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Fragmentation in international trade law: insights from the global investment regime

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Abstract: With World Trade Organization negotiations stagnant, and preferential trade agreements (PTAs) rapidly proliferating, international trade relations are shifting markedly toward bilateralism. The resulting fragmentation in the international trade regime poses serious risks to economic welfare and the coherence of international trade law. Similar challenges have been faced in the international investment regime, which is comprised of a highly fragmented network of bilateral investment treaties (BITs). However, scholars have identified several mechanisms that promote harmonization in the international investment regime. Among these are cross-treaty interpretation in dispute settlement and the inclusion of most-favoured nation (MFN) clauses in BITs. This paper assesses the scope for these two mechanisms to emerge in the international trade regime by comparing the legal framework, institutional dynamics, and political economy of the trade and investment regimes. The analysis suggests that cross-treaty interpretation is likely to emerge in the trade regime as PTA dispute settlement activity increases and that greater use of MFN clauses in PTAs is a viable possibility. These developments would mitigate the effects of fragmentation and advance harmonization in the international trade regime.

1. Introduction

With the Doha Round deadlocked and preferential trade agreements (PTAs) rapidly proliferating, there is considerable anxiety over the decline of multilateralism and the rise of bilateralism in international trade relations. As the negotiating impasse at the World Trade Organization (WTO) is unlikely to abate, ever more states are looking to PTAs to advance their export interests and economic liberalization. Over 300 PTAs are now in force. Scholars of international trade are increasingly turning their attention to how bilateralism and multilateralism can best be reconciled.[1]

Each additional PTA further fragments the sources of international trade law. Fragmentation can generate incoherence across the myriad treaties that form the body of international trade law, including PTAs and the multilateral WTO Agreements. Such incoherence may undermine the legitimacy of the international trade regime as a whole. Fragmentation in the sources of international trade law can also cause economic harm, by producing trade diversion and heightening the transaction costs faced by states and economic actors navigating the international trade regime.

In considering how to address fragmentation in international trade law, important insights can be drawn from the international investment regime, which is structured around 3,000 bilateral investment treaties (BITs) and lacks a substantive multilateral treaty. Despite this highly fragmented structure, Stephan Schill persuasively argues that international investment law has developed as a largely non-discriminatory, harmonious, and

conceptually coherent body of law.2

Schill identifies several mechanisms that drive harmonization in international investment law. Two of these are cross-treaty interpretation in dispute settlement and the inclusion of most-favoured nation (MFN) clauses in BITs. When international investment arbitration tribunals engage in cross-treaty interpretation, they interpret the governing treaty in light of other international investment treaties and prior arbitral decisions interpreting those other treaties. Another harmonizing force is supplied by the MFN clauses included in essentially all BITs. An MFN provision amounts to a promise by the granting state to the beneficiary state that any more advantageous investment treatment offered to a third state will be extended to the beneficiary state as well, equalizing the standard of treatment accorded to investments across the entire network of a state's BITs.3

This paper considers the potential for these two harmonizing mechanisms, cross-treaty interpretation and MFN clauses in bilateral treaties, to emerge in the increasingly fragmented landscape of the international trade regime. Section 2 of the paper surveys the role of bilateralism in international economic relations, and identifies several pressing consequences of fragmentation in international trade and investment law. Section 3 examines the widespread practice of cross-treaty interpretation in international investment arbitration and finds that a similar practice is likely to emerge in the international trade regime, promoting doctrinal coherence. The section considers both the legal framework for cross-treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT) and the non-legal drivers of cross-treaty interpretation in dispute settlement. Section 4 assesses the effect of MFN clauses in bilateral economic treaties and the varied patterns of their use in PTAs, finding that more extensive use of these clauses in PTAs is possible and would have a significant harmonizing effect on the international trade regime. Section 5 concludes.

2. The rise of bilateralism in international economic relations

2.1 The proliferation of PTAs and BITs

The explosive growth of PTAs has reshaped the institutional landscape of the international trade regime, moving away from multilateralism and toward bilateralism. With this shift, the institutional framework governing international trade has come to more closely resemble the international investment regime. Undoubtedly, there remain fundamental structural differences between the two regimes.4 Foremost among these is the longstanding multilateral governance of international trade law, from the inception of the GATT in 1947 to the creation of the WTO in 1994, and the absence of a substantive multilateral treaty on investment.5 Attempts to reach such an agreement on investment repeatedly failed, beginning with the abandoned Havana Charter of 1948 and more recently with unsuccessful attempts to negotiate the Multilateral Agreement on Investment (MAI) under the auspices of the Organization for Economic Cooperation and Development (OECD).6

The absence of a multilateral regime governing investment must be qualified in three ways. First, the treatment of international investment has been subject to obligations binding on

all states under customary international law (CIL) for centuries.7 However, the substance of CIL on investment protection is highly contested and has never been clearly defined.8 Over time, the importance of CIL for investment protection has been displaced by treaty obligations undertaken in BITs. Second, a number of multilateral treaties addressing related subjects also deal with particular elements of international investment law. For example, certain trade in services liberalization commitments under the General Agreement on Trade in Services (GATS) relate to the treatment of investment.9 Third, the international investment regime features robust procedural multilateral treaties governing the settlement of investment disputes. The 1966 ICSID (International Centre for Settlement of Investment Disputes) Convention provides an institutional framework for investor-state arbitration to which 156 countries are now party. However, the ICSID Convention imposes no substantive investment treatment obligations on member states.10

Bilateralism has long been the norm in international investment relations. From the eighteenth century, states entered into bilateral Friendship, Commerce, and Navigation (FCN) treaties, governing both trade and investment.11 Following World War II, efforts to create a multilateral institution governing investment failed when the Havana Charter was abandoned. Beginning with Germany in 1959, states began entering into BITs dealing exclusively with investment. These bilateral accords were signed with increasing frequency in the ensuing decades: roughly 75 were concluded in the 1960s, 90 in the 1970s, and 220 in the 1980s.12 In the 1990s, BIT formation rapidly escalated, and by the end of 2011, there were 2,833 BITs in force in addition to 331 other types of international investment agreements (generally bilateral in nature and often forming part of a PTA).13

The trajectory of bilateralism in the international trade regime has been more varied. Prior to the creation of the GATT in 1947, states regularly entered into bilateral treaties governing trade.14 For example, the 1860 Cobden-Chevalier Treaty between Britain and France, and the extensive United States FCN treaty program were all bilateral in nature. The creation of the GATT dramatically reshaped the international trade regime along multilateral lines, though states continued to go beyond multilateral commitments through bilateral accords addressing trade. GATT Article XXIV permitted the formation of PTAs, subject to certain disciplines. Consequently, a hybrid landscape of multilateral and bilateral governance developed in the international trade regime. Multilateral commitments were advanced through successive GATT trade rounds and the creation of the WTO in 1995; but states also pursued trade liberalization regionally, motivated by objectives ranging from the post-World War II political integration of Europe to frustration with the slow pace of multilateral trade liberalization.

Though the dynamic interaction of multilateral and regional trade governance is longstanding, there has been a marked shift toward bilateralism in the trade regime over the past two decades due to the proliferation of PTAs. Between 1948 and 1990, only 70 PTAs came into force. The pace of PTA formation then accelerated sharply, with approximately 300 PTAs in force by 2010.15 Among WTO Members, only Mongolia is not party to a PTA.16

As PTAs have proliferated, the nature of these agreements has evolved, revealing several emerging trends.17 PTAs are today more likely to be formed among developing countries.18 Roughly two-thirds of PTAs in force today are between developing countries,

compared with 20% in the late 1970s. Cross-regional PTAs19 are also becoming more common. Half of in-force PTAs are cross-regional, and this proportion is rising.20 Finally, PTAs increasingly involve deep integration among members. Deep integration PTAs include rules going beyond the scope of WTO commitments, affecting behind the border domestic policies in areas such as intellectual property, competition, investment, environment, labour standards, and human rights.21

The recent wave of PTA formation is driven in part by pessimism over the fate of the Doha Round. The difficulties in concluding the Doha Round relate to the changing balance of power in the global economy and the cumbersome institutional structure of the WTO. Many commentators argue that the WTO's structure must be reformed if future multilateral trade liberalization is to be achieved.22 Given the difficulty of undertaking such reforms, states will continue to pursue liberalization through PTAs. As they do, the trade regime increasingly resembles the investment regime, which has been structured around bilateral treaty relationships for decades.

2.2 Implications of fragmentation in trade and investment law

The rise of bilateralism in the international trade regime entails fragmentation in the sources of international trade law. This may have negative implications for both economic welfare and the conceptual coherence of trade law. First, economic welfare may suffer from fragmentation as the complex network of bilateral agreements heightens transaction costs for economic actors or produces trade diversion.23 Second, conceptual incoherence in international trade law can arise when two trade treaties impose conflicting obligations on a state (an issue discussed extensively elsewhere)24 or when similar trade law terms come to have substantially different meanings under different treaties. Two treaties may explicitly assign different definitions to the same trade law term, or dispute settlement panels may arrive at divergent interpretations of facially identical terms. Such incoherence in trade law doctrine across treaties is problematic in two respects. First, the transaction costs for economic actors to navigate the international trade regime are increased where terms are not given a common meaning across the entire regime. Second, the legitimacy of the international trade regime may suffer if seemingly identical trade law concepts have distinct, or even conflicting, meanings across the roughly 300 bilateral, plurilateral, and multilateral trade agreements.

Similar risks from fragmentation have been faced in the international investment regime, with its network of over 3,000 BITs. Each treaty may contain different standards of investment protection, and similar investment law terms may be given unique meanings across treaties by dispute settlement tribunals.25 As with fragmentation in international trade, this can have negative implications for economic welfare, by increasing transaction costs and diverting investment away from its optimal allocation,26 and for the conceptual coherence of international investment law across treaties, possibly undermining the legitimacy of the international investment regime.27

Despite the fragmented structure of the international investment regime, Schill compellingly argues that there is a strong countervailing tendency toward convergence and unity in the content of international investment law.28 Certainly, incoherence across the regime is observed in some areas, but this occurs to a far lesser extent than would be

expected from a regime organized around bilateral relationships. How such convergence has emerged from a structurally fragmented system may be highly relevant to understanding processes of harmonization and fragmentation in international trade law as PTAs continue to proliferate.

