NATIONAL TREATMENT IN INTERNATIONAL ECONOMIC LAW: THE CASE FOR CONSISTENT INTERPRETATION IN NEW GENERATION EU FREE TRADE AGREEMENTS

APHIWAN NATASHA KING*

ABSTRACT

This Note will argue in favor of a unified approach to the National Treatment standard across international trade and investment protections in recently concluded European Union Free Trade Agreements ("FTAs"). In recent years, existing inconsistencies between international trade and international investment jurisprudence have become more pronounced as the two legal spheres increasingly intersect. In the specific context of the EU, innovations in several recently concluded FTAs, such as EU-Canada Comprehensive Economic and Trade Agreement ("CETA"), the EU-Vietnam FTA, the EU-Singapore FTA, and the draft EU-Japan Economic Partnership Agreement ("EPA"), exemplify the substantive and procedural convergence of these two areas of law. To this end, this Note will critique existing discrepancies between the WTO and the international investment law approach to the National Treatment standard, focusing principally on case law surrounding i) the "likeness" comparator, ii) the "less favorable treatment" standard, and iii) the relevance of regulatory purpose. In examining each of these principal elements, it becomes evident that disparities across these legal standards are no longer defensible in the context of the new generation EU FTAs. As such, these treaties provide a unique opportunity for future investment adjudicators to utilize comparative WTO and investment jurisprudence to minimize existing discrepancies and uncertainties arising out of shared trade and investment norms.

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* B.A. (University of Cambridge); L.L.M. candidate (Georgetown University Law Center). The author thanks Timothy Brightbill for comments on earlier versions of this paper.

I. Introduction

Questions as to the appropriate relationship between international trade and international investment law have intensified in recent years. Despite the shared roots of these disciplines in Friendship, Commerce, and Navigation ("FCN") treaties of the eighteenth-nineteenth centuries, it became common practice over the course of the twentieth century to negotiate separate international trade and investment agreements, resulting in divergent legal standards, dispute resolution procedures, and administrative institutions. As a result, international trade law has been marked by its multilateralism and centralization since the early days of dispute resolution under the General Agreement on Tariffs and Trade ("GATT"), accelerating with the establishment of the World Trade Organization and Appellate Body ("AB") in 1995. By contrast, the primary feature of international investment law has been its comparative fragmentation and decentralization, a byproduct of the *ad hoc* tribunals established across a network of more than 3,000 heterogeneous and predominantly bilateral treaties. Moreover, where the WTO has been primarily responsible for the administration of state-to-state international trade disputes, international investment law has been enforced by private claimants and administered by a variety of commercial arbitral institutions including the International Centre for Settlement of Investment

Disputes ("ICSID"), Permanent Court of Arbitration ("PCA") and International Chamber of Commerce ("ICC").

As a result, jurisprudential approaches have diverged significantly across the two legal fields, even in the case of near identical legal norms such as National Treatment ("NT") and Most Favored Nation ("MFN"). However, public dissatisfaction with investor-state arbitration has increasingly compelled leading supranational actors such as the European Union to look to the WTO in their attempts to reform their foreign investment law. This has been particularly evident in the EU's conclusion of several innovative Free Trade Agreements ("FTAs"), which have adopted a partially hybridized approach to international investment and trade law standards and dispute resolution mechanisms.[1]

This Note explores how these innovations in treaty formulation are increasingly problematizing existing inconsistencies in the interpretation of shared trade and international investment norms such as National Treatment. The first section of this Note will provide an overview of the current debate surrounding the appropriateness of greater integration between international trade and investment law, and will outline evidence of the growing convergence of substantive, procedural and institutional aspects of these legal regimes. The second section will specifically examine these developments in the EU context with a focus on FTAs such as the EU-Canada Comprehensive Economic and Trade Agreement ("CETA"), the EU-Singapore FTA, the EU-Vietnam FTA, and the draft EU-Japan Economic Partnership Agreement ("EPA"). Finally, the third section will engage in a comparative analysis of the jurisprudence of the WTO and investment arbitral tribunals to demonstrate how textual innovations in these EU FTAs support greater consistency in the interpretation of the National Treatment standard.

II. The Convergence of International Trade and Investment Law

Recent years have witnessed growing momentum for a more unified approach to the regulation of international trade and foreign

1. *See, e.g.*, Kyle Dylan Dickson-Smith, *Does the European Union Have New Clothes: Understanding the EU's New Investment Treaty Model*, 17 J. World Inv. & Trade 773 (2016); Maria Laura Marceddu, *The EU Dispute Settlement: Towards Legal Certainty in an Uneven International Investment System?*, 1 Eur. Inv. L. & Arb. Rev. 33 (2016); Stefanie Schacherer, *TPP, CETA and TTIP Between Innovation and Consolidation: Resolving Investor–State Disputes Under Mega-regionals*, 7 J. Int'l Disp. Settlement 628 (2016); Stephan W. Schill, *Editorial: US Versus EU Leadership in Global Investment Governance*, 17 J. World Inv. & Trade 1 (2016); Gus Van Harten, *The European Commission's Push to Consolidate and Expand ISDS: An Assessment of the Proposed Canada-Europe CETA and Europe-Singapore FTA*, 11 Osgoode Legal Stud. Res. Paper Series 1 (2015).

investment.[2] Scholars have noted many parallels between the two areas of law, including the active participation of states and multinational corporate businesses in both spheres,[3] as well as the uniquely enforceable remedies available across both types of public international law agreement.[4] Additionally, many academics have noted that the purpose of both investment and trade agreements is essentially to promote economic liberalization and global mobility through eliminating protectionism.[5] This is evidenced by the common proliferation of standards such as NT and MFN across International Investment Agreements ("IIAs"), Preferential Trade Agreements ("PTAs"), and numerous WTO treaties.[6] According to this perspective, the separate regulation of trade and investment is ostensibly a function of historical accident,[7] and greater coordination between the two fields would be desirable to minimize unnecessary duplication and inefficiency.[8]

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2. *See, e.g.*, Amokura Kawharu, *Punctuated Equilibrium: The Potential Role of FTA Trade Commissions in the Evolution of International Investment Law*, 20 J. INT'L ECON. L. 87 (2017); Stephen S. Kho et al., *The EU TTIP Investment Court Proposal and the WTO Dispute Settlement System: Comparing Apples and Oranges?*, 33 ICSID REV. 326 (2017); ANDREW D. MITCHELL, DAVID HEATON, & CAROLINE HENCKELS, NON-DISCRIMINATION AND THE ROLE OF REGULATORY PURPOSE IN INTERNATIONAL TRADE AND INVESTMENT LAW (2016); JÜRGEN KURTZ, THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS (2016); Simon Klopschinski, *The WTOs DSU Article 23 as Guiding Principle for the Systemic Interpretation of International Investment Agreements in the Light of TRIPs*, 19 J. INT'L ECON. L. 211 (2016); Fillipo Fontanelli et al., *Lights and Shadows of the WTO-Inspired International Court System of Investor-State Dispute Settlement*, 1 EUR. INV. L. & ARB. REV. 191 (2016); Frank J. Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT'L ECON. L. 861 (2015).

3. Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT'L L. 761, 766 (2015).

4. KURTZ, *supra* note 2, at 1.

5. Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. INT'L L. 35, 60 (2013); Federico Ortino, *The Investment Treaty System as Judicial Review*, 24 AM. REV. INT'L ARB. 437, 440-45 (2013).

6. Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT'L L. 1, 11 (2015).

7. Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID REV. 372, 402-04 (2014); Tomer Broude, *Investment and Trade: The 'Lottie and Lisa' of International Economic Law?* 4-7 (Hebrew U. of Jerusalem Leg. Stud. Res. Paper No. 10-11, 2011).

8. *See, e.g.*, Roberto Echandi & Maree Newson, *The Influence of International Investment Patterns in International Economic Law Rulemaking: A Preliminary Sketch*, 17 J. INT'L ECON. L. 847, 848 (2014); Andrea K. Bjorklund, *National Treatment*, *in* STANDARDS OF INVESTMENT PROTECTION 29 (August Reinisch ed., 2008); August Reinisch, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System, Some Reflections from the Perspective of Investment Arbitration*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION 108, 121 (Isabelle Buffard et al. eds., 2008).

