Aleksei Petrenko

The Right to Regulate in International Economic Law: Towards a General Theory with Lessons from the GATS

Universitätsdrucke Göttingen

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To my parents, Tamara and Vladimir,
with love and gratitude

Preface/Acknowledgements

The idea to write this book came to me during my study in Germany at the Georg-August-Universität Göttingen. My interest in learning more about the right to regulate intensified later as I saw in practice the increasing relevance of this concept for many areas of international law. Completing this research was a challenging yet deeply rewarding experience, and I am thrilled to finally present the outcome in this publication.

First and foremost, I extend my deep gratitude to *Prof. Peter-Tobias Stoll*, who has been the continuous source of inspiration. His mentorship over the years has been pivotal, and I am profoundly thankful for this. I would also like to express my sincere appreciation to *Prof. Andreas Paulus*. It was an honor to receive his expert view, which provided critical perspectives that have greatly benefited my professional practice.

I owe a great debt of gratitude to *Dietrich* and *Inge Rauschning*, whose support played a significant role in facilitating my academic time in Germany and allowed me to take the first steps in working on this study. Their hospitality and encouragement enabled me to pursue my passion for international law.

My parents and family have provided a foundation of love and encouragement throughout this endeavor. They have always believed in me and provided the emotional and moral support necessary to keep me going. My wife, Katia, has been my anchor, with her daily encouragement, endurance, and understanding. Her

constant support made the completion of this monograph possible, and for that I am very grateful.

Throughout this long journey, many friends and colleagues, especially from the WTO Expertise Center (Moscow), the International and Comparative Law Research Center, and HSE University, have stood by my side and supported me in countless ways. While I will not mention everyone by name, for fear of missing someone important, please know that your support has been deeply appreciated, and you all know who you are. One exception, though: *Anna Kozyakova*, for her friendship and steadfast support.

Before finally moving to the content, it is important to note that the text presented here does not take into account developments in the issues raised since Spring 2022. Meanwhile, since the completion of this research, numerous developments have occurred in international law regarding the right to regulate. Noteworthy among these are the recent discussions in UNCITRAL Working Group III. The negotiations within the WTO concerning domestic regulation under the GATS have also seen significant progress. These developments, while not covered in this study, reflect the dynamic and evolving nature of the topics addressed here.

In conclusion, I hope this book provides valuable insights and contributes meaningfully to the ongoing discourse in international law. Thank you for joining me on this intellectual journey.

Moscow, August 2024 Aleksei Petrenko

Table of Contents

List of Abbreviations

Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ATS	Australian Treaty Series
BISD	Basic Instruments and Selected Documents
BIT(s)	Bilateral investment treaty/treaties
CETA	Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CVA	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECtHR	European Court of Human Rights

FIPA	Foreign Investment Promotion and Protection Agreement
FTA(s)	Free trade agreement(s)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
Glossary of Terms	GNS (Uruguay Round), Glossary of Terms/Inventory of Concepts and Points in Discussion, MTN.GNS/W/43/Rev.2, 25 October 1988
GNS	Group of Negotiations on Services
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA(s)	International investment agreement(s)
ILC	International Law Commission
ILM	International Legal Materials
LCIA	London Court of International Arbitration
MFN	Most-favored-nation
NAFTA	North American Free Trade Agreement
NPM provision(s)	Non-precluded measures provision(s)
OED	Oxford English Dictionary
OJ	Official Journal of the European Union
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RCEP	Regional Comprehensive Economic Partnership Agreement

RTA(s)	Regional trade agreement(s)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TNC	Trade Negotiations Committee
Tokyo Round Anti-Dumping Code	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade
TPP	Trans-Pacific Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
USMCA	Agreement between the United States of America, the United Mexican States, and Canada
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the World Trade Organization

Table of Cases

ICJ/PCIJ

Investment Arbitration

GATT 1947/WTO

Dispute Settlement Mechanisms in Regional Trade Agreements

Miscellaneous

Introduction

Problem and Relevance of the Topic

There is no denying that states are the ultimate actors, possessing unparalleled powers to legislate, enforce laws, and adjudicate within their territories. Furthermore, they are inherently *entitled* to exercise these powers.[1] This conventional wisdom, viewing states as supreme territorial entities equal to one another, has significantly contributed to the development of public international law as a discipline primarily defining permissible and non-permissible actions of states *vis-à-vis* each other.[2]

In this context, it is evident that international law should restrict state actions that infringe upon another state's domestic affair. This is the essence of international law in its traditional sense: establishing a framework in which states can act freely as long as they do not harm the legitimate rights and interests of other states. However, the legitimacy of such constraints is less clear when public

[1] See generally J. Coleman et al., 'International Investment Agreements, 2015–2016: A Review of Trends and New Approaches', in *Yearbook on International Investment Law & Policy 2015–2016* (2018), p. 72; V. Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs', *Vanderbilt Journal of Transnational Law* 50 (2017), p. 373; A. B. Marks, 'The Right to Regulate (Cooperatively)', 1 *University of Pennsylvania Law Review* 38 (2016), p. 4.

[2] See, for instance, A. Mills, 'Rethinking Jurisdiction in International Law', 1 *British Yearbook of International Law* 84 (2014), p. 236.

international law imposes restrictions on a state's domestic affairs that do not directly affect other states. The issue becomes more nuanced when a state pursues a legitimate public policy goal that benefits its own society, rather than addressing the treatment of foreign nationals. In such cases, it is appropriate to respect a state's sovereignty, building upon the strict Westphalian approach to public international law. As these situations gain traction, a significant challenge over the past decades has been to adequately express this due deference to state sovereignty in international legal terms without compromising the efficacy of any particular field of public international law.[3]

A growing recognition of states' right to regulate is at the forefront of attempts to address this challenge in international economic law.[4] The concept of the right to regulate has acquired significant momentum in international investment law in response to the systemic imbalance, perceived to exist between the rights and obligations of investors and host states. This imbalance has been starkly exposed by recent high-profile regulatory disputes, such as those over plain packaging requirements for cigarettes[5] and the decision to phase out nuclear power.[6] Consequently, states have sought to take firm control of the matter and rectify the system. In response, they developed a new generation of international investment agreements (IIAs)[7] that consistently feature the elaboration of the right to regulate as one of the novel themes, incorporating provisions that manifest this right,

[3] See, for instance, I. Cheyne, 'Deference and the Use of the Public Policy Exception in International Courts and Tribunals', in L. Gruszczynski & W. Werner (eds.), *Deference in International Courts and Tribunals* (2014). In addition to introducing new rules or amending existing ones in a specific legal area, a certain degree of deference to sovereignty can also be achieved through the application of the principle of systemic integration, as found in Article 31(3)(c) of the VCLT, which mandates considering "any relevant rules of international law applicable in the relations between the parties" in treaty interpretation (Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 [hereinafter VCLT]). See also R. Yotova, 'Systemic Integration: An Instrument for Reasserting the State's Control in Investment Arbitration?', *SSRN Electronic Journal* (2017), pp. 13–14.

[4] The right to regulate is not the only concept in public international law aimed at ensuring due deference to state sovereignty. For instance, in the context of international investment law, concepts such as the police powers doctrine, the margin of appreciation, and the principle of proportionality may have effects similar to those of the right to regulate (see, for instance, G. Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay', 2 *Revista de Direito Internacional (Brazilian Journal of International Law)* 14 (2017)).

[5] See *Philip Morris Brands Sàrl v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016; *Philip Morris Asia Ltd. v. Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015.

[6] See *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Order of The Tribunal Taking Note of the Discontinuance of the Proceeding, 9 November 2021, para. 5.

[7] For the sake of brevity, references to IIAs in this book also apply to investment chapters in FTAs, whenever appropriate.

directly or indirectly.[8] For instance, 43% of IIAs concluded between 2011 and 2016 include general exceptions, compared to just 7% of those concluded between 1959 and 2010.[9] According to the United Nations Conference on Trade and Development (UNCTAD), the number of IIAs with provisions safeguarding the right to regulate has grown significantly, including those clarifying substantive standards of protection or referring to public policy objectives in the preamble, thereby diversifying treaty objectives.[10]

In spite of the exciting developments in international investment law, the notion of the right to regulate cannot be considered pertinent solely to this field of international economic law. Another compelling area for studying this notion is international trade law. The General Agreement on Tariffs and Trade (GATT) 1947 and the World Trade Organization (WTO) agreements are deeply rooted in embedded liberalism, which posits that trade liberalization should be accompanied by appropriate state intervention in the market process. As a result, these agreements were designed from the outset to be more balanced, incorporating provisions such as GATT Article XX on "General Exceptions" and many other flexibilities.[11] Despite this purported balance, regulatory freedom under these agreements has always been a topic of discourse and has become even more critical with the inclusion of services and trade-related aspects of intellectual property rights in the multilateral trade system with the creation of the WTO in 1995.

However, the WTO legal regime is not the only constituent of international trade law today, given the recent proliferation of regional trade agreements (RTAs).[12] This trend has also been a prominent factor in developments related to the right to regulate in this field, culminating in creative drafting in such agreements, particularly those involving deeper integration and mega-regional character (*e.g.*, Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and Regional Comprehensive Economic Partnership Agreement (RCEP)). Unlike WTO agreements, RTAs frequently include explicit right-to-

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[8] M. Kinnear, 'Foreword to the Second Edition', in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: a Guide to the Key Issues* (2018), p. ix. A treaty provision that directly manifests the right to regulate is one that explicitly includes this term in its text. A significant challenge of this study is to identify provisions that indirectly manifest the right to regulate, given the wide variety of the clauses under IIAs and international trade agreements. To date, no comprehensive list of such provisions has been suggested in the doctrine.

[9] UNCTAD's Reform Package for the International Investment Regime (2018 edition), UNCTAD Investment Policy Hub. URL: https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition-, p. 70.

[10] *Ibid.*

[11] General Agreement on Tariffs and Trade, Agreement Establishing the World Trade Organization, Annex 1A, 15 April 1994, 1867 UNTS 187. [hereinafter GATT]

[12] Different terms denote the phenomenon of RTAs, such as preferential trade agreements, FTAs, and others. For the purposes of this study, these terms are used interchangeably.

regulate provisions. Moreover, these new provisions are active and have already become subjects of interstate litigation. In particular, some of the few trade disputes brought and considered under RTAs concern the right to regulate beyond traditional issues addressed under GATT Article XX-like provisions.[13] These novelties raise legal questions about the interpretation of such clauses and their practical relevance, as well as the overall understanding of the right to regulate in international trade law, which remain unanswered.

Perhaps international trade law could benefit significantly from the experiences of international investment law concerning regulatory space as manifested in the concept of the right to regulate. In fact, this could be a two-way street: exploring how each area individually approaches the right to regulate might enrich the understanding of this concept's function and potential in the other, eventually paving the way for a comprehensive understanding under international economic law.[14] After all, this may become yet another point of convergence between international investment law and international trade law, which many perceive to be occurring today.[15]

State of Research

As the convergence is still underway, the working assumption of this study is that the right to regulate has naturally assumed a special or particular (narrow) meaning in each of the fields mentioned above. This particular meaning determines the modalities of the interaction between inherent regulatory freedom and the constraints imposed by international law obligations. However, the notion of the right to regulate in these two areas has the same roots and appears to share the trajectory of later developments in IIAs and RTAs. This serves as a premise to initiate the discussion about *a general theory of the right to regulate in international economic law (hereinafter also referred to as a general theory).* This theory could thoroughly explain

[13] For instance, *Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union*, Final Report of the Arbitration Panel established pursuant to Article 307 of the Association Agreement between Ukraine, of the one part, and the European Union and its Member States, of the other part, 11 December 2020. [hereinafter Final Report of the Arbitration Panel, *Ukraine – Wood Products*]

[14] International economic law encompasses areas beyond international investment law and international trade law. However, this study proceeds from the understanding that these two fields are more suitable for substantive discussion of the right to regulate, given the extent to which this concept has been elaborated in them both practically and theoretically. Accordingly, studying the notion of the right to regulate in other areas of international economic law falls outside the scope of this work, and the conclusions reached herein for the entire field may require further examination and testing in those sub-fields.

[15] S. Gáspár-Szilágyi et al. (eds.), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (2020); J. Kurtz, *The WTO and International Investment Law: Converging Systems* (2016); T. Broude 'The 'Lottie and Lisa' of International Economic Law?', in R. Echandi & P. Sauve (eds.), *Prospects in International Investment Law and Policy* (2013).

the value and practical relevance of this concept in its application to matters governed by international economic law. At a minimum, its content might encompass the elements common to the particular meanings assumed by the right to regulate in international investment law and international trade law. Such a theory does not currently exist.

Besides, it would be premature to consider all conditions for devising such a theory as firmly established, since neither practice nor doctrine is sufficiently developed. Assuming the general feasibility of this theory, it is more prudent today to set the stage for its future development.

Extensive academic research over the past decades has already made a notable contribution to this effort. Although numerous papers on the right to regulate and associated issues exist under international investment law[16] and international trade

[16] A. Yap, *Right to Regulate in the Context of Expropriation* (A. Ugale (ed.), Jus Mundi, February 2022). URL: https://jusmundi.com/en/document/wiki/en-right-to-regulate-in-the-context-of-expropriation; M. J. Luque Macías, *Re-Politicising International Investment Law in Latin America through the Duty to Regulate Paradigm* (2021); Y. Abid, 'The Quest for Domestic Regulatory Space in the Investment Chapter of the Comprehensive and Progressive Trans-Pacific Partnership', 1–2 *Willamette Journal of International Law and Dispute Resolution* 27 (2020); X. Fei & Z. Li, 'Host States' Logic of Balance in Applying the Right to Regulate Foreign Investment Admission', 2 *US–China Law Review* 17 (2020); C. Giannakopoulos, 'The Right to Regulate in International Investment Law and the Law of State Responsibility: a Hohfeldian Approach', in P. Pazartzis & P. Merkouris (eds.), *Permutations of Responsibility in International Law* (2019); N. S. T. Sato, *Framing the Right to Regulate in the Public Interest in International Economic Law*, Doctoral Thesis, University of São Paulo Digital Library, 2019. URL: https://www.teses.usp.br/teses/disponiveis/2/2135/tde-14082020-112014/es.php; Y. Levashova, *The Right of States to Regulate in International Investment Law: the Search for Balance between Public Interest and Fair and Equitable Treatment* (2019); F. Morosini, 'Rethinking the Right to Regulate in Investment Agreements: Reflections from the South African and Brazilian Experiences', in A. Santos et al. (eds.), *World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization* (2019); C. Titi, 'The Right to Regulate', in M. M. Mbengue & S. Schacherer (eds.), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (2019); P. Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay', 1 *Asian Journal of International Law* 9 (2019); A. Schuppli, *Staatliches Regulierungsinteresse im Investitionsschutzrecht: Unter Besonderer Berücksichtigung des Schutzes vor Indirekten Enteignungen* (2019); W. Alschner & K. Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties', *SSRN Electronic Journal* (2018); J. Coleman et al., 'International Investment Agreements, 2015–2016: A Review of Trends and New Approaches', in *Yearbook on International Investment Law & Policy 2015–2016* (2018); D. K. Labin & R. R. Muratova, 'New Approaches to the Balance between Investor Protection and the Right to Regulate within Mega-regional Agreements', 4 *Moscow Journal of International Law* (2018); F. Morosini, 'Making the Right to Regulate in Investment Law and Policy Work for Development: Reflections from the South African and Brazilian Experiences', 2 *Investment Treaty News* 9 (2018); E. Trujillo, 'Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime Essays: Theoretical Perspectives and Cross-Cutting Issues', 8 *Boston College Law Review* 59 (2018); K. Yannaca-Small, 'Indirect Expropriation and the Right to Regulate: Has the Line Been Drawn?', in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: a Guide to the Key Issues* (2018); T. Broude et al., 'The Trans-Pacific Partnership and Regulatory Space: A Comparison of Treaty Texts', 2 *Journal of International Economic Law* 20 (2017); J. Kim, 'Balancing

law,[17] their analyses are not always instrumental in understanding this notion. While it has become common to discuss nearly all issues of regulatory freedom by mentioning the right to regulate, very few existing works address the concept substantively rather than in passing. This widespread approach may explain the lack of comprehensive studies on this concept in international economic law and its fields. One of the few exceptions is likely *Titi's* exploration of this concept in

Regulatory Interests through an Exceptions Framework under the Right to Regulate Provision in International Investment Agreements', 2 *The George Washington International Law Review* 50 (2018); V. Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs', *Vanderbilt Journal of Transnational Law* 50 (2017); G. Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay', 2 *Revista de Direito Internacional (Brazilian Journal of International Law)* 14 (2017); A. B. Marks, 'The Right to Regulate (Cooperatively)', 1 *University of Pennsylvania Law Review* 38 (2016); L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016); A. Pellet, 'Chapter 32: Police Powers or the State's Right to Regulate', in M. Kinnear et al. (eds.), *Building International Investment Law: the First 50 Years of ICSID* (2015); M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015); A. Titi, *The Right to Regulate in International Investment Law* (2014); C. Lévesque, 'The Inclusion of GATT Article XX Exceptions in IIAs: a Potentially Risky Policy', in R. Echandi & P. Sauve (eds.), *Prospects in International Investment Law and Policy* (2013); C. Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration', 1 *Journal of International Economic Law* 15 (2012); P. Ranjan, 'Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation', 1 *Asian Journal of International Law* 2 (2012); L. Markert, 'The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States', in M. Bungenberg et al. (eds.), *International Investment Law and EU Law* (2011); S. A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 4 *Journal of International Economic Law* 13 (2010); W. W. Burke-White & A. v. Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties', 2 *Virginia Journal of International Law* 48 (2008); H. Mann, 'The Right of States to Regulate and International Investment Law: A Comment', in UNCTAD, *The Development Dimension of FDI: Policy and Rule-making Perspectives: Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002* (2003); UNCTAD, The Development Dimension of FDI: Policy and Rule-making Perspectives: Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002 (2003).

[17] N. S. T. Sato, *Framing the Right to Regulate in the Public Interest in International Economic Law*, Doctoral Thesis, University of São Paulo Digital Library, 2019. URL: https://www.teses.usp.br/teses/disponiveis/2/2135/tde-14082020-112014/es.php; A. B. Marks, 'The Right to Regulate (Cooperatively)', 1 *University of Pennsylvania Law Review* 38 (2016); M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015); A. Aseeva, 'The Right of States to Regulate in Risk-Averse Areas and the ECtHR Concept of Margin of Appreciation in the WTO US–Cool Article 21.5 Decision', *Croatian Yearbook of European Law and Policy* 11 (2015); S. Battini & G. Vesperini (eds.), 'Global and European Constraints Upon National Right to Regulate: The Services Sector', *SSRN Electronic Journal* (2008); A. Lang, 'The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry', 4 *Journal of International Economic Law* 7 (2004); M. Krajewski, *National Regulation and Trade Liberalization in Services: the Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (2003).

international investment law, published in 2014, which may need updating due to subsequent substantial developments in the area.[18]

Other studies focus on fragmentary aspects related to the right to regulate. For instance, in international investment law, this concept is chiefly considered in its application to expropriation,[19] while other substantive standards of protection are often neglected.[20] Accordingly, thorough examinations of the right to regulate, such as *Levashova's* study in the context of fair and equitable treatment, are rare.[21]

In international trade law, the discourse often revolves around regulatory freedom or national regulatory autonomy under certain agreements and their provisions, whereas the term "the right to regulate" is not necessarily used.[22] Given the ubiquity and ambiguous content of the concept across fields, there are often works in both that refer to the right to regulate in their title but fail to meaningfully elaborate on it in the text.[23] Attempts to compare the approaches of both fields to the right to regulate or, more generally, regulatory freedom, which would enable cross-fertilization, are similarly rare.[24] Comparisons with approaches in other areas of international law, or involving them as broader contexts, are also under-

[18] A. Titi, *The Right to Regulate in International Investment Law* (2014).
[19] A. Yap, *Right to Regulate in the Context of Expropriation* (A. Ugale (ed.), Jus Mundi, February 2022). URL: https://jusmundi.com/en/document/wiki/en-right-to-regulate-in-the-context-of-expropriation; K. Yannaca-Small, 'Indirect Expropriation and the Right to Regulate: Has the Line Been Drawn?', in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: a Guide to the Key Issues* (2018); A. Pellet, 'Chapter 32: Police Powers or the State's Right to Regulate', in M. Kinnear et al. (eds.), *Building International Investment Law: the First 50 Years of ICSID* (2015); C. Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration', 1 *Journal of International Economic Law* 15 (2012).
[20] For instance, L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016), pp. 5–6.
[21] Y. Levashova, *The Right of States to Regulate in International Investment Law: the Search for Balance between Public Interest and Fair and Equitable Treatment* (2019).
[22] See, for instance, A. B. Marks, 'The Right to Regulate (Cooperatively)', 1 *University of Pennsylvania Law Review* 38 (2016); M. Krajewski, *National Regulation and Trade Liberalization in Services: the Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (2003).
[23] See, for instance, K. Yannaca-Small, 'Indirect Expropriation and the Right to Regulate: Has the Line Been Drawn?', in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: a Guide to the Key Issues* (2018).
[24] N. S. T. Sato, *Framing the Right to Regulate in the Public Interest in International Economic Law*, Doctoral Thesis, University of São Paulo Digital Library, 2019. URL: https://www.teses.usp.br/teses/disponiveis/2/2135/tde-14082020-112014/es.php; C. Titi, 'Embedded Liberalism and International Investment Agreements: The Future of the Right to Regulate, with Reflections on WTO Law', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018); M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015); B. Legum & I. Petculescu, 'GATT Article XX and International Investment Law', in R. Echandi & P. Sauve (eds.), *Prospects in International Investment Law and Policy* (2013); P. Muchlinski, 'Preface to Chapter 15 General Exceptions in International Investment Agreements', in M.-C. Cordonier Segger et al. (eds), *Sustainable Development in World Investment Law* (2011); A. P. Newcombe, 'General Exceptions in International Investment Agreements', in M.-C. Cordonier Segger et al. (eds), *Sustainable Development in World Investment Law* (2011).

researched. *Mouyal's* analysis of the right to regulate within international investment law in the context of human rights law is a profound example of a promising approach to studying this concept.[25]

This overview of the existing doctrine in the fields reveals that the right to regulate currently lacks comprehensive understanding among scholars. The notion of the right to regulate is undertheorized[26] and generally requires more attention in international economic law.[27]

Research Questions and Methodology

Considering the above, this study intends to contribute to the understanding of the right to regulate in international investment law and international trade law, viewed as adjacent terrains of international economic law. Despite some promising attempts in the recent past,[28] devising a comprehensive understanding of this concept in international economic law remains an ambitious task for the future. This book aims to lay the foundation for such a theory through two steps:

- First, *it will be determined whether a common understanding of the right to regulate in international economic law is feasible*. The emergence of a general theory will benefit the functioning of international investment and trade law. This theory, and its application in practice, will help reduce complexities and potential conflicts in the overlapping areas of international investment and trade law when the right to regulate is exercised.
- Second, *this study will explore the developmental dimension of the right to regulate as an essential component of a general theory*. The right to regulate should transcend its current role as a mere defense tool in litigation or an obscure reaffirmation of the regulatory freedom. The previously hidden yet present developmental dimension of this concept must come to light. This dimension will serve all

[25] L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016).

[26] C. Giannakopoulos, 'The Right to Regulate in International Investment Law and the Law of State Responsibility: a Hohfeldian Approach', in P. Pazartzis & P. Merkouris (eds.), *Permutations of Responsibility in International Law* (2019).

[27] See, for example, L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016), pp. 5–6. For an additional account of doctrinal views on the right to regulate in international investment law, which similarly conclude the need for further research in the field, see Section "Doctrinal Perspectives" below.

[28] See, for instance, the doctoral thesis defended by *Sato* in 2019, which examines the right to regulate as understood in international economic law based on studies of this notion in international investment and trade law. In her thesis, *Sato* analyzed the standard of review in both fields by examining selected case law and treaties (N. S. T. Sato, *Framing the Right to Regulate in the Public Interest in International Economic Law*, Doctoral Thesis, University of São Paulo Digital Library, 2019. URL: https://www.teses.usp.br/teses/disponiveis/2/2135/tde-14082020-112014/es.php).

> states' needs by providing a legal framework for introducing more efficient domestic regulations that pursue country-specific policy objectives.

With this in mind, the first chapter of this work explores the overall feasibility of the envisioned theory. Since states, as sovereigns, always enjoy the right to regulate in the broadest sense under general international law,[29] the opening chapter begins by identifying sovereignty as the conceptual basis for the right to regulate in both fields. Accordingly, an overview of the right to regulate in its connection to sovereignty and state jurisdiction, another derivative of sovereignty, is indispensable in establishing the overarching linkage between the special meanings of this right in international investment law and international trade law. Moreover, such an overview will facilitate generalizations. The discussion will then turn to a comparative analysis of how these two fields approach the right to regulate, with final considerations on the theory's feasibility embracing the apparent convergence of the two fields.

The second chapter will continue by exploring the possible content of a general theory beyond the common elements of the right to regulate found in international investment and trade law regimes.[30] This chapter will focus on the previously latent property of the right to regulate, vividly present in the General Agreement on Trade in Services (GATS) and especially in its *travaux préparatoires*. Specifically, the second chapter will explain the meaning of the development dimension of the right to regulate, based on the treaty interpretation rules outlined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). This will be done by focusing on the express recognition of the right to regulate in the GATS preamble, which precedes the later practice of IIAs and RTAs. The choice of this Agreement is justified by its worldwide membership and its role as a precursor, proven by many subsequent agreements. This allows GATS-specific conclusions to serve as a starting point for a more abstract discussion of the right to regulate in international economic law. In this sense, the GATS is highly relevant to both international investment and trade law regimes, as much of the overlap between them occurs in matters governed by this international trade agreement. For example, the GATS sets out rules for the commercial presence of foreign juridical persons, which could also be governed by IIAs.

At this juncture, it is worth noting that other approaches to studying the right to regulate under the GATS are also possible. For example, these approaches could include an examination of the entire design of the GATS with its built-in flexibilities, the balance struck in this covered agreement between competing goals, or the

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[29] C. Titi, 'Embedded Liberalism and International Investment Agreements: The Future of the Right to Regulate, with Reflections on WTO Law', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), p. 123.

[30] Areas other than those examined in this work can also be part of a general theory of the right to regulate in international economic law. However, as noted above, their consideration falls outside the scope of this study.

general exceptions under GATS Article XIV. However, this study posits that these examinations will not be as beneficial for developing a general theory of the right to regulate as the scrutiny of the GATS preambular language, which allows for drawing parallels with the recent practice of IIAs and RTAs employing comparable approaches to treaty drafting. Accordingly, other legitimate methods of studying the right to regulate under the GATS fall outside the scope of this study.

Based on the analysis in these two chapters, this book ultimately submits that a general theory of the right to regulate is attainable in international economic law. Drawing from the GATS and its negotiating history, the final conclusions will further suggest that the long-forgotten developmental dimension of the right to regulate should be included in such a theory, in addition to other possible elements established for that concept in international investment and trade law. For clarity, this book does not aim to design a comprehensive theory or provide all the answers. Instead, the goal of this research project is to pave the way for a more substantiated discussion about the right to regulate in international economic law and to highlight some aspects that should be considered when this theory is developed.

Chapter 1: The Feasibility of a General Theory

1.1 The Right to Regulate as an Attribute of Sovereignty

1.1.1 Sovereignty and the Right to Regulate

A state is traditionally free "to adopt, maintain, and enforce the measures necessary for the advancement of its public policy goals."[31] This regulatory freedom can manifest in various actions by legislative, administrative, and judicial bodies. The range of possible actions is so vast that listing all of them here would be impractical. Entering into treaties that circumscribe this capacity is also "a manifestation of the state regulatory capacity."[32] All of the above falls within the concept of the right to regulate in this "catch-all" sense[33] and can be understood as "an affirmation of states' authority to act as sovereigns on behalf of the will of the people."[34]

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[31] V. Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs', *Vanderbilt Journal of Transnational Law* 50 (2017), p. 373.
[32] A. Titi, *The Right to Regulate in International Investment Law* (2014), p. 32. See also L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016), p. 222; R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2012), p. 22.
[33] See J. Crawford, *Brownlie's Principles of Public International Law* (2019), p. 432.
[34] L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016), p. 8.

Regardless of its precise scope and content, the right to regulate is, by definition, a legal claim or power allowing its holder to do something otherwise not permitted. Like any other right, it must originate from somewhere. The search for its source does not appear problematic. Scholars and practitioners unanimously recognize the right to regulate as a fundamental aspect of sovereignty,[35] or even a core feature of the sovereign state,[36] which is "well-entrenched in customary international law."[37] Thus, the concept at hand belongs to the collection of rights held by a state lumped under the term of sovereignty, especially when the latter term is used "in its most common modern usage" as the accumulation of competences.[38]

A more challenging task is to succinctly define sovereignty and its relation to the right to regulate. As noted, "the word [sovereignty] itself has a lengthy and troubled history, and is susceptible to multiple meanings and justifications."[39] Two opposing approaches to sovereignty in international law are worth mentioning.[40] Positivist international law theory holds that states have "unrestricted freedoms as an *a priori* consequence of their statehood," with overall freedom existing "prior" to the law ("*the old approach*").[41] In contrast, modern usage assumes that sovereignty "does not

[35] A. B. Marks, 'The Right to Regulate (Cooperatively)', 1 *University of Pennsylvania Law Review* 38 (2016), p. 4; S. A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 4 *Journal of International Economic Law* 13 (2010), p. 1038.

[36] V. Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs', *Vanderbilt Journal of Transnational Law* 50 (2017), p. 373.

[37] A. Titi, *The Right to Regulate in International Investment Law* (2014), p. 32; C. Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration', 1 *Journal of International Economic Law* 15 (2012), p. 225; See also J. Coleman et al., 'International Investment Agreements, 2015–2016: A Review of Trends and New Approaches', in *Yearbook on International Investment Law & Policy 2015–2016* (2018), p. 72; L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016), p. 31. There are also attempts to establish in treaty terms that the right to regulate, in its broad meaning, is linked with customary international law. For instance, Article 20.1 of the 2012 SADC Model BIT explicitly notes that states have the right to regulate "in accordance with customary international law and other general principles of international law" (2012 SADC Model BIT. URL: https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf).

[38] For a broader discussion on sovereignty, see J. Crawford, *Brownlie's Principles of Public International Law* (2019), p. 432. Other important rights of sovereigns regarding economic activities within their territories are those under the principle of permanent sovereignty over natural resources, which underlines states' undivided capacity to exploit their resources (see N. J. Schrijver, 'Natural Resources, Permanent Sovereignty over' (June 2008), in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition)).

[39] J. Crawford, *Brownlie's Principles of Public International Law* (2019), p. 432.

[40] For clarity, given that this study falls under public international law, the text below focuses on sovereignty as understood under international law, while other theories are not considered.

[41] A. Mills, 'Rethinking Jurisdiction in International Law', 1 *British Yearbook of International Law* 84 (2014), p. 192.

define, but is defined by, the legal powers of a state within an international society of states" ("*the new approach*").[42]

Both understandings can accommodate the notion of the right to regulate. The subtle difference between them is akin to the question of which came first, the chicken or the egg. In the modern concept of sovereignty, the right to regulate as part of state competence defines sovereignty, and not *vice versa*. Each approach, however, contributes to a complete understanding of the right to regulate. The old approach centers on sovereignty, automatically deferring to it in interactions governed by international law. Within this framework, the right to regulate is assumed. Thus, questioning whether a state possesses this right might seem absurd to scholars and practitioners in this field. After all, there is little doubt that this right exists in international law.[43]

However, one might wonder why states increasingly include provisions in international investment and trade agreements explicitly recognizing their right to regulate.[44] Are such clauses necessary? Are they not redundant given the above discussion? It is not that states would lack this right without these provisions. However, the redundancy of such provisions aligns with the rigid interpretation of the old approach. Either way, states reinforce their right to regulate for many good reasons, especially legal certainty. Here, the new approach to sovereignty helps to better understand these provisions theoretically. This treaty design conveys the functionality of states as entities that adopt, maintain, and enforce regulations to pursue their public policy goals. The content of agreements with such provisions shows that they reflect the concept of modern sovereignty, understood as advancing publicly relevant goals, which could also be viewed as states simply being there for society. States exist not to rule but to address public concerns, and international legal instruments are the appropriate place to proclaim this under international law.[45]

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[42] *Ibid.*, p. 193. For a view that sovereignty can also be perceived as merely "the legal competence which states have in general," see J. Crawford, *Brownlie's Principles of Public International Law* (2019), p. 432. The shift in the understanding of sovereignty under public international law can also be characterized as its "humanization" (L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016), pp. 222–223).

[43] See C. Titi, 'The Right to Regulate', in M. M. Mbengue & S. Schacherer (eds.), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (2019), p. 162.

[44] For instance, paragraph 1 of Article 8.9 of the CETA stipulates that "[f]or the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories 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" (Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 14 January 2017, OJ L 11 [hereinafter CETA]). For an overview of this practice, see Section "Explicit (Re)Affirmation of the Right to Regulate" below.

[45] For instance, see A. Mills, 'Rethinking Jurisdiction in International Law', 1 *British Yearbook of International Law* 84 (2014), pp. 188–189, noting that "arguments are increasingly made that the foundations of international law have fundamentally shifted from state sovereignty to a greater

The new approach also clarifies whether entities other than states can hold the right to regulate. Conversely, under the narrowly understood old approach, non-sovereign subjects of international law may be perceived as lacking the inherent capacity to hold this right, as it is strictly a sovereign property. In other words, in this paradigm, only states possess the right to regulate.

Irrespective of the theoretical underpinnings, practice has already provided answers in many treaties that expose no such constraint. Many treaties broadly refer to the holders of the right to regulate, making no distinction between states and other entities recognized to possess this right. For instance, the GATS preamble recognizing the right to regulate does not refer to states. Instead, it acknowledges that WTO Members, which include both states and separate customs territories, possess this right. Consequently, the GATS recognizes that separate customs territories can also be legitimate holders of the right to regulate alongside states.[46] The more recent CETA similarly reaffirms its parties' right to regulate, with one of the parties being the European Union.[47] Hence, the European Union is also regarded by the drafters of the CETA as a subject that can legitimately exercise the right to regulate.

The practice aligns better with the new approach to sovereignty. According to this approach, the right to regulate can exist independently, without being tied to the sovereignty of a state, as the sovereignty of its holder in the traditional sense is not necessary for the existence of such a right. This detachment allows the right to regulate to belong to entities that are non-sovereign in the traditional sense, such as international organizations to which member states have transferred their competences. Some of these transferred competences may coincide with those falling within the scope of the right to regulate, such as the European Union's exclusive competence in common commercial policy extending to investment law matters.[48] Thus, while intrinsically connected to sovereignty, the right to regulate cannot be considered to be the exclusive domain of states.[49] However, exercising this right requires the transfer of certain competences and must be strictly within the confines of that transfer to be legitimate.

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concern with 'humanity', or from sovereignty as 'right' to sovereignty as 'responsibility'." See also, more generally, *Prosecutor v. Duško Tadić*, Appeals Chamber, International Criminal Tribunal for the former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 97, albeit in a different context, asserting that in international law, "[a] [s]tate-sovereignty-oriented approach ha[d] been gradually supplanted by a human-being-oriented approach."

[46] See General Agreement on Trade in Services, Agreement Establishing the World Trade Organization, Annex 1B, 15 April 1994, 1869 UNTS 183, preamble, recital 4. [hereinafter GATS] For a more detailed analysis, see Section "Members' Right to Regulate" below.

[47] CETA, *supra* note 44, preamble, recital 6. See also Art. 8.9.

[48] See Treaty on the Functioning of the European Union, Art. 3, 206–207.

[49] For the sake of brevity, references here to the right of states to regulate, when appropriate, also apply to entities other than a state.

Notwithstanding the particular approach to sovereignty, one matter remains abundantly clear: the right to regulate is, at a fundamental level, a corollary of sovereignty. Consequently, this attribute of the right to regulate, derived from sovereignty, is inherent in all the special meanings it may assume in different sub-fields of public international law. Thus, sovereignty inevitably serves as a linchpin common to all of them.

1.1.2 Jurisdiction and the Right to Regulate

It is inevitable that the issue of state jurisdiction[50] will arise when discussing sovereignty. These two concepts are intrinsically linked from both national and international law perspectives.[51] Given that both jurisdiction[52] and the right to regulate[53] are considered manifestations of state sovereignty under public international law, it is essential to determine how these two notions intersect.

As *Crawford* bluntly states, sovereignty is "shorthand for legal personality of a certain kind," while jurisdiction indicates "particular aspects, especially rights (or claims), liberties and powers."[54] With no exceptions, every exercise of public authority entails that of state jurisdiction.[55] In its turn, state jurisdiction can be exercised to prescribe, enforce, or adjudicate.[56]

Thus, jurisdiction, which covers all possible actions of state organs, resembles the concept of the right to regulate in its broadest sense. Both are derivatives of sovereignty, embodying a state's entitlement to govern its territory by prescribing, enforcing, and adjudicating. Their close resemblance has led some authors to use the terminology of one to describe the other. For instance, in the summary of its chapter on jurisdiction in a prominent international law textbook, *Staker* expounds

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[50] Jurisdiction has different meanings in a public international law context. This study refers to jurisdiction as the legal competence of a state to exercise its public authority.

[51] S. Beaulac, 'The Lotus Case in Context: Sovereignty, Westphalia, Vattel, and Positivism', in S. Allen et al. (eds.), *The Oxford Handbook of Jurisdiction in International Law* (2019), p. 42; C. Ryngaert, 'The Concept of Jurisdiction in International Law', in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (2015), p. 50. However, the connection between sovereignty and state jurisdiction is far from clear. In its introduction to the seminal work on jurisdiction, *Mann* articulated various ways the connection between sovereignty and jurisdiction could be described, stating that "[i]nternational jurisdiction is an aspect or an ingredient or a consequence of sovereignty (or of territoriality or of the principle of non-intervention" (F. A. Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', in *Recueil des Cours, Collected Courses of the Hague Academy of International Law*, volume 186 (1985), p. 20).

[52] D. W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources', 1 *British Yearbook of International Law* 53 (1983), p. 1.

[53] C. Giannakopoulos, 'The Right to Regulate in International Investment Law and the Law of State Responsibility: a Hohfeldian Approach', in P. Pazartzis & P. Merkouris (eds.), *Permutations of Responsibility in International Law* (2019), p. 156.

[54] J. Crawford, *Brownlie's Principles of Public International Law* (2019), p. 192.

[55] A. Orakhelashvili, 'State Jurisdiction in International Law: Complexities of a Basic Concept', in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (2015), p. 1.

[56] C. Staker, 'Jurisdiction', in M. Evans (ed.), *International Law* (2018), pp. 292–293.

jurisdiction as follows: "[e]ach [s]tate has the right to regulate its own public order, and to that end it is entitled to legislate for everyone within its territory."[57]

Even when considered broadly, the concept of the right to regulate is not merely another notion for state jurisdiction. The latter is a more generic term that subsumes the right to regulate, with notable distinctions between them under public international law. To begin with, jurisdiction encompasses *every* exercise of public authority. In contrast, the right to regulate, particularly in its special meanings in various fields of public international law, is necessarily invoked when such an exercise aims to advance public policy goals. For instance, a court decision in a dispute between private parties over whether a small debt was duly paid is an exercise of jurisdiction not necessarily carried out in pursuit of public policy goals.[58] Therefore, the right to regulate is narrower in scope.

Furthermore, the rules on jurisdiction in public international law are "closely related to the customary international law principles of non-intervention and sovereign equality of [s]tates."[59] Jurisdiction is, therefore, more diverse in content, embodying two elements: a state exercises jurisdiction within the limits of its sovereignty *and* must acknowledge that other states also possess this capacity within their sovereignty.[60] The second element serves as a basis under international law for a legitimate assertion of jurisdiction, despite other states' possibly valid claims. The territorial, personal, protective, and universality principles of jurisdiction were elaborated to resolve such concurrent claims when they arise.[61]

Although such principles and other similar rules do not fall within the ambit of the right to regulate, this concept is not alien to concerns about the admissible reach of national laws. If regulations in pursuit of the right to regulate aim to advance *national* public policy goals, these regulations are expected to focus on the state adopting them. Accordingly, their effect must be confined to the territory of that state and cease where other states may have their legitimate interests. Therefore, it is unclear whether the concept of the right to regulate accommodates the extraterritorial effects of legislation. Specifically, is the extraterritorial effect of domestic regulations a proper element of the notion of the right to regulate?

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[57] *Ibid.*, p. 289.

[58] Admittedly, one could argue that every court decision inevitably contributes to the domestic rule of law, whose advancement may be regarded as a public policy goal. In this vein, it should be recalled that "[t]here is a general presumption that measures adopted by [s]tates are intended for the furtherance of the common good" (*OOO Manolium-Processing v. The Republic of Belarus*, PCA Case No. 2018-06, Final Award, 22 June 2021, para. 425).

[59] C. Ryngaert, *Jurisdiction in International Law* (2015), p. 6. See also J. Kokott 'States, Sovereign' (April 2011), in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition).

[60] F. A. Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', in *Recueil des Cours, Collected Courses of the Hague Academy of International Law*, volume 186 (1985), p. 20; C. Ryngaert, 'The Concept of Jurisdiction in International Law', in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (2015), p. 51.

[61] C. Ryngaert, *Jurisdiction in International Law* (2015), pp. 101–144.

The aforementioned question continues to grow in importance as states increasingly adopt wide-reaching legislation to address various concerns, some of which are no longer purely national. For example, in exercising its right to regulate, transferred from Member States, the European Union currently seeks to establish a carbon border adjustment mechanism as part of its efforts to combat climate change.[62] This exercise of the right to regulate has an extraterritorial reach, as it would apply to goods entering the European Union from around the globe. Consequently, this legislation raises questions about its legitimacy on many levels.[63] The extraterritoriality of any similar exercise of the right to regulate presents a problematic issue, as no rationale currently supports extraterritoriality in the context of the right to regulate. It appears that the tools developed under public international law for jurisdiction could be useful due to the similarity of these concepts discussed above. However, this hypothesis requires further reasoning, which falls outside the scope of the present research project. This study proceeds from an understanding that the extraterritoriality of measures otherwise fitting the right to regulate is also a legitimate exercise of this right, provided there is a sufficient link to the national policy objectives of the state.

While it may be tempting to confuse jurisdiction with the right to regulate in its broadest sense, these are two different concepts, as seen above. Therefore, distinguishing between them is essential for a better understanding of the right to regulate as a derivative of sovereignty and its distinct legal value.

1.1.3 Preliminary Conclusions

Having emerged as a concern from the old approach to sovereignty, the right to regulate undoubtedly remains its derivative alongside jurisdiction. Some issues associated with the right to regulate can be better explained theoretically using the new approach to sovereignty, which allows for more flexibility. Although not exhaustive, the foregoing brief analysis underscores that the right to regulate can be understood from various angles and squarely fits with contemporary attempts to rethink basic concepts of international law. However, it is clear that sovereignty is where it all starts for the concept of the right to regulate, irrespective of the particular point of view.

In its broadest sense, the notion of the right to regulate resembles that of jurisdiction. The different contexts in which these two concepts have developed caution against conflating them. While public international law rules on jurisdiction generally determine whether a state's exercise of public authority is valid in light of

[62] See Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, 2021/0214(COD), 14 July 2021. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0564.

[63] See, for instance, J. Bacchus, *Legal Issues with the European Carbon Border Adjustment Mechanism* (CATO Institute Briefing Paper No. 125, 2021). URL: https://www.cato.org/briefing-paper/legal-issues-european-carbon-border-adjustment-mechanism.

other states' possible claims and interests, the right to regulate primarily focuses on advancing the society where the respective laws are enacted.

The prospect of conceptual cross-fertilization aids in better understanding the right to regulate and how it can be reconciled with contentious issues, such as the extraterritoriality of domestic regulation. However, neither teachings on sovereignty nor those on state jurisdiction provide a clear understanding of how the right to regulate should be interpreted in its special meanings within concrete fields of public international law. Therefore, recourse to other sources is required to better understand the right to regulate in international investment law and international trade law, as endeavored in this study.

1.2 Mapping Special Meanings of the Right to Regulate

1.2.1 Quest for Special Meanings

In its broadest sense, the right to regulate is essentially a corollary of sovereignty underscoring a state's entitlement to govern its territory through the exercise of its jurisdiction to prescribe, enforce, and adjudicate. Addressing the right to regulate in this sense helps rationalize states' superior position regarding regulatory powers within their territories. However, staying within that paradigm fails to capture the interplay between states' sovereign powers and their obligations under public international law, which is where the concept of the right to regulate is most useful. Knowing that a state can legitimately regulate is impractical *per se* when its international law commitments, to which it has consented, conflict with its regulatory freedom.

The key to this interaction lies in specific areas, not in general international law, including customary law,[64] regardless of how general international law connects sub-fields of public international law.[65]

The emergence and further sophistication of specialized rules and spheres of legal practice over the last decades have led to the creation of many particular fields within public international law. However, it must be noted that "such specialized law-making and institution building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law."[66] More importantly, "[e]ach rule-complex or 'regime' comes with its own principles, its own form of expertise and its own 'ethos', not necessarily identical to the ethos of neighbouring specialization."[67] Based on this, an operative presumption for this study is that different areas of international economic law, where investment and trade law are such "neighbouring specializations,"[68] may not necessarily share the same content and scope of the concept of the right to regulate.

As long as the right to regulate can assume different meanings, it is necessary to distinguish these meanings. Below is an attempt to do so for the international investment and trade law regimes. For this purpose, both areas will be approached as public international law disciplines. After that, international investment and trade law will be examined in relation to each other to determine whether a general theory of the right to regulate could potentially exist for both.

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[64] International customary law may also be relevant in examining the right to regulate under public international law. Of potential application is necessity as a circumstance precluding the wrongfulness of a state's act under the ILC's Articles on Responsibility of States for Internationally Wrongful Acts to the extent they reflect international customs (Articles on Responsibility of States for Internationally Wrongful Acts (ILC), appended to UN General Assembly Resolution 56/83, 12 December 2001). However, the practical relevance of such defenses is doubtful for international investment and trade law. For instance, *Titi* explains regarding international investment arbitration that "protection of the state's right to regulate through customary international law very rarely – if ever – becomes available" (C. Titi, 'Embedded Liberalism and International Investment Agreements: The Future of the Right to Regulate, with Reflections on WTO Law', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), p. 124). Necessity as a circumstance precluding wrongfulness also does not feature in WTO litigation. Accordingly, international customary law falls outside the scope of this study. However, it must be noted that international customary law continues to be binding alongside treaty regimes, as the ICJ famously held in *Nicaragua* (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392 at para. 73).

[65] For example, international customary rules of treaty interpretation apply across various fields of international law.

[66] See Report of the Study Group of the ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by M. Koskenniemi, A/CN.4/L.682, 13 April 2006, para. 8.

[67] *Ibid.*, para. 15.

[68] For a comparison between these two converging fields, focusing on their approaches to the right to regulate, see Sections "Special Meanings of the Right to Regulate" and "Comparison of the Special Meanings" below.

1.2.2 International Investment Law

1.2.2.1 Identifying Tools to Improve the System

In international investment law, the concept of the right to regulate can be traced back to 1974, when the UN General Assembly adopted the Charter of Economic Rights and Duties of States.[69] In Article 2 of the Charter, a state was recognized to have "the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities." According to *Fei* and *Li*, this was the first time when the phrase "right to regulate foreign investment" appeared in a legal instrument.[70] Although this was long before the concept began to thrive in investment law, soon after the adoption of this Charter, *Alexandrowicz* noted the tension this provision could create with other rules of international law. Referring to Article 2 of the Charter, he stated that "[t]hus the principle of traditional international law relating to minimum standards goes overboard."[71] Hence, even without a clear meaning at origin, the concept of the right to regulate already raised legitimate concerns about its interaction with the rules of public international law.

When there is an interaction, the likelihood of a legal conflict arises. Once it occurs, the conflict must be resolved, inevitably resulting in either widening or narrowing down the state's discretion in taking specific measures. Thus, the question in 1974 could have been: What will it mean when the right to regulate acquires a precise legal value in international investment law? Will the introduction of this legal concept alter the scope of host states' permitted conduct? Will it mean something else?

It took a long time before the international community began to receive answers to any of those questions. Until recently, the notion of the right to regulate was a dormant concept with no express content or practical application. However, the state of play has changed over the past 20 years. A wake-up call came in the form of a series of regulatory disputes, best illustrated by those concerning the Argentinian economic crisis,[72] the plain packaging requirements for cigarettes in

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[69] Charter of Economic Rights and Duties of States, adopted by UN General Assembly Resolution 3281 (XXIX), 12 December 1974. *Alexandrowicz* clarified that this Charter was adopted "not in the form of a multilateral treaty creating rights and obligations of States, but as a unilaterally issued code of behaviour which is in the nature of a General Assembly recommendation" (C. H. Alexandrowicz, *The Law of Nations in Global History* (2017), p. 411).

[70] X. Fei & Z. Li, 'Host States' Logic of Balance in Applying the Right to Regulate Foreign Investment Admission', 2 *US–China Law Review* 17 (2020), p. 65; see also A. R. Parra, *The History of ICSID* (2017), p. 109.

[71] See C. H. Alexandrowicz, *The Law of Nations in Global History* (2017), p. 412.

[72] See *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. Arb/02/16, Award, 28 September 2007; *Enron Corp. Ponderosa Asset, L.P. v. Argentine Republic*, ICSID Case No. Arb/01/3, Award, 22 May 2007; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. Arb/02/1, Decision on Liability, 3 October 2006; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

Australia and Uruguay,[73] and Germany's decision to phase out nuclear power.[74] These and other disputes have revealed that the balance reached in IIAs is tilted unsatisfactorily toward the protection of investors rather than appropriately serving the interests of host states.[75] The range of regulatory topics addressed in investment law disputes has become extremely broad, extending to issues of general public interest in the respective countries, such as environmental policy[76], sovereign decisions regarding privatization[77], urban policy[78], taxation[79], renewable energy,[80] and many others.