Schill identifies several mechanisms that promote coherence across the international investment regime, two of which are the practice of cross-treaty interpretation in dispute settlement and the inclusion of MFN clauses in BITs. Before turning to these in detail, a third harmonizing mechanism identified by Schill in the international investment regime should be noted and distinguished: nationality planning through corporate structuring.[29]

Corporate investors can change their nationality, and therefore the BIT governing their foreign investments, by reincorporating in another jurisdiction or channelling the investment through subsidiaries created in another jurisdiction. Most BITs assess the nationality of corporate investors based on the country of incorporation or the formally designated corporate headquarters, rather than where the corporation's operations are actually located or the nationality of shareholders. By restructuring to change nationality, the investor can effectively opt into the most protective BIT offered by the capital importing state. This capacity for treaty shopping by investors promotes harmonization in international investment law by undermining capital importing states' incentives to vary the level of investment protection offered under different treaties.[30]

The harmonizing mechanism of nationality planning through corporate structuring has no close analogue in the international trade regime, and therefore is not explored in detail in this paper. The rules of origin requirements that are ubiquitous in PTAs prevent exporters from easily restructuring operations to take advantage of the most favourable PTA offered by an importing state. The general principle underlying rules of origin is that a product will only receive preferential treatment if a sufficient proportion of the product's value was generated through activities within the territory of a party to the PTA. This means that nationality planning through corporate restructuring cannot alone enable an exporter to secure preferential market access under a PTA. The question is where the value is added to the product. Similarly, the benefits of a PTA cannot be accessed through transshipment. If country A has separate PTAs with countries B and C, but B and C do not have a PTA with each other, an exporter in B cannot access the market of C on preferential terms simply by routing the export through A. While a corporation's international production network could be restructured to secure preferential access under a PTA by complying with its rules of origin requirements, this would entail major transaction costs in physically shifting operations and altering supply chains, rather than simply reorganizing the legal structure of the corporation. Consequently, corporate structuring does not offer the same harmonizing potential in the international trade regime as it does with respect to international investment.

However, two other harmonizing mechanisms identified by Schill, cross-treaty interpretation and MFN clauses, may have far greater applicability to the international trade regime. The next two sections of this paper examine how these mechanisms operate in the international investment regime and the extent to which they may develop in the trade regime as the sources of trade law become increasingly fragmented.

3. Harmonization through cross-treaty interpretation

3.1 Cross-treaty interpretation in international investment law

Opportunities for convergence or divergence in the content of similarly worded treaties arise through dispute settlement, as investment arbitration tribunals must arrive at precise interpretations of vaguely worded obligations. BITs generally provide for investor-state arbitration by a dispute settlement institution, such as ICSID, or under a particular set of rules, such as UNCITRAL (United Nations Commission on International Trade Law) rules. Two features of the institutional design of investment dispute settlement are particularly susceptible to generating incoherence in international investment law. First, tribunals are mandated with interpreting the substantive obligations under a particular BIT governing the relationship between the parties, not the obligations existing between other states under unrelated BITs. Second, precedent does not formally bind arbitral tribunals, even where prior decisions have addressed precisely the same matter under the same BIT.

However, neither of these formal features of dispute settlement under BITs reflects the actual practice of arbitral tribunals.31 First, arbitrators frequently interpret the governing BIT in light of third-party treaties that do not bind the disputing parties.32 Tribunals refer to other BITs signed by one of the parties to the dispute to clarify that party's intention when concluding the governing BIT.33 They also compare the governing treaty with wholly unrelated BITs, to which neither of the disputing parties is a signatory, drawing interpretive conclusions by comparing different treaty texts.34

Second, arbitral tribunals consider the decisions of prior tribunals, including those interpreting third-country BITs. Indeed, a *de facto* system of precedent has emerged in investment treaty arbitration,35 and the precedents followed by tribunals are frequently derived from wholly unrelated BITs. Schill argues that the use of cross-treaty precedent 'creates intra-system communication and consistency'.36 Prior awards 'exercise, as a matter of fact, strong extra-legal constraints upon subsequent tribunals', and do so across the network of BITs.37 In this way, cross-treaty interpretation creates a discourse on the substance of international investment law that cuts across different treaty relationships, promoting the unity of the investment law regime as a whole.

The legal basis for cross-treaty interpretation in investment

The pervasive phenomenon of cross-treaty interpretation in investment arbitration is surprising from a traditional perspective of treaty interpretation, reflected in the interpretive rules of the Vienna Convention on the Law of Treaties (VCLT). As Schill explains, cross-treaty interpretation 'is problematic in view of the *inter partes* effect of international treaties, since using a third-party treaty as an interpretive aid can amount to either creating additional obligations, or conversely diminishing a right of one of the parties', in violation of Article 34 of the VCLT.38 This concern applies both to references to third-party treaty texts and to arbitral precedents arising under those third-party texts.39

Under the VCLT, there are limited circumstances in which cross-treaty interpretation may be permissible,40 but it is clear that tribunal practice frequently goes beyond the bounds of

the VCLT. Two interpretive rules are salient. First, it may be appropriate for tribunals to refer to third party treaties to determine the ordinary or special meaning of terms under Articles 31(1) and 31(4) of the VCLT. When referred to in this way, third party treaties are used like dictionaries, clarifying the meaning of the treaty terms that the parties selected.41 As McLachlan explains, treaties do not exist in a legal vacuum and 'some reference must be made to the surrounding legal system which defines the obligations assumed by the parties'.42 However, tribunals' use of third-party treaties regularly goes beyond this dictionary function, for example by considering third-party treaties drafted years after the treaty under interpretation. Subsequent treaties could not possibly have been in the minds of the drafters, and therefore are not probative of the legal meanings that they intended.43

Second, Article 31(3)(c) of the VCLT requires tribunals to interpret obligations in the governing treaty in light of 'any relevant rules of international law applicable in the relations between the parties'. However, BITs between completely different parties or involving just one of the parties to the dispute do not fall within the scope of this rule because they are not applicable between the parties.44 Nevertheless, investment tribunals frequently refer to such third-party BITs, going beyond what is permissible under Article 31(3)(c).45

It is clear that investment arbitration tribunals frequently operate outside the traditional interpretive rules set out in the VCLT. Paparinskis describes the observed interpretive methods as a 'vernacular *prima facie* reaching further than the traditional approaches'.46 An extreme expression of this vernacular was evident in *Saipem* v. *Bangladesh,* where the tribunal opined that while not bound by previous ICSID decisions, 'it must pay due consideration to earlier decisions of international tribunals' and 'has a duty to adopt solutions established in a series of consistent cases'.47 It is difficult to reconcile such a view with the interpretive rules of the VCLT.

Non-legal drivers of cross-treaty interpretation in investment

Despite the often tenuous legal basis for cross-treaty interpretation in investment arbitration, Schill observes that any 'purely positivistic critique of the practice of investment tribunals would have difficulty in changing the behaviour of tribunals'.48 Tribunals have strong incentives to engage in cross-treaty interpretation because of the structure of the international investment regime and the demands of states and investors for coherence across the system.

First, the existence of thousands of highly similar BITs makes it extremely tempting for tribunals to draw comparative conclusions across these agreements.49 Second, the vagueness of many substantive BIT obligations, such as 'fair and equitable treatment', provokes tribunals to look to previous interpretations of similar provisions for clarification, even where the available precedents are established under third-party BITs.50 Indeed, a *de facto* system of precedent cutting across treaty lines has emerged in the international investment regime.

The incentives for tribunals to draw upon precedents established under third-party BITs are reinforced by the existence of a focal point institution for investment dispute resolution: ICSID. There is no *de jure* reason for ICSID investment arbitration tribunals to interpret

similar obligations arising under different BITs in the same way;51 ICSID merely provides common procedural rules for arbitration, while substantive investment obligations arise bilaterally under BITs. Nevertheless, the Jeffery Commission argues that consistency in ICSID jurisprudence is encouraged by an *esprit de corps* among ICSID arbitrators.52 The repeat appointment, similar education, and professional encounters of arbitrators all support the development of 'progressive continuity' in ICSID jurisprudence.53 However, ICSID institutional identity cannot fully account for cross-treaty interpretation in investment. ICSID tribunals regularly cite precedents set under other investment arbitration procedural frameworks, such as UNCITRAL. The converse is also true, with decisions under UNCITRAL frequently citing ICSID jurisprudence.54 In this way, the system of *de facto* precedent and the phenomenon of cross-treaty interpretation in the international investment regime are not confined to one procedural institution.

3.2 The proliferation of PTAs and cross-treaty interpretation

Could a similar practice of cross-treaty interpretation emerge in the trade regime to promote system-wide coherence despite the increasingly fragmented sources of international trade law? The answer to this question remains unsettled, in large part due to the limited interstate55 dispute settlement activity that has occurred under PTAs.56 Most PTAs provide for dispute settlement through *ad hoc* panels, convened to adjudicate a single dispute.57 By 2011, there were only 25 known *ad hoc* panel decisions for interstate disputes across all PTAs.58 Some PTAs do not provide for dispute settlement through *ad hoc* panels, but through a permanent supranational court or tribunal structure, which may have jurisdiction over a broad range of issues relating to regional integration. Prominent examples include the European Court of Justice (ECJ) and the Andean Tribunal of Justice (ATJ).59 With the exception of these two bodies,60 other permanent supranational courts or tribunals have been largely inactive in settling disputes arising under PTAs.61 Given the limited interstate dispute settlement activity under PTAs to date, the WTO dispute settlement system is the dominant producer of jurisprudence on interstate trade law disputes.62

However, it is probable that interstate litigation under PTAs will become more prevalent in the coming years. First, as the number of PTAs proliferates, so too does the potential for interstate litigation under PTA law. Second, PTAs are shifting away from informal, diplomatic systems of dispute resolution to legalized dispute settlement through *ad hoc* panels.63 Third, many PTAs have only been recently concluded, and the implementation of their most controversial aspects has yet to occur.64 As contentious elements of PTAs are progressively implemented, more dispute settlement activity under PTAs may be observed. Fourth, the alternative of WTO dispute settlement will not be available to states litigating disputes on issues covered by PTAs but not covered under WTO law. As noted above,65 PTAs increasingly pursue deep integration by including issue areas not covered by the WTO Agreements (such as competition law and environmental and labour standards).66 Interstate litigation in these areas will necessarily be undertaken through PTA dispute settlement machinery, as the alternative of filing a complaint at the WTO will be unavailable.