The opposing view, however, is that greater integration between trade and investment is unsuitable due to the differing functions and objectives of each legal regime. According to this view, international trade law is primarily concerned with the overall efficiency of markets and the "public good,"[9] where international investment agreements primarily protect individual investors by guaranteeing fitness of economic conditions in host states.[10] The aim of trade disputes is thus to hold states to their prior economic commitments, whereas the aim of investment disputes is to realize the rights of investors through quasi-contractual warranties.[11] This disparity arguably supports the maintenance of different dispute resolution mechanisms and remedies[12] as well as differing jurisprudential approaches to legal standards such as NT and MFN.[13] Both perspectives are open to criticism. First, it is arguably over-simplistic to characterize either international trade or investment treaties as demonstrating a clear policy preference for economic liberalization, rights protection, or the "public good."[14] Although historical analysis supports the general proposition that state parties typically enter into such agreements in order to facilitate international economic mobility,[15] the heterogeneity of objectives articulated across the network of IIAs make it particularly difficult to generalize the overarching purpose of investment treaties.[16] Moreover, even within each type of agreement, different obligations arguably embody differing anxieties and concerns.[17]

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9. *See, e.g.*, GIANCARLO GANDOLFO, INTERNATIONAL TRADE THEORY AND POLICY 218 (2d ed., 1998); FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 35 (Jagdish N. Bhagwati & Robert E. Hudec, 1996).

10. *See* Alford, *supra* note 5, at 40; Chios Carmody, *Obligations versus Rights: Substantive Difference between WTO and International Investment Law*, 12 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 75, 78 (2017); Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 54-58 (2008).

11. Carmody, *supra* note 10, at 87; Todd J. Weiler, *Treatment No Less Favorable Provisions Within the Context of International Investment Law: Kindly Please Check Your International Trade Law Conceptions at the Door*, 12 SANTA CLARA J. INT'L L. 77, 88 (2013).

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

13. Robert Howse & Efraim Chalamish, *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz*, 20 EUR. J. INT'L L. 1087, 1090 (2009).

14. Pauwelyn, *supra* note 7, at 407.

15. KURTZ, *supra* note 2, at 31.

16. *See* MITCHELL ET AL., *supra* note 2, at 11.

17. Contrast, for instance, the WTO non-discrimination obligations with provisions on anti-dumping and countervailing duties. *See* General Agreement on Tariffs and Trade 1994 art. VI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994]; Agreement on the Implementation of Article VI of

The argument that international trade and investment are inherently irreconcilable is also typically premised on problematic assumptions. For instance, the contention that trade law enforces state obligations and investment law enforces individual rights confuses procedure with substance.[18] It is true that Investor State Dispute Settlement ("ISDS") is unique in permitting private claimants, but it is relatively uncontroversial that substantive obligations under IIAs are still owed by states to other state parties.[19] The fact that individual remedies and claims are afforded in investment is thus better viewed as the historical function of state competition for foreign capital, rather than as a reflection of any fundamental difference in the nature of the obligations owed under these public international law instruments.[20] Consequently, this line of argument conflates the reasoning for why international investment and trade regimes have historically been distinct with why they should continue to be distinct in the future. Moreover, whatever differences may have historically been justified between trade and investment, developments in both fields are increasingly bridging this divide.[21] The following section examines some of these developments in order to illustrate how the convergence of these regimes both suggests the benefits of greater coordination and the necessity of ameliorating existing tensions between these two areas of law.

A. *Current Developments in International Trade and Investment Law*

The normative, substantive, and procedural aspects of international trade and international investment law are increasingly coming into conflict. For instance, recent years have witnessed a growing overlap in the subject matter of many trade and investment disputes, evidenced by the increasing incidence of parallel legal proceedings.[22] Two

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the General Agreement on Tariffs and Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

18. Broude, *supra* note 7, at 8.

19. Note, however, that the exact nature of the investor's right under investment treaties remains contested. *See, e.g.*, Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L. L.J. 353 (2015); ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW 60-70 (2014).

20. *See, e.g.*, Beth A. Simmons, *Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment*, 66 WORLD POL. 12 (2014); KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL (2013).

21. Pauwelyn, *supra* note 3, at 766.

22. *See* Brooks E. Allen & Tommaso Soave, *Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration*, 30 ARB. INT'L 1 (2014).

prominent examples include the protracted dispute between Canadian softwood lumber producers and the United States,[23] and Phillip Morris's claims against Australia under both the Trade-Related Aspects of Intellectual Property Rights ("TRIPs") agreement and BITs.[24] The continuing extension of WTO treaties into new areas such as services, intellectual property, and government procurement can only be expected to increase the prevalence of such proceedings and the possibility of conflicting outcomes.[25]

However, states are also increasingly recognizing the benefits of a coordinated approach to investment and trade. For instance, states more regularly conclude bilateral and multilateral PTAs, which contain investment and trade chapters rather than individual Bilateral Investment Treaties ("BITs"),[26] although a few investment tribunals have upheld jurisdictional challenges arguing that such chapters should be viewed as mutually exclusive.[27] The broader backlash by civil society against ISDS has also accelerated the deployment of generalized regulatory exceptions modelled after Article XX of the General Agreement on Tariffs and Trade ("GATT") into a number of IIAs, suggesting that states are increasingly unifying their treaty formulation practices across the two fields.[28]

Increasing movement of institutional actors between the spheres of trade and investment is also evident. For example, several domestic

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23. *See, e.g.*, Appellate Body Report, *United States–Final Dumping Determination of Softwood Lumber from Canada*, WTO Doc. WT/DS264/AB/RW (adopted Aug. 15, 2006); Canfor Corp. v. United States, NAFTA/UNCITRAL, Decision on the Preliminary Question (Jan. 23, 2004), https://www.state.gov/documents/organization/67753.pdf.

24. *See, e.g.*, Phillip Morris Asia Ltd v. Commonwealth of Australia, UNCITRAL, Award on Jurisdiction and Admissibility (Dec. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf; Communication from the Chairperson of the Panel, *Australia–Certain Measures Regarding Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Product and Packaging*, WTO Doc. WT/DS467/22 (Sept. 21, 2017), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/467-22.pdf. *See generally* Puig, *supra* note 6, at 31-35.

25. KURTZ, *supra* note 2, at 10; Paulweyn, *supra* note 3, at 767 n.35; Allen & Soave, *supra* note 22, at 2; Echandi & Newston, *supra* note 8, at 866.

26. Puig, *supra* note 6, at 14. *See generally* Joshua P. Meltzer, *Investment*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 250-273 (Simon Lester et al. eds., 2d ed. 2016).

27. *See generally* Arwel Davies, *Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?*, 15 J. INT'L ECON. L. 793, 797 (2012).

28. *See generally* Amelia Keene, *The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements*, 18 J. WORLD INV. & TRADE 62 (2017); Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1 (2014).

governments have undergone institutional consolidations to unify competence over trade and investment.[29] It has also been anticipated that shortages in the pool of qualified investment arbitrators will propel increasing numbers of trade practitioners into international investment.[30] Finally, procedural convergence has been apparent in the employment of trade sanctions in a number of recent arbitration awards,[31] as well as in the inspiration drawn by academics, practitioners, and institutions from the WTO Appellate Body and Dispute Settlement Understanding ("DSU") in the recent push to reform ISDS by increasing multilateralism, arbiter independence, legal consistency, and transparency.[32]

These developments suggest that the overlap between the network of preferential trade and investment agreements is generating an increasing need for greater coordination and cross-pollination between these two areas of law. The extent to which this would be best achieved by a single regulatory regime is a more complicated question and outside the scope of this Note.[33] Nonetheless, this convergence suggests at a minimum that comparative jurisprudence would be useful in

29. For instance, the Office of the United States Trade Representative (USTR), the Australian Department of Foreign Affairs and Trade (DFAT), and the EU Commission are all responsible for investment negotiations and litigation.

30. Pauwelyn, *supra* note 3, at 805. *See generally* Freya Baetens, *The Rule of Law or the Perceptions of the Beholder? Why Investment Arbitrators Are Under Fire and Trade Adjudicators Are Not: A Response to Joost Pauwelyn*, 109 AM. J. INT'L L. 302 (2015); José Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*, 1 ONATI SOCIO-LEGAL SERIES 1, 23 (2011).

31. *See, e.g.*, Junianto James Losari & Michael Ewing-Chow, *A Clash of Treaties: The Lawfulness of Countermeasures in International Trade Law and International Investment Law*, 16 J. WORLD INV. & TRADE 274 (2015); Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, 44 GEO. J. INT'L L. 503 (2012).