This development, where measures taken for legitimate public goals could also be subject to litigation, created uncertainty about where the state's discretion ends in such matters. The previously existing unfettered freedom to define the state's development began to appear less secure. Suddenly, an adjudicator of investment law claims emerged who could dictate to a sovereign whether its decisions were correct. Accordingly, "investment treaty claims have increasingly come to be viewed by critics as a threat to sovereign rights to regulate in the public interest."[81] This threat also had a distinct economic perspective, as regulatory chill emerged as a concern, where states might hold back on genuine attempts to address legitimate policy issues for fear of further regulatory disputes.[82]

The states responded drastically to the newly perceived threat. Some believed that eliminating the system altogether was the right solution. Consequently, they

[73] See *Philip Morris Brands Sàrl v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016; *Philip Morris Asia Ltd. v. Australia*, PCA Case No. 2012–12, Award on Jurisdiction and Admissibility, 17 December 2015.

[74] See *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Order of The Tribunal Taking Note of the Discontinuance of the Proceeding, 9 November 2021, para. 5.

[75] See S. A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 4 *Journal of International Economic Law* 13 (2010), pp. 1046–1047, 1065–1066. See also *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 116; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 81; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113.

[76] See, for instance, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.

[77] See, for instance, *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

[78] See, for instance, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

[79] See, for instance, *Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Award, 1 July 2004.

[80] See, for instance, *The PV Investors v. Kingdom of Spain*, PCA Case No 2012-14, Final Award, 28 February 2020; *Charanne B.V. & Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016.

[81] E. Gaillard & M. McNeil, 'The Energy Charter Treaty', in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: a Guide to the Key Issues* (2018), p. 31.

[82] For more on regulatory chill, see F. Baetens & C. Tietje, 'Investor Protection', in *Draft Report of the Study Group on Preferential Trade Agreements*, International Law Association (2016), pp. 49–50.

sought to abandon it entirely or significantly reduce their participation in international investment law matters. Bolivia was the first state to withdraw from the ICSID Convention[83] in 2007, followed by Ecuador and Venezuela in 2009 and 2012, respectively.[84] Several countries, including Ecuador, South Africa, and Indonesia, terminated their bilateral investment treaties (BITs).[85] In contrast, others, such as Brazil, significantly changed their investment policies by declining to include arbitration provisions in their IIAs, which would have enabled investors to bring claims against parties to such treaties.[86] These actions raised novel legal issues concerning the possibility of initiating new investment law claims against these states.

Meanwhile, other countries adopted more modest actions. They aimed to save the system by reviewing their current IIAs and being more vigilant while concluding new ones. This practice included reviewing the negotiating templates for BITs to ensure that the balance between investor protection and state interests was adequately represented.[87] The early 2000s saw the creation of the 2004 Canada Model BIT,[88] updated twice since then,[89] the 2003 India Model BIT,[90] and the 2004 US Model BIT,[91] updated in 2012.[92] Notably, the 2004 Canada Model BIT and the

[83] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.
[84] N. Boeglin, *ICSID and Latin America : Criticisms, withdrawals and regional alternatives* (bilaterals.org, 2013). URL: https://www.bilaterals.org/?icsid-and-latin-america-criticisms&lang=fr.
[85] Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims, IIA Issues Note. No. 2, December 2010. URL: https://unctad.org/system/files/official-document/webdiaeia20106_en.pdf, p. 1; P.-T. Stoll, 'International Investment Law and the Rule of Law', 1 *Goettingen Journal of International Law* 9 (2018), p. 275. For the status of the concluded BITs, see International Investment Agreements Navigator, UNCTAD Investment Policy Hub. URL: https://investmentpolicy.unctad.org/international-investment-agreements.
[86] 2016 Brazil Model BIT. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download.
[87] C. Titi, 'Embedded Liberalism and International Investment Agreements: The Future of the Right to Regulate, with Reflections on WTO Law', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), pp. 129–130.
[88] 2004 Canada Model BIT. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download. [hereinafter 2004 Canada Model BIT]
[89] 2014 Canada Model BIT. URL: https://www.italaw.com/sites/default/files/files/italaw8236.pdf; 2021 Canada Model BIT. URL: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng. As for the summary of main changes in the latest Model BIT, among which is an introduction of provisions reinforcing the right to regulate, see 2021 FIPA model – Summary of main changes. Government of Canada. URL: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa_summary-2021_modele_apie_resume.aspx?lang=eng.
[90] 2003 India Model BIT. URL: https://www.italaw.com/sites/default/files/archive/ita1026.pdf.
[91] 2004 US Model BIT. URL: https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf. [hereinafter 2004 US Model BIT]
[92] 2012 US Model BIT. URL: https://ustr.gov/sites/de-fault/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

2004 US Model BIT have widened the scope of their respective countries' regulatory freedom by clarifying the protection standard of indirect expropriation, explicitly excluding non-discriminatory measures taken for public policy objectives.[93] Additionally, these model BITs included several exceptions tailored to their respective countries' interests.[94]

Despite these early attempts to get the system up and running, much remained to be done to fix it, as evidenced by the constant review of model BITs. If anything, international investment law is one of the fastest-evolving areas of public international law, continually meeting and solving challenges—certainly, not only those associated with the right to regulate.[95]

The last few decades have been marked by an ongoing search for better tools to fix the system. As a result, international investment law is currently experiencing "a rather controversial period."[96] Among state-driven reform efforts "in full swing" today[97] are attempts to reconcile states' inherent right to regulate in pursuit of national policy objectives,—and sometimes also a duty to do so, as some would argue,[98]—with the primary reason why the entire system of international investment

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[93] See 2004 Canada Model BIT, *supra* note 88, Annex B.13(1); 2004 US Model BIT, *supra* note 91, Annex B.

[94] C. Titi, 'Embedded Liberalism and International Investment Agreements: The Future of the Right to Regulate, with Reflections on WTO Law', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), pp. 129–130.

[95] For an overview of other issues and developments in this field since the 1990s, see P.-T. Stoll, 'International Investment Law and the Rule of Law', 1 *Goettingen Journal of International Law* 9 (2018), pp. 270–276; see also J. Coleman et al., 'International Investment Agreements, 2015–2016: A Review of Trends and New Approaches', in *Yearbook on International Investment Law & Policy 2015–2016* (2018), pp. 72–74.

[96] A. Kozyakova, *Foreign Investor Misconduct in International Investment Law* (2021), p. 4. In addition to the right to regulate, several other tools have been suggested lately to ensure regulatory freedom at a satisfactory level for states in international investment arbitration. In her recap of the suggestions, *Spears* distinguished concepts from other legal areas, such as "the 'least restrictive alternative' approach developed by the WTO Appellate Body in the trade law context, the three levels of scrutiny familiar to US constitutional law, the 'margin of appreciation' doctrine developed by the [ECtHR], the doctrine of 'necessity' developed by the European Court of Justice, the 'proportionality' analysis first developed by some national administrative and constitutional courts" (S. A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 4 *Journal of International Economic Law* 13 (2010), pp. 1048–1049). The abundance of such tools in different legal systems shows that they sometimes share similar concerns. However, an ill-considered transposition of an alien legal concept into another legal realm is always problematic. This might be the reason why none of these concepts has been fully accepted in international investment law.

[97] W. Alschner & K. Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties', *SSRN Electronic Journal* (2018), p. 1. For current efforts in this reform related to investor-state dispute settlement, see Working Group III: Investor-State Dispute Settlement Reform, UNCITRAL. URL: https://uncitral.un.org/en/working_groups/3/investor-state.

[98] M. J. Luque Macías, *Re-Politicising International Investment Law in Latin America through the Duty to Regulate Paradigm* (2021); L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016),

law emerged in the first place: the protection of foreign investments.[99] After all, states want to maintain the ability to introduce various regulations *while* continuing to attract foreign investments for economic growth.

Thus far, the common practical response for those adhering to IIAs and the overall system has been to tighten the levels of protection offered in them by:

- refining the major substantive standards of protection (see Section 1.2.2.2 below);
- integrating exceptions and carve-outs (see Section 1.2.2.3 below); or
- explicitly reaffirming the right to regulate (see Section 1.2.2.4 below).[100]

This section proceeds with dissecting these attempts to provide a distilled overview of the diverse approaches to the content of the right to regulate, as manifested in practice and prior academic writing.

1.2.2.2 Refining Substantial Standards of Protection

In theory, the starting point for considering the right to regulate has always been the search for a balance between the rights and obligations enshrined in IIAs. It is commonly believed that this balance is best depicted by the protection standards guaranteed by international investment law, such as expropriation, fair and equitable treatment, full protection and security, national treatment, most-favored-nation (MFN) treatment, and others. Accordingly, for a long time, and continuing today, a crucial aspect of dealing with the right to regulate is examining substantive standards of protection and determining to what extent they accommodate regulatory space.[101]

Notwithstanding the above, there is a clear limitation in the current approaches to the right to regulate related to protections under international investment law. With a single notable exception,[102] the doctrine is strikingly focused solely on one substantive standard of protection—expropriation. Other standards are largely

pp. 96–158; S. A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 4 *Journal of International Economic Law* 13 (2010), pp. 1037–1038. In its position paper, South Africa, along with the right to regulate, also referred to the duty to do so largely arising "from a range of domestic law elements (constitutional, administrative and legislative mandates)" (Bilateral Investment Treaty Policy Framework Review, Government Position Paper of the Republic of South Africa, 2009, p. 47).

[99] See, for instance, European Commission Concept Paper, Investment in TTIP and beyond – The path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court, 5 May 2015.

[100] P.-T. Stoll, 'International Investment Law and the Rule of Law', 1 *Goettingen Journal of International Law* 9 (2018), p. 275.

[101] For instance, E. Trujillo, 'Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime Essays: Theoretical Perspectives and Cross-Cutting Issues', 8 *Boston College Law Review* 59 (2018), pp. 2739–2741, 2743.

[102] Y. Levashova, *The Right of States to Regulate in International Investment Law: the Search for Balance between Public Interest and Fair and Equitable Treatment* (2019).

neglected in academic writing on the right to regulate,[103] despite their impact on regulatory freedom and consequent bearing on this right.[104]

In practice, it is only natural that the unsatisfactory outcomes of regulatory disputes have quickly been associated in the minds of IIAs drafters with substantive standards of protection. If state measures are frequently found to be contrary to investment law obligations, then the simplest way to improve the odds for host states in future litigation is by tweaking the wording of the respective provisions and narrowing their scope. In this regard, revising the respective provisions is a straightforward way to improve the balance between protections under international investment law and other public policy objectives. From *Lévesque's* point of view, it has more potential than adding general exceptions to IIAs, such as those modeled on GATT Article XX.[105]

The attempts under the model BITs to clarify the legal standard of indirect expropriation in treaty texts have quickly been taken on by other IIAs that were later concluded or reviewed. A notable example is the CETA between Canada and the European Union and its Member States. Article 8.12 of the CETA sets out the standard of protection against expropriation, with its first paragraph stipulating that the host state may not expropriate unless certain conditions are met. This paragraph concludes with a sentence making it plain that its interpretation must take into account Annex 8-A of the CETA. Most interestingly, this annex adds that

> *For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.*[106]

[103] For instance, L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016), pp. 5–6.
[104] See E. Trujillo, 'Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime Essays: Theoretical Perspectives and Cross-Cutting Issues', 8 *Boston College Law Review* 59 (2018), p. 2739. In practice, the right to regulate is also relevant in the context of substantive standards of protection other than expropriation. For instance, in *S.D. Myers, Inc. v. Canada*, the tribunal assessed claims under Article 1105(1) of the NAFTA concerning the application of the minimum standard of treatment. In so doing, it stated that the respective determination "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders" (*S.D. Myers, Inc. v. Government of Canada*, NAFTA Arbitration, Partial Award, 13 November 2000, para. 263). See also *Saluka Investments BV (the Netherlands) v. The Czech Republic*, UNCITRAL Arbitration, 17 March 2006, para. 305.
[105] C. Lévesque, 'The Inclusion of GATT Article XX Exceptions in IIAs: a Potentially Risky Policy', in R. Echandi & P. Sauve (eds.), *Prospects in International Investment Law and Policy* (2013), p. 370.
[106] CETA, *supra* note 44, Annex 8-A, para. 3.

The fact that this paragraph begins with "for greater certainty" does not diminish its legal relevance.[107] On the contrary, this interpretative provision of the CETA qualifies the standard of protection, making it challenging to prove in arbitration concerning perceived regulatory takings that indirect expropriation occurred. This provision establishes a *general* rule that non-discriminatory measures taken for legitimate public welfare objectives are not tantamount to indirect expropriation ("do not constitute indirect expropriations… except in the rare circumstance"). The circumstances under which this may still be the case are limited. They include situations where the negative impact of a measure is so severe that it appears "manifestly excessive" in light of the purpose for which the measure was taken. Taken together, this provision serves as a direct hint to the arbitrators not to mistakenly consider measures genuinely taken to exercise the right to regulate as instances of expropriation.

As a result, clarifying the respective standards of protection—most notably expropriation, as exemplified by the CETA and its Annex 8-A—has become increasingly popular in a new generation of IIAs. The idea behind such corrections is to increase the regulatory space for host countries through explicit treaty terms.

1.2.2.3 Integrating Exceptions and Carve-Outs into IIAs

As noted above, there are other ways of considering the right to regulate and related issues in international investment law. As states sought to balance investment protection and other public policy goals, the discussion of state regulatory freedom began to revolve around treaty provisions enabling host states to circumvent their obligations under IIAs. These treaty exceptions, also referred to as non-precluded measures provisions (NPM provisions), initially dominated the discourse on regulatory freedom in IIAs.[108] As the term suggests, NPM provisions allow states to take measures that would otherwise be contrary to their treaty obligations. They are "exceptions to the scope of the application" of IIAs,[109] preventing investment protections under IIAs from being applicable in exceptional circumstances. The advantage of including an NPM provision in IIAs is that states can find bespoke

[107] See, for instance, C. Titi, 'Embedded Liberalism and International Investment Agreements: The Future of the Right to Regulate, with Reflections on WTO Law', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), pp. 132–133.

[108] See W. W. Burke-White & A. v. Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties', 2 *Virginia Journal of International Law* 48 (2008); P. Ranjan, 'Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation', 1 *Asian Journal of International Law* 2 (2012).

[109] A. K. Sinha, 'Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries', 2 *Asian Journal of International Law* 7 (2017), p. 228.

solutions to their concerns, distinct from the customary norm.[110] As a result, incorporating such a provision will "allow for newer flexibilities on the part of the State."[111] Some authors point out that NPM provisions are the most effective tool "to ensure adequate regulatory space for host states."[112]

A typical example of such a provision is Article XI of the US–Argentina BIT, which was heavily litigated in the 2000s in cases against Argentina:

> *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.*[113]

This provision refers to a minimal number of permissible objectives, making its scope of application narrow. The inconsistent outcomes of Argentinian cases suggested the need to search for more viable options to find the balance.

As a result, discussions turned later to broader NPM provisions modeled on GATT Article XX or GATS Article XIV, which expand on the permissible objectives.[114] In the early 2010s, such general exceptions were considered an innovative way to accommodate more regulatory flexibility in IIAs.[115] Before that, these exceptions appropriated from the WTO were rarely included in IIAs, and the practice of investment tribunals dealing with them was accordingly scarce.[116] However, general exceptions borrowed from an alien field of law were not well

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[110] *Burke-White* and *von Staden* explain that the distinction between NPM provisions and customary law defenses lies in "their substantive content, their theoretical justification, their source of legal authority, and their scope of applicability" (W. W. Burke-White & A. v. Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties', 2 *Virginia Journal of International Law* 48 (2008), p. 321).

[111] J. Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis', 2 *International and Comparative Law Quarterly* 59 (2010), p. 347.

[112] A. K. Sinha, 'Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries', 2 *Asian Journal of International Law* 7 (2017), pp. 228–230, 262.

[113] Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/127/download.

[114] See A. P. Newcombe, 'General Exceptions in International Investment Agreements', in M.–C. Cordonier Segger et al. (eds), *Sustainable Development in World Investment Law* (2011); B. Legum & I. Petculescu, 'GATT Article XX and International Investment Law', in R. Echandi & P. Sauve (eds.), *Prospects in International Investment Law and Policy* (2013); C. Lévesque, 'The Inclusion of GATT Article XX Exceptions in IIAs: a Potentially Risky Policy', in R. Echandi & P. Sauve (eds.), *Prospects in International Investment Law and Policy* (2013).

[115] P. Muchlinski, 'Preface to Chapter 15 General Exceptions in International Investment Agreements', in M.–C. Cordonier Segger et al. (eds), *Sustainable Development in World Investment Law* (2011), p. 351.

[116] A. Titi, *The Right to Regulate in International Investment Law* (2014), p. 173.

received by all.[117] For instance, South Africa cautioned in 2009 that such provisions "raise more questions than answers" and that the transposition of the trade clause to investment law cannot be straightforward.[118]

Surprisingly, many interpretative issues remained unresolved after the first wave of disputes concerning the operation of such provisions, primarily due to the reluctance of all sides to engage with them. It appears that "[r]espondents fail to raise them appropriately and tribunals tend to ignore them or adopt interpretations that lessen their impact."[119] In *Eco Oro v. Republic of Colombia*, the arbitral tribunal even concluded that applying the general exceptions modeled after GATT Article XX of the respective free trade agreement (FTA) does not relieve a responding state from its duty to compensate.[120]

Accordingly, even though general exceptions seemed to be a step in the right direction, they failed to yield satisfactory results. States kept on looking for other tools that could help fix the system.

Besides NPM provisions modeled on GATT Article XX or GATS Article XIV, another tool has become popular in IIAs to exclude certain measures from the scope of treaty application altogether. This tool involves treaty provisions defined as exclusions or carve-outs. Such excluding provisions determine which measures fall outside the scope of certain substantive protective standards, dispute settlement, or an IIA in its entirety. A notable recent example that gained attention from practitioners and scholars[121] is the tobacco carve-out in the Trans-Pacific Partnership (TPP) incorporated by reference into the CPTPP:

> *A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by*

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117 C. Titi, 'Embedded Liberalism and International Investment Agreements: The Future of the Right to Regulate, with Reflections on WTO Law', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), pp. 130–131.

118 See Bilateral Investment Treaty Policy Framework Review, Government Position Paper of the Republic of South Africa, 2009, pp. 47–48.

119 W. Alschner & K. Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties', *SSRN Electronic Journal* (2018), p. 2. For an overview of interpretative issues, see A. P. Newcombe, 'General Exceptions in International Investment Agreements', in M.-C. Cordonier Segger et al. (eds), *Sustainable Development in World Investment Law* (2011).

120 *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, paras. 826–837. For critics of this decision, see J. B. Heath, *Eco Oro and the twilight of policy exceptionalism* (Investment Treaty News, 2021). URL: https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/.

121 See, for instance, V. Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs', *Vanderbilt Journal of Transnational Law* 50 (2017); S. Puig & G. Shaffer, 'A Breakthrough with the TPP: The Tobacco Carve-out Commentary', 2 *Yale Journal of Health Policy, Law and Ethics* 16 (2016).

> *the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.*[122]

This provision empowers parties to the CPTPP to effectively block companies from using the mechanism under this Agreement "to receive compensation for commercial damages resulting from tobacco control measures."[123] Provisions like this seem more efficient in shielding the most sensitive areas of public policy. However, the concern about their broader use is that their inclusion in IIAs could decrease investment protection and the overall attractiveness of the legal regime from investors' perspectives.[124]

As seen from the above, introducing exceptions and carve-outs into treaty texts has proven to be one of the most efficient and widely used means of addressing concerns about the allegedly improper balance in IIAs.

1.2.2.4 Explicit (Re)Affirmation of the Right to Regulate

Until recently, it was rare for an IIA to expressly recognize the right to regulate in its text.[125] As the balance issue became more acute in the mid-2000s, IIAs and investment chapters in FTAs increasingly began to include *explicit references to the right*

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[122] Trans-Pacific Partnership Agreement, 4 February 2016. URL: https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents, Art. 29.5. [hereinafter TPP] The footnotes to this provision are also of interest as they further clarify the parties' intention to ensure their tobacco control measures are not exposed more than necessary by the legal regime of the TPP. Footnote 11 specifies other TPP provisions that are not affected by the tobacco carve-out under Article 29.5, while footnote 12 provides a detailed definition of a tobacco control measure.

[123] S. Puig & G. Shaffer, 'A Breakthrough with the TPP: The Tobacco Carve-out Commentary', 2 *Yale Journal of Health Policy, Law and Ethics* 16 (2016), pp. 328–329.

[124] V. Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs', *Vanderbilt Journal of Transnational Law* 50 (2017), p. 404.

[125] Y. Abid, 'The Quest for Domestic Regulatory Space in the Investment Chapter of the Comprehensive and Progressive Trans-Pacific Partnership', 1–2 *Willamette Journal of International Law and Dispute Resolution* 27 (2020), p. 55; S. A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 4 *Journal of International Economic Law* 13 (2010), p. 1045. One of the earliest examples, albeit not explicitly mentioning the right to regulate, is Article 1114:1 of the NAFTA, which stipulates that "[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns" (North American Free Trade Agreement, 17 December 1992, 32 ILM 289 [hereinafter NAFTA]). As commentators explain, this provision has played a minor role in practice, leaving nearly no trace of added value in the operation of the entire agreement (C.–E. Côté, 'From Sea to Sea: Regulatory Space of Federal and Provincial Governments in Canada Under CETA and TPP Investment Chapters', *SSRN Electronic Journal* (2016), p. 13).

to regulate in their preambles and the main parts.[126] Inserting such clauses, also known as right-to-regulate provisions, is the third option for states designing new IIAs or reviewing old ones to preserve a satisfactory level of regulatory freedom.

By doing so, drafters attempt to eliminate the possibility that arbitrators will perceive the respective investment treaty as one-sided, aimed only at protecting investors and covered investments at the expense of national policy objectives.[127] Instead, especially when the right to regulate is reaffirmed in preambles, which are routinely used in investment arbitration to establish the agreement's object and purpose,[128] arbitrators will be directed under the VCLT to determine the object and purpose of such IIAs as encompassing host states' interests and not to regard non-economic objectives as secondary or negligible.[129]

Recognizing the right to regulate in the main treaty part has the potential to make this concept more operational. However, the implications of embedding IIAs with right-to-regulate provisions remain unclear,[130] even though some such clauses are labeled as "a positive innovation for the protection of the regulatory space of government."[131] Paragraph 1 of Article 8.9 of the CETA how such provisions can be worded:

> *For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories 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.*

Provisions that do not directly mention the right to regulate but affirm the parties' power to adopt, maintain, or enforce measures in pursuit of national policy objectives are also of comparable effect. For instance, Annex I, Section III(1) of the Canada-Costa Rica BIT reads:

> *Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement*

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126 For an overview of some practice of including explicit references to the right to regulate in the preambles and operative portions of treaty texts in the IIAs concluded in the 2010s, see J. Coleman et al., 'International Investment Agreements, 2015–2016: A Review of Trends and New Approaches', in *Yearbook on International Investment Law & Policy 2015–2016* (2018), pp. 75–86.

127 See A. Schuppli, *Staatliches Regulierungsinteresse im Investitionsschutzrecht: Unter Besonderer Berücksichtigung des Schutzes vor Indirekten Enteignungen* (2019), p. 48.

128 C. H. Brower II, 'Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes', *Yearbook on International Investment Law & Policy 2008–2009* (2009), p. 375. For a detailed analysis of the role of preambles in treaty interpretation, see Section "Legal Value of a Treaty Preamble" below.

129 S. A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 4 *Journal of International Economic Law* 13 (2010), pp. 1044–1045.

130 J. Coleman et al., 'International Investment Agreements, 2015–2016: A Review of Trends and New Approaches', in *Yearbook on International Investment Law & Policy 2015–2016* (2018), p. 86.

131 C.-E. Côté, 'From Sea to Sea: Regulatory Space of Federal and Provincial Governments in Canada Under CETA and TPP Investment Chapters', *SSRN Electronic Journal* (2016), p. 13.

> *that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*[132]

In *Infinito Gold Ltd. v. Republic of Costa Rica*, the arbitral tribunal interpreted and applied the above provision. Due to the self-limiting "otherwise consistent with" language,[133] it found this clause lacking the quality of a carve-out.[134] Nevertheless, the arbitral tribunal understood this provision as "reaffirming the State's right to regulate" by emphasizing that two goals of environment and investment protection "should, if possible, be reconciled so that they are mutually supportive and reinforcing."[135] Accordingly, such novel provisions specifically draw arbitrators' attention to the need to pay due deference to sovereign decisions made to pursue the right to regulate.

Consequently, drafting IIAs with express language safeguarding "the right of governments to regulate for public welfare reasons" aims to diminish the level of protection offered by investment treaties.[136] However, their practical relevance is yet to be fully uncovered.

1.2.2.5 Doctrinal Perspectives[137]

In the only comprehensive attempt so far to examine the right to regulate in international investment law, *Titi* defined the right to regulate in 2014 as

> *the legal right exceptionally permitting the host State to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate.*[138]

Since then, there have been notable developments in international investment law, including the emergence of mega-regional trade agreements that showcase modern

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[132] Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments, 18 March 1998. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/601/download.
See also TPP, *supra* note 122, Art. 9.16.

[133] Y. Abid, 'The Quest for Domestic Regulatory Space in the Investment Chapter of the Comprehensive and Progressive Trans-Pacific Partnership', 1–2 *Willamette Journal of International Law and Dispute Resolution* 27 (2020), p. 56. See also C.-E. Côté, 'From Sea to Sea: Regulatory Space of Federal and Provincial Governments in Canada Under CETA and TPP Investment Chapters', *SSRN Electronic Journal* (2016), p. 13.

[134] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, para. 777.

[135] *Ibid.*, para. 778. (footnote omitted)

[136] See Bilateral Investment Treaty Policy Framework Review, Government Position Paper of the Republic of South Africa, 2009, pp. 23–24.

[137] While the sections above are also based on the doctrinal sources, this part of the study aims to provide an overview of academic attempts to discuss the right to regulate as a pure concept, distinct from the specific legal sources in which it manifests.

[138] A. Titi, *The Right to Regulate in International Investment Law* (2014), p. 33.

techniques preserving the right to regulate, as discussed above. Despite the changes, *Titi's* definition remains relevant today, as evident from her later publications, which also note the experience of mega-regional trade agreements.[139]

She also explained that there should be a distinction between the right to regulate as "a legal right founded in law" and "a legitimate right, that belongs to the sphere of arbitral discretion."[140] This distinction is instrumental in differentiating the right to regulate as part of the applicable law from other possible considerations that an arbitral tribunal may take into account when deciding that no compensation is due.[141] For example, arbitral tribunals often invoke the police powers doctrine to explain why the regulatory measures of a host state do not entail the duty of compensation. Consequently, the police powers doctrine "has been often used interchangeably with" a state's right to regulate whenever a regulatory taking is at issue.[142] In the 2012 UNCTAD paper on expropriation, the authors primarily discuss the police powers doctrine in the section on "Asserting the State's right to regulate in the public interest."[143] However, since there is still no consensus on whether the police powers doctrine belongs to the body of applicable law,[144] it should not to be confused with the right to regulate, which is considered to be manifested in treaty terms, especially in those that expressly mention it. Drawing on this distinction, the present study focuses on the right to regulate as part of the applicable law.

Other authors also consider the right to regulate as an issue pertaining to whether a state should pay for its actions in the context of regulatory takings. For instance, while refraining from defining the right to regulate in the abstract, *Mouyal*

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[139] C. Titi, 'The Right to Regulate', in M. M. Mbengue & S. Schacherer (eds.), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (2019), p. 163.
[140] *Ibid.*
[141] *Ibid.* See also C. Titi, 'Embedded Liberalism and International Investment Agreements: The Future of the Right to Regulate, with Reflections on WTO Law', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), pp. 124–125.
[142] A. Yap, *Right to Regulate in the Context of Expropriation* (A. Ugale (ed.), Jus Mundi, February 2022). URL: https://jusmundi.com/en/document/wiki/en-right-to-regulate-in-the-context-of-expropriation, para. 1; L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016), pp. 8–9, 177.
[143] UNCTAD, *Expropriation – a Sequel, UNCTAD Series on Issues in International Investment Agreements II* (2012), pp. 78–110.
[144] For a view in favor of the police powers doctrine being part of international investment law, see A. Pellet, 'Chapter 32: Police Powers or the State's Right to Regulate', in M. Kinnear et al. (eds.), *Building International Investment Law: the First 50 Years of ICSID* (2015). For a view raising questions about this, see C. Titi, 'Police Powers Doctrine and International Investment Law', in A. Gattini et al. (eds.), *General Principles of Law and International Investment Arbitration* (2018); G. Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay', 2 *Revista de Direito Internacional (Brazilian Journal of International Law)* 14 (2017). Arbitral discretion can also be observed in how an arbitral tribunal understands the content of the right to regulate under international law, for which there is a lack of consistent jurisprudence (R. Yotova, 'Systemic Integration: An Instrument for Reasserting the State's Control in Investment Arbitration?', *SSRN Electronic Journal* (2017), p. 26).

considers that the scope of this term directly affects how to distinguish between "compensable and non-compensable regulation."[145]

A somewhat broader explanation of the implications of exercising the right to regulate, albeit along the same lines, was given by *Wagner*, who referred to it as merely regulatory space. According to him, this notion does not denote sporadic instances when a state may decide to contravene its international legal obligations. Instead, regulatory space emphasizes the recognition that a state has limited discretion not to grant protection to investments and investors under the respective IIAs if certain conditions are met.[146]

There are also attempts to highlight policies other than the environment, health, and safety when discussing the right to regulate. Building on the experiences of Brazil and South Africa, *Morosini* suggests expanding the notion of the right to regulate to necessarily include in it a pursuit of national policy objectives relevant to developing countries. For example, one of his main ideas is to remove the inhibition on regulatory experimentation to enable "countries to incorporate policy areas as diverse as redistributive justice and industrial policies."[147]

At the same time, there are nearly no attempts to theorize the concept of the right to regulate in international investment law. An outstanding exception is a paper by *Giannakopoulos*,[148] in which he conceptualized the right to regulate using *Hohfeld's* century-old analysis of the web of jural relations arising from the term "right."[149] *Giannakopoulos* concludes that recent attempts to frame the right to regulate "as being in principle a claim rather than a legal power," such as those by *Titi*, who views the right to regulate as a basis for not paying compensation otherwise due, are conceptually problematic and should be considered with caution—certainly not as a default or the only understanding of the right to regulate.[150]

Despite the widespread interest in the topic, it would be incorrect to conclude that there is sufficient doctrinal analysis of the right to regulate in international investment law. The existing attempts are fragmented. However, a common feature

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[145] L. W. Mouyal, *International Investment Law and the Right to Regulate* (2016), p. 169.

[146] M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015), p. 65.

[147] F. Morosini, 'Rethinking the Right to Regulate in Investment Agreements: Reflections from the South African and Brazilian Experiences', in A. Santos et al. (eds.), *World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization* (2019), pp. 163–164.

[148] C. Giannakopoulos, 'The Right to Regulate in International Investment Law and the Law of State Responsibility: a Hohfeldian Approach', in P. Pazartzis & P. Merkouris (eds.), *Permutations of Responsibility in International Law* (2019).

[149] See W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 1 *Yale Law Journal* 23 (1913–1914); W. N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', 8 *Yale Law Journal* 26 (1916–1917).

[150] C. Giannakopoulos, 'The Right to Regulate in International Investment Law and the Law of State Responsibility: a Hohfeldian Approach', in P. Pazartzis & P. Merkouris (eds.), *Permutations of Responsibility in International Law* (2019), pp. 175–178.

of most studies on this concept is their focus on the interaction with the obligation to compensate for expropriation. Other dimensions of the right to regulate in international investment law, such as those dealing with substantive protections other than expropriation or national policy objectives beyond the environment, health, and safety, remain open for further research and analysis.

1.2.2.6 Preliminary Conclusions

In recent decades, the proliferation of investment agreements, particularly those of a new generation, has been a critical factor in shaping the concept of the right to regulate in international investment law. A significant trend in this proliferation, relevant to the present study, is the emergence of numerous treaty provisions that directly or indirectly manifest the right to regulate.[151] For instance, 43% of IIAs concluded between 2011 and 2016 include general exceptions, compared to only 7% of those concluded between 1959 and 2010.[152] Similarly, according to the UNCTAD, the numbers of IIAs containing provisions safeguarding the right to regulate have grown significantly. These provisions include those clarifying the substantive standards of protection or referring to public policy objectives in preambles and diversifying thus treaty objectives.[153]

The encapsulation of the right to regulate in these provisions allows for a more straightforward discussion of this concept. As a result, it has become possible to consider specific investment agreement provisions rather than being confined to the doctrinal content of the right to regulate, which is often fragmented, scattered across the legal field, and difficult to grasp. Indeed, the foregoing analysis reveals that while the concept of the right to regulate thrives in international investment law today, there is no single comprehensive approach to understanding its meaning and scope in this field.

Specifically, the right to regulate is considered to manifest in the following provisions of IIAs and investment chapters of FTAs (see Table 1 below):

- the entire treaty text, reflecting the overall balance between rights and obligations under an IIA;
- substantive standards of protection under IIAs;
- NPM provisions and various carve-outs that exempt a state from treaty obligations to follow certain substantive standards of protection in exceptional circumstances or concerning particular state measures;

[151] A. Schuppli, *Staatliches Regulierungsinteresse im Investitionsschutzrecht: Unter Besonderer Berücksichtigung des Schutzes vor Indirekten Enteignungen* (2019), pp. 200–201.
[152] UNCTAD's Reform Package for the International Investment Regime (2018 edition), UNCTAD Investment Policy Hub. URL: https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition-, p. 70.
[153] *Ibid.*

- right-to-regulate provisions that reinforce this right by explicitly mentioning it in the preamble or text of an IIA and highlighting the relevance of non-economic policy objectives in the operation of such agreements.

Table 1: Manifestation of the Right to Regulate in Treaty Terms of IIAs

Specific provisions or treaty parts	Description	Examples
Treaty in its entirety	the overall balance between rights and obligations under the specific agreement, exposing the regulatory space enjoyed by the host state	(—)
Substantive protections and their refinement	— substantive standards of protection, such as expropriation, fair and equitable treatment, full protection and security, and others, from the perspective of whether they satisfactorily accommodate the regulatory space of host states	— Para. 3 of Annex 8-A of the CETA
	— interpretative provisions refining the standards of protection to tailor the applicable protective standards to the host state's interest in having wider discretion in its regulatory space	— Para. 1 of Art. 8.12 of the CETA together with its Annex 8-A
NPM provisions, carve-outs	— provisions that allow states to take measures that would otherwise be contrary to their treaty obligations	— Art. XI of the US–Argentina BIT,[154] Art. 21.1 of the US–Panama FTA[155]
	— provisions specifically designating certain measures or issues as being outside the scope of the particular substantive standard of protection, dispute	— Art. 29.5 of the TPP

[154] Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/127/download.

[155] United States – Panama Trade Promotion Agreement, 28 June 2007. URL: https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text.

	settlement, or the treaty in its entirety	
Right-to-regulate provisions	— provisions reinforcing the right to regulate by explicitly mentioning it in the preamble or main text of an agreement to ensure deference to the host state's regulatory power	— Art. 13.2 of the EU–Viet Nam FTA[156]
	— such provisions frequently refer to national policy objectives relevant to the exercise of the said right	— Recitals 6, 8 of the preamble of the CETA

1.2.3 International Trade Law

1.2.3.1 Embedded Liberalism's Central Role

For a long time, international trade law centered on multilateral efforts to create a legal regime that would benefit its participants by effectively regulating trade among them. As the first operational outcome of such attempts as part of the immediate post-World War II Bretton Woods system,[157] the GATT 1947 emerged from the United States' proposal to set up an International Trade Organization to enable its members to harmonize policies concerning international trade and employment.[158]

The design of the GATT 1947 was shaped in many aspects by the shared agreement about the proper configuration of international economic affairs that existed in the post-war period. According to *Oatley*, this agreement was reached among labor, business, and governments in the United States and Europe to restrict the global market liberalism by providing tools for greater economic security to industrial workers.[159] *Ruggie* is credited with coining this state of affairs in the mid-20th century as the "embedded liberalism compromise" or simply "embedded liberalism."[160] He defined this paradigm as a broad agreement seeking to establish an order that

[156] Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, 30 June 2019, OJ L 186.
[157] J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989), p. 307.
[158] See Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019, DSR 2019:VIII, p. 4301, para. 7.84. [hereinafter Panel Report, *Russia – Traffic in Transit*]
[159] T. H. Oatley, *International Political Economy* (2019), p. 466.
[160] See J. G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', 2 *International Organization* 36 (1982).

> *… unlike the economic nationalism of the thirties, … would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism.*[161]

As a result of these prevailing views, the GATT 1947 was created not only to contain plenty prohibitive and constraining rules but also to embrace various safeguards, exemptions and exceptions "that seemed to afford the contracting parties a great deal of regulatory space."[162] Achieving a delicate balance between these elements was an important goal for the international community. *Ruggie* aptly described the two-sided balancing nature of the trade deal that eventually became the GATT 1947, which merits quoting here:

> *[The GATT 1947] made obligatory the most-favored-nation rule, but a blanket exception was allowed for all existing preferential arrangements, and countries were permitted to form customs unions and free trade areas. Moreover, quantitative restrictions were prohibited, but were deemed suitable measures for safeguarding the balance of payments—explicitly including payments difficulties that resulted from domestic policies designed to secure full employment. … The substantial reduction of tariffs and other barriers to trade was called for; but it was not made obligatory and it was coupled with appropriate emergency actions, which were allowed if a domestic producer was threatened with injury from import competition that was due to past tariff concessions. ...*

In other words, the GATT 1947 can be seen as a reflection of the embedded liberalism compromise, as it "entailed coupling multilateral commitments to reducing certain trade barriers with the broad freedom to undertake domestic practices to maintain economic stability."[163] Even though the text of the GATT 1947 did not expressly refer to the right to regulate, its drafters designed many of its provisions to efficiently accommodate the regulatory freedom of states. For instance, *Lewis* refers to at least eleven ways in which otherwise strict rules on international trade in goods under the GATT 1947 have been deliberately made flexible. These include provisions allowing the adoption of balance of payment measures, the retention of certain preferential arrangements, and a dispute

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[161] *Ibid.*, p. 393.

[162] See M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015), p. 4.

[163] M. K. Lewis, 'The Embedded Liberalism Compromise in the Making of the GATT and Uruguay Round Agreements', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), p. 14; see also E. Reid, 'The WTO's Purpose, Regulatory Autonomy and the Future of the Embedded Liberalism Compromise', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), p. 225; M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015), p. 31.

resolution system based more on diplomacy and pragmatism than on strict adherence to law.[164]

Among such provisions safeguarding regulatory space is Article XX of the GATT, entitled "General Exceptions," which enables contracting parties to justify measures that would otherwise violate the GATT 1947. Such measures should be non-discriminatory and necessary or related to publicly relevant goals, including public morals, human, animal, or plant life and health, conservation of exhaustible natural resources, and others. As *Jackson* noted, measures covered by this provision "might be thought of as falling within the general 'police powers' or 'health and welfare powers' of a government."[165] Accordingly, Article XX of the GATT 1947, and subsequently that of the GATT 1994 as part of the WTO legal regime, should be treated as a vital vehicle in preserving the right to regulate, understood as the extent of regulatory freedom, for their Members.[166]

Conceived at a different time, the WTO continues the efforts initiated by the GATT 1947 to create the multilateral legal framework for international trade in goods. However, views diverge on whether the outcome of the Uruguay Round, which culminated in the creation of the WTO, is as faithful to embedded liberalism as the GATT 1947 initially was. *Titi* appears to support the view that the WTO, at its core, maintained adherence to the previously prevailing approach regarding the balance between rights and obligations envisaged in its agreements. The commitment to trade liberalization as the main rationale behind the WTO seems to be properly counterbalanced with mechanisms that "safeguard domestic stability and allow states to pursue core public interests."[167] Overall, according to this view, international trade law remains firmly entrenched in embedded liberalism.[168]

Meanwhile, some opinions suggest that it would be more accurate to describe the multilateral trade system as departing from this approach. For example, the transition to a rules-based system in the WTO, particularly through the introduction of the brand-new dispute settlement system, can be seen as a retreat from the embedded liberalism compromise. *Lewis* suggests that the negative consensus required for adopting panel and Appellate Body reports, along with other strict

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[164] M. K. Lewis, 'The Embedded Liberalism Compromise in the Making of the GATT and Uruguay Round Agreements', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), pp. 16–17; see also M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015), pp. 31–32.

[165] J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989), p. 206.

[166] Unlike general exceptions, national security exceptions under GATT Article XXI have received little attention in the discourse about the regulatory space due to their narrower scope of application and less frequent invocation in the ordinary course of trade.

[167] C. Titi, 'Embedded Liberalism and International Investment Agreements: The Future of the Right to Regulate, with Reflections on WTO Law', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), pp. 122–123.

[168] M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015), p. 31.

procedural rules on dispute settlement, has weakened domestic policy space, as WTO Members now lack the leeway that previously existed for GATT 1947 contracting parties. In fact, the ability to resolve arising issues diplomatically without a predetermined outcome, where any contracting party could prevent the adoption of a panel report, can be seen as more freedom in these matters. Similarly, new substantive obligations in WTO agreements have reduced policy space because, before their introduction, there were no legal rules to constrain domestic decision-making in those fields.[169]

Irrespective of the correct answer, it is undeniable that embedded liberalism has immensely influenced the architecture of the multilateral trade legal regime that began with the GATT 1947 and was later transformed into the WTO. This paradigm has paved the way for a shared understanding from early on that both elements of international trade must be equally nurtured, so that trade liberalization as a goal is reconciled with appropriate domestic interventionism.

Consequently, from early on, the multilateral trade system was profoundly geared towards maintaining the balance between trade liberalization efforts and the protection of states' national policy objectives. As demonstrated below, this inherent approach has had far-reaching implications for the concept of the right to regulate in international trade law and its development.

1.2.3.2 Sparse Mentions in WTO Agreements

Just as in the GATT 1947, the treaty text of WTO agreements contains virtually no express references to the right to regulate.[170] The only exception is the GATS, whose preamble explicitly recognizes the right to regulate of WTO Members.[171] As the only specific mention of this notion in the WTO agreements, the preambular language of the GATS deserves special attention. With that in mind, the second chapter of this study aims to scrutinize the GATS preambular provision that explicitly recognizes the right to regulate, including its negotiating history.

The lack of express references to the right to regulate in WTO agreements has been vital to the development of the particular meaning of the right to regulate in international trade law. The absence of such references appears to be one of the main reasons why the discourse in this field regarding regulatory freedom has not

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[169] M. K. Lewis, 'The Embedded Liberalism Compromise in the Making of the GATT and Uruguay Round Agreements', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), pp. 23–25.

[170] For the sake of clarity, WTO agreements are those annexed to the WTO Agreement (Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154 [hereinafter WTO Agreement]).

[171] GATS, *supra* note 46, preamble, recital 4.

revolved much around the right to regulate. It is only natural that a comprehensive study of this notion has yet to emerge in international trade law.[172]

However, this does not mean that discussions of regulatory space under the respective legal regime did not occur, akin to concerns associated with the right to regulate, albeit not necessarily identical to them. While embedded liberalism, as a political economy explanation of the emergence and development of the multilateral trade system, is undoubtedly instrumental in understanding the place of the right to regulate in the system, it does not provide all the answers. An analysis of specific provisions and their application in practice can shed more light on this issue. Below are several practical considerations that could aid in mapping the particular meaning of the right to regulate in international trade law.

1.2.3.3 Relevance in Dispute Settlement

Although WTO agreements do not explicitly refer to the right to regulate, this phrase appears in China's Accession Protocol to the WTO. This document contains commitments that China assumed upon accession to the organization, representing a different instance from WTO agreements that set forth the same obligations for *all* WTO Members or, in the case of plurilateral agreements, for all WTO Members that *have accepted* them.[173]

Paragraph 5.1 of China's Accession Protocol stipulates in relevant part:

> *Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. …*

In *China – Publications and Audiovisual Products*, the Appellate Body had the opportunity to interpret the phrase "China's right to regulate trade" in the above provision of China's Accession Protocol to the WTO. In doing so, it confirmed that the right to regulate is an inherent power of a Member's government, not "a right bestowed by international treaties such as the *WTO Agreement*."[174] As per the

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[172] International trade law doctrine is marked by a lack of research exclusively devoted to the right to regulate in this field. Consequently, this part of the first chapter will not contain a separate discussion of doctrinal views. In this regard, it will differ from the preceding section on international investment law. Nevertheless, the doctrinal views on regulatory space in international trade law will provide the basis for further considerations concerning the right to regulate in the WTO and RTAs in this section.

[173] See WTO Agreement, *supra* note 170, Art. II:3. For a detailed legal analysis of WTO accessions, see D. Geraets, *Accession to the World Trade Organization: a Legal Analysis* (2018).

[174] Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR

Appellate Body, the function of the Agreement Establishing the World Trade Organization (WTO Agreement) is to discipline that right by requiring WTO Members to respect their commitments agreed upon therein.[175] Ultimately, the Appellate Body did not support China's contention that the right to regulate can conceptually operate as an exception. According to China, "the right to regulate trade is the expression of a general exception to Member's obligations, which leaves room for the implementation of public policies and is crucial for the preservation of China's sovereignty."[176]

It must also be noted that some constraints naturally come with this decision of the WTO dispute settlement system, one of which is that the Appellate Body's conclusion regarding the right to regulate is specific to the particular document it interpreted, qualified by its context. Thus, it may not be appropriate to extend the Appellate Body's explanation of the concept at hand automatically to the entire legal regime of the WTO.[177]

On a different occasion, the Appellate Body also implied that provisions of WTO agreements limit Members' right to regulate. In *US – Clove Cigarettes*, it reached this conclusion regarding Articles 2.1 and 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement), which prohibit discrimination against imported goods and require that technical regulations be no more trade-restrictive than necessary to fulfill a legitimate objective.[178] This example further confirms the understanding of the operation of the right to regulate, which holds that "a country's inherent right to regulate includes the right to act in a manner that does not create a breach" of WTO agreements.[179]

In addition, the right to regulate often surfaces in panels' and the Appellate Body's determinations of the object and purpose of WTO agreements. The deliberations in this regard are often framed in their reports "in terms of 'balance.'"[180] In this vein, the Appellate Body in *US – Clove Cigarettes* juxtaposed the

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2010:I, p. 3, para. 222. [hereinafter Appellate Body Report, *China – Publications and Audiovisual Products*]

[175] *Ibid.*

[176] See Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261, para. 7.240. [Panel Report, *China – Publications and Audiovisual Products*]

[177] For additional considerations on the possible extrapolation of the Appellate Body's findings beyond the Accession Protocol, see Section "Ordinary Meaning" below.

[178] Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751, para. 93. [hereinafter Appellate Body Report, *US – Clove Cigarettes*]

[179] M. Tyagi, 'Flesh on a Legal Fiction: Early Practice in the WTO on Accession Protocols', 2 *Journal of International Economic Law* 15 (2012), pp. 406–407, 435.

[180] Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018 [appealed; adoption pending], para. 7.755. [hereinafter Panel Report, *Thailand –*

desire to prevent unnecessary barriers to trade with Members' right to regulate when it defined the object and purpose of the TBT Agreement.[181] In *Argentina – Financial Services*, the panel similarly stated that the GATS, whose preamble expressly refers to the right to regulate, strikes a balance between the right to regulate and the objective of expanding trade in conditions of transparency and progressive liberalization.[182]

Apart from the above statements and a few other exceptions, the right to regulate does not seem to have played a vital role in WTO litigation. This is so much the case that the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)* did not address the issue of the right to regulate, despite the responding party and one of the complaining parties, along with some third parties, making assertions specifically referring to this notion.[183] Similarly, GATT 1947 panel reports do not reveal whether the right to regulate was ever part of debated issues. The only possible exception is *Canada – Administration of the Foreign Investment Review Act*, where the GATT panel affirmed that the GATT 1947 "does not prevent [the contracting parties] from exercising [their] sovereign right to regulate direct investments."[184] Neither party to that dispute appeared to contest that statement.

However, some fundamental inferences could nevertheless be taken from the existing jurisprudence about the particular meaning of the right to regulate in the WTO legal regime. According to established practice, WTO Members' right to regulate is deemed circumscribed by the commitments they assumed upon acceding to the WTO. As a result, they are free to exercise this right as long as WTO-

Cigarettes (Philippines) (Article 21.5 – Philippines)] Curiously enough, the Appellate Body in *EC – Seal* noted in passing that the answer from dispute settlement regarding whether such a balance exists in every legal instrument in the WTO is most likely to be affirmative. As per the Appellate Body, "[i]f there is a perceived imbalance in the existing rights and obligations under the TBT Agreement and the GATT 1994, the authority rests with the Members of the WTO to address that imbalance" (Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7, para. 5.125 [hereinafter Appellate Body Reports, EC – Seal]). In other words, any issue with the current configuration of the WTO legal regime requiring correction should be brought up elsewhere—possibly by providing an authoritative interpretation of the provisions at hand or by amending them in accordance with the procedures set forth under Articles IX:2 and X of the WTO Agreement, respectively.

[181] Appellate Body Report, *US – Clove Cigarettes*, *supra* note 178, para. 96.

[182] Panel Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/R and Add.1, adopted 9 May 2016, as modified by Appellate Body Report WT/DS453/AB/R, DSR 2016:II, p. 599, para. 7.233. [hereinafter Panel Report, *Argentina – Financial Services*]

[183] See Appellate Body Reports, United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725, paras. 2.35–2.36, 2.100, 2.205, 5.367. In its reports, the Appellate Body does not expressly mention the right to regulate, except when summarizing the positions of the WTO Members involved in the dispute.

[184] GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act*, L/5504, adopted 7 February 1984, BISD 30S/140, paras. 3.3, 5.1.

inconsistent outcome does not arise. Conversely, exercising the right to regulate is not, in itself, grounds to justify a breach of WTO agreements.

In determining the object and purpose of WTO agreements, the Appellate Body considered the right to regulate as one of the values against which to assess whether the proper balance is reflected in treaty terms. It follows that the right to regulate and such a balance should not be conflated. Thus, there is a discernable inclination in international trade law towards to view the right to regulate as part of the considerations pertaining to the balance reached in WTO agreements. The right to regulate is not the result of this balance but one of the elements tested against each other.