As PTA dispute settlement activity rises, so does the potential for fragmentation in international trade law jurisprudence across treaties, both multilateral and bilateral.

However, it also creates the opportunity for a practice of cross-treaty interpretation to emerge that would counter fragmentation and promote coherence, as it has in the international investment regime.

The current practice of WTO panels and the Appellate Body with respect to cross-treaty interpretation is mixed. WTO dispute settlement bodies have interpreted the WTO Agreements in light of non-WTO treaties, even where the legal basis for doing so under the interpretive rules of the VCLT was unclear.67 For example, in *US - Foreign Sourced Income,*68 the Appellate Body engaged in cross-treaty interpretation to determine the meaning of 'foreign sourced income' in the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Appellate Body interpreted the term in light of a common approach found in a number of bilateral and multilateral treaties addressing double taxation, but it did not explain the legal basis for doing so under the VCLT. Additionally, in *Mexico - Taxes on Soft Drinks,*69 the Appellate Body left open the possibility that Members' obligations under a PTA could pose a 'legal impediment' to a WTO panel ruling on the merits of a claim. While the Appellate Body did not clarify what such legal impediments might be, this could entail cross-treaty interpretation if a WTO panel interpreted its jurisdiction under the WTO Agreements more narrowly based on the text of a PTA (for example, by having regard to a PTA forum selection clause). These examples suggest a willingness by WTO dispute settlement bodies to engage in cross-treaty interpretation through reference to the text of external treaties, as is observed in the investment regime.

Yet, unlike investment arbitration panels, WTO panels and the Appellate Body have seldom made reference to precedents generated by other tribunals interpreting non-WTO treaties. Busch argues that the absence of citation to non-WTO jurisprudence indicates that precedents established in one trade dispute settlement institution do not spill over into another, such that 'one can speak meaningfully about separate bodies of *de facto stare decisis* at the WTO and NAFTA [North American Free Trade Agreement]'.70 If the operation of *de facto stare decisis* in the international trade regime is indeed confined within individual treaty bodies, then a process of cross-treaty interpretation with reference to precedents established under other treaties, as seen in the international investment regime, is unlikely to emerge.

However, the view that WTO and PTA dispute settlement bodies are disinclined to consider each other's case law is unwarranted. The small number of WTO panel and Appellate Body references to PTA case law is best explained by the limited extent of PTA dispute settlement activity, as noted above.71 Moreover, there are already several instances in which WTO dispute settlement bodies have referred to the trade jurisprudence of regional dispute settlement institutions. Decisions of the ECJ were relied upon by the Appellate Body in *EC-Bananas III*72 and by the panel in *US-Gambling.*73 Notably, in *US-Gambling,* the WTO panel's interpretation of the GATS Article XIV(a) public morals exception was supported with reference to ECJ jurisprudence concerning an equivalent provision in the EC Treaty. This is a clear example of cross-treaty interpretation at the WTO, and tribunal jurisprudence having precedential effect across institutional boundaries.74

With respect to PTA tribunal consideration of multilateral precedents, Busch contends that PTA tribunals generally do not refer to case law generated by WTO panels and the Appellate Body.75 He notes that references to WTO case law in NAFTA Chapter 20 interstate disputes 'have been ad hoc and controversial, rather than setting expectations about the

institution's *de facto stare decisis* '.76

This is not a fair characterization of the NAFTA interstate dispute jurisprudence.77 Although there have only been three decided Chapter 20 cases on which to base any assessment,78 the NAFTA panels in all three cases cited GATT/WTO case law. In *Cross Border Trucking Services,*79 the NAFTA panel held that GATT/WTO jurisprudence on the GATT Article XX general exceptions provisions 'proves helpful in determining what "necessary" means' under the NAFTA Article 2101 general exceptions provision.80 Similarly, the NAFTA panel in *Broom Corn Brooms*81 drew an analogy to a GATT panel decision82 in finding that the International Trade Commission violated NAFTA requirements concerning the sufficiency of reasons.83 The panel also considered GATT/WTO case law on like product determinations84 and the requirements for adequacy of notice.85 Finally, the NAFTA panel in *US-Origin Agricultural Products*86 stated that exceptions to trade liberalization obligations must be viewed with caution, noting that the 'principle that exceptions to general obligations are to be construed narrowly is well accepted in the interpretation of the GATT'.87

The foregoing examples show that cross-treaty interpretation is already occurring in the trade regime. How far the practice will develop will only become clear as PTA dispute settlement activity grows. Both the legal framework of treaty interpretation and the institutional features of the international trade regime will bear on whether a robust practice of cross-treaty interpretation, akin to that observed in the investment regime, will emerge. This issue has not yet been examined in the scholarly literature and is considered in the following sections.

The legal basis for cross-treaty interpretation in trade

The VCLT rules concerning cross-treaty interpretation described above for international investment law also apply to international trade law. Cross-treaty interpretation under VCLT Article 31(1) and 31(4), to clarify the ordinary or special meaning of words, operates in a similar manner in the international investment and trade regimes. Under these rules, WTO or PTA panels may be justified in relying upon third-party treaties (whether regional or multilateral) to the extent that they elucidate the meaning of treaty terms selected by the parties at the time of drafting.88

However, another possible justification for cross-treaty interpretation under the VCLT, Article 31(3)(c), has substantially different implications in the international trade regime. This rule requires tribunals to interpret the governing treaty in light of 'any relevant rules of international law applicable in the relations between the parties'. As noted above, this rule does not justify cross-treaty interpretation across BITs, since other BITs will involve different parties, and will therefore not constitute rules of international law applicable between with parties within the meaning of VCLT Article 31(3)(c).89 However, applied in the international trade regime, Article 31(3)(c) does permit and indeed requires cross-treaty interpretation, but only in one direction. PTA tribunals are essentially always required to interpret PTA obligations in light of relevant WTO law. However, WTO tribunals cannot rely on this rule to justify consideration of PTA law, nor can PTA tribunals rely on this provision to justify consideration of third-party PTAs.

This unidirectional basis for cross-treaty interpretation under Article 31(3)(c) results from

the article's relational requirement: the external international law obligation relied on as an interpretive aid must be one that is applicable in the relations between all parties to the treaty under consideration. For any given PTA, all parties to the PTA are also likely to be WTO members. Therefore, a PTA tribunal is required under Article 31(3)(c) to interpret the governing PTA in light of relevant and applicable WTO law.90 However, the PTA tribunal could not interpret the governing treaty in light of another PTA under Article 31(3)(c) because, in almost all situations, not all parties to the governing treaty would also be party to the other PTA. Similarly, the rule would not justify consideration by a WTO tribunal of PTA law or jurisprudence when interpreting the WTO Agreements, because not all WTO Members will also be members of the PTA.91

In summary, the rules of the VCLT are more conducive to cross-treaty interpretation in the international trade regime than in the international investment regime in one important respect. While Article 31(3)(c) cannot justify cross-treaty interpretation in the international investment regime, it effectively demands that PTA tribunals interpret their governing treaties in light of WTO law.

Non-legal drivers of cross-treaty interpretation in trade

The experience of the international investment regime suggests that the interpretive practice of WTO and PTA tribunals will not be confined by the rules of the VCLT. The institutional landscape, the content of the treaties under interpretation, the conduct of the disputing parties, and the identity of the parties can also encourage or discourage cross-treaty interpretation. On balance, these factors suggest that the incentives for cross-treaty interpretation in the international trade regime are weaker than in the international investment regime, but nevertheless remain significant. They indicate that in the short-run, the most likely form of cross-treaty interpretation to emerge is PTA tribunals citing WTO precedent, but that in the long-run inter-PTA citation and WTO reliance on PTA jurisprudence could also expand.

The institutional landscape. Though there is no formal legal hierarchy between WTO and PTA dispute settlement tribunals, WTO institutions occupy a perceived position of pre-eminence. The perceived legitimacy of WTO dispute settlement is heightened by its well-developed jurisprudence, robust appellate review (with the creation of the WTO Appellate Body in 1995), reputation for neutrality and technical expertise, and most importantly by the WTO's broad multilateral membership.92 This *de facto* hierarchy may encourage PTA tribunals to look to WTO law as an interpretive guide, but discourage WTO tribunals from relying on PTA law.93 This contrasts with the horizontal relationship between investment tribunals resolving disputes under BITs. A similar horizontal relationship exists among PTA tribunals. However, they may be less likely than investment tribunals to cite each other's precedents because they lack a common procedural regime for dispute settlement, such as ICSID, which may foster an *esprit de corps* among arbitrators,94 encouraging coherence across ICSID jurisprudence irrespective of the BIT under interpretation.95 Yet the community of potential international trade panellists is also quite limited, and an *esprit de corps* could develop within this epistemic community even in the absence of a unifying procedural institution.

The content of PTAs. The scope for cross-treaty interpretation in the trade regime may be

more limited than in the investment regime because of greater divergences in the content of trade agreements. However, the similarities in content across PTAs should not be understated. Nearly all trade agreements make reference to common trade concepts such as national treatment, most-favoured nation treatment, and safeguards. Such similarities in content create scope for cross-treaty interpretation among PTA and WTO tribunals.

