventually dismissed the relevance of WTO law for investment purposes as “not specifically pertinent” for the issue at hand.\(^{651}\) It firstly argued with the allegedly different object and purpose of the two obligations, reasoning that the WTO national treatment standard intends to protect imported products, while the investment provision is meant to protect exported products from indirect taxes in their country of origin.\(^{652}\) Thereafter, it compared the language “in like situations” used in the BIT provision with the text of the GATT/WTO provision “like products” and decided that they were markedly different – from here it ultimately concluded that the WTO test is not importable into the investment realm.\(^{653}\)

The tribunal in *Methanex Corporation v. United States of America* initially seemed open towards relevant WTO jurisprudence and generally considered that it

> “may derive guidance from the way in which a similar phrase in the GATT has been interpreted in the past. Whilst such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant.”\(^{654}\)

Having established this general rule, the tribunal nevertheless went on to distinguish the language “like circumstances” used in Article 1102 NAFTA from “like products” found in Article III GATT. It reasoned that the drafters of the NAFTA were well aware of the GATT terminology “like products” and had used language such as “like goods” in other chap-

\(^{651}\) *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Award, 1 July 2004, ¶¶174-175.

\(^{652}\) *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Award, 1 July 2004, ¶¶175-176.

\(^{653}\) *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Award, 1 July 2004, ¶176. For a criticism of the tribunal’s analysis as “selective and misleading” refer to Kurtz, 20 European Journal of International Law 749, 764 (2009).

ters of the NAFTA concluding that if they had intended a reference to the GATT approach in the investment chapter, they would have expressly adopted language to this effect.\textsuperscript{655} Since they did not do so, they must have intended to create “distinct regimes for trade and investment.”\textsuperscript{656} It therefore ultimately discarded the WTO-likeness test in its enquiry.\textsuperscript{657}

The tribunal in \textit{Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan} affirmed the ruling in \textit{Occidental} and also considered that the BIT national treatment clause must be interpreted in an autonomous manner, independent of the WTO approach.\textsuperscript{658} This conclusion was also drawn by the tribunal in \textit{Merrill \& Ring Forestry L.P. v. Canada}, which discarded the pertinence of WTO law in their likeness enquiry, albeit without express mention of \textit{Occidental} or other awards. The tribunal particularly pointed to the different purposes of the WTO and NAFTA Chapter Eleven, which “includes matters that go beyond trade so as to provide for broader mechanisms of economic integration and coordination of economic policies”.\textsuperscript{659}

Conversely, the tribunal in \textit{Corn Products International, Inc. v. The United Mexican States} found the fact that the WTO Appellate Body had decided that the products in question were “like products” within the meaning of Article III(4) GATT “highly relevant” for the application of the NAFTA national treatment provision.\textsuperscript{660} Also the tribunal in \textit{Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia} adopted the trade law approach to

\textsuperscript{655} \textit{Methanex Corporation v. United States of America}, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter B, ¶¶30-34.

\textsuperscript{656} \textit{Methanex Corporation v. United States of America}, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter B, ¶35, stating that “the intent of the drafters [of NAFTA was] to create distinct regimes for trade and investment.”.

\textsuperscript{657} \textit{Methanex Corporation v. United States of America}, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter B, ¶38.

\textsuperscript{658} \textit{Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan}, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶389, 402. Considering the tribunal’s reading to be based on a “simplistic notion” taken from \textit{Methanex} and to be “strained and implausible” is \textit{Kurtz}, 20 European Journal of International Law 1095, 1098 (2009).

\textsuperscript{659} \textit{Merrill \& Ring Forestry L.P. v. The Government of Canada}, Award, 31 March 2010, ¶¶85-87.

\textsuperscript{660} \textit{Corn Products International, Inc. v. The United Mexican States}, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, ¶122.
identifying which sectors were relevant when deciding whether less favorable treatment had occurred.\textsuperscript{661} It distinguished the clause in the applicable treaty from the clause applied by the tribunal in \textit{Occidental v. Ecuador} on the basis of a divergence in wording. Since the treaty at hand lacked language such as “like situations” or “like products”, the tribunal felt free to adopt the WTO approach.\textsuperscript{662}

While tribunals thus have not converged on a dominant approach over the course of time, one can still discern from the above awards that tribunals compared the texts, the systematic differences, and the object and purposes of the national treatment standards in trade and investment law to decide whether or not to take recourse to WTO jurisprudence.

The comparison of the two standards has also been the subject of academic literature.\textsuperscript{663} Regardless of their respective conclusions as to whether inspiration from WTO jurisprudence is appropriate or not, commentators generally caution that any comparative exercise needs to be closely attentive to textual differences, to any potentially differing object and purposes, and has to take into account systematic differences across the two regimes.\textsuperscript{664} They thus developed criteria similar to the catalogue adopted by the investment tribunals.

\begin{itemize}
\item \textsuperscript{661} Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, Award on Jurisdiction and Liability, 28 April 2011, ¶¶313-316.
\item \textsuperscript{662} Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, Award on Jurisdiction and Liability, 28 April 2011, ¶313.
\item \textsuperscript{664} See Dolzer/Schreuer, Principles of International Investment Law, 2\textsuperscript{nd} ed., p. 206 (2012); Kurtz, in: Schill (ed.), International Investment Law and Comparative Law 243, 250-255 (2010); Kurtz, 20 European Journal of International Law 749, 755-759 (2009); Howse/Chalamish, 20 European Journal of International Law 1087, 1088, 1090 (2009). Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 332 (2011) also caution that incorrect reliance on WTO jurisprudence in the context of national treatment will likely have a more limited impact than in the context of the interpretation of general exception provisions since only few investment arbitrations are decided on the construction of a non-discrimination standard alone, while successful invoca-
\end{itemize}
2. The Use of WTO Jurisprudence in the Interpretation of the Investment Most-Favored-Nation Treatment Standard

The most-favored-nation treatment standard is another typical substantive commitment of modern international economic law that exists in the trade and the investment realm alike. Its general purpose is to ensure that the parties to a treaty treat deal with each other no less favorably than they deal with third parties. Similar to the national treatment standard, while the language and the context of MFN provisions vary across the two systems, sufficient commonalities exist that may warrant a comparative recourse to the law of the WTO.

Recognizing the potential merit of a comparative approach, the United Nations International Law Commission established a Study Group in 2009 co-chaired by Donald M. Mc. Rae and A. Rohan Perera, which, in part, is explaining the implications of WTO jurisprudence on the interpretation of MFN treatment in international investment law. The Study Group was reconstituted in subsequent years and reviewed various papers that were prepared according to the framework set out in 2009. Although con-
clusive results on the relationship between trade and investment MFN treatment standards have not been published to date, the Study Group reaffirmed in its latest report its intention “to study further the question of MFN in relation to trade in services under GATS and investment agreements.”

Investment tribunals have not yet considered adopting a comparative approach to the interpretation of the MFN standard across the two systems. This is regrettable considering the wealth of WTO jurisprudence on, for instance, the notion of “likeness” or the meaning of terms such as “less favorable” treatment, including an extensive list of measures that have already been examined in the context of the GATT MFN standard.

Nonetheless, the topic has attracted some academic attention. Walid Ben Hamida, for instance, assesses whether and how WTO experience with MFN clauses may be helpful in determining whether an investor can use the MFN provision in order to rely on more favorable dispute settlement provisions accepted by the host State in its other IIAs – a question of considerable debate among investment scholars, with tribunals taking diverging viewpoints. Also on the scope of application of the MFN provision, Jürgen Kurtz examined in particular whether the strong economic and political case for the inclusion of MFN treatment in the international trade realm is automatically transportable to the investment setting. He finds that, while, historically, MFN treatment with respect to trade in goods has been a cornerstone in the efforts to rebuild the international economy in the aftermath of the Second World War, the MFN principle has only played a marginal role in the beginnings of the international in-


vestment law system which were predominately characterized by a commitment to the protection of foreign investors against unlawful expropriations.\textsuperscript{673} Moreover, barriers to trade in goods such as quantitative restrictions or tariffs usually apply at the border, while State measures affecting foreign investment activities take effect after the entry into the host State and may take any form, resulting in a much bigger regulatory impact of investment law compared to trade law.\textsuperscript{674} Seen in the context of other fundamental structural differences between the realms of trade and investment, such as the different breadth of access to the dispute settlement processes and the absence of general exceptions for public policy objectives in most IIAs, Kurtz concludes that a high level of sensitivity is required by investment tribunals when deciding how to interpret the MFN standard in the future.\textsuperscript{675}

Generally, scholars thus seem to agree that a comparative approach to MFN treatment across the two regimes may be fruitful in addressing problems with the interpretation and application of MFN provisions in international investment law. At the same time, they raise awareness of the undeniable differences between the two systems and caution that the clear-cut economic and normative case for a broad interpretation of the MFN standard in international trade law may not be easily transportable into the interpretation of the investment standard. The work of the ILC and scholarship tend to agree that investment law may benefit from a cross-regime fertilization with the jurisprudence of the WTO.

\textsuperscript{673} See Kurtz, 5 The Journal of World Investment & Trade 861, 865-866 (2004); \textit{Kurtz}, in: Weiler (ed.), International Investment Law and Arbitration 523, 526-527 (2004). For an account of the historical setting in which the first IIAs were concluded see \textit{supra} Chapter Three, Part B, I.


3. The Use of WTO Jurisprudence in the Interpretation of the Investment Security Exception Clauses

As elaborated in more detail above, the tribunal in Continental Casualty v. Argentina also drew on WTO case law on Article XX GATT in order to construe the security exception clause of Article XI of the U.S. – Argentina BIT 1991. In particular, the tribunal’s approach to the question when a measure is “necessary” to achieve one of the permissible objectives was heavily informed by pertinent decisions of the WTO Appellate Body. The Continental Casualty tribunal forms an exception among its peers in that it felt comfortable to reference WTO jurisprudence on general exceptions while other tribunals occupied with the same question preferred to take recourse to customary international law on the state of necessity. The tribunal reasoned in particular that:

“Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in the GATT, rather than to refer to the requirements of necessity under customary international law.”

The statement suggests that the tribunal found the wording of the provisions as well as their contextual function sufficiently similar to justify a comparative interpretive approach. This bold recourse to WTO case law has been endorsed in academic writings for its recognition of a certain margin of appreciation of the host State in the balancing between investment protection and legitimate regulatory State interests. For instance, Stone Sweet applauds the award for undertaking the “mature form of proportionality analysis” developed in the WTO for the interpretation of Arti-

676 See supra Chapter Five, Part A, II, 1, c.
677 For this reason, the Continental Casualty arbitration has been described as “a first example of adjudicatory cross-fertilization in international economic law” by Reinisch, in: Dekker/Hey (eds.), 41 Netherlands Yearbook of International Law 137, 152 (2010).
Article XX GATT, which offers “the best available doctrinal framework with which to meet the present challenges to the BIT-ICSID system.”681 In the same line, Burke-White and Von Staden consider that the WTO approach to the concept of necessity “offers perhaps the best middle ground for balancing the legitimate expectations of both states and investors.”682

The decision, however, has also attracted criticism in the scholarship for a variety of reasons. They largely turn on an alleged inappropriateness of reference to WTO general exception jurisprudence in the construction of an IIA security exception though, and are not directed at the general feasibility of recourse to WTO jurisprudence in investor-State proceedings per se. Among others, it is contended that the two cross-referenced clauses were historically, textually, and conceptually different and thus not comparable.683 If at all, the tribunal should have referred to the GATT security exception Article XXI GATT.684 Additionally, it is asserted that Article XI of the BIT was merely meant to affirm existing customary rules and that thus recourse to custom would have been more appropriate.685 Only occasionally have critics put forward that international trade and investment


law are different practice areas with differing purposes and divergent evolutions and thus cannot be compared.686