32. *See, e.g.*, U.N. Comm'n Int'l Trade L., Rep. on Possible Reform of Investor-State Dispute Settlement, U.N. Doc. A/CN.9/WG.III/WP.142 (Sept. 18, 2017); Rebecca Lee Katz, *Modeling an International Investment Court After the World Trade Organization Dispute Settlement Body*, 22 HARV. NEGOT. L. REV. 163 (2016); Yenkong Ngangjoh-Hodu & Collins C. Ajibo, *ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration*, 6 J. INT'L DISP. SETTLEMENT 308 (2015).

33. *See, e.g.*, Nicolette Butler & Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation?*, 64 NETH. INT'L. L. REV. 43 (2017); Stephanie Hartmann, *When Two International Regimes Collide: An Analysis of the Tobacco Plain Packaging Disputes and Why Overlapping Jurisdiction of the WTO and Investment Tribunals Does Not Result in Convergence of Norms*, 21 UCLA J. INT'L L. FOREIGN AFF. 204 (2017); Adam Hyams & Gonzalo Villalta Puig, *Preferential Trade Agreements and the World Trade Organization: Developments to the Dispute Settlement Understanding*, 44 LEGAL ISSUES ECON. INTEGRATION 237 (2017).

ameliorating substantive tensions between these interlocking legal spheres. To date however, WTO jurisprudence has often been inconsistently and problematically applied by investment arbiters, and trade panelists have paid little to no attention to the jurisprudence arising from investment decisions.[34]

Recent reforms by the EU, therefore, not only provide an illustrative case study of some of these convergence factors, but also the emergence of a legal environment which is ripe for the cross-fertilization of WTO and international investment jurisprudence. The next section will outline some of these developments to demonstrate why the European Union's new generation of investment dispute resolution bodies will be uniquely positioned to achieve a higher level of unification between the spheres of investment and trade.

III. Convergence Factors in New Generation European Union Free Trade Agreements

Evidence of increasing institutional, procedural, and substantive convergence between trade and investment is particularly pronounced in the EU context. Although the EU has had competence over trade since its inception, it was only under the Lisbon Treaty in 2009 that the European Commission was granted competence over foreign investment.[35] It was evident as early as 2010 that the Commission intended to pursue an integrated trade and investment policy, noting in a Communication that the two fields were "today inter-dependent and complementary" and signaling that its preference in the future would be to integrate investment commitments into ongoing trade negotiations rather than concluding individuals BITs.[36]

The Commission has continued to reiterate this commitment to achieving a coordinated approach to trade and investment policy,[37] as

34. *See generally* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 Am. J. Int'l L. 45 (2013); Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents*, 20 Eur. J. Int'l L. 749 (2009).

35. *See generally* Angelos Dimopoulos, EU Foreign Investment Law 65-121 (Oxford Univ. Press) (2011); Youri Devuyst, *The European Union's Competence in International Trade After the Treaty of Lisbon*, 39 Ga. J. Int'l & Comp. L. 639 (2010).

36. *Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy*, at 7, COM (2010) 343 final (Jul. 7, 2010) [hereinafter *Towards a Comprehensive European International Investment Policy*].

37. *See, e.g.*, *Investment in TTIP and Beyond–the Path for Reform*, at 1 (May 5, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF; *Trade for All: Towards a More*

well as to structural reform of ISDS since approximately 2014.[38] This culminated in the Commission's announcement in 2015 that it would establish a permanent multilateral investment court to facilitate greater public confidence in the dispute resolution system,[39] and to remedy the problem of "the lack of predictability and interpretive consistency."[40] The Commission has argued that such a court would, *inter alia*, ensure a "better balance between the objectives pursued by international trade and investment agreements."[41] These developments suggest that the Commission will continue to prioritize the integration of international trade and investment in its attempts to redesign its international investment commitments.

A. *Procedural Convergence in Recent European Union Free Trade Agreements*

The desire to integrate greater experience from the WTO into the field of investment has also been evident in the dispute resolution mechanisms established under a number of recently concluded EU FTAs. Forinstance, under CETA,[42] the EU-Vietnam FTA,[43] and the draft EU-Japan EPA,[44] it is explicitly stated that investment arbiters should have experience in international trade law.[45] The EU-Singapore FTA has not included such a requirement,[46] but has instead stated that arbiters should have experience in public international law more broadly.[47] The

Responsible Trade and Investment Policy, at 11 (Oct. 14, 2015), http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.

38. *See, e.g.*, European Commission Press Release, Commission to Consult European Public on Provisions in EU-US Trade Deal on Investment and Investor-State Dispute Settlement, EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR TRADE (Jan. 21, 2014).

39. *Towards a Comprehensive European International Investment Policy*, *supra* note 36, at 11.

40. *Commission Staff Working Document Impact Assessment: Multilateral Reform of Investment Dispute Resolution*, at 20, COM (2017) 439 final (Sept. 13, 2017).

41. *Id.* at 59.

42. Comprehensive Economic and Trade Agreement Between Canada, of the One Part, and the European and Its Member States, of the Other Part, Can.-Eur., Sept. 14, 2016, http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf [hereinafter CETA].

43. Trade in Services, Investment and E-Commerce Chapter, EU-Vietnam Free Trade Agreement (*Agreed text as of January 2016)*, Viet.-Eur., Feb. 1, 2016, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf [hereinafter EU-Vietnam FTA].

44. Dispute Settlement Chapter, EU-Japan Economic Partnership Agreement (*Agreed text as of December 2017)*, Japan-Eur., Dec. 8, 2017, http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155713.pdf [hereinafter Draft EU-Japan EPA].

45. CETA, *supra* note 42, art. 8.27.4; EU-Vietnam FTA, *supra* note 43, Chapter II, § 3, art. 12.4; Draft EU-Japan EPA, *supra* note 44, art. 10.

46. EU-Singapore Free Trade Agreement (*Authentic text as of May 2015*), Sing.-Eur., Jun. 29, 2015, http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 [hereinafter EU-Singapore FTA].

47. EU-Singapore FTA, *supra* note 46, art. 9.18.6.

standing two-tiered tribunal and appellate tribunal established under CETA is also a unique adjudicative body in the field of international investment that was heavily structurally modelled after the WTO Appellate Body.[48] Members of both tribunals will similarly receive a monthly retainer fee[49] and serve for a five-year term renewable once,[50] and individual disputes will likewise be heard by a randomized panel of three members.[51] Additionally, although the draft EU-Japan EPA maintains the use of *ad hoc* arbitral tribunals, it innovatively utilizes a single Dispute Resolution chapter for the entire treaty and clarifies that in interpreting any provisions of the agreement, arbiters should "take into account relevant interpretations in reports of panels and the appellate body."[52] These FTAs, thus both indirectly mimic WTO dispute resolution, and in some instances directly empower arbiters to integrate international trade jurisprudence into their adjudication of investment disputes.

It should be noted that the Commission has suggested it may eventually pursue a more "judicial" model for the investment court, with more broadly formulated qualification requirements and full-time arbiters appointed for non-renewable terms.[53] However, the Commission has also indicated that arbiter experience in trade and economics will remain desirable, and noted the possibility of establishing an investment advisory center for developing countries modelled on the Advisory Center on WTO Law ("AWCL").[54] There is good reason to anticipate, therefore, that both the interim CETA Tribunal and eventual investment court will have the mandate, experience, and elevated institutional status to integrate jurisprudence from other fields of public international law, including international trade.[55]

B. *Substantive Convergence in Recent European Union Free Trade Agreements*

A number of textual innovations in these EU FTAs may also facilitate greater jurisprudential comparisons between trade and investment. For instance, most of the new-generation EU FTAs have explicitly

48. *See, e.g.*, *Transatlantic Trade & Investment Partnership Advisory Group: Meeting Report*, at 3 (Sept. 17, 2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153803.pdf.

49. CETA, *supra* note 42, art. 8.27.12, art. 8.27.15.

50. *Id.* art. 8.27.5.

51. *Id.* art. 8.27.6.

52. Draft EU-Japan EPA, *supra* note 44, art. 16.

53. *Towards a Comprehensive European International Investment Policy*, *supra* note 36.