1.2.3.4 Article XX of the GATT: Prime Manifestation

The right to regulate in international trade law can be understood as reconciling the interest in trade liberalization with legitimate regulatory policy objectives, with Article XX of the GATT being the best example of where the objectives and conditions are spelled out to discipline the regulatory discretion of WTO Members.[185] WTO adjudicative bodies typically use phrases such as "the right to regulate *under* Article XX of the GATT" [186] or "under the GATT 1994, a Member's right to regulate *is accommodated under* Article XX."[187] Some WTO Members have claimed that the rights envisaged in this provision reflect "the 'inherent power' of WTO Members to regulate international trade," implying that they would also exist in the absence of explicit language in WTO agreements.[188] These passages and arguments imply a strong connection between two sets of issues: those under the concept of the right to regulate and those specifically related to Article XX.

Curiously enough, the perception of this provision and its ensuing relevance in practice were different prior to the WTO. As *Wagner* explains, it was nearly impossible in GATT 1947 litigation to justify a measure under Article XX because of the stringent approach taken by panels at that time.[189] Later, the WTO Appellate Body fine-tuned this approach by embracing the new constellation of a freshly installed legal regime. In doing so, the Appellate Body made the general exceptions under the GATT 1994 fully operational and relevant in practice, especially for

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185 P.-T. Stoll, 'Non-tariff barriers and regulatory cooperation', in *Draft Report of the Study Group on Preferential Trade Agreements*, International Law Association (2016). URL: https://www.ila-hq.org/index.php/study-groups?study-groupsID=69, p. 18.

186 See Appellate Body Reports, *EC – Seal*, *supra* note 180, para. 5.77. (emphasis added)

187 *Ibid.*, para. 5.125. (emphasis added)

188 See, for instance, Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, fn. 1612.

189 M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015), pp. 31–32; A. Aseeva, 'The Right of States to Regulate in Risk-Averse Areas and the ECtHR Concept of Margin of Appreciation in the WTO US–Cool Article 21.5 Decision', *Croatian Yearbook of European Law and Policy* 11 (2015), pp. 179–183.

responding parties in WTO disputes.[190] As a result, WTO Members' interest in having more freedom to regulate trade-related issues has been satisfied, and Article XX of the GATT 1994 has been routinely regarded as the provision relevant to Members' exercise of the right to regulate.[191]

Furthermore, the language of Article XX grew even into something more due to its relevance in contexts other than the GATT 1994 itself. For example, although the sixth recital of the preamble to the TBT agreement does not contain the phrase "the right to regulate," it did not prevent the Appellate Body from stating that this recital entails "the *explicit* recognition of Members' right to regulate."[192] In fact, the sixth recital of the preamble to the TBT Agreement reflects much of the language used in Article XX of the GATT:[193]

> *Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement; …*[194]

Meanwhile, the focus on general exception provisions in the prevailing discourse does not mean that there is no right to regulate under those WTO agreements that lack such a clause. This notion is inherent in them, as is the case in the TBT Agreement according to the Appellate Body.[195] Still, the baseline appears to be Article XX of the GATT, as the Appellate Body's explanation regarding the TBT agreement has been tied to the general exceptions under the GATT:

> *… the balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, and the recognition of Members' right to regulate under the sixth recital, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.*[196]

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[190] M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015), pp. 31–32.
[191] P.-T. Stoll, 'Non-tariff barriers and regulatory cooperation', in *Draft Report of the Study Group on Preferential Trade Agreements*, International Law Association (2016). URL: https://www.ila-hq.org/index.php/study-groups?study-groupsID=69, pp. 18–19.
[192] Appellate Body Report, *US – Clove Cigarettes*, *supra* note 178, para. 94. (emphasis added)
[193] Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305, para. 8.55. [hereinafter Panel Report, *EC – Asbestos*]
[194] Underlining added where the language of this recital is similar to Article XX of the GATT. See also Panel Report, *EC – Asbestos*, *supra* note 193, fn. 40 to para. 8.55.
[195] Appellate Body Reports, *EC – Seal*, *supra* note 180, para. 5.124.
[196] *Ibid.*, para. 5.127. See also Appellate Body Report, *US – Clove Cigarettes*, *supra* note 178, para. 96.

If considerations about regulatory freedom are to some extent equated with those under the notion of the right to regulate, one could refer to *Wagner's* explanation, which accurately recaps the treatment of regulatory space in international trade law:

> *Properly understood, regulatory space is not an occasion for … WTO members to decide in an unfettered manner … to prohibit a product from entering a WTO member's territory. Rather, it is the recognition that, under particular circumstances … a WTO member has discretion – within limits – to deny … the importation of a particular product, provided that a justification can be provided.*[197]

Article XX of the GATT is the provision implied above that stipulates "particular circumstances," which could provide the required "justification."

The preceding overview suggests that the international trade law discourse on the right to regulate has been overshadowed by considerations related to general exceptions under Article XX of the GATT, unmatched by those related to any other provision. Most importantly, these considerations extend well beyond the context of the GATT 1994: their indirect impact on WTO agreements that lack GATT Article XX-like provisions is traceable in the relevant jurisprudence.

1.2.3.5 RTAs and the Right to Regulate

The WTO legal regime is undoubtedly the uncontested centerpiece of international trade law. The multilateral trade system established by this organization has long dominated global efforts to facilitate trade among nations and achieve economic growth and development.

However, the current landscape of international legal framework for trade is not what it was when the WTO emerged in 1995, let alone when its precursor, GATT 1947, became operational almost half a century earlier. Since the establishment of the WTO, there has been a vast proliferation of RTAs. In their reach, such agreements have shifted from being barely noticeable flecks on the map to virtually becoming the map itself.[198] As of March 2022, 353 RTAs are in force, according to the WTO.[199] With that number, it is no wonder that all WTO Members are parties to at least one RTA, with Mongolia ceasing to be the last exception when it concluded an RTA with Japan in 2016.[200] Accordingly, the share of world trade

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[197] M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015), p. 68.

[198] See generally World Trade Report 2011, The WTO and Preferential Trade Agreements: From Co-existence to Coherence. WTO. URL: https://www.wto.org/eng-lish/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf.

[199] Regional Trade Agreements Database, WTO. URL: http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.

[200] P. V. d. Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (2021), p. 733.

between RTAs members has more than doubled since 1965, rising from around 22% in 1965 to 60% in 2010.[201]

Based on the above, the quest for the special meaning that the right to regulate may have assumed in international trade law does not end with examining the WTO legal regime. The number and coverage of RTAs have been dramatically growing, making them a crucial part of international trade law that should not be overlooked in the analysis. Consequently, the next step is to consider the plethora of RTAs and the practice therein accommodating the right to regulate. Another intriguing issue is determining whether this practice departs from the approach taken by the WTO in defining and applying the right to regulate.

As in WTO agreements, the manifestation of the right to regulate in preferential trade agreements can take different forms. These agreements often contain rules similar to Article XX of the GATT, frequently by incorporating the latter.[202] As some RTAs go not only "deeper in WTO covered sector but also … broader in their scope,"[203] the more ambitious agreements demonstrate an enhanced capacity to address concerns arising from the need to preserve regulatory freedom.

Indeed, RTAs drafters seem to have recently embraced the trend in international investment law of including right-to-regulate provisions in respective treaties, not only in their investment chapters resembling IIAs.[204] Unlike the GATS[205]—the only WTO agreement expressly referring to the notion right to regulate by name,—some RTAs mention it not only in the preamble but also in the main text.[206]

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[201] N. Limão, *Preferential Trade Agreements* (National Bureau of Economic Research Working Paper 22138, 2016). URL: http://www.nber.org/papers/w22138.pdf, pp. 5, 12.

[202] NAFTA, *supra* note 125, Art. 2101; CETA, *supra* note 44, Art. 28.3; TPP, *supra* note 122, Art. 29.1; Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, 17 June 2015, 2015 ATS 15, Art. 16.2; Regional Comprehensive Economic Partnership Agreement, 15 November 2020. URL: https://www.dfat.gov.au/trade/agreements/in-force/rcep/rcep-text, Art. 17.12. [hereinafter RCEP]

[203] G. Marceau, 'News from Geneva on RTAs and WTO-plus, WTO-more, and WTO-minus', in *Draft Report of the Study Group on Preferential Trade Agreements*, International Law Association (2016). URL: https://www.ila-hq.org/index.php/study-groups?study-groupsID=69, p. 69.

[204] The interplay between the legal regimes of investment chapters in RTAs and other parts of the respective agreements remains largely unclear and falls outside the scope of this study.

[205] Remarkably, the negotiating history of the GATS reveals that the drafters considered including a right-to-regulate provision in the main text of the agreement, which would have become Article VI:1 of the GATS as part of its disciplines on domestic regulation. Similar to the current trends in RTAs, this provision would have expressly disciplined the right to regulate by requiring its exercise not to be inconsistent with the other provisions of the GATS. To this end, such a provision would have been ahead of its time. For more on the preparatory work of the GATS and considerations about the choice for a right-to-regulate provision in its text, see Sections "Negotiating History" and "The Preamble vs. Main Text Dilemma" below.

[206] For an example of preambular language, the 2005 India–Singapore FTA states in its preamble that its parties have agreed to this Agreement "REAFFIRMING their right to pursue economic philosophies suited to their development goals and their right to regulate activities to realise their national policy objectives" (Comprehensive Economic Cooperation Agreement between the

In that vein, RTAs seem to be stepping into the WTO's shoes, as preferential trade agreements often explicitly recognize the right to regulate as part of their disciplines on trade in services.[207] For example, pursuant to Article 85(4) of the EU–Ukraine Association Agreement, "[e]ach Party shall retain the right to regulate and to introduce new regulations to meet legitimate policy objectives, provided they are compatible with this Chapter." While recognizing this domain of states, this article stipulates that an exercise of the right to regulate thereunder cannot contradict other provisions of Chapter 6 on "[e]stablishment, trade in services and electronic commerce." Furthermore, the language of this provision does not allow it to be considered a possible exception to state measures otherwise inconsistent with the EU–Ukraine Association Agreement. Viewed on a larger scale, such provisions under FTAs do not appear to deviate from the approach to the right to regulate taken in the WTO legal regime.

Other instances where the right to regulate is considered a fitting concept are RTA chapters on trade and labour, trade and environment, or trade and sustainable development.[208] For example, Article 290 of the EU–Ukraine Association Agreement envisages in relevant part:

> *Recognising the right of the Parties to establish and regulate their own levels of domestic environmental and labour protection and sustainable development policies and priorities, in line with relevant internationally recognised principles and agreements, and to adopt or modify their legislation accordingly, the Parties shall ensure that their legislation provides for high levels of environmental and labour protection and shall strive to continue to improve that legislation. …*[209]

Republic of India and the Republic of Singapore, 29 June 2005. URL: https://commerce.gov.in/international-trade/trade-agreements/comprehensive-economic-cooperation-agreement-between-the-republic-of-india-and-the-republic-of-singapore/, preamble, recital 9). See also Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China, 7 April 2008, 2590 UNTS 101, preamble, recital 8. Article 290 of the EU–Ukraine Association Agreement, interpreted in more detail below, is an example of how the right to regulate can be upheld in a treaty's main text (Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, 27 June 2014, OJ L 161).

[207] TPP, *supra* note 122, Art. 10.8(2); RCEP, *supra* note 202, Art. 8.15(5).

[208] P.-T. Stoll, 'Non-tariff barriers and regulatory cooperation', in *Draft Report of the Study Group on Preferential Trade Agreements*, International Law Association (2016). URL: https://www.ila-hq.org/index.php/study-groups?study-groupsID=69, p. 19.

[209] The second part of this article reads, "[a]s a way to achieve the objectives referred to in this Article, Ukraine shall approximate its laws, regulations and administrative practice to the EU acquis." For obvious reasons, this is not the part that is conventionally added to RTAs other than those involving the EU and similar in nature to its association agreements.

Since the proliferation of RTAs is relatively a recent phenomenon, only a handful of trade disputes have been brought and considered under them to date.[210] Fortunately, one of these disputes involved the interpretation and application of the above provision, which occurred in the dispute over certain export restrictions under the Association Agreement between the European Union and Ukraine.[211]

This dispute concerned two export bans by Ukraine: one applied *indefinitely* to timber and sawn wood of certain species, and the other applied *temporarily* to unprocessed timber.[212] According to the European Union, both export bans were inconsistent with Article 35 of the Association Agreement, which proscribes quantitative restrictions similar to those prohibited by Article XI of the GATT.[213] Ukraine responded by denying the breach of that provision, which would be, in any event, justified under the general exceptions in Article 36 of the Association Agreement and Article XX of the GATT 1994 by incorporation, since the measures at issue were introduced to achieve publicly relevant goals listed in them. As per Ukraine, the permanent ban was introduced as necessary to protect plant life or health, whereas the temporary ban was related to the conservation of exhaustible natural resources under the respective parts of Article XX of the GATT 1994.[214]

Most notably, in the context of the present study, Ukraine asserted that these bans "[were] a mere exercise of [Ukraine's] right to regulate its own level of environmental protection" pursuant to Article 290 of the Association Agreement.[215] Ukraine explained that it did not contend that any regulation would fall within the legitimate exercise of this right in the context of that Agreement. However, according to Ukraine, the Association Agreement provides the right to set its own

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[210] As of March 2022, nine disputes have been publicly reported by the European Union and the United States as submitted for consideration under the respective dispute settlement provisions of RTAs. See Disputes under bilateral trade agreements. European Commission. URL: https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/; FTA Dispute Settlement. Office of the United States Trade Representative, Executive Office of the President. URL: https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/fta-dispute-settlement.

[211] Final Report of the Arbitration Panel, *Ukraine – Wood Products*, *supra* note 13. For a general overview of the dispute and associated issues, see I. Polovets, 'Report of Arbitration Panel in Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union', 1 *Legal Issues of Economic Integration* 48 (2021); V. Pogoretskyy, 'The Arbitration Panel Report in *Ukraine – Export Prohibition on Wood Products*: Lessons from the 'Pegasus' of International Adjudication', 5–6 *The Journal of World Investment & Trade* 22 (2021); Y. Rovnov, 'EU–Ukraine Arbitration: Will WTO Law Become More Deferential Outside the WTO?', 6 *Journal of World Trade* 55 (2021).

[212] Final Report of the Arbitration Panel, *Ukraine – Wood Products*, *supra* note 13, paras. 64–68.

[213] *Ibid.*, paras. 73–74. In fact, based on the wording of Article 35, the Arbitration Panel found Article XI of the GATT 1994 to be incorporated into the Association Agreement in its entirety (see *Ibid.*, paras. 185–190, 192).

[214] *Ibid.*, paras. 78–79, 261–262.

[215] *Ibid.*, para. 80.

levels of domestic environmental protection, and Article 290 operates as an exception to the prohibitions of Article 35 of this Agreement.[216]

While not contesting Ukraine's right to regulate as such, the European Union clarified that its exercise within the meaning of the said provision could only be "in accordance with the requirements of other provisions of the Association Agreement that give expression and operationalise the 'right to regulate', including the policy exceptions mentioned in Article 36."[217] In any event, the invocation of the right to regulate cannot serve as a self-standing exception, according to the complainant in this dispute.[218]

The Arbitration Panel interpreted and applied Article 290 of the Association Agreement in conjunction with other provisions in Chapter 13, as invoked by Ukraine. These additional provisions include Article 292 on "Multilateral environmental agreements," Article 294 on "Trade in forestry products," and Article 296 on "Upholding levels of protection."[219] In its assessment, the Arbitration Panel determined that the provisions of Chapter 13 were not designed to override the provisions of other chapters of Title IV, including Article 35 of the Association Agreement. Thus, the Arbitration Panel declined to characterize Chapter 13 as containing "self-standing or unqualified exceptions to justify" violations of substantive obligations, such as those under Article 35 of the Association Agreement. As a corollary, the Arbitration Panel sided with the European Union, concluding that Article 290 of the Association Agreement on "Right to Regulate" does not operate as an exception to the said provision prohibiting quantitative restrictions in trade.[220]

Instead, the Arbitration Panel considered that "Chapter 13 provisions complement the provisions of other chapters of Title IV as relevant 'context'" within the meaning of Article 31 of the VCLT.[221] It explained that the provisions invoked by Ukraine under Chapter 13 predominantly display "'promotional' or 'programmatic'" language.[222] As a result, such articles "may not give rise to immediate and precise obligations," unlike the provisions in Chapter 1 and specifically Article 35 of the Association Agreement.[223] The Arbitration Panel concluded that compliance with Chapter 13 provisions cannot excuse a breach of Article 35.[224]

Three main observations can be inferred from the Arbitration Panel's decision in *Ukraine – Wood Products* regarding its approach to interpreting and applying the

[216] *Ibid.*, p. 150.
[217] *Ibid.*, para. 232 citing EU's responses to the Arbitration Panel's Questions, para. 282.
[218] *Ibid.*, para. 75.
[219] *Ibid.*, para. 246.
[220] *Ibid.*, para. 244.
[221] *Ibid.*, para. 245.
[222] *Ibid.*, para. 250.
[223] *Ibid.*
[224] *Ibid.*, para. 251.

notion of the right to regulate as part of the main text of the Association Agreement. *First*, the special meaning of the right to regulate as part of the treaty language should not be considered without taking into account the provision itself, in which this notion appears, and its context. Consequently, the Arbitration Panel did not focus on the right to regulate as such. Instead, it considered related provisions collectively to understand not just one term but also its immediate context. Thus, the particular meaning of the right to regulate, whatever that is, did not override the meaning of all the provisions under Chapter 13 of the Association Agreement.

Second, based on the specific language of Chapter 13 provisions in their connection to Article 35 of the Association Agreement, the Arbitration Panel found the former, including Article 290 on "Right to regulate," incapable of serving as an exception to substantive obligations arising from this Agreement. Accordingly, the right to regulate does not inherently possess the quality of transforming the provisions in which it is recognized into exceptions. After all, the provision at hand recognizes as a legitimate exercise of the right to regulate only those laws that are "in line with relevant internationally recognized principles and agreements," which are related to "domestic environmental and labour protection and sustainable development policies and priorities."

Third, this does not imply that Article 290 on "Right to regulate" in the Association Agreement lacks value. By recognizing the right to regulate in the main treaty text, the drafters of the Association Agreement have enhanced the relevance of context as a necessary element in treaty interpretation. In *Ukraine – Wood Products*, the Arbitration Panel specifically acknowledged this in the following passage:

> *Accordingly, the Arbitration Panel considers that the requirement to interpret Article 36 of the [Association Agreement] harmoniously with the provisions of Chapter 13 comports with admitting that a highly trade restrictive measure such as an export ban may still be found necessary within the meaning of Article XX(b) of the GATT 1994, as incorporated into Article 36 of the [Association Agreement]. The Arbitration Panel considers that the provisions of Chapter 13 (*in casu*, Article 290 on the right to regulate and Article 294 on trade in forest products) serve as relevant context for the purposes of "weighing and balancing" with more flexibility any of the individual variables of the necessity test, considered individually and in relation to each other.* In casu*, as a consequence, the high trade restrictive effect inherent to an export ban cannot be considered to automatically outweigh the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the "necessity" of the measure.*

In other words, including Article 290 on "Right to regulate" in the main text of the Association Agreement has significantly influenced the considerations of how general exceptions can apply to justify measures found to violate the Article 35 prohibition on quantitative restrictions. Thus, ultimately, the Arbitration Panel was swayed to be more favorable to the position of the responding state in this dispute when it came to the justification of its actions. Without the Chapter 13 provisions

in the Association Agreement, including Article 290, the Arbitration Panel would have been compelled to take a different approach to interpreting Article 36.

One must be cautious not to automatically extrapolate the Arbitration Panel's interpretation of the right to regulate as expressed in Article 290 of the Association Agreement to the entire field of regional trade agreements and how they deal with this notion. Similarly, in the WTO context, the Appellate Body in *Australia – Apples* warned against determining the meaning of a word or phrase based on the meaning of similar words and phrases in "other provisions of the covered agreements."[225] Accordingly, even in the context of the single undertaking system of the WTO, a term in one agreement does not necessarily have the same meaning when used in other covered agreements. This principle of interpretation certainly applies to the plethora of isolated RTAs, where each treaty is subject to its own interpretation, even though they often use similar language and there is a great temptation to assign "uniform meanings to similar or identical terms across various treaties."[226] In any case, the proliferation of RTAs has posed many legal questions about the operation of this regional field of trade integration, thus contributing to the fragmentation of international law.[227]

Nevertheless, some coherence can be found beyond the mere similarities in the treaty language of various RTAs concerning approaches to the right to regulate. There is at least one other instance of an adjudicative body under an RTA referring to this notion along the lines of the decision in *Ukraine – Wood Products*. This occurred in a proceeding constituted under Article 13.15 of the EU–Korea FTA, in which the Panel of Experts dealt with labor law issues.[228] In so doing, it noted that the exercise of the right to regulate must be "consistent with the internationally recognised standards or agreements" specifically referred to in other provisions of the EU–Korea FTA. The Panel of Experts concluded that, whatever the precise "scope and character of national labour laws and policies, these should conform to the bedrock of the fundamental rights and principles referred to in Article 13.4" of

[225] Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175, fn. 285 referring to Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243, para. 89.

[226] For similar considerations about NPM provisions in various IIAs, see W. W. Burke-White & A. v. Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties', 2 *Virginia Journal of International Law* 48 (2008), pp. 337–341.

[227] See Report of the Study Group of the ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by M. Koskenniemi, A/CN.4/L.682, 13 April 2006, para. 210.

[228] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, 6 October 2010, OJ L 127.

the FTA.[229] In other words, for the exercise of this right to be considered legitimate in the sense of the EU–Korea FTA, it equally should not be inconsistent with the provisions of this Agreement. This approach boils down to a simple understanding: a state may take measures as long as they do not contradict the RTA.

The foregoing overview confirms the initial thesis that the search for the particular meaning of the right to regulate in international trade law must not stop at the WTO legal regime. On the contrary, the currently witnessed high day of trade law rules at the regional level presents an exciting opportunity to expand the analysis of the multilateral trade system. Moreover, many RTAs further constrain states' regulatory freedom, especially when they cover "WTO-plus" rights and obligations, such as those concerning the environment and labor. In such situations, the need for the proper accommodation of the right to regulate may be greater.

Neither the treaty language of RTAs nor the adjudicative bodies' interpretation of certain right-to-regulate provisions has revealed any notable deviation from the approaches articulated above concerning the WTO legal system. This similarity indicates a uniform approach to the concept of the right to regulate in the legal regimes of the WTO and RTAs as constituent elements of international trade law.

1.2.3.6 Preliminary Conclusions

International trade law as we know it today was born from the political and economic considerations known as embedded liberalism. From the outset, the drafters of the respective treaties were aware of the necessity to create a delicate balance between trade liberalization and state interventionism. As a result, the GATT 1947 was already meaningfully equipped with flexibility tools. These are the provisions that permitted states to take a step back from commitments to protect the interests of the domestic producers and consumers if the situation required so.[230] One such flexibility tools, well-known outside the purview of international trade law, is Article XX of the GATT on "General Exceptions," which allows states to deviate from the otherwise strict rules of the GATT in certain circumstances.

The WTO appears to have primarily maintained its predecessor's adherence to the paradigm of embedded liberalism. The integral balance in the covered agreements emanating from this heritage likely explains why WTO agreements do not expressly refer to the right to regulate, with the GATS being the only exception recognizing this right in its preamble. The goal of assuring states that they can maintain high levels of regulatory freedom was likely achieved by other means, thus there was no need to mention the right to regulate expressly in the text.

[229] *Panel of Experts proceeding constituted under Article 13.15 of the EU–Korea Free Trade Agreement*, Report of the Panel of Experts, 20 January 2021, para. 83. For a complete picture, it must be noted that in this dispute and in *Ukraine – Wood Products*, the adjudicative bodies interpreted and applied different FTAs sharing one party—the European Union. Probably, due to this fact, the respective provisions of both FTAs about the right to regulate are formulated similarly. The similarities in wording have paved the way for a coherent interpretation.

[230] J. Kurtz, *The WTO and International Investment Law: Converging Systems* (2016), p. 4.

Consequently, the discourse on regulatory freedom and associated issues did not gravitate around the notion of the right to regulate for a long time.

Despite the lack of direct references to this notion in WTO agreements, there are several instances where the adjudicative bodies of the WTO have dealt with it. Presented simply, the outcome of all these instances boils down to the understanding that the right to regulate is not granted by the WTO Agreement. Instead, it is inherent to WTO Members and can be understood as the right to act in a manner that does not violate WTO agreements. Furthermore, nothing in this practice, including the interpretation and application of China's Accession Protocol and the TBT Agreement, suggests that a provision recognizing the right to regulate could serve as a self-standing exception to the substantive obligations under the covered agreements.

Moreover, the discussion of the regulatory space accorded under the WTO agreements is often framed in terms of a balance struck between WTO Members' rights and obligations. The right to regulate is just one of the values weighed against others in the quest for that balance. Accordingly, Article XX of the GATT truly became the champion of all the possible manifestations of the right to regulate in the legal regime of the WTO. Meanwhile, the absence of GATT Article XX-like provisions in some WTO agreements did not preclude the Appellate Body from finding the necessary balance in them.

Discussion of the right to regulate in international trade law would be incomplete without considering developments in the emerging realm of plentiful RTAs. While emulating the success of the WTO in regulating international trade, these regional agreements often surpass it in reach and coverage. Unsurprisingly, RTAs began to feature richer treaty texts with more references to the right to regulate than WTO agreements. A more curious finding is that among the relatively few disputes under RTAs that exist today, some have seen adjudicative bodies address the notion of the right to regulate. Analysis of RTAs and the outcomes of dispute settlements thereunder has demonstrated that this regional level of trade commitments does not deviate from the WTO's approaches to the right to regulate. Such adherence may indicate that international trade law possesses a uniform system quality, at least in its approach to the right to regulate.

In summary, the following observations can be made about the meaning the right to regulate seems to have assumed in international trade law, in both WTO agreements and modern RTAs:

- Given that the rise of this field was premised on embedded liberalism, the resulting self-sufficiency of its treaty language prevented the concept of the right to regulate, or similar notions, from emerging in parallel to international agreements regulating the area.
- Still, the issue of regulatory space accorded under the respective agreements was as important as elsewhere. The right to regulate found its best manifestation in provisions similar to Article XX of the GATT.

- Furthermore, the right to regulate has been part of considerations about the balance struck under WTO agreements between the trade liberalization efforts and the desire to maintain regulatory freedom.
- Neither the treaty text nor jurisprudence under the WTO and RTAs suggests that right-to-regulate provisions of any kind were designed to operate as standalone exception clauses merely by virtue of expressly mentioning this notion.
- Moreover, the adjudicative bodies of the WTO and RTAs have repeatedly confirmed that a state can exercise its right to regulate only as long as the outcome is not inconsistent with the respective international agreements.

1.3 Convergence Between the Two Fields

A general theory of the right to regulate in international economic law would be impossible to contemplate *ab initio* if its constituent parts were fundamentally incompatible. Therefore, it would be logical to pave the way for such a theory by determining whether international investment and trade law are sufficiently congruent.

One way to achieve this would be to examine both fields to see if there are more similarities than differences. Just as "[r]egime comparison is not a particularly novel undertaking" in general,[231] it is not unusual for international investment and trade law, as many have sought to compare them in recent years. Based on the sheer number of previous doctrinal attempts,[232] one can preliminarily infer that these

[231] M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015), p. 15.

[232] C. Henckels, 'Permission to Act: the Legal Character of General and Security Exceptions in International Trade and Investment Law', 3 *International and Comparative Law Quarterly* 69 (2020); S. Gáspár-Szilágyi et al. (eds.), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (2020); M. Lubambo de Melo, 'Protection of Domestic Investors under the WTO and International Investment Regimes', 4 *World Trade Review* 19 (2020); D. Chalmers & J. Slupska, 'The Regional Remaking of Trade and Investment Law', 1 *European Journal of International Law* 30 (2019); A. Afilalo, 'Failed Boundaries: The Near-Perfect Correlation between State-to-State WTO Claims and Private Party Investment Rights', 4 *Emory International Law Review* 32 (2018); Y. Guohua, 'On the Construction of the World Trade and Investment Organization WTO', 3 *Journal of WTO and China* 7 (2017); A. P. Martin & B. Mercurio, 'Towards a Convergence of Trade and Investment Law: A Right to Take Prudential Measures for the Preservation of Financial Stability', 3 *International Lawyer* 51 (2018); O. Ismailov, 'Interaction of International Investment and Trade Regimes on Interpreting Treaty Necessity Clauses: Convergence or Divergence?', 2 *Georgetown Journal of International Law* 48 (2017); J. Kurtz, *The WTO and International Investment Law: Converging Systems* (2016); L. Baccini & A. Dur, 'Investment Discrimination and the Proliferation of Preferential Trade Agreements', 4 *Journal of Conflict Resolution* 59 (2015); F. J. Garcia et al., 'Reforming the International Investment Regime: Lessons from International Trade Law', 4 *Journal of International Economic Law* 18 (2015); J. Pauwelyn, 'The Rule of Law without the Rule of Lawyers: Why Investment Arbitrators Are from Mars, Trade

fields are undoubtedly close and that meticulous analysis in this regard is probably no longer academically imperative. Instead, building on the above overview of both regimes through the prism of the right to regulate, this section will highlight selected issues of their comparison and determine whether cross-fertilization between international investment and trade law regimes is generally possible.

While both areas constrain states' powers to govern economic activities within their territories, international investment law and international trade law stem from different economic, political, and other constellations. Their discrepancies have led to contrasting paths and results. In their exemplary analysis, *DiMascio* and *Pauwelyn* recapped the differences between the two fields by concisely pointing out that

> *In sum, the trade regime is about overall welfare, efficiency, liberalization, state-to-state exchanges of market access, and trade opportunities—not individual rights. … In sum, the traditional investment regime is about fairness grounded in customary rules on treatment of aliens, not efficiency. It is about protection, not liberalization, and about individual rights, not state-to-state exchanges of market opportunities.*[233]

Indeed, international trade and investment law are fairly distinct areas within the field of international economic law. The following points of distinction between

Adjudicators from Venus', 4 *The American Journal of International Law* 109 (2015); S. Puig, 'The Merging of International Trade and Investment Law', 1 *Berkeley Journal of International Law* 33 (2015); M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015); T. Broude, 'Toward an Economic Approach to the Consolidation of International Trade Regulation and International Investment Law', 1 *Jerusalem Review of Legal Studies* 9 (2014); I. Galea & Bogdan Biris, 'National Treatment in International Trade and Investment Law Conference Papers', 2 *Acta Juridica Hungarica* 55 (2014); R. P. Alford, 'The Convergence of International Trade and Investment Arbitration', 1 *Santa Clara Journal of International Law* 12 (2013); A. K. Bjorklund, 'Convergence or Complementarity', 1 *Santa Clara Journal of International Law* 12 (2013); T. Broude 'The 'Lottie and Lisa' of International Economic Law?', in R. Echandi & P. Sauve (eds.), *Prospects in International Investment Law and Policy* (2013); M. E. Footer, 'On the Laws of Attraction: Examining the Relationship between Foreign Investment and International Trade', in R. Echandi & P. Sauve (eds.), *Prospects in International Investment Law and Policy* (2013); A. M. Johnston & M. J. Trebilcock, 'Fragmentation in International Trade Law: Insights from the Global Investment Regime', 4 *World Trade Review* 12 (2013); A. Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 1 *The American Journal of International Law* 107 (2013); A. Davies, 'Scoping the Boundary between the Trade Law and Investment Law Regimes: When Does a Measure Related to Investment', 3 *Journal of International Economic Law* 15 (2012); J. Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents', 3 *The European Journal of International Law* 20 (2009); N. DiMascio & J. Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', 1 *The American Journal of International Law* 102 (2008); T. S. Shenkin, 'Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty Comment', 2 *University of Pittsburgh Law Review* 55 (1994).

[233] N. DiMascio & J. Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', 1 *The American Journal of International Law* 102 (2008), pp. 54, 56.

them are worth mentioning here (international investment law *versus* trade law, where appropriate):

- investor-to-state *versus* state-to-state legal framework, particularly concerning dispute resolution;[234]
- a highly diffused spread of rules in the plethora of IIAs "with no real institutional core" *versus* a somewhat centralized system with the WTO at its heart;[235]
- a system of rules historically rooted in international customary law *vs.* mainly treaty-based law, aside from general issues such as treaty interpretation and others;[236]
- separate epistemic communities.[237]

Despite these stark differences, it appears that both regimes "are on parallel tracks headed in the same direction."[238] It is therefore not surprising that academics and practitioners have produced many papers comparing the two regimes. According to *Kurtz*, whose assessment of the matter has fueled intense debates,[239] five factors are bringing these fields together:

- notable overlap in the regulated subject matter (for example, both fields have rules to regulate foreign juridical persons' commercial presence) and rules (for example, national treatment and general exceptions);[240]
- the same measure can be subject to litigation under both dispute settlement systems (for example, the plain packaging requirement that was challenged under BITs and in the WTO);[241]
- substitutability and complementarity of both regimes (high import tariffs can incentivize an increase in foreign direct investments to bypass them; investment and trade law rules complement each other in the construction of global supply chains, especially in RTAs of deeper integration);[242]

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234 A. Afilalo, 'Failed Boundaries: The Near-Perfect Correlation between State-to-State WTO Claims and Private Party Investment Rights', 4 *Emory International Law Review* 32 (2018), pp. 471–481.
235 J. Kurtz, *The WTO and International Investment Law: Converging Systems* (2016), p. 2.
236 *Ibid.*, p. 3.
237 M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015), p. 87.
238 R. P. Alford, 'The Convergence of International Trade and Investment Arbitration', 1 *Santa Clara Journal of International Law* 12 (2013), p. 60.
239 See, for instance, Book Symposium on Jürgen Kurtz's The WTO and International Investment Law, Jerusalem Review of Legal Studies, Volume 9, Issue 1 (2014). URL: https://academic.oup.com/jrls/issue/9/1.
240 J. Kurtz, *The WTO and International Investment Law: Converging Systems* (2016), pp. 10–13.
241 *Ibid.*, pp. 13–15; see also S. Gáspár-Szilágyi et al., 'Assessing Convergence in International Economic Disputes – A Framework', in S. Gáspár-Szilágyi et al. (eds.), *Adjudicating Trade and Investment Disputes* (2020), p. 4.
242 J. Kurtz, *The WTO and International Investment Law: Converging Systems* (2016), pp. 15–18.

- cross-fertilization of jurisprudence (increasing reliance by adjudicators in one field on case law from the other);[243]
- "movement of actors across the two fields" (for example, former WTO Appellate Body members sit as arbitrators in investment law disputes).[244]

As a result of these and many other pushing together factors,[245] the underlying discourse of recent years has been the convergence between two fields. While some also notice signs of divergence,[246] the approximation between the two fields seems to dominate the relevant discourse.[247] The recent proliferation of RTAs with embedded investment chapters only makes a more compelling case for such convergence, as their combined content is "a reflection of the modern era of globalized chains of supply."[248]

The ongoing signs of convergence have numerous implications. *Gáspár-Szilágyi*, *Behn* and *Langford* identify three related aspects: legal, empirical, and normative. Convergence enables the development of law and legal doctrine since legal tools from one field may become relevant to the other. From an empirical perspective, a decision that previously could have impacted only one field now can affect developments in the other. Hence, policymakers and adjudicators must be aware of the broader context and make their decisions with this knowledge. Lastly, the overall legitimacy of public international law is reinforced as convergence implies the coexistence of distinct systems within a more unified legal space with shared principles and normative value.[249]

Thus, the growing signs of convergence between international investment and trade law regimes should be considered a positive phenomenon that, while posing new challenges, enables further developments. One such development is the advancement of law and legal doctrine in light of the mutually reinforcing nature of international investment and trade law: lessons learned in one field can enrich the

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[243] *Ibid.*, pp. 18–19.
[244] *Ibid.*, pp. 19–20.
[245] Some of the unmentioned points of convergence can be deduced from the attempts to reform investor-state dispute settlement undertaken in UNCITRAL Working Group III, where one of the considered options is the establishment of a permanent court, possibly approximating the design of the WTO Appellate Body. See Working Group III: Investor-State Dispute Settlement Reform, UNCITRAL. URL: https://uncitral.un.org/en/working_groups/3/investor-state.
[246] W. Alschner, 'Heading for Divorce? Investment Protection Rules in Free Trade Agreements', in M. Elsig et al. (eds.), *The Shifting Landscape of Global Trade Governance* (2019).
[247] See M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 1 *University of Pennsylvania Law Review* 36 (2015).
[248] R. P. Alford, 'The Convergence of International Trade and Investment Arbitration', 1 *Santa Clara Journal of International Law* 12 (2013), p. 60; See also S. Gáspár-Szilágyi et al., 'Assessing Convergence in International Economic Disputes – A Framework', in S. Gáspár-Szilágyi et al. (eds.), *Adjudicating Trade and Investment Disputes* (2020), p. 2.
[249] S. Gáspár-Szilágyi et al., 'Assessing Convergence in International Economic Disputes – A Framework', in S. Gáspár-Szilágyi et al. (eds.), *Adjudicating Trade and Investment Disputes* (2020), pp. 4–5.

other. Therefore, studying these regimes in light of the ongoing convergence will help shape a comprehensive understanding of the notion of the right to regulate in international economic law.

1.4 Concluding Observations

1.4.1 Special Meanings of the Right to Regulate

International economic law encompasses numerous fields. Among these, international investment law and international trade law are arguably the two that most rapidly evolving areas in the last decades.[250] A notable consequence of these developments is the inevitable increase in frictions between their respective rules and the regulatory freedom of states. Naturally, each of these legal fields has sought to find an appropriate approach to accommodate the state's sovereign powers while preserving the efficiency of the legal regimes established for investment protection and the promotion of international trade.

Exploring the differences between these fields is essential to defining the special meaning of the right to regulate in international investment law and international trade law. *International investment law* arose out of concerns about the safety of foreign investors and the protection of their foreign direct investments. Consequently, many agreements in this field primarily focused on achieving these goals and neglected host states' interests in maintaining their sovereign powers to regulate economic activities. Only later, with increased use of dispute settlement under these agreements, particularly regarding regulatory disputes, did the realization emerge that the regulatory freedom of states is an under-protected value. Deference to state sovereignty became necessary, and some refuge was found in the concept of the right to regulate, which helped adjudicators to distinguish between compensatory and non-compensatory takings.

The uncertainty surrounding the theoretical concept, with no precise contours under international customary law, has led to drafting creativity in BITs, IIAs and investment chapters of FTAs, which have proliferated dramatically in recent decades. Several options were considered to preserve the right to regulate, including the insertion of NPM provisions, carve-outs and right-to-regulate clauses in the treaty text. While some aimed to bolster states' position in investment law disputes, others either completely precluded litigation over certain matters or operated as exceptions to breaches of protective standards under the agreements. To this end, GATT Article XX-like provisions became popular in IIAs.

Thus, international investment law has demonstrated its inclination to treat the notion of the right to regulate as a lifeline to preserve states' interest in maintaining

[250] R. P. Alford, 'The Convergence of International Trade and Investment Arbitration', 1 *Santa Clara Journal of International Law* 12 (2013), p. 60.

regulatory freedom. Put differently, the right to regulate in the context of international investment law serves as a defensive tool.

In contrast, *international trade law* has emerged from a different paradigm and set of goals in mind compared to international investment law. The political and economic considerations of embedded liberalism, which initially underpinned the newly created legal regime of the GATT 1947, have pre-determined the configuration of modern international trade law. Although not universally accepted, the WTO Agreement appears to be well-equipped with provisions that promote free trade and maintain states' right to regulate. This completeness explains why the right to regulate did not arise conceptually alongside the treaty text; its possible functions were early on assumed by specific provisions, such as Article XX of the GATT on "General Exceptions," which became a clear manifestation of the right to regulate within the system and beyond. Attempts by responding states to incorporate such functions of the right to regulate into applicable law in disputes like *China – Publications and Audiovisual Products* were not fruitful. In this context, the independent role of the right to regulate as part of customary law or as provisions expressly recognizing it was minimal in excusing violations of substantive rights and obligations under WTO agreements, if it existed at all.

Moreover, the Appellate Body has repeatedly stated that WTO Members may exercise their right to regulate insofar as WTO agreements are not breached. In other words, the right to regulate was considered inherent to what states do. However, these inherent powers were constrained by the international law obligations that states themselves assumed in exercising their right to regulate.

Since the WTO Agreement does not constitute international trade law in its entirety, the study of RTAs and their practice has also been proven instrumental in understanding the meaning of the right to regulate in this area. The legal regimes created under RTAs appear not to deviate from the approach to this notion in the WTO. The emerging jurisprudence under RTAs already firmly suggests the following. Based on the express language to that end, right-to-regulate provisions do not operate as exceptions in themselves within RTAs, but they can serve as context within the meaning of Article 31 of the VCLT and make a difference where the treaty text mandates it. Similarly to the WTO, the exercise of the right to regulate is considered limited by the provisions of regional trade agreements.

Accordingly, international trade law approaches the right to regulate as an integral element of its legal framework. Meanwhile, its direct impact as an independent concept often appears unclear, as many functions were early on undertaken by specific provisions that do not expressly mention the right to regulate. For this reason, this notion has played a fairly minor role in litigation over trade law matters, as arising issues could almost always be resolved without recourse to it.

As evidenced above, the right to regulate has indeed assumed special meanings in international investment and trade law regimes. Each has developed unique

characteristics, owing to the peculiarities of how these fields originated and evolved over the years.

1.4.2 Comparison of the Special Meanings

Comparing both fields brings to light the different roles played by the right to regulate in each (see Table 2 below). Recourse to this notion in international investment law was a solution to problems stemming from defects in the treaty design of older IIAs, which are currently being corrected. Such a narrative is alien to international trade law, which lacks a similar deficient treaty design. In international trade law, the right to regulate has rather been an omnipresent consideration about the system's founding premises, with little practical relevance, as the majority of arising questions are resolved by existing treaty rules without the need to apply this notion. These differences were coined by the origin of the respective fields and their subsequent developments.

Table 2: Emergence and Development of the Special Meanings of the Right to Regulate in International Investment and Trade Law (Simplified Comparison)

	International Investment Law	International Trade Law
Starting point	One-sided IIAs insufficiently respecting host states' interests in their treaty texts	Treaty texts with sufficient in-built flexibilities, such as GATT Art. XX and similar provisions
Issue to resolve	States' dissatisfaction with litigation that exposed the improper balance in IIAs, resulting in a perceived lack of appropriate tools for defending their interests	No similar issue due to self-sufficiency: arising issues could be meaningfully resolved with recourse to the treaty itself (although major concerns persist about regulatory freedom)
Initial solution to the issue found in the right to regulate	The right to regulate operating as a defense tool *alongside* treaty texts (a "gap-filling function") (for example, regulatory taking entailing no duty to compensate due to the exercise of the right to regulate)	The right to regulate had little to no separate operational meaning as there were no gaps to fill (however, the concept was understood as part of the balance struck in trade agreements)
Further developments and prospects	Embedding IIAs with provisions intended to restore balance through (1) refining substantive standards of protection; (2) inserting NPM provisions and	While remaining faithful to self-sufficiency, RTAs increasingly began to include right-to-regulate provisions and expand on in-built flexibilities

	carve-outs; and (3) incorporating right-to-regulate clauses	

However, it would be inaccurate to overlook the similarities in their respective approaches, especially given the apparent convergence between these adjacent fields of international economic law. Their recent approximation has been discussed elsewhere, and it is now commonly accepted that these two fields are closer than ever before. While the precise degree of approximation and its ultimate endpoint are unclear, the convergence between the two fields is in plain sight. The right to regulate could potentially become another point of their convergence (see Figure 1 below).[251] Both fields view the right to regulate as a vehicle for paying due deference to the sovereignty of states, which have the ultimate discretion to govern economic activities within their territories. This deference can take various forms: serving as an excuse for otherwise wrongful actions, creating an elaborate balance in treaty design, or providing additional consideration in the state's favor when applying substantive standards to specific sets of facts and circumstances in disputes. However, at the core, it constantly involves states' interests receiving a "preferential treatment."

As a result, in both instances, the pendulum has swung back in treaty design, especially considering the experience of vastly proliferated IIAs and RTAs. Their drafters have been creative in elaborating new treaty provisions that efficiently encapsulate the sought deference to sovereignty with minimal damage to the overall performance of the respective legal regimes. In a way, the developments in international investment law can be viewed as attempts to catch up with international trade law, resulting in IIAs that display a delicate balance between competing goals, similar to WTO agreements.[252]

Therefore, international investment law and international trade law have long been separate arenas for the concept of the right to regulate to emerge and mature. Viewed through the prism of the ongoing convergence between the two fields, the special meanings of the right to regulate under international investment and trade law are not as different as they might seem at first glance. In fact, the approaches of these fields to the right to regulate may be another point of convergence, given

[251] See OED Online, "convergence, n." (Oxford University Press, December 2021), which defines convergence as "[t]he action or fact of converging; movement directed toward or terminating in the same point (called the point of convergence)." For further elaboration on the argument that the right to regulate is another point of convergence between international investment and trade law, see Section "Final Conclusions and Future Considerations" below.

[252] C. Titi, 'Embedded Liberalism and International Investment Agreements: The Future of the Right to Regulate, with Reflections on WTO Law', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), p. 135; M. K. Lewis, 'The Embedded Liberalism Compromise in the Making of the GATT and Uruguay Round Agreements', in G. Moon & L. Toohey (eds.), *The Future of International Economic Integration* (2018), pp. 27–28; J. Kurtz, *The WTO and International Investment Law: Converging Systems* (2016), pp. 11–12.

the shared trajectory of changes these meanings are currently undergoing in international investment and trade law regimes.

1.4.3 Assessing the Viability of a General Theory

What does the above mean for the first research question of this study? First, it must be concluded that there is no unified meaning of the right to regulate under international economic law. Establishing a single meaning for the entire field has proven impossible. The revealed differences in the approaches of international investment and trade law to the right to regulate further support this conclusion.

By all means, establishing a unified meaning of the right to regulate in the field would be an end of the matter. Its demonstrated existence would provide a firm foundation upon which a general theory of the right to regulate could be built. However, this outcome does not necessarily mean that a general theory is not feasible.

Quite to the contrary, the lack of the above foundation is insurmountable. Another option is to consider the right to regulate as a point of convergence between international investment law and international trade law. Such an approximation suggests that there is more similarity than difference in the attitudes of both realms towards the right to regulate.

Moreover, their approaches are not static. The identified special meanings of the right to regulate in these two realms have evolved significantly and continue to be shaped along similar lines, as seen from the vast proliferation of IIAs and RTAs in recent years. This process may lead to the amalgamation of the meanings of the right to regulate in international investment and trade law. Ultimately, a unified approach may not exist today, but it could emerge in the future.

On top of that, it should be remembered that the right to regulate shares a conceptual origin in international investment and trade law as a basic attribute of sovereignty. On this account alone, the special meanings of the right to regulate in these areas are not far apart.

Accordingly, nothing prevents the contemplation of a general theory, especially when circumstances become more appropriate. It is therefore submitted that a general theory is feasible. This conclusion rests on the understanding that the particular meanings assumed by the right to regulate in international investment and trade law are compatible, notably because sovereignty is the binding force between them. Moreover, the observed convergence of both fields includes their approaches to the right to regulate.

Future developments in practice, along with further research, are necessary prerequisites for determining the precise content of a general theory. With a view to contributing to this, the following chapter examines the GATS approach to the right to regulate and aims to determine possible directions for the development of a general theory in international economic law.

Chapter 2: Lessons from the GATS Preamble

2.1 Laying the Framework

This chapter aims to explain why the development dimension should be part of a general theory of the right to regulate in international economic law. The relevance and value of this dimension of the right to regulate will be illuminated by examining the special meaning of the right to regulate in the context of WTO disciplines on trade in services, as represented in the GATS. Of all possible approaches, doctrinally native to international trade law, this part of the study focuses on a single GATS provision that expressly refers to the right to regulate. Three factors have predetermined this approach.

First, by comprehensively addressing international trade in services, the GATS intrudes into the sovereign domain of states like no other agreement, thus creating more frictions. The more frictions, the greater the demand for preserving states' power to regulate economic activities within their territories, otherwise threatened by creeping international commitments and unexpected developments in practice. In this regard, the GATS is unique compared to other WTO agreements, especially those dealing with trade in goods. Their content is not as pervasive as that of the GATS; it is one thing to have a bound tariff rate for imported goods that would

under no circumstances apply to domestic ones, and another to regulate a services sector with rules applying to both foreign and domestic service providers.[253]

Second, compared to other WTO agreements, the GATS stands out for another reason as well. While the right to regulate is fundamental to comprehending how the entire system works, it is surprising that the term "right to regulate" or its equivalent does not frequently appear in the text of WTO agreements. These agreements rarely mention the right to regulate explicitly, with the GATS being an exception.[254] Even so, the GATS refers to the right to regulate only once, mentioning it in the preamble in its fourth recital:

> … Recognizing *the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right; …*[255]

The inclusion of this notion in the preamble is hardly incidental and may have a bearing on how the entire GATS operates. A preamble is a conventional source for determining the object and purpose of the entire agreement. Consequently, a comprehensive analysis of the preambular text mentioning the right to regulate may shed light on the interpretation of all other provisions of the GATS.

Third, the GATS has no equals in sight as it "is the first *comprehensive* multilateral agreement on trade in services."[256] More specifically, it "is the first multilateral, legally enforceable agreement covering cross-border trade, investment, and movement of producers or consumers in the service sector."[257] Besides, multilateral legal instruments that mentioned the right to regulate prior to the GATS cannot reveal as much due to their significantly narrower nature.[258] Unlike these

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[253] For a detailed legal analysis of the GATS and the peculiarities of the legal regime it created, see W. Zdouc, *Legal Problems Arising under the General Agreement on Trade in Services: Comparative Analysis of GATS and GATT* (2002).

[254] In *US – Clove Cigarettes*, the Appellate Body referred to recital 6 of the preamble of the Agreement on Technical Barriers to Trade as "recognizing" Members' right to regulate despite the lack of explicit wording using this term. See Appellate Body Report, *US – Clove Cigarettes*, *supra* note 178, para. 95.

[255] Emphasis original. See also Ministerial Conference, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 7.

