

## AUTONOMY TO SET THE LEVEL OF REGULATORY PROTECTION IN INTERNATIONAL INVESTMENT LAW

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**Abstract** This article argues that State autonomy in setting the level of protection for permissible regulatory aims can be better operationalised in the investment treaty regime. The article draws on comparative insights from WTO law, where it is established that WTO members have the right to determine the level of protection for permissible regulatory aims, although significant disciplines are placed on the means used to achieve those aims. It is then argued that investment treaties are, properly interpreted, consistent with the idea that States retain autonomy to determine the level of protection for permissible regulatory aims. Finally, the article proposes removing from the fair and equitable treatment and indirect expropriation standards proportionality balancing *stricto sensu*, as this undermines State autonomy in setting the level of protection. Overall, this article argues for a partial reorientation of investment law, in which non-discriminatory measures that pursue a permissible regulatory aim, including at a particular level, should not amount to a breach of a treaty where a State uses the means that involve the least possible restriction of the competing interests protected by relevant investment treaty obligations.

**Keywords:** public international law, investment treaties, investor-State arbitration, regulatory autonomy, fair and equitable treatment, indirect expropriation, expropriation annex, proportionality analysis.

### I. INTRODUCTION

The freedom of States to determine their own regulatory goals and to implement policies to pursue those goals, while nevertheless complying with their obligations under trade and investment treaties, remains a fundamental question in international economic law.<sup>1</sup> One key aspect of this freedom is

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<sup>1</sup> A Mitchell, E Sheargold and T Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment* (Edward Elgar 2017) 2, 6; B Natens, *Regulatory Autonomy and International Trade in Services: The EU Under GATS and RTAs* (Edward Elgar 2016) 2–6.

the ability of States to determine the level at which they will pursue permissible regulatory aims. For example, a State may take measures to protect human health against a particular risk and aim to reduce that risk ‘to the maximum extent possible’.<sup>2</sup> In WTO law, this concept is referred to as the ‘level of protection’ selected by a WTO member. In short, while various disciplines are imposed by the WTO agreements, members retain the right to select their own level of protection for permissible regulatory aims, such as the protection of human health, the environment or public morals.<sup>3</sup> Any alternative, less trade-restrictive measures proposed by a complainant must ‘preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued’.<sup>4</sup>

Various provisions in newer investment treaties, and remarks by investor-State tribunals, provide support for the idea that despite having undertaken investment protection obligations, as in the WTO context, States retain substantial autonomy in selecting which regulatory aims to pursue and the level at which to pursue permissible aims. Less unambiguously, in Opinion 1/17, the Court of Justice of the European Union held that the investor-State tribunals created under the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) were not empowered to call into question the level of protection of public interests adopted by European Union (EU) institutions, with the result that CETA’s investor-State dispute settlement provisions did not adversely affect the autonomy of the EU legal order.<sup>5</sup> However,

<sup>2</sup> Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, para 7.108. Consider also Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para 168; Appellate Body Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, WT/DS495/AB/R, adopted 26 April 2019, paras 5.25–6.

<sup>3</sup> See eg Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, paras 140, 210; Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, para 6.461, affirmed in Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014, para 5.200; Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, adopted 19 January 2010, para 7.819.

<sup>4</sup> Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, para 308; Appellate Body Report, *Brazil – Retreaded Tyres* (n 3) para 156.

<sup>5</sup> CJEU Opinion 1/17 (2019) EU:C:2019:341, paras 148–61. Riffel suggests that from an EU law perspective, the Opinion elevates the EU’s autonomy in determining the level of protection to a constitutional requirement in order for the EU to be able to accede to an international agreement: C Riffel, ‘The CETA Opinion of the European Court of Justice and Its Implications—Not That Selfish After All’ (2019) 22 JIEL 503, 519–21. Fanou highlights that this aspect of Opinion 1/17 lays the basis for respondents to challenge the enforcement of investor-State awards within the EU, in cases concerning an EU-level measure or the implementation of EU law by Member States, on the basis that the interpretation contained in the award undermines the EU’s autonomy in setting the level of protection for public interests. Importantly, this reasoning may apply to the extra-EU investment treaties of EU Member States, as well as to a future multilateral investment court: M Fanou, ‘The

whether the relevant provisions of CETA actually support that proposition is debatable.<sup>6</sup>

If States retain the right to select the desired level of protection for permissible policy aims, this would have major implications for how investment treaties should be interpreted and applied, and for the appropriate role of investor-State tribunals.<sup>7</sup> Similarly to Michael Ming Du's observation in relation to WTO law, a first key implication would be that all of the obligations imposed by investment treaties would need to be interpreted and applied in light of a State's ability to choose its own level of protection for permissible regulatory aims.<sup>8</sup> Secondly, the role for international scrutiny by investor-State tribunals would be limited. While tribunals could scrutinise whether the means employed by a State to achieve its desired level of protection comply with investment treaty disciplines, they could not second-guess the level of protection a State pursues for a permissible regulatory aim.<sup>9</sup> Nevertheless, it must be acknowledged that, as Du argues in the WTO context, the autonomy of States to select the level of protection for permissible regulatory aims, and the disciplines imposed by international agreements on the means by which the chosen level of protection is pursued, 'are in a constant state of tension'.<sup>10</sup>

This article makes the case that investment treaties should be interpreted in a manner that preserves States' autonomy to select the desired level of protection for permissible regulatory aims.<sup>11</sup> It will show that the basis that has been laid within key standards of investment protection for proportionality balancing *stricto sensu* means there is an increasing potential that investment treaties may be interpreted in ways that undermine a State's ability to pursue a desired level of protection for permissible regulatory aims. This article advocates a partial reorientation of investment law, in which non-discriminatory measures that pursue a permissible regulatory aim (eg the protection of human health or the environment), including at a particular level (eg a policy of zero risk), should not give rise to a breach of treaty, where a State uses the means that involve the least possible restriction of the competing interests protected by relevant investment treaty obligations. This would amount to introducing a greater hierarchy of values than currently

CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future' (2020) 22 CYELS 106, 127–31. Contrast C Titi, 'Opinion 1/17 and the Future of Investment Dispute Settlement: Implications for the Design of a Multilateral Investment Court' in L Sachs, L Johnson and J Coleman (eds), *Yearbook on International Investment Law & Policy 2019* (Oxford University Press 2021) 533–5.

<sup>6</sup> See also GC Leonelli, 'CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test' (2020) 47 LIIEI 43, 52–4, 61–8 (suggesting that CETA's investor-State tribunals may in practice affect the EU's ability to set the level of protection, eg in the context of precautionary measures without a clear scientific basis).

<sup>7</sup> M Ming Du, 'Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?' (2010) 13 JIEL 1077, 1079. <sup>8</sup> *ibid.* <sup>9</sup> *ibid.* <sup>10</sup> *ibid.*

<sup>11</sup> Generally, this article uses the term 'investment treaties' as a shorthand to refer to both Bilateral Investment Treaties (BITs) and investment chapters in wider Free Trade Agreements (FTAs), although where necessary the two are differentiated.

exists under most investment treaties, in which legitimate public welfare interests would be given clearer priority over the interest of investment protection. Nevertheless, the article will demonstrate that there is already a basis in newer investment treaties for the idea that public welfare interests, such as the protection of the environment or public health, can at times take priority over investment protection.