54. *Id.*

55. Jieying Ding, *Enforcement in International Investment and Trade Law: History, Assessment, and Proposed Solutions*, 47 GEO. J. INT'L L. 1137, 1163 (2015).

enshrined the objective of liberalizing trade and investment,[56] in contrast to older generation treaties such as the North American Free Trade Agreement ("NAFTA"), which refer separately to the objectives of "increasing substantially investment opportunities" and eliminating "barriers to trade."[57] Additionally, this suggests that theoretical objections espoused by some commentators regarding the differing objectives of trade and investment agreements are less applicable in the EU FTA context.

Moreover, generalized regulatory exceptions from trade law have been directly imported into the EU FTAs. For instance, Article XX of the GATT has been directly incorporated into the investment chapters of CETA[58] and the draft EU-Japan EPA,[59] and exceptions closely modelled after Article XX have been included in the NT provision of the EU-Singapore FTA[60] and in a stand-alone provision under the EU-Vietnam FTA.[61] Additionally, government procurement and subsidies exceptions modelled after Article III:8(a) and (b) of the GATT have been employed in many of these investment chapters,[62] an extremely unique development in investment treaty formulation.[63] Greater concern for coherence between the two legal regimes is also evident

56. EU-Vietnam FTA, *supra* note 43, Chapter I, art. 1.2; EU-Singapore FTA, *supra* note 46, art. 1.2; ("the objectives of this Agreement are to liberalise and facilitate trade and investment"); Free Trade Agreement Between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part, Eur.-S. Kor., art. 1.1(b), Oct. 15, 2009, 2011 O.J. (L 127) 8 ("the objectives of this Agreement are . . . to liberalise trade in services and investment"); Cross Border Trade in Services, Investment Liberalization and Electronic Commerce Chapter, EU-Japan Economic Partnership Agreement, Japan-Eur., art. 1.1, *negotiations finalized* Dec. 8, 2017. The only exception to this trend is CETA, which does not include an "Objectives" clause in its investment chapter but instead emphasizes in its preamble that its provisions are designed to "protect investments and investors" and "stimulate mutually-beneficial business activity" while protecting the right of States "to regulate in the public interest." *See* CETA, *supra* note 42.

57. North American Free Trade Agreement art. 102, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

58. CETA, *supra* note 42, art. 28.3.

59. Draft EU-Japan EPA, *supra* note 44, art. 1.

60. EU-Singapore FTA, *supra* note 46, art. 9.3.3.

61. EU-Vietnam FTA, *supra* note 43, Chapter VII. *See also European Union Proposal for Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce Chapter*, at 51, (2015), http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf [hereinafter *EU Proposal for TTIP*].

62. CETA, *supra* note 42, art. 8.15.5; Draft EU-Japan EPA, *supra* note 44, art. 7.5-6; EU-Singapore FTA, *supra* note 46, art. 9.2.2-3.

63. Rudolf Adlung, *International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS*, 17 J. WORLD INV. & TRADE 47, 55-56 (2016) (noting that of the 200 BITs examined, only one contained an exception for government procurement).

in the inclusion of provisions specifying that states may deviate from certain investment obligations in order to remain in compliance with TRIPs.[64]

In summary, the new-generation EU FTAs herald important procedural and substantive developments which either implicitly or explicitly empower future investment arbiters to take greater stock of trade jurisprudence. These innovations should create a legal environment in which international trade law concepts and analytical frameworks are particularly pertinent for improving and clarifying international investment law. The following section will explore this possibility further through the specific case study of the NT standard across WTO and international investment law.

IV. National Treatment Across the WTO and International Investment Law: Implications in the European Union Context

The current jurisprudence surrounding the NT standard differs substantially across international trade and international investment law. This is partially the result of the heterogeneous wording of the NT clause both within and across the legal regimes. NT obligations can be found across a number of WTO treaties such as the General Agreement on Trade in Services ("GATS"),[65] TRIPs,[66] Agreement on Technical Barriers to Trade ("TBT"),[67] and Agreement on Government Procurement ("GPA").[68] However, the bulk of WTO jurisprudence centers on the original Article III of the GATT, which requires that "treatment no less favorable" be afforded to "like goods" on the basis of nationality in respect to internal taxation[69] and regulations,[70] affecting "sale, purchase, transportation, distribution, or use."[71] Article XVII of

64. CETA, *supra* note 42, art. 8.12.5, 8.15.4; Draft EU-Japan EPA, *supra* note 44; EU-Singapore FTA, *supra* note 46, art. 9.6.3.

65. General Agreement on Trade in Services art. XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

66. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 2.1, 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

67. Agreement on Technical Barriers to Trade art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1858 U.N.T.S. 120.

68. Agreement on Government Procurement art. III:2(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, 1951 U.N.T.S. 103.

69. General Agreement on Tariffs and Trade art. III:2, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT].

70. *Id.* art. III:4.

71. *Id.*

the GATS is formulated more broadly and prohibits less favorable treatment in relation to "like services and service suppliers."[72]

Conversely, NT standards in investment treaties typically prohibit discrimination against investors and investments in "like circumstances." For instance, the EU-Singapore FTA refers to "like situations" in respect to "operation, management, conduct, maintenance, use, enjoyment and sale or other disposal" of investments.[73] CETA refers instead to "like circumstances," and additionally refers to the "establishment, acquisition, expansion" and "conduct" of investments.[74] The textual scope of the NT standard thus remains comparatively broader in the investment context in the ability to contest domestic measures affecting the investor, as well as any point across the "lifecycle" of the investment.[75]

Notwithstanding these differences, three common features of the NT standard are evident across both investment and trade jurisprudence: the need to demonstrate "likeness," the need to demonstrate treatment "no less favorable," and the need to consider the regulatory purpose or intent of the respondent state. This section will analyze the potential benefits and opportunities in integrating WTO jurisprudence surrounding these criteria into the EU investment context.

A. *"Likeness" Under WTO and International Investment Law*

1. "Likeness" in WTO Law

The bulk of the jurisprudence surrounding the "likeness" comparator in WTO law derives from the GATT, under which the relative "likeness" of goods may differ depending on whether one is considering the NT prohibition under Article III:2 or III:4.[76] This is the result of the fact that an alternative comparator, "directly competitive or substitutable" products, is used in Article III:2 in contrast to the term "like products" used in Article III:4, resulting in slightly differing jurisprudence

72. GATS, *supra* note 65, at art. XVII.

73. EU-Singapore FTA, *supra* note 46, art. 9.3.1.

74. CETA, *supra* note 42, art. 8.6.1.

75. DiMascio & Pauwelyn, *supra* note 10, at 67-68.

76. Appellate Body Report, *Japan–Taxes on Alcohol Beverages II*, at 21, WTO Doc. WT/DS8/AB/R (adopted Oct. 4, 1996). For a more detailed discussion, see MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM, PETROS C. MAVROIDIS & MICHAEL HAHN, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 196 (Oxford University Press, 3rd ed. 2017); PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 374-83 (Cambridge University Press, 4th ed. 2017).

for each provision.[77]

In general, however, "likeness" under both provisions of the GATT is principally a determination about the nature and extent to which a "competitive relationship" exists between the imported and domestic product.[78] The four so-called Border Tax Adjustment ("BTA") factors are also considered in determining "likeness":[79] namely, the end-uses of the product, consumer tastes and habits, physical characteristics, and any customs classifications or domestic regulatory regimes.[80] The jurisprudence of the Appellate Body has shifted over time from an emphasis on physical characteristics to a more flexible application of all four criteria.[81] In *Philippines–Distilled Spirits*, for instance, the Appellate Body stressed that while a panel may start by examining physical characteristics, none of the BTA factors has an "overarching role,"[82] and the criteria are rather "tools available to panels for organizing and assessing the evidence relating to the competitive relationship."[83] As such, it is evident that the primary test in the context of the GATT remains the "competitive relationship," with the BTA factors acting as supplementary tools in assisting this determination.

Although the jurisprudence in the context of the GATS is more nascent,[84] it appears that the presence of a "competitive relationship" is likewise viewed as the central condition for "likeness."[85] Moreover, the Appellate Body has recently held that it is not necessary to separately demonstrate the likeness of services and service suppliers, but rather that both should be considered holistically with the relative weight

77. *See* GATT, *supra* note 69. It has been confirmed by the WTO Appellate Body that "like products" should be viewed as a subset of the broader concept of "directly competitive or substitutable" products.

78. Appellate Body Report, *European Communities–Measures Affecting Asbestos-Containing Products*, ¶ 99, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001) [hereinafter *EC–Asbestos*].