[256] M. Matsushita et al., *The World Trade Organization: Law, Practice, and Policy* (2015), p. 555; P. Delimatsis, 'Trade in Services and Regulatory Flexibility: 20 Years of GATS, 20 Years of Critique', in M. Bungenberg et al. (eds.), *European Yearbook of International Economic Law 2016* (2016), p. 157.

[257] P. Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity* (2007), p. 85.

[258] For example, the United Nations Convention on International Multimodal Transport of Goods (1980, not in force) and the International Telecommunication Convention (1982) similarly mention the right to regulate in their preambles (United Nations Convention on International Multimodal Transport of Goods, 24 May 1980, UN Doc. TD/MT/CONF/16; International Telecommunication Convention, 6 November 1982, 1531 UNTS 1). However, these references are

instruments, the GATS has demonstrated a precursor capacity, as subsequent RTAs unquestionably build on its legacy and often incorporate similar language in framing commitments for international trade in services. This precursor capacity also extends to the reaffirmation of the right to regulate in RTAs concerning the regulation of trade in services and beyond.[259] While no direct evidence was found, the drafters of later IIAs that expressly recognize the right to regulate in their text appear to have learned from the GATS preamble, at least when judged chronologically.[260] Thus, studying the GATS preamble may help better understand the aspects of the right to regulate that would also be relevant outside this trade agreement.

Considering the foregoing, this chapter seeks to examine the GATS provision recognizing the right to regulate to determine its content and meaning within the context of international trade law. This study is undertaken with the caveat that this analysis can only produce a fraction of the knowledge about the special meaning assumed by the right to regulate in the GATS, as other legitimate methods of studying this notion will not be employed.[261] However, this particular approach is unavailable for other WTO agreements that do not expressly mention the right to regulate, and thus it can generate further understanding that would otherwise be impossible to attain. Ultimately, the results of examining the GATS preamble will be used as part of the overall argument made in this study regarding a general theory of the right to regulate in international economic law, its possible content, and—most importantly—the relevance and value of the development dimension of this notion.

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confined to the specific services sectors to which the respective conventions are devoted, and therefore their possible relevance for other contexts is strictly limited, let alone that the former legal instrument never came into force. For an overview of the international disciplines and arrangements relevant to trade in services, see the note by the Secretariat prepared after the Uruguay Round was launched to support the negotiations about trade in services: GNS (Uruguay Round), Summary of Objectives, Coverage and Main Features of Existing International Disciplines and Arrangements Relevant to Trade in Services, Note by the Secretariat, MTN.GNS/W/16, 6 August 1987.

[259] See, for example, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018. URL: https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents, preamble, recital 6; TPP, *supra* note 122, Art. 10.8.2; CETA, *supra* note 44, preamble, recital 6 and Arts. 23.2, 24.3; RCEP, *supra* note 202, preamble, recital 9 and Art. 8.15.5.

[260] It is difficult to determine which IIA was the first to explicitly recognize the right to regulate in their text, especially considering also those provisions that do not mention this concept by name but similarly accord appropriate regulatory space to states. However, in terms of trends, the inclusion of right-to-regulate provisions became more frequent in the last decade, while the GATS was adopted earlier, in 1994. See, for instance, J. Coleman et al., 'International Investment Agreements, 2015–2016: A Review of Trends and New Approaches', in *Yearbook on International Investment Law & Policy 2015–2016* (2018), p. 72.

[261] Based on the special meaning of the right to regulate in international trade law as overviewed above, other relevant options would include a study of the entire design of the GATS with its in-built flexibilities, the balance struck in this covered agreement between competing goals, or the general exceptions under GATS Article XIV.

To examine the GATS preamble recognizing the right to regulate, this chapter proceeds as follows. It will commence with a brief overview of interpretative tools applicable to the GATS. Since the GATS refers to the right to regulate in the preamble, special attention will be devoted to determining whether a particular approach exists in public international law in general and WTO law specifically to interpret preambular language, as opposed to the main treaty text. The next step involves a detailed description of the interpretative tools most relevant to the present study under Articles 31 and 32 of the VCLT, followed by their application to the fourth recital of the GATS with the aim of legitimately arriving at its meaning under public international law. As a crucial part of understanding the right to regulate in the GATS, the negotiating history will be explored, highlighting the discussions that eventually led to the creation of the fourth recital of the GATS preamble.

2.2 Rules Applicable to Interpreting the GATS Preamble

2.2.1 Treaty Interpretation Rules

Like any other treaty, the provisions of the GATS reveal their meaning when interpreted according to applicable international law. Since the GATS is also a covered agreement of the WTO,[262] Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) constrains the spectrum of international law applicable to its interpretation:

> … *The Members recognize that [the dispute settlement system of the WTO] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.* …

The existence of this clause alludes to the frequent assertion that the WTO is a self-contained regime.[263] This characteristic of the WTO highlights the limited interaction between its legal regime and general public international law.[264] The

[262] Understanding on Rules and Procedures Governing the Settlement of Disputes, Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994, 1869 UNTS 401, Art. 1.1 and Appendix 1. [hereinafter DSU] Under Article 1.1 of the DSU, the WTO dispute settlement system applies only to claims arising out of covered agreements. See also P. V. d. Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005), p. 188.

[263] Report of the Study Group of the ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by M. Koskenniemi, A/CN.4/L.682, 13 April 2006, para. 134.

[264] Defined succinctly, a self-contained regime is another term for *lex specialis* of a higher degree. A self-contained treaty or legal regime virtually excludes the applicability of extraneous international law, provided that the conditions for this are met. The exclusion is valid if the legal regime provides

basic rule defining the scope of this interaction is that international law "applies to the extent that the WTO treaty agreements do not 'contract out' from it."[265] The Appellate Body concurs that WTO law "is not to be read in clinical isolation from public international law."[266] In *Korea – Procurement*, the panel, in a more general statement, similarly noted that "the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO."[267]

According to Article 3.2 of the DSU, "customary rules of interpretation of public international law" must be taken into account when the WTO dispute settlement system entertains complaints brought by its Members. This provision appears to have codified the previously established practice of the GATT 1947.[268] Its wording allows for two groups of interpretation rules. The first group encompasses rules outlined in Articles 31–33 of the VCLT to the extent that they reflect customary rules of interpretation.[269] Under Article 31 of the VCLT, the principal method is to interpret a treaty "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." Article 32 of the VCLT provides supplementary rules for interpretation to confirm the meaning of the text resulting from the application of the general rule of interpretation in Article 31 of the VCLT, or to

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a legal rule addressing the particular issue; other rules of international law will be ignored in this instance. The *Tehran Hostages* case by the ICJ illustrates the operation of self-contained regimes in practice. In its decision, the ICJ explained that since diplomatic law offered a means to deal with its violation, no recourse to rules outside this field of law was legally possible. More precisely, the rule discernible from the decision is that as long as diplomatic law contains a means of retaliation, retaliation by recourse to other norms of public international law is not permitted. See *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, ICJ Reports 1980, p. 3 at paras. 86–87. Regarding the topic of self-contained regimes generally, see also Report of the Study Group of the ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by M. Koskenniemi, A/CN.4/L.682, 13 April 2006, paras. 123–194.

[265] Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, p. 3541, para. 7.96. [hereinafter Panel Report, *Korea – Procurement*]

[266] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3, p. 15. [hereinafter Appellate Body Report, *US – Gasoline*]

[267] Panel Report, *Korea – Procurement*, *supra* note 265, para. 7.96.

[268] Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, p. 125, para. 6.7.

[269] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97, p. 10 [hereinafter Appellate Body Report, *Japan – Alcoholic Beverages II*]; Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571, para. 59 [hereinafter Appellate Body Report, *US – Softwood Lumber IV*]; Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295, para. 307. [hereinafter Appellate Body Reports, *China – Raw Materials*] See also O. Dörr & K. Schmalenbach, 'Article 31 General Rule of Interpretation', in O. Dörr & K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (2012), p. 561.

determine it when such interpretation leads to an unsatisfactory outcome by being ambiguous or absurd. If a treaty has more than one authentic language, Article 33 of the VCLT guides interpreters on how to resolve issues arising from this multiplicity.[270] The application of the rules contained in these articles ensures arriving at a *permissible* interpretation of a treaty.[271]

At the same time, the VCLT does not contain an exhaustive set of rules for treaty interpretation.[272] The wording of Article 3.2 of the DSU also suggests that rules of interpretation other than those in the VCLT can apply to discern the meaning of the GATS. Potential useful legal techniques include the principles of *lex specialis*,[273] effectiveness in interpretation of treaties,[274] *ejusdem generis*,[275] *in dubio mitius*,[276] *a contrario sensu*,[277] reliance upon an assumption *arguendo*,[278] and many others.

Thus, the GATS provisions should be understood through the lens of the customary rules of interpretation of public international law. As confirmed in WTO dispute settlement practice, these include, first and foremost, the rules under Articles 31–33 of the VCLT. Their application is a necessary prerequisite to reaching a permissible interpretation. Legal techniques other than those explicitly mentioned in these articles of the VCLT may also apply, provided they are part of the applicable customary law.

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[270] See Appellate Body Reports, Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7, fn. 512.

[271] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697, para. 60.

[272] O. Dörr & K. Schmalenbach, 'Article 31 General Rule of Interpretation', in O. Dörr & K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (2012), p. 538. For a list of possible interpretative techniques that may supplement the primary rule of interpretation as expressed in Article 31 of the VCLT, in addition to those in Articles 32–33 of the VCLT, see A. Aust, *Modern Treaty Law and Practice* (2013), pp. 220–221. See also Panel Report, *Korea – Procurement*, *supra* note 265, fn. 753.

[273] Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW, adopted 4 August 2000, as modified by Appellate Body Report WT/DS46/AB/RW, DSR 2000:IX, p. 4093, para. 6.33. [hereinafter Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*]

[274] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3, para. 80.

[275] Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449, para. 444; Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7, fn. 1290.

[276] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135, fn. 154. [hereinafter Appellate Body Report, *EC – Hormones*]

[277] Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, *supra* note 273, para. 6.33.

[278] Appellate Body Report, *China – Publications and Audiovisual Products*, *supra* note 174, para. 213.

2.2.2 Legal Value of a Treaty Preamble

2.2.2.1 Treaty Preambles in Public International Law

A preamble is a separate, integral part of a treaty that constitutes the general pronouncement of its objectives along with the circumstances attending the treaty's creation. A preamble precedes the main body of the treaty, which is specifically designed to set out the enforceable rights and obligations of its parties. Such an introductory clause usually "defines, in general terms, the purposes and considerations that led the parties to conclude the treaty."[279] Although it is widely accepted that "[t]he main legal function of [preambles] … is that of interpretative tool,"[280] opinions diverge about the particular significance that should be attached to preambles when determining the meaning of a treaty provision.

To this end, different functions are ascribed to preambles depending on their wording and the discernible intentions of their drafters. For instance, *Mbengue* speaks of "interpretive, supplementary, incorporative, and binding" functions of preambles, noting that each may be present "either simultaneously or alternatively."[281] Through the lens of the *interpretive function*, a preamble is examined to determine the extent to which it may affect the scope of rights and obligations under respective international treaties, given the general rule of interpretation laid out in the VCLT.[282] A preamble may also "fill lacunae or gaps in treaties" by explaining which rules govern a particular issue in the absence of treaty provisions dealing with it with sufficient precision (the *supplementary function*).[283] Besides, in its *incorporative function*, a preamble may refer to extraneous legal instruments, thus making them applicable.[284] In addition to declaratory statements, a preamble may also contain statements of a legally binding and, consequently, enforceable nature (the *binding function*).[285] Ultimately, the relevance of any specific preamble largely depends on how its drafters have formulated it.

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[279] M. M. Mbengue, 'Preamble' (September 2006), in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition), para. 1.

[280] A. v. Bogdandy, 'Preamble WTO Agreement', in R. Wolfrum et al. (eds.), *WTO – Institutions and Dispute Settlement* (2006), p. 4. (emphasis omitted)

[281] M. M. Mbengue, 'Preamble' (September 2006), in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition), para. 2.

[282] *Ibid.*, paras. 3–5.

[283] *Ibid.*, paras. 6–8.

[284] *Ibid.*, paras. 9–10.

[285] *Ibid.*, paras. 11–14. As an example of the possible binding function, *Mbengue* mentions the preambular wording of the 2001 Stockholm Convention on Persistent Organic Pollutants: "ACKNOWLEDGING that precaution underlies the concerns of all the Parties and is embedded within this Convention, … REAFFIRMING that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of

Be it as it may, a preamble, as a separate structural element of a treaty, can be better understood if viewed alongside other constitutive elements, particularly to establish whether a preamble, as another commentator put it, is part of a text-and-context or, rather, an object-and-purpose analysis.[286] In other words, the question revolves around the capacity of a preamble to convey rights and obligations on its own, as opposed to merely supporting the other provisions of a treaty.

Just as for the interpretation of treaties in general, the VCLT is the starting point for categorizing preambles relative to other means of understanding the meaning of treaty provisions. Plainly read, Article 31(2) of the VCLT juxtaposes a preamble with the text ("… text, including its preamble and …"). This juxtaposition through "including" implies that a treaty preamble should be regarded as part of the text and not as an entirely separate element.[287] Despite this clarity, "[v]irtually all those who engage in treaty interpretation today accept and employ the object-and-purpose approach to preambles."[288] This approach presupposes that, regarding the object and purpose of a treaty, its preamble is the most suitable source from which these can be derived when a treaty contains one. Indeed, it is not unusual for international courts and tribunals to rely on preambular language to substantiate their findings on the object and purpose of a particular treaty.[289]

Based on the above, it is evident that preambles can be treated on par with other parts of a treaty as long as they are not excluded from the general process of treaty interpretation and do not stand entirely apart. On the contrary, their involvement in the process of interpretation is indispensable. However, the impact will always depend on the wording chosen by the drafters. Most likely, a preamble would be used at least to ascertain the object and purpose of a treaty.

Since the present study concerns a WTO agreement, it is crucial to examine in detail the approach taken in this organization, with due regard to its predecessor. An examination of this practice will explain how the general understanding of the role of preambles in treaty interpretation, as outlined above, is refracted through the peculiarities of this autonomous legal regime.

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other States or of areas beyond the limits of national jurisdiction" (Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 2256 UNTS 119). See also *Case concerning Rights of Nationals of the United States of America in Morocco (France v. USA)*, Judgment, ICJ Reports 1952, p. 176 at pp. 183–184.

286 M. H. Hulme, 'Preambles in Treaty Interpretation', 5 *University of Pennsylvania Law Review* 164 (2016), pp. 1297–1303.

287 VCLT, *supra* note 3, Art. 31(2).

288 M. H. Hulme, 'Preambles in Treaty Interpretation', 5 *University of Pennsylvania Law Review* 164 (2016), p. 1300.

289 For instance: *Asylum Case (Colombia v. Peru)*, Judgment, ICJ Reports 1950, p. 266 at 282; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgement, ICJ Reports 2002, p. 625 at para. 51.

2.2.2.2 Treaty Preambles in the WTO Legal Regime

Chronologically, the dispute *US – Norwegian Salmon AD* was the first within the GATT/WTO system where an adjudicative body pronounced on the place of preambles in treaty interpretation. This dispute concerned anti-dumping duties on imports of fresh and chilled Atlantic salmon imposed by the United States on imports from Norway. These duties were levied following an affirmative final determination of dumping.

Norway claimed that the United States had failed to apply fair and equitable procedures in making the determination. The panel understood this allegation as deriving solely from the preamble to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Tokyo Round Anti-Dumping Code), which states, "it is desirable to provide for equitable and open procedures as the basis for a full examination of dumping cases." Consequently, the GATT panel had to determine "the rôle to be accorded to the preamble" to resolve the matter. It needed to determine whether the cited part of the preamble constituted a stand-alone legal basis for claims that could be entertained by the then-dispute settlement system.[290]

In a report adopted in 1994, the GATT panel interpreted the preambular statement invoked by Norway as not capable of creating a legal obligation on its own under the Tokyo Round Anti-Dumping Code. An examination of the wording of the preamble provision invoked by Norway was not part of its legal analysis. Instead, the GATT panel relied on *Encyclopedia of Public International Law (1984)*, which summarized the approach to the utility of preambles in treaty interpretation as part of the text that is "generally not intended to constitute substantive stipulations."[291] The GATT panel also admitted that the preambular language at issue "could guide the Panel's interpretation of specific operative provisions of the Agreement" as part of the context in the sense of Article 31(2) of the VCLT.[292]

In *US – Norwegian Salmon AD*, the GATT panel thereby confirmed the limited role of preambles in treaty interpretation and application. However, it is difficult to conclusively treat this decision as precluding a preambular provision from being interpreted as constituting substantive rights and obligations. The GATT panel reached its conclusion only concerning the single statement in the preamble relied on by Norway. The citation from *Encyclopedia of Public International Law (1984)*, referred to by the panel, also supports that any preambular language requires individual examination, as indicated by the word "generally" in the excerpt quoted

[290] GATT Panel Report, Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, adopted 27 April 1994, BISD 41S/229, para. 368. [hereinafter GATT Panel Report, US – Norwegian Salmon AD]

[291] R. Bernhardt (ed.), *Encyclopedia of Public International Law. Volume 7: History of International Law, Foundations and Principles of International Law, Sources of International Law, Law of Treaties* (1984), p. 394. The quote is provided as cited in GATT Panel Report, *US – Norwegian Salmon AD*, *supra* note 290, fn. 206.

[292] GATT Panel Report, *US – Norwegian Salmon AD*, *supra* note 290, para. 369.

above. Thus, the GATT panel's approach to the legal value of treaty preambles seems to align with general international law: preambles are conventionally treated as declarations, but this is not the end of the matter.

The consideration of the GATT panel report begs the question of its relevance for interpreting the GATS preamble. It may be argued that this report has no relevance because it was decided within the framework of the GATT 1947, which is legally distinct from the WTO, let alone the GATS. However, GATT panel decisions are not without value to the current dispute settlement system, especially when they reflect well-settled practice. In *US – 1916 Act (EC)*, the Appellate Body confirmed this by pronouncing that GATT panel reports may "provide guidance to the WTO and, therefore, to panels and the Appellate Body."[293] Consequently, the approach envisaged in *US – Norwegian Salmon AD* can be instructive and legally compelling for resolving similar questions in the dispute settlement of the WTO and, accordingly, for the present study. The relevance of the GATT panel's pronouncement on the legal value of preambles is further confirmed by the fact that it was once referred to in a WTO dispute by a compliance panel.[294]

Unlike the GATT 1947, the WTO Agreement comprises several international agreements subject to compulsory dispute settlement, most of which contain a preamble. With the establishment of the WTO, the new dispute settlement system has obtained more opportunities to delve into the legal issues related to the of role of preambles in treaty interpretation.[295] A short overview of the relevant practice and considerations is provided below, according to the functions of preambles set out by *Mbengue*.

2.2.2.2.1 Interpretative Function

In *US – Shrimp*, the Appellate Body interpreted and applied the preamble of the WTO Agreement while deciding whether sea turtles fall within the category of "exhaustible natural resources" under Article XX(g) of the GATT 1994. The Appellate Body stated that "[t]he preamble of the WTO Agreement-which informs not only the GATT 1994, but also the other covered agreements-explicitly acknowledges 'the objective of *sustainable development*.'"[296] Building on this understanding, the Appellate Body referred to various international legal

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[293] Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793, para. 61.
[294] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, fn. 1607.
[295] As seen from *US – Norwegian Salmon AD*, the multilateral dispute settlement system before the WTO also covered international agreements other than the GATT 1947. Since not all contracting parties to the GATT 1947 were also parties to international agreements like the Tokyo Round Anti-Dumping Code, the practice of litigating under these agreements was limited.
[296] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755, para. 129 (emphasis original). [hereinafter Appellate Body Report, *US – Shrimp*] See also Ministerial Conference, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 6.

instruments in its analysis and ultimately concluded that the animals in question belong to the category of "exhaustible natural resources."[297]

The above example showcases that within the WTO dispute settlement system, adjudicators are advised not to overlook preambles, as they "must add colour, texture and shading to … interpretation of" WTO agreements.[298] This approach has been subsequently endorsed by panels and the Appellate Body, providing examples of preambles regarded as important context for interpreting covered agreements.[299] In *EC – Chicken Cuts*, the panel confirmed that preambles can be useful in determining the object and purpose of a treaty.[300]

Regarding the interpretative function of preambles, no distinct deviations have been detected in the practice of the WTO dispute settlement system compared to the prevailing approach in general international law. A preamble is a helpful tool for interpreting treaty provisions, but its relevance highly depends on the fashion in which it is formulated.

2.2.2.2.2 Supplementary Function

There is no relevant practice of panels and the Appellate Body manifestly portraying the supplementary function of preambles. However, the preamble of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) illustrates how this function may operate within the WTO legal regime.[301]

Recital 6 of the SPS Agreement preamble reads:

> *Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and*

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297 Appellate Body Report, *US – Shrimp*, *supra* note 296, para. 134.
298 *Ibid.*, para. 153.
299 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States*, WT/DS381/AB/RW/USA and Add.1 / *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW2 and Add.1, adopted 11 January 2019, DSR 2019:III, p. 1101, para. 6.23 [Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*]; Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, p. 1127, para. 7.335.
300 Panel Reports, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R (Brazil) / WT/DS286/R (Thailand), adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, p. 9295 / DSR 2005:XX, p. 9721, para. 7.318. [hereinafter Panel Reports, *EC – Chicken Cuts*] See also fn. 523.
301 Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement Establishing the World Trade Organization, Annex 1A, 15 April 1994, 1867 UNTS 493.

> *regional organizations operating within the framework of the International Plant Protection convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health; …*

The Appellate Body explained that this recital sets the goal of harmonizing sanitary and phytosanitary measures of WTO Members by referencing international standards, guidelines, and recommendations, while it does not make their use obligatory.[302] As a result, these instruments may govern matters not regulated by the SPS Agreement when a sanitary or phytosanitary measure is based on them and thus supplement the operation of this WTO agreement.

Therefore, preambles of WTO agreements are not alien to the supplementary function. Recital 6 of the SPS Agreement preamble is a prominent example of how this function of preambles is embedded in the WTO legal regime.[303]

2.2.2.2.3 Incorporative Function

An intriguing peculiarity can be observed based on examples of how the *incorporative function* of preambles has unraveled itself within the context of international trade law. The WTO Agreement, in its Annex 1A, lists international agreements regulating trade in goods. These are inherently built around the GATT 1994, although the plain wording of this annex does not assign it such a central position. While the GATT 1994 contains various exceptions, not all other WTO agreements and documents are equally equipped with similar provisions. Consequently, some Members have sought to connect exceptions enshrined in the GATT 1994 with other WTO legal instruments. They intended to use this connection to excuse alleged violations of the latter on grounds not foreseen by the plain language of those sources of obligations and commitments that other Members assert to be in violation. Without delving into unnecessary details, the following examples are relevant and will be described briefly.

China was the first WTO Member to claim in a trade dispute that general exceptions under Article XX of the GATT 1994 apply to provisions outside the purview of this trade agreement. In *China – Audiovisuals*, *China – Raw Materials*, and *China – Rare Earths*, it attempted by this means to justify the alleged violations of obligations arising from its Accession Protocol to the WTO. Panels and the Appellate Body agreed with China that such a right may principally exist. However, they confined this right to be applicable only when "a clearly discernable, objective link to [a Member's] regulation of trade in the relevant products" can be established

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[302] Appellate Body Report, *EC – Hormones*, *supra* note 276, para. 165.

[303] Another example of the supplementary function, albeit arguably to a lesser degree, could be recital 3 of the TBT Agreement, which references international standards and conformity assessment systems (Agreement on Technical Barriers to Trade, Agreement Establishing the World Trade Organization, Annex 1A, 15 April 1994, 1868 UNTS 120). See Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359, para. 216.

based on the language of the provision concerned.[304] This "objective link" should be established, as the Appellate Body underscored in *China – Rare Earths*,

> *… through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments.*[305]

In all these disputes with China as a respondent, the provisions of its Accession Protocol were under scrutiny. A similar legal constellation was considered in *Russia – Traffic in Transit*, in which Russia successfully argued that national security exceptions under Article XXI of the GATT apply to justify alleged violations of particular provisions of Russia's Accession Protocol to the WTO.[306] These disputes offer a broad view of how the "objective link" can be established through WTO Members' accession protocols.

A more recent example is the *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* dispute, where Thailand argued the applicability of general exceptions under Article XX of the GATT 1994 to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (CVA). In stark contrast with previous case law, this was an attempt to establish the applicability of exceptions not to an accession protocol but to *another* WTO agreement on trade in goods. Provided that the previous jurisprudence regarding applicability is relevant, for such an argument to be valid, it should be based on the "objective link" between the GATT 1994 and the CVA. One of the intermediaries between the GATT 1994 and the CVA, as proffered by Thailand, was the latter's preamble. Thailand relied on its recitals, which state that WTO Members adopted the CVA "*[d]esiring* to further the objectives of GATT 1994" and "*[r]ecognizing* the importance of the provisions of Article VII of GATT 1994 and desiring to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation."[307] These recitals appeared to Thailand as the necessary connection between the CVA and the GATT 1994, especially its Article VII. Yet, the compliance panel disagreed with Thailand.[308] The second compliance panel

[304] See Appellate Body Report, *China – Publications and Audiovisual Products*, *supra* note 174, para. 233.
[305] Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805, para. 5.55.
[306] Panel Report, *Russia – Traffic in Transit*, *supra* note 158, paras. 7.229–7.258. The panel report has been adopted.
[307] Emphasis original.
[308] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.749.

upheld this decision, as no novel arguments were presented that had not already been considered by another compliance panel.[309]

These examples depict how the incorporative function of preambles operates within the context of the WTO legal regime. What distinguishes this function in WTO agreements is that a preamble can refer to other agreements within the same system rather than pointing to rules outside its realm. Such incorporation can theoretically imply the applicability of exceptions under the GATT 1994 to other WTO agreements on trade in goods. However, practice under the CVA has thus far failed to support this argument in WTO disputes.

2.2.2.2.4 Binding Function

The WTO adjudicative system seems to have a blind spot concerning the binding function of preambles. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, the compliance panel effectively recapped the essence of the previous jurisprudence on the matter by stating that "in the absence of clear and specific language to the contrary, a treaty interpreter may presume that the language of a preamble is not a source of legally operative rights or obligations."[310]

An indicative example of this approach is *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, where Mexico argued that

> *Measures that discriminate in a manner that goes against the objective of sustainable development are inconsistent with this important context[, i.e. the context provided by the preamble of the WTO Agreement,] and, therefore, can be found to be inconsistent with the obligations and requirements in Article 2.1 [of the TBT Agreement] and the chapeau to Article XX [of the GATT 1994].*[311]

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[309] Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Second Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW2 and Add.1, circulated to WTO Members 12 July 2019 [appealed; adoption pending], section 7.3.7.3.1. [hereinafter Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*]

[310] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.749.

[311] Panel Reports, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States*, WT/DS381/RW/USA and Add.1 / *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW2 and Add.1, adopted 11 January 2019, as upheld by Appellate Body Report WT/DS381/AB/RW/USA / WT/DS381/AB/RW2, DSR 2019:III, p. 1315, para. 7.130. [hereinafter Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*] It must be noted that the compliance panel initially misread Mexico's assertion when it issued its report for an interim review. Mexico requested a correction to the panel's findings to accurately reflect its actual claim. The DSU Article 21.5 panel agreed to revise its report so that it would no longer suggest that "Mexico's argument entails the conclusion that a measure may be found to be inconsistent with a particular provision of the covered agreements 'because it does not further one of the goals referenced in the preamble'" (Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, supra note 311, para. 6.38). Even though such requests are not rare during interim reviews, this

The compliance panel disagreed with this contention, understanding it as an attempt "to elevate the preambular language to the level of substantive obligation."[312] According to the panel, such an interpretation of the WTO Agreement preamble would "accord it more weight than the language used by the Members in framing the obligations contained in the covered agreements." The Appellate Body later confirmed that the preamble of the WTO Agreement is not a source of substantive obligations, although it may provide context for interpreting certain provisions of WTO agreements.[313]

Adhering to this approach, the panel in *US – Section 301 Trade Act* contrasted preambular text with other parts of the treaty. While explaining the value of security and predictability in the multilateral trading system, the panel noted that it would refer "not only to preambular language [of the WTO Agreement] but also to positive law provisions in the DSU itself" for a better understanding.[314] This quotation can be understood as implying that preambular language cannot contain such "positive law provisions." Regardless of the correctness of this reading, it appears to be a single statement out of context that has not seemingly received a systemic confirmation. Therefore, it cannot be regarded as irrefutably representing the general approach of the WTO dispute settlement as denying preambles any operative meaning in principle.

As seen above, the WTO dispute settlement system is generally susceptible to the idea that preambles can have normative value when their language mandates it. Despite this, WTO adjudicative bodies tend to consider preambles devoid of operative meaning, with no exceptions so far.

2.2.2.2.5 Overview

The examination of panel and Appellate Body practices regarding preambles and their role in treaty interpretation has revealed a similar approach to that taken by other international courts and adjudicative bodies relying on the VCLT. While it was not the task of this section to exhaustively categorize the provided examples according to the functions set out above, preambles in WTO agreements distinctly perform most, if not all, of these functions. Aside from the interpretative, supplementary, and incorporative functions, it cannot be ruled out that a preamble

example shows that Members are careful not to read into preambles more than what they deem necessary regarding a possible expansion of rights and obligations.

[312] *Ibid.*, para. 7.130.

[313] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, supra note 299, para. 6.23. See also Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925, para. 161. [hereinafter Appellate Body Report, *EC – Tariff Preferences*]

[314] Panel Report, *United States – Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, p. 815, para. 7.75. To avoid confusion, it must be noted that the preamble of the DSU consists entirely of the phrase "*Members* hereby *agree* as follows." (emphasis original)

could also potentially be a source of a substantive obligation on its own, granted the clarity of its wording to this extent.

The incorporative function of WTO preambles deserves highlighting because the manner in which this function manifests in the WTO stands out compared to other legal regimes under public international law. WTO agreements often refer to each other in their preambles. By adding such cross-linkages, the drafters intended to strengthen the multilateral trading system.[315] These mutual references operate within the context of the presumption against conflicts in WTO agreements.[316] Furthermore, these cross-linkages helped increase the efficiency of the WTO dispute settlement system and "avoid[] the problem of legal and procedural fragmentation that characterized the pre-WTO dispute settlement system."[317] While the precise coverage, meaning, and relevance of these cross-linkages are subject to independent scrutiny, this function of WTO preambles underscores the paramount importance of preambles for the overall effective operation of the WTO legal regime.

The study of the interpretative function revealed that the preambles of WTO agreements inform interpreters of the object and purpose of those agreements. Preambles can also serve as context. Nevertheless, it is nearly impossible to mechanically dissect preambles to attribute their impact separately to any of the textual elements recognized by the VCLT (*e.g.*, text, context, and object and purpose).

In any case, the combined effect of all interpretative instruments is rightly accepted in the well-expressed formula that preambles "*must add colour, texture and shading to … interpretation of*" WTO agreements.[318] This understanding applies to the GATS preamble: the next section on interpreting its recital recognizing the right to regulate proceeds based on this understanding.

2.2.3 Preliminary Conclusions

The GATS is a treaty subject to the rules of interpretation under public international law. In the meantime, Article 3.2 of the DSU limits the scope of law applicable to its interpretation, making only customary international law relevant for such purposes. In practice, the adjudicative bodies of the WTO dispute settlement

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[315] Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167, p. 16.

[316] See Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365, para. 7.155.

[317] Panel Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, upheld by Appellate Body Report WT/DS22/AB/R, DSR 1997:I, p. 189, para. 242. According to the panel, "[t]o revert to a situation where Article VI of GATT 1994 could have different meanings depending upon whether or not it was applied in conjunction with the SCM Agreement would perpetuate in part the legal fragmentation that the integrated WTO system was intended to avoid."

[318] Appellate Body Report, *US – Shrimp*, *supra* note 296, para. 153. (emphasis added)

system routinely rely on Articles 31–33 of the VCLT when interpreting covered agreements because they largely reflect the applicable customary law. Consequently, these provisions are the instruments through which it is possible to achieve a legally sound understanding of GATS provisions.

Interpretative rules outside the explicit language of the VCLT may also be relevant to elucidate the meaning of the GATS, provided they belong to customary law. It appears that while these interpretative techniques are often referred to, the choice of using them is always text-driven: the language of the provision at issue and its context dictate the appropriateness of each technique, since no pre-determined set of rules universally applies. Furthermore, these rules play a secondary role, as recourse to the general rule of interpretation under Article 31 of the VCLT remains preeminent. Hence, a permissible interpretation of a GATS provision requires recourse to the VCLT articles first, and only in specific instances to certain rules outside the VCLT.

Since the provision examined in this study is a preambular recital, the initial question was whether there is any peculiarity under applicable international law about interpreting preambular language on its own. Indeed, preambles are conventionally treated as mere declarations that cannot possess normative value on their own. Such an understanding would have limited the scope and possibly the relevance of this study. However, scrutiny of this issue has proven that assertion misplaced. While it is true that treaty parties often make declarations in preambles not designed to create enforceable rights and obligations, their functions are broader than these two extremes.

Given the complexity of the legal regime created by the WTO Agreement, preambles in related trade agreements come in nearly "all shapes and sizes." They perform various functions and, most notably, help the multilateral trading system hold together through extensive cross-linkages. Beyond that, the existing practice of preambles' application in the GATT/WTO system does not exclude the possibility that preambles can have normative value. This means that a fully-fledged interpretation of the recital in the GATS preamble referring to the right to regulate may reveal more than initially expected. Yet, the goal is not merely to determine whether this recital possesses such quality. Instead, the goal is to comprehensively explore the notion of the right to regulate *as it is* within the context of the norms on trade in services under the GATS and ultimately arrive at a permissible interpretation. Any other result would, as the Appellate Body seemed to have alerted, "add to or diminish the rights and obligations" and therefore run counter to Article 3.2 of the DSU, which prohibits the WTO dispute settlement from expanding WTO Members' rights and obligations beyond what is unwarranted by the text of the covered agreements.

Keeping that in mind, the meaning and relevance of the term "right to regulate" will be studied in the next part of the study as it appears in recital 4 of the GATS. Among the variety of possible legal interpretive instruments, those chosen for this exercise will be either indispensable or most informative. The section will begin by

applying the general rule of interpretation under Article 31 of the VCLT to the recital. Recourse will be made to supplementary rules of interpretation, emphasizing the negotiating history of the GATS as the most revealing. The section will conclude with the outlook on the results of this interpretive exercise.

2.3 Special Meanings of the Right to Regulate under the GATS Preamble

2.3.1 Text and Context

As outlined above, Article 31 of the VCLT is the starting point for ascertaining the meaning of a treaty. It stipulates several steps, involving the determination of the canonical triad: *(i)* the ordinary meaning of the terms, *(ii)* their context, and *(iii)* the object and purpose of the treaty. These elements constitute *a* general rule of interpretation, as follows from the title of Article 31 of the VCLT. By drafting the heading in the singular, the International Law Commission "intended to indicate that the application of the means of interpretation in the article would be a single combined operation."[319] *Villiger* similarly notes that "[n]o one particular means mentioned in Article 31 dominates the others."[320]

The WTO dispute settlement system is no stranger to this approach to interpretation. In *Canada – Autos*, the panel underlined that "[t]he three elements referred to in Article 31—text, context and object and purpose—are to be viewed as one integrated rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order."[321]

In *EC – Chicken Cuts*, the Appellate Body of the WTO affirmed that "[i]nterpretation pursuant to the customary rules codified in Article 31 is ultimately a holistic exercise that should not be mechanically subdivided into rigid components."[322] A closer reading of the report reveals that it does not entirely forbid such subdivision. Rather, the Appellate Body explained that when the panel incorrectly labeled textual excerpts as belonging to the ordinary meaning element, it did not make an error in interpretation. The Appellate Body decided so because it did not consider this panel's inaccuracy to change the outcome of the interpretative exercise, even though the panel should have referred to the excerpts

[319] Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, volume II, pp. 219–220.
[320] M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 435.
[321] Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043, para. 10.12.
[322] Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157, para. 176. [hereinafter Appellate Body Report, *EC – Chicken Cuts*]

as part of the context. Consequently, there should be a wide margin of discretion in determining whether the analysis of selected text falls under any of the interpretative elements under Article 31 of the VCLT, as long as the outcome constitutes a legally permissible interpretation.

Thus, the analysis of the fourth recital of the GATS preamble should be based on each of the constitutive elements of the interpretative process under Article 31 of the VCLT. This interpretative exercise should proceed with the understanding that it is not always possible to decompose the process conclusively into those pieces. The preliminary results must be reconciled to arrive at an outcome founded on all these elements in any event.

2.3.1.1 Ordinary Meaning

Article 31(1) of the VCLT stipulates that the primary method of treaty interpretation is to ascertain the ordinary meaning of its terms, subject to further clarification:

> *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.*

Long before this rule was codified in Article 31(1) of the VCLT, the Permanent Court of International Justice established the cardinal principle of treaty interpretation: "words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd."[323] In *Competence of the General Assembly for the Admission of a State to the United Nations*, the International Court of Justice (ICJ) stressed that "[i]f the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."[324]

It is equally axiomatic within the WTO dispute settlement system that treaty provisions are to be understood based on the ordinary meaning of their text first.[325] In *US – Cotton Yarn*, the panel noted that "panels and the Appellate Body have often consulted dictionaries as a starting point" to discern the ordinary meaning of words used in WTO agreements.[326] They have done this so frequently that it creates the impression of venerating dictionary definitions. The panels' and Appellate Body's over-reliance on dictionary definitions is unique compared to other international

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[323] *Polish Postal Service in Danzig*, Advisory Opinion, 1925 PCIJ Series B, No. 11, p. 39.

[324] *Competence of Assembly regarding Admission to the United Nations*, Advisory Opinion, ICJ Reports 1950, p. 4 at 8. See also *Territorial dispute (Libya v. Chad)*, Judgment, ICJ Reports 1994, p. 6 at para. 41; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, ICJ Reports 2004, p. 279 at para. 100.

[325] Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 269, p. 11.

[326] Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, adopted 5 November 2001, as modified by Appellate Body Report WT/DS192/AB/R, DSR 2001:XII, p. 6067, para. 7.48.

judicial and quasi-judicial bodies.[327] Extensive reference to dictionaries leads to more legitimate results, as the definitions used are more objectively substantiated. This common ground also contributes to the panels' and the Appellate Body's ability to speak with a single voice.

Adhering to the approach taken by panels and the Appellate Body, and with a view to reaching a legitimate result, the comprehensive interpretation of the GATS preamble should draw on dictionary interpretations of the most essential words in the recital of the GATS preamble referring to the right to regulate. One of them is the word "regulate." The Oxford English Dictionary defines it as "to control, govern, or direct, esp[ecially] by means of regulations or restrictions," which contextually alludes to the main function of a state to govern the territory under its control.[328] Meanwhile, the word "right" is defined as "a legal, equitable, or moral entitlement to do something."[329] Coupled with the word "regulate," it fuses into the pair "right to regulate," purporting the entitlement to exercise authority over the territory. Against the backdrop of the GATS, it means to adopt regulations and enforce them "on the supply of services."[330] In simpler terms, "literally, the 'right to regulate' means the right to take measures for the purpose of regulating trade."[331] This right belongs to WTO Members and may be exercised "within their territories." However, this interpretation leaves open the question of whether extraterritorial effects of state measures fall within the legitimate exercise of the right to regulate.[332]

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[327] M. Krajewski, *National Regulation and Trade Liberalization in Services: the Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (2003), p. 51.

[328] OED Online, "regulate, v." (Oxford University Press, December 2009), Section 1.a.

[329] OED Online, "right, n." (Oxford University Press, June 2010), Section II.9.d. (emphasis omitted)

[330] See GATS, *supra* note 46, preamble, recital 4.

[331] China's interpretation of "the right to regulate", as noted in paragraph 7.240 of the panel report in *China – Publications and Audiovisual Products*. The panel in that case discerned another meaning of that phrase, albeit relying on a different dictionary from the one used throughout this study: "The verb 'regulate' is defined in relevant part as '[c]ontrol, govern, or direct by rule or regulations; subject to guidance or restrictions'. In the context of paragraph 5.1, the regulator is China, i.e., a government. Thus, China's right to 'regulate' trade can be understood as meaning China's right to subject trade to governmental control, guidance, direction or restrictions, by rule or regulations" (Panel Report, *China – Publications and Audiovisual Products*, *supra* note 176, para. 7.257 citing Shorter Oxford English Dictionary, volume II (2002), p. 2516) (footnotes omitted). The panel also noted that "[w]e should recall at this point that 'regulation' may mean restriction" (Panel Report, *China – Publications and Audiovisual Products*, *supra* note 176, para. 7.277, stating in footnote 232 also that "[a]s noted above, the dictionary meaning of the verb 'regulate' includes 'subject to guidance or restrictions'").

[332] For an elaboration on whether the extraterritorial effects of state measures fall within the legitimate exercise of the right to regulate under the GATS, see Section "on the supply of services within their territories" below. For general considerations on whether the right to regulate, in its broadest sense, extends to the extraterritorial effects of state measures, see Section "Jurisdiction and the Right to Regulate" above.

This analysis chimes well with the Appellate Body's case-specific interpretation of the phrase "right to regulate" in *China – Publications and Audiovisual Products*.[333] To determine whether China could justify measures inconsistent with Paragraph 5.1 of its Accession Protocol by invoking Article XX of the GATT 1994, the Appellate Body scrutinized the introductory phrase to that paragraph of China's Accession Protocol, which states: "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement." As per the Appellate Body, the right to regulate trade means a Member's "power to subject international commerce to regulation."[334] However, this finding is confined to the context in which the Appellate Body has arrived at the just quoted definition of the right to regulate.

Be that as it may, this definition is not a suitable basis for the present study for the following grounds. To begin with, the Appellate Body did not interpret the term "the right to regulate" on its own and did not deal with the preambular text. It was bound to give a meaning to this phrase given the particular textual surroundings of the operative portion of the text. The most striking difference of these surroundings is the presence of the word "trade" immediately following the phrase "right to regulate," whereas the GATS preamble does not mention this word in the fourth recital. Additionally, the phrase interpreted by the Appellate Body forms part of the Accession Protocol to the WTO of China, a legal instrument distinct from the GATS. This fact prevents that finding from being blindly extrapolated to all other instances where the right to regulate may be mentioned in the context of international trade. Moreover, it appears that the Appellate Body did not employ the comprehensive set of interpretative techniques envisaged by the VCLT and customary international law, although it reached a somewhat persuasive outcome. Finally, as this always is the case, the ruling was tailored by the arguments and positions of the parties to that dispute and, therefore, is rather case-specific.

In a portion of its analysis, the Appellate Body characterized the right to regulate, in its own words, "in the abstract."[335] As much as the Appellate Body can be liberated from the particulars of the case, it is crucial to note its account of the right to regulate as "an inherent power enjoyed by a Member's government, rather than a right bestowed by international treaties such as the *WTO Agreement*."[336] This position is also adopted by the present study: Members inherently possess the right to regulate by virtue of their sovereignty, independent of their commitments under international law.

As a corollary of all the above, the right to regulate seems closely intertwined with state sovereignty. As a sovereign entity, a state may *ipso facto* adopt and enforce laws within its boundaries. Yet, the concept of sovereignty does not directly address how the playing field should be leveled in terms of its interaction with public

[333] Appellate Body Report, *China – Publications and Audiovisual Products*, *supra* note 174, paras. 218–221.
[334] Appellate Body Report, *China – Publications and Audiovisual Products*, *supra* note 174, para. 221.
[335] *Ibid.*, para. 222.
[336] *Ibid.*

international law. In this regard, the right to regulate may serve as a proxy and undoubtedly possesses various dimensions, depending on the context in which it is employed within legal provisions like the GATS preamble.[337]

2.3.1.2 Context

In *US – Gambling*, the Appellate Body correctly observed that "dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue all meanings of words—be those meanings common or rare, universal or specialized."[338] This implies that while reliance on dictionaries is helpful, it does not constitute the entirety of the exercise required to correctly interpret the meaning of a treaty provision. With that in mind, the Appellate Body laid out in *India – Additional Import Duties* that "all relevant attributes or definitions need to be considered in ascribing to a treaty's terms the ordinary meaning given to those terms in their context and in the light of the treaty's object and purpose."[339]

In this vein, "a second step in the interpretation process," that is recourse to context, is available to elucidate the meaning of a treaty provision.[340] This step involves exploration of "the connection of a clause with other parts of the agreement."[341] According to *Villiger*,

> *The context will include the remaining terms of the sentence and of paragraph; the entire article at issue; and the remainder of the treaty, i.e., its text, including its preamble … and annexes (e.g., maps) ….*[342]

Consequently, this section will further explore the context of the phrase "the right to regulate," examining its presence in the fourth recital and its relationship with other provisions of the GATS, including the remaining recitals of the preamble and the main body of the text.

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[337] Examining the GATS negotiating history reveals further reasons behind the ordinary meaning of the specific recital that are not apparent from the treaty text alone. For the corresponding analysis of the *travaux* and its outcomes, see Sections "GATS Negotiating History Related to the Right to Regulate" and "Meaning Behind the GATS Right-to-Regulate Provision" below. These reasons are succinctly presented in Table 6 below.

[338] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475), para. 164. [hereinafter Appellate Body Report, *US – Gambling*]

[339] Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted 17 November 2008, DSR 2008:XX, p. 8223, para. 167.

[340] U. Linderfalk, *On the Interpretation of Treaties: the Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), p. 102.

[341] M. Herdegen, 'Interpretation in International Law' (March 2013), in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition), para. 12.

[342] M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 427. (emphasis omitted)

2.3.1.2.1 ", and to introduce new regulations,"

The preliminary result, hinging on the discernment of the ordinary meaning of "the right to regulate," suggests that this phrase implies a WTO Member's entitlement to enact measures for regulating trade. It is perplexing, then, that in addition to recognizing the right to regulate, the fourth recital also highlights the Members' right "to introduce new regulations." Should not the right to regulate already encompass this activity, *i.e.* the state's continual entitlement to adopt laws and regulations affecting trade?

Given that treaty provisions should be construed to ensure none are devoid of meaning,[343] there are few interpretations possible for the inclusion of this phrase. To begin with, this phrase can be regarded as an illustration of how an exercise of the right to regulate can look like. Such a straightforward clarification would help ensure that interpreters do not deviate from the correct path in their search for the precise content of the right to regulate.

Another relevant attribute that may shed light on the meaning of that addition is the usage of punctuation. This approach to interpretation is widely used. For instance, the ICJ paid regard to the placement of commas when interpreting a treaty provision in *Aegean Sea Continental Shelf (Greece v. Turkey)*.[344] Likewise, panels and the Appellate Body have previously dealt with arguments based on the possible implications of "comma placement (or lack thereof)."[345] In *Russia – Railway Equipment*, the Appellate Body concluded that the interpretation of Article 5.1.1 of the TBT Agreement would have been different had the drafters not inserted a comma in it.[346]

Given these considerations, it would be an oversight not to take a closer look at the punctuation in the fourth recital. The phrase "and to introduce new regulations" is set off by commas from the rest of the sentence. It would be incorrect to assume that the usage of these commas was inadvertent.[347] Grammatically, this use of

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[343] Appellate Body Report, *US – Gasoline, supra* note 266, p. 20; U. Linderfalk, *On the Interpretation of Treaties: the Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), p. 108.

[344] *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, ICJ Reports 1978, p. 3 at para. 53.

[345] See Appellate Body Report, *US – Gambling*, *supra* note 338, para. 245; Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, p. 3451, paras. 7.104–7.105.

[346] Appellate Body Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/AB/R and Add.1, adopted 5 March 2020, para. 5.127. The Appellate Body stated, "[i]n our view, had the intention of the drafters been to mandate an assessment of a 'comparable situation' by reference only to the situation in a country, to the exclusion of the situation of suppliers, they would not have inserted the comma in the text of the first clause of Article 5.1.1 [of the TBT Agreement]."

[347] The Appellate Body is yet to caution against assuming that the choice of punctuation marks in treaties was unintentional and carrying no additional meaning. However, it has already done so concerning the drafters' use of treaty words (Appellate Body Report, *EC – Hormones*, *supra* note 276, para. 164).

commas indicates the deliberate inclusion of a nonrestrictive clause, which "and to introduce new regulations" certainly represents. Such clauses provide a reader with a secondary type of information that is strictly not needed for the sentence to be complete and clear. [348] Had the drafters intended that phrase to carry a special meaning distinct from the term "the right to regulate," they would have omitted those commas. Nevertheless, the fourth recital remains comprehensive even without this clause. Therefore, the meaning of the clause seems to be reduced, at best, to the clarification or exemplification of the right to regulate in general.

Crucially, the phrase at hand, linked by the conjunction "and," indicates that the right to introduce new regulations coexists with the right to regulate in its other interpretations. The deliberate use of this wording invalidates the meaning of the former as a mere example of the right to regulate. Granted that the inclusion of the phrase under examination adds value, its presence in the fourth recital likely aims to emphasize that the right to regulate protects states' discretion to take future measures, namely, their recognized entitlement to do so even post-WTO accession ("to introduce *new* regulations"). Thus, it underscores the dynamic nature of this concept, ensuring that the right to regulate is not perceived as fixed at the time of WTO accession.

Therefore, as inferred from the wording of the fourth recital,[349] WTO Members' right to introduce new regulations is not opposed to the right to regulate. Instead, the phrasing and punctuation in this recital highlight the adaptability of regulatory discretion that Members enjoy, which also embodies the right to introduce *new* regulations. Accordingly, the right to regulate is an inherently fluid concept that changes over time as new public goals may arise and require brand-new regulations.

2.3.1.2.2 "in order to meet national policy objectives"

Not all domestic regulations would fall within the rubric of the right to regulate under the fourth recital of the GATS preamble. Pursuant to its plain wording, the right to regulate is lawfully enjoyed only with respect to specific goals. This right is recognized, that is, "accept[ed] … to be valid,"[350] to be applicable only "in order to meet national policy objectives."[351]

The GATS does not define national policy objectives even though it mentions them as a category in other provisions, for instance, in the third recital of the preamble and Article XIX:2. In *Argentina – Financial Services*, both the panel found and the Appellate Body confirmed that national policy objectives, in their variety,

[348] D. Hacker & N. Sommers, *A Writer's Reference* (2011), pp. 262–263.