Increasingly, PTAs address deep integration issues not covered in the WTO Agreements, such as competition and human rights, encouraging cross-treaty interpretation among PTAs rather than between PTAs and the WTO.96 When PTA tribunals are faced with disputes engaging these issues, there will be an absence of directly relevant WTO jurisprudence. They may therefore turn to the jurisprudence of other PTA tribunals for interpretive guidance. PTA tribunals, rather than the WTO, will be the leading generators of jurisprudence in these rapidly developing areas of deep integration not governed by the WTO but increasingly covered in PTAs. In these new areas of economic integration, a substantial body of PTA jurisprudence can be expected to develop. If such deep integration issues are ultimately brought within the ambit of WTO law, WTO panels and the Appellate Body seeking interpretive guidance will have strong incentives to look to PTA precedents, encouraging the flow of trade law norms from PTAs to the WTO.97

The conduct of disputing parties. The conduct of the disputing parties will also be an important determinant of cross-treaty interpretation in the international trade regime. State parties to a trade dispute may cite jurisprudence arising under unrelated trade agreements for rhetorical effect, to illustrate how other tribunals have applied similar trade law concepts to similar fact patterns. Given the limited volume of PTA dispute settlement activity, parties will inevitably have to look beyond disputes arising under the governing treaty for such examples. Tribunals are then likely to feel compelled to respond to these comparisons when issuing their judgment, despite their lack of legal significance under the governing BIT. This has been evident in the international investment regime.98 For example, in *El Paso* v. *Argentina,*99 an ICSID tribunal stated that it was reasonable to consider the decisions of other international tribunals, 'especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent'.100

The identity of the parties. An important distinction between the trade and investment regimes is the identity of the parties. Most BITs provide for investor-state dispute settlement, while private economic actors do not have standing in trade disputes under the WTO and most types of trade disputes under PTAs.101 While this should not impact the tendency of tribunals to engage in cross-treaty interpretation, it does result in far more dispute settlement activity in the international investment regime, since decisions by investors to litigate are not tempered by diplomatic considerations. This larger body of jurisprudence then facilitates cross-treaty interpretation, in contrast to the limited current PTA jurisprudence constraining the dialogue between trade tribunals. As dispute settlement activity under PTAs increases, this constraint will be eased, but these tribunals are never likely to be as active as investor-state investment arbitration panels.

3.3 The expected rise of cross-treaty interpretation in trade

Though the practice of cross-treaty interpretation is not yet firmly established in the international trade regime, it is likely to develop in the coming years as PTA dispute

tribunals become more active. The legal scope for cross-treaty interpretation is arguably greater for the international trade regime than the international investment regime, since VCLT Article 31(3)(c) effectively requires PTA tribunals to consider relevant and applicable WTO law, but does not justify cross-treaty interpretation between BITs. Both the VCLT legal framework and the *de facto* hierarchy of trade institutions suggest that trade law norms will tend to flow from the WTO to PTAs. Such a hub-and-spoke model would be particularly effective in countering fragmentation in the international trade regime. However, as PTA dispute settlement activity grows, there will be greater potential for horizontal dialogue between PTA tribunals, analogous to that occurring between BIT tribunals. This will be most likely when disputes involve deep integration issues beyond the scope of the WTO Agreements and therefore of WTO jurisprudence.

4. Harmonization through MFN clauses

Another important insight to be drawn from the international investment regime concerns MFN clauses. The use of unconditional MFN clauses in PTAs has been suggested as a way to mitigate fragmentation in the international trade regime as PTAs proliferate.[102] Such clauses are standard features of BITs, and have served an important multilateralizing function in the international investment regime.[103]

MFN clauses guarantee that the parties will extend to each other the most favourable treatment granted to any other state. There are two forms of MFN treatment: conditional and unconditional.[104] For more favourable treatment to be extended to a trading partner under a conditional MFN clause, that partner must provide equivalent concessions in return. In contrast, an unconditional MFN clause automatically extends to the beneficiary trading partner any more favourable treatment accorded by the granting state to a third-party state by incorporating into the governing treaty more favourable terms offered to the third-party.[105] As Pauwelyn explains, an unconditional MFN clause could be included within PTAs such that 'whatever PTA parties have conceded *in the past* or may concede in a *future* PTA must also be extended to the current PTA partner(s)'.[106]

The use of MFN clauses in PTAs is currently limited. While these provisions are not uncommon in PTA services and government procurement chapters, they are almost never included in trade in goods chapters.[107] However, the inclusion of MFN clauses in trade in goods chapters is not inconceivable. Historically, MFN clauses covering trade in goods were regular features of pre-GATT trade agreements and, more recently, were included in the Economic Partnership Agreements (EPAs) between the EC (European Communities) and ACP (African, Caribbean, and Pacific) states.

The variable use of unconditional MFN clauses between the investment and trade regimes, and within trade agreements across time and issue area, presents a number of puzzles requiring further research. This section offers some initial observations about the use of unconditional MFN clauses in the trade and investment regimes today, their historical use in the trade regime, and the potential implications for the global trading system if unconditional MFN clauses are included more broadly in PTAs.

4.1 MFN in the investment regime

The fragmented structure of the international investment regime suggests that standards of investor protection could vary considerably across different treaties. Indeed, there are textual variations across agreements, reflecting negotiated outcomes between different dyads of states and the evolution of state preferences over time.[108] Despite these variations, investors enjoy highly similar substantive treatment across the global network of BITs. This is due in part to the effect of unconditional MFN clauses, found in essentially all BITs. As Schill explains, 'MFN clauses have the effect of multilateralizing the substantive standards of treatment and prevent differentiated, preferential, and discriminatory treatment among investors from different States.'[109] MFN clauses in BITs enhance global welfare by removing market distortions arising from different levels of investment protection being accorded to investors from different countries.[110] They also eliminate transaction costs that would arise if states had to constantly renegotiate previous agreements to update and harmonize levels of investor protection.

Practically, MFN clauses enable an investor covered by a BIT with an MFN clause to 'invoke the benefits granted to third-party nationals by another BIT of the host State and import them into its relationship with the host State'.[111] Importing substantive investor protections through MFN is legally uncontroversial.[112] This is reflected in the arbitral jurisprudence, including cases such as *MTD* v. *Chile,*[113]*Pope & Talbot* v. *Canada,*[114]*Rumeli* v. *Kazakhstan,*[115]*ATA* v. *Jordan,*[116] and *White Industries* v. *India.*[117]

The inclusion of MFN clauses also impacts the drafting of BITs by neutralizing state incentives to alter or restrict investor protections. Such restrictions would simply be undone through the operation of MFN. In this way, MFN clauses play a causal role in producing the highly convergent standards observed across BIT texts. However, some states have reacted to the constraining effect of MFN by including sectoral carve-outs and temporal limitations in unconditional MFN clauses. For example, Canada's most recent model BIT excludes from the MFN provision all treaties previously in force at the time a new BIT is signed, enabling Canada to 'ratchet down' investor protections with each subsequent BIT while still guaranteeing investors that they would benefit from any more advantageous treatment offered in later BITs.[118] Most states have not limited the unconditional MFN clause in their BITs in this way.

4.2 MFN in the trade regime

Though the use of MFN clauses in PTAs today is relatively limited, these provisions were prevalent in bilateral trade agreements before the creation of the GATT. Conditional MFN was the dominant form used in trade agreements in the late eighteenth and early nineteenth century, accounting for 90% of all MFN clauses in treaties until 1860.[119]

At that point, a shift in state practice occurred and unconditional MFN clauses became more prevalent. Schill suggests that the transition to unconditional MFN reflected the high cost and complexity of administering the system of conditional MFN, given the need to constantly renegotiate concessions between states.[120] However, the export interests of Britain, the dominant trading power, were also an important cause of the transition to unconditional MFN. When negotiating the 1860 Cobden-Chevalier Treaty with France, Britain - which had already undertaken substantial unilateral trade liberalization - insisted on an unconditional rather than conditional MFN clause. With its markets already highly

liberalized, it would have little to bargain with to obtain further concessions if France made a more advantageous trade pact with another partner.121 In the years following Cobden-Chevalier, unconditional MFN became dominant, resulting in substantial trade liberalization throughout Europe.122

In the inter-war period, unconditional MFN clauses again served an important function in international trade agreements. In the 1920s, the US abandoned its insistence on the conditional form of MFN in its commercial treaties.123 The 1927 International Economic Conference advocated the inclusion of unconditional MFN clauses, free of any limitations, in international trade agreements as 'an essential condition of the free and healthy development of commerce between States'.124 Following the Great Depression, the 1934 US Reciprocal Trade Agreements Act called for the use of the unconditional form in all international trade agreements.125 From 1934 to 1945, the US negotiated 27 bilateral trade agreements, all containing an unconditional MFN clause.126 Yanai argues that the American adoption of unconditional MFN in its bilateral trade agreements was not driven by an ideological attachment to the principle of non-discrimination, but rather by a desire to maximize market access for US exporters.127

With the inception of the GATT, MFN became a pillar of the multilateral trading system and the pursuit of bilateral trade agreements subsided. Though bilateral trade agreements are once again proliferating, MFN clauses are now included on a far more limited basis and with considerable variation. MFN clauses are found in almost all PTA investment chapters, many trade in services chapters, and some government procurement chapters. Most often, unconditional MFN clauses are used though there are some instances of conditional MFN clauses in services and government procurement chapters. MFN clauses are almost never used in PTA trade in goods chapters, despite the fact that trade in goods is precisely what unconditional MFN clauses governed in the bilateral treaties of the pre-GATT period.