It has been suggested that the tribunal’s inclination towards international trade law was prompted by the professional background of its presiding arbitrator, Giorgio Sacerdoti, who was a member of the WTO Appellate Body from 2001 to 2009.687 This suggestion seems plausible. The basis of this consideration is the assumption that legal interactions between different branches of law may also be analyzed as social interactions between the relevant legal communities.688 One can assume that socio-cultural similarities between the relevant decision-makers as well as sharing similar characteristics may raise the likelihood of cross-regime borrowing.689 Sociological factors that may be relevant in this regard include not only career paths, but also the process of socialization, ideology, link to certain social movements or professional position, heritage, the use of terminologies, differences in legal cultures, and the general relationship between the communities (mistrust, antagonism).690 More specifically, it may be argued that a more pronounced socio-cultural proximity between

Chapter Five The Interpretation of General Exception Clauses

the communities of international trade and investment law should enhance the inclination of the relevant decision-makers to mutually incorporate rules of the other legal sphere. In turn, this may result in a closer normative proximity between these branches of international economic law, paralleling the close socio-cultural proximity of its social communities. These factors may very well have played a role in the Continental Casualty decision.691

4. Other Applications of WTO Law in IIA Adjudication

Although the above examples are the most important examples of when tribunals did, could or should have taken recourse to the jurisprudence of the WTO, the instances in which WTO adjudication has been found to be relevant in investor-State arbitrations are not limited to just these. For example, tribunals took recourse to WTO case law in their enquiry as to whether the host State had imposed performance requirements692 and when interpreting the concept of “legitimate expectations” in the context of the fair and equitable treatment standard.693

Cross-fertilization with WTO jurisprudence is by no means restricted to substantive standards, though, and also appears in procedural matters. For instance, in Methanex Corporation v. United States of America, the tribunal drew heavily on the example of the WTO in justifying its decision to permit amicus curiae briefs.694 Other tribunals have relied on WTO prece-

691 However, the decision in Continental Casualty is not an anomaly. Another former member of the WTO Appellate Body was appointed as arbitrator in Abalclat and Others v. Argentina and issued a deeply critical dissent of the majority’s decision; See Abalclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Abi-Saab, 28 October 2011.
694 Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae”, 15 January 2001, ¶33 citing United States – Imposing of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carton Steel Products Originating in the United Kingdom, Appellate Body Report, WT/DS/138/AB/R, 10 May 2000, ¶¶41-42. The Methanex reasoning was subsequently adopted, among others, by the tribunals in
dents to establish the existence of an obligation of the Parties to provide
evidence and to explain the reasons if the State wants to withhold informa-
tion.  

While these examples do not purport to be a comprehensive account of
all instances in which investment tribunals considered WTO law and juris-
prudence, they may serve to complete the above picture.

5. Conclusion

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Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.
and Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic,
ICISD Case No. ARB/03/19, Response to a Petition for Transparency and Parti-
cipation as Amicus Curiae, 19 May 2005, ¶22 and Suez, Sociedad General de
Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Ar-
gentine Republic (formerly Aguas Provinciales de Santa Fe S.A. Suez, Sociedad
General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del
Agua S.A. v. Argentine Republic), ICSID Case No. ARB/03/17, Order in response
to a Petition for Participation as Amicus Curiae, 17 March 2006, ¶21, which both
reference parallel procedures of the WTO DSM. Other tribunals affirmed the Me-
thanex conclusions with only cursory reference to WTO jurisprudence, see
United Parcel Service of America, Inc. v. Canada, Decision of the Tribunal on
Petitions for Intervention and Participation as Amici Curiae, 17 October 2001,

For more comprehensive overviews refer to Marceau/Izaguerri/Lanovoy, 47
Journal of World Trade 481 (2013) and Tereposky/Maguire, in: Rovine (ed.),
Contemporary Issues in International Arbitration and Mediation – The Fordham

204 (2012); Newcombe/Paradell, Law and Practice of Investment Treaties, p.
503 (2009). See also Kurtz, ASIL Proc. 214, 243, 243 (2015) who refers to an “iden-
tifiable and troubling opposition to the use of WTO law in investor-state
arbitration.”.
in actual fact take recourse to WTO jurisprudence in the interpretation and application of norms and principle that exist in a similar manner in both legal regimes as a means of bolstering the legitimacy of their argument more frequently than maybe expected. 698 One likely reason for this cross-regime borrowing is the functional closeness of the concerned terms and concepts across the two legal systems. 699

To the extent that tribunals have been more reluctant to draw upon WTO jurisprudence, they have mainly distinguished the specific investment provisions in question from similar WTO provisions on the basis of an allegedly decisively different wording, a distinct object and purpose, and structural differences between the two systems. 700 Scholars generally agree with these criteria. As a preliminary conclusion, therefore, the inclination of investment tribunals to cross-reference WTO jurisprudence in the interpretation of IIA general exceptions – and the legitimacy of any cross-borrowing – will depend on comparisons between the provisions’ respective wording and between their object and purpose as well as on an analysis of how the structural differences between the WTO regime and the investment system may influence the respective interpretations. 701


699 See Marceau/Izaguerri/Lanovoy, 47 Journal of World Trade 481, 505, 529 (2013), singling out in particular the concept of “necessity”.

700 An additional reason for this reluctance may be the risk arbitrators are running of exposing their award to subsequent challenges if the Parties did not invoke WTO precedents themselves; see Marceau/Izaguerri/Lanovoy, 47 Journal of World Trade 481, 485 (2013) with reference to Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment, 16 September 2011.

701 For a proposal to use similar criteria to assess the potential for a cross-fertilization between the jurisprudence on trade law general exceptions of different treaties see Wolfrum, in: Wolfrum, et al. (eds.), Max Planck Commentaries on World Trade Law, Vol. 5, WTO – Trade in Goods, Article XX GATT, ¶3 (2011).
These criteria strikingly resemble the customary rules of treaty interpretation codified in Article 31 VCLT.702

II. The Case for a Cross-Regime Fertilization as regards General Exception Clauses

1. Comparable Texts of IIA General Exception Clauses and Article XX GATT or Article XIV GATS

The majority of IIA general exception provisions either incorporate or is modeled on Article XX GATT or Article XIV GATS.703 In particular, the technique of incorporation by reference is a strong indicator that States intend investment tribunals to consider the body of WTO jurisprudence in their deliberations.704 The same holds true with regard to general exceptions whose wording has been adapted to the investment setting in the treaty negotiation process and thus does not fully reflect the WTO language. Naturally, WTO general exceptions cannot be adopted word-by-word by IIA treaty drafters. Amendments to the language, such as e.g. the substitution of the terminology “international trade” with “investments or investors”, are necessary to cater for the fact that treaties deal with investment and investors as opposed to trade in goods or services.705 Other textual amendments, such as the codification of WTO jurisprudence on e.g. the addition of “living and non-living” to the exception for exhaustible natural resources, strongly imply that States are open to the idea of taking into account WTO jurisprudence. Even José Alvarez and Tegan Brink, two of the most outspoken critics of the reference to WTO jurisprudence in the construction of IIA security exceptions consider that:

702 Article 31 VCLT reads: “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.”.

703 See supra Chapter Two, Part B, I.

704 See, e.g., Article 1(2) of Chapter 15 of the ASEAN – Australia – New Zealand PTIA (signed 27 February 2009, entered into force 1 January 2010), which reads: “For the purposes of Chapter 8 (Trade in Services), Chapter 9 (Movement of Natural Persons) and Chapter 11 (Investment), Article XIV of GATS including its footnotes shall be incorporated into and shall form part of this Agreement, mutatis mutandis.”.

705 See Kennedy, 4 Czech Yearbook of International Law 3, 17 (2013).
“[w]hen comparable texts exist, WTO case law may be able to provide useful guidance to BIT interpreters on how the substantive subject matter of exceptions, such as “exhaustible natural resources,” should be defined (a matter on which consistency in international agreements is important), as well as on the standard of review with respect to necessity in the context of a provision that contains a similar, albeit not identical, controlling “chapeau.””

There is thus a strong textual argument in favor of reliance on WTO jurisprudence by investment tribunals to the extent that the IIA general exception clauses either incorporate or are modeled on Article XX GATT or Article XIV GATS.

Whether these considerations are automatically transportable to the interpretation of *sui generis* IIA general exceptions is less clear. It seems possible that the *chapeau* of the WTO general exceptions has affected the interpretation of the entire norm and the degree of deference accorded to States under the clauses even though evidence to this effect is hard to identify in the case law. In particular, the *chapeau* might have put the WTO Appellate Body in a position to adopt a comparatively broad interpretation of the individual public policy objectives and the nexus requirements, granting more deference to the host State, since it acted in a corrective manner and provided for protection against abusive invocation by

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706 Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 344 (2011). Also not that they consider the language found in the introductory paragraph to Article 10 of the Canadian Model FIPA “obviously similar to that of GATT Article XX” although Article 10 substitutes the text “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” with “arbitrary or unjustifiable discrimination between investments or between investors” to account for the investment setting; See Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 345 (2011).


B. The Case for a Cross-Regime Fertilization

host States. Tribunals should be mindful of this when they intend to consider WTO jurisprudence in the interpretation of IIA general exception clauses that do not entail such an extensive protection against abuses or none at all.\footnote{709} Whether the safeguards entailed in the *sui generis* provision are substantially comparable to the WTO *chapeau* should be an important factor in the decision concerning the extent to which reliance on WTO jurisprudence is appropriate.

2. Comparable Purposes of IIAs and the GATT/GATS and of General Exception Clauses Contained Therein

Secondly, in their comparative enquiry as to whether to draw on WTO case law investment tribunals have considered both the object and purpose of the obligation in trade and investment law respectively as well as the object and purpose of the underlying legal regime as a whole.

Some commentators characterize the goals of international trade and investment law as decisively different so that a conclusion reached in one regime is not readily transferable to the other. Trade law is concerned with “overall welfare, efficiency, liberalization, state-to-state exchanges of market access and trade opportunities” (concentrating on “macro-issues”), whereas international investment law centers on investment protection (as opposed to liberalization) and individual rights (as opposed to state-state exchanges of market opportunities and thus focusing on “micro-issues”).\footnote{710} However, this differentiation confuses the structure of and the means employed by the two systems with the objectives pursued by them.\footnote{711} It is true that international trade law contemplates a reduction of tariffs and other barriers to cross-border trade while international investment law focuses on the reduction of risks of investment abroad through

\footnote{709} For details on the different safeguards against abuses built into general exception clauses see supra Chapter Two, Part C, II, 3.


\footnote{711} See *Broude*, in: Echandi/Sauvé (eds.), Prospects in International Investment Law and Policy 139, 144 (2013).
extensive private property protection. Nonetheless, it is not accurate to argue that trade law is solely occupied with State interests while investment law deals solely with the protection of private interests. WTO State-to-State disputes are often pursued in representation of private claimants and thus regularly protect individual rights of private economic actors at least indirectly. Conversely, the object and purpose of contemporary IIAs (which are likely the investment treaties containing general exceptions) is not exhaustively reflected in the classical foreign investment protection objective but encompasses broader notions of sustainable economic development, which eventually leads to growing general welfare and prosperity. Despite the different nuances, international trade law and international investment law in fact share the goal of increasing general welfare and prosperity through liberalized international economic activity, although they pursue it with different means. The common overall purpose of the two regimes hence does not warrant a differential interpretive approach to general exceptions.

Turning to a comparison of the object and purpose of general exception clauses across international trade and investment law, no significant difference exists: Some contend that the purpose of Article XX GATT was to enable discrimination based on nationality and that this purpose was of no avail in investment law since the latter is meant to protect property rights

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713 See infra Chapter Four, Part A, II.

against any kind of improper governmental interference. However, this argument does not capture the purpose of Article XX GATT comprehensively since it, similarly to the argument above, confuses the means employed by general exceptions with the aims pursued by them. International trade law obligations primarily focus on the protection from discrimination based on nationality, while international investment law protects foreign investment in an absolute manner without requiring discriminatory intent on part of the host State. General exceptions in both legal systems allow States to derogate from their treaty obligations upon their successful invocation. To do so, they necessarily permit nationality-based discrimination in international trade law and any kind of interference with foreign investment in international investment law, both of which would normally be outlawed by the respective legal systems. This does not change the fact that, in both legal regimes, the objectives of general exceptions are strikingly similar: To elevate the specified non-economic values over the goals of trade liberalization or investment protection respectively in cases of normative conflict.