[349] Examining the GATS negotiating history reveals further reasons why the specific recital contains the phrase "and to introduce new regulations" that are not apparent from the treaty text alone. For the corresponding analysis of the *travaux* and its outcome, see Sections "GATS Negotiating History Related to the Right to Regulate" and "Meaning Behind the GATS Right-to-Regulate Provision" below. These reasons are succinctly presented in Table 6 below.

[350] See OED Online, "recognize, v." (Oxford University Press, June 2009), Section 2.b.

[351] GATS, *supra* note 46, preamble, recital 4.

should not be understood restrictively; indeed extend beyond the policy reasons explicitly articulated in Article XIV of the GATS.[352] This provision about general exceptions specifies public goals, in pursuit of which a state measure, otherwise inconsistent with the GATS, could be justified without entailing state responsibility. The Appellate Body further explained that "the pursuit of a Member's national policy objectives is not equivalent to violation of a Member's GATS obligations, and can be accommodated without the need to invoke exceptions."[353]

Given this interpretation, the right to regulate, when legitimately exercised to meet national policy objectives, can be accommodated without invoking exceptions. There is no unavoidable conflict between exercising the right to regulate and complying with GATS provisions. In other words, exercising the right to regulate trade in services does not necessarily result in a GATS violation. Therefore, the right to regulate as stipulated in the preamble is not equivalent in its operation to exceptions, whether general exceptions under Article XIV of the GATS or others.

Sometimes, understanding a concept by defining what it is not, can be helpful. Thus, a better comprehension of the term "exception" within the WTO legal regime is instrumental for this study of the right to regulate. In *India – Export Related Measures*, the panel provided a long-awaited explanation of how provisions considered exceptions operate. The panel distinguished between exceptions and so-called excluding provisions: "although the outcome of upholding an exception or an excluding provision is the same (*i.e.* the complaint fails), an exception presupposes a valid claim, to which it responds, whereas if an excluding provision applies, there is no valid claim under the provision that is excluded."[354] Before the applicability of an exception can be triggered, a *prima facie* case of a state's measure being inconsistent with a covered agreement must be established.[355] It follows that exceptions framed in treaty terms are secondary in their operation, whereas the right to regulate, as shown in the analysis so far, is always actively present.

This attribute of the right to regulate under the GATS, being more than just a tool to justify a breach of an international law commitment, contrasts starkly with how the right to regulate is understood in other contexts, most notably in international investment law. *Titi* has clarified that in international investment law,

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[352] Panel Report, *Argentina – Financial Services*, *supra* note 182, paras. 7.215–7.216; Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431, paras. 6.114, 6.117. [hereinafter Appellate Body Report, *Argentina – Financial Services*]

[353] Appellate Body Report, *Argentina – Financial Services*, *supra* note 352, para. 6.117.

[354] Panel Report, *India – Export Related Measures*, WT/DS541/R and Add.1, circulated to WTO Members 31 October 2019 [appealed; adoption pending], para. 7.8. [hereinafter Panel Report, *India – Export Related Measures*] See also paras. 7.5–7.12. This panel report is currently under appeal, yet the cited paragraphs do not feature among those India has appealed. See Notification of an Appeal by India under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, *India – Export Related Measures*, WT/DS541/7, 22 November 2019.

[355] Panel Report, *India – Export Related Measures*, *supra* note 354, para. 7.14.

the right to regulate means "a legal right that permits a departure from specific investment commitments assumed by a state on the international plane without incurring a duty to compensate."[356] This definition closely aligns with the understanding of how exceptions operate within the WTO. According to this definition, behavior contrary to international law stipulations will not entail responsibility in the form of compensation if it stems from the legitimate exercise of the right to regulate.[357] When extrapolated to the GATS realm, this understanding will certainly overlook the evolving nature of the right to regulate, as revealed above.

Consequently, the notion of the right to regulate has dimensions beyond being merely another exception. To this end, the GATS does not refer to the right to regulate in general, implying that a state may issue whatever regulations it pleases. Instead, the covered entitlement is limited, since regulations resulting from the exercise of the right to regulate must be linked to an objective that qualifies as a national policy. Regulations arbitrarily enacted by Members would not be considered within the right to regulate as per the fourth recital of the GATS preamble. The list of general exceptions in Article XIV of the GATS illustrates the types of goals that may constitute national policy objectives: protection of public morals, maintaining of public order, and protection of human, animal or plant life or health, among others.

Hence, the right to regulate must be defined through the national policy objectives that domestic regulations are required to pursue. However, this reliance on national policy objectives does not mean that the nature of the right to regulate is similar to that of exceptions: the former is operative and meaningful even when no GATS-inconsistent behavior is at stake.[358]

2.3.1.2.3 "on the supply of services within their territories"

The phrase "on the supply of services within their territories" appears in the recital of the GATS preamble that recognizes the right to regulate. It provides additional immediate context to this notion. By including this phrase, the drafters have confined the right to regulate to situations where its exercise concerns the supply of services strictly within Members' territories. As long as a Member's regulations apply to and are enforced within its territory, the legitimate exercise of the right to regulate, within the meaning of the GATS preamble, is warranted. However, it is

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356 A. Titi, *The Right to Regulate in International Investment Law* (2014), p. 52.

357 For a detailed overview of the particular meaning assumed by the right to regulate in international investment law and its comparison with that under international trade law, see Sections "Mapping Special Meanings of the Right to Regulate" and "Concluding Observations" above.

358 Examining the GATS negotiating history reveals further reasons why the specific recital contains the phrase "in order to meet national policy objectives" that are not apparent from the treaty text alone. For the corresponding analysis of the *travaux* and its outcome, see Sections "GATS Negotiating History Related to the Right to Regulate" and "Meaning Behind the GATS Right-to-Regulate Provision" below. These reasons are succinctly presented in Table 6 below.

unclear whether *the extraterritorial effect* of such measures would fall within the scope of a valid exercise of the right to regulate. This effect would be present in legislation with "a link with another sovereign" when the regulated matters "are not exclusively of domestic concern."[359] For instance, this would be the case of a country's market abuse regime with prohibitions and restrictions applying to actions and omissions both within and outside that country as criteria for lawful marketing and trading activities on its territory.

The WTO dispute settlement has yet to produce a decision interpreting and applying this phrase as part of the fourth recital of the GATS. Although no such occasion has arisen, panels and the Appellate Body have interpreted similar phrases, such as "within the territory of a Member" in Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement)[360] and Article 4.1(c) of the Agreement on Safeguards, or "into [a Member's] territory" in Article 2.1 of the Agreement on Safeguards.[361] Their findings were built on distinct immediate contexts and concerned different legal issues. Therefore, their relevance to whether extraterritoriality can be reconciled with the concept of the right to regulate under the GATS is minimal.[362]

At the same time, extraterritorially has already been addressed by the Appellate Body. In *US – Shrimp*, it explained that the WTO legal regime accommodates measures with an extraterritorial dimension:

> *conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX [of the GATT]. … It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX [of the GATT].*[363]

The Appellate Body reached these conclusions in the context of Article XX of the GATT. These are also pertinent for the interpretation and application of Article XIV of the GATS (general exceptions), as demonstrated by the Appellate Body's

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[359] C. Ryngaert, Jurisdiction in International Law (2015), p. 6.

[360] Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143, para. 8.67. [hereinafter Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*]

[361] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515, para. 111.

[362] See Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175, fn. 285 referring to Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243, para. 89.

[363] Appellate Body Report, *US – Shrimp*, *supra* note 296, para. 121.

ruling in *US – Gambling*, where it confirmed the applicability of past decisions under Article XX of the GATT to the comparable GATS provision.[364] Thus, Article XIV of the GATS should also be read as possibly capable of justifying extraterritorial measures otherwise inconsistent with the GATS. In other words, the extraterritorial aspect of such measures is not outside the purview of Article XIV of the GATS.

In its turn, Article XIV of the GATS informs the meaning of the fourth recital of the GATS preamble, as this article is part of its context. Consequently, these two provisions must be read harmoniously. Since Article XIV of the GATS may apply to and justify extraterritorial effects, the phrase "within their territories" in the preamble can also be understood as not excluding the extraterritorial dimension of measures from the scope of the right to regulate.

This tentative conclusion is also supported by another reason. Measures with extraterritorial effect normally maintain a link to the state's territory, as this is where they are enforced. A WTO Member is unlikely to suggest that its regulations would be enforced outside its territory. *Weil* noted in this regard that "[c]ertainly, neither normative nor recognitive jurisdiction can ever be extended as far as enforcement jurisdiction."[365] From this perspective, finding that the right to regulate applies to measures with extraterritorial effect does not lead to an irreconcilable conflict with the phrase "within their territories." The territorial element will still be present in such a context.[366] As long as this is correct, an exercise of the right to regulate resulting in the adoption of a measure with extraterritorial effects affecting the supply of services will be valid within the meaning of the fourth recital of the GATS preamble.

2.3.1.2.4 Members' Right to Regulate

The fourth recital of the GATS preamble, which recognizes the right to regulate, does not mention this concept in the abstract. Its operation is confined to WTO Members, who under the GATS preamble are recognized to enjoy this right. WTO membership consists of states and separate customs territories.[367] Since the latter are also included, "sovereignty as such … is not a precondition for WTO membership."[368] Therefore, the GATS preamble must be understood to refer to the right to regulate not only of states, but also of separate customs territories that are WTO Members.

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[364] Appellate Body Report, *US – Gambling*, *supra* note 338, para. 291.

[365] P. Weil, 'International Law Limitations on State Jurisdiction', in Olmstead, C.J. (ed.), *Extra-territorial Application of Laws and Responses thereto* (1984), p. 35.

[366] For further discussion on how a territorial link could justify the extraterritorial effects of state measures when adopted in exercise of the right to regulate, see Section "Jurisdiction and the Right to Regulate" above.

[367] WTO Agreement, *supra* note 170, Art. XII:1.

[368] F. Schorkopf, 'Agreement XII WTO Agreement', in R. Wolfrum et al. (eds.), *WTO – Institutions and Dispute Settlement* (2006), p. 146.

This interpretation of the GATS preamble might seem at odds with the traditional view that the right to regulate belongs only to states.[369] However, it is possible to reconcile these views. Separate customs territories can become WTO Members only if they "possess[] full autonomy in the conduct of [their] external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements."[370] Accordingly, separate customs territories enjoy the right to regulate not independently but only to the extent that the sovereignty of the states that created them allows within the prescribed boundaries.

At this juncture, an explanation is necessary regarding Taiwan, which acceded to the WTO in 2002 as the separate customs territory of Taiwan, Penghu, Kinmen and Matsu, or Chinese Taipei.[371] Due to the political controversy affecting its status in international law, Taiwan's example may not fit squarely into the category of separate customs territories when they are understood solely as formations established by independent countries. Its membership in the WTO confirms that sovereignty under the old approach is not required to accede to this organization. Conversely, this example also provides an opportunity to discuss the new approach to sovereignty in practical terms. In this regard, *Charnovitz* suggests that "Taiwan's entry into the WTO enhanced Taiwan's sovereignty when sovereignty is understood in its modern meaning."[372] With this in mind, there is little doubt that Taiwan can also exercise its right to regulate within the meaning of the GATS preamble.

However, it is unclear if separate customs territories other than those with broader competences actually adopt regulations on the supply of services *in practice* and, if so, to what extent. After all, separate customs territories are not normally expected to engage in these matters given the definition of customs territories in Article XXIV:2 of the GATT, read together with Article XXIV:8(a).[373] Thus, the practical dimension of this issue—whether entities other than states enjoy the right to regulate under the fourth recital of the GATS preamble—may be limited.

That notwithstanding, both states and separate customs territories are considered under the GATS preamble to be the entities that may enjoy the right to regulate, with no automatic exclusion of non-state actors. Accordingly, this study refers to WTO Members as including both states and separate customs territories. Thus, references to the right to regulate of states also apply, where relevant, to that of separate customs territories in the context of the WTO.

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369 For a more detailed analysis of the connection between sovereignty and the right to regulate, see Section "The Right to Regulate as an Attribute of Sovereignty" above.

370 WTO Agreement, *supra* note 170, Art. XII:1.

371 See Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) and the WTO, WTO. URL: https://www.wto.org/english/thewto_e/countries_e/chinese_taipei_e.htm.

372 S. Charnovitz, 'Taiwan's WTO Membership and its International Implications', 2 *Asian Journal of WTO & International Health Law and Policy* 1 (2006), p. 424.

373 See also Article V of the GATS about economic integration.

2.3.1.2.5 Progressive Liberalization of Trade in Services

As is usual in treaties, the GATS preamble mentions goals and values recognized by WTO Members regarding international trade in services. It is noteworthy that these goals have counterparts in the preamble that are fundamentally at odds with each other. As noted by the panel in *Argentina – Financial Services*, the right to regulate is complemented by "the express desire of the signatories to the Agreement to expand trade in services under conditions of transparency and progressive liberalization and as a means of promoting economic growth and development."[374]

This understanding emanates from a contextual interpretation that involves examining the other recitals of the GATS preamble. The most evident counterpart to the right to regulate seems to be the objective expressed in the third recital: an ambition to achieve "progressively higher levels of liberalization of trade in services." This goal is intended to be accomplished through successive rounds of multilateral negotiations subject to the rules under Part IV of the GATS:

> ... Desiring *the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;* …[375]

The wording chosen by the drafters in this recital has enabled the Appellate Body to characterize the third recital—almost in passing—as also referring to the right to regulate, even though it does not contain this terminology like the fourth recital.[376] Thus, the third recital works as an intermediary, bringing closer the interplay between the right to regulate and the liberalization of trade in services. The dynamic character of both concepts suggests that a delicate balance must be struck between them, since the third recital implies that liberalization is strongly desired but only to the extent that national policy objectives are given "due respect."[377] A potential clash between these two values is unavoidable when national policy objectives oppose the end goal of liberalization, which is to expand trade in services.[378]

2.3.1.2.6 Special and Differential Treatment

Under the special and differential treatment principle, the WTO Agreement contains many provisions that "attempt to take the special needs of developing

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[374] Panel Report, *Argentina – Financial Services*, *supra* note 182, para. 7.216.

[375] GATS, *supra* note 46, preamble, recital 3.

[376] Appellate Body Report, *Argentina – Financial Services*, *supra* note 352, para. 6.116.

[377] Setting semantics aside, Part IV of the GATS, entitled "Progressive liberalization," addresses three distinct topics. Two of these topics—the negotiation of specific commitments and the modification of schedules—fundamentally lay the foundation for Members' future activities. The third, concerning the schedules of specific commitments, serves as a baseline for developing rules on trade in services.

[378] GATS, *supra* note 46, preamble, recital 2.

countries into account."[379] The fourth recital of the GATS preamble is considered one of these provisions, as it states that Members recognize "the particular need of the developing countries to exercise" the right to regulate. According to the typology developed by the WTO Secretariat, this recital belongs to the group of the provisions "under which WTO Members should safeguard the interests of developing country Members."[380]

Thus, the fourth recital is not solely focused on the appreciation of the right to regulate; it also addresses the special and differential treatment of developing countries. These terms are so interwoven that they convey a special meaning not only when paired but also when considered individually. The drafters explain the need for developing countries to enjoy this right by pointing out "asymmetries existing with respect to the degree of development of services regulations in different countries."[381] It follows that the right to regulate manifests in at least two dimensions. The first one is the need to pursue national policy objectives that sometimes conflict with international trade rules.

Furthermore, the right to regulate is also seen as a tool for developing services regulations, aligning with the particular emphasis on the ability to introduce new regulations. For this reason, developing countries are actively encouraged to exercise their right to regulate as long as the asymmetries described in the fourth recital persist. Consequently, developing countries may enjoy the right to regulate to a greater extent.[382]

2.3.1.3 Preliminary Conclusions

Concordantly with the general rule of interpretation under the VCLT, the ordinary meaning of the phrase "the right to regulate" in the fourth recital of the GATS preamble suggests that Members have the right to take measures to regulate trade within their territories. This entitlement is characterized by its dynamic nature, as evidenced by the inclusion of the phrase "and to introduce new regulations" in recital 4 and the textual connection to special and differential treatment of developing countries. The drafters of the GATS preamble noted the difference in the degree of development of services regulations between various countries, hence

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[379] P. V. d. Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005), p. 43.

[380] Committee on Trade and Development, Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat, WT/COMTD/W/258, 2 March 2021, pp. 95, 97.

[381] GATS, *supra* note 46, preamble, recital 4.

[382] Examining the GATS negotiating history reveals further reasons why the pertinent recital addresses the asymmetries in regulatory situations across countries and "the particular need of developing countries to exercise" the right to regulate—insights not apparent from the treaty text alone. For the corresponding analysis of the *travaux* and its outcome, see Sections "GATS Negotiating History Related to the Right to Regulate" and "Meaning Behind the GATS Right-to-Regulate Provision" below. These reasons are succinctly presented in Table 6 below.

the significance of adopting new regulations as necessarily falling under the purview of the right to regulate. Meanwhile, a Member enjoys the right to regulate, provided it is exercised purely to meet national policy objectives that are not strictly confined to the permissible goals under Article XIV of the GATS (general exceptions).[383]

The analysis of the fourth recital of the GATS does not support the view that this right-to-regulate provision has an operative meaning on its own. Accordingly, no evidence was found to state that the GATS preamble performs the binding function in this regard. Specifically, the fourth recital does not serve as an exception clause to justify measures that would otherwise be inconsistent with the GATS. However, the express reaffirmation of this right in the preamble has significant implications for the interpretation and application of other GATS provisions as it would serve as an important context for them. It follows that "a correct interpretation of any GATS provision would give proper weight to the [p]reamble's affirmation of a Member's right to regulate and to introduce new regulations."[384] Thus, other provisions of this Agreement may require more deference to sovereigns' decisions to pursue the right to regulate. In the absence of a more appropriate example from the WTO, the situation in point is *Ukraine – Wood Products* decided under the EU–Ukraine Association Agreement. In this dispute, the Arbitration Panel regarded a right-to-regulate provision of this Agreement as capable of affecting the "weigh and balancing" considerations under the general exception clause of this RTA. It is submitted that the preambular text of the GATS similarly influences the interpretation and application of its other provisions, particularly in the case of developing countries, though arguably to a lesser degree since this recognition appears in the preamble rather than in the main text, as in the EU–Ukraine Association Agreement.[385]

Based on the foregoing, it is contended that the right to regulate primarily serves to fulfill two functions. Firstly, Members exercise this right to pursue national policy objectives, even if these objectives conflict with their WTO obligations. In this vein, national policy objectives are often aimed at protecting the values of the respective society with a corollary effect of limiting trade. Thus, pursuing such national policy objectives might prevent Members from achieving the goal of progressively developing trade in services.

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383 It should be noted that, according to the panel in *EC – Tariff Preferences*, "the characterization of a particular provision as an exception does not diminish the importance of the policy objectives pursued by that provision" (Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, p. 1009, para. 7.52). See also Appellate Body Report, *EC – Tariff Preferences*, *supra* note 313, para. 95.

384 P. Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity* (2007), p. 86.

385 For a detailed analysis of this dispute in the context of the right to regulate, see Section "RTAs and the Right to Regulate" above.

Secondly, the right to regulate may also be considered a means of developing services regulations whereby a question of Members' compliance with GATS obligations does not arise. This function exposes the development dimension of the right to regulate. To a certain degree, the right to regulate is an inevitable tool for developing countries to leap forward. Yet, the relevance of this function of the right to regulate is no less notable for developed countries given its inherently dynamic nature since national policy objectives may change over time, including the necessity to adapt to new trade and societal challenges.

2.3.2 Object and Purpose

2.3.2.1 Overview

The object and purpose constitutes a separate element among those recognized by the VCLT as having a bearing on treaty interpretation; namely, the object and purpose must be considered alongside "text" and "context" to render a legally correct interpretation. This element attaches importance to the subject matter governed by a treaty ("object") and the aim of the norms in the treaty ("purpose").[386] They both inseparably go hand in hand with each other in the sense of Article 31 of the VCLT. Naturally, the object and purpose can be understood as both "the result" and "the means" of interpretation, illustrating the intended outcomes of treaty implementation and allowing adjustments to the interpretative path as necessary.[387] In other words, the object and purpose of a treaty serves as a beacon towards which interpreters should gravitate in their efforts to ascertain the meanings of treaty provisions.

The VCLT does not introduce the object and purpose as an entirely independent element, whose consideration should be undertaken in isolation of the two others ("text" and "context"). Instead, it establishes a rule that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in the light of* its object and purpose."[388] It follows that the object and purpose represents a sort of a lens through which the terms of the treaty (*i.e.* "text") should be understood in their context. Some commentators have straightforwardly stated that "it is always a second step in the interpretation process" when the object and purpose comes into play in the process of treaty interpretation.[389] What is more, the object and purpose proves itself to be a good tool in treaty interpretation when two or more concurring interpretations are being considered with a view of choosing the legally right one. This is where the object and purpose is employed quite often, whereby it is safe to conclude that "[i]n

386 R. Kolb, *The Law of Treaties: an Introduction* (2016), p. 145.
387 *Ibid.*, pp. 145–146.
388 Emphasis added.
389 U. Linderfalk, *On the Interpretation of Treaties: the Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), p. 203.

practice, having regard to the object and purpose is more for the purpose of confirming an interpretation."[390]

Meanwhile, the VCLT does not specifically prescribe how to determine a treaty's object and purpose. In spite of this, interpreters routinely commence their search for the object and purpose of the treaty by analyzing a preamble or "a general clause at the beginning of the treaty."[391]

2.3.2.2 Object and Purpose in the WTO Legal Regime

The literal approach to interpretation—firmly relying on the ordinary terms of treaty language—has led the Appellate Body to understand that "the starting point for ascertaining 'object and purpose' is the treaty itself, in its entirety."[392] To some extent, this first step has something to do with the fact that not all WTO agreements have preambles or otherwise general clauses at their beginning. This holds true, for example, for the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the SCM Agreement. In the absence of such a "discrete statement of objectives," operational provisions of the agreement in question may be at disposal for its interpreters, as follows from the panel report in *US – Zeroing (EC)*.[393] However, the prevailing rule that a preamble serves as the primary source for establishing the object and purpose of a WTO agreement, should it possess one, remains intact.[394] In light of the multiplicity of agreements coming under the umbrella of the WTO legal regime, the panel in *EC – Chicken Cuts* stated that "[t]he object and purpose of the WTO Agreement can be deduced from the preambles of the WTO Agreement and of the agreements annexed thereto."[395]

The subsequent question concerns the extent to which panels and the Appellate Body utilize the object and purpose element in treaty interpretation within the WTO's scope. The first compliance panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* has encapsulated the role of this interpretative tool by stating that "the object and purpose of the covered agreements should guide us to avoid interpretations that would enable Members to 'circumvent' or 'evade' their

390 A. Aust, *Modern Treaty Law and Practice* (2013), p. 209.
391 M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 428.
392 Appellate Body Report, *EC – Chicken Cuts*, *supra* note 322, para. 238.
393 Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, p. 521, fn. 292. [hereinafter Panel Report, *US – Zeroing (EC)*]
394 See, for instance, Panel Reports, *EC – Chicken Cuts*, *supra* note 300, para. 7.318.
395 Panel Reports, *EC – Chicken Cuts*, *supra* note 300, para. 7.318. See also fn. 523.

obligations."[396] In this regard, this panel drew upon several preceding panel and Appellate Body reports to support its understanding.[397]

A notable illustration is provided by the case of *US – Softwood Lumber IV*. Canada argued in this dispute that the term "goods" shall only cover "tradable items with an actual or potential tariff classification."[398] This interpretation would exclude standing lumber from falling within the scope of Article 1.1(a)(1)(iii) of the SCM Agreement. Consequently, absent one of the constituent elements of a subsidy—a financial contribution—it would be impossible to establish a subsidy under Article 1 of the SCM Agreement, as the provision of standing lumber would not qualify, according to Canada. Without a subsidy, the US would err in making a final affirmative countervailing duty determination on certain softwood lumber imports from Canada. The Appellate Body disagreed with Canada because the proposed interpretation "would … undermine the object and purpose of the SCM Agreement, which is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while recognizing at the same time the right of Members to impose such measures under certain conditions."[399]

Consistent with this example, the object and purpose functions as an interpretative element within the WTO's legal system, similarly to its role in international law generally. Its function is to identify which among two or more interpretations is more legally correct. Recourse to the object and purpose of an agreement would normally be taken, in the words of the Appellate Body, "[w]here the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired."[400]

2.3.2.3 Object and Purpose in Interpreting the GATS Preamble

Unlike some other covered agreements, such as the Anti-Dumping Agreement and the SCM Agreement, the GATS does have a preamble. Thus, the object and purpose of the GATS can be inferred from its preamble, without needing to scrutinize the entire text of the agreement, as opposed to the aforementioned covered agreements. Crucially, the right to regulate—a focal term of interest in this study—is precisely located in the GATS preamble. This peculiarity arguably makes it more difficult to interpret this term compared to the situation in which the right to regulate would have been part of any other provision of the GATS.

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396 Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.642.
397 Appellate Body Report, *US – Shrimp*, *supra* note 296, para. 114; Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, *supra* note 360, paras. 8.75–8.76; Appellate Body Report, *US – Softwood Lumber IV*, *supra* note 269, para. 64; Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119, para. 8.39.
398 Appellate Body Report, *US – Softwood Lumber IV*, *supra* note 269, para. 61.
399 *Ibid.*, para. 64.
400 Appellate Body Report, *US – Shrimp*, *supra* note 296, para. 114.

At this juncture, a specific question arises as to how to discern the meaning of a preamble, or more precisely, one of its recitals, from the object and purpose perspective, particularly when the preamble itself is acknowledged as a source that reflects the treaty's telos. It must be noted at the outset that the outcome might depend on the configuration of the particular treaty and, in particular, on whether the recital in question embodies the *raison d'être* of the treaty. Obviously, not all parts of a preamble necessarily reflect the object and purpose of a treaty.

A possible solution to this conundrum is to make use of the following fact. The other recitals in the preamble surrounding the one at issue could be regarded as a source not only of the object and purpose but also of the other interpretative elements. For instance, the remainder of the preamble should be considered both as context and as reflecting the object and purpose when interpreting the recital in question. In other words, these two elements intersect to such a degree that distinguishing between them becomes impractical. This would be in line with Article 31(2) of the VCLT, which clarifies that the context may comprise distinct elements, such as the treaty preamble.

An indirect hint supporting this idea may also be drawn from a side note by the panel in *US – Zeroing (EC)*. In its report, the panel assessed an argument by the European Communities that aimed to highlight the object and purpose of an *individual* provision of the Anti-Dumping Agreement. The panel noted that this argument "might be better characterized as a further contextual argument rather than an argument relating to object and purpose" given that Article 31 of the VCLT speaks of the object and purpose of the *entire* treaty, not of its single provisions.[401] Therefore, the interpretative function of preambular recitals may serve as a source for both object and purpose and context under Article 31 of the VCLT. Despite this, as that statement in *US – Zeroing (EC)* suggests, it is inappropriate to conflate those functions when they can be distinctly separated.

Hence, the recitals in the preamble do not deliver the object and purpose of the entire GATS individually. It means that other recitals as context inform the content of recital 4, recognizing the right to regulate.

The unique aspects of the legal regime created by WTO agreements offer an alternative approach to interpreting a preambular recital, one that does not contradict the method previously described. Similar to other WTO agreements, the GATS is an integral component of the WTO Agreement. Being at the forefront of the WTO's legal regime, it aims to establish guiding principles common for the specific commitments made by Members in agreements annexed to the WTO Agreement. The Appellate Body notes that this intent to imbue WTO agreements with common principles is clearly evident in the drafting of the WTO Agreement's preamble. As a result, the Appellate Body concluded in *US – Shrimp* that "[a]s this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the

[401] Panel Report, *US – Zeroing (EC)*, *supra* note 393, fn. 292.

agreements annexed to the WTO Agreement."[402] Although this legal interpretation originally applied to the GATT 1994, it can also extend to other WTO agreements, including the GATS.

The two approaches outlined above can be reconciled. Based on them, the understanding of the right to regulate as it appears in recital 4 can be enhanced by completing two analytical steps concerning the object and purpose of the GATS. *First*, the other recitals should be examined as they build up the immediate context for "the right to regulate" as stated in the preamble. *Second*, the preamble of the WTO Agreement can elucidate the drafters' intent behind including the term "the right to regulate" in the GATS preamble.

2.3.2.3.1 Remainder of the GATS Preamble

Beginning with the immediate context, *recital 1* of the GATS preamble succinctly provides the backstory that explains the necessity of the GATS legal regime in contemporary international trade law. As the panel noted in *Mexico – Telecoms*, the preamble to the GATS "refers in expansive terms to the 'growing importance' of trade in services for the 'world economy.'"[403] Indeed, the increasing importance of trade in services spurred the negotiations during the Uruguay Round, leading to the creation of an agreement on trade in services akin to the existing agreement on goods, namely, the GATT 1947. This recital precedes a more detailed explanation in the preamble that trade in services plays a crucial role in "the growth and development of the world economy," underscoring the need for both quantitative and qualitative advancement. This broad perspective is reflected in the earlier conclusion that the right to regulate, as outlined in recital 4 of the preamble, functions in at least two distinct ways. The right to regulate, as explicitly stated in the plain wording of the fourth recital, means "to introduce new regulations." This suggests that the right to regulate possesses a numerical dimension. Furthermore, the right to regulate is seen as a mechanism for the gradual development of trade in services, especially in developing countries, intended to extend beyond merely adopting new regulations that do not qualitatively differ from existing ones.

Recital 2 clarifies the particular objective of the agreement, which is "to establish a multilateral framework of principles and rules for trade in services." Here, the goal of progressive liberalization, among other objectives, is introduced. Against the backdrop of recital 4, the goal of progressive liberalization appears to be a counterpart of the right to regulate, insofar as the exercise of the latter conflicts with progressive liberalization. Consequently, due regard must be paid to the relationship between these two principles to properly understand the term the right to regulate in recital 4.

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[402] Appellate Body Report, *US – Shrimp*, *supra* note 296, para. 153.

[403] Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, p. 1537, fn. 845.

Moreover, the second recital clarifies that trade in services is not an end in itself. It is rather a means for the growth of "all trading partners and the development of developing countries." The last part echoes recital 4, where it recognizes "the particular need of developing countries to exercise" their right to regulate and, thus, fortifies the function of the principle of special and differentiated treatment within the area of trade in services.

Recital 3 of the preamble specifies how the goal of progressive development of trade in services is supposed to be achieved. Crucially, this recital speaks of "an overall balance of rights and obligations" along with "national policy objectives." Its drafters sought to emphasize the importance of progressive liberalization of trade in services but not at the expense of national policy objectives, whenever possible. The third recital is paramount as it functions as an intermediary between the second and fourth recitals devoted to liberalization in trade and the right to regulate, respectively. Thus, recital 3 underlines that the right to regulate, as a concept recognized by the GATS preamble, does not exist in isolation and is constrained by the equally vital need to achieve the opposing objective.

The analysis presented above sits well with the Appellate Body's view that "the GATS seeks to strike a balance between a Member's obligations assumed under the Agreement and that Member's right to pursue national policy objectives."[404] It is noteworthy that the Appellate Body tends to describe "the object and purpose of various WTO agreements in terms of 'balance.'"[405] For example, it has notably done so concerning the TBT Agreement and the SCM Agreement.[406] Thus, using the term "balance" to describe the object and purpose appears to be a proper interpretative technique within the scope of WTO agreements.

This interpretative technique is adhered to by the panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, which used it to determine whether violations of the CVA could be justified by general exceptions under Article XX of the GATT. In this dispute, Thailand argued that, absent the applicability of Article XX of the GATT, the CVA would lack its inherent balance between the rights and obligations of Members. However, the panel disagreed with Thailand, eventually finding that the balance within the CVA is self-sufficient and does not necessitate extrapolating exceptions from other covered agreements.[407]

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[404] Appellate Body Report, *Argentina – Financial Services*, *supra* note 352, para. 6.114.

[405] Panel Report, Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines), para. 7.755.

[406] See Appellate Body Report, *Argentina – Financial Services*, supra note 352, para. 6.114; Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131, para. 115.

[407] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.754–7.757. The panel's legal findings on the applicability of Article XX of the GATT to the CVA are currently under appeal. For related insights, see Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, *supra* note 309, paras. 7.448–7.449, where the second compliance panel in this dispute arrived at the same conclusion, which is also now under appeal.

Furthermore, it is clearly discernible from *the final recitals (5 and 6)* that trade in services is not equally developed across all Members. Consequently, additional support is required for developing countries, particularly focusing on the situation in the least-developed countries. By expressly stating that this support should be provided "through the strengthening of their domestic services capacity and its efficiency and competitiveness," recital 5 offers further evidence that the right to regulate encompasses the qualitative development of trade in services.

Based on the analysis of the other recitals, the immediate context of recital 4, which recognizes the right to regulate, confirms the preliminary findings derived from the text and its immediate context. Despite this, the preceding analysis has better accentuated certain aspects, which in turn lead to a more substantiated understanding of the nature of the right to regulate concept, as contemplated in the GATS. For instance, it is evident that the right to regulate involves not only the mere adoption of new regulations but also efforts to enhance these regulations in terms of their quality, coverage, and density.

Besides, the recitals expose a clash between the right to regulate—envisaged as the adoption of new regulations to meet national policy objectives—and the progressive development of trade in services. In *US – Gambling*, the panel highlighted this clash by stating, "Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired."[408]

2.3.2.3.2 WTO Agreement Preamble

Moving on to the second logical step in the examination as defined above, it is important to preliminarily recall the Appellate Body's appraisal of the preamble to the WTO Agreement as appropriate.[409] By characterizing it so, the Appellate Body has endorsed the view that this "preamble for the new WTO Agreement … strengthened the multilateral trading system … to further the objectives, of that Agreement and the other agreements resulting from that Round."[410] Consequently, recourse to this preamble is necessary to better understand the objectives of the covered agreements, including those of the GATS. The first two recitals to the preamble of the WTO Agreement are of most interest in this context.

Recital 1 of the preamble of the WTO Agreement is informative in many respects. First of all, it attaches great importance to the objective of sustainable development that would bring Members to "the optimal use of the world's resources."[411] Similar to the case of *US – Shrimp* concerning trade in goods under

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[408] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797, para. 6.316.

[409] Appellate Body Report, *US – Shrimp*, *supra* note 296, para. 152 citing WTO Agreement, *supra* note 170, Article III:1.

[410] *Ibid*.

[411] WTO Agreement, *supra* note 170, preamble, recital 1.

the GATT 1994,[412] this reference may influence the interpretation of the corresponding objectives underlying the general exceptions under the GATS. Consequently, a Member could reasonably anticipate more leeway in adopting measures related to these objectives while relying on the general exception clause in the GATS.

However, this reference to sustainable development should be interpreted without prejudice to other goals that may also serve as national policy objectives within the broader framework of the right to regulate. Either way, there is no textual support for the understanding that the reference to sustainable development in the preamble of the WTO Agreement would somehow downgrade the role of the other national policy objectives.

On a broader scale, the commitment to achieving the goal outlined in this recital is not absolute. Recital 1 juxtaposes the need "to protect and preserve the environment" with "respective needs and concerns at different levels of economic development."[413] With that phrase, the drafters pointed out that the regulatory space is always country-specific and should be determined on a case-by-case basis.[414]

In a manner akin to the GATS preamble, *recital 2* of the WTO Agreement preamble addresses the special needs of developing countries. This recital does so, underscoring that international trade is a suitable tool for economic development, especially in developing countries.[415] The inclusion of this recital in the WTO Agreement's preamble further confirms that the special and differential treatment of developing countries is integral to the single package accepted by Members upon accession to the WTO.

The three other recitals provide less assistance in inferring additional factors relevant to analyzing the right to regulate. Nevertheless, they outline the general configuration of the WTO Agreement, designed to develop "an integrated, more viable and durable multilateral trading system."[416] This phrase has led the Appellate Body to deem that the WTO Agreement "reflect[s] the balance struck by WTO Members between trade and non-trade-related concerns."[417] The balance within the WTO Agreement is fragile, as it rests on the willingness of its Members to engage while maintaining the latitude to freely adopt trade law instruments. The Appellate Body has nicely put this in words that deserve to be quoted in full:

> *It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the*

412 Appellate Body Report, *US – Shrimp*, *supra* note 296, para. 129.
413 WTO Agreement, *supra* note 170, preamble, recital 1.
414 Appellate Body Report, *EC – Tariff Preferences*, *supra* note 313, para. 161.
415 Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, DSR 2015:II, p. 783, para. 6.5.
416 WTO Agreement, *supra* note 170, preamble, recital 4.
417 Appellate Body Reports, *China – Raw Materials*, *supra* note 269, para. 306.

> *benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.*[418]

Consequently, the WTO Agreement's preamble reveals that the scope of the right to regulate may vary based on a Member's level of development and specific needs, including those of developing countries. Simultaneously, the objective of sustainable development stands out as the sole national policy objective mentioned in this preamble.

2.3.2.4 Preliminary Conclusions

Before proceeding to the overall conclusion of this section, it is important to recall that the object and purpose is typically examined to confirm the legal correctness of interpretations derived from other elements enshrined in Article 31(1) of the VCLT. The preliminary interpretation of the recital in the GATS preamble, which refers to the right to regulate, is crucially important to this interpretative exercise. The tentative conclusion is that the GATS aims at the progressive development of trade in services. However, as progress is made toward this goal, it is essential to consider the recognized ability of Members to enact regulations that effectively pursue national policy objectives. At the same time, the needs of developing countries must also be recognized.

Recourse to the object and purpose of the GATS has proven to be a nontrivial task, particularly as the provision under scrutiny is merely a recital in its preamble, rather than a substantive treaty provision. The adopted approach involved, firstly, turning to the other recitals of the GATS preamble and considering them as contextual elements for interpretation—not only as sources for determining the object and purpose—and secondly, examining the preamble of the WTO Agreement. The outcome confirmed the preliminary interpretation of recital 4, with additional clarifications. First, the right to regulate pertains to developing regulations not merely by taking new measures, but also by enhancing their quality, coverage, and density. The other recitals in the GATS preamble elucidate that the right to regulate corresponds to the goal of progressively developing trade in services through further liberalization. On the other hand, the WTO Agreement's preamble reminds us that special attention should be paid to the needs of developing countries and that, more broadly, the contours of the right to regulate will vary among countries, depending on their development levels and current needs. Notably, the objective of sustainable development, expressly mentioned, can play a dual role: as a national policy objective that limits free trade in services and as a guiding principle for developing regulations for trade in services.

Furthermore, the preceding analysis is not at odds with the interim conclusion previously reached regarding the binding function of the preambular language in question. It further appears that recital 4 of the GATS preamble does not have an

[418] Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 269, p. 15.

operative meaning on its own. Moreover, the practical relevance of this right-to-regulate provision in the interpretation and application of other GATS provisions may be less than previously suggested in this study. If this provision were invoked by a respondent in a WTO dispute, the potential effect of recognizing the right to regulate would likely be counterbalanced by the opposing desire to achieve progressively higher levels of liberalization of trade in services. As a result, the balance would be found. This outcome appears plausible, given the demonstrated tendency of panels and the Appellate Body to discuss the object and purpose of individual covered agreements in terms of achieving balance.

2.3.3 Negotiating History

2.3.3.1 Theoretical Background

The interpretative outcome, resulting from the proper application of Article 31 of the VCLT, is expected to encompass all answers to the meaning of a treaty provision interpreted in this manner.[419] This stems from the straightforward understanding that the text itself should clearly indicate "the intention of the parties," authentically expressed at the time of their agreement, as compared to any other form that might represent this intention.[420] To this end, the application of Article 31 helps elucidate *the meaning of the text*, as opposed to "a fresh investigation as to the *supposed* intentions of the parties."[421] However, it is not uncommon for meanings inferred solely based on Article 31 of the VCLT to be unsatisfactory to the interpreter, being unclear, incomplete, unpersuasive, or even absurd.

This is where the rules contemplated in Article 32 of the VCLT come into play. This provision is devoted to the so-called supplementary means of interpretation. Initially, the wording of Article 32 of the VCLT necessitates clarification regarding the supplementary means of interpretation to which it refers. This provision names two such means ("preparatory work of the treaty" and "the circumstances of its conclusion") and makes clear that the list is not exhaustive ("including").[422] In respect of the GATS preamble, the most revealing supplementary means seems to be its extensive preparatory work that is available. For this reason, this section will

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[419] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851, para. 86. [hereinafter Appellate Body Report, *EC – Computer Equipment*]

[420] See Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, volume II, p. 223. To be precise, in formulating the rules on treaty interpretation, the ILC proceeded with the understanding that "the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation."

[421] A. Aust, *Modern Treaty Law and Practice* (2013), p. 217. (emphasis added)

[422] See Appellate Body Report, *EC – Chicken Cuts*, *supra* note 322, para. 283. M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 445.

focus on the *travaux préparatoires* of the GATS.[423] This approach sits well with the Appellate Body's statement that "an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties."[424]

The designation of interpretation means in Article 32 of the VCLT as supplementary denotes their auxiliary role. Accordingly, recourse to them is not obligatory. Being merely suggestive, recourse to these means may only be warranted in a limited number of cases. Depending on its function, such recourse may be undertaken to "confirm the meaning resulting from the application of [A]rticle 31" or to determine the meaning when the resulting interpretation is ambiguous or unreasonable.[425] This diminished standing of preparatory work is underscored by conventional wisdom stating that negotiating materials are "usually seen as being often incomplete and misleading, thus by their nature less authentic than the other elements of interpretation."[426]

A pertinent question at this stage is how one should approach the preparatory work if the interpretation under Article 31 of the VCLT results in an outcome that is neither ambiguous nor unreasonable. More precisely, can recourse to supplementary means of interpretation serve not merely to confirm but to "correct" the meaning inferred from the instruments of Article 31? It is true that the language of that provision does not envisage such an option. However, many authorities,

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[423] Meanwhile, it would be inaccurate to assert state that supplementary means of interpretation, aside from preparatory work, are seldom invoked by parties in WTO disputes or have played an indistinct role in treaty interpretation. For instance, in the case of *US – Large Civil Aircraft (2nd Complaint)*, the panel, while interpreting Article 1 of the SCM Agreement, referred to numerous instruments it considered as circumstances surrounding the conclusion of this covered agreement: "both pre-existing GATT disciplines regarding government procurement, relevant dispute settlement proceedings that took place under those disciplines, and also the negotiations that were underway to establish new disciplines regarding government procurement, including government procurement in respect of services" (Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649, para. 7.964 [hereinafter Panel Report, *US – Large Civil Aircraft (2nd Complaint)*]).

[424] Appellate Body Report, *EC – Chicken Cuts*, *supra* note 322, para. 283.

[425] See Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291, para. 267 [hereinafter Appellate Body Report, *US – Continued Zeroing*]; Panel Report, *Korea – Procurement*, *supra* note 265, para. 7.13; Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, *supra* note 423, para. 7.961.

[426] O. Dörr & K. Schmalenbach, 'Article 32 Supplementary Means of Interpretation', in O. Dörr & K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (2012), pp. 571–572. The diminished authenticity is chiefly explained by the fact the *travaux* do not reflect the agreement between the parties "at the time when or after it received authentic expression in the text" (Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, volume II, p. 220). (emphasis omitted)

including *Judge Schwebel*, advocate a different approach.[427] This alternative approach is supported by the typical engagement of states in dispute settlement.[428] Whatever the clarity of the provision at issue, states normally present arguments that draw on the preparatory work and corresponding evidence to support their cases. In turn, international courts and tribunals are highly unlikely to disregard such submissions during deliberations,[429] even if they ultimately determine that recourse to the *travaux* merely confirmed the meaning derived from the application of Article 31 of the VCLT or was entirely unnecessary.[430] For this reason, the Appellate Body might have referred to Article 32 of the VCLT as part of a holistic approach to interpreting treaty provisions.[431]

The panel's decision in *Russia – Traffic in Transit* exemplifies the inevitable utilization of negotiating history under Article 32 of the VCLT. Even though the panel had already reached a conclusion about the justiciability of Article XXI(b)(iii) of the GATT 1994 predicated on the "textual and contextual interpretation … , in light of the object and purpose of the GATT 1994 and WTO Agreement," it nevertheless brought to bear the *travaux* to confirm its findings.[432] The panel not

[427] S. M. Schwebel, *Justice in International Law* (2011), pp. 289–296. See also Summary record of the 769th Meeting on the Law of Treaties (ILC), Yearbook of the International Law Commission, 1964, volume I, p. 308 at 313–314; A. Aust, *Modern Treaty Law and Practice* (2013), p. 213; J. D. Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History', 4 *The American Journal of International Law* 107 (2013), pp. 781, 802; J. Klabbers, 'International Legal Histories: The Declining Importance of Travaux Preparatoires in Treaty Interpretation?', 3 *Netherlands International Law Review* 50 (2003), pp. 268, 285.

[428] It goes without saying that dispute settlement represents just one of the many contexts in which a treaty is interpreted and applied. Other contexts might yield different results. Nonetheless, dispute settlement is frequently showcased, and its publicly available outcomes offer valuable insights.

[429] For instance, international courts and tribunals invariably consider the preparatory work, as illustrated in the following scenario: "courts probably scrutinize the negotiating history whether the text seems clear or not. If the negotiating history supports a court's first impression, then the court labels the text as clear and can cite the negotiating history as confirming that meaning in accordance with [A]rticle 32. If the negotiating history disconfirms the court's first impression, it can disregard it and cite its first impression as the clear meaning of the text or, alternatively, declare the text ambiguous and refer to the negotiating history in accordance with [A]rticle 32. Of course, this procedure is contrary to the law as codified in [A]rticles 31 and 32, under which the negotiating history cannot vary the meaning of a clear textual provision." (K. J. Vandevelde, 'Treaty Interpretation from a Negotiator's Perspective', 2 *Vanderbilt Journal of Transnational Law* 21 (1988), pp. 296–297).

[430] S. M. Schwebel, *Justice in International Law* (2011), p. 291.

[431] Appellate Body Report, *US – Continued Zeroing*, *supra* note 425, para. 268.

[432] Panel Report, *Russia – Traffic in Transit*, *supra* note 158, para. 7.83. The Appellate Body adopted a similar approach in *US – Carbon Steel*, turning to the preparatory work of the SCM Agreement even after concluding that it was not necessary from a legal standpoint (Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779, paras. 89–90 [hereinafter Appellate Body Report, *US – Carbon Steel*]). A similar approach was also evident in one of the early disputes under the USMCA, where the panel utilized supplementary means of

only referred to the preparatory work but also engaged in a lengthy discussion on the subject, devoting as many paragraphs to this as it did to its reasoning based on Article 31 of the VCLT. Given that this panel report was the first within the WTO to address a dispute concerning the interpretation and application of national security exceptions, its persuasiveness would certainly have been compromised had it not included a discussion of the negotiating history. However, this discussion was not *stricto sensu* necessary within the framework of Article 32 of the VCLT, as its prerequisites were not met. With such situations in mind, *Rosenne* aptly noted that the marginalized role of the negotiating history "[is] coming close to a legal fiction," especially considering the circumstances under which treaty provisions are interpreted during dispute resolution.[433]

If interpreted in such a restrictive manner that the *travaux* are used only to confirm previously established meanings, Article 32 of the VCLT would seem devoid of substantive meaning. Indeed, if this article is applied in such a manner, it would add virtually nothing to the text that is otherwise understandable on its own, especially since the threshold for ambiguity or absurdity is high and serves distinct purposes. *Judge Schwebel* vigorously opposed the non-operational characterization of Article 32. He explained that such an interpretation would not align with typical treaty drafting principles, which presume that all treaty provisions are meaningful. More specifically, *Judge Schwebel* asserted that "[t]he [VCLT] does not reproduce boilerplate as so many contracts routinely do."[434] He thereby highlighted the unique nature of the VCLT compared to contracts governed by private law or other international agreements, suggesting that it is less likely to contain poorly drafted or intentionally irregular provisions that lack meaningful content.

Therefore, consulting the negotiating history of a treaty is essential to producing a comprehensive interpretation. This is why this study proceeds from the understanding that "Articles 31 and 32 [are] intertwined halves of a single, unitary whole."[435] In *China – Publications and Audiovisual Products*, the Appellate Body further

interpretation in *Canada – Dairy TRQ Allocation Measures*, even though it "ha[d] reached a clear reading of the Processor Clause under [VCLT] Article 31" (*Canada – Dairy TRQ Allocation Measures*, Arbitral Panel Established pursuant to USMCA Article 31 (CDA-USA-2021-31-010), Final Report, 20 December 2021, para. 134).

[433] Summary record of the 766th Meeting on the Law of Treaties (ILC), Yearbook of the International Law Commission, 1964, volume I, p. 283.

[434] S. M. Schwebel, *Justice in International Law* (2011), p. 294.

[435] J. D. Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History', 4 *The American Journal of International Law* 107 (2013), p. 802. This approach appears consistent with the jurisprudence of the WTO dispute settlement, as evidenced by the Appellate Body Report in *US – Continued Zeroing*: "[t]he principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. … [T]reaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise" (Appellate Body Report, *US – Continued Zeroing*, *supra* note 425, para. 268).

elucidated this by stating that "the purpose of treaty interpretation under Articles 31 and 32 of the [VCLT] is to ascertain 'common intentions' of the parties."[436]

Consequently, scrutinizing the drafting history of the GATS is pivotal to enriching the interpretation of the term "right to regulate" and ultimately arriving at a legitimate result.

2.3.3.2 GATS Negotiating History Related to the Right to Regulate

2.3.3.2.1 Path to Punta del Este and Negotiation Autonomy

The GATT 1947 sponsored eight successive rounds of multilateral trade negotiations, each devoted to furthering trade liberalization.[437] Besides reducing tariffs, later rounds also aimed at expanding the GATT 1947's rulebook. The last such round commenced on 20 September 1986. Known as the Uruguay Round for being launched by the CONTRACTING PARTIES[438] of the GATT 1947 in Punta del Este, Uruguay, this round has proven to be the most ambitious of them all. Ultimately, it led to the creation of a new international organization—the WTO—with a unique and extensive set of trade disciplines.[439]

This is also where, for the first time in the history of the GATT 1947, a round of negotiations covered international trade in services.[440] Before the 1980s, liberalizing trade in services on a multilateral basis was economically unfeasible. Due to earlier stages of economic structure and technological development, the potential benefits of such liberalization were unclear and, at best, negligible; economists routinely "minimized the importance of services and their trade."[441] Aside from the purely economic considerations embraced at the time, the experience of addressing international trade in services was equally scarce. Disciplines regulating trade in services did not exist on the multilateral level; they were included only in "bilateral

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[436] Appellate Body Report, *China – Publications and Audiovisual Products*, *supra* note 174, para. 405. See also Appellate Body Report, *EC – Computer Equipment*, *supra* note 419, para. 93.