There is some indication that MFN clauses may be incorporated more frequently in trade in goods chapters in the future. The EC's recent Economic Partnership Agreements (EPAs) with African, Caribbean, and Pacific (ACP) states controversially include unconditional MFN clauses for market access relating to trade in goods.128 Notably, these clauses are prospective only; more favourable treatment under PTAs concluded prior to the signing of the EPA would not be captured. Additionally, the reciprocal MFN obligation on ACP states is only triggered where more favourable treatment is accorded through a free trade agreement with a 'major trading economy'.129 Subsequent PTAs between ACP states and small countries would not trigger the clause.130

The EPA MFN clauses are controversial because they are viewed as impeding ACP states from concluding South-South PTAs with emerging economies that would come within the 'major trading economy' definition, including Brazil, India, and China.131 Some commentators have argued that the EPA MFN obligations could violate the Enabling Clause of the GATT/WTO, which endorses the promotion of South-South PTAs, and that the clauses are at odds with the development objectives of the EPAs.132 Undoubtedly, the EC's motivation in including the MFN clause is to secure its preferred market access in EPA partner economies, and particularly to avoid becoming a less favoured trading partner than a rival major economy. Indeed, EC Development Commissioner Louis Michel stated in an interview, 'It is difficult to say that Europe should let our partner countries treat our economic adversaries better than us. We are generous but not naive.'133 In this way, a

desire to secure export markets motivates the EC's insistence on unconditional MFN clauses in the EPAs, much like it motivated Britain in the 1860 Cobden-Chevalier Treaty and the United States in its bilateral trade agreements of the 1930s and 1940s.

4.3 The political economy of unconditional MFN clauses

A number of puzzles are presented by the current usage of unconditional MFN clauses in trade and investment agreements. Foremost among these is why MFN clauses are so prevalent in BITs but subject to such variable use in PTAs, including their overwhelming exclusion from PTA trade in goods chapters. These differences may largely be accounted for by the distinct content of BITs and PTAs and the unique dynamics of political economy engaged by each type of agreement.

Including an unconditional MFN clause in a BIT comes at a relatively low cost to the granting state. By the same token, it also offers relatively modest gains for the beneficiary state and interested private economic actors. The content of BITs is highly similar, meaning that few differences arise between agreements that would trigger extension to other BITs through an MFN clause.134 Moreover, BITs generally involve only investor protection, and not market access for investment. Unlike preferential tariff rates for trade, which relate directly to market access, variations in investor protection are less likely to impact investment flows, particularly with respect to states where investor rights are already well protected through domestic legal institutions.135 Finally, to the extent that MFN in BITs enhances investment flows by raising the terms of investor protection for all partners to the most advantageous level offered to any partner, inflows of investment are not generally regarded as a threat by domestic political constituencies to the same extent as surges in imports of goods (and are indeed the very raison d'etre for host countries negotiating BITs).

In contrast, unconditional MFN clauses in PTAs could have profound distributive implications between countries and among domestic interest groups. There is more variation in the content of PTAs than BITs, creating greater scope for MFN to operate. Importantly, the content of PTAs reflects a carefully calibrated *quid pro quo* bargain, as the parties generally aim to maximize market access abroad for export-oriented industries and minimize market access concessions for import-competing industries.136 An unconditional MFN clause may threaten to disrupt this bargain. If one PTA partner but not the other subsequently concludes a more favourable PTA, then extension of these additional benefits through MFN will disrupt the equilibrium struck in the original deal.137 However, even in the absence of unconditional MFN, maintaining the balance of concessions in PTAs cannot be assured. If one party subsequently signs another PTA with a second country whose exporters are rivals of those of the first PTA partner, then the equilibrium of the value of concessions in the first PTA will be disrupted.

In general, MFN clauses facilitate greater liberalization over time, since any additional concession granted to a new partner must be extended to all existing PTA partners. Consequently, unconditional MFN clauses are likely to be opposed by import-competing industries. However, they would be supported by export-oriented industries, keen to ensure that newly obtained margins of preference are not lost through the PTA partner subsequently offering superior preferences to a third country. Indeed, studying the use of

MFN clauses in the trade in services chapters of PTAs, Fink and Jansen argue that countries 'which maintain restrictive trade policies and a "defensive" negotiating position in services are more likely to shun such a clause than countries with liberal service policies and "offensive" interests' and find this to be borne out in the incidence of MFN clauses in existing services chapters.138

The higher distributive stakes involved in PTA MFN clauses may explain their greater use in investment agreements over trade agreements, but a number of puzzles remain. One is the common use of MFN clauses in trade in services chapters but extremely rare use in trade in goods chapters. Pauwelyn suggests that many services concessions only make sense on a nondiscriminatory MFN basis, such as service sector transparency or regulatory reforms.139 However, other aspects of services agreements concern market access in a manner that is analogous to trade in goods. Export-oriented and import-competing services industries would therefore be expected to have strong preferences regarding unconditional MFN clauses in these areas.

A further puzzle is the willingness of states to include MFN provisions in PTA government procurement chapters, which involve trade in goods, but not in trade in goods chapters more generally. Baldwin, Evenett, and Low suggest that 'there is something particular to the nature of competition in procurement markets (perhaps the rents in such markets are on average higher or exporters in procurement markets are more concentrated and potentially better at lobbying for their own interests)'.140 If this is the case, there may be other instances in which goods exporters enjoy sufficient rents or are sufficiently concentrated to seek the inclusion of an unconditional MFN clause for trade in goods. More research is needed on what conditions are conducive to the institutional choice of unconditional MFN in PTAs, and whether those conditions are likely to be present as the global economy evolves in the coming years.

4.4 Implications of a return to unconditional MFN in PTAs

The recent inclusion of MFN clauses in EPAs and the long history of MFN clauses in trade agreements make clear that in certain circumstances it may be in a state's interest to insist upon an unconditional MFN clause for trade in goods. In general, the political dominance of export-oriented or import-competing industries could play an important role in openness to unconditional MFN. Also, where a state has liberalized trade to a greater degree than its partner, it will have strong incentives to seek an unconditional MFN clause. A fully liberalized state will have few trade-related concessions to bargain with if a PTA partner subsequently offers superior preferences to a third-country. This is one reason that unconditional MFN was insisted upon by Britain in the 1860 Cobden-Chevalier Treaty, and may help to explain the EC's insistence on unconditional MFN in the EPAs.141

If unconditional MFN clauses were widely introduced in PTA goods and services chapters, a number of important implications for the global trading system would likely follow. First, global welfare gains would result from the overall lowering of protection levels and by eliminating market distortions caused by differing levels of preferences across PTAs. Even where existing PTAs appear to offer the same levels of preference on the same tariff lines, differences in rules of origin radically impact the effective level of trade liberalization. These types of variations create great potential for an MFN clause to multilateralize trade in goods

concessions across a state's network of PTAs.142

Second, the presence of MFN clauses would promote the convergence of PTA treaty terms, since any substantive differences in drafting would in any case be levelled out through the operation of MFN. This impact of MFN on the incentives of treaty drafters may account in part for the high degree of convergence observed in treaty terms across BITs.

Third, states may become more reluctant to widen or deepen trade commitments in new PTAs, since these new concessions would be extended across their entire network of PTAs. Because new concessions that must be shared through MFN carry a higher cost for the offering state (from the perspective of import-competing industries), deeper and wider agreements are only likely to be struck with large potential trading partners that justify the unconditional extension of benefits to all previous PTA partners without compensation. This would significantly change the nature of PTAs involving small countries, which today often serve as laboratories for new deep integration initiatives143 because the PTA partner's small export capability limits the potential negative impact of liberalization on import-competing producers. Since unconditional MFN would require more advantageous treatment conferred on a small country partner to be shared across a state's entire network of PTAs, this laboratory function may cease.144

Fourth, to the extent that unconditional MFN clauses multilateralize the gains from trade liberalization achieved through PTAs, they may undermine political will for progress on liberalization through the WTO. In the international investment regime, Pauwelyn observes that the lack of will for a substantive multilateral agreement is 'in no small part due to the MFN clause traditionally included in BITs'.145 Just as the creation of the GATT in 1947 displaced the use of unconditional MFN in bilateral trade agreements, a return to unconditional MFN clauses in PTAs today could diminish reliance on the WTO to supply multilateral trade liberalization.

5. Conclusion

The movement toward bilateralism in the international trade regime shows no signs of abating. The resulting fragmentation in the sources of international trade law poses a number of serious challenges. Economic harm can result from trade diversion and heightened transaction costs. Moreover, the coherence and legitimacy of international trade law may be undermined where similar trade law terms are accorded different, or even contradictory, meanings under various treaties.

As PTAs proliferate, the international trade regime comes to more closely resemble the international investment regime, which is structured around over 3,000 BITs. Despite the highly fragmented structure of the international investment regime, Schill persuasively argues that there are strong tendencies toward harmonization and coherence in the content of international investment law.146 Two mechanisms driving this harmonization and coherence are cross-treaty interpretation in dispute settlement and the inclusion of unconditional MFN clauses in bilateral investment treaties. These same mechanisms could emerge in the international trade regime, mitigating the challenges of fragmentation posed by the proliferation of PTAs.

The practice of cross-treaty interpretation in trade is likely to develop among PTA and WTO

dispute settlement panels as PTA jurisprudence grows. The legal framework of the VCLT is indeed more conducive to cross-treaty interpretation in the international trade regime than in the international investment regime, but only with respect to the consideration of WTO treaties and case law by PTA tribunals. This unidirectional flow of trade law norms from the multilateral to regional levels, further reinforced by the *de facto* institutional hierarchy between the WTO and PTAs, is favourable to maintaining coherence in international trade law. As the body of PTA jurisprudence grows over the long-term, cross-treaty interpretation among PTA tribunals is also likely to develop, particularly in deep integration issue areas beyond the scope of the WTO Agreements, on which no WTO jurisprudence would exist. Importantly, tribunals, rather than states, largely drive the practice of cross-treaty interpretation, as they confront the task of resolving trade disputes in an increasingly fragmented legal landscape.

In contrast, the inclusion of unconditional MFN clauses in PTAs is a deliberate policy choice that states must make. While this has only been done to a limited extent in existing PTAs, there is strong historical precedent for the use of unconditional MFN clauses in bilateral trade agreements and the EC recently insisted on the inclusion of such clauses in trade agreements with ACP states. The political economy conditions that induce states to include unconditional MFN clauses in PTAs require further study, but it appears that high existing levels of liberalization by one of the treaty parties and politically dominant export oriented industries have historically been important factors driving the selection of unconditional MFN. The implications of widespread use of unconditional MFN clauses in PTAs would be immense, effectively multilateralizing trade liberalization across the entire network of a state's PTAs. MFN clauses would also alter the incentives facing PTA treaty drafters, discouraging them from pursuing treaty variations that would in any case be undone through the operation of MFN.