In sum, therefore, the objectives of general exceptions in trade and investment law are sufficiently comparable to enable a cross-fertilization of the respective jurisprudence.

3. Structural Differences between Investor-State Arbitration and WTO Dispute Settlement

As a third criterion, tribunals have been mindful of structural differences between the investor-State arbitration system and the world trading dispute settlement scheme when deciding whether cross-regime borrowing is appropriate. The different structures may have an impact on the legal in-


interpretation of general exceptions adopted in the respective regime and thus need to be considered when applying trade jurisprudence in the investment context. This truism is often explicitly highlighted in academic literature, which usually only briefly touch upon the appearance of general exception provisions in recent IIAs. However, most of the commentators are satisfied with generically cautioning against reliance on WTO jurisprudence without appropriate attention to the structural differences between the two legal systems without referring to what they consider to be the pertinent differences between investment law and trade law. In the alternative, if they mention allegedly decisive differences, but do not or only cursorily explain why these differences do have, might have, or should have an impact on the interpretation of general exceptions across the two regimes as if the issue was self-explanatory. Their words of caution, which may well be interpreted as criticisms of what they fear may turn out to be a too casual reliance on WTO jurisprudence, thus appear to be not well founded.

Nonetheless, there are of course structural differences between trade and investment dispute settlement that may have an impact on the interpretation of obligations assumed under the respective legal regime.

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720 The following section draws on the comparison between the WTO dispute settlement regime and the international investment arbitration system undertaken in Sabanogullari, 8 Transnational Dispute Management (2011).
a. Multilateral System vs. Bilateral Treaty Network

The first noteworthy difference between the world trading system and international investment law are the legal foundations the systems rest upon. The WTO regime is a multilateral system. It consists multiple agreements, which are annexed to the Marrakesh Agreement Establishing the World Trade Organization.\(^721\) They all apply equally and are equally binding on all WTO Member States.\(^722\) This setting has enabled a consistent jurisprudence free from contradictions.

In contrast, international investment law is based on a network of more than 2957 BITS, complemented by another 367 PTIAs.\(^723\) They all contain substantially similar provisions, which however may vary as to their details. The same holds true to the extent that they feature general exception provisions.\(^724\) It follows that tribunals need to have regard to the particulars of each individual general exception provisions and to compare them with the WTO model provision to decide whether reference to WTO precedent is appropriate.

b. Inter-State vs. Investor-State Dispute Settlement

Another structural difference relates to the access to the dispute settlement systems. In the world trading regime such access is limited to States.\(^725\) Although GATT/WTO disputes often affect the economic interests of private actors, it remains a prerogative of States to initiate proceedings.\(^726\) States thus retain the sole discretionary power to decide which types of

\(^721\) Marrakesh Agreement Establishing the World Trade Organization (signed on 15 April 1994, entry into force on 1 January 1995).


\(^723\) See supra Chapter Two, Part A, I and II respectively.

\(^724\) See supra Chapter Two for an account of the different variations of IIA general exception provisions.


conflicts are brought before WTO dispute settlement. In taking this decision, they are likely to consider not only legal aspects but also possible political repercussions. For instance, a State would arguably be less inclined to challenge a foreign State measure if that challenge increased the risk of creating a precedent and facing a similar challenge to its regulatory behavior in the future.\footnote{See \textit{Alvarez/Brink}, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 349 (2011); \textit{Kurtz}, 5 The Journal of World Investment & Trade 861, 869 (2004).}

States therefore act as inherent political filters to the trade dispute settlement system.\footnote{See \textit{Van Aaken/Kurtz}, 12 Journal of International Economic Law 859, 861 (2009); \textit{Kurtz}, 5 The Journal of World Investment & Trade 861, 869 (2004).}

In contrast, private foreign investors are regularly granted the right to initiate arbitral proceedings against the host States under an applicable IIA.\footnote{See \textit{Kurtz}, 5 The Journal of World Investment & Trade 861, 869 (2004).} There is hence no State filter in investor-state dispute settlement.\footnote{See \textit{Kurtz}, supra note 38, at 232.} Governmental influence is limited to the drafting of an IIA. Unlike States, investors likely care little about political restraints and only consider economic factors in their decision whether to initiate arbitration.\footnote{See \textit{Kurtz}, 20 European Journal of International Law 749, 757 (2009).}

Considering also that the focus of international investment law shifted from protection against expropriations in its inception\footnote{See \textit{supra} Chapter Three, Part B, I, 2.} to challenging regulatory State measures in general nowadays, this broad access to investor-State dispute settlement results in a greater potential for the initiation of proceedings against a multiplicity of State measures.\footnote{See \textit{Kurtz}, 5 The Journal of World Investment & Trade 861, 870 (2004).} This may have a restraining effect on the regulatory flexibility of host States since every State measure may be exposed to the potential risk of expensive litigation.\footnote{See \textit{Karl}, in: Shan, et al. (eds.), Redefining Sovereignty in International Economic Law 225, 232 (2008).}
c. Permanent Adjudicators and Institutions vs. ad hoc Arbitrations

Another key difference between the trade and investment dispute settlement systems is their respective structure. With the WTO Appellate Body, the world trading system includes a standing body composed of seven members elected for four-year terms with the possibility of one reappointment for another four-year term.\(^{735}\) Each member is required to be a person of “recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.”\(^ {736}\) While not a requirement, members are mainly public officials.\(^ {737}\) Additionally, the WTO is equipped with a permanent legal secretariat, which provides assistance to its Member States.

In contrast, investment arbitration is decentralized and takes place before arbitral tribunals constituted on an *ad hoc* basis once a dispute arises. The composition of these tribunals changes from case to case.\(^ {738}\) Naturally, this makes the emergence of a uniform approach to the interpretation of individual obligations more difficult. Unlike in the WTO system, it is also noteworthy that most investment arbitrators have a private law commercial arbitration background. This may result in a perceived need to establish and legitimize international investment law as an independent legal area, including the rejection of established WTO precedent.\(^ {739}\) Arbitrators need to be mindful of this danger when approaching the question of whether or not to reference WTO cases.

d. Appellate Review vs. Annulment

The WTO encompasses a complex system to settle disputes between its Member States concerning their rights and duties under WTO law. After initial unsuccessful consultations, the Complainant State may refer the dis-
pute to a WTO panel for adjudication. Upon the issuance of the panel’s report, the parties to the dispute have the right to appeal it with regard to errors of law. The dispute then comes before a standing Appellate Body, which guarantees consistency in the application of the law and remedies erroneous interpretations of substantive standards in the first instance.  

This contributes to legal certainty.

International investment law does not have an appeal mechanism. This lack probably relates to the general aim of (commercial rather than investment) arbitration to accelerate proceedings for economic reasons. The International Center for the Settlement of Investment Disputes (ICSID), for instance, only provides for an annulment mechanism based on procedural flaws, but not for a substantive scrutiny in form of an appeal. Other fora do not even provide as much. The creation of a proper appeal mechanism de lege ferenda has been hotly debated for some time now, but it still remains far away from actual implementation. Shortcomings in the interpretation of investment law are therefore harder to remedy and have contributed to a body of divergent arbitral awards, which has resulted in legal uncertainty. In turn, this has narrowed the scope of state regulatory power by increasing the risks States are facing when trying to experiment with their regulatory discretion.

e. Prospective Remedies vs. Retrospective Remedies

Further differences can be identified in the respective remedy schemes. Remedies in the WTO realm are prospective in nature. The losing State has to remove the offending measure within a “reasonable period of time” and has to bring it into conformity with its WTO obligations. Only if a State fails to comply with this obligation can the Dispute Settlement Body

741 Article 52(1) ICSID.
745 Article 19(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).
exceptionally authorize the prevailing State to resort to unilateral countermeasures in the form of trade retaliation.\textsuperscript{746} The retaliation does not necessarily have to target the industry that is treated more favorably under the WTO-inconsistent regulatory scheme and is thus intergovernmental in nature.\textsuperscript{747} Furthermore, the losing State may choose how to bring its measure into conformity with WTO law and may, hence, not necessarily make the changes the prevailing State would have wished for. Since the consequences of non-adherence are thus comparatively weak, WTO Member States retain a considerable amount of their regulatory flexibility.\textsuperscript{748}

In contrast, remedies in the investment realm are retrospective in nature.\textsuperscript{749} Tribunals award compensation in form of monetary damages to the mistreated investor, which usually consists of prompt, adequate and effective compensation.\textsuperscript{750} If the dispute was heard under the premises of the International Center for the Settlement of Investment Disputes, decisions are also directly enforceable in all Member States of the ICSID Convention.\textsuperscript{751} But also if the arbitration takes place in a different forum, the widely ratified New York Convention on the Recognition of Foreign Arbitral Award of 1958\textsuperscript{752} obliges its Members to recognize and enforce foreign arbitral awards and limits the grounds upon which a State may refuse to do so.\textsuperscript{753} The remedies scheme in international investment law is thus very investor-friendly and the enforcement of favorable awards against the host State is very investor-friendly.\textsuperscript{754} As a result, a State may be prevented from experimenting with regulatory measures. It is even possible that

\begin{itemize}
\item \textsuperscript{746} Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).
\item \textsuperscript{748} See Kurtz, 20 European Journal of International Law 749, 759 (2009).
\item \textsuperscript{749} See Kurtz, 20 European Journal of International Law 749, 759 (2009).
\item \textsuperscript{750} See Newcombe/Paradell, Law and Practice of Investment Tribunals, pp. 377-392 (2009); Van Aaken/Kurtz, 12 Journal of International Economic Law 859, 861 (2009).
\item \textsuperscript{751} Article 54(1) ICSID Convention.
\item \textsuperscript{753} See Newcombe/Paradell, Law and Practice of Investment Tribunals, p. 25 (2009).
\item \textsuperscript{754} Van Aaken/Kurtz, 12 Journal of International Economic Law 859, 861 (2009) characterize this difference to the law of the WTO as “perhaps most crucially”.
\end{itemize}
certain chilling effects on State regulation, in particular for the economically inferior developing States, may arise.\textsuperscript{755}

4. Appraisal

The textual similarities between the WTO general exception clauses and IIA general exceptions modeled on them suggest that reference to WTO jurisprudence by investment tribunals is not only legally possibly but is also intended by the treaty parties. This applies all the more if the general exception clauses are incorporated into the IIA by reference to WTO agreements or if the State parties amended the text of the provision so as to codify the jurisprudence of the WTO AB, signifying their endorsement thereof. A comparison of the objectives and purposes of the two legal regimes or of the general exception clauses contained therein respectively shows that they are sufficiently comparable to allow cross-regime borrowing.

That being said, the existence of structural differences between the international investment world and the world trading regime cannot be denied. It is however important to note that most of the particularities relate to procedural aspects; for instance the particularities of the respective dispute settlement mechanisms or the available remedies. Their impact on substantive obligations remains limited. Generally, tribunals should however be mindful of the fact that international investment law, structurally, but also as regards its scope of application, is more intrusive on a State’s sovereignty than WTO law. This may require tribunals to take a more deferential approach in the interpretation of general exceptions than exists in the WTO realm.\textsuperscript{756}

\textsuperscript{755} See Kurtz, 20 European Journal of International Law 749, 759 (2009). See also Desierto, Public Policy in International Economic Law, pp. 317-320 (2015) for an account of how these differences impact upon the regulatory freedoms in WTO and investment law.

\textsuperscript{756} Alvarez/Brink, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 350 (2011) come to the opposite conclusion and argue that the WTO Appellate Body “might opt for a deferential view of what constitutes a legitimate governmental measure” because of the interstate structure and the limited remedies. Considering the above-demonstrated sovereignty-limiting impact of international investment law, this view is not persuasive.
Taking guidance from WTO jurisprudence, not in the sense of “binding precedents” but merely as “persuasive authority”, would also accelerate the development of a uniform case law, which in turn would add to legal certainty for both investors and host States. In fact, if some tribunals opted for an investment-specific approach, while others made reference to established WTO case law, the resulting legal uncertainty might be counterproductive to the goal of safeguarding the regulatory interests of host States and intensify the existing legitimacy crisis. Also, under this approach investment tribunals should feel encouraged to take guidance from WTO jurisprudence on general exceptions.