[437] These negotiation rounds, held between 1947 and 1994, are known as the Geneva Round (1947), Annecy Round (1949), Torquay Round (1951), a second Geneva Round (1956), Dillon Round (1960–61), Kennedy Round (1964–67), Tokyo Round (1973–79), and Uruguay Round (1986–94). See The GATT years: from Havana to Marrakesh, WTO. URL: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

[438] "CONTRACTING PARTIES: expressed all in caps, this term refers to the highest organ of the GATT with the substantial authority to adopt acts by GATT organs, modify the agreement, launch trade negotiations, *etc.*" (J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), p. 699).

[439] Ministerial Declaration on the Uruguay Round, GATT MIN.DEC, 20 September 1986, p. 1. The first five rounds dealt solely with tariff reductions. Subsequent rounds had a broader agenda and outcome, yet they were overshadowed by the comprehensive achievements of the Uruguay Round, which culminated in the creation of the WTO with several new trade disciplines. P. V. d. Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005), p. 390.

[440] Ministerial Declaration on the Uruguay Round, GATT MIN.DEC, 20 September 1986.

[441] W. J. Drake & K. Nicolaïdis, 'Ideas, Interests, and Institutionalization: "Trade in Services" and the Uruguay Round', 1 *International Organization* 46 (1992), p. 43.

and regional schemes" in a minimal manner.[442] For these reasons, introducing this issue in the Uruguay Round proved to be anything but straightforward. Following the GATT 1947 tradition of *unanimous* decisions to launch new rounds, all contracting parties—including those with little or nearly no interest in the matter—were required to agree to the proposed expansion of the negotiating mandate after substantive preliminary discussions.[443] Although it is beyond the scope of this study to delve deeply into how services were included in the Uruguay Round mandate, a brief overview is essential to providing a complete picture.

The inclusion of trade in services in the negotiating mandate followed several years of attempts to initiate discussions on this topic, led by the United States, which first realized the potential benefits of opening up services markets. This emerging topic gained prominence against the backdrop of a growing awareness that services had become a vital component of international trade by the 1980s.[444] Slow and steady, other countries were persuaded by the concept of exploring international trade in services as a factor influencing economic growth and national well-being.[445] As early as 1982, the CONTRACTING PARTIES adopted a ministerial declaration that recommended a national examination of the matter, the exchange of relevant information, and a subsequent review of these examination results.[446] The requisite groundwork, including contributions from non-governmental actors,[447] facilitated the "construction and dissemination of a shared body of knowledge among participants" of the discussions.[448] As *Ascher* reports, seventeen national studies

[442] J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), pp. 690–692.
[443] W. J. Drake & K. Nicolaïdis, 'Ideas, Interests, and Institutionalization: "Trade in Services" and the Uruguay Round', 1 *International Organization* 46 (1992), p. 65.
[444] For a comprehensive overview of the pre-negotiation history leading to the conclusion of the GATS, see J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011); T. P. Stewart, *The GATT Uruguay Round: a Negotiating History (1986–1992)* (1993), pp. 2341–2358.
[445] Interestingly, not all countries where services were as crucial to the economy and trade as in the United States immediately favored liberalizing trade in services through negotiations under the GATT 1947. For instance, the European Communities initially hesitated to fully commit, partly because such a commitment could draw unwanted attention to its agriculture policy, which the European Communities was not prepared to alter. See J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), pp. 695–697; R. R. Rivers et al., 'Putting Services on the Table: The New GATT Round', 1 *Stanford Journal of International Law* 23 (1987), p. 20.
[446] CONTRACTING PARTIES (GATT), Ministerial Declaration, L/5424, 29 November 1982, p. 14.
[447] For instance, *Drake* and *Nicolaïdis* provide a well-substantiated argument that the epistemic community played an essential role in recognizing the importance of including international trade in services in the negotiating mandate (W. J. Drake & K. Nicolaïdis, 'Ideas, Interests, and Institutionalization: "Trade in Services" and the Uruguay Round', 1 *International Organization* 46 (1992)).
[448] A. Lang, 'GATS', in D. Bethlehem et al. (eds.), *The Oxford Handbook of International Trade Law* (2009), p. 159.

submitted between 1984 and 1986 subsequently paved the way for more substantive discussions about whether multilateral rules on the liberalization of trade in services were desirable and attainable under the GATT 1947.[449]

While developed countries responded with at least a moderate "yes," developing countries did not share this view. The latter were less inclined to accept that, should multilateral trade negotiations succeed, international trade in services would thereafter fall under the auspices of the GATT 1947. *Drake* and *Nicolaïdis* explain that "[t]he majority of [less developed countries] simply had not been convinced that liberalization could be to their long-term advantage, and they feared binding, short-term commitments to radical domestic restructuring before their competitive capabilities were established."[450] Eventually, as the preliminary discussions progressed, this predisposition culminated in the stark opposition of the developing countries' partnership known as the G-10 to including services in the round.[451] They deliberately remained silent on services in their proposals for a draft of the 1986 Ministerial Declaration.[452] In a document distributed just a couple of months before the Uruguay Round Ministerial Declaration's adoption, G-10 has articulated reasons why services were not to be included in the negotiating mandate of the next round:

> *In relation to services, the exchange of information carried out in the context of the CONTRACTING PARTIES' Decisions of 1982, 1984 and 1985 clearly demonstrates that data provided so far has been insufficient and unbalanced, that basic definitions are lacking and that important issues raised by developing contracting parties have not been addressed. It is therefore not possible to take up at this stage the question of "whether or not any multilateral action is appropriate and desirable". In this situation, it becomes impossible to visualize negotiations in the context of a multilateral trade round in GATT or in a GATT framework.*[453]

It is somewhat surprising that this stern position of the G-10 countries appeared to have been overcome within just two months, as the Uruguay Round's mandate ultimately did include services as a topic of negotiation. The stumbling block in the negotiations was removed as the concerns of developing countries were sufficiently

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[449] B. Ascher, 'Multilateral Negotiations on Trade in Services: Concepts, Goals, Issues', 2 *Georgia Journal of International and Comparative Law* 19 (1989), p. 395.
[450] W. J. Drake & K. Nicolaïdis, 'Ideas, Interests, and Institutionalization: "Trade in Services" and the Uruguay Round', 1 *International Organization* 46 (1992), pp. 65–66.
[451] The G-10 consisted of Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia (see J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), p. 701).
[452] See Preparatory Committee (GATT), Draft Ministerial Declaration, PREP.COM(86)W/41, 23 June 1986; Preparatory Committee (GATT), Draft Ministerial Declaration, Revision, PREP.COM(86)W/41/Rev.1, 16 July 1986.
[453] Preparatory Committee (GATT), Communication from Brazil, Addendum, PREP.COM(86)W/41/Rev.1/Add.1, 22 July 1986, p. 4.

addressed, enabling them to agree to include services in the next round.[454] It would, however, be an overstatement to say that their doubts had been fully dispelled by the time of the Uruguay Round's launch. *Au contraire*, these remained a recurrent theme in the negotiations, with, as argued below in more detail, major implications for understanding the precise content of the right to regulate meant in the GATS.

To move forward, one of the compromises that emerged was the formal bifurcation of the negotiating process. This process was effectively split into two separate tracks: one covering trade in goods and the other covering trade in services. The separation was achieved by making decisions in different meetings: *(1)* for trade in goods and the launch of the new round in general—during the session of the CONTRACTING PARTIES; *(2)* for trade in services—concurrently, at an *ad hoc* intergovernmental meeting.[455]

This configuration was designed to ensure that no trade-offs would be possible between the areas: the negotiating outcomes should not be mutually dependent. Thus, developing countries were reassured that the leverage in goods could not be used "to access the protected services markets of developing countries."[456]

Besides, a separate track of negotiations, which arose "in a semi-formal way," created an opportunity for countries to express differing intentions behind this design.[457] Several statements reflecting this sentiment were made when negotiations as part of the new GATT round commenced. Developing countries repeatedly voiced opposition to using concessions in one field as a bargaining chip for another. In its initial document submitted for consideration, Brazil devoted considerable space to reminding other participants about "a clear separate legal basis for decision making," concluding that negotiations concerning trade in services fall outside the GATT framework.[458] In a forceful statement, India echoed this view, further

[454] For more details on the hesitation of developing countries and the resolution of these challenges, see T. P. Stewart, *The GATT Uruguay Round: a Negotiating History (1986–1992)* (1993), pp. 2354–2358; J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), pp. 701–704.

[455] See Ministerial Declaration on the Uruguay Round, GATT MIN.DEC, 20 September 1986, pp. 1, 10; GNS (Uruguay Round), Communication from Jamaica, The Uruguay Round and Trade in Services, MTN.GNS/W/28, 24 November 1987, p. 3.

[456] S. P. Shukla, *From GATT to WTO and beyond* (UN University World Institute for Development Economics Research Working Papers No. 195, 2000), p. 17; G. R. Winham, 'The Prenegotiation Phase of the Uruguay Round', 2 *International Journal* 44 (1989), p. 299. See also M. Koehler, *Das Allgemeine Übereinkommen über den Handel mit Dienstleistungen (GATS): Rahmenregelung zur Liberalisierung des Internationalen Dienstleistungsverkehrs unter Besonderer Berücksichtigung des Grenzüberschreitenden Personenverkehrs von Dienstleistungsanbietern* (1999), p. 72.

[457] See S. Page, *The GATT Uruguay Round: Effects on Developing Countries* (1991), p. 40.

[458] GNS (Uruguay Round), Communication from Brazil, MTN.GNS/W/3, 11 March 1987, paras. 4–8. [hereinafter Communication from Brazil, MTN.GNS/W/3, 11 March 1987]

explaining that "the unique structure of the Uruguay Declaration" does not foresee any linkage, except those related to "the singleness of the political undertaking."[459]

At the same time, the bifurcation of this process seems not to have had a tangible impact on the negotiations. It is challenging to determine whether any debate over this issue occurred, as no public records of positions contrary to those of Brazil and India are available. Moreover, there are at least two compelling reasons to believe that this separation was, in effect, merely a *façade* to placate developing countries. The relevance of this separation becomes blurry because both tracks appear in a single ministerial declaration, especially in the absence of explicit statements to the contrary. Similarly, the Group of Negotiations on Services (GNS) was designed to report to the same organ as the Group of Negotiations on Goods, namely the Trade Negotiations Committee (TNC). Therefore, not only legal but also institutional unity was there for both tracks.[460] Finally, in that very statement above, Brazil has assured other countries of its unflinching willingness "to fulfill the commitments assumed in Punta del Este" about *both* trade in goods and that in services.[461]

Thus, it appears that the sole tangible contribution of this separation was the negotiating countries' agreement to disable cross-linkages between these areas. This agreement has cemented the autonomy of the negotiations concerning trade in services. The enhanced autonomy implies that the outcomes of these negotiations should be accepted at face value. Accordingly, the notions and definitions agreed upon in accompanying trade talks were legally insulated from interferences originating in other areas of trade negotiations. In this context, the newly negotiated terms are inherently GATS-specific, primarily due to the significant fact that the GATS is a distinct treaty. The elaboration of these specific terms was formally under no direct influence from trade bargaining with chips from the other domain.

Although the available negotiating record may be imperfect, it remains a vital source capable of clearly elucidating the meaning of the right to regulate in international trade, as distinct from trade in goods or other areas. As a corollary, this bifurcation of the negotiating process additionally suggests that the content of the right to regulate derived through the recourse to the negotiating history of the GATS might not be easily transposable to other trade disciplines in the WTO and beyond. As far as the WTO Agreement is concerned, the spill-over effect for other trade agreements within it is, to a certain extent, feasible due to the single

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459 GNS (Uruguay Round), Communication from India, MTN.GNS/W/4, 11 March 1987, paras. 4–5. [hereinafter Communication from India, MTN.GNS/W/4, 11 March 1987] In the context outside the discussion of the two separate tracks, some countries argued that such linkages should not exist, citing economic theories (see GNS (Uruguay Round), Note on the Meeting of 8–10 April 1987, MTN.GNS/8, 6 May 1987, para. 5).

460 J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), p. 704.

461 Communication from Brazil, MTN.GNS/W/3, 11 March 1987, *supra* note 458, paras. 7–8.

undertaking approach of the organization.[462] However, this approach became relevant later, when GATT Members faced the ultimate decision of whether to accept the results of the Uruguay Round. Before that, negotiating countries were not subject to the constraints of the single undertaking approach. These considerations appear to have their parallel in India's statements circulated on 11 March 1987, in which it distinguished the concept of "a single undertaking" from that of "a single political undertaking." India referred to the latter to acknowledge the Uruguay Round Ministerial Declaration covering negotiations for both trade in goods and in services.[463] In light of the foregoing, the *travaux* to the GATS may appear to be profoundly valuable in determining the meaning of the right to regulate under the GATS since the preparatory work constitutes a source for this interpretive exercise as authentic as it can be.

2.3.3.2.2 Mandate, Records, Constraints

Organizationally separate, the Ministerial Declaration on the Uruguay Round, launched in 1986, initiated the multilateral negotiations on trade in services and envisaged a mandate for these negotiations as part of the next round. This mandate featured quite general wording crafted by the representatives of the contracting parties. Assigned to the negotiations about trade in services, Part II of said ministerial declaration does not appear to be as elaborate as its Part I devoted to the negotiations on trade in goods—in terms of length, merely a paragraph against several pages for the latter. Yet, the wording chosen by the drafters of the Ministerial Declaration on the Uruguay Round served as the point of departure for lengthy negotiations, culminating eight years later in what is now known as the GATS:

> *Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations.*[464]

Understandably, this passage merely sets the stage for subsequent discussions and is not necessarily expected to exhibit discernible parallels with the final text of the agreement. Still, a considerable part ends up in the preamble of the GATS. With minor editorial changes, its second recital repeats the next phrase of the mandate: "expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners

[462] P. V. d. Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005), p. 46.
[463] Communication from India, MTN.GNS/W/4, 11 March 1987, *supra* note 459, para. 4.
[464] Ministerial Declaration on the Uruguay Round, GATT MIN.DEC, 20 September 1986.

and the development of developing countries." Meanwhile, the phrase "respect [for] the policy objectives of national laws and regulations" from the mandate appears to have been closely transformed into "due respect to national policy objectives" in the third recital of the preamble, without significant alteration.

Unlike these passages, the notion of the right to regulate is not expressed in the mandate. Evidently, it was coined later during the negotiations, prior to its final insertion in the text of the new agreement. With this initial hypothesis in mind, it is posited that the available negotiating records of the Uruguay Round, while not ideal, are most likely the best means to facilitate a thorough examination of how the right to regulate emerged as one of the concepts delineated in the GATS preamble. The narrative presented here results from an in-depth scrutiny of accessible sources, aiming not only to trace the genesis of the said notion but also to explore the development of specific ideas associated with the right to regulate and trade in services throughout the Uruguay Round.

A few words on the sources analyzed in this part of the study are necessary before laying the groundwork. The negotiating records at issue come mainly from work done within the operation of two bodies established under the Uruguay Round Ministerial Declaration. These records predominantly consist of statements made by negotiating countries and are deemed relevant under Article 32 of the VCLT (*travaux préparatoires*). These bodies are the GNS and the TNC, to which the former reports. The records under consideration comprise notes of the meetings (including those at the ministerial level), countries' communications, reports, and other documents filed and considered between 1986 and 1994.

The volume of documents produced during that period, which cover the negotiations preceding the creation of the GATS, is vast. Included in these are at least 36 notes from meetings of the GNS (MTN.GNS/…) and 276 country communications and other relevant documents (MTN.GNS/W/…).[465] Despite the apparent abundance of available sources, their richness may exist largely in the sheer numbers of documents. Therefore, studying these records presents its own challenges: some parts may be missing, and discussions on some issues may not be sufficiently detailed, making it difficult to draw definitive conclusions. Tracing back a proposal and its verification can also prove challenging because the cross-linkages in these documents may be unclear and inconsistent. For instance, until well into the negotiations, meeting notes did not specify who made the statements during the meetings; it took more than a year after the negotiations began for a proposal to emerge, suggesting to "identify countries in association with their interventions."[466]

[465] All documents related to the GNS meetings were issued under the MTN.GNS letterheads (see TNC (Uruguay Round), Trade Negotiations Committee, Meeting of 27 October 1986, MTN.TNC/1, 17 November 1986, p. 3).

[466] For example, rather than identifying specific countries, these notes frequently use phrases like "one member said," "another member stated," "in the view of some members," "it was also suggested," *etc.* During the informal negotiations preceding the official meeting on 14–15 December,

Moreover, trade talks are not always formally recorded, especially when conducted behind closed doors.[467] Accordingly, this study acknowledges that the narrative is incomplete and thus may resist a comprehensive reconstruction due to these irregularities.

Before proceeding with the narrative, another issue must be addressed concerning the terminology used in the negotiating records. The phrase "the right to regulate" does not often appear in the *travaux*, making its study a limited exercise. It could be argued that participants of the Uruguay Round frequently utilized alternative wording to refer to states' recognized sovereign ability to adopt regulations, a concept central to the right to regulate. The preparatory work of the GATS includes phrases that could serve as substitutes, such as "the sovereign right to treat … differently,"[468] "due regard … given to national sovereignty,"[469] "question of national sovereignty,"[470] "the sovereign right … to legislate,"[471] "the power to regulate,"[472] "sovereignty of national economic space,"[473] "the sovereign authority to initiate and implement rules,"[474] and even "country's need to regulate domestically."[475] This list is not exhaustive.

This variety raises the question: what weight should such related notions carry in this study? Apparently, it is impossible to conclusively determine whether states used them interchangeably. For that reason alone, it would be premature to immediately equate these phrases with the notion of the right to regulate. Despite this, to overlook them in their entirety would make this examination incomplete. With due caution, this study therefore proceeds to pay attention, as necessary, to

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it had been suggested to depart from this practice and instead to refer to those intervening on the record (GNS (Uruguay Round), Note on the Meeting of 14–15 December 1987, MTN.GNS/12, 19 January 1988, para. 50).

[467] Under the Uruguay Round Ministerial Declaration, transparency is stipulated as a principle governing how negotiations should be conducted. Although transparency as a governing principle mandates that discussions be open and accessible to all participants, it seems unlikely that no trade talks occurred outside of joint meetings. After all, the ability to have talks behind closed doors is the distinct feature of diplomacy generally, let alone trade diplomacy specifically. See Ministerial Declaration on the Uruguay Round, GATT MIN.DEC, 20 September 1986, p. 2.

[468] GNS (Uruguay Round), Note on the Meeting of 15–17 September 1987, MTN.GNS/10, 15 October 1987, para. 15.

[469] GNS (Uruguay Round), Note on the Meeting of 3–5 November 1987, MTN.GNS/11, 30 November 1987, para. 7.

[470] *Ibid.*, para. 23.

[471] GNS (Uruguay Round), Note on the Meeting of 14–15 December 1987, MTN.GNS/12, 19 January 1988, para. 30.

[472] GNS (Uruguay Round), Communication from Argentina, Elements for a Possible Framework Agreement on Trade in Services, MTN.GNS/W/33, 22 March 1988, p. 4.

[473] GNS (Uruguay Round), Note on the Meeting of 31 October – 3 November 1988, MTN.GNS/18, 29 November 1988, para. 51.

[474] GNS (Uruguay Round), Note on the Meeting of 20–24 November 1989, MTN.GNS/27, 22 December 1989, para. 9.

[475] GNS (Uruguay Round), Communication from Canada, Transparency, MTN.GNS/W/13, 26 June 1987, p. 2.

instances where negotiation participants used phrases in their communications or interventions other than "the right to regulate" that closely resembled it in meaning.

Bearing these peculiarities and limitations in mind, this study now turns to the negotiating records of the Uruguay Round.

2.3.3.2.3 Developing Countries Lead

The critical role of developing countries became evident in how international trade in services was included in the negotiating mandate under the Uruguay Round Ministerial Declaration. Initially, these countries strongly opposed the expansion of the mandate. The wording of the mandate was thus tailored to the interests of opposing countries, and the mandate consequently addressed their concerns by explicitly mentioning respect for national policy objectives and development.[476] As previously demonstrated, these concerns are notably linked to the notion of the right to regulate. Therefore, it is instructive to first examine how these countries further developed their ideas when the Uruguay Round negotiations commenced, particularly as these countries were notable active at that time.

One of the first documents submitted for discussion by GATT parties was a communication from a country, skeptical of the negotiations about trade in services. In its communication circulated on 11 March 1987, Brazil highlighted the overall reluctance of developing countries to include negotiations on trade in services in the Uruguay Round.[477] Even though, as Brazil admits itself, this reluctance "was partially overcome in Punta del Este," the tone of its early statement suggested that the country was still ambivalent about the entire endeavor.[478] Its stance was central to the environment surrounding the talks in the 1980s over the expansion of GATT negotiations, which clearly could not shift overnight into a more agreeable sentiment. At the outset, developing countries "adamantly refused to enter into any negotiation on this issue," with Brazil being one of the countries strongly advocating for this approach.[479] To recall, Brazil was among the ten developing countries constituting G-10, obtaining whose consent was the last frontier to overcome for the Uruguay Round Ministerial Declaration to be adopted with services in the negotiation mandate.

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[476] These were also key issues within the "common working platform" developed during the behind-the-scenes negotiations among India, Brazil, and the European Communities shortly before the adoption of the Uruguay Round Ministerial Declaration (S. P. Shukla, *From GATT to WTO and beyond* (UN University World Institute for Development Economics Research Working Papers No. 195, 2000), p. 17).

[477] Communication from Brazil, MTN.GNS/W/3, 11 March 1987, *supra* note 458, para. 1.

[478] *Ibid.*, para. 3.

[479] J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), p. 698. See also GNS (Uruguay Round), Communication from Jamaica, The Uruguay Round and Trade in Services, MTN.GNS/W/28, 24 November 1987, p. 3.

Several reasons are advanced to explain developing countries' attitude towards trade in services that, after the launch of the new round, did not cease to hover. They plainly lagged behind developed countries in terms of negotiating resources. Moreover, beyond a basic lack of knowledge about the subject, it was prohibitively costly and burdensome for developing countries to expand the scope of trade negotiations. As a result, this prevented them from effectively participating in negotiations on trade in services, in addition to those on trade in goods.[480] Besides, unlike many sectors in developed countries, negotiations on services lacked support from any lobby in developing countries.[481] The absence of a lobby was a direct consequence of the fact that trade in services was economically insignificant for developing countries. Against this backdrop, during the first meeting of the GNS, there were calls for a study on the role of trade in services in the economies of the respective countries.[482]

However, there is more. Referring to *services* by name, *Marchetti* and *Mavroidis* have incisively dubbed another *"S" word* a concept that significantly shaped the attitude of developing countries towards the ongoing negotiations.[483] The compatibility of the negotiating outcome with state *sovereignty* was referred to by Brazil in the very same statement as the most critical premise under which developing countries were willing to participate in the negotiations over trade in services. Being somewhat blurry as to what this contention precisely meant, it was, however, clear that Brazil stood up against the result, according to which some countries would undertake more commitments than the others.[484]

Further elaborating on this issue, Brazil pointed out that the regulations in developing countries had almost exclusively covered traditional service sectors.[485] In contrast, developed countries have extensively regulated all service sectors. This stark difference was then labeled "a de facto acute asymmetry in the respective positions of developing and developed countries."[486]

This asymmetry is the key to understanding another "S" word as the issue at stake. Developing countries—at least some of them—portrayed themselves as

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[480] See Communication from Brazil, MTN.GNS/W/3, 11 March 1987, *supra* note 458, para. 2.
[481] J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), p. 698.
[482] GNS (Uruguay Round), Note on the Meeting of 23–25 February 1987, MTN.GNS/7, 20 March 1987, para. 14.
[483] J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), p. 698.
[484] Communication from Brazil, MTN.GNS/W/3, 11 March 1987, *supra* note 458, para. 10.
[485] In its communication, Brazil did not specify which services sectors it considered traditional. However, by contrasting them with "the new technologically advanced areas," Brazil might have hinted that traditional services sectors, in its opinion, refer to those established before recent scientific advancements in areas such as computer, information, and communications technologies. Consequently, traditional services sectors include tourism, wholesale trade, and retail services, among others. See Communication from Brazil, MTN.GNS/W/3, 11 March 1987, *supra* note 458, para. 11.
[486] *Ibid.* (underlining original).

being forced to assume more obligations than developed countries for as long as the existing disparity persisted.[487] The following considerations illustrate this point: while participants in the negotiations sought liberalization, there could be various outcomes brought about thereby. One of them, relevant for these trains of thought, could be a simple dismantlement of already existing regulations. If sectors other than traditional services are unregulated, trade liberalization could likely impose a "double" set of obligations on developing countries. These countries would be obliged, first, to refrain from imposing trade barriers in existing services sectors, *and* second, to be prevented from regulating sectors that are yet to emerge or mature as part of their development process. Developing countries considered it unfair to undertake such commitments, arguing that developed countries, given the asymmetry, would not be similarly constrained. In other words, since developed countries had already regulated everything feasible, the prohibition on introducing new regulations would not affect them as significantly. The unfairness would arise from the fact that developed countries had already spent their time comfortably regulating and promoting technology-advanced services sectors. In the meantime, developing countries would be deprived of such conveniences. Brazil suggested that one way to correct this asymmetry was by achieving a comparable level of services development—an idea apparently left for further deliberations.[488]

Likewise, some other developing countries expressed their concerns along these lines. In its communication, circulated concurrently with Brazil's, India also cautioned against reinterpreting the mandate to imply that trade liberalization was the primary goal of the negotiations. Properly interpreted, the mandate identifies liberalization merely as one of the conditions for trade expansion. However, India emphasized that this condition neither necessitates nor justifies the dismantlement of national regulations.[489] Later, at the GNS meeting from 8–10 April 1987, several states also asserted that national regulations should not be viewed as inherent barriers to trade, emphasizing that liberalization should not lead to the elimination of domestic rules.[490] Like the considerations above, these views challenge a mechanical interpretation of "liberalization" as qualified by "progressive" in the mandate.

Similarly, Jamaica's first communication addressed concerns about the rigidity in interpreting and applying the mandate. In its paper, Jamaica discussed the potential of a "greater degree of obligations" due to such rigidity, which developing countries might assume given the existing disparities.[491]

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[487] Communication from India, MTN.GNS/W/4, 11 March 1987, *supra* note 459, paras. 10–14.
[488] See Communication from Brazil, MTN.GNS/W/3, 11 March 1987, *supra* note 458, para. 12.
[489] Communication from India, MTN.GNS/W/4, 11 March 1987, *supra* note 459, paras. 7–8.
[490] GNS (Uruguay Round), Note on the Meeting of 8–10 April 1987, MTN.GNS/8, 6 May 1987, paras. 48–49 referring to two statements of "one member." See also GNS (Uruguay Round), Communication from Brazil, MTN.GNS/W/20, 17 September 1987, para. 9.
[491] GNS (Uruguay Round), Communication from Jamaica, The Uruguay Round and Trade in Services, MTN.GNS/W/28, 24 November 1987, para. 12.

In November 1987, Mexico advanced a proposal that introducing regulations for "new services or to an enhanced transportability of traditional services" should not be seen as an obstacle to international trade for developing countries.[492] This proposal would prevent a "double" set of obligations by removing commitments that could be deemed unfair if agreed upon. It follows from the communication of Mexico that such an exception would serve "the stated objective of fostering the economic development" of developing countries and be compatible with the general framework for trade in services sought under the Uruguay Round Ministerial Declaration.[493]

From a broader perspective, it is evident that developing countries tended to focus their first communications more on general issues, predominantly concerning the proper interpretation of the negotiating mandate.[494] This is evident, especially when compared to what developed countries sought to talk about first (for example, raising the list of specific points of discussion[495] along with presenting service data reports and statistics[496]). Being less versed in services matters, developing countries were understandably more disposed to discuss the threshold issues worrying them. For these reasons, developing countries seemed inclined to gravitate towards more familiar, anchoring concepts that could offer additional protection to their interests. Consequently, several voices raised similar concerns, noting "the question of economic sovereignty and the fear about foreign dominance in many services

[492] GNS (Uruguay Round), Communication from Mexico, Preliminary Comments on Non-Discrimination, National Treatment and Transparency, MTN.GNS/W/25, 3 November 1987, para. 4(c), p. 6. See also GNS (Uruguay Round), Note on the Meeting of 14–15 December 1987, MTN.GNS/12, 19 January 1988, para. 8. See also GNS (Uruguay Round), Communication from Mexico, MTN.GNS/W/42, 30 June 1988, para. 6(e)(i).

[493] GNS (Uruguay Round), Communication from Mexico, Preliminary Comments on Non-Discrimination, National Treatment and Transparency, MTN.GNS/W/25, 3 November 1987, p. 6.

[494] For instance, in its first communication, India clarified that liberalization itself is not the objective outlined in the Ministerial Declaration on the Uruguay Round. It further allocated fundamental significance to the declaration's wording, which stipulates that the resulting framework for trade in services should be designed to "respect the policy objectives of [national] laws and regulations" (Communication from India, MTN.GNS/W/4, 11 March 1987, *supra* note 459, paras. 7–8; compare with Ministerial Declaration on the Uruguay Round, GATT MIN.DEC, 20 September 1986, Part II). However, it would be an overstatement to suggest that developing countries spoke in a unified manner. Singapore serves as the most notable example of a developing country whose initial communication was relatively straightforward, addressing different modes of service consumptions and the use of statistics in negotiations (GNS (Uruguay Round), Communication from Singapore, MTN.GNS/W/6, 9 April 1987).

[495] See, for example, GNS (Uruguay Round), Communication from Sweden on behalf of the Nordic Countries, MTN.GNS/W/1, 17 February 1987, p. 2; GNS (Uruguay Round), Communication from Japan, MTN.GNS/W/2, 24 February 1987.

[496] See, for example, GNS (Uruguay Round), Communication from the United States, MTN.GNS/W/7, 9 April 1987; GNS (Uruguay Round), Canadian Data on Services, MTN.GNS/W/10, 25 June 1987; GNS (Uruguay Round), Communication from Australia, Some Notes on the Measurement of Services in Australia's Balance of Payment Statistics, MTN.GNS/W/11, 26 June 1987; GNS (Uruguay Round), Communication from the European Communities, Statistics on International Trade in Services, MTN.GNS/W/22, 23 October 1987.

sectors."[497] It was argued that the expected outcome should conform to the mandate and ultimately result in "a legal framework that is fully compatible with economic growth and development."[498]

In the context described above, the notion of the right to regulate as it applies to international trade in services was acknowledged for the first time in the Uruguay Round[499]. It appears that Brazil pioneered this issue, as evidenced in its communication on 11 March 1987, which referred to the "exercise of the sovereign right to regulate the services sectors."[500] Brazil linked this notion to the governmental promotion of vital national policy objectives, which are "by definition legitimate." Since these were negotiations *among* states, Brazil concluded that the states must be the ultimate beneficiaries of the negotiating outcomes. Put simply, the interests and rights of states should take precedence.[501] While discussing these issues and their relation to the goal of trade liberalization, Brazil firmly asserted that both national regulations and the ongoing negotiations aim to promote "the individual economic growth and development of our countries."[502]

The notion of the right to regulate did not immediately resonate with other negotiation participants. After Brazil's communication was circulated and discussed at the GNS meeting, it took at least two more meetings before the term resurfaced in the official records. This occurred during the ninth meeting, where one member noted that the multilateral framework resulting from the negotiations ought not to undermine the governments' right to regulate. Interestingly, in that brief intervention, the states' right was juxtaposed with the view—albeit quite humbly expressed—that valid reasons must underpin the introduction or maintenance of domestic regulation. Against this background, it was suggested that principles such as clarity and predictability are essential for the growth of international trade in services.[503] From this intervention, one might tentatively infer that common ground

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[497] GNS (Uruguay Round), Note on the Meeting of 3–5 November 1987, MTN.GNS/11, 30 November 1987, para. 23.

[498] GNS (Uruguay Round), Communication from Brazil, MTN.GNS/W/20, 17 September 1987, para. 13. Some of such voices are difficult to ascribe to any particular country, given how records were kept (GNS (Uruguay Round), Note on the Meeting of 8–10 April 1987, MTN.GNS/8, 6 May 1987, paras. 29–30). Developed countries have also acknowledged the need to establish such a legal framework in their communications (see GNS (Uruguay Round), Communication from Sweden on behalf of the Nordic Countries, General Objectives and Concepts of Relevance to a Framework Agreement on Trade in Services, MTN.GNS/W/26, 3 November 1987, p. 2).

[499] To be precise, these issues were discussed during the sixth GNS meeting from 23 to 25 February 1987, while Brazil's communication was circulated among the participants of that group later—on 11 March 1987.

[500] Communication from Brazil, MTN.GNS/W/3, 11 March 1987, *supra* note 458, para. 1. See also TNC (Uruguay Round), Cuba, Statement by Mr. A. Betancourt Rosa, Deputy-Minister, Ministry of Foreign Trade, MTN.TNC/MIN(88)/ST/46, 6 December 1988, p. 6.

[501] Communication from Brazil, MTN.GNS/W/3, 11 March 1987, *supra* note 458, para. 16.

[502] *Ibid.*, para. 17.

[503] GNS (Uruguay Round), Note on the Meeting of 15–17 September 1987, MTN.GNS/10, 15 October 1987, para. 24.

exists between the two concepts—the right to regulate and future disciplines on domestic regulation—as both are understood in the GATS.

Based on the above, it was developing countries that introduced the notion of the right to regulate into the negotiations for an agreement on trade in services. The invocation of this concept appears to stem from developing countries' desire to maintain control while venturing into uncharted waters. At this preliminary stage, the first communications tentatively unveil key topics associated with the right to regulate when negotiations had just begun (development, asymmetry in regulatory situation, the right to introduce new regulations and appropriate regulation). These topics will be further explored as permitted by the available negotiating records.

2.3.3.2.4 Gradual Shift of Developed Countries' Stance

Initial brief mentions of the right to regulate concept were promptly acknowledged. In October 1987, there was the first communication from a developed country suggesting using this concept in the framework for trade in services. Based on the already somewhat detailed discussions on the matter, the United States proposed some general ideas that could lay the foundation of the new agreement in order "to give more focus to the discussions."[504] As one of the general considerations, it suggested that "[t]he framework should recognize *the sovereign right* of every country *to regulate* its services industries."[505] This point was followed by a proposal against the adoption of new regulations that would restrict trade.[506] This communication from the United States seems to be the first verifiably concrete proposal concerning the new agreement's content, originating from a developed country and incorporating the notion of the right to regulate.

In spite of this reference to the right to regulate, the Concepts for a Framework Agreement in Services proposed by the United States did not chime well with developing countries. Brazil took issue with what it perceived as yet another attempt to rewire the mandate. Brazil viewed the proposal as one-sided, criticizing the document for neglecting the developmental aspects outlined in the Ministerial Declaration that initiated the Uruguay Round.[507] Brazil did not comment specifically

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[504] GNS (Uruguay Round), Note on the Meeting of 3–5 November 1987, MTN.GNS/11, 30 November 1987, para. 7.

[505] GNS (Uruguay Round), Communication from the United States, Concepts for a Framework Agreement in Services, MTN.GNS/W/24, 27 October 1987, p. 2 (emphasis added). [hereinafter Communication from the United States, Concepts for a Framework Agreement in Services, MTN.GNS/W/24, 27 October 1987] For comparison, Australia later emphasized that a broadly covered framework agreement should not imply "the loss by any country of its sovereign right to regulate" (GNS (Uruguay Round), Note on the Meeting of 31 October – 3 November 1988, MTN.GNS/18, 29 November 1988, para. 31).

[506] Communication from the United States, Concepts for a Framework Agreement in Services, MTN.GNS/W/24, 27 October 1987, *supra* note 505, p. 3.

[507] GNS (Uruguay Round), Communication from Brazil, MTN.GNS/W/27, 5 November 1987, pp. 2–3. See also GNS (Uruguay Round), Note on the Meeting of 3–5 November 1987, MTN.GNS/11, 30 November 1987, para. 24.

on the part about the recognition of the right to regulate. When compared to the relevant recitals of the GATS, this passage in the United States' proposal indeed does not appear to have been drafted with the mandated objective of development in mind.[508] During the GNS meeting in November 1987, India similarly found it difficult to agree with the proposal of the United States. One reason was that the proposal ran short of taking note of development—an issue that, in its view, required more substantive content. In doing so, India issued a statement that possibly underscored its interpretation of the right to regulate, noting that "[i]t would not be appropriate to determine the legitimacy or the reasons for national regulations."[509] In the same meeting of the GNS, the United States explained its decision to omit more concrete concerns of developing countries. Its proposal lacked the development issue because "no conclusions had yet been reached on how this should best be addressed."[510]

The sentiment among developing countries that their concerns were inadequately addressed in the proposals from developed countries persisted for some time. In December 1988, India[511] and Egypt[512] highlighted the absence of development objectives in the communications to that point. Similar voices were raised later, too.[513] Negotiation participants were still seeking the appropriate approach to these issues.

After navigating the initial stage of negotiations—characterized by entering uncharted waters—participants shifted their focus to more detailed discussions concerning the potential content of the new agreement. The first set of proposals, communicated following that from the United States, as briefly discussed above,

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[508] Among the general considerations, the United States proposed that "[t]he framework should recognize the sovereign right of every country to regulate its services industries. At the same time, it should be agreed that the framework is intended to deal only with those measures whose purpose or effect is to restrict the access and operations of foreign service providers. The framework must ensure against the adoption or application of measures whose purpose or effect is restrictive or distortive of trade" (Communication from the United States, Concepts for a Framework Agreement in Services, MTN.GNS/W/24, 27 October 1987, *supra* note 505, p. 2).

[509] GNS (Uruguay Round), Note on the Meeting of 3–5 November 1987, MTN.GNS/11, 30 November 1987, para. 17. The intervention referred to does not identify India as the country that made it. However, India may be conclusively determined as such country since, in the same paragraph, the intervening country was revealed as that who filed communication MTN.GNS/W/4, whose text plainly suggests that India produced it (Communication from India, MTN.GNS/W/4, 11 March 1987, *supra* note 459).

[510] GNS (Uruguay Round), Note on the Meeting of 3–5 November 1987, MTN.GNS/11, 30 November 1987, para. 30.

[511] GNS (Uruguay Round), Note on the Meeting of 14–15 December 1987, MTN.GNS/12, 19 January 1988, para. 14.

[512] *Ibid.*, para. 25.

[513] See, for instance, GNS (Uruguay Round), Note on the Meeting of 27–29 January 1988, MTN.GNS/13, 17 February 1988, para. 38.

were silent on the notion of the right to regulate.[514] Particularly noteworthy is the submission from Sweden, circulated on behalf of the Nordic countries on 14 March 1988. This proposal articulated concepts for inclusion in the preamble of the new agreement, intended to incorporate language from the Uruguay Round's mandate along with development considerations. Accordingly, the proposal's drafters did not design the preambular text to recognize the right to regulate. However, one might speculate that the vague references to the mandate are intended at least to address the expressed need "to respect the policy objectives of national laws and regulations applying to services."

Similarly, the wording of a principle in the Swedish submission for the new agreement, titled "Regulations," posits that the framework should not impose any restrictions beyond those "required to meet legitimate national regulatory objectives."[515] Although this principle does not explicitly mention the right to regulate, it can essentially be understood as related to this concept due to its intrinsic connection with national policy objectives.

This point in the negotiating records reveals a debate over whether the preamble is an appropriate place for a concept to reside. In April 1988, participants discussed Sweden's proposal in MTN.GNS/W/32 to include the notion of development in the preamble of the services agreement. Several participants opposed this option, arguing that situating the concept of development in the preamble rather than in the main text might relegate it. These countries argued that mentioning it in the preamble would be "with no practical effect at all,"[516] while one member went as far as to label the preambular language as "not legally binding."[517] These views were expressed to ensure that the intention to embed development within the framework would not go unnoticed. Furthermore, developing countries did not want this to become just another exception.[518] For example, Argentina contended that integrating the development notion into the services agreement "should not be confused with ad hoc exceptions such as balance-of-payment."[519] In other words, it should be something more permanent in its application than those exceptions that do not always apply but only when the circumstances for that are met. Relevant for this study, Argentina introduced this understanding as "*allowing* developing

[514] See, for instance, GNS (Uruguay Round), Communication from the European Communities, Discussion Paper: a Possible Conceptual Structure for a Services Agreement, MTN.GNS/W/29, 10 December 1987.

[515] GNS (Uruguay Round), Communication from Sweden on behalf of the Nordic Countries, Discussion Paper: a Possible Structure for an Agreement on Services, MTN.GNS/W/32, 14 March 1988, pp. 5–7.

[516] GNS (Uruguay Round), Note on Meeting of 22–25 March 1988, MTN.GNS/14, 29 April 1988, para. 31.

[517] *Ibid.*, para. 18. See also paras. 16, 27.

[518] See GNS (Uruguay Round), Note on Meeting of 22–25 March 1988, MTN.GNS/14, 29 April 1988, para. 18.

[519] GNS (Uruguay Round), Communication from Argentina, Elements for a Possible Framework Agreement on Trade in Services, MTN.GNS/W/33, 22 March 1988, p. 3.

countries to adopt measures *to regulate* certain services activities relating to economic development."[520]

Despite extensive discussions on the concept of development, its precise meaning remained somewhat elusive. In June 1988, a timely elaboration emerged as Mexico circulated a communication intended to lend clarity to this issue, devoting the entire paper—albeit only three pages—to the concept of development. Once again, it emphasized that the concept of development must be an inherent part of the framework and should not be conflated with "waivers, exceptions or 'special treatment.'"[521] For a clear reason, this approach markedly contrasts with submissions from developed countries, which only occasionally and briefly mentioned special and differential treatment and typically included a caveat that further examination is required.[522]

Accordingly, even though developed countries expressed sympathy for the needs articulated early by developing countries, satisfying these needs proved challenging. The mention of the right to regulate was a step in the right direction, though it was insufficient at that time to facilitate further progress in negotiations concerning this notion. Unlike the right to regulate itself, associated concepts received further advancement, with the notion of development assuming an imminent role in the subsequent discussions.

2.3.3.2.5 Mid-Term Review 1988

After two years of negotiations, the GATT Secretariat prepared the Glossary of Terms/Inventory of Concepts and Points in Discussion (Glossary of Terms) in 1988, which was revised twice. This document was intended to clarify and define certain terms frequently used in the negotiations. The outcome of this endeavor was a comprehensive compilation of the statements made by the participants about international trade in services up to that point. The excerpts from those statements addressed key topics of interest regarding the potential content of the future services agreement, including establishment/commercial presence, exceptions/escape clauses, market access, MFN, and national treatment.[523]

This document has a separate section on the concept of development but lacks one on the right to regulate.[524] This omission suggests that, although the right to regulate was occasionally referenced, such discussions were not deemed significant

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[520] *Ibid.* (emphasis added). See also the statement by Peru supporting the idea of development viewed not as an exception in GNS (Uruguay Round), Note on the Meeting of 31 October – 3 November 1988, MTN.GNS/18, 29 November 1988, para. 3.
[521] GNS (Uruguay Round), Communication from Mexico, MTN.GNS/W/42, 30 June 1988, para. 2.
[522] For instance, GNS (Uruguay Round), Communication from Japan, Structure of a Multilateral Framework for Trade in Services, MTN.GNS/W/40, 19 May 1988, pp. 4–5.
[523] GNS (Uruguay Round), Glossary of Terms/Inventory of Concepts and Points in Discussion, MTN.GNS/W/43/Rev.2, 25 October 1988. [hereinafter Glossary of Terms/Inventory of Concepts and Points in Discussion, MTN.GNS/W/43/Rev.2, 25 October 1988]
[524] *Ibid.*, Part III.

enough to warrant a separate mention. Another possible explanation is that these discussions were subsumed by more prominent negotiating topics, such as development, exceptions, and regulations, effectively spreading them across these areas. Indeed, the notion of the right to regulate is mentioned in the inventory under the rubric of "Respect for National Policy Objectives," with other associated concepts like national policy objectives mentioned elsewhere.[525] The only mention of the notion of the right to regulate comes from the United States proposal regarding general considerations that could form the foundation of the new agreement.[526]

Over time, the negotiations amassed a critical volume of ideas and concepts regarding trade in services, necessitating thorough examination. This necessity prompted several exercises similar to the preparation of the Glossary of Terms, as well as periodic reviews conducted by the TNC based on reports from the Chairman of the GNS.[527] However, ultimate approval of the progress could only come from the highest authority at the ministerial level. To secure this approval and facilitate the process, a mid-term review of the Uruguay Round's progress was scheduled to be conducted by the TNC at the ministerial level from 5 to 9 December 1988 in Montreal.[528]

On 25 November 1988, the GNS delivered a report intended to be presented before the TNC at the ministerial level.[529] The report briefly described the progress achieved through its nineteen meetings and concluded by outlining items worth exploring in the following year.[530] Beyond the formal adoption of the GNS report,[531] the mid-term review led to the examination of these items, and, consequently, the Montreal Declaration provided an updated list of issues to be further developed in the ongoing negotiations.[532] Thus, the consideration of both documents (the GNS report and the Montreal Declaration) is key to understanding

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[525] *Ibid.*, p. 42.
[526] Communication from the United States, Concepts for a Framework Agreement in Services, MTN.GNS/W/24, 27 October 1987, *supra* note 505, p. 2.
[527] For instance, TNC (Uruguay Round), Trade Negotiations Committee, Fourth Meeting: 17 December 1987, MTN.TNC/4, 26 January 1988, paras. 11–17.
[528] *Ibid.*, paras. 20–27. In paragraph 20, the TNC explains that the authority to convene such a meeting at the ministerial level "was to be found both in the first paragraph of the Ministerial Declaration and in the decision adopted by the TNC at its meeting on 27 October 1986 (MTN.TNC/1, paragraph 2(i))." See also TNC (Uruguay Round), Trade Negotiations Committee, Fifth Meeting: 18 February 1988, MTN.TNC/5, 9 March 1988, paras. 2–3, 5.
[529] See TNC (Uruguay Round), Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, MTN.TNC/7(MIN), 9 December 1988, p. 40.
[530] GNS (Uruguay Round), Group of Negotiations on Services, Report to the Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, MTN.GNS/21, 25 November 1988. [hereinafter GNS, Report to the Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, MTN.GNS/21, 25 November 1988]
[531] TNC (Uruguay Round), Meeting at Ministerial Level: Palais des Congrès, Montreal (Canada), 5–9 December 1988, MTN.TNC/8(MIN), 17 January 1989, p. 11.
[532] TNC (Uruguay Round), Mid-Term Meeting, MTN.TNC/11, 21 April 1989.

the state of affairs at the time and the role, if any, that the notion of the right to regulate played during the first two years of negotiations.

Their comparison is particularly revealing for two reasons. *First*, the text accompanying the items in the GNS report was largely in brackets. The use of square-bracketed language in the report is curious because it neither contained nor was intended to contain the language of the agreement. This negotiating technique is often seen with regard to future treaty language. As in treaty texts, this technique indicated that the text in brackets was not final. At least two inferences can be made at this point. On the one hand, the issues thus confined are already part of the record; they were discussed and considered important. On the other hand, the precise language has yet to be elaborated or chosen from among the alternatives.[533] Therefore, whether the particular section of the report ended up in the Montreal Declaration, which is also quite preliminary, may indicate the direction the negotiations took at the ministerial level.

Second, the list in the Ministerial Declaration does not correspond to all the items prepared by the GNS. This difference prompts a comparison of the relevant parts, even though the TNC explicitly stated at the ministerial level that "other elements" of the GNS report should also be taken into account in future negotiations.[534] For instance, the description of the item "Regulatory situation" allows for parallels to be drawn with the fourth recital of the GATS. This item similarly acknowledges the asymmetry of regulatory coverage between developing and developed countries, as well as the right of the former to adopt *new* regulations.[535] While mentioning all this, the mid-term version makes it more general: the asymmetry between developing and developed countries is referred to as "in different countries"—just as it appears in the mentioned recital of the GATS, juxtaposed with the notion of the right to regulate.[536] In other words, this transition from the report to the TNC text after the mid-term review is where *the concept of asymmetry took a different turn*: the disparity in the regulatory situation was recognized as present in all countries, not only when comparing regulatory approaches in developing and developed countries.

Surprisingly, the report item "Sovereignty of national economic space" did not appear in the final text of the Ministerial Declaration. This item mentions the right and duty to regulate in the national interest, which was supposed to be "the starting point and the governing principle in the elaboration of all rules and disciplines."[537] It is tempting to characterize the right to regulate as an overarching principle in the concluding remarks of the section on the *travaux*. However, hasty reliance on this

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533 TNC (Uruguay Round), Meeting at Ministerial Level: Palais des Congrès, Montreal (Canada), 5–9 December 1988, MTN.TNC/8(MIN), 17 January 1989, pp. 4–5.

534 TNC (Uruguay Round), Mid-Term Meeting, MTN.TNC/11, 21 April 1989, p. 41.

535 GNS, Report to the Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, MTN.GNS/21, 25 November 1988, *supra* note 530, p. 6.

536 TNC (Uruguay Round), Mid-Term Meeting, MTN.TNC/11, 21 April 1989, p. 40.

537 GNS, Report to the Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, MTN.GNS/21, 25 November 1988, *supra* note 530, p. 8.

characterization is not warranted. The wording of this item, including both the title and description, is in brackets and not final. The brackets signify the lack of consensus: not all countries agreed with the idea or the chosen phrasing. Furthermore, it is important to note that this part was not included in the ministerial declaration. Aside from the possibility that the TNC text at the ministerial level was designed to be concise (four pages on trade in services compared to twelve pages of the report), there may be other reasons why ministers decided not to include this element in the text following the mid-term review. A controversy might have arisen around the dual nature of the sovereignty of national economic space implied by this item. According to it, countries were recognized not only to enjoy the right to regulate but also to have a duty to do so ("*[t]he right and duty* of any government *to regulate* all sectors of its national economy in the national interest shall be fully recognized").[538] These two words (right and duty) appear to have been paired for the first time, as far as the records indicate. In the absence of any evidence,[539] it is plausible to speculate that this sudden pairing might be the reason why this wording was not included in the TNC text. After all, countries might oppose undertaking additional, potentially unknown duties that were not discussed, let alone agreed upon.