Cross-treaty interpretation and MFN clauses in PTAs are undoubtedly imperfect substitutes for strengthening multilateral institutions and advancing multilateral trade liberalization. But the changing balance of power in the global economy and the cumbersome institutional structure of the WTO suggest that multilateral progress will remain elusive in the coming years and that PTAs will continue to proliferate. Faced with this reality, cross-treaty interpretation and the use of MFN clauses in PTAs could mitigate the risks posed by fragmentation in the international trade regime, much as they have in the international investment regime.

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1. See Richard E. Baldwin and Patrick Low (eds.), *Multilateralizing Regionalism* (New York: Cambridge University Press, 2009); Richard E. Baldwin, 'Multilateralising Regionalism: Spaghetti Bowls as Building Blocks on the Path to Global Free Trade', **29** (11) (2006), *The World Economy,* 1451.

2. Stephan W. Schill, *The Multilateralization of International Investment Law* (New York: Cambridge University Press, 2009).

3. Ibid.

4. See Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', **102** (2008), *American Journal of International Law,* 48 at 53-8.

5. Michael J. Trebilcock, *Understanding Trade Law* (Northampton, MA: Edward Elgar, 2011) at 11.

6. Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements', **12** (2005), *UC Davis Journal of International Law,* 157 at 162, 191.

7. Ibid. at 159.

8. See Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008); M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010).

9. Trebilcock, *Understanding Trade Law, supra* note 5 at 113.

10. Andreas F. Lowenfeld, 'Investment Agreements and International Law', **42** (2003), *Columbia Journal of Transnational Law,* 123 at 125.

11. Vandevelde, 'A Brief History of International Investment Agreements', *supra* note 6 at 158.

12. Ibid. at 170-2.

13. UNCTAD, *World Investment Report 2012: Toward a New Generation of Investment Policies* (Geneva: United Nations Publications, 2012) at 84.

14. DiMascio and Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties', *supra* note 4 at 51.

15. WTO, *World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (Geneva: World Trade Organization, 2011) at 54.

16. Ibid. at 42, 57.

17. See Roberto V. Fiorentino, Jo-Ann Crawford, and Christelle Toqueboeuf, 'The Landscape of Regional Trade Agreements and WTO Surveillance', in Richard Baldwin and Patrick Low (eds.), *Multilateralizing Regionalism* (New York: Cambridge University Press, 2009), 28.

18. WTO, *World Trade Report 2011, supra* note 15 at 56.

19. Fiorentino *et al.,* 'The Landscape of Regional Trade Agreements and WTO Surveillance', *supra* note 17, define cross-regional as involving countries from different geographical groupings used in the WTO International Trade Statistics Report.

20. WTO, *World Trade Report 2011, supra* note 15 at 59.

21. Ibid. at 110.

22. For recent reviews of institutional challenges facing the WTO, see Report of the Consultative Board to the Director-General of the WTO, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: World Trade Organisation, 2004); Debra P. Steger, 'The Future of the WTO: The Case for Institutional Reform', **12** (2009), *Journal of International Economic Law,* 803; see generally, Debra P. Steger (ed.), *Redesigning the World Trade Organization for the Twenty-First Century* (Waterloo, ON: Wilfred Laurier University Press, 2010); Tomer Broude, *International Governance in the WTO: Judicial Boundaries and Political Capitulation* (London: Cameron May, 2004).

23. The theoretical and empirical literature on the economic effects of PTAs is extensive, though largely inconclusive. See Kyle W. Bagwell and Petros C. Mavroidis (eds.), *Preferential Trade Agreements: A Law and Economics Analysis* (New York: Cambridge University Press, 2011); Arvind Panagariya, 'Preferential Trade Liberalization: The Traditional Theory and New Developments', **38** (2000), *Journal of Economic Literature,* 287.

24. See Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements', in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (New York: Oxford University Press, 2006), 465; Locknie Hsu, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links', in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (New York: Oxford University Press, 2006); Gabrielle Marceau and Julian Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO', **1** (1) (2010), *Journal of International Dispute Settlement,* 67; Joost Pauwelyn and Luiz Eduardo Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns (Im)Possible Solutions', **42** (2009), *Cornell International Law Journal,* 77; Jennifer Hillman, 'Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO- What Should the WTO Do?', **42** (2009), *Cornell International Law Journal,* 193; William J. Davey and André Sapir, 'The *Soft Drinks* Case: The WTO and Regional Agreements', **8** (1) (2009), *World Trade Review,***5** .

25. Stephan W. Schill, 'The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds', **2** (1) (2010) *Trade, Law and Development,* 59 at 63 [Schill, 'Emergence of a Multilateral System'].

26. For a comparison of on the political economy of PTAs and BITs, see DiMascio and Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties', *supra* note 4 at 53-8.

27. Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions', **73** (2005), *Fordham Law Review,* 1521 at 1546.

28. Schill, *The Multilateralization of International Investment Law, supra* note 2 at 293.

29. Ibid. at 221.

30. Ibid. at 237.

31. Schill, 'Emergence of a Multilateral System', *supra* note 25 at 81.

32. Ibid. at 81.

33. Schill, *The Multilateralization of International Investment Law, supra* note 2 at 305.

34. Ibid. at 312.

35. Jeffery P. Commission, 'Precedent in Investment Treaty Arbitration', **24** (2) (2007), *Journal of International Arbitration,* 129 at 150-151. In 2006, ICSID awards on the merits of a dispute cited an average of 9.3 prior ICSID awards and decisions. Non-ICSID arbitral tribunals cited an average of 18.43 treaty awards and decisions per award.

36. Schill, *The Multilateralization of International Investment Law, supra* note 2 at 358.

37. Ibid. at 323.

38. Ibid. at 295.

39. Ibid. at 358.

40. Martins Paparinskis, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules', in Ole Kristian Fauchald and André Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Portland, OR: Hart Publishing, 2012), 87.

41. Ibid. at 97.

42. Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', **54** (2005), *International and Comparative Law Quarterly,* 279 at 287.

43. Paparinskis, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules', *supra* note 40 at 90. Paparinskis notes the case of *Siag* v. *Egypt,* where the tribunal interpreted the meaning of 'fair and equitable treatment' in a 1989 BIT with reference to several post-2000 arbitral tribunal

awards interpreting similar terms in BITs that were concluded from 1991 through 1996. *Waguij Elie George Siag and Vecchi* v. *Arab Republic of Egypt,* ICSID Case No. ARB/05/15, Award, 1 June 2009.

44. McLachlan persuasively argues that 'parties' in VCLT Article 31(3)(c) should be understood to encompass all parties to the governing treaty, rather than merely the parties to the dispute at hand. This is consistent with the definition of 'party' in VCLT Article 2 and because VCLT Article 31 'is concerned with the promulgation of a general rule, which would apply to the interpretation of a treaty irrespective of whether any particular parties to it may happen to be in dispute'. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', *supra* note 42 at 315.

45. Another interpretive approach enabling dialogue between arbitral tribunals and promoting harmonization in the jurisprudence across BITs is recourse to general principles of law. Stephan Schill, 'General Principles of Law and International Investment Law' in Tarcisio Gazzini and Eric De Brabandere, *International Investment Law: The Sources of Rights and Obligations* (Leiden: Martinis Nijhoff, 2012), 133-181. Article 31(3)(c) of the VCLT requires that a treaty be interpreted in light of all relevant rules of international law applicable between the parties. One source of the rules of international law set out in Article 38(1)(c) of the Statute of the International Court of Justice is 'general principles of law'. An arbitral tribunal can properly consider general principles of law that are relevant to the treaty obligations under interpretation. In doing so, it may look to earlier arbitral decisions, including decisions arising under different BITs, to help determine the existence of a general principle of law or to draw upon an articulation of a recognized general principle of law. See *Duke Energy International Peru Investment No. 1, Ltd* v. *Republic of Peru,* ICSID Case No. ARB/03/28, Annulment Proceeding, Decision of the *Ad Hoc* Committee, 1 March 2012 at paras. 87-88. This interpretive strategy creates a harmonizing dialogue between arbitral tribunals, but does not strictly constitute cross-treaty interpretation. By considering past arbitral jurisprudence on general principles of law, a tribunal would not be relying upon the interpretation of another BIT, but on a past tribunal's articulation of general principles of law, a source of law that is not confined to a particular treaty relationship. It must also be noted that tribunals seldom make recourse to general principles of law as an interpretive strategy. In a study of over 100 ICSID decisions, Fauchald found that tribunals invoked general principles of law as an interpretive argument in only four cases. Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals - An Empirical Analysis', **19** (2) (2008), *European Journal of International Law,* 301 at 326. The harmonizing force of this interpretive approach may therefore be attenuated.

46. Paparinskis, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules', *supra* note 40 at 110.

47. *Saipem SpA* v. *People's Republic of Bangladesh,* ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 at para. 67.

48. Schill, *The Multilateralization of International Investment Law, supra* note 2 at 359.

49. Christoph H. Shreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' (2006) Transnational Dispute Management at 7, online: www.univie.ac.at/intlaw/pdf/cspubl_85.pdf.

50. Schill, *The Multilateralization of International Investment Law, supra* note 2 at 332.

51. Because there is no rule of *stare decisis* at international law, or in the ICSID convention, there is also no legal basis to expect an ICSID tribunal to follow the decisions of a prior ICSID tribunal interpreting the same BIT.

52. Commission, 'Precedent in Investment Treaty Arbitration', *supra* note 35 at 137-139; see also Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration', **30** (4) (2006), *Fordham International Law Journal,* 1014 at 1047 (arguing that as the diversity of arbitrators increases, the system of precedent in investment arbitration may come under pressure). But see Schill, *The Multilateralization of International Investment Law, supra* note 2 at 287 (disagreeing with the weight that Commission attaches to the *esprit de corps* among ICSID arbitrators).