This article builds on prior suggestions, in both the WTO and investment treaty contexts, that the balancing techniques employed by adjudicators have a particular relationship with autonomy in setting the level of protection. Proportionality balancing *stricto sensu* involves weighing the costs and benefits of an impugned measure in all the circumstances and undermines State autonomy in setting the level of protection. Least restrictive means testing takes the regulatory goal pursued by a State as a given, and asks if it could be achieved through means that are less restrictive of other legally protected interests, and this respects domestic autonomy in setting the level of protection.<sup>12</sup>

It is argued that, in the investment treaty context, autonomy in determining the level of protection for permissible regulatory aims is appropriate because investment treaties do not evidence any intention to harmonise domestic regulatory standards and, on the contrary, recognise that States will remain free to pursue a wide range of regulatory goals, subject to some degree of control over the means utilised.<sup>13</sup> In other words, investment treaties should be understood, like the WTO Agreements, as permitting regulatory diversity.<sup>14</sup>

<sup>12</sup> See eg JHH Weiler, 'Brazil—Measures Affecting Imports of Retreaded Tyres (DS322)' (2009) 8 WorldTR 137, 139–40; CI Nagy, 'Clash of Trade and National Public Interest in WTO Law: The Illusion of "Weighing and Balancing" and the Theory of Reservation' (2020) 23 JIEL 143, 148–9; J Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 ICLQ 325, 368–9.

<sup>13</sup> Harmonisation can be defined 'as the process of making different regulations, principles, domestic laws and government policies substantially or effectively the same or similar': G Mayeda, 'Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries' (2004) 7 JIEL 737, 740. See generally DW Leebron, 'Lying Down with Procrustes: An Analysis of Harmonization Claims' in JN Bhagwati and RE Hudec (eds), *Fair Trade & Harmonization: Prerequisites for Free Trade? Vol 1: Economic Analysis* (MIT Press 1996) 43–8. Some degree of harmonisation does not necessarily prevent States from being permitted to adopt a higher level of protection, subject to being able to justify the need for it, as both the WTO's TBT and SPS Agreements demonstrate: T Cottier and B Imeli, 'Harmonization' in T Cottier and K Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law* (Edward Elgar 2017) 59–60. Conceptually, autonomy in setting the level of protection is consistent with a 'host country control' model of economic integration, whereby States retain the ability to set the standards that will apply to economic activity on their territory, subject to compliance with agreed international disciplines: J Snell, 'The Internal Market and the Philosophies of Market Integration' in C Barnard and S Peers (eds), *European Union Law* (3rd edn, Oxford University Press 2020) 335–8. See also AO Sykes, 'The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets' (1999) 2 JIEL 49, 61–5 (discussing a model of 'policed decentralization' whereby States have 'the freedom to pursue different goals or different levels of regulatory stringency', subject to certain disciplines, such as non-discrimination and use of the least restrictive means).

<sup>14</sup> On the point that the WTO Agreements have been interpreted to permit regulatory diversity, see eg PC Mavroidis, *The Regulation of International Trade*, vol 1 (MIT Press 2016) 420. R Howse,

Nevertheless, under the approach advanced in this article adjudicators would retain a residual role in scrutinising whether a regulatory aim pursued by a State is a permissible one, for example in the context of a particular investment treaty. However, as investment treaties are generally consistent with States pursuing a wide range of policy aims, this stage of the analysis would be limited to excluding measures that predominantly serve impermissible aims, such as protectionist or discriminatory measures. The overall claim of this article, concerning autonomy in setting the level of protection for permissible regulatory aims, is most directly relevant to those investor-State cases that involve a challenge to a State's laws or regulations, as these will typically reflect a particular level of protection the State has pursued for the relevant regulatory aim.<sup>15</sup> However, this analysis is also relevant for some disputes where an investor challenges more individualised administrative treatment, as, in certain cases, such treatment is based on a particular level of protection that a State has adopted for a permissible regulatory aim, such as the protection of human health or the environment.<sup>16</sup>

The article proceeds as follows. Part II briefly reviews what is meant by the expression 'level of protection', to aid a clear understanding for the purposes of the subsequent analysis. Part III considers the concept of State autonomy in setting the level of protection as developed in WTO law, through an examination of the necessity jurisprudence developed across several covered agreements. WTO law is drawn on as a comparator because it provides a rich repository of experience in balancing treaty-protected economic interests (the interest of trade liberalisation), with non-trade interests that are also recognised as legitimate by the relevant agreements. Part IV makes the case that investment treaties are, properly interpreted, consistent with the idea that States retain autonomy to select and implement a desired level of protection for permissible regulatory goals, despite investment treaty obligations constraining the means through which those goals may be pursued. Part V turns to some key areas where further attention is required to protect States' autonomy in selecting and implementing a desired level of protection for

J Langille and K Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*' (2015) 48 *GWILR* 81, 89–91. On the rationale for permitting regulatory diversity, subject to certain constraints (eg non-discrimination and use of the least trade restrictive means), see eg AO Sykes, 'The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets' (n 13); M Trebilcock and R Howse, 'Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics' (1998) 6 *EJLE* 5, 28, 31–2.

<sup>15</sup> Consider eg *Philip Morris Brands SÀRL v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) (plain packaging regulations for tobacco products given public health concerns); *Methanex Corporation v USA*, UNCITRAL, Final Award (3 August 2005) pt II, ch D, paras 2–22 (ban on the sale and use of a gasoline additive given environmental and public health concerns).

<sup>16</sup> Consider eg *Chemtura Corporation (formerly Crompton Corporation) v Canada*, UNCITRAL, Award (2 August 2010) paras 6–49 (dispute over regulatory process involving ban on claimant's pesticide products); *David R Aven et al v Costa Rica*, ICSID Case No UNCT/15/3, Award (18 September 2018) paras 415–587 (dispute concerning application of Costa Rica's environmental laws to the claimants' project).

permissible regulatory aims. Specifically, this Part demonstrates that within the fair and equitable treatment (FET) and indirect expropriation standards, recent case law and treaty drafting approaches have established a basis for proportionality balancing *stricto sensu*, and thus for adjudicators potentially second-guessing a State's chosen level of protection for permissible regulatory aims. It provides suggestions concerning how treaty drafters can address this emerging problem by limiting the FET and indirect expropriation standards to a least restrictive means test. Part VI concludes.