In summary, the text of the TNC after the mid-term review, when read together with the GNS report, forms the basis with which the participants approached 1989. This background indicates that the notion of the right to regulate had already surfaced during the negotiations and found its place. The role it played was not major, yet its recognition was repeatedly requested, primarily by developing countries. Interestingly, some parallels with the language of the fourth recital of the GATS could already be drawn, particularly regarding the asymmetry in regulatory situations among different countries and the rights of developing countries to introduce new regulations.

2.3.3.2.6 Year After Review and Provision Placement

The two-year-long negotiations resulted in a rather moderate outcome for international trade in services. The participants moved forward primarily with a common understanding of "the concepts and composition of services trade and the problems faced by governments in reconciling their differing objectives."[540] No

[538] GNS, Report to the Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, MTN.GNS/21, 25 November 1988, *supra* note 530, p. 8. (emphasis added)
[539] For instance, during the TNC meeting, the ministers avoided mentioning the notion of the right to regulate. The only time it appears in the ministerial statements on record was when the representative of Nigeria warned of the danger of negotiations being "at the expense of the sovereign rights of nations to regulate and protect their natural endowments" (see TNC (Uruguay Round), Nigeria, Statement by Mr. T.A. Anumudu, Director-General, Federal Ministry of Trade, MTN.TNC/MIN(88)/ST/18, 5 December 1988, p. 3).
[540] B. Ascher, 'Multilateral Negotiations on Trade in Services: Concepts, Goals, Issues', 2 *Georgia Journal of International and Comparative Law* 19 (1989), p. 400.

draft agreement on services was in sight by the time of the Montreal mid-term ministerial meeting. Consequently, the ministerial declaration adopted there was not significantly different in its part on services from the Punta del Este declaration. Being "essentially another statement of purpose," the outcome considered at the ministerial level served as a guide for future work, not a final result.[541] Nonetheless, policymakers viewed it optimistically as it established the mandate for negotiations to continue.[542]

Having addressed the general issues of trade in services, the participants of the Uruguay Round were now expected to go into more details following the mid-term review. They were urged to do so under time pressure. To this end, an ambitious goal was set at the ministerial level "to assemble the necessary elements for a draft" by the end of 1989. For that reason, three out of four items for future work on services set forth in the Montreal Declaration directly concerned more specific issues than those considered before.[543] While previously negotiators had considered trade in services generally and mainly sought to develop concepts applicable across the board, they now turned to evaluating the compatibility of this groundwork with different services sectors.[544] In other words, "[i]t was time to stop rehashing general principles in the abstract and see how they might work in each case."[545]

In line with these aspirations, subsequent communications and notes submitted for consideration increasingly focused on sectoral aspects of trade in services. This process began with the Secretariat drawing up a reference list of sectors in April 1989, followed by its notes on various sectors.[546] Countries quickly caught up by providing indicative lists of sectors of interest[547] and their views on how specific sectors operate.[548]

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[541] W. J. Drake & K. Nicolaïdis, 'Ideas, Interests, and Institutionalization: "Trade in Services" and the Uruguay Round', 1 *International Organization* 46 (1992), pp. 79–80.
[542] *Ibid.*
[543] The last item for such future work touched upon "the role of international disciplines and arrangements and on the question of definition and statistics" (TNC (Uruguay Round), Mid-Term Meeting, MTN.TNC/11, 21 April 1989, p. 41).
[544] *Ibid.*
[545] W. J. Drake & K. Nicolaïdis, 'Ideas, Interests, and Institutionalization: "Trade in Services" and the Uruguay Round', 1 *International Organization* 46 (1992), p. 80.
[546] GNS (Uruguay Round), Reference List of Sectors, Note by the Secretariat, MTN.GNS/W/50, 13 April 1989. For notes on specific sectors, see, for example, GNS (Uruguay Round), Trade in Telecommunications Services, Note by the Secretariat, MTN.GNS/W/52, 19 May 1989; GNS (Uruguay Round), Construction and Engineering Services, Note by the Secretariat, MTN.GNS/W/53, 23 May 1989.
[547] See, for example, GNS (Uruguay Round), Communication from Poland, Indicative List of Sectors of Interest to Poland, MTN.GNS/W/55, 23 May 1989; GNS (Uruguay Round), Communication from the European Community, Indicative List of Sectors of Interest to the European Community, MTN.GNS/W/56, 25 May 1989.
[548] See, for example, GNS (Uruguay Round), Communication from Mexico, Test of the Applicability of Concepts, Principles and Rules to the Financial Services Sector, MTN.GNS/W/71, 15 September 1989.

Although of a more general nature, the notion of the right to regulate is evident in these discussions. Countries and the Secretariat frequently referenced this concept while discussing national policy objectives pursued by governments through regulations. For instance, regarding telecommunication services, the Secretariat cited national security as the dominant consideration for regulating this sector, describing it as "the most powerful" reason for exercising the right to regulate.[549] The European Communities echoed this understanding, by emphasizing the need to preserve inherent regulatory sovereignty to protect the network.[550] According to the records, the right to regulate financial services was equally important, although for a different reason: the efficiency of such markets depends on state regulation.[551]

Other instances where this notion is mentioned include countries indicating specific governmental actions that are legitimate under the sovereign right to regulate. For example, Egypt stated, "[t]he right of countries to regulate different service sectors was recognized in the [GNS'] mandate, and one of the recognized means for such regulation was the granting of exclusive rights."[552] This statement by Egypt was juxtaposed with those on regulatory asymmetries in different countries and the right of developing countries to introduce new regulations.[553] The European Communities also highlighted the existence of monopolies in specific sectors as part of such governmental actions.[554]

All these statements referring to the right to regulate, along with others found during the research, constitute only a minuscule fraction of the discussed issues and topics. Their mentions appear to be sporadic at best. Therefore, it is difficult, based on these alone, to conclusively infer anything of systemic value given the many other issues discussed more intensely, which were often regarded as more central at this stage of the negotiations. However, it cannot be said that the negotiations entirely neglected this notion. The concepts and ideas associated with the right to regulate have largely remained the same. The rare mentions of this notion should be taken as a sign that the right to regulate has the potential to be important for more detailed issues of trade in services, beyond general matters, *i.e.*, that the right to regulate is applicable and relevant in the context of particular service sectors as well.

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[549] GNS (Uruguay Round), Trade in Telecommunications Services, Note by the Secretariat, MTN.GNS/W/52, 19 May 1989, para. 41.
[550] GNS (Uruguay Round), Note on the Meeting of 5–9 June 1989, MTN.GNS/23, 11 July 1989, para. 76.
[551] GNS (Uruguay Round), Trade in Financial Services, Note by the Secretariat, MTN.GNS/W/68, 4 September 1989, para. 44.
[552] GNS (Uruguay Round), Note on the Meeting of 5–9 June 1989, MTN.GNS/23, 11 July 1989, para. 125.
[553] *Ibid*. See also para. 281. For a similar statement from Yugoslavia regarding transport services, see GNS (Uruguay Round), Note on the Meeting of 17–21 July 1989, MTN.GNS/24, 28 August 1989, para. 112.
[554] GNS (Uruguay Round), Note on the Meeting of 5–9 June 1989, MTN.GNS/23, 11 July 1989, para. 130.

An indirect confirmation of this understanding of the right to regulate comes from negotiating countries' attempts throughout 1989 to keep up with the tight schedule and offer an updated view of how the new agreement could look. With this in mind, some countries presented communications outlining the possible content of the new agreement. Of particular interest is the one circulated by the United States on 17 October 1989.[555] Unlike many similar papers before it, this proposal did not merely contain a list of concepts intended to form the basis of the new framework. Instead, it was a draft agreement.[556] This draft is especially curious for the present study for the following reasons.

This draft Agreement on Trade in Services, as referred to in the communication, provides for the recognition of the participating parties' right to regulate:

> *The Parties recognize the right of each Party to regulate within its territories the provision of covered services, including the right of Parties to introduce new measures consistent with this Agreement.*[557]

The above excerpt clearly denotes that, as in the GATS, the right of each contracting party to regulate is recognized by the agreement. Besides, this right seems to be linked with the right to introduce new measures. However, the text provides no reasons for the additional recognition of such a right; for instance, there is no mention of the regulatory asymmetry between developing and developed countries.

The proposed Agreement on Trade in Services placed this recognition in its main text. The right to regulate is mentioned in the context of the disciplines on domestic regulation (Article 11) in the Agreement on Trade in Services. The preamble merely declares "the need of governments to continue to regulate certain services for legitimate domestic reasons," routinely connecting the regulation of services with national policy objectives.

Concerning the right to regulate, one aspect strongly distinguishes the Agreement on Trade in Services with the GATS. This distinction lies in the part of the text where the right to regulate is introduced. Unlike the GATS, the Agreement on Trade in Services includes the right to regulate in the main text, while its preamble is arguably silent on this issue. It is therefore intriguing to explore why the drafters deemed it more reasonable to place the right to regulate in Article 11 rather than in the preamble, as it is in the GATS, and to consider the implications for the overall interpretative exercise.

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[555] GNS (Uruguay Round), Communication from the United States, Agreement on Trade in Services, MTN.GNS/W/75, 17 October 1989.

[556] The United States explicitly stated that "this was a legal and not a conceptual text" (GNS (Uruguay Round), Note on the Meeting of 23–25 October 1989, MTN.GNS/26, 17 November 1989, para. 16).

[557] GNS (Uruguay Round), Communication from the United States, Agreement on Trade in Services, MTN.GNS/W/75, 17 October 1989, p. 8.

The United States had an opportunity to explain its choice. During the GNS meeting of 23–25 October 1989, the Chairman called upon the United States "to introduce … a proposal for an agreement on trade in services."[558] The representative of the United States noted that the respective provision had "stressed the right to regulate in the case of all services."[559] According to the United States, countries should not nullify or impair the benefits of the agreement while exercising this right. This explanation, however, adds nothing new compared to the text of the proposed provision on the right to regulate and, consequently, does not clarify the relevance of introducing the notion of the right to regulate in the main text of the agreement.[560]

However, the relevance can be inferred from the fact of where the right to regulate is mentioned in the treaty text. Placing the right to regulate in the main text could be seen as an additional endorsement by those who considered it diminishing to include legal concepts in the preamble. Perhaps the United States sought to address concerns previously raised in the negotiations about the right to regulate, particularly during the discussion of Sweden's proposal in MTN.GNS/W/32.[561]

More importantly, the United States clarified that the right to regulate in the context of trade in services has a more concrete dimension than merely being a general principle with ambiguous content. This proposal demonstrates that countries believed the right to regulate, as part of the topic of domestic regulation, could have more practical applications concerning specific issues of trade in services. It should be noted that Article 11 of the Agreement on Trade in Services has a counterpart in Article VI of the GATS. Certainly, it would be premature to draw direct parallels with Article VI of the GATS, given the notable differences between the two articles (Article 11 of the Agreement on Trade in Services is significantly shorter and omits certain topics). However, this draft submitted by the United States strongly indicates that these two issues are closely interrelated: the right to regulate and the disciplines on domestic regulation as they evolved into those under the GATS.

As mentioned earlier, the United States' proposal was not the only one submitted to ensure that the GNS met its deadline for assembling the elements of the draft agreement on trade in services. The communications received before the end of 1989 were conceptual papers, unlike the United States' proposal. These communications rarely referenced the right to regulate. When they did, countries referred to the general need to recognize this notion in the text of the agreement,

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[558] GNS (Uruguay Round), Note on the Meeting of 23–25 October 1989, MTN.GNS/26, 17 November 1989, para. 3.
[559] *Ibid.*, para. 11.
[560] *Ibid.* However, Article 11.1 of the Agreement on Trade in Services allows for a different interpretation, according to which the condition of not nullifying or impairing benefits would only apply to new measures adopted in the exercise of the right to regulate.
[561] See GNS (Uruguay Round), Note on Meeting of 22–25 March 1988, MTN.GNS/14, 29 April 1988, paras. 16, 18, 27, 31.

alluding to the right of developing countries to regulate services sectors[562] and the asymmetry between their regulatory situations and those of developed countries.[563] The compilation made by the Secretariat to develop the elements supports this insight, indicating that the relevance of the right to regulate decreased—it is mentioned only once in 49 pages.[564]

Eventually, the GNS managed to produce elements for the new agreement. These elements were assembled into a draft paper circulated on 18 December 1989.[565] This document included various topics and issues extensively discussed by the participants over several years. For each topic, the GNS suggested text intended to crystallize the participants' understanding and to serve as an intermediary before the first draft of the agreement was proposed. Each part of the text was preceded by a note referencing the agreed basis for the suggested passages (a reference to a paragraph of the Montreal Declaration constituting such authorization).

The GNS placed the notion of the right to regulate under the rubric of "Regulatory Situation." The relevant excerpt reads:

> *Signatories to the framework shall have the right to regulate the provision of services within their territories in order to meet national policy objectives. This includes the right of signatories to introduce new regulations consistent with commitments under the framework. It is recognized that developing countries may have a particular need to exercise this right. Regulations shall not be applied in a manner which could constitute a means of arbitrary or unjustifiable discrimination between signatories.*[566]

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[562] GNS (Uruguay Round), Communication from Mexico, Elements for a Framework Agreement with Special Reference to the Participation of Developing Countries, MTN.GNS/W/85, 20 November 1989, p. 10; GNS (Uruguay Round), Communication from Brazil, Elements for a Draft Framework Agreement on Trade in Services, MTN.GNS/W/86, 21 November 1989, p. 16.

[563] GNS (Uruguay Round), Communication from India, Elements of a Multilateral Framework for Trade in Services, MTN.GNS/W/87, 13 December 1989, p. 6; GNS (Uruguay Round), Communication from Malaysia, MTN.GNS/W/89, 15 December 1989, p. 6.

[564] GNS (Uruguay Round), Material to be Considered with a View to Fulfilling the Mandate given to the GNS in Paragraph 11 of the Montreal Declaration (MTN.TNC/11), Note by the Secretariat, MTN.GNS/W/90, 18 December 1989, p. 31. In 1990, an addendum was circulated to supplement this document with additional statements. Among them was Brazil's position concerning the regulatory situation: "[g]iven the asymmetries which exist with respect to the degree of development of services regulations in different countries, the framework agreement should recognize the right of countries, in particular of developing countries, to introduce new regulations related to the services sector, concerning e.g. the establishment of state enterprises, the granting of exclusive rights of certain sectors, the upgrading of skills and others judged necessary for the promotion of development objectives" (GNS (Uruguay Round), Material to be Considered with a View to Fulfilling the Mandate given to the GNS in Paragraph 11 of the Montreal Declaration (MTN.TNC/11), Addendum, MTN.GNS/W/90/Add.1, 4 January 1990, p. 5).

[565] GNS (Uruguay Round), Draft, Elements for a Draft Which Would Permit Negotiations to Take Place for the Completion of All Parts of the Multilateral Framework, MTN.GNS/28, 18 December 1989.

[566] *Ibid.*, p. 10.

The text does not allow to determine whether this excerpt was intended to be part of the preamble or the main text. However, it could be reasonably construed that the latter is more likely since the word "preamble" appears only in the table of contents. Regarding the main body of the text, it is positioned far from the section on the regulatory situation. It is unclear to what extent this excerpt reflects the United States' choice to refer to the right to regulate outside the preamble. Yet, more certainty exists concerning the text itself: it was likely to be agreed upon later, as it reasonably matched the negotiating record thus far. For that reason, no square brackets were used, unlike in many other parts of the document that were still replete with such language. Be it as it may, the text presented by the GNS was still not a draft agreement.

Substantially, the excerpt above is noteworthy as a *chronological* step leading to the text that ultimately becomes the GATS. However, it is difficult to determine whether it adds anything new compared to the discussions mentioned above, hence the absence of square-bracketed language. This text has reinforced the understanding that no one seemed to object to the inclusion of the right to regulate in the new agreement.

Based on the above, one could conclude that even though the new phase of negotiations after the mid-term review brought some progress and made it possible to achieve the goal set out in the Montreal Declaration, the outcome was still quite moderate. Tasked with accelerating their efforts to achieve a tangible result, the participants of the negotiations did their best to draft suggestions for possible elements of the new agreement by the end of 1989. Apart from rare instances like the United States' proposal in MTN.GNS/W/75 containing treaty text, the suggestions remained conceptual: a draft of the new agreement had yet to emerge for negotiations to shift from concepts and statistics to concrete provisions.

This phase of negotiations revealed that participants did not consider the preamble to be the only place in the new agreement where the notion of the right to regulate should be included. As evidenced by the United States' proposal and indirectly by the GNS' elements for the draft agreement, other alternatives were considered. Before this issue can be properly reflected upon, it must be established that the evidence supporting the existence of such alternatives is not accidental and can be corroborated by other documents and proposals discussed later. However, it should be noted at this stage that during the negotiations, the right to regulate was conceived as being capable of inclusion in the main body of the treaty text in the context of possible disciplines on domestic regulation, thus possibly having a legal value different from that of the preambular text.

2.3.3.2.7 Emergence and Consolidation of Draft Agreements

At the end of 1989, the GNS presented the necessary elements for drafting a multilateral framework for trade in services. These elements received mixed reactions, as many had hoped for a higher degree of consensus and greater overall

progress in the negotiations.[567] The mere existence of such elements, however, presupposed more active work from then on, moving closer to the definite end of the negotiations, *i.e.*, directly elaborating on the text of the future agreement.

The following year of negotiations was marked by an increase in submissions from various countries, individually or jointly, communicating their views on the proper design of the agreement on trade in services. This surge of draft agreements culminated in the critical mass prompting the creation of the so-called July text by the GNS in 1990, which was an early attempt to converge the positions of all participants into a unified draft agreement as much as possible at that time.[568] This July text was supposed to become a turning point in the negotiations, enabling further consideration to focus on the text, not merely on the concepts. Consequently, the provisions of the July text were to be thoroughly examined and, if necessary, supplemented and refined.[569] This July text was in no way final, as "several key issues remained unresolved," including those related to "the coverage; MFN and market access; and the negotiation and application of specific commitments."[570]

Before discussing this July text, it is important to consider other submitted submissions by the participants in the negotiations. In addition to the United States' proposal considered above *(1)*, a total of five other proposals were communicated. They were sponsored by *(2)* Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago, and Uruguay; *(3)* Cameroon, China, Egypt, India, Kenya, Nigeria, and Tanzania; *(4)* Switzerland; *(5)* the European Communities; and *(6)* Japan. Examining these proposals is essential at this stage to better understand the relevance states were ready to attach to the right to regulate and related concepts in the treaty text. This relevance can be objectively deduced from at least two elements under Articles 31 and 32 of the VCLT, applied by analogy as if these drafts constituted an already concluded treaty text: the plain wording of the proposed provisions and their immediate context (*e.g.*, the preamble or the main text). Indeed, the scope of rights and obligations emanating from these provisions could vary greatly depending on their context.

Aware of the drafting consequences, states carefully approached the question of how the right to regulate should be handled within the framework of the proposed agreement. To arrive at these proposed texts of the agreement, they had to process the vast body of information produced during the negotiations. The drafts communicated during this period represented the first attempt to express in treaty

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[567] See GNS (Uruguay Round), Note on the Meeting of 18 December 1989, MTN.GNS/29, 11 January 1990.

[568] GNS (Uruguay Round), Draft Multilateral Framework for Trade in Services, Introductory Note by the Chairman on the GNS Negotiations on a Framework Agreement, MTN.GNS/35, 23 July 1990.

[569] *Ibid.*, pp. 1–2.

[570] J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), p. 711.

language all previous discussions of the relevant concepts, whether recorded or not, often held in the abstract. At the same time, these texts are highly bespoke, offering a glimpse into the positions of the countries that authored them. Consequently, these drafts provide a more diverse view of where the negotiations stood at the time and could better reveal the existent extremes, unlike the July text, which is less telling in this regard.

The proposed drafts all refer to the right to regulate (the respective excerpts are reproduced for convenience in Table 3 and Table 4 below). Their coherent approach indicates that the participants who were active enough to draft a comprehensive proposal all considered this notion indispensable for the general framework to be fully operational. Moreover, this understanding was shared by both developing and developed countries, as evidenced by the diversity of the drafters of those proposals. They represented a significant portion of the negotiating participants: 21 countries and the European Communities out of 123 countries by the end of the Uruguay Round.[571] Coupled with the fact that the right to regulate was frequently discussed during the negotiations, this joint approach in the texts could ensure a secure place for the right to regulate in the upcoming agreement. However, the precise configuration of its incorporation into the text of the agreement remained unclear to a greater extent.

For instance, it was quite unsettled in which part of the agreement the notion of the right to regulate should be included. The proposed texts demonstrate that the drafters essentially considered only two options: referencing this notion in the preamble *and* the main text or in the main text only. Curiously enough, the positions were split evenly in this regard (Drafts 1, 3, 4, and 2, 5, 6, respectively).[572] None of the proposed texts suggest that the reference to the right to regulate should be made only in the preamble. This neglect of the preambular text stands out compared to the opposite approach in the GATS, as discussed above regarding the United States' communication (Draft 1).

If the drafters chose to mention the right to regulate in the main text, the further question relevant to this study would be whether they contemplated this mention to be a stand-alone provision or, if not, which provision they considered most appropriate for including this notion. Examination of all the texts shows that they are surprisingly uniform in this regard. With some variation, in the majority of the draft agreements, the provision about the right to regulate was determined to belong

[571] The Uruguay Round, WTO. URL: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

[572] Even though two drafts do not mention "the right to regulate" explicitly, it is argued that their references to other concepts in the preamble have a similar meaning, as they cite related issues and take note of national policy objectives in the pursuit of which governments may regulate services (Draft 1 mentions "the need … to regulate," whereas Draft 3 refers to "the sovereignty of national economic space").

to the section on the regulatory situation, often titled as domestic regulation(s).[573] The drafters thereby substantiated the intrinsic link between the two, as was first uncovered in the United States' proposal. The connection apparently flowed from the fact that the disciplines on domestic regulation(s) in the respective draft agreements paid due regard to the dynamic nature of the right to regulate ("introduce new regulations") by embodying rules on the proper administration of relevant regulations[574] and referring to technical standards and qualifications applicable to different services sectors.[575]

Meanwhile, the alternative of putting the notion of the right to regulate in the preamble was not completely disregarded. *Au contraire*, half of the draft agreements cited this notion and associated concepts in their preambles. Despite its seeming lack of success thus far, this alternative later gained momentum and eventually prevailed, as the text of the GATS reveals—how this shift occurred is discussed in later subsections of the present study. However, the dilemma of where to include this notion was already present when these six drafts were communicated for consideration. Although their drafters preferred the main text, they were not confident that this choice exhausted the need to mention it without supplementing it with preambular language.

Furthermore, the participants in the negotiations seemed to distinguish the binding force of different provisions and parts of the treaty.[576] Commenting on the proposal made by Cameroon, China, Egypt, India, Kenya, Nigeria, and Tanzania (Draft 3), India alluded to the provision recognizing the right to introduce new regulations as one possessing "a legally-binding nature."[577] Although it is unclear whether India associated this binding nature with the provision's placement in the main text rather than the preamble, or with its phrasing, India's contention is valuable as it comes from one of the sponsors of this particular communication. Also instructive is the statement by the United States that "[i]n some cases, preambular language might best capture notions for which it was difficult to give

[573] Draft 2 contains the notion of the right to regulate in Article 1, untitled, which is part of Chapter I, "Principles and Commitments." Draft 3 and 4 are more specific: the provisions citing the right to regulate are in Article 11, "Regulatory situation," and Article 9, "Domestic regulations. Standards and qualifications."

[574] For instance, GNS (Uruguay Round), Communication from the United States, Agreement on Trade in Services, MTN.GNS/W/75, 17 October 1989, Art. 11.2; GNS (Uruguay Round), Communication from Japan, Draft General Agreement on Trade in Services, MTN.GNS/W/107, 10 July 1990, Art. 606.2.

[575] For instance, GNS (Uruguay Round), Communication from Switzerland, Draft General Agreement on Trade in Services (GATS), MTN.GNS/W/102, 7 June 1990, Art. 9.2; GNS (Uruguay Round), Communication from the European Communities, Proposal by the European Community, Draft General Agreement on Trade in Services, MTN.GNS/W/105, 18 June 1990, Art. V:1-V:2.

[576] For instance, India indirectly raised such a concern in its comment during the GNS Meeting in May 1990 with respect to the agenda item about the increasing participation of developing countries (GNS (Uruguay Round), Note on the Meeting of 7–11 May 1990, MTN.GNS/33, 8 June 1990, para. 68).

[577] *Ibid.*

operational meaning in the framework."[578] It appears that, in addition to provisions related to development, the United States questioned the reasonableness of adding a binding effect to those on competition rules in the exercise of the right to regulate.[579] These statements by the United States support the understanding that the critical issue for the drafters was to pin down the "operational meaning" of the treaty provisions, including those related to the right to regulate.

Regarding *the content of the proposals*, the first observation is that the draft provisions on the right to regulate do not deviate significantly from each other. Certain themes recur in nearly all of them, suggesting an emerging consensus on the topics associated with the right to regulate. Additionally, given the relatively long intervals between the respective communications, the drafters of the subsequent draft agreements were likely inspired by their predecessors. Regardless of whether this is correct, the penultimate communication, from the European Communities (Draft 5), is undoubtedly short of such possible influence; its provision on the right to regulate is the least detailed.

The recurring elements are not surprising, as they are mainly in line with the negotiating history preceding the emergence of the draft texts. These elements include:

- recognition of governments' right to introduce new regulations consistent with the general framework (Drafts 1, 2, 3, 4, 6);[580]
- recognition of developing countries' particular need to exercise the right to regulate (Drafts 2, 3, 6);
- introduction of regulations shall not nullify or impair obligations under the agreement (Drafts 1, 2);
- regulations shall not be applied in a manner that constitutes arbitrary or unjustifiable discrimination (Drafts 3, 4).

The above elements form the background with which the participants approached mid-1990. The increased number of draft agreements with comparable provisions referring to the right to regulate, coming from various countries, was more than a

[578] The United States, with more clarity, expressed its view that development-related provisions possessed an ambiguous operational meaning. See GNS (Uruguay Round), Note on the Meeting of 26–30 March 1990, MTN.GNS/32, 24 April 1990, para. 16.

[579] *Ibid.*

[580] This element continued to be supported during the meetings of the GNS in 1990. The necessity for the recognition of such a right was once again justified by referencing the asymmetry in the regulatory situation in different countries. See, for instance, GNS (Uruguay Round), Note on the Meeting of 16–19 January 1990, MTN.GNS/30, 8 February 1990, para. 13 (Hungary); GNS (Uruguay Round), Note on the Meeting of 26–30 March 1990, MTN.GNS/32, 24 April 1990, para. 3 (Mexico); GNS (Uruguay Round), Note on the Meeting of 7–11 May 1990, MTN.GNS/33, 8 June 1990, para. 59 (the European Communities). For the general recognition of the right to regulate "within the boundaries of the agreement" in respect of Draft 4 by its sponsor (Switzerland), see GNS (Uruguay Round), Note on the Meeting of 18–22 June 1990, MTN.GNS/34, 16 July 1990, para. 2.

mere corollary of the later stage of the negotiations, as participants had long craved tangible results. The presented texts were intended to facilitate the GNS in its endeavor to fulfill its plan to prepare a completed draft framework by July 1990.[581] Keeping up with the schedule, the GNS managed to produce the text entitled "Draft Multilateral Framework for Trade in Services," which was circulated on 23 July 1990 (*the July text*). In his Introductory Note to this draft, the Chairman of the GNS pointed out the preliminary character of the text.[582] Despite the removal of square brackets in many instances, he warned against considering this draft as adopted by the GNS and, thus, embodying the consensus of its members. Instead, the July text represented work in progress, indicating that "[t]he entire text is … subject to further consideration."[583]

However, the July text was the only at the time attempt to consolidate the text and, with it, different opinions about the composition of the future agreement. It appears to be successful because, according to *Marchetti and Mavroidis*, despite later modifications to the July text, "it is fair to state that the basic architecture of the GATS was negotiated there and then."[584]

Unsurprisingly, the July text built on past experience and, in many aspects, strongly resembled the approaches of the states that presented their draft agreements. Since it was quite preliminary, some parts of the July text still needed further elaboration. For this reason, the preamble was left blank, with no explanation offered. As it was blank, the preamble naturally did not refer to the right to regulate, and in this respect, ran counter to some previous draft agreements. The lack of attention devoted to this section of the agreement could be explained by the fact that the GNS acted under time pressure and preferred not to spend valuable time on filling out a blank text perceived by many to be of limited legal significance and, accordingly, less important as a starting point in such a constellation. Besides, the GNS was probably unsure about the content of the preamble; there may not have been enough agreement on this issue at that time, although no evidence exists to support either side. In any event, the efforts to phrase the respective parts of preambles in the previous drafts were not in vain. Common ideas were transposed into the main part of the July text, along with some elements used in the main texts of previous drafts. These transposed ideas from the

[581] GNS (Uruguay Round), Note on the Meeting of 16–19 January 1990, MTN.GNS/30, 8 February 1990, paras. 46, 48.

[582] In spite of some disagreements about the content, the assessment of the current state of the negotiations provided in the Introductory Note to the July text was overall supported by their participants (see GNS (Uruguay Round), Note on the Meeting of 16–20 July, MTN.GNS/36, 24 July 1990, paras. 17–35).

[583] For instance, the preambular language and the provisions under Parts V and VI were not elaborated in this draft (GNS (Uruguay Round), Draft Multilateral Framework for Trade in Services, Introductory Note by the Chairman on the GNS Negotiations on a Framework Agreement, MTN.GNS/35, 23 July 1990, pp. 1–2).

[584] J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), p. 720.

preambles include the juxtaposition of the right to regulate and the exercise of such a right to pursue national policy objectives in line with the general framework.

With the preamble deliberately left blank, the only option for the July text to mention the right to regulate was in its main text. The drafters determined that Article VII of the July text was the appropriate place to provide for the recognition of the right to regulate. The "language [of this provision] was generally consistent with the parties' proposals," as it drew heavily from the common elements of six drafts (see Table 3 and Table 4 below).[585] More specifically, the July text first notes the right to introduce new regulations and second recognizes that developing countries may have a special need to exercise the right to regulate.

As in most draft agreements, the drafters of the July text deemed it reasonable to put a provision on the right to regulate alongside those on domestic regulation. Article VII, devoted to this topic, was still underdeveloped compared to its counterpart in the GATS. Still, the general trend of anchoring the concept of the right to regulate within the area of domestic regulation has been solidified.

In sum, it took almost four years of negotiations to produce the first draft agreements. Viewed exclusively from the standpoint of how they handle the right to regulate, the draft texts are characterized by a high degree of harmonization. Certain themes discussed among the participants previously, as the records suggest, recur in most of them. Moreover, their drafters appear to have preferred including a provision on the right to regulate within the disciplines on domestic regulation while neglecting the preamble, which is relevant to note since the GATS takes a different approach, preferring preambular language.

It was not unexpected that the first consolidated text followed in the steps of these six draft agreements sponsored in 1989–1990. The consolidation of divergent views and synthesizing them was the objective behind its creation, after all. As a result, the July text gathered the most commonly used elements of the six drafts by fusing the wording of their preambles and main texts. This draft constituted the first, albeit moderate, version of the future agreement on trade in services. From this point forward, the negotiations were inextricably linked with the text presented by the GNS.

Although commentators did not single out the issues related to the right to regulate as unsettled and in need of more attention after the July text,[586] it appears that the corresponding wording was still not identical to that of the GATS and, thus, required further elaboration. Therefore, examining subsequent negotiating records may be necessary to understand the reasons behind the further fine-tuning of the respective provisions.

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585 T. P. Stewart, *The GATT Uruguay Round: a Negotiating History (1986–1992)* (1993), p. 2384.

586 *Ibid.*, p. 2388; J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), p. 711. See also GNS (Uruguay Round), Note on the Meeting of 16–20 July, MTN.GNS/36, 24 July 1990, para. 14.

Table 3: References to the Right to Regulate in the Proposed Drafts. Part 1[587]

	Communication from the United States (17 October 1989, MTN.GNS/W/75)	Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago, and Uruguay (26 February 1990, MTN.GNS/W/95)	Communication from Cameroon, China, Egypt, India, Kenya, Nigeria, and Tanzania (4 May 1990, MTN.GNS/W/101)	Communication from Switzerland (7 June 1990, MTN.GNS/W/102)
Preamble	*Recital 3:* Desiring to promote the growth of trade in services while recognizing *the need* of governments to continue *to regulate* certain services for legitimate domestic reasons.	(—)	*Recital 8:* Recognizing *the sovereignty of national economic space*, and that accordingly the Multilateral Framework should respect the policy objectives of national laws and regulations applying to trade in services.	*Recital 6:* RECOGNIZING *the right* of governments *to regulate* the services sectors of their countries in conformity with rules and disciplines of the Agreement.
Main text	*Article 11. Domestic regulation:* The Parties recognize *the right* of each Party *to regulate*	*Chapter I. Principles and Commitments. Article 1(11):* Regulatory situation. Parties to the Framework, and	*Article 11. Regulatory situation:* Parties to the Framework shall have *the right to regulate*	*Article 9. Domestic regulations, Standards and Qualifications:* PARTIES *may regulate* within their territory

[587] Emphasis has been added to highlight references to the right to regulate or associated concepts in the provided excerpts.

	within its territories the provision of covered services, including the right of Parties to introduce new measures consistent with this Agreement. Parties shall ensure that such measures are not prepared, adopted or applied, the intent or effect of which is to nullify or impair the obligations of this Agreement.	in particular developing countries, shall have *the right to regulate* the provision of services within their territories in order to implement national policy objectives, including the introduction of new regulations consistent with the objectives, principles and disciplines under the Framework. Regulations shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties.	the provision of services within their territories, <u>inter alia</u> through the grant of exclusive rights in certain sectors, in order to implement national policy objectives. This includes the right of Parties to introduce new regulations consistent with commitments under the Framework. The Parties recognize that developing countries Parties may have a particular need to exercise this right. Regulations shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties.	the provision of services and may introduce new measures consistent with the Agreement. In order to avoid circumvention of the objectives of the Agreement, such regulations shall not amount to and shall not be applied in a manner that would constitute: a) a means of arbitrary or unjustifiable discrimination among PARTIES; or b) a disguised restriction on trade in services.

Table 4: References to the Right to Regulate in the Proposed Drafts. Part 2 with the July Text and the GATS[588]

	Communication from the	Communication from Japan	Draft Multilateral	GATS

[588] Emphasis has been added to highlight references to the right to regulate in the provided excerpts.

	European Communities (18 June 1990, MTN.GNS/W/105)	(10 July 1990, MTN.GNS/W/107)	Framework for Trade in Services (the July text) (23 July 1990, MTN.GNS/35)	
Preamble	(—)	(—)	(left blank in the draft for the entire preamble part)	*Recital 4:* *Recognizing the right* of Members *to regulate*, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.

Main text	*Article V. Domestic regulation:* 1. (a) Subject to the provisions of this Agreement, parties shall have *the right to regulate* the provision of services in accordance with public policy considerations. Rules, standards and qualifications required for the provision of a service within a party's territory shall be based on objective requirements, such as competence or the ability to provide a service. Wherever appropriate, recourse should be made to internationally agreed requirements.	*Article 606. Domestic regulations:* *The right* of each Party *to regulate* the provision of services within its own territories, in order to meet national policy objectives, shall be exercised in a manner consistent with the provisions of this Agreement. This includes the right of each Party to introduce new regulations consistent with its commitments under this Agreement. Parties recognize that developing countries may have a particular need to exercise this right.	*Article VII(1). Domestic regulation:* *The right* of parties *to regulate* the provision of services within their territories, in order to meet national policy objectives, shall be exercised in a manner consistent with the provisions of the framework. This includes the right of signatories to introduce new regulations consistent with commitments under the framework. It is recognized that developing countries may have a particular need to exercise this right.	(—)

2.3.3.2.8 Towards the Final Text(s) on the Right to Regulate

With the July text at hand, the GNS was better equipped to produce the final text. Initially, this was planned to happen by the next TNC meeting at the ministerial

level, which was scheduled to take place in Brussels in December 1990.[589] *Ambassador Jaramillo*, a representative of Colombia and chairman of the GNS, presented a new version of the text on his own authority at the end of the year (*the December text*).[590] It was not a text that had been agreed upon by the participants of the negotiations. Still, it was an important step forward, especially regarding the composition of annexes to the agreement devoted to certain services sectors. In their overall assessment of the December draft, *Drake* and *Nicolaïdis* concluded that "most of the framework's major principles and sections were in place," despite the fact that its text was still replete with bracketed language denoting a "lack of final consensus on fine points."[591] Some disciplines still needed to be elaborated *ab initio*. For instance, the annex on the financial sector was marked as part of the agreement, but it remained entirely blank in this version.

There is little to no recorded evidence of how the transition from the July text to the December draft actually took place in respect of the provisions addressing the right to regulate. The available notes on the GNS meetings and individual or collective participants' submissions are largely silent on this matter. It can only be presumed that the amendments made to the July text originated from informal consultations held by the participants among themselves and with the chairman of the GNS.[592] Since the new version of the text was prepared independently of any country, it is possible that its drafters took the liberty to suggest amendments that, in their view, best reflected the progress on particular issues. Nevertheless, the amendments and the entire text still needed to be agreed upon by the participants. In the absence of explanatory statements from countries, the text of the agreement seems to be the only sufficiently objective source for making inferences about the transition to the new wording of the provisions on the right to regulate.

As far as the right to regulate was concerned, the progress made within a few months could hardly be defined as a major leap forward.[593] A few new aspects introduced to the text are nevertheless worthy of mention. First of all, unlike in the July text, preambular language was added to the new draft. According to the

[589] See TNC (Uruguay Round), Chairman's Summing-up at the Meeting of 26 July 1990, MTN.TNC/15, 30 July 1990, Section 3.

[590] TNC (Uruguay Round), Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, MTN.TNC/W/35/Rev.1, 3 December 1990. See also GNS (Uruguay Round), Note on the Meeting of 12 and 22 November 1990, MTN.GNS/40, 28 November 1990, para. 2.

[591] W. J. Drake & K. Nicolaïdis, 'Ideas, Interests, and Institutionalization: "Trade in Services" and the Uruguay Round', 1 *International Organization* 46 (1992), p. 88; J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), pp. 711–712.

[592] See, for instance, an indirect confirmation that such consultations took place in GNS (Uruguay Round), Note on the Meeting of 12 and 22 November 1990, MTN.GNS/40, 28 November 1990, para. 1.

[593] For a more general assessment from the chairman of the GNS and the positions of the countries about the outcome reached in this new version, see GNS (Uruguay Round), Note on the Meeting of 12 and 22 November 1990, MTN.GNS/40, 28 November 1990.

drafters' design, the preamble was one of the two instances where the agreement acknowledged the right to regulate. Second, more details were provided this time about the possible content of these provisions and their rationale: the draft noted the asymmetry between regulatory situations in different countries and exemplified one of the possible ways to exercise the right to regulate ("the granting of exclusive rights in certain sectors").

The dilemma of where to place the provision on the right to regulate in the agreement, hidden in the July text but clear in hindsight, was not resolved by December 1990. On the contrary, it became more acute, as the text of the agreement itself suggested. The right-to-regulate provision now appeared twice: in the preamble (recital 5) and the main text (paragraph 1 of Article VI entitled "Domestic Regulation") (see Table 5 below). The draft explicitly indicated that these were *alternatives* to each other. To this end, the text contains cross-references between these two provisions, such as the footnote in the preamble plainly announcing recital 5 as an "[a]lternative to paragraph 1 of Article VI." Thus, the drafters could not decide on the preferred option. Instead, they offered delegations an opportunity to elaborate on the matter and ultimately decide which option they deemed more appropriate for the new agreement.

Contrary to what might be expected, both alternatives were not identical in scope. The distinction was likely drawn because slightly different approaches were deemed suitable for a preambular text, on the one hand, and the main body of the agreement, on the other. However, the difference in wording used went beyond minor drafting issues. The alternative provided in the main text is more detailed, as it essentially mirrors recital 4 of the preamble of the December text but adds more to its content. In particular, paragraph 1 of Article VI specifies that

- the application of this provision is "subject to the provisions of this Agreement";
- the right to regulate explicitly includes "the granting of exclusive rights in certain sectors in order to implement national policy objectives";
- the particular need for developing countries to exercise the right to regulate is recognized due to the asymmetry in regulatory situations in different countries.

By juxtaposing these additional elements with operative disciplines on domestic regulation, paragraph 1 of Article VI essentially qualified the right to regulate with additional rules, most notably "that domestic regulations should not restrict trade or be discriminatory and should be based on objective criteria such as competence and the ability to provide services."[594] As *Drake* and *Nicolaïdis* further noted, the

[594] W. J. Drake & K. Nicolaïdis, 'Ideas, Interests, and Institutionalization: "Trade in Services" and the Uruguay Round', 1 *International Organization* 46 (1992), pp. 89–90.

disciplines under Article VI "subject national regulators for the first time to an external, commercial set of criteria on which their actions may be challenged."[595]

Accordingly, the December text represented a further step in elaborating GATS provisions related to the right to regulate. It is especially interesting for its objective confirmation of the concerns regarding the proper recognition of the right to regulate in the new agreement: the drafters hesitated about the appropriate placement in the agreement and invited participants to consider two alternative provisions. Irrespective of the operative meaning of either clause, the notion of the right to regulate once again received strong support as an intrinsic part of disciplines on domestic regulation rather than other parts of the agreement, such as general exceptions. Yet, this 1990 draft was not the end of the journey for the provisions recognizing the right to regulate or for the agreement on trade in services as a whole.

The December text was considered in Brussels along with other commitments negotiated during the Uruguay Round. The Brussels meeting of the TNC "was supposed to mark the end of the negotiations"[596] but failed to fulfill this goal and conclude the Uruguay Round. One of the main issues to resolve regarding international trade in services was the application of the MFN provision.[597] It was not trade in services that eventually constituted the stumbling block in the negotiations: as *Marchetti* and *Mavroidis* report, "[f]ailure to agree on farm issues *ipso facto* led to general failure."[598] The negotiations appeared to have stalled for a while.[599]

Negotiations on trade in services resumed the following year. The non-adoption of the December text presented negotiators with another opportunity to refine it. In mid-1991, the chairman of the GNS issued a report to take stock of the progress in the negotiations. According to his assessment, all three central pillars of the new framework (articles, annexes, and initial commitments to liberalize trade in services) still needed to be advanced before the work could genuinely be considered complete.[600] The ongoing work on schedules of commitments, which were more intense at this stage, led to the necessary re-drafting of provisions directly related to these matters (Articles XVI on market access and XVII on national treatment). *Chairman Jaramillo* further informed that "[i]n this process, a number of concerns with respect to Article VI on domestic regulation have also been addressed."[601] However, the report did not identify these concerns, making it impossible to

[595] *Ibid.*, p. 90.
[596] T. P. Stewart, *The GATT Uruguay Round: a Negotiating History (1986–1992)* (1993), p. 2394.
[597] *Ibid.*, p. 2395.
[598] J. A. Marchetti & P. C. Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)', 3 *European Journal of International Law* 22 (2011), p. 712.
[599] For more on the deadlock and how it was overcome, see T. P. Stewart, *The GATT Uruguay Round: a Negotiating History (1986–1992)* (1993), pp. 2395–2396.
[600] GNS (Uruguay Round), Report by the Chairman of the Group of Negotiations on Services to the Trade Negotiations Committee, MTN.GNS/W/130, 30 July 1991, pp. 4–5.
[601] *Ibid.*, p. 1.

determine whether any of them related to the right to regulate or to other issues stipulated in this provision of the December draft. As a result, the chairman announced that "Article VI w[ould] be re-drafted in the light of the progress made in dealing with Articles XVI and XVII."[602] Accordingly, this report indicated that certain changes would be introduced in the text of Article VI and would appear in the next version. However, it did not specify the particular amendments to the text and precise reasons for them.

The chairman of the GNS noted in his report that the negotiations should be completed by the end of 1991.[603] The next general assessment of the negotiations' readiness for conclusion took place in November 1991, when the Director-General of the GATT 1947 (*Arthur Dunkel*) presented his views on the status of all topics under the aegis of the Uruguay Round.[604] He also provided a separate assessment of international trade in services. *Director-General Dunkel* concluded that concerning the articles, one of the pillars of the agreement on trade in services, "much of the work is of a technical nature and can be completed soon."[605] Relying on this statement and assuming it extends to the preamble as well, it could be concluded that the main work in that respect was perceived as nearly complete by the end of 1991. Consequently, the provision about the right to regulate was not expected to undergo a dramatic transformation from that point onward.

The above assertion was proven correct by further progress in the ongoing negotiations. The advancement in the negotiations provided the next opportunity to revive overall success when, in December 1991, *Director-General Dunkel* presented a text consolidating the results of the Uruguay Round (*the Dunkel draft*, see Table 5 below).[606] It incorporated all agreements that were negotiated over during this round. The text "was released with the expectation that either it would be accepted in its entirety … or that it would serve as the basis for intense and decisive negotiations aimed to quickly bring the Round to a conclusion."[607] This message was clearly communicated to the participants in the negotiations.[608]

Once again, no records are publicly available to reasonably trace the discussions, let alone the reasons, that led to the changes made in the Dunkel draft concerning the provisions on the right to regulate. As with the December text, the following analysis predominantly focuses on the text of the new version as it is.

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[602] *Ibid.*

[603] *Ibid.*, pp. 3–5.

[604] TNC (Uruguay Round), Progress of Work in Negotiations Group: Stock-taking, MTN.TNC/W/89/Add.1, 7 November 1991.

[605] *Ibid.*, pp. 10–11.

[606] TNC (Uruguay Round), Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, 20 December 1991.

[607] T. P. Stewart, *The GATT Uruguay Round: a Negotiating History (1986–1992)* (1993), p. 2412.

[608] See TNC (Uruguay Round), Trade Negotiations Committee, Meeting on 13 January 1992, Opening Statement and Concluding Remarks by the Chairman, Trade Negotiations Committee, MTN.TNC/W/99, 15 January 1992.

The Dunkel draft refers to the right to regulate in the GATS only once. It does so in recital 4 of the preamble, while the main part of the agreement no longer mentions this notion. It appears that the drafters abandoned the idea of placing the respective provision among the disciplines on domestic regulation under Article VI of the GATS.

The wording of recital 4 differs from the previous version of the corresponding text in the preamble in only one aspect: the Dunkel draft additionally notes the asymmetry in regulatory situations in different countries as a reason for recognizing the particular need for developing countries to exercise the right to regulate. However, this element is not new. In the December text, it was part of the provision placed among the disciplines on domestic regulation. Therefore, it is reasonable to conclude that the drafters of the new text thought it necessary to retain this reference to the asymmetry by relocating it from Article VI to the preamble. In contrast, other aspects distinguishing it from the preamble were deleted along with the rest of the provision on the right to regulate in the main text, namely the clause about circumscribing the right to regulate to the disciplines of the agreement ("subject to the provisions of this Agreement") and the example of an exercise of the right to regulate ("granting of the exclusive rights")). Thus, the text plainly revealed that its drafters opted for placing the provision about the right to regulate in the preamble of the new agreement while keeping some additional elements from the main text.

The amendments to the text could likely be better understood by referring to the statement made by Thailand during the GNS meeting held from 27 May to 6 June 1991. Chronologically situated halfway between the two drafts (the December text and the Dunkel draft), the representative of Thailand

> *stressed that a very clear definition and circumscription of non-violation cases was necessary to permit national regulators to exert their widely-accepted prerogative of adapting regulatory systems to changes and evolutions in economic systems, especially given the recognition in draft Article VI that parties had the right to regulate.*[609]

This assertion hints that after the December text, states were apparently still searching for wording that would bring a higher degree of precision to the provision on domestic regulation. No matter how fundamentally important, recognizing the right to regulate alone can raise doubts about the precise content of such a notion. An operative meaning is more likely to be conveyed through additional clauses in the provision, such as those in Article VI of the December text. Yet, as the above statement from Thailand suggests, not all countries were satisfied with the wording of that provision in the December text. In light of this statement, it is curious that instead of expanding or refining the text of Article VI concerning the right to regulate, the drafters made a radical decision. As seen in the Dunkel draft, they

[609] GNS (Uruguay Round), Note on the Meeting of 27 May to 6 June 1991, MTN.GNS/42, 24 June 1991, para. 46.

chose not to seek better phrasing in Article VI and instead opted to relocate the provision recognizing the right to regulate to the preamble. Was this an indication of the impossibility of drafting Article VI to note the right to regulate in a manner satisfactory for the participants of the negotiations? There is no conclusive answer based on the available sources.

Recital 4 of the Dunkel draft is phrased nearly identically to the final version of the GATS adopted following the Uruguay Round. The only difference is editorial (aside from "Parties" later transforming into "Members," there was a change in the position of a comma used in the middle of the provision).

It is understood that after this December 1991 draft, no other version of the provision on the right to regulate was proposed or discussed during the negotiations. The negotiating records do not contain evidence to the contrary. This does not mean that the negotiations stopped there; there were still some issues to resolve before the Uruguay Round could be concluded in 1994, which took several more years. However, an overview of how this happened exceeds the goals set for this chapter.

Consequently, the provision on the right to regulate had crystallized by the end of 1991 to eventually become recital 4 of the GATS preamble.