53. Commission, 'Precedent in Investment Treaty Arbitration', *supra* note 35 at 137.

54. Ibid. at 150-151.

55. Interstate dispute settlement, where the complainant and responding party are both states, is distinct from

dispute settlement involving a state and a private actor, such as investor-state dispute settlement that is a standard feature of BITs. Under some PTAs, private actors may have standing to bring a claim against a state party to the PTA. For example, private actors may challenge a state party's antidumping and countervailing duty determinations under Chapter 19 of NAFTA. However, the primary mode of dispute settlement provided for under PTAs is interstate in nature; similarly at the WTO, dispute settlement is strictly interstate. This paper therefore focuses on the likelihood of cross-treaty interpretation emerging through interstate dispute settlement in the trade regime.

56. William J. Davey, 'Dispute Settlement in the WTO and RTAs', in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (New York: Oxford University Press, 2006), 343 at 349.

57. Amelia Porges, 'Dispute Settlement', in Jean-Christophe Maur and Jean-Pierre Chauffor (eds.), *Preferential Trade Agreement Policies for Development: A Handbook* (Washington, DC: World Bank, 2011), 467 at 473.

58. Ibid. at 492.

59. Dispute settlement before the ATJ is overwhelmingly concentrated in the area of intellectual property and therefore makes only a narrow contribution to international trade law jurisprudence. Porges, 'Dispute Settlement', *supra* note 57 at 492.

60. It should be noted that much of the dispute settlement activity before the ECJ and ATJ is not interstate in nature. The relatively high level of activity before these institutions is due to mechanisms enabling private litigants to pursue complaints and national courts to submit reference questions on regional treaty obligations. See Walter Mattli and Anne-Marie Slaughter, 'Revisiting the European Court of Justice', **51** (1) (1998), *International Organization,* 186; Laurence R. Helfer and Karen J. Alter, 'The Andean Tribunal and Its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community', **41** (2009), *NYU Journal of International Law and Politics,* 871 at 873-877.

61. Porges, 'Dispute Settlement', *supra* note 57 at 492.

62. For statistical analyses of GATT/WTO dispute settlement, see Marc L. Busch and Eric Reinhardt, 'The Evolution of GATT/WTO Dispute Settlement', in John M. Curtis and Dan Ciuriak (eds.), *Trade Policy Research 2003* (Ottawa: Minister of Public Works and Government Services, 2003), 143-183; Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2011 - A Statistical Analysis', **15** (1) (2012), *Journal of International Economic Law,* 315.

63. Porges, 'Dispute Settlement', *supra* note 57 at 471. PTAs such as ASEAN, SACU, and the European Economic Partnership Agreements (EPAs) have all moved to rule-based dispute settlement modeled on the WTO DSU.

64. Ibid. at 492.

65. See text accompanying note 21.

66. WTO, *World Trade Report, supra* note 15 at 131.

67. Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law: Questions of Jurisdiction and Merits', **37** (6) (2003), *Journal of World Trade,* 997 [Pauwelyn, 'Non-WTO Law']; Isabelle Van Damme, 'What Role is there for Regional International Law in the Interpretation of the WTO Agreements?', in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (New York: Oxford University Press, 2006), 553 at 575.

68. *United States - Tax Treatment for 'Foreign Sales Corporations' (Article 21.5 - EC)* (2005), WTO Doc. WT/DS108/AB/RW2, at para. 143 n. 123 (Appellate Body Report) [*US-Foreign Sourced Income*].

69. *Mexico - Tax Measures on Soft Drinks and Other Beverages* (2006) WT/DS308/AB/R (Appellate Body Report), at para. 54 [*Mexico-Taxes on Soft Drinks*]. This case involved a US challenge of Mexican taxes on soft drinks, which were imposed following a longstanding and unresolved dispute over US obligations under NAFTA. Mexico unsuccessfully argued that the WTO panel should have declined to exercise jurisdiction over the dispute in favour of a NAFTA panel.

70. Marc L. Busch, 'Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade', **61** (2007), *International Organization,* 735 at 742.

71. See text accompanying notes 55 through 62.

72. *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (1997), WTO Doc. WT/DS27/AB/R at para. 170 n. 91 (Appellate Body Report) [*EC-Bananas III*]. The Appellate Body supported its interpretation of two provisions of the Lomé Convention dealing with the importation of bananas from ACP (African, Caribbean, and Pacific) states with reference to a decision of the European Court of Justice (ECJ) also interpreting the Lomé Convention.

73. *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2004), WTO Doc. WT/DS285/R at para. 6.473 n. 914 (Panel Report) [*US-Gambling*].

74. It must be noted that WTO panels and the Appellate Body have declined to consider the burgeoning jurisprudence arising from BIT or PTA-based investor-state dispute settlement proceedings. This may be because of the differing subject matter of trade and investment treaties, the non-interstate character of investor-state disputes, and the divergent professional backgrounds of investment arbitrators and trade dispute settlement panelists. See DiMascio and Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties', *supra* note 4 at 59.

75. Busch, 'Overlapping Institutions', *supra* note 70 at 742.

76. Ibid.

77. While the potential for cross-treaty interpretation in interstate trade disputes is the focus of this paper, it should be noted that NAFTA investor-state panels regularly rely upon WTO jurisprudence. Voeten observes that about '25 percent of NAFTA panel review decisions make at least a passing reference to WTO decisions'. Erik Voeten, 'Borrowing and Nonborrowing among International Courts', **39** (2) (2010), *The Journal of Legal Studies,* 547 at 571.

78. Interstate disputes involving the interpretation and application of NAFTA are governed by NAFTA Chapter 20. This chapter must be distinguished from the dispute settlement procedures available under NAFTA Chapters 11 and 19, which are not interstate in character and therefore not part of the body of interstate PTA jurisprudence with which this paper is concerned.

79. *In re Cross-Border Trucking Services (Mexico* v. *United States)* (2001), USA-MEX-98-2008-01 at paras. 262-270 (Chapter 20 Panel) [*Cross Border Trucking Services*].

80. Ibid. at para. 262.

81. *In re US Safeguard Action Taken on Broom Corn Brooms from Mexico (Mexico* v. *United States)* (1998), USA-97-2008-01 at paras. 53, 66-67, 69-72, 78 (Chapter 20 Panel) [*Broom Corn Brooms*].

82. *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States,* ADP/92 (1993).

83. *Broom Corn Brooms, supra* note 81 at paras. 69-71.

84. Ibid. at para. 66.

85. Ibid. at para. 53.

86. *In re Tariffs Applied by Canada to Certain US-Origin Agricultural Products (United States v Canada)* (1996), CDA-95-2008-01 (Chapter 20 Panel) [*US-Origin Agricultural Products*].

87. Ibid. at para. 122 n. 109.

88. A further interpretive approach under the VCLT equally applicable in the trade and investment regimes is interpretation in light of general principles of law. See discussion at note 45.

89. See note 44 and accompanying text.

90. Andrew D. Mitchell and Tania Voon, 'PTAs and Public International Law', in Simon Nicholas Lester and Bryan Mercurio (eds.), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge: Cambridge University Press, 2009), 114 at 139.

91. See *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (2006), WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R at para. 7.70 (Panel Report) [*EC-Biotech*] (holding that Article 31(3)(c) requires 'consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted'). See also International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006), UN Doc. A/CN.4/L.682 at para. 450 (commenting that the approach of the panel in *EC-Biotech* 'makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under Article 31 (3)(c) would be allowed').

92. Davey, 'Dispute Settlement in the WTO and RTAs', *supra* note 56 at 355. Voeten views the relationship between the WTO and PTAs as creating an implicit 'chain of delegation', with the WTO at the top of the chain. Voeten, 'Borrowing and Nonborrowing among International Courts', *supra* note 77 at 566.

93. *De facto* hierarchies among formally equal international tribunals are a well-recognized phenomenon. In a study of cross-tribunal citation in international law, Miller found that over half of all references were to ICJ jurisprudence. Nathan Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', **15** (2002), *Leiden Journal of International Law,* 483 at 488. See also Suzannah Linton and Firew Kebede Tiba, 'The International Judge in an Age of Multiple International Courts and Tribunals', **9** (2009), *Chicago Journal of International Law,* 407 at 418.

94. Commission, 'Precedent in Investment Treaty Arbitration', *supra* note 35 at 137-139.

95. See the text accompanying notes 52 and 53.

96. See text accompanying note 21.

97. Along similar lines, Weiler has argued that 'it would not seem too much to ask that NAFTA awards be considered by WTO panels in the adoption of an inductive approach to as-of-yet "untested" GATS obligations'. Todd Weiler, 'NAFTA Article 1005 and the Principles of International Economic Law', **42** (2003), *Columbia Journal of Transnational Law,* 35 at 73.

98. Franck notes that it is common practice in investment disputes 'for private investors and governments to refer to prior investment tribunal decisions that appear to favour them, and it is inevitable that arbitral tribunals interpreting similar provisions of investment treaties will consider and follow those previous decisions'. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration', *supra* note 27 at 1612.

99. *El Paso Energy International Company* v. *Argentina,* ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 [*El Paso* v. *Argentina*].

100. Ibid. at para. 39.

101. One exception to this is created by NAFTA Chapter 19, which enables industry groups to challenge anti-dumping and countervailing duty determinations of national authorities. However, these challenges do not involve the interpretation and application of NAFTA, but rather provide for review of national authority decisions according to domestic law.

102. See for example Richard Baldwin, Simon Evenett, and Patrick Low, 'Beyond Tariffs: Multilateralizating Non-Tariff RTA Commitments', in Richard Baldwin and Patrick Low (eds.), *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge: Cambridge University Press, 2009), 79 at 81; Joost Pauwelyn, 'Legal Avenues to "Multilateralizing Regionalism": Beyond Article XXIV', in Richard Baldwin and Patrick Low (eds.), *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge: Cambridge University Press, 2009), 368 at 394 [Pauwelyn, 'Legal Avenues'].

103. Schill, *The Multilateralization of International Investment Law, supra* note 2 at 20.

104. Doctrine and state practice establish that there is a presumption in favour of the unconditional form where the treaty under interpretation does not specify whether the MFN clause is conditional or unconditional. International Law Commission, 'Draft Articles on Most Favoured Nation Clauses with Commentaries', *Yearbook of the International Law Commission,* 1978, Vol. II, Part Two at 37.