## II. DEFINING THE 'LEVEL OF PROTECTION'

This short Part unpacks what is meant when referring to the level of protection, an understanding of which is crucial for the subsequent analysis. Most commonly, the term 'level of protection' refers to the degree to which a particular regulatory aim, recognised as permissible in a particular context (eg by a treaty), is fulfilled.<sup>17</sup> For example, WTO panels and the Appellate Body (AB) have accepted that the various regulatory aims recognised as permissible by Article XX of the General Agreement on Tariffs and Trade (GATT), Article XIV of the General Agreement on Trade in Services (GATS), and Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement), such as the protection of public health or public morals, can be fulfilled to varying degrees.<sup>18</sup> Likewise, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) defines the term 'appropriate level of sanitary or phytosanitary protection' as '[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory'.<sup>19</sup> A note attached to this definition adds that 'Many Members otherwise refer to this concept as the "acceptable level of risk"'.<sup>20</sup> However, as Jeffery Atik highlights, an acceptable level of risk is not the same as the level of protection pursued by a regulator. Rather, the former refers to the degree of residual risk that is left, after mitigation measures have been implemented, whereas the level of protection concerns the extent to which a member chooses to reduce a particular risk.<sup>21</sup>

Another important distinction to appreciate is the difference between a level of protection that may be intended by a regulator when formulating regulatory aims and selecting measures to achieve those aims, and the level of protection actually achieved by a measure. As will be seen, at times, the 'level of

<sup>17</sup> CP Bown and JP Trachtman, 'Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act' (2009) 8 WorldTR 85, 124. B McGrady, 'Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures' (2009) 12 JIEL 153, 157. <sup>18</sup> See below text at (nn 34–5, 37, 58). <sup>19</sup> SPS Agreement Annex A, para 5.

<sup>20</sup> *ibid.*

<sup>21</sup> J Atik, 'On the Efficiency of Health Measures and the "Appropriate Level of Protection"' in G van Calster and D Prévost (eds), *Research Handbook on Environment, Health and the WTO* (Edward Elgar 2013) 117–18.

protection' is used to refer to a particular degree of fulfilment of a legitimate regulatory aim (eg protection of public health) intended by a regulator *ex ante*. Used in this way, the level of protection is a distinct issue within the broader question of what may constitute a legitimate regulatory aim.

However, the level of protection intended by a regulator may differ from that achieved by a measure, as implemented. As will be demonstrated below, in some contexts the focus is on the level of protection achieved, for example the extent to which a contested measure, as implemented, reduces a particular risk to human health. Indeed, many would suggest that a State whose measures are being scrutinised should not be permitted to assert a higher level of protection than that achieved by the impugned measures.<sup>22</sup> A further point to note is that, in practice, regulators often do not determine a desired level of protection prior to selecting regulatory measures.<sup>23</sup> In these cases, subsequent scrutiny of a State's measures (eg by an international adjudicator) has to focus on the level of protection achieved. The level of protection will be deduced from, and identical to, the measure itself.<sup>24</sup>

### III. AUTONOMY IN SETTING THE LEVEL OF PROTECTION IN WTO LAW

This Part analyses the idea, developed in WTO law, that WTO members retain the freedom to select the level at which they will pursue permissible regulatory objectives. This comparative analysis can shed light on areas where investment treaties, and investor-State tribunals, could be more attentive to the right of States to determine and implement their own regulatory goals, including a specific level of protection for permissible regulatory aims. While contextual differences between international trade and investment law must be kept in mind, there is a sound rationale for drawing on WTO law as a comparator, as it provides a rich repository of experience in responding to the challenge of respecting domestic autonomy in setting regulatory aims while nevertheless enforcing treaty disciplines on the means utilised to pursue those aims.<sup>25</sup> Indeed, some suggest that the challenge facing adjudicators of balancing 'market values and regulatory ideals' can produce a deep level of convergence between interpretative approaches in the international trade and investment regimes that is not 'provision specific'.<sup>26</sup>

<sup>22</sup> DH Regan, 'The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing' (2007) 6 WorldTR 347, 359–60, fn 17; Bown and Trachtman (n 17) 124, 129.

<sup>23</sup> Atik (n 21) 122; Weiler (n 12) 144.

<sup>24</sup> Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, para 7.375.

<sup>25</sup> See eg J Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2016) 280–2; AD Mitchell and C Henckels, 'Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law' (2013) 14 ChicagoJIntL 93, 162–4; S Cho and J Kurtz, 'Convergence and Divergence in International Economic Law and Politics' (2018) 29 EJIL 169, 197.

<sup>26</sup> Cho and Kurtz (n 25) 170–1, 197.

While the concept of the ‘level of protection’ has the strongest textual basis in the SPS Agreement, it has also been drawn upon in jurisprudence under the GATT, GATS, and TBT Agreement. In the latter contexts, there is either no or a more limited textual basis for the idea that members have the right to determine the desired level of protection for permissible regulatory aims.<sup>27</sup> Nevertheless, it is clear that ‘the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context’.<sup>28</sup> Thus, Petros Mavroidis observes in relation to the concept of necessity, as developed in GATT Article XX jurisprudence: ‘WTO adjudicating bodies have consistently held that their power of review extends only to means employed. The choice of ends (including the level of enforcement) is the exclusive privilege of WTO members.’<sup>29</sup>

#### A. GATT Article XX/GATS Article XIV

The concept of the level of protection has been repeatedly drawn upon within the necessity test developed under GATT Article XX(a), (b) and (d) and its GATS equivalents. The necessity analysis under these provisions has been interpreted to require ‘a process of “weighing and balancing” a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure’.<sup>30</sup> ‘In most cases, a comparison between the challenged measure and possible [less trade-restrictive] alternatives should subsequently be undertaken.’<sup>31</sup> Although the reference to ‘weighing and balancing’ and the importance of the interests at stake has at times been interpreted as signalling proportionality balancing *stricto sensu*, most commentators agree that in jurisprudence to date, WTO adjudicators have employed a form of least restrictive means testing, where the regulatory aim pursued by a member has not been questioned, and the importance of the relevant regulatory interests can provide an additional margin of appreciation, which makes it easier for a member to establish that its measures are necessary.<sup>32</sup>

<sup>27</sup> The term appears in the preamble to the TBT Agreement: see below text (n 48). The term does not appear in GATT or GATS but has been drawn on in interpreting those agreements: Panel Report, *US – Clove Cigarettes* (n 24) para 7.370.

<sup>28</sup> Appellate Body Report, *Brazil – Retreaded Tyres* (n 3) para 210.

<sup>29</sup> Mavroidis (n 14) 436–7.

<sup>30</sup> Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R, adopted 22 June 2016, para 5.70; Appellate Body Reports, *EC – Seal Products* (n 3) para 5.169; Appellate Body Report, *Brazil – Retreaded Tyres* (n 3) para 156; Appellate Body Report, *US – Gambling* (n 4) paras 305–6.

<sup>31</sup> Appellate Body Report, *Colombia – Textiles* (n 30) para 5.70; Appellate Body Report, *US – Gambling* (n 4) para 307; Appellate Body Reports, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para 166.