Table 5: References to the Right to Regulate in the Consolidated Texts[610]

	Draft Multilateral Framework for Trade in Services (the July text) (23 July 1990, MTN.GNS/35)	Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (the December text) (3 December 1990, MTN.TNC/W/35/Rev.1)	Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (the Dunkel draft) (20 December 1991, MTN.TNC/W/FA)	GATS
Preamble	(left blank in the draft for the entire preamble section)	*Recitals 2 and 5:* The Parties to this Agreement, [Recognizing the sovereignty of national	*Recital 4:* <u>Recognizing</u> *the right* of Parties *to regulate*, and to introduce new regulations, on the supply of	*Recital 4:* *Recognizing the right* of Members *to regulate*, and to introduce new regulations, on

[610] Emphasis has been added to highlight references to the right to regulate in the provided excerpts.

		economic space;] … [Recognizing *the right* of Parties *to regulate*, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives, and the particular need of developing countries to exercise this right].* *Alternative to paragraph 1 of Article VI.	services within their territories in order to meet national policy objectives, and given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.	the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.
Main text	*Article VII(1). Domestic regulation:* *The right* of parties *to regulate* the provision of services within their territories, in order to meet national policy objectives, shall be exercised in a manner consistent with the provisions of the framework. This includes the right of signatories to introduce new regulations	*Article VI. Domestic regulation:* [1. Subject to the provisions of this Agreement, *the right* of Parties *to regulate* the provision of services within their territories in order to meet national policy objectives is recognized. This includes the right to introduce new regulations. It is recognized that, given the	(—)	(—)

	consistent with commitments under the framework. It is recognized that developing countries may have a particular need to exercise this right.	asymmetries existing with respect to the degree of development of services regulations indifferent countries, developing countries may have a particular need to exercise this right. Such right may include, inter alia, the granting of exclusive rights in certain sectors in order to implement national policy objectives.]* *See paragraph 5 of the Preamble.		

2.3.3.3 Preliminary Conclusions

2.3.3.3.1 The Genesis of the Right to Regulate in the GATS

Examining the negotiating history of a treaty is challenging when the *travaux* are poorly recorded and often unreliable. Although the GATS stands out compared to many other treaties with little to no sources for interpretation under Article 32 of the VCLT, its extensive preparatory work is similarly incomplete and erratic at times. Over a thousand pages of individual and collective communications, GNS meetings, drafts of the agreement, and other documents are available for examination. However, many crucial turning points undoubtedly occurred behind closed doors, leaving no records. Nevertheless, the final text was undoubtedly "the result of a carefully negotiated compromise that drew from a number of different

proposals, reflecting divergent interests and views."[611] Therefore, this section proceeds with the careful understanding that, although tracing the origin and development of the notion of the right to regulate appears possible, the contours of the outcome may not be as sharply defined as desired. The outcome is likely to leave room for speculation and ambiguity. In any event, the following main themes have been determined based on the analysis of the available negotiating history of the GATS during the Uruguay Round.

In the mid-1980s, the world economy became ready, perhaps for the first time in history, for the emergence of multilateral disciplines on international trade in services. During this period, developed countries realized that trade in services was a continually growing part of international trade that could greatly benefit from GATT-like liberalization efforts. For various reasons, this understanding was not uniformly accepted by countries with differing economic interests and capacities. Notably, developing countries were significantly less willing to embrace the creation of multilateral rules for trade in services. This attitude had a lasting impact on the Uruguay Round, leading to the separation of negotiating tracks between trade in goods and trade in services.

In 1986, the Uruguay Round was launched with the mandate calling for the creation of a multilateral framework of principles and rules for trade in services. Specific goals were established, including fostering the growth of developing countries. The outcome was intended to "respect the policy objectives of national laws and regulations applying to services."[612] While it did not explicitly mention the right to regulate, it was undoubtedly the starting point, acting as a filter through which this concept could eventually be introduced into future negotiations.

Developing countries were less versed in trade in services matters. Consequently, during the Uruguay Round, they initially tended to raise broader, more fundamental issues rather than detailed specifics, which they understood could provide additional protection to their interests. These countries likely pioneered the notion of the right to regulate in the context of creating the GATS. Brazil seems to have initiated the discussion of this notion by mentioning it in one of the first communications circulated among the negotiation participants.[613] Consequently, the discussion of the right to regulate, introduced by developing countries to serve their interests, was intertwined with other topics of concern: development, preservation of sovereignty, unfair regulatory asymmetries, and the right to introduce new regulations where developed countries had already exercised it. These all topics were addressed in the negotiations, contributing to the developing countries' desire to maintain control while navigating uncharted waters.

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[611] This quote, originally articulated by the Appellate Body concerning the final text of Article 11.9 and Article 21.3 of the SCM Agreement, aptly describes the formation of treaties, particularly multilateral agreements (Appellate Body Report, *US – Carbon Steel*, *supra* note 432, para. 90).
[612] Ministerial Declaration on the Uruguay Round, GATT MIN.DEC, 20 September 1986.
[613] Communication from Brazil, MTN.GNS/W/3, 11 March 1987, *supra* note 458, para. 1.

From the outset, there was a widely shared understanding that increasing the participation of developing countries in the world trading system was highly desirable. Despite debates on the precise implementation to be done concerning international trade in services, including specific modalities,[614] developed countries sought a compromise to ensure the comprehensive deal would not fall. For instance, the United States was the first developed country to embrace the notion of the right to regulate as a principle for the new agreement. Shortly after the negotiations began, it mentioned this notion in its paper on general ideas for the framework.[615] Gradually, other developed countries supported the mandatory inclusion of the right to regulate in their proposals for concepts to be reflected in the new agreement.

Despite this promising start, the right to regulate did not become a major issue in the negotiations. In its 51-page Glossary of Terms, which embodies delegations' relevant statements two years after the launch of the Uruguay Round, the GATT secretariat mentioned it only briefly.[616] Subsequent attempts to take stock of the negotiations, such as the outcome of the mid-term review of 1988 and the circulation of possible elements of the new agreement, also gave limited attention to the notion of the right to regulate.[617] As the right to regulate was not a major topic of discussion, it understandably did not make it comprehensively into the record. The lack of extensive discussions on this notion and its relevance to trade in services has proven to be a significant hurdle in understanding the rationale behind its invocation in the GATS during the preparatory work.

Yet, it appears that no active member of the GNS thought it appropriate to completely disregard the concept of the right to regulate, especially as seen from the draft agreements prepared during the first three or four years after the negotiations began. Between 1989 and 1990, six parallel proposals for the text of the new agreement were communicated by various countries, both individually and collectively. The plain wording of the respective provisions revealed that the drafters unanimously agreed that the recognition of the right to regulate must be included in the international agreement on trade in services. However, they differed

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614 T. P. Stewart, *The GATT Uruguay Round: a Negotiating History (1986–1992)* (1993), pp. 2360, 2366–2367.

615 Communication from the United States, Concepts for a Framework Agreement in Services, MTN.GNS/W/24, 27 October 1987, *supra* note 505, p. 2. (emphasis added) Australia later asserted that a broadly covered framework agreement should not result in "the loss by any country of its sovereign right to regulate" (GNS (Uruguay Round), Note on the Meeting of 31 October – 3 November 1988, MTN.GNS/18, 29 November 1988, para. 31).

616 Glossary of Terms/Inventory of Concepts and Points in Discussion, MTN.GNS/W/43/Rev.2, 25 October 1988, *supra* note 523.

617 See TNC (Uruguay Round), Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, MTN.TNC/7(MIN), 9 December 1988; TNC (Uruguay Round), Mid-Term Meeting, MTN.TNC/11, 21 April 1989; GNS (Uruguay Round), Draft, Elements for a Draft Which Would Permit Negotiations to Take Place for the Completion of All Parts of the Multilateral Framework, MTN.GNS/28, 18 December 1989.

on the precise content of the provision and its placement within the agreement. Despite the varied wording offered for the provision recognizing the right to regulate, the participants did not significantly deviate from one another; their views were relatively convergent, with no single draft presenting an entirely new perspective. Regarding placement, the drafts offered two options for noting the recognition of the right to regulate: either in both the preamble *and* the main text (specifically in the provision on the regulatory situation or, in later drafts, on domestic regulation) or in the main text only.

The ultimate convergence of the different views expressed in those drafts occurred when the chairman of the GNS took charge and presented the July text in 1990. From that point, the negotiators discussed a draft not authored by any single country, which was thus relatively free from the constraints of being the ultimate design of specific states, making it easier for all countries to agree. When the December text of 1990 emerged as the next version, the dilemma of where to place the provision on the right to regulate remained unresolved. However, the two options underwent a modest transformation: now the participants of the Uruguay Round had to choose between the preamble and the main text (Article VI on domestic regulation) as the appropriate place to accommodate the provision expressly recognizing the right to regulate.

When the Dunkel draft emerged in 1991, it became evident that the negotiators ultimately opted for the preamble, as the draft no longer referred to the right to regulate in the main text. The fourth recital of this draft's preamble became the sole provision devoted to the recognition of the right to regulate. Its wording did not undergo substantial changes until the very end of the Uruguay Round and, aside from editorial corrections, contained language nearly identical to that of the GATS concerning the recognition of the right to regulate. Hence, the Dunkel draft, specifically recital 4 of its preamble, can be considered the final iteration in the series of drafts recognizing the right to regulate before the GATS was ultimately adopted. No relevant discussions about this provision were recorded after the circulation of this draft. Therefore, the Dunkel draft marks the ends of the search for explanations of how the fourth recital of the GATS recognizing the right to regulate came to be.

2.3.3.3.2 Meaning Behind the GATS Right-to-Regulate Provision

The preparatory work for the GATS has provided valuable insights into the meaning of the fourth recital of its preamble. The examination of the negotiating history has revealed the prominent role played by developing countries in drafting the GATS provision related to the right to regulate. Even though the goal of trade liberalization naturally required the inclusion of its counterpart in the agreement, developing countries delivered a thrust that was necessary to incorporate the concept of the right to regulate into the GATS with its current wording. The developmental dimension of the right to regulate in the GATS has been elucidated.

It would be incorrect to assume that the recital of the GATS preamble concerning the right to regulate is an exclusively development-specific provision serving developing countries' interests under the special and differential treatment in the WTO. Like developing countries, developed countries also supported inclusion of such a provision in the new international agreement on trade in services. Consequently, the provision concerning the right to regulate was adjusted during the drafting process to be more general. For example, its clause regarding asymmetries between different countries initially referred to those between developing and developed ones. The adjustment ensured that all states have exercised their right to regulate differently, making this disparity relevant beyond the contrast between developing and developed countries.

The detailed results of the analysis of the *travaux* are presented in Table 6 below. This table breaks down the fourth recital of the GATS preamble into distinct elements, numbered as follows:

> … *Recognizing* (1) *the right of Members to regulate,* (2) *and to introduce new regulations, on the supply of services within their territories* (3) *in order to meet national policy objectives and,* (4) *given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;* …

For each element, it was possible to identify considerations likely taken into account during the negotiation of the provision. The introduction of these elements aimed to reduce the ambiguity that the provision could have had if it were only about the mere recognition of the right to regulate. The most efficient way to reduce ambiguity has proven to be expanding the provision's wording by including examples of the exercise of the right to regulate and additional explanations. Some of these elements, such as citing the granting of exclusive rights as an example of the exercise of the right to regulate, were lost along the way, while others remained part of the provision.

Equally intriguing in the study of the preparatory work was identifying what was lost during the development of the GATS. As demonstrated, this international agreement could have incorporated the recognition of the right to regulate in its main text (see Table 3, Table 4, and Table 5 above). Although this did not occur, the negotiators' efforts in designing a right-to-regulate provision for the GATS were not in vain. Recently, many RTAs and IIAs have begun to feature provisions using similar language to reaffirm the right to regulate in the main text. It is likely that the inclusion of such provisions is deliberately based on the experience from the Uruguay Round. Consequently, the considerations discussed above can help understand recent treaty practices under international trade and investment law. Ultimately, this finding highlights the precursor role of the GATS, adding a hidden layer to its significance.

Table 6: Elements of the GATS Right-to-Regulate Provision and Their Possible Origin

Elements under recital 4 of the GATS preamble	Plausible reasoning for the inclusion of each element in the GATS based on the preparatory work	Document(s) incorporating the element into the negotiations
"the right of Members to regulate"	As an undeniably sovereign domain, the right to regulate was invoked to help developing countries avoid conceding more during negotiations than they were prepared to. The invocation of this concept, also supported by developed countries, helped balance the outcome of the negotiations by providing a counterpart to the goal of progressive liberalization.	Communication from Brazil (MTN.GNS/W/3, 11 March 1987) Note on the Meeting of 15–17 September 1987 (MTN.GNS/10, 15 October 1987) Communication from the United States (MTN.GNS/W/24, 27 October 1987)
", and to introduce new regulations,"	A safeguarding clause guaranteeing that the outcome of the negotiations would not preclude developing countries from regulating new, emerging, or currently underdeveloped services sectors. In contrast, developed countries had already regulated their modern services sectors. Developing countries deemed it fair to explicitly reserve such a right; otherwise, regulatory asymmetries could not be fairly corrected.	Communication from Mexico (MTN.GNS/W/25, 3 November 1987)
"in order to meet national policy objectives"	As a corollary of developing countries' hesitation about including trade in services in the Uruguay Round, special attention was given to ensuring that the negotiations would not deviate from the mandate established in Punta	Ministerial Declaration on the Uruguay Round, 20 September 1986

	del Este. Thus, there was a reliance on wording referring to national policy objectives, which is associated with the concept of the right to regulate.	
"given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right"	Developing countries were concerned about assuming more obligations due to existing asymmetries. They opposed a negotiating outcome that would require them to open their markets while also preventing them from initially regulating nascent services sectors. This situation differed from that in developed countries, where it was assumed all services sectors had already been regulated, and therefore, these countries would only face obligations related to dismantling their existing regulations. Consequently, developing countries had a particular need to exercise the right to regulate by introducing new regulations, whereas developed countries were deemed to have largely exercised this right already.	Communication from Brazil (MTN.GNS/W/3, 11 March 1987) Communication from Jamaica (MTN.GNS/W/28, 24 November 1987)

2.3.3.3.3 The Preamble vs. Main Text Dilemma

One of the pivotal issues deserving separate discussion is the negotiators' hesitance regarding the proper placement of the provision recognizing the right to regulate within the GATS.[618] The assertive yet futile attempts by negotiators to incorporate the concept of the right to regulate in the main text may affect the understanding of its nature within international trade law and, given the broader relevance of the GATS, within international investment law as well. What do these changes in the wording and placement of the provision mean for the interpretation of the fourth

[618] See H. Hestermeyer, 'Preamble GATS', in R. Wolfrum et al. (eds.), *WTO – Trade in Services* (2008), pp. 20, 26–27.

recital of the GATS and the notion of the right to regulate mentioned therein? Interpreting these changes throughout the negotiations aligns with the Appellate Body's approach under Article 32 of the VCLT, which states that an amendment to a draft provision should not be assumed to be "merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen."[619] The absence of an explanation in the official record does not suggest such an oversight either.[620]

Firstly, no direct sources are available to trace the specific reasons behind the final decision to mention the right to regulate in the preamble. The discussions regarding the choice between the two options are not on the record. The only accessible sources are the succession of drafts and indirect statements from delegations on related topics. These statements revealed a sentiment among certain states that preambular language does not necessarily possess legally binding force and may be better suited for concepts lacking a clear operational meaning. This sentiment suggests that the choice between the preamble and main text could be linked to whether the provision possesses, can, or is supposed to possess an operational meaning. If the answer is positive, the main text could be more appropriate for accommodating it, as the main text typically contains all operative provisions of a treaty. Thus, it seems plausible that countries uncertain about the precise content of the provision recognizing the right to regulate would prefer placing it in the preamble, since featuring it elsewhere could create more ambiguity about the operation of the GATS.

This inclination to place a vaguely designed provision in the preamble is better understood in the context of treaty-making in international economic law at the time. Indeed, the operational meaning of a provision recognizing the right to regulate but only "subject to the provisions of this Agreement" might have been unclear and even redundant in the early 1990s. What is the additional value of such a provision if the recognized right, with no defined content, is immediately qualified to operate only within the treaty's confines?

At that time, few had experience interpreting and applying such treaty provisions because they were a rarity. Currently, right-to-regulate provisions are no longer an anomaly in the landscape of international economic agreements. As demonstrated in the first chapter, RTAs and IIAs have increasingly embedded such clauses in the main text. Some of these agreements similarly clarify that the right to regulate is valid when exercised in accordance with other provisions of the respective treaty. The recent report of the Arbitration Panel in *Ukraine – Wood*

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[619] Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11, p. 17. [hereinafter Appellate Body Report, *US – Underwear*] It is important to note that the Appellate Body's statement referred to treaties in force, not to the succession of drafts leading to the adoption of an agreement. The same principle on how to treat the *travaux* may also be relevant when different drafts of a single provision are discussed. See also Appellate Body Report, *US – Carbon Steel*, *supra* note 432, para. 90.

[620] Appellate Body Report, *US – Underwear*, *supra* note 619, p. 17.

Products and the award of the arbitral tribunal in *Infinito Gold Ltd. v. Republic of Costa Rica* can serve as guides to the operative meaning of such provisions in RTAs and IIAs, with the potential for cross-fertilization between them.[621]

Nevertheless, the available sources do not confirm the understanding that the lack of an operative meaning of a right-to-regulate provision was the definitive reason for its placement in the preamble of the GATS. While some participants may have distinguished the binding force of different parts of an agreement during the negotiations, none of their statements, explored in detail in the previous parts of the study, were made directly in relation to the right to regulate. Furthermore, the analyzed records do not suggest that participants who considered preambles of less legal value represented the majority. In any event, neither the VCLT nor customary law supports the contention that treaty language is automatically devoid of an operational meaning simply because it is in the preamble. Ultimately, the wording of the treaty provision determines its capacity to have an operational meaning.[622] Therefore, while the negotiators may have considered the preamble's conventionally neglected role, there is no conclusive evidence that this consideration prevailed.

At the same time, it would be remiss to overlook the plain wording and overall design of the provision on the right to regulate. In all known drafts, provisions have centered on recognizing that such a right exists, with auxiliary explanations of what its exercise may entail (*e.g.*, the introduction of new regulations) and the reasons for specifically noting this right in the agreement (*e.g.*, the asymmetries in the regulatory situations). By inserting it into the international agreement on trade in services, the drafters sought to *declare* the recognition of the right to regulate, *i.e.*, to make it widely known that the parties undertake the respective obligations while preserving their sovereign rights. Given its declaratory nature, such a provision could reasonably be expected to be part of the preamble.

However, there are examples of provisions in other WTO agreements that, using such logic, would have been better accommodated in their preambles but instead appear in the main text. For instance, Article 14 of the WTO Agreement on Agriculture simply reads: "Members agree to give effect to the [SPS Agreement]."[623] In *EC – Bananas III (Ecuador)*, the panel suggested that this language may serve the drafters' intention "to provide a complete overview of the Uruguay Round results in agriculture, since these matters are referred to generally in the preamble to the

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[621] For a detailed analysis of the final report of the Arbitration Panel in *Ukraine – Wood Products*, see Section "RTAs and the Right to Regulate" above. For an overview of the arbitral tribunal's award in *Infinito Gold Ltd. v. Republic of Costa Rica*, see Section "Explicit (Re)Affirmation of the Right to Regulate" above.

[622] However, it must be conceded that negotiators' perception of the potential legal and political effects of commitments contribute more to the final configuration of the treaty more than the actual legal effect of the respective provisions when they are in force.

[623] Agreement on Agriculture, Agreement Establishing the World Trade Organization, Annex 1A, 15 April 1994, 1867 UNTS 410.

Agreement."[624] Consequently, the overall design of the provision may not be dispositive in determining its proper place in the agreement.

Of particular interest is the choice of the provision deemed most appropriate for recognizing the right to regulate. Although the wording of Article VI of the GATS ultimately did not recognize the right to regulate, its consideration, along with that of its predecessors as an alternative in the Dunkel draft and previous texts, was anything but random. Since the start of the negotiations, and even long before that, participants pondered the nature of services and their trade to better understand whether GATT-like liberalization of trade in services was possible, and if so, in what form. One underlying issue complicating this exercise was that trade in services presented a new realm for all involved, quite different from the relatively well-known waters of international trade in goods liberalization. This was because, among many other reasons, "[s]ervices differ from trade in goods insofar they often require changes in domestic regulations."[625] Hence, the negotiators necessarily bore in mind that international trade in services is inherently more connected to the national regulatory situation and, in this vein, different from that in goods.

Moreover, the records indicate that no other provision of the GATS was as closely tied to the notion of the right to regulate as the one on domestic regulation. Surprisingly, the same holds true for provisions conventionally associated with the right to regulate, such as those on exceptions. For example, the connection between the right to regulate and the provision on general exceptions, which later became Article XIV of the GATS, was not significant enough for the negotiators to leave an insightful mark in the preparatory work.

In sum, the preamble *versus* main text dilemma that emerged during the negotiations confirmed the difficulty of defining and manifesting the right to regulate in treaty terms. The negotiators' oscillation between the two options was largely due to the lack of a clear-cut solution. However, the hesitation itself is probably not the most revealing issue exposed by the negotiating history in this regard. Instead, it is the inevitable link between the right to regulate as a concept under the GATS and its disciplines on domestic regulation that stands out. Connections with other GATS provisions, including general exceptions, have not surfaced in the *travaux* distinctly enough to draw any inferences. This indicates that the link to the disciplines on domestic regulation prevails, confirming that the right to regulate in the GATS is intended to positively impact national regulations and their development.

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[624] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:III, p. 1085, para. 7.125.

[625] D. Rodrik, 'What Do Trade Agreements Really Do?', 2 *Journal of Economic Perspectives* 32 (2018), p. 85.

2.4 Concluding Observations

2.4.1 The Right to Regulate in the GATS Preamble

The right to adopt and enforce legislation is inherent to the legal and political concept of sovereign states. Sovereignty distinguishes states from other entities by ensuring their independence in decision-making regarding the governance of their territory. This freedom is arguably no longer absolute, as their obligations under public international law often constrain it. When this occurs, the sovereign right to adopt and enforce legislation does not disappear. *Au contraire*, this discretion appears to be *de facto* omnipresent, thus affecting the scope of the respective rights and obligations arising from treaties or other international law obligations. However, the precise relevance will always depend on the nature of the obligations at issue and, more specifically, in the case of a treaty, the wording employed. The WTO disciplines on international trade in services are particularly fascinating in this regard, as they uniquely intrude into states' power to introduce domestic regulations. This might explain the explicit recognition in the GATS of WTO Members' right to regulate, which embraces the sovereign states' freedom to govern their territory. With this recognition comes a question about its exact meaning and specific relevance for the legal regime under the GATS and beyond.

At first glance, the recognition of the right to regulate in the GATS may seem entirely declaratory because it is provided in the preamble. This initial impression is strong since preambles are conventionally regarded as parts of treaties with no normative value. However, an examination of the role of preambles in treaty interpretation challenges this assumption. While preambular language may not always possess distinct content on its own, the wording used is dispositive of whether the preamble has normative value, *i.e.*, whether it can be considered a separate source of rights and obligations. The practice under the WTO and its predecessor, the GATT 1947, confirms this understanding. Furthermore, a preamble of a treaty, like any other provision, is subject to the process of treaty interpretation under the rules of the VCLT to establish its meaning. Therefore, a detailed study of the notion of the right to regulate in the GATS requires recourse to the interpretative instruments contained in the VCLT, primarily Articles 31 and 32.

According to the general rule of interpretation under the VCLT, the right to regulate in the context of the GATS means Members' right to take measures for the purpose of regulating trade in services within their territories, exercised to reach national policy objectives. The following are distinct aspects of the concept of the right to regulate under the GATS identified in this study:

- The right to regulate is exercised to pursue national policy objectives, which are not limited to those mentioned under Article XIV of the GATS on general exceptions as permissible goals. National policy objectives naturally

vary over time due to societal changes. Therefore, the right to regulate intrinsically possesses a dynamic nature.

- Being a dynamic concept, the right to regulate is not confined only to a Member's regulations existing at the time of accession to the WTO. Rather, the right to regulate has been explicitly recognized in the GATS to give momentum to the development of the regulatory framework, with the aim of reducing asymmetries between different countries. This involves advancing the quality, coverage, and density of regulations. Although the final wording of the provision is more neutral, its origins clearly show that special treatment of developing countries played a prominent role in the formulation of the concepts behind this provision. Initially, the provision referred to asymmetries between developing and developed countries, but the final text simply mentions asymmetries "in different countries".
- The exercise of the right to regulate is not synonymous with pursuing national policy objectives at the expense of trade liberalization under the GATS. The preparatory work contains little to no evidence that negotiators considered the right to regulate as referring primarily to situations where a GATS-inconsistent measure adopted in the exercise of this right could still be justified (for instance, when the conditions under Article XIV of the GATS are met).
- The *travaux* clearly connected the concept of the right to regulate with GATS provisions on domestic regulation. Article VI of the GATS and its predecessors were considered on an equal basis with the preamble as the proper place to accommodate a provision recognizing the right to regulate. Given this connection, the right to regulate under the GATS must be understood as having constraints related to the administration of existing regulations and their further development and improvement. Therefore, the developmental dimension is strongly present in the concept of the right to regulate under the GATS.

The explicit recognition of the right to regulate in the preamble impacts the interpretation and application of other GATS provisions. This preambular provision provides important context for them and helps determine the object and purpose of the entire agreement within the meaning of the VCLT. However, its precise effect may be modest, given that the counter-objective of progressive liberalization of international trade in services will also be considered. Consequently, in the search for balance under the GATS, any possible impact of the right to regulate would likely be offset by its counterpart among the objectives recognized by the preamble.

On a larger scale, the meaning of the right to regulate under the GATS preamble largely aligns with the special meaning assumed by this notion in international trade law, as set out in the first chapter. Similar to international trade law in general, the right to regulate under the GATS preamble is a vital consideration related to

national regulatory freedom and the balance struck in the GATS between competing goals, where preserving the right to regulate is one of them. Additionally, the preambular language does not have an operational meaning on its own. It does not function as a treaty exception of any kind and is expected to be exercised consistently with other GATS provisions. Given these parallels, the outcomes of both chapters are mutually reinforcing—the particular meaning of the concept in one sub-area of international trade law confirms the findings regarding the concept's meaning in the entire area and *vice versa*.

Most importantly, the preceding analysis, resting on the *travaux*, has revealed the dynamic character of the right to regulate, emphasizing the overall intention to advance regulations. As a result, this concept, which possesses the developmental dimension, aims to improve the quality, coverage, and density of regulations through the link to domestic regulation disciplines, considering the needs of developing countries but not limited to them. Achieving this goal is a difficult task. Probably, the recent successes in negotiations on services domestic regulation in the WTO will help revitalize the unique features of the right to regulate under the GATS preamble, as strongly suggested by the preparatory work for this international agreement.

2.4.2 Contextualizing the GATS Approach to the Right to Regulate

Concluded in 1994, the Uruguay Round achieved prodigious success, previously unknown in the international trade world. Among other achievements, this round of negotiations led to the creation of the first comprehensive multilateral international agreement on trade in services, something unimaginable ten or more years earlier.

Being the first comes with natural limitations. One of these is that the GATS negotiators did not have any compelling examples to draw from while deliberating on the necessary recognition of the right to regulate in the treaty text. The GATT 1947 did not contain any provision about regulatory space or the right to regulate that could inspire the negotiators. Similarly, IIAs offered little help: even though the notion of the right to regulate in the context of international investment law was already known, its full potential and practical relevance had yet to be realized. The *travaux* of the GATS do not contain references to the context of international investment law, and no deliberations were found linking the right to regulate to that context either.

Naturally, the drafters of the GATS did their best to develop a working solution satisfactory to all countries involved. As the negotiation history suggests, this was not an easy task given the lack of clarity about what that solution should be in practice. The demand for a right-to-regulate provision was present from the outset, but no one had a clear idea of what such a provision should look like, where it should be placed, and, most importantly, whether it could be operationalized at all. Embedded liberalism of the old GATT 1947 still prevailed, as the reaffirmation of

the right to regulate in the GATS did not become just another exception among the flexibilities integral to the new legal framework for disciplines on international trade in services.

As a result, the preambular recognition of the right to regulate in the GATS emerged as a novel and enigmatic provision with obscure meaning and practical relevance. Unsurprisingly, it remained so for a long time: its presence in the GATS did not yield groundbreaking results for the WTO legal regime.

Nearly 30 years after the creation of the GATS, it is timely to contextualize the special meaning of the right to regulate as derived from its preamble, according to Articles 31 and 32 of the VCLT. Indeed, studying the special meaning assumed by the right to regulate in one agreement inevitably raises the question of how that special meaning compares to the entire field and adjacent areas. For the GATS, this question necessitates a closer examination of the international trade and investment law regimes, given the unique stance of this Agreement in both fields.

First, concerning updates to the rulebook, there has not been significant development in the WTO that could be associated with the preambular recognition of the right to regulate in the GATS. The analysis in the first chapter demonstrates more progress of this kind in the realm of international trade law outside the WTO. Many recent RTAs include explicit right-to-regulate provisions and those that indirectly manifest this right. The same is true in the context of international investment law, since IIAs and investment chapters in RTAs often feature both types of such provisions. If the GATS recognition of the right to regulate was once an anomaly, it is now undeniably part of the current trend.

With all that in mind, it can now be argued that the GATS is the precursor of that trend. The later practice of RTAs and IIAs suggests that some of their right-to-regulate provisions could, in fact, be inspired by the GATS preamble. By a stretch of the imagination, it may also be argued that the drafters of these modern international agreements might have been aware of the draft provisions that were proposed and discussed but eventually excluded from the GATS disciplines on domestic regulation. These draft provisions are particularly remarkable because some aimed to introduce into the main body of the treaty the formula of expressly recognizing the right to regulate when exercised consistently with the rest of the treaty, as some international agreements routinely do today.

While these assertions are tempting, the evidence does not validate them conclusively. Naturally, the GATS is older than those RTAs and IIAs that explicitly refer to the right to regulate in their texts. Besides, comparing treaty texts for similarities in right-to-regulate provisions can make these contentions more plausible. However, no direct evidence has been found to provide further support. A study of the negotiating history of individual RTAs and IIAs could shed more light on this.

Be that as it may, the GATS has been at the vanguard of efforts to address states' sovereign concerns about regulatory freedom, as it explicitly recognized the right to regulate before the trend of RTAs and IIAs doing so. Its preambular language may

not be strong enough to have had a considerable impact on the operation of the entire GATS. Despite this, there is little doubt that its example has shown, directly or indirectly, one possible way to accommodate issues related to national regulatory space under international economic law.

Final Conclusions and Future Considerations

Conducting Research on the Right to Regulate

Studying the concept of the right to regulate is reminiscent of the following parable from *David Foster Wallace's* commencement speech to the graduating class at Kenyon College in 2005:

> *There are these two young fish swimming along and they happen to meet an older fish swimming the other way, who nods at them and says "Morning, boys. How's the water?" And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes "What the hell is water?"*[626]

Wallace continued with, "[t]he point of the fish story is merely that the most obvious, important realities are often the ones that are hardest to see and talk about."[627] This is exactly how the topic of the right to regulate in international economic law feels from a researcher's perspective. Just like water for fish, the right to regulate seems omnipresent in the related fields, especially in the international investment law discourse. This omnipresence has led to a paradoxical situation: while the concept appears in numerous scholarly books and articles, only a few discuss it meaningfully,

[626] This is Water by David Foster Wallace (Full Transcript and Audio), 2005 Commencement Speech to the Graduating Class at Kenyon College. URL: https://fs.blog/david-foster-wallace-this-is-water/.
[627] *Ibid.*

providing insights beyond the conventional wisdom that states enjoy regulatory freedom, but public international law can restrict it and sometimes does so excessively.

As demonstrated above, the recent proliferation of IIAs and RTAs has the sweeping capacity to transform the narrative surrounding this concept. This novel practice adds new tangible material to the topic, such as various treaty provisions that directly or indirectly manifest the right to regulate. Similar to the GATS preamble, some of these provisions contain an express recognition of the right to regulate, appearing not only in preambles but also in the main text. Still, the "fish" question largely remains unanswered: what is the meaning of the right to regulate in international economic law? Can a general theory of the right to regulate in this field provide an answer?

A theory built on the approaches to the right to regulate in international investment and trade law would be highly relevant in practice, given the apparent convergence between the two fields. The greater the degree of convergence, the more threatening the consequences of inconsistencies between the two regimes, which are supposed to work together harmoniously. This high-risk overlap is best illustrated by situations where the same measure could be challenged under both regimes, often yielding unsatisfactory results, as seen in the *US – Canada softwood lumber* and *US – Mexico sweetener* disputes under the WTO and the North American Free Trade Agreement (NAFTA).[628] Recently, the potential for these fields to intersect has increased due to the proliferation of RTAs with investment chapters, where international investment and trade rules coexist in a single legal regime. If these inconsistencies remain uncorrected, benefits arising from one area could be nullified or significantly impaired by the other. What would have happened if the plain packaging requirement had been found lawful in one area but not in the other?

A general theory of the right to regulate could become a vital tool for improving the system. Such a theory could thoroughly explain the value and practical relevance of this concept in its application to matters governed by international economic law. Its content might at least encompass the elements common to the special meanings assumed by the right to regulate in both international investment law and international trade law. However, the analysis of practice and doctrine confirms this study's premise that the conditions for developing a general theory are not sufficiently present. Thus, devising such a theory under the current circumstances would be an overly ambitious task. Therefore, this book has proceeded with a different intention in mind. This study aims to pave the way for this theory by *(1)* testing its overall feasibility and *(2)* highlighting the developmental dimension of the right to regulate as one of the hidden yet essential areas it could cover, in addition to the most obvious elements common to both areas.

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[628] See, for instance, J. Pauwelyn, 'Editorial Comment: Adding Sweeteners to Softwood Lumber: the WTO–NAFTA 'Spaghetti Bowl' is Cooking', 1 *Journal of International Economic Law* 9 (2006).

The Feasibility of a General Theory

In the first part of this research project, the feasibility of a general theory was examined by comparing the approaches of international investment and trade law regimes to the right to regulate, identifying their commonalities and differences. The shared origin of this concept served as a binding force enabling this comparison. Regardless of the special meaning the right to regulate eventually assumed in each field, states enjoy this right because they are *sovereign* entities.[629] The connection between sovereignty and the right to regulate, as revealed and explored, highlighted an additional perspective for understanding the latter. This perspective also involves considering state jurisdiction as another derivative of sovereignty, which could be confused with the right to regulate under public international law, as both refer to permissible state actions governing its territory. The main takeaway is that the right to regulate, in its broadest meaning, is fundamentally a corollary of sovereignty, and this should always be part of the understanding of this concept. In other words, sovereignty is the source of inspiration for the conceptual emergence of the right to regulate in international economic law, directly impacting its meaning and practical relevance.

The revealed origin of the right to regulate, common to both international investment law and international trade law, suggests that sovereignty may serve as the overarching linkage between them. Consequently, the particular meanings of the right to regulate in these areas are not alien to each other, despite their potential divergence. Moreover, the special meanings are fundamentally the same in that they both require due deference to sovereign decisions made to pursue the right to regulate. They may also overlap in many other essential aspects. Thus, sovereignty serves as the inevitable linchpin and the first building block for a general theory of the right to regulate in international economic law.

The preceding analysis has also highlighted the notable differences in the special meanings of the right to regulate in international investment and trade law, owing to the unique conception and evolution of each area.

The absence of broader flexibilities in the text of older IIAs has predetermined the development of the particular meaning of the right to regulate under *international investment law*. The right to regulate had long been primarily a defense tool in litigation, existing alongside treaty text. This legal right filled gaps by helping host states in investment disputes shield themselves from investors' claims. Its successful invocation was expected to lift the duty to compensate for the violation of international legal commitments. Consequently, discussions of the right to regulate were frequently confined to its customary and doctrinal content, utterly fragmented and scattered across the legal field, often fluid and intangible.

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[629] Entities other than states can also exercise the right to regulate within the scope of the competences transferred to them by sovereign states. In doing so, these entities effectively act based on state sovereignty.

This nebulous and elusive impression of the notion began to clarify after IIAs more efficiently manifested the right to regulate, both directly and indirectly. Since treaty provisions offer a better basis for objective interpretation and application, it has been argued that the particular meaning of the right to regulate in international investment law can now be deduced from these provisions, enabling a more internally coherent result. A brief assessment of these newly drafted provisions shows they remained faithful to the idea of balancing the rights and obligations of host states and investors, with a more appropriate representation of the former.

Accordingly, the discussion of the right to regulate in international investment law can now also focus on the interpretation and application of IIA provisions, where this right mostly manifests (see Table 1 above):

- treaty text in its entirety as a reflection of the overall balance between the rights and obligations under an IIA;
- substantive standards of protection under IIAs;
- NPM provisions and carve-outs that exempt a state from treaty obligations to follow certain substantive standards of protection in exceptional circumstances or concerning particular state measures;
- right-to-regulate provisions reinforcing this right by explicitly mentioning it in the preamble or the text of an IIA and emphasizing the relevance of non-economic policy objectives in the operation of such agreements.

In contrast, *international trade law* is strongly characterized by the self-sufficiency of its constituent treaties, as firm legal commitments were always counterbalanced by built-in flexibilities, whether exceptions, exemptions, or exclusions of various kinds. This initial self-sufficiency of international trade agreements has been a driving force in developing the particular meaning of the right to regulate in this area. Differently from international investment law, there was no need for a gap-filler. The role of defense in dispute settlement was assumed by treaty provisions such as GATT Article XX, GATS Article XIV, and those modeled after them, which are deemed to uphold states' right to regulate. Attempts by responding states to invoke such functions of the right to regulate in the applicable law, as seen in *China – Publications and Audiovisual Products* and other disputes, failed. Nevertheless, this does not mean that the concept of the right to regulate was without its place; regulatory freedom considerations have always been a concern.

Consequently, the special meaning assumed by the right to regulate in international trade law was not reduced to one primary function but became more nuanced. In addition to self-sufficiency and its manifestation in general exception provisions, this particular meaning can be defined as follows:

- The right to regulate has been considered in the balance struck under WTO agreements between trade liberalization efforts and the desire to maintain regulatory freedom.

- Neither the treaty text nor jurisprudence under the WTO and RTAs suggests that right-to-regulate provisions of any kind were designed to operate solely as exception clauses by virtue of expressly mentioning this notion.
- Furthermore, the adjudicative bodies of the WTO and RTAs have repeatedly confirmed that a state can exercise its right to regulate only as long as the outcome is not inconsistent with the respective international agreements.

As observed, international investment and trade law regimes have developed diverse views on the right to regulate. Are these two approaches reconcilable? The difference in their early functions—a defense in litigation *versus* an omnipresent sovereign property already expressed in consenting to international legal commitments—suggests a difficulty in this exercise.

A potential solution is to consider the apparent convergence between the two fields, influenced in part by the recent proliferation of RTAs with investment chapters. Convergence, by definition, is a dynamic process of moving from two different points towards one.[630] Naturally, there will be many stages in the process where the two converging systems may still be objectively considered worlds apart. Given this context, the current differences in approach are not insurmountable barriers in the present analysis. In fact, these differences intrinsically make alignment possible. After all, only contrasting elements can converge.

If answered positively, two questions and their elaboration can help consider the right to regulate as one of the points of convergence between international investment and international trade law (see Figure 1 below). First, has the approach to the right to regulate in both areas been evolving? Second, if so, are both fields heading in the same direction?

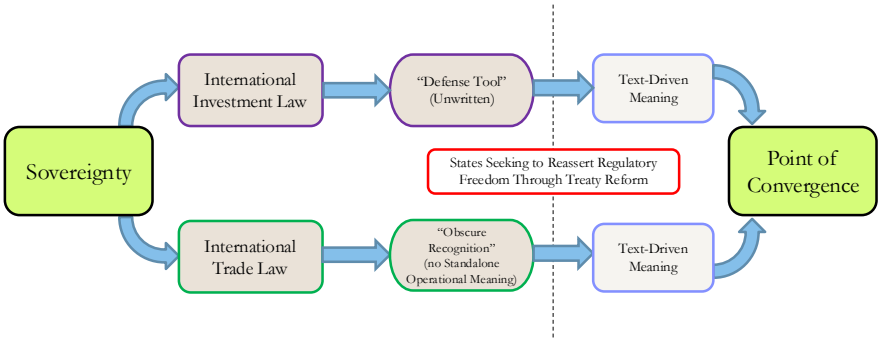
The analysis has demonstrated that the special meanings assumed by the right to regulate in these fields are not static. In international investment law, the right to regulate arose as a concept alongside treaty text, where its successful invocation could lift the obligation to compensate for a regulatory taking. Today, this concept thrives in treaty text and serves the broader function of restoring balance in IIAs. Through treaty language, this function is performed more objectively and in a more precise manner (see Table 1 above). In international trade law, the self-sufficiency of constituent international agreements prevented the right to regulate from emerging in a similar capacity to operating as an exception clause. Accordingly, its practical role, especially as evident from the jurisprudence of the GATT 1947 and the WTO, has long been minor. The evolution of RTAs has revitalized this concept in international trade law by embedding the right to regulate in their texts. Whereas previously the right to regulate could be neglected in treaty interpretation and

630 The OED defines convergence as "[t]he action or fact of converging; movement directed toward or terminating in the same point (called the point of convergence)" (OED Online, "convergence, n." (Oxford University Press, December 2021). (emphasis omitted)

application, it is now integral to the text and cannot be ignored in RTAs that expressly refer to it in preambles and main texts.

Answering the second question requires determining the trajectory of these developments in both fields. In international investment law, there seems to be a shift from an unwritten exception towards more nuanced treaty provisions that manifest the right to regulate, aiming to level the playing field for investors and host states. In international trade law, the potential of the right to regulate is being harnessed through its operational meaning in RTAs, although it does not equate to exception clauses, as suggested by *Ukraine – Wood Products*. In this context, it is important to note that the WTO is passing the baton to RTAs in this progression. Consequently, this analysis reveals a strong inclination in both fields towards juridification of the right to regulate and expanding the impact this concept may have on the operation of their respective treaty regimes. Assuming, for the sake of argument, that the particular meanings of the right to regulate in both areas began as opposites, they now appear to be moving towards a middle ground. As a result, the right to regulate has the potential to become another point of convergence between the two fields.

Figure 1: The Right to Regulate as a Point of Convergence Between International Investment Law and International Trade Law



Since the right to regulate can be considered a point of convergence between international investment and trade law, there are no formidable obstacles to the possibility of a general theory of the right to regulate in international economic law. Therefore, it is submitted that a general theory of the right to regulate in international economic law is feasible. Not only is this theory feasible, but it is also indispensable for the efficient operation of the entire field of international economic law. The emergence and practical application of this theory will help reduce complexities and potential conflicts in the overlapping areas of international investment and trade law when the right to regulate is exercised.

The Developmental Dimension of the Right to Regulate

The second chapter has substantiated the proposal that the developmental dimension of the right to regulate should be part of a general theory. This dimension is a hidden yet insightful lesson from the GATS, revealed in the study under Articles 31 and 32 of the VCLT, regarding the special meaning assumed by the right to regulate in the GATS preamble.[631]

Examining this WTO agreement does not exhaust the search for necessary elements of such a theory beyond common approaches in international investment law and international trade law. However, the choice of the GATS for these purposes was not incidental. This Agreement holds a unique position not only in international trade law but also in international investment law. For the former, it is the only WTO agreement that expressly recognizes the right to regulate, thus allowing an objective study of this concept as part of its treaty text. In later RTAs, the preambular language of the GATS became a true precursor to the subsequent practice in international trade law of embedding right-to-regulate provisions into new generation agreements. The GATS also appears to have influenced a similar practice in treaty drafting in international investment law. While no direct evidence conclusively establishes causation, the timeline suggests that the drafters of recent IIAs might have drawn inspiration from the GATS and its negotiating history, created significantly earlier in 1994.

The analysis of the GATS preamble demonstrates that the special meaning assumed by the right to regulate in this provision does not significantly deviate from that in international trade law. Similar to the entire field, the right to regulate here does not have an operational meaning on its own and, more specifically, does not function as a stand-alone exception. Moreover, recital 4 of the preamble meaningfully contributes to the balance struck in the GATS between the rights and obligations of WTO Members and can accordingly be utilized in the interpretation and application of other GATS provisions, serving as context or an element that helps discern the object and purpose of the entire agreement.

To a certain extent, the limited operational characteristic of this provision stems from its *preambular* position in the GATS, given that treaty preambles are conventionally regarded as incapable of containing enforceable rights and obligations. However, a closer look at public international law and the WTO legal regime suggests that more attention should be directed at the wording of the respective preambles rather than their status when interpreting and applying them. In any event, the plain language of the provision confirms that its drafters did not intend for it to be operational on its own.

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631 To ensure clarity, other approaches to studying the right to regulate under the GATS are also possible. These could include an examination of the overall design of the GATS, its inherent flexibilities, the balance it strikes between competing goals, or the general exceptions under GATS Article XIV.

Consideration of the preparatory work of the GATS, despite being legally unnecessary except to confirm the preambular meaning under VCLT Article 31, has proven most insightful in understanding how this provision came to be. The study of more than a thousand pages of the *travaux*, often hectic and incomplete, illuminate *the developmental dimension of the right to regulate*, which has been largely neglected and seldom recalled over time.[632] This development dimension entails the inherent dynamic character of the right to regulate. For instance, invoking this notion was never supposed to freeze the *status quo* when a new Member joins the WTO. On the contrary, WTO Members were encouraged to develop their regulations in terms of quality, coverage, and density.

Though developing countries pioneered this notion in the negotiating record and significantly contributed to drafting the corresponding provision in the GATS, this dimension of the right to regulate is not confined to the special and differential treatment of developing countries in the WTO legal regime. In fact, sovereignty concerns and the asymmetry between the regulatory situations in developing and developed countries were major factors in highlighting the right to regulate. However, the wording of the provision was adjusted to refer more generally to the asymmetry between *different* countries.

More importantly, the negotiators seriously considered including the right-to-regulate provision in the main part of the agreement as part of its domestic regulation disciplines, which later became Article VI of the GATS. Although they ultimately retained the preambular text, this deliberation denotes the strong link between the concept of the right to regulate and these disciplines, which contain a mandate for creating "new disciplines relating to domestic regulation for services that seek to … facilitate trade services worldwide."[633] Consequently, the right to regulate under the GATS should also be understood as possessing the quality expressed in its development dimension.

In light of the above, it is submitted that the developmental dimension of the right to regulate should be incorporated into the general theory of this concept in international economic law. Further development in this field can benefit from an enhanced understanding of the right to regulate as a vital tool in promoting national policy objectives, which vary greatly from state to state. This will serve all countries' needs by providing a legal framework for introducing more efficient domestic regulations tailored to country-specific national policy objectives.

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632 F. Morosini, 'Making the Right to Regulate in Investment Law and Policy Work for Development: Reflections from the South African and Brazilian Experiences', 2 *Investment Treaty News* 9 (2018); H. Mann, 'The Right of States to Regulate and International Investment Law: A Comment', in UNCTAD, *The Development Dimension of FDI: Policy and Rule-making Perspectives: Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002* (2003), pp. 216–218.

633 For an overview of GATS Article VI:4, which aims at developing "any necessary disciplines" as part of its mandate, see P. Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity* (2007), pp. 112–117.

Conclusions and Directions for Future Research

Even though the "water" may still remain somewhat opaque, as in *Wallace's* parable, this study sought to shed light on the interplay between international economic law and states' regulatory space, often referred to as the right to regulate. Developing a general theory could reduce complexities and potential conflicts where the exercises of the right to regulate under international investment and trade law regimes coincide in their effects. Such a theory would assist governmental authorities, practicing lawyers, and scholars in navigating the complex issues regulated by those areas and provide better solutions for evolving problems. A clear understanding of the right to regulate, shared by adjacent fields of international economic law, would lead to greater legal certainty and adherence to the rule of law.

As these problems continually emerge and demand solutions, it is essential to get a proper grasp of what the right to regulate is and what it is not. The right to regulate is often considered a key instrument for states to counter unwarranted attacks on their sovereign regulatory freedom. While its utility in this regard is undisputed and must remain so, there should also be limits built into this concept. Without any restraints, invoking the right to regulate in practice could resemble the operation of national security exceptions, frequently disrupting the ordinary course of economic activities and international relations more than solving problems.

It is important to remember that the concept of the right to regulate was always intended as a tool to alleviate the excessive tension between international legal commitments and sovereignty. This tension requires proper handling and is certainly one of "the most obvious, important realities" that is "hardest to see and talk about." However, the narrative of the right to regulate as merely a protective measure must change. Considering the right to regulate primarily as a defensive tool complicates matters because it presupposes the existence of conflict. As the study of the GATS and its negotiating history strongly suggests, the right to regulate is capable of much more than simply exempting states from obligations or reaffirming regulatory space in a declarative manner.

The right to regulate should serve as *a means of looking not only into the past* (has the state exercised its right to regulate in line with international legal commitments?) *but also into the future* (how can the legal framework be designed to accommodate changing public policy goals and positively affect a country's development?). The developmental dimension of the right to regulate can be pivotal in framing this forward-looking functionality in international economic law.

This study invites reflection on the proposal that the developmental dimension should be part of a general theory of the right to regulate in international economic law—a major lesson to learn from the GATS. Additional research and analysis are needed to define the precise contours of this theory, whose feasibility has been demonstrated. Future studies should also delineate the developmental dimension in concrete legal terms to give it a distinct operational meaning. For instance, this could be achieved by incorporating this dimension into new right-to-regulate provisions

in IIAs and international trade agreements, providing the necessary legal framework for the further development of the involved countries and territories. GATS disciplines on domestic regulation, combining substantive rules with a procedural framework for negotiations, could serve as a starting point in the search for framing the development dimension of the right to regulate in practical terms.

Hopefully, a general theory of the right to regulate in international economic law, built on these ideas, will provide necessary answers and support the continuous functioning of this interplay and the entire field.

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This book presents a comprehensive study of the right to regulate in international investment law and international trade law, with a focus on its growing recognition in modern treaties such as IIAs and RTAs. The ongoing convergence of these fields creates fertile ground for developing a general theory of this concept within international economic law. The study explores the feasibility of such a theory, placing particular emphasis on the often overlooked yet critical developmental dimension of the right to regulate, as evidenced by the GATS and its negotiating history. This analysis aims to provide scholars, practitioners, and policymakers with valuable insights for navigating complex regulatory issues. It also invites deeper reflection on how the right to regulate can evolve beyond its current role, potentially shaping future developments in international economic law.

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