Proposals exist that the States could include in the IIA some form of interpretive guidance that refers investment tribunals to WTO jurisprudence in an additional subparagraph of the general exception provision, an annex to the IIA, or specific reference in the negotiation history. Until now, States have not chosen to go down that route. Considering that authoritative statements issued by State Parties to an IIA on the interpretation of substantive standards are rare in the investment treaty system, it is unlikely that such statements with regard to general exceptions will be witnessed in the future. Considering the above, they also do not appear necessary to draw the attention of investment tribunals to WTO jurisprudence.

In conclusion, cross-regime borrowing from WTO jurisprudence in the case of IIA general exception provisions that are textually sufficiently similar is legitimate and appropriate and will accelerate the emergence of a uniform jurisprudence. The latter will contribute to legal certainty and predictability and is thus to be encouraged.

758 The most prominent among the few examples is the statement of the NAFTA Free Trade Commission on the appropriate interpretation of Article 1105(1) NAFTA, see NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001 (available at: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp, last visited 12 November 2017). The Commission’s interpretation statements are binding on a tribunal according to Article 1131(2) NAFTA.
The Possibility of Accounting for WTO Jurisprudence during Investment Treaty Interpretation

Having concluded that cross-regime borrowing in the interpretation of investment general exception clauses is legitimate, at least to the extent that the provisions are modeled on Article XX GATT or Article XIV GATS (and need to exercise more caution if the applicable IIA provides for a *sui generis* general exception provision), the following section gives brief guidance to investment tribunals on how to take into account external law in investor-State disputes.

Some commentators appear to suggest that the principle of systemic integration as codified in Article 31(3) lit. (c) VCLT would be useful as a doctrinal underpinning for the recourse to WTO jurisprudence by investment tribunals. Article 31(3) lit. (c) VCLT obliges a treaty interpreter to take into account together with the context “any relevant rules of international law applicable in the relations between the parties.” The provision recently gained considerable attention after the International Court of Justice utilized it in *Case concerning Oil Platforms*. It is considered by some to be the most promising remedy to ameliorate the risks associated with the phenomenon of the fragmentation into diverse international legal orders, serving “a function analogous to that of a master-key in a large

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760 The customary international law character of Article 31(3) lit. (c) VCLT has been recognized by the International Court of Justice at the latest in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, I.C.J. Reports 2008, 177, 219, ¶112.


762 Note that this exercise forms a mandatory part of the interpretive process and not a merely subsidiary means of interpretation if the meaning is ambiguous, obscure or manifestly absurd or unreasonable (as contrasted with the use of *travaux préparatoires* according to Article 32 VCLT).


building.” IIAs are not self-contained regimes. They do not exist in clinical isolation but are instruments of international law and as such governed by it. The principle of systemic integration thus seems to be an underestimated but suitable instrument to address conflicts between different sub-systems of international law.

Article 31(3) lit. (c) VCLT requires that the “rule” to be considered must be “relevant” and that it must be “applicable in the relations between the parties”. The fulfillment of the individual requirements is heavily contested in many cases, but not problematic for reference to WTO law by investment tribunals. The only other condition is that both parties to the IIA are also Member States of the WTO. That being said, the point in question here is not whether IIA tribunals are obliged to consider WTO norms in their interpretation but rather whether they can use Article 31(3) lit. (c) to rely on external WTO jurisprudence. Problematic is that Article 31(3) lit. (c) VCLT only applies to “rules”. The notion of “rules” corresponds to the notion of the sources of international law as laid down in Article 38(1) ICJ-Statute.

According thereto, the primary sources of international law are treaties (lit (a)), custom (lit. (b)) and general principles of law (lit. (c)). Judicial decisions and the teachings of the most highly qualified publicists are considered to be merely “subsidiary means for the determination of rules of international law”.

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767 Cf. Article 2(1) lit. (a) VCLT, which designates that “1. For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law [...]”.
768 Generally on the reconciliation of international investment law with other areas of international law see Van Aaken, 17 Finnish Yearbook of International Law 91 (2008); Hirsch, in: Muchlinski, et al. (eds.), The Oxford Handbook of International Investment Law 154 (2008).
law” (lit. (d)). At most, they therefore only qualify as “rules” under Article 31(3) lit. (c) VCLT to the extent that they lead to the identification of primary sources of international law. Whether investment tribunal can thus utilize Article 31(3) lit. (c) VCLT to justify their recourse to WTO jurisprudence seems at least doubtful.

But also apart from the principle of systemic integration, investment tribunals have little trouble in referring or considering WTO cases for the purpose of interpreting investment obligations. In fact, it is a common practice of international courts and tribunals to consider interpretations undertaken by other international bodies in their decisions. Most prominently, the International Court of Justice believed that it should consider the interpretations of the United Nations Human Rights Committee and reasoned in its judgment on the merits in Ahmadou Sadio Diallo that

"[t]he point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled”

Two paragraphs later, the ICJ also noted that its interpretation of a provision of the African (Banjul) Charter of Human and Peoples’ Rights was consistent with the interpretation accorded to the respective obligations in the European Convention for the Protection of Human Rights by the European Court of Human Rights and in the American Convention on Human Rights by the Inter-American Court of Human Rights, both of which would be “close in substance” to the obligation at issue.

Similarly, WTO general exception provisions are “close in substance” to IIA general exception provisions, at least to the extent the latter are modeled on the former. Reliance on WTO jurisprudence in their construc-

772 For extensive examples see supra Chapter Five, Part B, I.
773 See Gardiner Treaty Interpretation, p. 268 (2008) who notes that “courts and tribunals do make free use of such material without apparently seeing any need to find a specific justification in the Vienna rules.”.
tion as persuasive authority and in the interests of the consistency of international law and of legal certainty is thus possible for IIA tribunals.

C. The Interpretation of Key Terms in General Exception Clauses

Having established that recourse to WTO jurisprudence during the interpretation of IIA general exception clauses is appropriate and legitimate, the following section turns to the interpretation that should be accorded to key terms in IIA general exception provisions. In its course, it draws extensively on insights from WTO precedents.

According to established WTO practice, the interpretation and application of the two WTO general exception provisions follows a three-step procedure. First, the measure pursued by the State has to fall within the range of policies and objectives enumerated exhaustively in paragraphs (a) through (j) in the case of Article XX GATT, or (a) through (e) respectively in the case of Article XIV GATS. Second, the measure needs to be e.g. “necessary” for, “relating to” or “directed to” the pursuit of the legitimate policy objective, depending on which nexus requirement the respective exception sub-paragraph specifies. Third, the measure must conform to the conditions stipulated in the introductory paragraph. The latter two requirements constitute checks on a State’s right to invoke that exception, firstly on the level of suitability of the means chosen to pursue a particular regulatory objective, and secondly on hidden or embedded discrimination in the application of the measure. As stressed by the Appellate Body, this sequence of steps does not reflect a random choice “but rather the fundamental structure and logic of Article XX.” It should therefore be observed to by investment tribunals.


I. Permissible Objectives

The enquiry as to whether a State measure may be defended under a general exception provision always begins with the question of whether it pursues a permissible objective recognized as such by the general exception provision. This list is exhaustive and cannot be unilaterally expanded after the treaty drafting process has been completed, even if so desired by the host State. Hence the range of permissible exceptions is restricted to those enumerated in the clause. While the regulatory power of host States is thus on the one hand expressly recognized and affirmed in the areas listed, it is, on the other hand, simultaneously limited to the exhaustive enumeration of policy objectives in the clause. Given the difficulties of treaty amendment, it is likely that the list will remain static for a considerable time.

Naturally, the larger the number of permissible objectives is, the more regulatory leeway is accorded to the host State and vice versa. Despite this, the fear of an overly broad regulatory power of the host State has been overstated. In fact, as will be elaborated in more detail below, some academics are even highly critical of this closed list approach for diametrically opposed reasons, arguing that it represents a major reason why the inclusion of exception clauses in IIAs might actually turn out to be more detrimental to the regulatory autonomy of host States than the provision of regulatory discretion already extant in the interpretation of certain substantive IIA disciplines, the latter being not confined to a limited set of public interests.778

1. Protection of Human, Animal or Plant Life or Health and Other Health-Related Objectives

The most frequently found permissible objectives in IIA general exception clauses are the “protection of human, animal or plant life or health” or

778 This line of argument suggests that, in the absence of a general exception provision, States are free to submit any kind and number of policy objectives the challenged measure is meant to implement to the tribunal which may take them into account in its interpretation of a number of substantive IIA disciplines. The presence of a general exception clause with an exhaustive list of permissible objectives would, it is asserted, preclude this option. For details, see infra Chapter Four, Part D, III.
varying other formulations that may be summarized under the heading of “health-related objectives”. In comparison with other permissible objectives, the exception probably offers the fewest interpretive ambiguities.\textsuperscript{779} What qualifies under human, animal or plant “life” or “health” is essentially uncontroversial.\textsuperscript{780} The difficulty lies in the assessment when human, animal or plant life or health is sufficiently threatened to trigger the exception.\textsuperscript{781} WTO jurisprudence suggests that for the risk to be identified, it needs to be based on objective scientific evidence.\textsuperscript{782} Secondly, there must be a rational or objective relationship between that evidence and the measure taken by the State.\textsuperscript{783} The risk evaluation and the measure taken on its basis do not need to be supported by a consensus or even a majority view among scientists. Rather, “qualified and respected sources”, even if they constitute a minority view, are considered sufficient in the WTO realm.\textsuperscript{784} Importantly, environmental measures may fall under the exception as long as they relate to human, animal or plant life or health.\textsuperscript{785} However, to the extent that IIAs only incorporate or are modeled on Article XIV GATS, the absence of an exception “relating to the conservation of exhaustible natural resources” as entailed in Article XX lit. (g) GATT needs to be taken into account. Cases in which the challenged State measure purports to be aimed at the protection of natural resources such as air or water


\textsuperscript{781} See Burke-White/Von Staden, 48 Virginia Journal of International Law 307, 361 (2008).


\textsuperscript{785} This is expressly clarified by some IIA general exception clauses. Other provisions include the protection of the environment as self-standing objective. For an overview see supra Chapter Two, Part C, II, 1, e.
may be problematic. While environmental measures that protect living natural resources, for instance animal populations or trees, readily fall within the exception’s scope, measures concerning non-living natural resources are only covered if a connection to the life or health of humans, animals or plants can be established.

Some *sui generis* exception provisions only apply to measures protecting “human health” or “public health” and are thus narrower in scope than the above. Similarly, other provisions cover only the prevention of pests and diseases in animals or plants and unlike the above provision do not encompass, for instance, the diversity of the animal or plant population.