<sup>32</sup> See eg Mitchell and Henckels (n 25) 128–30, 135, 149–50; M Du, ‘The Necessity Test in World Trade Law: What Now?’ (2016) 15 ChineseJIL 817, 825–7, 835; P Van den Bossche,



In order to qualify as a genuine alternative, any proposed alternative measure must allow the responding member to achieve its desired level of protection for the relevant policy objective.<sup>33</sup> For example, in the context of GATT Article XX (a) and GATS Article XIV(a), WTO adjudicators have emphasised that ‘Members have the right to determine the level of protection that they consider appropriate’ in relation to issues of public moral concern.<sup>34</sup> In the context of GATT Article XX(b), the AB has noted that ‘WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation’.<sup>35</sup> Scrutiny instead focuses on whether the measures adopted by a member are necessary to achieve its chosen level of protection, or whether alternative, less trade-restrictive measures could achieve the member’s desired level of protection.<sup>36</sup> Similarly, in the context of GATT Article XX(d), the AB has noted ‘[i]t is not open to doubt that Members ... have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations’.<sup>37</sup>

Importantly, it is ultimately for a panel or the AB, not the responding member, to determine the level of protection that was pursued by a member.<sup>38</sup> In this regard, *Korea – Beef* is a particularly controversial ruling because the AB restated the level of protection that was pursued by Korea at a lower level than that which Korea had claimed.<sup>39</sup> The GATT Article XX/GATS Article XIV case law is not entirely clear on how the level of protection asserted by a responding member interacts with the level of

‘Looking for Proportionality in WTO Law’ (2008) 35 LIEI 283, 289–93; Regan (n 22) 348–60. Contrast F Fontanelli, ‘Necessity Killed the GATT: Art XX GATT and the Misleading Rhetoric About “Weighing and Balancing”’ (2012) 4 EJLS 39, 58, 65–6, 68; AO Sykes, ‘The Least Restrictive Means’ (2003) 70 UChiLRev 403, 415–16.

<sup>33</sup> Additionally, a proposed alternative measure will not qualify as ‘reasonably available’ ‘where the responding Member is not capable of taking it, or where the alternative imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties’: Appellate Body Report, *US – Gambling* (n 4) para 308, affirmed in Appellate Body Report, *Brazil – Retreaded Tyres* (n 3) para 156, and Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, para 318.

<sup>34</sup> Appellate Body Reports, *EC – Seal Products* (n 3) para 5.200, citing Panel Report, *United States – Gambling* (n 3) para 6.461; Panel Report, *China – Publications and Audiovisual Products* (n 3) para 7.819.

<sup>35</sup> Appellate Body Report, *EC – Asbestos* (n 3) para 168; Appellate Body Report, *Brazil – Retreaded Tyres* (n 3) para 140.

<sup>36</sup> eg Appellate Body Report, *EC – Asbestos* (n 3) para 174.

<sup>37</sup> Appellate Body Report, *Korea – Beef* (n 31) para 176, drawing on GATT Panel Report, *United States – Section 337 of the Tariff Act 1930*, L/6439 - 36S/345, adopted 7 November 1989, para 5.26.

<sup>38</sup> Appellate Body Report, *US – Gambling* (n 4) para 304; G Marceau and JP Trachtman, ‘A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade’ (2014) 48 JWT 351, 386; McGrady (n 17) 156.

<sup>39</sup> Appellate Body Report, *Korea – Beef* (n 31) para 178 (finding in relation to the goal of eliminating fraud concerning the origin of beef sold in the retail market, Korea had not intended to ‘totally eliminate’ such fraud as opposed to ‘reduce [it] considerably’). Du (n 7) 1098.

protection achieved by the impugned measures. Some statements appear to suggest that the level of protection is an aspect of the member's regulatory aim, essentially concerning the level at which a member decides to pursue a particular policy goal, and is analytically separate from the measures adopted to achieve that level of protection.<sup>40</sup> However, much of the case law suggests that the level of protection is closely related to the contribution that a member's measures make to the relevant policy objective, with any proposed alternative, less trade-restrictive measures needing to 'make a contribution that is at least equivalent to that' made by the impugned measures.<sup>41</sup>

This ambiguity in the GATT Article XX/GATS Article XIV necessity jurisprudence, concerning whether the focus is on the level of protection intended *ex ante*, or the degree of contribution to the relevant aim actually achieved, is a potential weakness of the WTO approach drawn on by this article for comparative inspiration. Nevertheless, the weight of the GATT Article XX/GATS Article XIV necessity jurisprudence focuses on the level of protection achieved by a measure, as implemented, a position that is also clearly endorsed by the necessity jurisprudence under the TBT Agreement, considered next. As will be explained below, this article suggests that in the investment treaty context, the focus should also be on the level of protection achieved by the impugned measure(s).

Another potential difficulty of transplanting the approach found in WTO necessity jurisprudence to the level of protection to the investment treaty context is that, in practice, it can be difficult to pinpoint the level of protection, or degree of fulfilment of a permissible aim, achieved by a measure. This reflects that the goal pursued by a measure can often be stated at different levels of generality, and there may also be a range of possible metrics for measuring the degree to which a measure achieves a particular aim.<sup>42</sup> While this difficulty with the WTO approach is noteworthy, the case law considered in this subsection and the next (concerning the TBT Agreement) suggests that WTO adjudicators have been able to use the degree to which a measure contributes to a particular aim as a workable benchmark. For example, the AB has observed that to determine the objective of a measure and 'the effectiveness of' the respondent's 'regulatory approach'—ie the level of protection, as implemented—a panel may consider the 'texts of statutes, legislative history, and pronouncements of government agencies or officials',

<sup>40</sup> See eg Appellate Body Report, *Brazil – Retreaded Tyres* (n 3) paras 140, 144–5, 210.

<sup>41</sup> eg Panel Report, *China – Publications and Audiovisual Products* (n 3) paras 7.888, 7.894, 7.898–9; Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, paras 71–2; Appellate Body Report, *Brazil – Retreaded Tyres* (n 3) para 156. See also Appellate Body Report, *China – Publications and Audiovisual Products* (n 33) para 252.

<sup>42</sup> AD Mitchell and J Munro, 'No Retreat: An Emerging Principle of Non-Regression from Environmental Protections in International Investment Law' (2019) 50 *GeoInt'lL* 625, 660–2 (flagging a similar problem in relation to environmental non-regression clauses in investment treaties); McGrady (n 17) 157–60.

as well as ‘the structure and operation of the measure and ... contrary evidence proffered by the complaining party’.<sup>43</sup> Importantly, by referring to contemporaneous evidence, including concerning the operation of a measure, an adjudicator can reduce the potential for the respondent to offer strategic ‘post-hoc rationalizations’, which assert a higher level of protection than was actually pursued, after a dispute arises.<sup>44</sup> The WTO experience also demonstrates that adjudicators will frequently consider expert evidence to inform their understanding of the level of protection achieved by an impugned measure or a proposed alternative.<sup>45</sup> Overall, while the approach of the GATT/GATS case law to the issue of autonomy in setting the level of protection is not without difficulty, those difficulties are not so great as to suggest that the concept should not be drawn upon for comparative inspiration in the investment treaty context.

### B. TBT Agreement

The idea that WTO members have the right to determine which policy objectives to pursue, and the level at which to do so, has also informed the necessity test under Article 2.2 of the TBT Agreement.<sup>46</sup> By way of context, Article 2.2 of the TBT Agreement provides that ‘technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create’, and specifies a non-exhaustive list of ‘legitimate objectives’.<sup>47</sup> These include ‘national security requirements; the prevention of deceptive practices; protection of human

<sup>43</sup> Appellate Body Report, *US – Gambling* (n 4) para 304.