105. Stephan W. Schill, 'Multilateralizing Investment Treaties through Most-Favoured-Nation Clauses', **27** (2) (2009), *Berkeley Journal of International Law,* 496 at 507 [Schill, 'Multilateralizing through MFN'].

106. Joost Pauwelyn, 'Multilateralizing Regionalism: What About an MFN Clause in Preferential Trade Agreements?', **103** (2009), *American Society for International Law Proceedings,* 122 at 122 [Pauwelyn, 'MFN'].

107. MFN clauses are also prevalent in PTA investment chapters, which are functionally similar to BITs.

108. Alvarez and Sauvant observe that the model US BIT has evolved considerably over the past decades, but no effort has been made to revisit prior treaties to harmonize texts. Karl P. Sauvant and José E Alvarez, 'Introduction', in Karl P. Sauvant and José E. Alvarez (eds.), *The Evolving International Investment Regime* (New York: Oxford University Press, 2011), xxxi at xl.

109. Schill, *The Multilateralization of International Investment Law, supra* note 2 at 20.

110. Expected investment returns must be discounted based on risk, which is impacted in part by the available level of investment protection in the host state. Because MFN clauses harmonize protection standards across bilateral relationships, potential market distortions based on the degree of investment protection afforded to investors under different BITs are avoided. See Schill, 'Multilateralizing through MFN', *supra* note 105 at 508.

111. Schill, 'Multilateralizing through MFN', *supra* note 105 at 504. The application of MFN clauses is limited by the scope of the treaty in which they are found. If a BIT does not address a particular issue area at all, then the MFN clause in that treaty cannot incorporate terms from other BITs dealing with that issue.

112. In contrast, tribunals have been sharply divided on whether MFN clauses entitle investors to the most favourable procedural protections available under other BITs signed by the host state. Peter Muchlinski, 'The Framework of Investment Protection: The Content of BITs', in Karl P. Sauvant and Lisa E. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment* (Oxford: Oxford University Press, 2009), 37 at 53.

113. *MTD Equity Sdn Bhd and MTD Chile SA* v. *Chile,* ICSID Case No. ARB/01/7, Award, 25 May 2004 at paras. 104, 197, 206 [*MTD* v. *Chile*] (holding that the MFN clause under the Chilean-Malaysian BIT entitled the investor to rely upon Article 3(2) of the Chilean-Croatian BIT, which provided that when a party admitted an investment, it was required to grant the necessary permits in accordance with its laws and regulations).

114. *Pope & Talbot Inc* v. *Canada* (2001), Award on the Merits of Phase 2, 7 ICSID Rep 102 at paras. 108-09 (UNCITRAL) [*Pope & Talbot* v. *Canada*] (observing that if the minimum standard of treatment under NAFTA Article 1105(1) was interpreted more narrowly than in Canada's other BITs, investors would be entitled under NAFTA's Article 1103 MFN guarantee to invoke the most expansive articulation of the minimum standard of treatment accorded by Canada in any of its BITs).

115. *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS* v. *Kazakhstan* (2008), ICSID Case No. ARM/05/16, Award, 29 July 2008 at para. 575 [*Rumeli* v. *Kazakhstan*] (noting, in a dispute arising under the Turkey-Kazakhstan BIT, that the 'parties agree that in view of the MFN clause contained in the BIT, Respondent's international obligations assumed in other bilateral treaties, and in particular the United Kingdom-Kazakhstan BIT, are applicable to this case').

116. *ATA Construction, Industrial and Trading Company* v. *The Hashemite Kingdom of Jordan,* ICSID Case No. ARB/08/2), Award, 18 May 2010 at para. 125 n. 16 [*ATA* v. *Jordan*] (observing, in a dispute under the Turkey-Jordan BIT, that by virtue of the MFN clause in the BIT, Jordan assumed the obligation to accord the Turkish investor's investment fair and equitable treatment, guaranteed in the UK-Jordan BIT, and treatment no less favourable than that required by international law, guaranteed in the Spain-Jordan BIT).

117. *White Industries Australia Limited* v. *India,* UNCITRAL (India-Australia BIT), Award, 30 Nov 30 2011 at paras. 11.2.1-11.2.9 [*White Industries* v. *India*]. In *White Industries* v. *India,* the tribunal held that pursuant to the MFN clause in the Australia-India BIT, India was obliged to provide to the Australian investor 'effective means of asserting claims and enforcing rights', as guaranteed under the India-Kuwait BIT. The tribunal rejected India's argument that this subverted the negotiated balance of the governing BIT, finding instead that 'it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause'. The tribunal explained that there is no class of provisions of the treaty that are *per se* immune from an MFN obligation, unless they can be read within the treaty as constituting an exception to MFN treatment.

118. See Annex III(1) of Canada's Model Foreign Investment Promotion and Protection Agreement, online: www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf.

119. For example, a 1778 trade treaty between the US and France included a conditional MFN clause, providing that 'if the United States made new concessions to any third party, France could receive these concessions only when it provided the United States compensation which would be equivalent to that offered to the United States by the third party'. Akiko Yanai, 'The Function of the MFN clause in the Global Trading System' (2002), Working Paper Series 01/02 - No. 3, Institute for Development Economies APEC Study Center at 8, online: www.ide.go.jp/English/Publish/Download/Apec/pdf/2001_15.pdf.

120. Schill, 'Multilateralizing through MFN', *supra* note 105 at 511.

121. Yanai, 'The Function of the MFN clause in the Global Trading System', *supra* note 119 at 11.

122. Ibid.

123. International Law Commission, 'Draft Articles on Most Favoured Nation Clauses with Commentaries', *Yearbook of the International Law Commission,* 1978, Vol. II, Part Two at 33.

124. Schill, 'Multilateralizing through MFN', *supra* note 105 at 512 n. 54

125. Yanai, 'The Function of the MFN clause in the Global Trading System', *supra* note 119 at 12.

126. Ibid. at 13.

127. Ibid.

128. Article 19(1) of the EC-CARIFORUM EPA is illustrative. This provision imposes a simple unconditional MFN obligation on the EC, which 'shall accord to the CARIFORUM States any more favourable treatment applicable as a result of the EC Party becoming party to a free trade agreement with third parties after the signature of this Agreement'. *Economic Partnership Agreement,* CARIFORUM states and the European Community and its Member States, 15 October 2008, *Official Journal of the European Union,* No. L 289/I/3, 30.10.2008, online: http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf [EC-CAIRFORUM EPA].

129. EC-CARIFORUM EPA, *supra* note 128, Article 19(2).

130. A major trading economy is defined in the EPAs as a country having a greater than 1% share in world exports or a group of countries collectively having over a 1.5% share of world exports. EC-CARIFORUM EPA, supra note 128, Article 19(4).

131. Pauwelyn, 'MFN', *supra* note 106 at 123.

132. See Christopher Hovius and Jean-René Oettli, 'Measuring the Challenge: The Most-Favoured Treatment Clause in the Economic Partnership Agreements between the European Community and Africa, Caribbean and Pacific Countries', **45** (3) (2012), *Journal of World Trade,* 553; Pauwelyn, 'MFN', *supra* note 106 at 123.

133. Inter Press Service, 'We Are Generous but Not Naïve: Interview with Louis Michel, EU Development Commissioner', 11 January 2008, online: http://ipsnews.net/news.asp?idnews=40762.

134. Pauwelyn, 'MFN', *supra* note 106 at 123. But note that this similarity across BITs may itself be driven by the prevalence of MFN clauses, since these clauses would in any case undo substantive variations in investment protection, elevating all MFN beneficiary states to the highest level of protection accorded to any state.

135. Jennifer L. Tobin and Marc L. Busch, 'A BIT is Better than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements', **62** (1) (2010), *World Politics,* 1.

136. Pauwelyn, 'MFN', *supra* note 106 at 123.

137. Pauwelyn, 'Legal Avenues', *supra* note 102 at 394.

138. Carsten Fink and Marion Jansen, 'Services Provisions in Regional Trade Agreements: Stumbling Blocks or Building Blocks for Multilateral Liberalization?', in Richard Baldwin and Patrick Low (eds.), *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge: Cambridge University Press, 2009), 221 at 247.

139. Pauwelyn, 'MFN', *supra* note 106 at 122.

140. Baldwin, Evenett, and Low, 'Beyond Tariffs: Multilateralizating Non-Tariff RTA Commitments', *supra* note 102 at 96.

141. Given that the EC is liberalizing essentially all trade with the ACP states and not demanding full-reciprocity from EPA partners, it is unclear what trade-based concessions the EC could subsequently offer EPA partners to secure additional liberalization in future.

142. For example, a report published by the Overseas Development Institute (ODI) and European Centre for Development Policy Management (ECPDM) concludes that the MFN clauses in the recent EPAs negotiated between the EC and ACP states would apply to rules of origin for trade in goods. These MFN provisions state that they apply to the subject matter of the chapter in which they are found, and this chapter includes rules of origin. Consequently, if the EU offers less constraining rules of origin to a third party in a future agreement, it would also have to extend these favourable rules to its EPA partners. ODI and ECPDM, 'The New EPAs: Comparative Analysis of Their Content and the Challenges for 2008' (31 March 2008) at 59, online:www.odi.org.uk/resources/details.asp?id=1139&title=epas-comparativeanalysis-tasks-2008.

143. Joel P. Trachtman, 'International trade: regionalism', in Andrew T. Guzman and Alan O. Sykes (eds.), *Research Handbook in International Economic Law* (Northampton, MA: Edward Elgar, 2007), 151 at 160.

144. One way to preserve the potential for innovative small country PTAs is to include a market size requirement for an unconditional MFN clause to be triggered, as has been done by the EC in the recent EPAs. See text accompanying notes 128 through 130.

145. Pauwelyn, 'MFN', *supra* note 106 at 123.

146. Schill, *The Multilateralization of International Investment Law, supra* note 2.