79. GATT Working Party Report, *Border Tax Adjustments*, WTO Doc. L/3464 (adopted Dec. 2, 1970).

80. Appellate Body Report, *Philippines–Tax on Distilled Spirits (Philippines–Distilled Spirits)*, ¶¶ 114-68, WTO Doc. WT/DS396/AB/R (adopted Dec. 21, 2011).

81. MATTIA MELLONI, THE PRINCIPLE OF NATIONAL TREATMENT IN THE GATT: A SURVEY OF THE JURISPRUDENCE, PRACTICE AND POLICY 144-45 (Bruylant, 2005); Ion Gâlea & Bogdan Biriş, *National Treatment in International Trade and Investment Law*, 55 ACTA JURIDICA HUNGARICA 174, 177 (2014).

82. *Philippines–Distilled Spirits, supra* note 81, ¶ 119.

83. *Id.* ¶ 131.

84. *See generally* Gilles Muller, *National Treatment and the GATS: Lessons from Jurisprudence*, 50 J. WORLD TRADE, 819 (2016).

85. Appellate Body Report, *Argentina–Measures Relating to Trade in Goods and Services*, ¶ 6.25, WTO Doc. WT/DS453/AB/R (adopted Apr. 4, 2016) [hereinafter *Argentina-Financial Services*].

accorded to each differing on a case-by-case basis.[86] The *BTA* factors will also continue to be relevant in this context, although the characteristics and attributes of the *suppliers* themselves must also be considered.[87]

2. "Likeness" in International Investment Law

Conversely, there is much less consensus about the appropriate inquiry for "likeness" in international investment law,[88] primarily due to the heterogeneity of NT clauses across IIAs and the fragmentary nature of investment arbitral jurisprudence.[89] Broadly speaking, tribunals have typically considered one or more of the following characteristics: whether the investors operate in the same business or economic sector,[90] the competitive relationship between investors,[91] and whether the investors are subject to a comparable legal regime or regulatory requirements.[92] However, there remains much dissent as to the necessity or sufficiency of any of these factors.

For instance, the tribunal in *Occidental Exploration and Production Co v. Ecuador* rejected the necessity of demonstrating either a shared sector or a competitive relationship,[93] opting to find that an oil company was sufficiently "like" flower and seafood producers because they were all exporters.[94] The necessity of finding a competitive relationship was also rejected in *Methanex v. United States*,[95] in which the tribunal held that it was sufficient that the investments were otherwise "identical" in terms

86. *Id.* ¶ 6.29.

87. *Id.* ¶ 6.32.

88. Bjorklund, *supra* note 8, at 38.

89. MITCHELL ET AL., *supra* note 2, at 49; Guiguo Wang, *Likeness and Less Favorable Treatment in Investment Arbitration*, 3 J. INTL. COMP. L. 73, 74 (2016).

90. *See, e.g.*, Archer Daniels Midland Co. v. Mexico (No 5), ICSID Case No. ARB (AF)/04/5, Award, ¶ 198 (Nov. 21, 2007); Marvin Roy Feldman Karpa v. Mexico, ICSID Case No. ARB (AF)/99/1, Award, ¶¶ 171-2 (Dec. 16, 2002); Grand River Enters. Six Nations Ltd. v. United States, UNCITRAL, Award, ¶ 165 (Jan. 12, 2011). *See generally* August Reinisch, *National Treatment*, *in* INTERNATIONAL INVESTMENT LAW: A HANDBOOK 856 (Marc Bungenberg et al. eds., 2015); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DECLARATION ON NATIONAL TREATMENT FOR FOREIGN CONTROLLED ENTERPRISE 22 (1993).

91. *See, e.g.*, S.D. Myers v. Canada, UNCITRAL, Partial Award, ¶ 250-51 (Nov. 13, 2000).

92. *See, e.g.*, Apotex Holdings Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Award, ¶ 8.15 (Aug. 25, 2014); Pope & Talbot v. Canada, UNCITRAL, Award on the Merits of Phase 2, ¶¶ 83-95 (Apr. 10, 2001).

93. Occidental Expl. & Prod. Co. v. Ecuador, LCIA Case No. UN3467, Award (Jul. 1, 2004).

94. *Id.* ¶¶ 175-6.

95. Methanex v. United States, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005).

of their physical characteristics.[96] Other tribunals have accorded priority to a myriad of other factors in determining likeness, such as the type of selling,[97] consumer preferences,[98] regional location of the investment,[99] business portfolio and relative size of the investors,[100] and relative economic circumstances of the industries.[101]

3. Comparative Analysis of the "Likeness" Criterion

In light of the inconsistent and often artificial application of the "likeness" criterion in the investment context, a number of commentators have advocated for the importation of the central test of a "competitive relationship" into investment law.[102] Such an approach would arguably strike a better balance between protecting the regulatory autonomy of the state and deterring protectionism.[103] This approach has much to recommend to it, as would the importation of a *BTA* multifactorial approach, in which relevant criteria such as the size and market share of investors, the end-uses, consumer preferences and physical attributes of investments, and relevant domestic customs regulations or classificatory schemes could be evaluated.

There are numerous possible advantages to this approach. First, the employment of the test of a "competitive relationship" as opposed to the popular but nebulous concept of the "business" or "economic" sector would narrow the ability of investment arbiters to overextend NT obligations in cases of tenuously related investments.[104] The approach would also supply a uniform set of criteria to be assessed holistically, rather than an ad hoc set of factors that investment arbiters could choose to evaluate or exclude at will. This would have the benefit of

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96. *Id.* Part IV, Chapter B, ¶ 19.

97. *See, e.g.*, Champion Trading Co. v. Egypt, ICSID Case No. ARB/02/09, Award, ¶ 154 (Oct. 27, 2006) (no "likeness" between selling at a fixed price in a government scheme and selling on the open market).

98. *See, e.g.*, Corn Prods. Int'l Inc. v. Mexico, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, ¶ 126 (Jan. 15, 2009) (likeness found as products were "indistinguishable from the point of view of the end-users").

99. *See, e.g.*, Merrill & Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award, ¶ 91 (Mar. 31, 2010) (no "likeness" between operators in different regions).

100. *See, e.g.*, Renee Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, Award, ¶ 398 (Feb. 26, 2014).

101. *See, e.g.*, Cargill v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, ¶ 204 (Sep. 18, 2009) (discussion of *GAMI*).

102. KURTZ, *supra* note 2, at 108; Nicholas F. Diebold, *Standards of Non-Discrimination in International Economic Law*, 60 Int'l & Comp. L.Q. 831, 855-56 (2011).

103. *Id.*

104. *See, e.g.*, *Occidental Expl. & Prod. Co. v. Ecuador, supra* note 93.

building on existing investment jurisprudence to achieve the desired result of greater legal stability and coherence.

However, as central components of WTO jurisprudence such as the idea of the "competitive relationship" are arguably imprecise and inconsistently applied,[105] the value of extending this test to the investment context is contestable. Some commentators have suggested, for example, that heavy reliance on qualitative *BTA* factors (such as physical characteristics, regulatory classification etc.,) has tended to result in an unpredictable treatment of the importance of quantitative economic analysis.[106] Various views have been advanced as a solution to this deficit, with some academics calling alternately for a greater emphasis on supply-side or demand-side evidence,[107] and others advocating for a greater stress on qualitative factors in recognition of the inherently normative nature of the "likeness" criterion.[108]

In the specific context of investment, however, the textual reference to like "circumstances" rather than "products" suggests that broader qualitative considerations should remain relevant, as "circumstances" would appear to entail a broader analysis than merely the economic evidence of competition. Moreover, the fact that the protection is offered to both investments and investors complicates the application of a strictly econometric analysis, as it is not clear whether the competitive relationship must exist between the investments or the investors, as many commentators have similarly noted in the context of the GATS.[109] Given these shared interpretive difficulties, one possible approach could be to adopt a similar method for "circumstances" to that utilized under the GATS for "services and service suppliers."[110] This would involve considering the likeness of both the *investment* and the *investor*, but varying the relative focus on each depending on the case at hand. As noted by Diebold in the context of services, such an approach would provide a structured but flexible

105. Damien Neven & Joel P. Trachtman, *Philippines–Taxes on Distilled Spirits: Like Products and Market Definition*, 12 WORLD TRADE REV. 297, 321 (2013); WON-MOG CHOI, 'LIKE PRODUCTS' IN INTERNATIONAL TRADE LAW: TOWARDS A CONSISTENT GATT/WTO JURISPRUDENCE 154-7 (2003).