<sup>44</sup> FJ Garcia, ‘The Salmon Case: Evolution of Balancing Mechanisms for Non-Trade Values in WTO’ in GA Bermann and PC Mavroidis (eds), *Trade and Human Health and Safety* (Cambridge University Press 2006) 149–50 (discussing this risk).

<sup>45</sup> See eg Panel Reports, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, paras 7.514–17; Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, para 384.

<sup>46</sup> In addition to the case law discussed below, consider the *obiter* remark in Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R, adopted 23 October 2002, para 7.120 (‘Article 2.2 and this preambular text affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them’).

<sup>47</sup> TBT Agreement art 2.2. Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, para 313. An earlier draft of Article 2.2 included a footnote stating that ‘This provision is intended to ensure proportionality between regulations and the risks non-fulfilment of legitimate objectives would create’, but this was not included in the final agreement: GATT Doc MTN.TNC/W/FA (20 December 1991) at G.3. Arguably, this supports the view that the provision does not permit proportionality balancing *stricto sensu*: J Neumann and E Türk, ‘Necessity Revisited: Proportionality in World Trade Organization Law After *Korea—Beef*, *EC—Asbestos* and *EC—Sardines*’ (2003) 37 *JWT* 199, 221.

health or safety, animal or plant life or health, or the environment'. The sixth recital in the preamble of the TBT Agreement also states that:

no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.<sup>48</sup>

The TBT Agreement does not contain a closed list of legitimate objectives that may justify trade-restrictive measures. WTO adjudicators have held that they must make an independent assessment of whether a member's technical regulation pursues a legitimate objective.<sup>49</sup> Where the objective pursued by a technical regulation is among those listed in Article 2.2, no further inquiry is required into whether it qualifies as a legitimate objective.<sup>50</sup> Where the objective pursued is not listed in Article 2.2, WTO adjudicators have considered whether the objective is 'linked or related to a specific listed objective', or supported by other parts of the TBT Agreement (specifically the sixth and seventh recitals of the preamble), or whether the legitimate objectives recognised by other WTO agreements provide guidance.<sup>51</sup> As Andrew Mitchell and Caroline Henckels have argued, in situations where a treaty provision does not specify a closed list of legitimate objectives, an adjudicator's role in relation to the question of whether a measure pursues a legitimate objective should be limited to filtering out 'exercises of power ... that cannot ever justify limiting protected rights and interests', such as measures that pursue protectionist or discriminatory objectives.<sup>52</sup> Beyond this, adjudicators would do well to accept that as a general matter 'states may determine their own legitimate policy objectives'.<sup>53</sup> It will be suggested below that the approach to this issue under the TBT Agreement is relevant to the investment treaty context because investment treaties typically do not contain a closed list of permissible policy objectives that may justify measures that restrict other treaty-protected interests.

The necessity test in Article 2.2 of the TBT Agreement has been interpreted to require 'a relational analysis of the trade-restrictiveness of the technical

<sup>48</sup> TBT Agreement Preamble.

<sup>49</sup> See eg Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R, adopted 23 July 2012, paras 371, 395; Appellate Body Report, *US – Tuna II* (n 47) para 314.

<sup>50</sup> Appellate Body Reports, *US – COOL* (n 49) para 372.

<sup>51</sup> *ibid* paras 370, 372, 444–5.

<sup>52</sup> Mitchell and Henckels (n 25) 99; C Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press 2015) 127–8.

<sup>53</sup> Mitchell and Henckels (n 25) 151.

regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfilment would create'. This usually requires a comparison with potential alternative measures that would be less trade-restrictive but 'make an equivalent contribution to the relevant legitimate objective'.<sup>54</sup> Despite an initial panel interpretation to the contrary,<sup>55</sup> it is now clear that the focus under Article 2.2 of the TBT Agreement is not on the level at which a member aimed to achieve a permissible objective. 'Rather, what a panel is required to do, under Article 2.2, is to assess the degree to which a Member's technical regulation, as adopted, written, and applied, contributes to the legitimate objective pursued by that Member.'<sup>56</sup>

In order to determine the degree of contribution achieved by a member's technical regulation, a panel must consider 'the design, structure, and operation of the technical regulation, as well as ... evidence relating to the application of the measure'.<sup>57</sup> The idea is that 'a WTO Member, by preparing, adopting, and applying a measure in order to pursue a legitimate objective, articulates either implicitly or explicitly the level at which it seeks to pursue that particular legitimate objective'.<sup>58</sup> Specifically, the level at which a member chooses to pursue a legitimate objective 'is usually revealed by the degree of contribution that a technical regulation *actually* makes to its objective', although it 'may also be discernible ... through an express provision or statement in the instrument at issue'.<sup>59</sup> There is a parallel here with the approach seen above in the GATT/GATS context, where the level of protection pursued by a responding member is subject to objective determination, through reference to evidence concerning the structure and operation of a measure (ie, the degree to which it actually achieves a particular objective) and other contextual evidence.<sup>60</sup>

Within the broader necessity test under Article 2.2, any proposed alternative measure must achieve an 'an *equivalent* degree of contribution to the relevant legitimate objective'.<sup>61</sup> The AB has held that the phrase 'taking account of the risks non-fulfilment would create' in Article 2.2 cannot lessen the degree of contribution needed for an alternative measure to qualify as equivalent, as this could 'erode the principle that a member shall not be prevented from

<sup>54</sup> Appellate Body Report, *US – Tuna II* (n 47) paras 318, 320–2.

<sup>55</sup> See Panel Report, *US – Clove Cigarettes* (n 24) para 7.370.

<sup>56</sup> Appellate Body Reports, *US – COOL* (n 49) para 390, affirmed in Panel Reports, *Australia – Tobacco Plain Packaging* (n 45) para 7.196.

<sup>57</sup> Appellate Body Report, *US – Tuna II* (n 47) para 317.

<sup>58</sup> *ibid* para 316.

<sup>59</sup> Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW, WT/DS386/AB/RW, adopted 29 May 2015, para 5.201 and fn 632 (emphasis in original).

<sup>60</sup> See above text at (n 43).

<sup>61</sup> *US – COOL (Article 21.5)* (n 59) para 5.201 (emphasis in original).

pursuing a legitimate objective “at the levels it considers appropriate”.<sup>62</sup> Furthermore, the AB has rejected the argument that the phrase ‘taking account of the risks non-fulfilment would create’ provides a ‘basis for taking into account the relative importance of the objective pursued ... compared to the importance of other objectives’.<sup>63</sup> These statements highlight how the necessity test under Article 2.2 of the TBT Agreement has been interpreted so as to preserve WTO members’ ability to choose which regulatory aims to pursue and the level at which to pursue permissible aims.