A straightforward example for the relevance of such a health-related exception in the investment context is the case of *Philip Morris Asia Ltd. v. Commonwealth of Australia*.\(^ {786} \)

2. Securing Compliance with Laws and Regulations

Another permissible objective deals with the enforcement of laws and regulations not inconsistent with the underlying IIA. There seems to be some confusion among investment commentators as regards the scope of application of this exception. Some take it as “exclusionary wording […] that effectively emaciates ostensibly progressive provisions” and argue that the “final caveat severely undermines the whole concept of a regulatory exception by superimposing the terms of the BIT”.\(^ {787} \) In consequence, they submit that “[a]t the very best it is redundant, since laws and regulation not inconsistent with the BIT would appear to be permissible anyway.”\(^ {788} \) However, this argumentation is based on a flawed understanding of the text of the exception. A careful reading reveals that the exception does not

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\(^{786}\) *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Notice of Arbitration, 21 November 2011. For a more detailed account see *supra* Chapter One, Part B, III. For a detailed study on the interplay between public health and international investment law see *Vadi*, Public Health in International Investment Law and Arbitration (2012).


apply to laws and regulations consistent with the IIA, which indeed would be circular, but rather to IIA-inconsistent measures undertaken to secure compliance with such IIA-consistent laws and regulations. In other words, measures undertaken to secure compliance with IIA consistent laws and regulations should not trigger compensatory duties even if the individual measure in question would violate an IIA provision.\footnote{See Meckenstock, Investment Protection and Human Rights Regulations, p. 132 (2010).}

An example of a measure that is based upon laws that are \textit{per se} not inconsistent with an IIA could be a government policy aimed at the creation and operation of national social benefits schemes.\footnote{The following example is taken from Peterson, Bilateral Investment Treaties and Development Policy-Making, IISD, pp. 30-31 (2004). It was also referenced in Meckenstock, Investment Protection and Human Rights Regulations, pp. 107-108 (2010).} For instance, a State could adopt a law which introduces a nationwide public health scheme. Such a law would not be inconsistent \textit{per se} with the BIT. However, measures taken to implement this law may have a negative impact on the market share of foreign investors that are engaged in the sale of private health insurance. These investors could then seek compensation for indirect expropriation or for violations of the FET standard.\footnote{See Peterson, Bilateral Investment Treaties and Development Policy-Making, IISD, pp. 30-31 (2004). With reference thereto also Meckenstock, Investment Protection and Human Rights Regulations, pp. 107-108 (2010).}

### 3. Conservation of Living or Non-Living Exhaustible Natural Resources

The conservation of exhaustible natural resources is another permissible objective expressly recognized by Article XX lit. (g) GATT, but not by Article XIV GATS which is lacking a matching exception. This is important and needs to be considered by States contemplating the inclusion of WTO-based general exceptions since, together with the protection of human, animal or plant life or health, the exception has been used as a gateway for the introduction of environmental considerations into the WTO system despite the fact that an explicit environmental exception is lacking.\footnote{See Matz-Lück/Wolfrum, in: Wolfrum, et al. (eds.), Max Planck Commentaries on World Trade Law, Vol. 5, WTO – Trade in Goods, Article XX (g) GATT, ¶2 (2011).} States

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790 The following example is taken from Peterson, Bilateral Investment Treaties and Development Policy-Making, IISD, pp. 30-31 (2004). It was also referenced in Meckenstock, Investment Protection and Human Rights Regulations, pp. 107-108 (2010).
that plan to incorporate by reference only Article XIV GATS without making amendments should be mindful that they cut themselves out of this opportunity.

It is further noteworthy that Article XX lit. (g) GATT only speaks of “exhaustible natural resources”, the conservation of which may be justifiable. The meaning of “exhaustible” is straightforward. It includes all resources that can be depleted. What may qualify as a “natural resource” is more intricate. To clarify their intentions, investment treaty drafters have added that such resources may be both “living and non-living”. This clarification is rooted in the jurisprudence of the WTO Appellate Body, which has also held that the exception applies not only to “mineral” or “non-living” resources but also to “living species which may be susceptible to depletion, such as sea turtles.” In doing so, the Appellate Body particularly highlighted the relevance attached to living resources as an environmental resource. Of significance in investment law may also be the interpretation undertaken by the Panel in US – Gasoline, which ruled that clean air may also qualify as exhaustible natural resources under the exception.

The significance of the exception lies in the range of environmental considerations that may be attached to it. A practical example is the case of Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica. The investor in this case had purchased a property of over thirty kilometers of Pacific coastline to develop it as a tourist resort and residential community. Subsequently, Costa Rica issued an expropriation decree for the property in order to add it to a national park and contribute to the preservation of rare species. Since the investor did not agree with the amount of compensation offered by Costa Rica, it brought an investment claim.

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796 Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, ICSID Case No. ARB/96/1, Award, 17 February 2000.
797 In the award, the tribunal made the infamous statement that “[e]xpropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a
4. Protection of Public Morals

IIA general exception clauses that incorporate Article XX GATT or Article XIV GATS fully or in relevant part entail an exception from investment rules for the “protection of public morals”.\(^{798}\) *Sui generis* exception clauses sometimes also use the essentially synonymous phrasing “public morality”.

In contrast to health-related objectives, public morals are a highly relational concept.\(^{799}\) They have been defined in WTO jurisprudence as “standards of right and wrong conduct maintained by or on behalf of a community or nation.”\(^{800}\) In other words, the content of “public morals” depends on the predominant moral values shared by a certain society at a certain point in time.\(^{801}\) Consequently, no international standard of what constitutes “public morals” exists and the standard differs from country to country. The term may also encompass human rights and social standards if they are part of the host State’s legal order.\(^{802}\) The concept’s inherent relativity requires tribunals to grant States a considerable margin of appreciation. While States that want to rely on the public morals exception are required to produce evidence that the adopted measures are taken in response to moral concerns that indeed exist in their society, tribunals

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\(^{798}\) Article XX lit. (a) GATT and Article XIV lit. (a) GATS. On these see generally *Feddersen*, 7 Minnesota Journal of Global Trade 75, 78 (1998); *Charnovitz*, 38 Virginia Journal of International Law 689 (1997-1998).


should generally accept such domestic determinations and adopt a deferential standard of review.803

There are several ways that impairment of foreign investment could be introduced on the basis of public morals. As a practical example, in *International Thunderbird Gaming Corporation v. The United Mexican States*, a Canadian investor was engaged in the business of operating gaming facilities in Mexico.804 Although the investor had received governmental assurances to the contrary, these machines were later declared illegal gambling equipment and the facilities were closed down upon which the investor filed an investment claim against Mexico. Mexico defended its regulation as reflecting its national views on public morals. Other State measures that are conceivable and may involve questions of public morals include measures relating to alcoholic beverages, sex, slavery, torture of animals and drug abuse.805

5. Maintenance of Public Order

The maintenance of public order is a permissible objective mainly found in IIA general exceptions modeled on Article XIV GATS, but which also features in more common IIA security exception provisions and hybrid provisions incorporating both security and more limited public welfare objectives.806 In the WTO realm, the term has been defined as referring “to the preservation of the fundamental interests of a society, as reflected in

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806 In particular for the latter two types of clauses, for which recourse to WTO jurisprudence may be of more limited value, the arbitrations involving the Argentine financial crisis and academic commentary dealing with security exception clauses may be illustrative for the meaning of public order, see supra Chapter Five, Part
public policy and law” that relate to “standards of law, security and morality”. In contrast to more serious threats of war or armed conflict, which may threaten a State’s existence, the security dimension of the public order exception only relates to law-enforcement related activities to maintain the rule of law within a State in peacetime.\textsuperscript{808} Clauses drafted on Article XIV GATS often also incorporate footnote 5, which limits the invocation of the public order exceptions to instances “where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” An identical footnote was also part of the public order exception in the ultimately unsuccessful Multilateral Agreement on Investment,\textsuperscript{809} on which there appears to have been consensus that the application of a State’s criminal laws, anti-terrorist measures, and money laundering regulation qualify under the exception.\textsuperscript{810} In the context of security exception provisions, the tribunals have also ruled that an economic crisis may give rise to a threat to public order.\textsuperscript{811}

6. Protection of National Treasures of Artistic, Historic, or Archaeological Value

Article XX lit. (f) GATT covers measures that are “imposed for the protection of national treasures of artistic, historic or archaeological value”. In the investment context, it expresses the fundamental right of States to take measures to protect its national treasures, and ultimately to preserve its cultural identity, even if they conflict with their IIA obligations. The exception is best understood in a broad sense to encompass everything that is 


\textsuperscript{808} See VanDuzer/Simons/Maveda, Integrating Sustainable Development into International Investment Agreements, p. 231 (2012).


\textsuperscript{811} See supra Chapter Five, Part A, II, 1.
commonly referred to as “cultural property”. The only prerequisite seems to be that the cultural property to be protected must entail a temporal element. Contemporaneous cultural products such as films, music, or literature are probably not covered by the exception’s scope.

The exception’s utility in the investment context is demonstrated by the example of Parkering-Compagniet AS v. Republic of Lithuania. In this case, a Norwegian investor participated in a bid to build a parking area in the historical center of Vilnius, Lithuania, which is listed as cultural heritage site of outstanding universal value in the World Heritage List. The project was rejected on cultural heritage grounds and another project was selected that did not foresee excavations under the Cathedral. In reaction, the investor filed an investment claim against Lithuania, alleging discrimination. Although the investors’ claims were dismissed in their entirety by the tribunal, the existence of an exception provision might have deterred the investor from bringing a claim in the first place.

7. Protection of the Environment

Neither Article XX GATT nor Article XIV GATS contain an explicit commitment to the protection of the environment as one of their permissible objectives. This absence stands in marked contrast to the insistence of civil society on and the ensuing demand of States for appropriate regulatory discretion when it comes to the pursuance of environmental policies. To a certain degree, this shortcoming is remedied by the introduction of environmental considerations through Article XX lit. (b) and lit. (g) GATT. The options under Article XIV GATS are more limited since it only includes an exception for the protection of human, animal or plant life or

813 See Zleptnig, Non-Economic Objectives in WTO Law, p. 181 (2010).
814 Parkering-Compagniet AS v Republic of Lithuania, ICSID Case No ARB/05/8, Award, 11 September 2007.
815 The list is available at http://whc.unesco.org/en/list (last visited 12 November 2017).
health to which environmental considerations may be attached, but no excep-
tion for the conservation of natural resources.

Some States therefore include an explicit exception for the protection of the environment in their *sui generis* clauses. This has the advantage that all measures taken for environmental purposes are justifiable and not only those that qualify as either protecting human, animal or plant life or health or that conserve natural resources.

8. Other Explicit Permissible Objectives

The remaining permissible objectives of Article XX GATT and Article XIV GATS that deal with trade in gold and silver (Article XX lit. (c) GATT), products of prison labor (Article XX lit. (e) GATT), obligations under international commodities agreements (Article XX lit. (h) GATT), efforts to ensure essential quantities of materials to a domestic processing industry (Article XX lit. (i) GATT), products in general or local short supply (Article XX lit. (j) GATT), the equitable or effective imposition or collection of direct taxes (Article XIV lit. (d) GATS), or double taxation agreements (Article XIV lit. (e) GATS) are not discussed in this section. They have been, and still are, of limited practical importance in international trade law and are similarly unlikely to yield much importance in international investment law.

II. The Nexus Requirements

If a measure is found to fall under the scope of the exception provision, a tribunal will have to examine whether it was also sufficiently linked to the pursued public interest. The necessary relationship between the State measure and the permissible objective sought by the former is indicated by the nexus requirement.

Chapter Five The Interpretation of General Exception Clauses

1. Necessary

The nexus requirement that a measure must be “necessary” for the achievement of the permissible objectives is overwhelmingly used in IIA general exception clauses. In part, other nexus requirements in WTO model clauses are even replaced with the necessity threshold during treaty negotiations.\footnote{818} The WTO Appellate Body has developed a complex test to evaluate whether a measure is “necessary” to pursue a permissible objective, which may guide the interpretation of investment tribunals.

a. The WTO Approach to Necessity

The condition that the measure in question must be “necessary” to achieve the objective sought appears in Article XX lit. (a), (b) and (d) GATT and Article XIV lit. (a), (b) and (c) GATS and in IIA general exception clauses modeled on them.