106. Emily Lydgate, *Sorting out Mixed Messages under the WTO National Treatment Principle: A Proposed Approach*, 15 WORLD TRADE REV. 423, 428-437 (2016).

107. Neven & Trachtman, *supra* note 105, at 325; NICOLAS F. DIEBOLD, NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES: "LIKENESS" IN WTO/GATS 268 (2010); Adrian Emich, *Same Same but Different: Fiscal Discrimination in WTO and EU Law*, 32 LEGAL ISSUES ECON. INTEGRATION 369, 415 (2005).

108. MITCHELL ET AL., *supra* note 2, at 72.

109. World Trade Organization Economic Research and Statistics Division, *Determining 'Likeness' Under the GATS: Squaring the Circle?*, at 10-11, WTO Staff Working Paper No. ERSD-2006-08 (Sept. 2006).

110. GATS, *supra* note 65, art. XVII.

test that would better account for potential interdependencies between the investment and investor.[111]

An additional consideration in the EU context is the test utilized by the Court of Justice of the European Union ("ECJ") in evaluating "similar products" under Article 110(1) TFEU, wherein consumer need, organoleptic properties, fiscal classifications, origin, and manufacturing process are holistically evaluated.[112] The importation of a multi-factorial approach could thus serve to better integrate the international investment regime with the ongoing informal "dialogue" between WTO Panels and the ECJ in considering one another's findings on "like goods" and "similar products."[113] For instance, the Panel in *Korea–Alcoholic Beverage* accepted that ECJ rulings may have some persuasive value in Article III:2 cases,[114] noting that "there is some relevance in examining how the ECJ has defined markets in similar situations to assist in understanding the relationship between non-discrimination provisions and competition law."[115] A similar comparative approach could be adopted in relation to "likeness" in the EU investment context, with WTO and ECJ rulings on "similar products" and "like goods" having persuasive value on considerations of "like circumstances."

Analysis of the jurisprudence surrounding "likeness" in the WTO and investment context thus illuminates the potential benefits of adopting a WTO style approach to the evaluation of "like" investors and investments. Whatever the shortcomings of the GATT and GATS approaches, WTO jurisprudence at least provides a set of clear factors and the central idea of "competition" to guide their analysis of "likeness." Future investment arbiters adjudicating new generation EU investment obligations would do well to incorporate a similar approach into their interpretation of the National Treatment standard.

B. *"Less Favorable Treatment" under WTO and International Investment Law*

Substantial differences also prevail in terms of the "less favorable treatment" standard across WTO and international investment

111. DIEBOLD, *supra* note 107, at 218.

112. Case 27/67, Firma Fink-Frucht GmbH v. Hauptzollamt Munchen-Landsbergerstrasse, 1968 E.C.R. 224, 232; Case 106/84, Comm'n of Eur. Communities v. Denmark, 1986 E.C.R. 833, ¶ 12.

113. Although note that WTO Panels have not always been receptive of ECJ judgements. *See generally* Michelle Q. Zang, *Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement*, 28 EUR. J. INT'L L. 273, 287-92 (2017).

114. Panel Report, *Korea–Taxes on Alcoholic Beverages*, WTO Doc. WT/DS75/R (adopted Sept. 17, 1998).

115. *Id.* ¶ 10.81.

jurisprudence. The interpretation of "less favorable treatment" has shifted considerably over time in the WTO, particularly in relation to whether a measure which clearly discriminates based on national origin (de jure discrimination) will prima facie qualify as less favorable treatment.[116] Nonetheless, in the context of Article III:4 of the GATT, the prevailing test is whether the contested domestic measure modifies the equality of competitive conditions in the relevant market.[117] Additionally, although there has been some conflicting precedent in Panel reports, the Appellate Body has confirmed that the relevant inquiry is whether the group of "like" imported products is accorded less favorable treatment than the group of "like" domestic products.[118]

In the context of investment arbitral jurisprudence, however, there remains a lack of consensus as to the appropriate test to be utilized in relation to "less favorable treatment."[119] Most arbitral tribunals appear to have accepted that both *de jure* and *de facto* discriminatory measures will be encompassed by the standard.[120] However, the dominant approach of many tribunals following *Pope & Talbot v. Canada*[121] has been to apply a "best treatment" standard under which the foreign investor must merely prove that any single domestic actor is receiving more favorable treatment under the contested measure.[122] Conversely, a few tribunals such as that in *ADF v. US* have appeared to support an approach analogous to that of the Appellate Body under which it must

116. MELLONI, *supra* note 81, at 160-62. Some critics argue that in practice *de jure discriminatory* measures will still invariably result in a finding of breach. *See, e.g.*, William J. Davey & Keith E. Maskus, *Thailand–Cigarettes (Philippines): A More Serious Role for the 'Less Favorable Treatment' Standard of Article III:4*, 12 WORLD TRADE R. 163, 181 (2013); WILLIAM J. DAVEY, NON-DISCRIMINATION IN THE WORLD TRADE ORGANIZATION 341 (Hague Academy of International Law, 1st ed. 2012). *See also* Appellate Body Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products*, ¶ 7.1537, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009).

117. Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 135-137, WTO Doc. WT/DS161/AB/R (adopted Dec. 11, 2000).

118. *EC–Asbestos*, *supra* note 78, ¶ 100.

119. *See generally* PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS (Peter Van den Bossche & Werner Zdouc eds., 3d ed. 2017).

120. *See, e.g.*, *Archer Daniels Midland v. Mexico*, *supra* note 90, ¶ 193; *Pope & Talbot v. Canada*, *supra* note 92, ¶ 43; *Feldman v. Mexico*, *supra* note 90, ¶ 183.

121. *Pope & Talbot v. Canada, supra* note 92.

122. *See, e.g.*, *Methanex v. United States*, *supra* note 95, Part IV, Chapter B, ¶¶ 20-21; *Archer Daniels Midland v. Mexico*, *supra* note 90, ¶ 205; *Corn Prods. Int'l Inc. v. Mexico*, *supra* note 98, ¶ 117. *See generally* Weiler, *supra* note 11, at 104-06.

be demonstrated that the "group" of "like" domestic products has received more favorable treatment.[123]

1. Comparative Analysis of the "Less Favorable Treatment" Criterion

Commentators such as Kurtz have suggested that the phrase "less favorable treatment" should be interpreted identically irrespective of whether it is embedded in a trade or an investment agreement. As he notes, "the choice by an individual investor to invoke *procedural* rights granted by the state parties cannot, in and of itself, control the question of the *substantive* legal standard against which the respondent state's actions should be judged."[124] Academics such as Weiler, however, have maintained that in the specific context of investment, the historical development of the NT and MFN obligations means that both types of protections are better viewed as linguistic variations on the same legal standard which is ultimately concerned with the best treatment afforded to any domestic investor in the host state.[125]

However, Weiler's argument carries little weight in the context of new-generation FTAs concluded by the EU. The continued application of a "best treatment" standard is sensible in the context of those NT provisions, such as Article 1102 of NAFTA, which specifically state that the relevant standard is "treatment no less favorable than the most favorable treatment accorded."[126] However, in new generation EU FTAs, the wording of the standard is identical across the trade NT obligation (typically directly incorporating Article III of the GATT) and investment NT obligation,[127] each referring to "treatment no less favorable."[128] Interpreting the term according to its "ordinary meaning" in the context of the treaty in which it is embedded, as pursuant to Article 31(1) of the Vienna Convention of the Law of Treaties (VCLT),

123. ADF Group v. United States, ICSID Case No. ARB (AF)/00/1, Award, ¶ 157 (Jan. 9, 2003).

124. KURTZ, *supra* note 2, at 111. *See also Archer Daniels Midland v. Mexico*, *supra* note 90, ¶ 173.

125. Weiler, *supra* note 11, at 79.

126. North American Free Trade Agreement art. 1102(3),, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993). Moreover, the popularity of the "best treatment" approach in investment arbitral jurisprudence is likely at least in part attributable to predominance of NAFTA awards in this area of law. *See generally* Leila Choukroune, *National Treatment in International Investment Law and Arbitration: A Relative Standard for Autonomous Public Regulation and Sovereign Development*, *in* THE PRINCIPLE OF NATIONAL TREATMENT IN INTERNATIONAL ECONOMIC LAW: TRADE, INVESTMENT AND INTELLECTUAL PROPERTY (Anselm Kamperman Sanders ed., 2014).