Ultimately, in the context of Article 2.2 of the TBT Agreement, the focus is on the degree of contribution to the relevant regulatory objective which is actually made by the impugned measures. In contrast, a test utilising the benchmark of the level of protection intended by a regulator *ex ante* is more deferential to a regulating State as it allows the State to pronounce the desired level of protection and does not reduce that level based on the effectiveness of the measures adopted to achieve it. As will be seen next, such a test is mandated under the SPS Agreement.

### C. SPS Agreement

The concept of the appropriate level of protection (ALOP) ‘runs throughout’ the SPS Agreement.<sup>64</sup> As noted above, the term is defined as ‘[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory’.<sup>65</sup> The concern that the disciplines imposed by the SPS Agreement should not require ‘[m]embers to change their appropriate level of protection of human, animal or plant life or health’ is apparent in the Agreement’s preamble, and several of the specific obligations imposed.<sup>66</sup> As Atik observes, ‘the operative presumption of the SPS Agreement is national autonomy in setting health and food safety targets ... [however] the SPS Agreement meaningfully cabins these respective autonomies: not all is permitted’.<sup>67</sup> For the purposes of this article, the necessity test imposed under

<sup>62</sup> *ibid* paras 5.264–6. However, the AB has accepted that ‘the nature of the risks and the gravity of the consequences arising from the non-fulfilment of the technical regulation’s objective’, can inform the margin of appreciation enjoyed by a panel in assessing whether a proposed alternative measure would achieve an equivalent degree of contribution to the relevant objective: *ibid* paras 5.215, 5.217–18, 5.254, 5.269. See also Appellate Body Report, *US – Tuna II* (n 47) paras 321–2. These statements appear to suggest that where the risks of non-fulfilment of the relevant objective are grave, it will be more difficult to establish that a proposed alternative would make an equivalent degree of contribution. For a similar interpretation see Mitchell and Henckels (n 25) 144. Contrast C Downes, ‘Worth Shopping Around? Defending Regulatory Autonomy under the SPS and TBT Agreements’ (2015) 14 WTR 553, 567–72 (suggesting this aspect of Article 2.2 may provide a basis for proportionality balancing *stricto sensu*); A Desmedt, ‘Proportionality in WTO Law’ (2001) 4 JIEL 441, 459–60 (similar).

<sup>63</sup> *US – COOL (Article 21.5)* (n 59) paras 5.277, 5.279.

<sup>64</sup> Atik (n 21) 116.

<sup>65</sup> SPS Agreement Annex A, para 5.

<sup>66</sup> *eg ibid* Preamble, arts 3.3, 4.1, 5.6.

<sup>67</sup> Atik (n 21) 118.

Article 5.6 is particularly relevant, which requires that members' sanitary or phytosanitary (SPS) measures 'are not more trade-restrictive than required to achieve their appropriate level of ... protection, taking into account technical and economic feasibility'.<sup>68</sup> A footnote clarifies that: 'a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of ... protection and is significantly less restrictive to trade'.<sup>69</sup> As others have noted, the language of Article 5.6 and the associated footnote is arguably more 'protective of domestic regulatory autonomy compared to the necessary test in GATT Article XX', because it is explicitly stated that any alternative measure must achieve the member's selected level of protection.<sup>70</sup> Accordingly, any lowering of the regulatory objective, through a balancing exercise that considers factors such as a measure's trade restrictiveness, the measure's contribution to the relevant regulatory objective or the relative importance of the aim, is explicitly prohibited.<sup>71</sup>

Within Article 5.6 jurisprudence, WTO adjudicators have held that determining the appropriate level of protection 'is a *prerogative*' of the member concerned.<sup>72</sup> The idea is that the level of protection selected by a member 'is an *objective*' determined *ex ante*, whereas an SPS measure 'is an *instrument* chosen to attain or implement that objective'.<sup>73</sup> At this point, it is helpful to emphasise a key difference between the necessity test under the SPS Agreement, and the necessity tests under other WTO agreements, considered above. Specifically, as Yury Rovnov has noted:

it is only the SPS Agreement that establishes a separate metric (ALOP) for the different levels (degrees) of achievement of such a policy objective (in this case, protection against SPS risks) and gauges the legality of the covered measures by reference to that metric – which is taken to exist independently of the challenged measure – rather than to the measure itself.<sup>74</sup>

In contrast, as we saw above in relation to the GATT/GATS and TBT necessity jurisprudence, those agreements do not contain a textual basis for a benchmark, such as the ALOP, that is separate from the measure itself. Instead, as we have seen, the concept of the 'level of protection' in those contexts is generally

<sup>68</sup> SPS Agreement art 5.6. Another key discipline on SPS measures is that they must be based on a risk assessment that takes account of available scientific evidence: SPS Agreement arts 5.1–5.2. Potentially, this requirement can also curtail a member's ability to pursue a particular level of protection. Note that SPS measures that conform to international standards are presumed to be consistent with the SPS Agreement and the GATT: SPS Agreement art 3.2.

<sup>69</sup> SPS Agreement art 5.6, fn 3.

<sup>70</sup> Du (n 32) 845.  
<sup>71</sup> *ibid.* J Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (Oxford University Press 2009) 159–61.

<sup>72</sup> Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, para 199 (emphasis in original).

<sup>73</sup> *ibid.* para 200 (emphasis in original).

<sup>74</sup> Y Rovnov, 'Appropriate Level of Protection: The Most Misconceived Notion of WTO Law' (2021) 31 EJIL 1343, 1344.

understood as the degree to which the relevant measure, as implemented, contributes to the relevant policy aim. In short, in those contexts, it is the level of protection achieved by a measure that serves as the benchmark for necessity, or least restrictive means, testing. Given this difference, the obligation to determine the appropriate level of protection, to enable the application of the disciplines of the SPS Agreement,<sup>75</sup> is best understood as specific to the SPS context.

Ordinarily, a panel adjudicating a claim under Article 5.6 is ‘expected to accord weight to the respondent’s articulation of its appropriate level of protection’, particularly where it ‘was specified in advance of the adoption of the SPS measure ... with sufficient precision, and where it has been consistently expressed by the responding Member’.<sup>76</sup> However, similar to what has been seen above in relation to other WTO agreements, in the SPS context, a panel does not have to completely defer to the respondent’s characterisation of its appropriate level of protection and must determine this on the basis of the totality of the record.<sup>77</sup> Additionally, where a member has not determined its appropriate level of protection, or has not done so with sufficient precision, the AB has accepted that the appropriate level of protection can be inferred ‘on the basis of the level of protection reflected in the SPS measure actually applied’.<sup>78</sup> To succeed with a claim under Article 5.6 of the SPS Agreement, a complainant has to advance scientific evidence to establish a prima facie case that its proposed alternative measure would meet the regulating member’s selected level of protection.<sup>79</sup> For cases where a member has determined its level of protection with sufficient clarity prior to adopting an SPS measure, the benchmark that proposed alternative measures must meet is the level of protection selected by the member, not that achieved by its measure.<sup>80</sup>

Rovnov has highlighted that in practice both WTO panels, and WTO members themselves, have expressed the chosen ALOP in broad and imprecise qualitative formulations, which are similar across SPS disputes (eg a ‘high’ or ‘very high’ level of protection).<sup>81</sup> Schebesta and Sinopoli similarly note that in many SPS disputes the ALOP is only defined in vague terms and has to be induced, at least partly, from the SPS measure applied.<sup>82</sup> In short, the experience in the SPS case law has been that the ALOP is an imprecise concept, and members often refrain from clearly articulating their

<sup>75</sup> Appellate Body Report, *Australia – Salmon* (n 72) paras 205–7.