Generally, the WTO Appellate Body has clarified that necessity forms an objective rather than a subjective standard.\footnote{819} However, a State’s subjective characterization of the measure as evidenced for instance by statutory texts, legislative history or governmental pronouncements can also be relevant in the assessment.\footnote{820} As to the meaning of “necessary”, the WTO Appellate Body found on numerous occasions the term is situated on a continuum which stretches between “indispensable” at the one end and “making a contribution to” at the other end. According to the Appellate Body, the meaning of “necessary” lies considerably closer to the pole of “indispensable” than to the opposite pole.\footnote{821}

\footnote{818} See supra Chapter Two, Part B, III.
The Appellate Body has developed a detailed two-step test to determine whether a measure is “necessary”. First, the Appellate Body embarks upon a weighing and balancing of the degree to which the measure achieves its objective against the trade restrictiveness of the measure in light of the importance of the objective sought. In order to do so, it first identifies the importance of the objective pursued by the challenged measure. This is probably the most controversial element of the test since it seems to accord a considerable amount of discretionary power on a WTO tribunal to second-guess the level of protection the responding State deemed appropriate for a given objective. However, the case practice of the WTO Panels and the Appellate Body suggest that an objective will be held to be of high importance once it falls within an explicit exception entailed in the clause.822

Secondly, the degree to which the challenged measure contributes to the achievement of the objective has to be established. A contribution to the achievement of the objective exists “when there is a genuine relationship of ends and means between the objective pursued and the measure at issue”823 or, if an actual contribution is not immediately observable in the short term, if the measure is “apt to produce a material contribution.”824 This approach recognizes the uncertainty that may exist as regards the assessment of the effect of a public policy measure and affords considerable


deference to the projections of the responding State. Moreover, the suitability of the measure to produce a contribution can be established by a quantitative or a qualitative test.\textsuperscript{825}

Thirdly, the degree to which the measure restricts international trade has to be assessed.\textsuperscript{826} This determination is not to be equated with the degree to which the measure is inconsistent with GATT/WTO obligations, but is to be assessed by considering the measure’s factual impact on imports.\textsuperscript{827}

The results of these enquiries are then weighed and balanced against each other in light of the importance of the objective. The more a measure contributes to its objectives and the less trade-restrictive it is, the likelier it qualifies as “necessary” under the weighing and balancing part of the test.\textsuperscript{828} Considering the competing objectives in light of the importance of the objective sought ensures that an appropriate margin of appreciation is applied in this analysis.\textsuperscript{829}

If a measure preliminarily qualifies as being “necessary”, in a second step an analysis as to whether alternatives to the challenged measure exist that are equally effective and reasonably available but less trade restrictive has to be undertaken.\textsuperscript{830} If an alternative WTO-consistent measure is reasonably available, the measure in question is not necessary. If no WTO-
complaint is reasonably available, the measure among the reasonably available ones has to be picked that is the least inconsistent with WTO obligations. 831 The complaining State has to identify less restrictive alternatives to which the responding State must show that the alternative is either not reasonably available or does not achieve the same level of protection. 832 An alternative will not be deemed reasonably available if it is merely theoretical in nature, the State is not capable of taking it, or the measure imposes an undue burden in the form of prohibitive costs or technical difficulties on the responding State. 833 Importantly, the alternative measure proposed by the complaining State must meet the desired level of protection of the responding State. 834 As the Appellate Body put it “WTO Members have the right to determine the level of protection they consider appropriate” as regards the objectives set out in Article XX GATT (and Article XIV GATS). 835

b. The WTO Approach to Necessity in International Investment Law

In comparison to recourse to WTO jurisprudence on permissible objectives, the question whether surrounding investment tribunals should take guidance from WTO case law on the necessity nexus requirement is con-

siderably more controversial. In particular, the question concerning how much deference investment tribunals should grant to host States in their necessity enquiry is heavily contested. The problem is approached against the background of the above conclusions that WTO jurisprudence is generally appropriate to guide the interpretation of IIA general exception clauses and that international investment law, in general, is more intrusive on a host State’s regulatory sovereignty that international trade law.  

As outlined in the last section, the importance of a regulatory objective is considered relevant in the weighing and balancing test developed by the WTO Appellate Body to establish necessity. When taking guidance from this test, investment tribunals should be mindful of the Panel’s statement in *US – Gasoline* that “it [is] not the necessity of the policy goal that [is] to be examined, but whether or not [the challenged measure] is necessary […]” to achieve the host State’s objectives.  

In other words, what a tribunal should not do is conduct a *de novo* review of whether the arbitrators subjectively would have pursued the same objectives, thereby effectively second-guessing a host State’s decision under the pretext of assessing the measure’s objective’s importance. Only this way does the tribunal adequately preserve the host State’s sovereign right to decide which policy goals it wants to pursue. Therefore, investment tribunals should generally demonstrate a high degree of deference in their enquiry into the importance of a measure’s objective.

As regards the question on whether alternative measures are reasonably available, tribunals should be mindful that not every alternative measure is to be considered, but indeed only those that meet the host State’s desired level of protection. Moreover, tribunals are also required to examine whether the pursuance of an alternative measure would lead to an “undue burden”, which may be assessed in – among others – financial terms. Here, tribunals need to take into account that the host State may be better placed to evaluate the efficacy and feasibility of a measure.

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836 For both conclusions see *supra* Chapter Five, Part B, II, 4.
2. Related to / Relating to

Sometimes, general exception clauses stipulate that the State measure needs to “relate to” or be “relating to” the permissible objective. In particular, the term “relating to” features prominently in Article XX lit. (g) GATT and investment exceptions modeled on or incorporating the clause. The GATT Panel in Canada – Herring and Salmon decided that the terminology “relating to” was not equivalent to the term “necessary” and therefore must mean something different. The Panel went on to interpret “relating to” as requiring that the contested measure must be “primarily aimed at” the permissible objective to be justifiable. The WTO Appellate Body upheld this reading in US – Gasoline, highlighting the “substantial” and not merely incidental or inadvertent relationship” between means and ends pursued. In US – Shrimp, however, the Appellate Body avoided the “primarily aimed at” language and instead required a “reasonable” relationship between the measure and the pursued objective. In that case, a “close and real” relationship between the measure and the aim that was “every bit as substantial” as the one in US – Gasoline was deemed sufficient. Therefore, the two requirements under the “relating to” test seem to be, first, the existence of a causal relationship between the measure and the objective pursued and, second, the “substantial”, “close and real”, or “reasonable” nature of the relationship. Due to the split in the jurisprudence, it remains to be seen which approach will become the dominant one in the future. Compared to the “necessity” threshold, the “relating to” test is less demanding and therefore more deferential to a State’s sovereignty.

841 “Relating to” language can also be found in Article XX lit. (c) GATT and Article XX lit. (e) GATT. However, the respective exceptions for the imports and exports of gold and silver and products of prison labor have not attracted much attention and have not been the subject of trade dispute settlement thus far.


3. Imposed for

The requirement that a contested measure must be “imposed for” the permissible objective only appears in IIA general exceptions in connection with the “protection of treasures of artistic, historic or archaeological value”. To date, however, there exists no WTO case law interpreting this nexus requirement. Nevertheless, one may ascertain that “imposed for” probably constitutes a less onerous requirement than “necessary for”. According to its ordinary meaning, a measure that is “imposed for” an objective does not necessarily have to be “necessary” for its achievement. In other words, while “imposed for” seems to require that the measure must be aimed at the objective, the measure does not have to qualify as the least restrictive means available to the host State.\textsuperscript{847} The test for this nexus requirement hence comes close to the interpretation accorded to the wording “relating to” in early GATT cases.\textsuperscript{848}

4. Designed and Applied to / for

Other \textit{sui generis} general exception provisions entail the requirement that the measure has to be “designed and applied” for the permissible objective. Again, this nexus requirement does not appear in Article XX GATT or Article XIV GATS so that the utility of WTO jurisprudence in its construction is limited. Starting again from the ordinary meaning of the terms, the use of “designed” suggests that the State must have specifically tailored the measure to achieve the sought objective. However, that alone is insufficient. The State must have also “applied” the measure to achieve the aim, which suggests that the measure must also have been implemented accordingly to qualify under the exception.

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5. Directed to

A number of *sui generis* general exception provisions require that the measure must be “directed to” the permissible objective. This nexus requirement is not contained in the WTO model provisions, which means that investment tribunals will consequently not be able to rely on WTO jurisprudence in its construction. It is safe to assume that, in comparison to the more common necessity threshold requirement, the phrasing “directed to” constitutes a more lenient nexus standard. Its ordinary meaning suggests that a governmental measure is permissible as long as it is intended by the State to pursue the legitimate objective. Its interpretation thus resembles the possible interpretation of the “imposed for” nexus standard and the interpretation accorded to “relating to” in *Canada – Herring and Salmon*, where the WTO Appellate Body held that a measure must be “primarily aimed at” the achievement of the permissible objective to be justifiable.

6. Which it Considers Necessary

One IIA employs “which it considers necessary” language for the five permissible objectives of its general exception clause. This formulation’s significance lies in the fact that it makes the clause self-judging, making the State the sole arbiter of the question of whether the conditions for the invocation of the exception are fulfilled. Tribunal scrutiny is limited to a mere good faith review. The language is borrowed from and often used in security exception clauses, which allow the State to derogate from its investment obligations in case of a threat to public order, international peace and security, or to protect its own essential security interests. In instances such as these, which pose a threat to the very existence of the State itself, it may be understandable to provide the State with the opportunity to take the measures it considers necessary to end the peril without being second-guessed by a tribunal with the advantage of hindsight. Since the absence of an effective judicial review mechanism increases the danger of abusive


850 Article 5 of the Framework Investment Agreement in APTA Participating States (signed 15 December 2009).
invocations of the clause, however, the inclusion of such language calls for exceptional reasons. It is at least doubtful whether these reasons are present in the context of the pursuance of non-economic policy goals usually entailed in general exceptions, and most States – with the exception of the APTA members – do not seem to hold this view and thus refrain from using self-judging language.

7. No Nexus Requirement

On the rare occasion, IIA general exception clauses do not use any particular nexus requirements and employ the terms “to” or “for” to denote the required degree of connection between means and end. This signifies that a simple causal link between measure and objective suffices for successful reliance on the exception.

III. The Introductory Clause (“Chapeau”)

After having established that the proposed measure is aimed at achieving a permissible objective and is adequately connected to it as stipulated by the nexus requirement, a tribunal will have to assess the measure against the introductory paragraph (or “chapeau”) preceding the majority of general exception provisions drafted on the WTO model provisions.

The chapeau’s main purpose and function is to prevent the abusive invocation of the exception provision. Its current form originates in Article XX GATT, was later included in Article XIV GATS and is now regularly transplanted into IIA general exception clauses modeled on the WTO provisions. Its requirements, according to the WTO Appellate Body, emanate from the doctrine of good faith, recognized as general principle under public international law, which provides a safeguard against any misuse or abuse of the general exception provision.851 The WTO Appellate Body infers from this that there is a “need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the ex-

ceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand.\textsuperscript{852}

The task of interpreting the introductory clause has thus been characterized as “the delicate one of locating and marking out a line equilibrium between the rights of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions […] of GATT 1994.”\textsuperscript{853} The WTO Appellate Body went on to explain that this “line of equilibrium” is meant to ensure that “neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.”\textsuperscript{854}

Transported to the investment world, the difficulty in the interpretation of the introductory clause thus lies in the reconciliation of the stipulated conditions against abusive invocation with the rights of the host State to enjoy its regulatory flexibility in the policy areas covered by the general exception clause.

a. Application of the Measure

As emphasized by the WTO Appellate Body in \textit{United States – Gasoline}, under the \textit{chapeau} it is not the measure as such which is be assessed but rather the manner in which the measure was applied in the case at hand.\textsuperscript{855}

This is important to note since it means that the assessment of the challenged measure is different under the introductory clause than the enquiry as to whether a State measures qualifies as furthering a permissible objective under the individual exception sub-paragraph. The different focus may, for instance, mean that a legislative measure that provides for ample flexibility in its application may pass scrutiny under the exception para-


graph, but that the actual implementation of the legislation does not meet the threshold of the introductory clause.\textsuperscript{856} As a result, the State measure would not be justifiable under the general exception clause.

b. Arbitrary or Unjustifiable Discrimination

After having established that there is a difference in treatment in the application of a measure, a tribunal will have to ascertain whether this discrimination was unjustifiable or arbitrary. What is considered to be “unjustifiable” or “arbitrary” in WTO jurisprudence is less clear. Academic commentary on the issue usually give an account of a number of cases and factual circumstances in which the Appellate Body found unjustifiable or arbitrary discrimination.\textsuperscript{857} These findings are highly fact-specific and therefore of limited probative value in investment law.