127. *See, e.g.*, CETA, *supra* note 42, art. 2.3.1; EU-Vietnam FTA, *supra* note 43, art 12; EU-Singapore FTA, *supra* note 46, art. 2.3.

128. *See, e.g.*, CETA, *supra* note 42, art. 2.3, 8.6, 8.7; Draft EU-Japan EPA, *supra* note 44.

it is difficult to see why these provisions should be interpreted differently. This construction is additionally supported, as aforementioned, by the fact that the primary "object and purpose,"[129] articulated in the objectives of many of the EU FTAs, is identical for the both trade and investment—that is, trade and investment liberalization respectively. This suggests that in applying the NT standard, investment arbiters should be primarily concerned with the overall effect of the measure on competitive opportunities afforded to foreign investors, rather than ensuring that an investor receives the best possible version of state treatment.[130]

Moreover, there may be additional grounds to support this construction depending on the EU FTA at issue. For instance, the Joint Interpretive Instrument for CETA specifies that the investment protections should not "result in foreign investors being treated more favorably than domestic investors."[131] Applying Article 31(2)(b) of the VCLT, interpreting the NT standard as requiring "best treatment" would arguably conflict with this instrument as it would result in more favorable treatment being afforded to the foreign investor than other similarly prejudiced domestic investors. In the context of the EU-Japan EPA moreover, such an interpretation would be supported by the requirement that investment arbiters take into account the jurisprudence of WTO Panels and the Appellate Body.[132] The specific formulation of these EU FTAs thus lends support to the implementation of a group "less favorable treatment" standard in line with WTO jurisprudence.

There would also be several practical benefits to such an approach. First, as the "best treatment" approach results in a lower burden of proof for prospective claimants, closing this disparity would minimize the likelihood of commercial actors exploiting this gap to subvert the WTO dispute resolution system.[133] In the specific context of the EU,

129. Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

130. KURTZ, *supra* note 2, at 85-86.

131. Joint Interpretive Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States art 6(a), Jan. 14, 2017, 2017 O.J. (L 11) 3.

132. Draft EU-Japan EPA, *supra* note 44, art. 16.

133. *See, e.g.*, Maria Alcover & Ana Maria Garcés, *The Interpretation of 'Treatment No Less Favorable' Under Article III: 4 of the GATT 1994 and Article 2.1 of the TBT Agreement: A Comparative Analysis*, 11 GLOBAL TRADE CUSTOMS J. 360, 368 (2016) (discussing disparities between the GATT and TBT); Susy Frankel, *Interpreting the Overlap of International Investment and Intellectual Property Law*, 19 J. INT'L ECON. L. 121, 143 (2016) (making the same point in the context of overlapping disputes between IP and investment).

Diebold has additionally noted that this approach would better accord with the approach taken by the ECJ in interpreting Article 110(2) of the TFEU.[134] However, given the substantial differences in wording between "less favorable treatment" and the affording "indirect protection" standard of Article 110(2), drawing strict comparisons between Article 110(2) and this element of the NT standard should be cautioned.

One possible drawback of this approach is that investment arbiters and individual claimants, unlike WTO panelists and state parties, are arguably not as well placed to provide or assess economic evidence regarding the operation of an economic group as a whole, or the causal link between the disputed measure and the effect on competitive conditions.[135] However, in the context of those EU FTAs in which it is mandated that investment arbiters have experience in trade law, this problem may be less pronounced. Moreover, it has been recently noted by the Appellate Body that while empirical evidence will be relevant to the assessment of "less favorable treatment," a rigid economic analysis is not necessary and arbiters should rather consider the "design, structure, and expected operation of the measure."[136] Such an approach is very similar to that already employed by investment tribunals, and the additional onus on investor claimants to adduce economic evidence in their favor should therefore be viewed as a "real but reasonable burden of persuasion."[137]

In conclusion, it would be in better accord with both the text and objective of the investment protections embedded in new generation EU FTAs to adopt a "group" rather than a "best treatment" approach to the NT standard. Such an approach would have the additional benefit of promoting greater coherence between the WTO and investment jurisprudence, and respecting the common roots of "less favorable treatment" standard in public international law.

C. *Regulatory Purpose under the WTO and International Investment Law*

The idea of regulatory "purpose" or "intent" is typically used to encompass one or both of two possible concepts: either that a subjective "protectionist" intent by the regulator should be a prerequisite for breach of the

134. KURTZ *supra* note 2, at 216.

135. *Id.* at 121.

136. Appellate Body Report, *Thailand–Customs and Fiscal Measures on Cigarettes from the Philippines (Thailand–Cigarettes)*, ¶ 129-130, WTO Doc. WT/DS371/AB/R, (adopted Jun. 17, 2011). *See also* Appellate Body Report, *Chile–Taxes on Alcoholic Beverages*, ¶ 71, WTO Doc. WT/DS87/AB/R (adopted Dec. 13, 1999) [hereinafter *Chile-Alcoholic Beverages*].

137. KURTZ, *supra* note 2, at 216.

NT standard, or that differential treatment should be permitted under the NT standard provided it is the result of a legitimate objective regulatory distinction.[138] Both in the WTO and international investment context, academics and arbiters have struggled to determine the extent to which this factor should be considered in relation to the NT standard.

In the WTO context, arbiters have attempted to incorporate different versions of these concepts into both the "likeness" or "less favorable treatment" stage of the NT analysis. For instance, several panels following *US–Malt Beverages*[139] applied the concept of a so-called "aims-and-effects" test within the concept of "like products" under the GATT,[140] although this approach was later rejected by the Appellate Body in *Japan–Alcohol Beverages II*.[141] The Panel in *US–Tuna II*[142] also attempted to rely on dicta in *Dominican Republic–Cigarettes* to introduce the idea of legitimate regulatory distinctions into the concept of "less favorable treatment,"[143] although it appears that this approach has since been disapproved by the Appellate Body in *US–Clove Cigarettes*.[144] The prevailing approach under the GATT, therefore, appears to be one in which the concept of "regulatory purpose" is not explicitly relevant,[145] although some commentators have noted that the continued emphasis on the "design and intended operation" of the measure in cases like *Thailand–Cigarettes* provides a back door by which to consider this issue.[146]

In contrast, in the context of the TBT, the Appellate Body has bifurcated "less favorable treatment" in a two-stage test, requiring not only an examination of competitive conditions, but also whether the difference in treatment stems from a "legitimate regulatory

138. MITCHELL ET AL., *supra* note 2, at 5-20.

139. Panel Report, *United States–Measures Affecting Alcoholic and Malt Beverages*, WTO Doc. DS23/R - 39S/206 (adopted Jun. 19, 1992).

140. *See, e.g.*, Panel Report, *United States–Taxes on Automobiles*, ¶ 5.10, WTO Doc. D31/4 (adopted Oct. 11, 1994).

141. Appellate Body Report, *Japan–Taxes on Alcoholic Beverages (Japan–Alcoholic Beverages II)*, 8, WTO Doc. WT/DS8/AB/R (adopted Oct. 4, 1996). *See also Chile-Alcoholic Beverages, supra* 136, ¶ 62.

142. Appellate Body Report. *United States–Measures Concerning the Importation, Marketing and Sale of Tuna Products (US–Tuna II)*, WTO Doc. WT/DS381/AB/R (adopted May 16, 2002).

143. Appellate Body Report, *Dominican Republic–Measures Affecting the Importation and Sale of Cigarettes*, ¶ 96, WTO Doc. WT/DS302/AB/R (adopted Apr. 25, 2005).

144. Appellate Body Report, *US–Clove Cigarettes*, n. 372, WTO Doc. WTO/DS406/AB/R (adopted Apr. 4, 2012) [hereinafter *US–Clove Cigarettes*].

145. Lothar Ehring, *National Treatment under the GATT 1994: Jurisprudential Developments in De Facto Discrimination, in* THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 52 (Peter Van den Bossche & Werner Zdouc eds., 2017).