<sup>76</sup> Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, adopted 19 June 2015, para 5.221. <sup>77</sup> *ibid.*

<sup>78</sup> Appellate Body Report, *Australia – Salmon* (n 72) para 207.

<sup>79</sup> See Appellate Body Report, *Australia – Apples* (n 45) paras 364–6.

<sup>80</sup> See Appellate Body Report, *Australia – Salmon* (n 72) paras 200–4; Appellate Body Report, *Australia – Apples* (n 45) para 344. <sup>81</sup> Rovnov (n 74) 1360–5.

<sup>82</sup> H Schebesta and D Sinopoli, ‘The Potency of the SPS Agreement’s Excessivity Test: The Impact of Article 5.6 on Trade Liberalization and the Regulatory Power of WTO Members to Take Sanitary and Phytosanitary Measures’ (2018) 21 *JIEL* 123, 135–7.



selected ALOP, despite the obligation to do so.<sup>83</sup> While it is important to acknowledge these difficulties with the ALOP concept, they would not necessarily arise in the same way, or to the same extent, in the investment treaty context. This is because, unlike the SPS Agreement, investment treaties do not create a benchmark of the ALOP that is separate from the challenged measure(s), nor impose an obligation on States to determine *ex ante* the level of protection that is desired. Accordingly, in the investment treaty context, similar to the GATT/GATS and TBT case law considered above, the focus should be on the level of protection, or degree of contribution to the relevant aim, achieved by the impugned measure(s), which would serve as the benchmark that proposed alternative measures must meet. While this does not remove the difficulties, discussed above, around pinpointing the level of protection that a measure, as implemented, achieves,<sup>84</sup> it suggests that the difficulties arising in the SPS context, with its focus on the ALOP as a benchmark separate from the measure itself, are distinct.

#### D. Summarising the Lessons from WTO Law

This analysis of the level of protection in WTO law offers several lessons for how the ability of States to select and implement a particular level of protection for permissible regulatory aims could be better protected in the investment treaty regime. Above all, WTO members' autonomy in deciding the level at which to pursue permissible regulatory aims has informed how key WTO disciplines and exceptions have been interpreted and applied. Contextual interpretation has played a key role in this regard.<sup>85</sup> A good example is the frequent reference to the sixth recital in the preamble of the TBT Agreement when interpreting the necessity test under Article 2.2 of that Agreement. In investment law, where the relevant treaties generally do not specify a limited range of permissible regulatory objectives and, as will be shown, there is a growing body of treaty provisions aimed at safeguarding regulatory autonomy, the starting point should also be substantial deference towards a State's own choice of which regulatory objectives to pursue, and the level at which to pursue those aims.<sup>86</sup>

<sup>83</sup> See also L Gruszczynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement* (Oxford University Press 2010) 249–50 (noting the unsatisfactory results that emerge from the SPS Agreement using a benchmark, the ALOP, that is separate from the level of protection reflected in the impugned measure).

<sup>84</sup> See above text at (n 42).

<sup>85</sup> CE Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard and Due Diligence* (forthcoming, Oxford University Press 2021) 150–1, 172–3 (suggesting WTO necessity jurisprudence reflects the principles of effectiveness and contextual interpretation); I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press 2009) 298–9 (suggesting the AB's necessity jurisprudence reflects systemic values that govern all WTO treaty language, including preserving sufficient policy space for members).

<sup>86</sup> See above text at (nn 52–3).

Importantly, host State autonomy in selecting regulatory aims, including a particular level of protection, also needs to inform the interpretation of key treaty disciplines.<sup>87</sup> In this regard, WTO necessity jurisprudence, analysed above, offers certain insights, because it has avoided undermining members' choice of regulatory aims, while still placing meaningful restrictions on the means selected to achieve those objectives.<sup>88</sup> As has been seen, WTO necessity jurisprudence employs a least-restrictive means test, and has avoided engaging in proportionality balancing *stricto sensu*, whereby the regulatory goal pursued by a member could be directly weighed against, and downgraded in light of, the competing treaty-protected interest of trade liberalisation. In this respect, the requirement that any proposed alternative measure must make an equivalent contribution to the relevant regulatory aim is a crucial feature of the necessity jurisprudence.

Nevertheless, significant constraints are placed on how members may pursue their chosen regulatory aims. As seen above, WTO provisions frequently require that members use the least trade-restrictive means reasonably available.<sup>89</sup> Other related provisions, which have not been the focus of this article, require that the measures themselves, or the manner in which they are applied, are non-discriminatory.<sup>90</sup> Through these features, WTO law endorses a hierarchy of values, whereby non-trade regulatory aims recognised as legitimate within a particular covered agreement can take priority over the interest of trade liberalisation, so long as the specified conditions for pursuing such non-trade aims are complied with.<sup>91</sup>

In the next Part, it will be demonstrated that there is already a significant textual basis in newer investment treaties for the proposition that the treaty parties retain the right to determine which regulatory objectives to pursue and the level at which to pursue permissible aims. The challenge is mostly one of better integrating this idea into the interpretation and application of investment protection standards. It is suggested that the requirement to construe investment protection obligations in their full context, having regard

<sup>87</sup> See also J Arato, K Claussen and JB Heath, 'The Perils of Pandemic Exceptionalism' (2020) 114 AJIL 627, 635 (advocating incorporating flexibilities within primary obligations).

<sup>88</sup> See also Mitchell and Henckels (n 25) 146–7, 151, 153–7 (identifying lessons that investment tribunals can draw from WTO necessity jurisprudence).

<sup>89</sup> TBT Agreement art 2.2 and SPS Agreement art 5.6 explicitly refer to trade restrictiveness. In the context of GATT art XX and GATS art XIV, the case law has developed the benchmark of utilising the least trade-restrictive means reasonably available. Earlier case law at times referred to the idea of the 'least degree of inconsistency' with other treaty obligations: see eg Mitchell and Henckels (n 21) 131–2. As they note, later case law has indicated that the focus in assessing trade-restrictiveness is on 'the factual impact of the measure on the underlying values that the infringed obligation is designed to protect': *ibid.* See Appellate Body Report, *China – Publications and Audiovisual Products* (n 33) para 306.

<sup>90</sup> ie the chapeau to GATT art XX/GATS art XIV, TBT Agreement art 2.1, SPS Agreement art 2.3.