Picking out the more general points, discrimination will be deemed “arbitrary or unjustifiable” if it is not rationally connected to the objective that the challenged measure is intended to pursue. Therefore, the analysis focuses on the cause or rationale of the discrimination as opposed to its effect. Its rationale must be considered in light of the objectives listed in the exception sub-paragraphs of Article XX GATT or Article XIV GATS.\textsuperscript{858} This means that discriminatory treatment that bears no relationship to the objective pursued by the contested measure, but is based on different causes, cannot be justified under the \textit{chapeau}.\textsuperscript{859} This is to ensure

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\item \textsuperscript{857} See, e.g., Zlepnig, Non-Economic Objectives in WTO Law, pp. 288-289 (2010).
\item \textsuperscript{859} \textit{Brazil – Measures Affecting Imports of Retreated Tyres}, Appellate Body Report, WT/DS332/AB/R, adopted on 17 December 2007, ¶232. The discriminatory treatment in this case was motivated by Brazil’s desire to comply with a MERCOSUR ruling while the contested measure was intended to further the protection of public health and the environment.
\end{enumerate}
\end{footnotesize}
that measures that derogate from WTO obligations are applied consistently.\textsuperscript{860}

For example, legislation that generally qualifies as being necessary for the protection of public health but differentiates in its individual application on two investors on the basis of non-health considerations would amount to unjustifiable or arbitrary discrimination and thus would fail the \textit{chapeau} test.

c. Between Investments or between Investors (Where Like Conditions Prevail)

Most IIA general exception clauses clarify that the discrimination needs to take place between investments or between investors, sometimes complemented with the words “where like conditions prevail”. This is a rather straightforward clarification that the relevant comparators in the discrimination enquiry are (like) investments or investors. More obscure are clauses stipulating that the relevant comparators are “countries”, “States”, or “Parties” “where like conditions prevail”. Considering that general exceptions are applied to measures enacted by a single State within its own borders, there is no apparent link to the connection of conditions in other countries.\textsuperscript{861} It is conceivable that the language relates to nationality-based discrimination of foreign investors. However, this would already be covered by the term “investors”, which encompasses discrimination between two foreign investors as well as between one foreign and one domestic investor. The meaning of the text thus remains obscure and should therefore be abandoned.

d. Disguised Restriction of International Trade (or Investment)

WTO case law on the interpretation of the notion of disguised restriction of international trade is rare. In \textit{US – Gasoline}, the Appellate Body held that concealed hindrances do not exhaust the term “disguised restric-

Rather, a disguised restriction exists if a measure that formally meets the requirements of the general exception clause in actual fact is discriminatory or designed to pursue a trade-restrictive objective. Accordingly, the three groups of measures which have been found to fall under this requirement in the jurisprudence of the WTO Appellate Body are the following:

- Measures that are not published or announced by the competent authorities;
- Measures that constitute disguised discrimination; and
- Measures whose “design, architecture and revealing structure” give away their protectionist character.

These principles are readily transportable to the interpretation of the chapéau of investment general exception clauses, which use language such as a “disguised restriction on investors or investments”, a “disguised restriction on investment of investors of the other Party” or a “disguised restriction on investment flows”. It is noteworthy that some IIA general exceptions still employ the terminology “disguised restriction on international trade”. The same holds true for IIA general exceptions that merely incorporate the WTO provisions by reference. The purpose of this terminology is unclear. Considering that it may become a back door to investors raising trade law issues to confront a measure before an investment tribunal, which, it may safely be assumed, is not intended by the State Parties, it should be abandoned for more investment-specific language.

866 Particularly Canadian IIAs.
3. The Relevance of the Chapeau to the Analysis of Nexus Requirements

José Alvarez and Tegan Brink point out that the existence of the *chapeau* may have an impact upon the interpretation accorded to the necessity requirement. The assumption seems to be that the necessity test does not need to be overly strict itself, for instance by requiring that a measure does not amount to discrimination to be necessary, since there is another safeguard against arbitrary or unjustifiable discrimination on the level of the *chapeau*. This argument is not necessarily restricted to the necessary nexus requirement but could be put forward for the interpretation of any other nexus requirements. In consequence, Alvarez and Brink caution that any comparative exercise needs to be mindful of this fact and must examine whether principles developed in the jurisprudence on Article XX GATT or Article XIV GATS can properly inform the interpretation of clauses that do not contain comparable *chapeau* requirements. This observation may be of relevance for *sui generis* and other IIA general exception clauses that omit a *chapeau* paragraph or stipulate other good faith or non-discrimination requirements.

The assumption that the *chapeau* may have an impact on the interpretation of the necessity requirement has a certain appeal. However, as demonstrated by Andrew Mitchell and Caroline Henckels, there is little evidence in WTO jurisprudence to support this claim. In fact, the WTO Appellate Body has used the general exceptions’ necessity test to inform its interpretive approach to other WTO provisions, for instance in the SPS and TBT Agreements, that feature a necessity requirement but no *chapeau* clause. They therefore come to the conclusion that “although sensitivity to context is required, the presence of the *chapeau* does not preclude the

868 See *Alvarez/Brink*, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011 319, 345 (2011). They submit this argument in the context of exploring whether the interpretation of necessity requirements in IIA security exception may be guided by WTO jurisprudence on general exceptions. However, the same question may appear in the context of IIA general exceptions that do not stipulate *chapeau* requirements.


871 See *supra* Chapter Two, Part C, II, 3, b.

WTO necessity test informing the approach taken by investment tribunals."\(^{873}\) While one may agree with this conclusion, investment tribunals should nevertheless pay attention to the fact that an influence of the *chapeau* on the amount of deference accorded under the nexus requirement ultimately cannot be ruled out.

IV. Notification Requirements

Sometimes, States draft their general exception clauses with notification requirements as further safeguards against abusive invocation.\(^{874}\) One can distinguish between two different forms of notification requirement, which feature varying degrees of strictness. The simplest form can be found for instance in Article 15(3) of the Japan-Colombia BIT, which reads as follows:

**Article 15 General and Security Exceptions**

1. [General exception provision]
2. [Security exception provision]
3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1, that does not conform with the obligations under this Agreement other than Article 12, that Contracting Party shall endeavor to, as soon as possible, notify the measure to the other Contracting Party.\(^{875}\)

While the paragraph stipulates the requirement that measures taken pursuant to the general exception clause need to be notified to the other State Party, its mandatory language “shall” is qualified by the verb “endeavor”, which does not place a definite legal obligation to inform the other State Party to the IIA on the State taking the measure. Rather, the State is only obliged to make an effort to inform the other State, which constitutes a

\(^{873}\) See *Mitchell/Henckels*, 14 Chicago Journal of International Law 93, 137 (2013). Their observations largely deal with IIA security exception clauses employing necessity requirements but not *chapeau* provision. However, they also apply to the case of IIA general exception clauses.

\(^{874}\) For details on this drafting practice, see *supra* Chapter Two, Part C, II, 3, c. See also *Salacuse*, The Law of Investment Treaties, p. 343 (2010) for a similar observation.

\(^{875}\) Article 15 of the Japan – Colombia BIT (signed 12 September 2011).
considerably weaker obligation to act as opposed to an obligation to achieve a certain result.

A more rigorous example of a notification requirement is found in Article 18(3) of the Japan-Laos BIT, which provides as follows:

“A more rigorous example of a notification requirement is found in Article 18(3) of the Japan-Laos BIT, which provides as follows:

"Article 18 General and Security Exception Clauses
3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 of this Article, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 13, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of the measure; (c) legal source of the measure; (d) succinct description of the measure; and (e) purpose of the measure."

Notification requirements of this type of clause are much more sophisticated compared to the prior provision. They require the State Party that includes the clause to provide the other Contracting Party with details on a number of elements of the measure, including a succinct description of the measure, its purpose and legal source, the infringed obligations under the treaty, and the affected industrial sector or sub-sector. In light of the virtually limitless number of variations in which a regulatory State measure may interact or adversely affect foreign investment, the required richness of detail is indeed prudent to enhance transparency of the domestic legal framework and prevent abuses. The expedient nature (“shall”) of the notification, which has to take place either “prior to the entry into force of the measure or as soon thereafter as possible” adds an additional layer of protection against abuses.

D. The Impact of Inconsistent Investment Treaty Practice

A last general interpretive issue raised by the inclusion of general exception clauses is the impact of inconsistent investment treaty practice on the

interpretation process. As discussed above, States have only recently begun to incorporate such clauses into their IIA programs. It follows that several States have IIAs currently in force that contain similar or even identical treaty language in their substantive provisions but only sporadically subject their application to a general exception provision. Examples are the treaty programs of Canada and Mauritius. To date, 36 out of 38 Canadian FIPAs contain a general exception provision, which means that two FIPAs do not. Likewise, 28 out of 46 Mauritian BITs include general exceptions leaving 18 Mauritian BITs without a respective clause. At times, States also contemporaneously negotiate IIAs of which some include general exceptions while others do not. For instance, in 1997 Mauritius concluded four BITs, with Indonesia, Mozambique, Pakistan, and Portugal. The treaties with Indonesia, Mozambique, and Pakistan include a general exception provision for the protection of public health and the prevention of diseases and pests in animals or plants, while the contemporaneously concluded BIT with Portugal does not entail a respective provision. Save for the omission or inclusion respectively, the protection accorded by the four BITs is essentially identical.

Such inconsistent treaty practice may pose different interpretive difficulties. The first question relates to the possible influence of the inclusion or omission respectively of general exception clauses on the interpretation of other treaty disciplines in the same IIA. The second and related interpretive problem raised by inconsistent treaty practice appears in the interpretation of two contemporaneously concluded and largely identical IIAs by the same State, of which one includes a general exception provision

877 See supra Chapter Two, Part A.
878 As a side note, while the majority of Canadian FIPAs include general exception clauses modeled on Article XX GATT, the general exception provision of NAFTA (Article 2101), to which Canada is a party, does not apply to its investment Chapter 11.
883 Article II(3) of the Mauritius – Indonesia BIT.
884 Article 12 of the Mauritius – Mozambique BIT.
885 Article 12 of the Mauritius – Pakistan BIT.

Chapter Five The Interpretation of General Exception Clauses
while the other does not. This scenario begs the question whether the conscious or unconscious omission of general exception clauses in an IIA demonstrates intent on part of the host State to eliminate its sovereign right to regulate in the public interest by entering into the IIA to the extent that such regulation violates investment obligations.

I. The Impact of the Inclusion or Omission of General Exception Clauses in a Treaty on the Interpretation of Other Investment Disciplines in the Same Treaty

The first scenario relates to the impact of the inclusion or omission respectively of general exception clauses on the interpretation of other treaty disciplines contained in the same treaty. The underlying hypothesis is that tribunals might be tempted to avoid considerations of the host State’s regulatory purpose on the level of the obligation, for instance in their expropriation or national treatment inquiry, on the basis that such an assessment would render an existing general exception provision effectively redundant. The argument thus suggests that the presence of a general exception clause might result in a narrow interpretation of substantive IIA obligations discounting the public interest on the level of the obligation and only taking it into account on the level of the exception. Cases of two comparable treaties concluded by one State that contain practically identical treaty provisions, save for the inclusion or omission of the general exception clause may be particularly symptomatic.

According to Article 31(1) VCLT, the interpretation of a treaty must be undertaken in good faith and guided by the ordinary meaning of its terms, in their context, and in the light of the treaty’s object and purpose. The relevant context in the interpretation of IIA obligations includes the remaining text of the treaty, Article 31(2) VCLT. The rationale of the context’s inclusion in the interpretive process is that one treaty clause shall not be construed in a way that would contradict the meaning of another clause in the same treaty. There have indeed been numerous occasions in which investment tribunals have been influenced in their interpretation by the

context provided by other provisions in the same treaty.\footnote{888} The context may thus serve as the basis for an argument that the presence of an exception clause in a treaty, compared to an identical treaty with no general exception provision, provides informative context to the interpretation of other treaty disciplines contained in the same treaty.