146. Lydgate, *supra* note 106, at 436. *See also* DiMascio & Pauwelyn, *supra* note 10, at 65.

distinction."[147] The exact scope of this concept is not yet entirely clear,[148] although the Appellate Body has cautioned against drawing comparisons between the GATT and the TBT in *EC Seal Products*, noting that "legitimate regulatory distinctions" should not be viewed as an analogue for the concept of "arbitrary" or "unjustifiable" treatment under Article XX of the GATT.[149] Nonetheless, the importation of the "legitimate regulatory distinction" test into the context of the TBT illustrates the repeated revival of some kind of "regulatory purpose" criterion in WTO jurisprudence.

In the context of investment, tribunals have also adopted a wide variety of approaches to the relevance of regulatory purpose.[150] Some tribunals have expressly disavowed the necessity of demonstrating a protectionist intent by the state,[151] while others have appeared to explicitly adopt it as an additional requirement.[152] Numerous approaches have also been adopted in relation to objective regulatory defenses. For instance, in *S.D. Myers v. Canada*, the tribunal argued that the existence of any legitimate regulatory justifications should be considered as part of the analysis of "like circumstances."[153] Other tribunals, conversely, have simply stated that it is necessary to consider whether there are any "legitimate"[154] or "rational"[155] justifications for the domestic measure as an additional factor. However, to date, there appears to be little coherence across international investment jurisprudence as to the relative weight or deference to afford to this factor.

147. *See, e.g.*, *Argentina-Financial Services*, *supra* note 85, ¶ 6.210; Appellate Body Report, *United States–Certain Country of Origin Labelling (COOL) Requirements*, ¶ 340, WTO Doc. WT/DS384/AB/R (adopted Jun. 29, 2012); *US–Clove Cigarettes*, *supra* note 144, ¶ 182.

148. *See generally* Alcover & Garces, *supra* note 133.

149. Appellate Body Report, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.310-5.315, WTO Doc. WT/DS400/AB/R (adopted May 22, 2014).

150. *See generally* Reinisch, *supra* note 90.

151. *See, e.g.*, *S.D. Myers v. Canada*, *supra* note 91, ¶¶ 252-54; *Feldman v. Mexico*, *supra* note 90, ¶ 83; *Pope & Talbot v. Canada, supra* note 92, ¶ 79; Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 368 (Sep. 11, 2007).

152. *See, e.g.*, *Methanex v. United States, supra* note 95, Part III, Chapter B, ¶¶ 46-60; LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 146 (Oct. 3, 2006).

153. *S.D. Myers v. Canada*, *supra* note 91, ¶ 250.

154. *Parkerings-Compagniet AS v. Republic of Lithuania*, *supra* note 151, ¶ 368.

155. *Pope & Talbot v. Canada*, *supra* note 92, ¶ 78.

1. Comparative Analysis of the "Regulatory Purpose" Criterion

The repeated resurgence and reconfiguration of some form of regulatory purpose consideration in both the context of WTO and investment jurisprudence suggests that to some extent, arbiters will "almost inevitably" have to consider the regulatory purpose of the measure in the course of examining alleged breaches of the NT standard.[156] Moreover, capturing such considerations into regulatory exception clauses modelled after Article XX of the GATT may be problematic given the historically narrow interpretation of such provisions.[157] As a result, jurisprudential clarity as to what role regulatory purpose serves in relation to the NT standard is desirable to increase certainty and clarity for prospective disputants.[158]

What is more problematic is the precise legal form that this consideration should take. Kurtz has argued that a breach of the NT standard should never be found unless the claimant can demonstrate a subjective protectionist intent by the state, through its legislative history, protectionist statements or domestic court rulings.[159] While such an approach has the benefit of simplicity, it would seemingly narrow the scope of NT to exclude even measures which yield a clearly protectionist effect but for which no evidence regarding the state's subjective intent is available. Mitchell, Heaton, and Henckels, conversely, have argued that adjudicators should test whether the measure "does not have a significant protectionist regulatory purpose . . . and is rationally connected to the least restrictive means of achieving a non-protectionist purpose."[160] However, even the co-authors remain in disagreement about how best to implement this approach in a legal framework.[161] Experience in the EU context also lends little clarity to best practices for implementation. The ECJ has similarly struggled in its jurisprudence on free movement of goods to determine the extent to which it should allow for legitimate regulatory purposes beyond Article 36 of the TFEU (modeled after Article XX of the GATT), as particularly evidenced by the judicial invention of an extra open-ended category of

156. MITCHELL ET AL., *supra* note 2, at 97.

157. Benn McGrady, *Principles of Non-Discrimination after US–Clove Cigarettes, US–Tuna II, US–COOL and EC–Seal Products and their Implications for International Investment Law*, 16 J. WORLD INV. & TRADE 141, 160 (2015).

158. *Id.*

159. KURTZ, *supra* note 2, at 135.

160. MITCHELL ET AL., *supra* note 2, at 173-76.

161. Mark Huber, *Book Review: Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law*, 20 J. INT'L ECON. L. 431, 434 (2017).

"mandatory requirements," such as environmental protection in *Cassis De Dijon*.[162]

In the specific context of new generation EU FTAs, however, this difficulty may be ameliorated by the presence of important textual innovations that directly provide for considerations of regulatory purpose. In fact, this type of innovation is perhaps most evident in another recently concluded FTA, the Trans Pacific Partnership ("TPP"), in which an additional footnote has been added to the NT protection specifying that whether treatment is no less favorable depends "on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of *legitimate public welfare objectives*."[163] Although this precise formulation has not been taken up in any EU FTAs, its language has been mimicked in the investment chapters of both CETA[164] and the EU-Vietnam FTA,[165] which "reaffirm" the right of parties to regulate to "achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."[166]

The use of "reaffirms" arguably undermines the extent to which these provisions can be considered legally binding.[167] Nonetheless, these clauses support arbiters considering any "legitimate policy objectives" of the measure, including but not limited to those grounds listed in Article XX of the GATT. This could thus provide arbiters with the means through which to construct a third prong under the NT standard, under which a measure that otherwise results in different competitive conditions may be rescued by an objectively legitimate regulatory purpose. This would be similar to the approach currently utilized by the Appellate Body in the context of the TBT but would not have to be subsumed into the standard of "less favorable treatment."

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162. Rewe Zentrale v. Bundesmonopolverwaltung fur Branntwein, Case 120/78 650, 662 (1979) ECR 649. *See generally* Catherine Barnard, *Derogations, Justifications and the Four Freedoms: Is the State Interest Really Protected?*, *in* THE OUTER LIMITS OF EUROPEAN UNION LAW (Catherine Barnard & Okeoghene Odudu eds., 2009).

163. Trans-Pacific Partnership Agreement, art. 9.4, Jan. 26, 2016.

164. CETA, *supra* note 42, art. 8.9.

165. EU-Vietnam FTA, *supra* note 43, art. 13bis.

166. *See also EU Proposal for TTIP*, *supra* note 61, at art. 1-1 (including similar clarification in its Objectives clause).

167. Christian Tietje & Kevin Crow, *The Reform of Investment Protection Rules in CETA, TTIP and Other Recent EU-FTAs: Convincing?*, *in* MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP AND TISA: NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS 100 (Stephan Griller et al. eds., 2017).

In conclusion, analysis of WTO and investment jurisprudence demonstrates that some consideration of regulatory purpose has always been inextricable from the concept of NT. Future investment arbiters in the EU context should build on the opportunities afforded to them due to textual innovations in these FTAs to clarify and construct a clear test through which to consider the regulatory purpose of the measure, as the WTO has begun to do in the context of the TBT.

V. Conclusion

The preceding analysis has demonstrated, using the case study of the National Treatment standard, that innovations in the formulation of new generation EU FTAs may facilitate greater integration of WTO jurisprudence into international investment standards. It has shown that a unified approach in the interpretation of "likeness" and "less favorable treatment" would better accord with the text of these FTAs and is desirable to promote greater legal consistency and coherence. Moreover, the shared difficulties experienced by both WTO and investment arbiters in incorporating a "regulatory purpose" consideration into NT demonstrates the merit of creating an independent "third prong" under which to consider legitimate public policy objectives in relation to these FTAs.

Debates as to whether and to what extent cross-pollination of trade and investment jurisprudence is desirable continue apace. This Note contributes to this broader dialogue by demonstrating at least one clear context in which comparative jurisprudence from the field of international trade could not only promote greater coherence and consistency in international investment law but is also more consistent with the text of the underlying agreement. Continued acceleration in the convergence of these legal regimes reinforces the importance of such an analysis, which may be particularly actionable in the jurisprudence of future EU investment arbiters and any eventual investment court.