That being said, IIA tribunals have also disregarded the context on occasion and held that some treaty provisions are sufficiently independent to stand alone without influence from the context of other provisions in the treaty.\footnote{889} As regards general exceptions, it is equally doubtful whether tribunals should take the presence of an exception clause as an argument to lower the standard of review with regard to the assessment of treaty violations to the effect that the regulatory purpose is discounted in the tribunal’s first order inquiry. There are good arguments to suggest that the regulatory purpose needs to be considered – where possible – already on the level of the obligation and not only on the level of the exception.\footnote{890} The first ties in with the exhaustive list of public purposes contained in general exception clauses. What on the one hand acts as immanent safeguard against overly broad or abusive invocation, on the other hand limits State action justifiable under the clause to the values enumerated therein. Given the difficulty of pursuing treaty amendments, States would hence be locked into a closed list of policies for a considerable time without the possibility of legitimately pursuing public welfare measures not covered by the clause’s scope if the regulatory purpose was ignored on the level of the obligation. This arguably cannot be the intention of States in including general exceptions, which aim to enhance and not limit the States’ regulatory flexibility. Moreover, as a more symbolic reason, it would be a mistake to force a State to justify one of its non-discriminatory and non-arbitrary measures taken for a legitimate public purpose before an internation-

\footnote{888} For a list of pertinent arbitrations refer to \textit{Weeramantry}, Treaty Interpretation in Investment Arbitration, ¶3.54, fn. 108 (2012).
\footnote{889} See \textit{Weeramantry}, Treaty Interpretation in Investment Arbitration, ¶3.57 (2012) who refers to the example of the tribunal in \textit{Salini Construttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan}, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, ¶128-130, which held that the meaning of the BIT’s umbrella clause is not affected by other provisions of the BIT.
\footnote{890} Similar arguments may be advanced to rebut the allegation that general exception clauses limited the regulatory flexibility that exists within the interpretation of the national treatment standard, see supra Chapter Four, Part D, III.
al tribunal. Instead, there should not even be the finding of a treaty violation calling for a justification in the first place. Such an interpretive approach would also not make general exception clauses effectively redundant. Even if the public interest is considered in the interpretation of some treaty obligations, general exception clauses retain their place in cases involving the violation of other treaty standards where the regulatory purpose is less relevant or not relevant at all in the first order inquiry. In addition, they act as complementary backstop if, for whatever reason, the tribunal does not consider the regulatory purpose in its treaty violation inquiry and thus guarantee greater legal certainty and regulatory flexibility. Inconsistent treaty practice should therefore not tempt tribunals to take the presence of general exceptions as having a narrowing impact on the interpretation of other obligations contained in the treaty.

II. The Interpretive Impact of the Inclusion or Omission of General Exception Clauses Across Different Treaties in the Same Treaty Program

The second scenario deals with the impact of inconsistent treaty practice on the interpretation of contemporaneous treaties out of which one includes general exceptions while the other does not. The question here is what effect the presence of general exception clauses in other treaties concluded by one of the treaty Parties may or may not have on the interpretation of the applicable IIA that lacks a respective provision. In other words, does the omission of a general exception clause in an IIA by a host State, which habitually incorporates such clauses in its other IIAs, create a presumption in favor of a narrow construction of substantive treaty obligations, leaving no room for public interest considerations, with the argument that the host State intentionally omitted a general exception clause, which would have acted as a special provision to which public interest consideration could have been attached, in this specific treaty?

Again, the VCLT serves as starting point of the examination. In particular, Article 31(2) and (3) VCLT give some guidance on when to take recourse to other international agreements or instruments in the interpretation of a treaty. According to these rules, another international agreement, rule or subsequent practice is only relevant for the interpretation of a treaty if either the Parties to both international agreements are identical, the rule is applicable in the relations of both Parties, or the subsequent
practice establishes agreement among them. Since BITs and most PTIAs are bilateral in nature, though, the treaty Parties of two or more IIAs necessarily differ. For the same reason, the treaty practice of one Party to the IIA at issue cannot usually be taken as to establish agreement between both Parties. Because of this disparity in the treaty Parties, other IIAs do not fall in any of the categories identified in Article 31(2) or (3) VCLT.

The lack of textual grounding in the VCLT notwithstanding, it is an empirical fact that international courts and tribunals frequently look at third treaties in order to ascertain the meaning of a term in the treaty in question although the treaty Parties disagree. Richard Gardiner generally discusses such comparative interpretive exercises under the heading of Article 31(3) lit. (c) VCLT and observes that it constitutes “such an accepted and established practice that it is hard to find any situation in which justification in terms of the [VCLT rules] has been presented. Correspondingly, investment tribunals have also used the antecedent or subsequent treaty practice of one or more State Parties to assist in the interpretation of their treaty without justifying this practice by recourse to the VCLT rules. For example, the tribunal in *CMS v. Argentina* arrived at the conclusion that the applicable security exception provision in the US –Argentina BIT was not self-judging by comparing the clause’s wording to the provisions found in the GATT and in other BITs. Reasons for tribunals possibly deeming the comparison particularly fruitful probably include that IIAs largely con-

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891 See Gardiner, Treaty Interpretation, p. 283 (2008). But see also Reinisch, in: Bungenberg, et al. (eds.), International Investment Law 372, 386 (2015), who discusses the relevance of other international investment agreements under the heading of “contextual interpretation” within the meaning of Article 31(1) VCLT.


893 *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶370. Other arbitrations in which the tribunal has taken recourse to third treaties include the following: *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, ¶34 (taking recourse to “most contemporary bilateral
tain similar or identical provisions, apply to essentially the same type of subject matters and are often based on a model treaty which can be referenced. 894

Other IIA tribunals have been more reluctant to compare IIAs, and, for instance, pointed to the difference in the treaty parties 895 or opined that the remaining BIT practice of both parties to the BIT at issue was of “limited probative value”. 896 As rightly pointed out by the tribunal in Siemens A.G. v. The Argentine Republic when comparing a model BIT with the textually different BIT at issue “it is not in [the tribunal’s] power to second-guess [the Argentina – Germany BIT drafters’] intentions by attributing special meaning to phrases based on whether they were or were not part of a model draft”. 897 In particular, the conscious or unconscious omission of a treaty provision cannot be testament to the intention of the State to completely relinquish its sovereign right to regulate by concluding an IIA. 898

Many reasons for the omission or inclusion of general exception clauses in only some treaties but not in others are conceivable, but not easily discernable from a comparison of the treaties’ texts. Influential for the decision

treaties” in the interpretation of the BIT at issue) and Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶¶292-293 (“[m]ost relevant to an assessment of state practice possibly bearing on the 1992 Bolivia-Netherlands BIT are those BITs which were negotiated contemporaneously in the early 1990s.”). For more examples refer to Weeramantry, Treaty Interpretation in Investment Arbitration, ¶¶3.119-3.132, in particular fn. 246, and ¶¶5.32-5.39, in particular fn. 71 (2012). Referencing the argumentation in Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶46 the same author rightly cautions in ¶3.121 that “[t]ribunals must thus be careful of attributing a meaning to a specific treaty from a State’s other treaties.”.

895 Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, ¶143.
896 Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶¶309-314. For more reasons of IIA tribunal to avoid reliance on other treaties as interpretive aid, see Weeramantry, Treaty Interpretation in Investment Arbitration, ¶5.37 (2012).
may be the negotiating power of the Parties as well as the circumstances surrounding the particular negotiations. The omission of a general exception provision may have been due to the objections of only one of the two treaty Parties to which the other Party reluctantly gave in. Such objections may have different reasons as well, including that the objecting State perceives its regulatory flexibility sufficiently safeguarded in the interpretation of treaty obligations. Andrew Newcombe suggests that another potential reason relates to the treaty making strategy of States. According to him, States may opt to include general exceptions when they expect to be the capital-importing country in relation to the other treaty Party in order to secure more regulatory flexibility for themselves as host countries. Conversely, States would be more likely to exclude such clauses in the negotiating process when they expect to be the capital-exporting country so as to not jeopardize the IIA protection of their nationals’ investments abroad.899 While this idea sounds plausible, this study’s statistical survey did not find evidence for such a negotiating strategy. In particular, the inclusion of a general exception provision does not seem to depend on the level of economic development of the treaty Parties or respective disparities between the Parties.900 Notwithstanding, whatever the reason of the omission of general exceptions in individual treaties may be, one cannot arrive at the conclusion that inconsistent treaty practice in a State’s BIT program is evidence of an intention of that State to eliminate its sovereign right to regulate by entering into an IIA without an exception clause.

The problem could also be framed as a matter of treaty silence on an issue that could have been included in the treaty. Dealing with the impact of such silence on the interpretation of a treaty, tribunals on occasion have had regard to similar treaties. In most instances, they dealt with the question under which circumstances terms may be implied that have not been explicitly included in the treaty.901 More insightful for the present purposes is the decision in Tokios Tokelés v. Ukraine in which the tribunal

900 See supra Chapter Two, Part A, III.
looked to similar treaties in order to make sense of the absence of a qualification to a treaty provision in the treaty at issue. That such a qualification had been included in other IIAs was regarded “as a deliberate choice of the Contracting Parties” not to impose limits on the provision in the treaty at hand.\textsuperscript{902} Adopting this argumentation, one could thus reason that the presence of general exceptions in other IIAs concluded by one of the Contracting Parties was evidence of its intention not to include gateways for the considerations of the regulatory purpose in the IIA at issue. However, tribunal should generally be reluctant to easily read silence as implying a certain intention on part of the State Parties. As the tribunal in \textit{Salini Construttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan} pointed out “silence may mean agreement or disagreement. It also may happen that no conclusion should be drawn from silence.”\textsuperscript{903} Similarly, arbitrator Georges Abi-Saab noted in his dissenting opinion in \textit{Abaclat v. Argentine Republic} that silence needs to be qualified with surrounding circumstances to entail legal consequences.\textsuperscript{904} As elaborated in the preceding paragraph, the reasons for the inclusion or omission of general exceptions may be widespread. They thus cannot be inferred from an alleged silence in a treaty text.

For the above reasons, the influence of inconsistent treaty practice as regards the inclusion or omission of general exceptions on the interpretation of other IIAs remains an, albeit interesting, hypothesis, but finds no basis in the rules of interpretation under the VCLT. Since it is furthermore impossible to deduce an intent on part of the treaty Parties, however framed, from the omission of general exceptions, inconsistent treaty practice should have no bearing on the interpretation of general exceptions at all.

\textsuperscript{902} Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, ¶36.
\textsuperscript{904} Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Abi-Saab, 28 October 2011, ¶168.
E. Conclusion

The plain fact that Chapter Five is the longest section of this study demonstrates that the inclusion of general exception clauses in IIAs poses a significant number of interpretation problems. Much of the uncertainty stems from the fact that tribunals have yet to address general exception clauses, but also from the lack of express stipulations on part of the State community as to how investment general exception clauses that are predominantly drafted on WTO model provisions should be interpreted.

As has been shown above, tribunals can be expected to approach general exceptions narrowly as derogations from the investment protection agenda once they are called to adjudicate upon them for the first time. This is regrettable and at odds with the intention of States that have included general exceptions in IIAs, which is to recalibrate the relationship between investment obligations and their right to regulate for the public interest that has been thrown out of balance in the eyes of many States. Ultimately, general exceptions are intended to enhance the host States’ regulatory flexibility.  

A better interpretive approach would hence be to steer a middle course and approach general exceptions without interpretive presumptions and only in accordance with the VCLT rules on interpretation.

In this respect, it seems advisable for investment tribunals to have regard to the wealth of WTO jurisprudence on the interpretation of general exception provision. Investment tribunals have frequently used WTO case law to inform their interpretation of treaty provisions that are shared across the two legal systems. They have taken particular care to examine the textual heterogeneity or homogeneity of the clauses, potentially differing objectives, and pertinent systematic differences across international trade and investment law to decide whether a cross-fertilization of the jurisprudence is in order. Applying these criteria to the case of general exceptions, one must come to the conclusion that, especially where comparable texts exist, recourse to WTO jurisprudence to guide the interpretation of investment general exception clauses is legitimate and appropriate. What is more, such recourse will also assist in fashioning a more uniform interpretive approach and hence mitigate fears of divergent rulings and growing legal uncertainty.

905 See supra Chapter Four, Part B, II.
The jurisprudence of WTO Panels and the Appellate Body as regards permissible objective, nexus requirements, and *chapeau* requirements may indeed provide helpful guidance in investment cases. Examples of conflicts between investment protection and the pursuance of the non-economic policy objectives that may be solved by general exceptions are readily apparent in past investment jurisprudence. Particular attention should be paid by tribunals to demonstrate the appropriate amount of deference when adopting the intricate necessity test of the WTO Appellate Body.

*E. Conclusion*