<sup>91</sup> eg P Van den Bossche and W Zdouc, *The Law and Policy of the World Trade Organization: Texts, Cases and Materials* (4th edn, Cambridge University Press 2017) 545–6.

to the competing interest of regulatory autonomy, can be taken significantly further yet. In particular, investment treaties and jurisprudence could be reoriented towards a similar balance to that seen in the WTO context, whereby so long as a State pursues a permissible regulatory aim and uses the means to achieve that aim that involve the least possible restriction of the competing interests protected by relevant investment treaty obligations, a treaty breach should not be found.<sup>92</sup>

At this point, it can simply be noted that this is not the orientation that has always been adopted, even in recent treaties or arbitral awards. Rather, as will be shown, within the key standards of FET and the protection against indirect expropriation, both adjudicators and treaty drafters have laid a clear basis for proportionality balancing *stricto sensu*, which could involve prioritising the interest of investment protection over the regulatory aim pursued by a State, even where the least restrictive means have been utilised. A core claim of the following parts is that this opening for proportionality balancing *stricto sensu* must be reconsidered, if investment treaties are to be construed in a manner that respects State autonomy to determine the level at which to pursue permissible regulatory aims.

#### IV. INVESTMENT TREATIES ARE CONSISTENT WITH STATE AUTONOMY IN SETTING THE LEVEL OF PROTECTION FOR PERMISSIBLE REGULATORY AIMS

This Part argues that investment treaties are, properly interpreted, consistent with the idea that States retain autonomy to determine the level at which to pursue permissible regulatory aims. While investment treaties constrain the means through which States may pursue their selected policy aims, it will be suggested that they are largely not concerned with limiting what those policy goals may be. Although only a subset of the provisions considered in this Part explicitly address the treaty parties' autonomy to determine the level of protection for certain permissible regulatory aims (eg environmental or labour protection), collectively the effect of the provisions considered is significant. The provisions discussed signal to adjudicators that investment protection is not the only concern of investment treaties, and at times evidence an intention to give priority to competing regulatory aims.<sup>93</sup> The

<sup>92</sup> In applying a least-restrictive means test there is a question of whether the focus should be on the effect of an impugned measure on an individual complainant investor, or on the degree to which the measure restricts the competing values protected by applicable legal norms, viewed in a wider perspective. See eg EM Leonhardsen, 'Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration' (2012) 3 JIDS 95, 114, drawing on DH Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1986) 84 MichLRev 1091, 1101–7. As Caroline Foster has argued, if one takes the view that investment treaties ultimately remain inter-State bargains, despite the procedural rights conferred on investors, then the focus should be on the impact of a measure on the interest of investment protection, as enshrined in applicable treaty provisions, rather than the burden falling on an individual complainant: Foster (n 85) 259–61.

<sup>93</sup> Kurtz (n 25) 169–71.

provisions analysed in this Part provide a textual hook through which investment adjudicators could give greater effect to host State autonomy in pursuing a desired level of protection for permissible regulatory aims. Accordingly, while this claim concerning States' autonomy to determine the level of protection amounts to an extension of existing trends, it has a significant basis in existing investment treaties and case law. This Part has three subsections: first, it considers several different categories of investment treaty provisions that provide textual support for this claim, before considering arbitral interpretations that have recognised the autonomy retained by States to determine which regulatory aims to pursue. Finally, it is explained why this argument holds even in relation to older investment treaties, which do not contain textual references to a wider range of non-economic interests.

*A. Investment Treaty Provisions Supporting State Autonomy to Determine Regulatory Aims, including Levels of Protection*

One category of provisions that are directly relevant to the claim being made concerning States' autonomy to determine the level of protection are provisions which affirm that the treaty parties, despite undertaking investment protection obligations, retain the right to regulate. Such a provision first appeared in Article 1114(1) of the North American Free Trade Agreement (NAFTA), which provides: 'Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.'<sup>94</sup> Similar provisions have been routinely used by a range of States over the last 15 years.<sup>95</sup>

Increasingly, right to regulate provisions extend beyond the environmental regulation of investment activity to cover a non-exhaustive list of legitimate regulatory objectives.<sup>96</sup> Due to the 'otherwise consistent' qualification, such provisions have widely been viewed as 'self-cancelling',<sup>97</sup> although some commentators have advanced alternative interpretations.<sup>98</sup> However, an

<sup>94</sup> NAFTA (1992) art 1114(1).

<sup>95</sup> From many, eg Mexico–Chile FTA (1998) art 9–15(1); Singapore–United States FTA (2003) art 15.10; Korea–Peru FTA (2010) art 9.9; Morocco–Nigeria BIT (2016) art 13(4).

<sup>96</sup> eg Indonesia–Australia CEPA (2019) art 14.16; CETA art 8.9(1); United States–Mexico–Canada Agreement (USMCA) (2018) art 14.16.

<sup>97</sup> eg L Johnson, L Sachs and N Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) 58 *ColumJTransnatlL* 58, 101; C Martini, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting' (2017) 50 *The International Lawyer* 529, 568.

<sup>98</sup> See JW Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 385 (suggesting that 'The phrase "otherwise consistent with the Treaty" would seem to mean that the

analogy can be drawn with the sixth preambular recital to the TBT Agreement, considered above, which is also prefaced by a qualification of measures that are ‘otherwise in accordance with the provisions of this Agreement’, but which has been interpreted as providing context that has shaped how the disciplines contained in that Agreement are construed.<sup>99</sup> Furthermore, recent case law interpreting right to regulate provisions suggests that even provisions including the ‘otherwise consistent’ qualifier can have a significant effect on how investment treaties are construed, essentially by serving as interpretative context that underscores the margin of appreciation to be afforded to State measures pursuing permissible regulatory aims.<sup>100</sup>

A particular form of right to regulate provisions is found in the recent Model BITs of the Belgium–Luxembourg Economic Union (BLEU), Canada, Colombia, the Netherlands and the Slovak Republic, and recent investment treaties concluded by the EU, Colombia, Hungary and the United Arab Emirates (UAE). With some variations, these clauses clarify that the provisions of the relevant agreement do not affect the right of the parties to regulate through measures to achieve a range of legitimate policy objectives, and omit the ‘otherwise consistent’ qualifier.<sup>101</sup> Such provisions still do not provide an unambiguous basis for the parties to adopt measures inconsistent with other obligations contained in the relevant treaties, and are most likely to serve as interpretative context that would inform the construction of

measures in question would be consistent but for the fact that they were taken to assure that investments will be conducted in an environmentally sensitive manner’).

<sup>99</sup> Mitchell, Sheargold and Voon (n 1) 159. Consider also art 8.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which requires that the relevant measures are ‘consistent with the provisions of this Agreement’, and has been held to provide interpretative context that informs the construction of other provisions of the Agreement: Panel Reports, *Australia – Tobacco Plain Packaging* (n 45) paras 7.2401–8.

<sup>100</sup> *Aven v Costa Rica* (n 16) paras 412–13, 743; *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award (3 November 2015) paras 387–90, 445–6, 458; *Infinito Gold Ltd v Costa Rica*, ICSID Case No ARB/14/5, Award (3 June 2021) paras 772–81. In *SD Myers*, Arbitrator Schwartz rejected the argument that due to the ‘otherwise consistent’ qualification, art 1114 of NAFTA was merely ‘empty rhetoric’; rather the provision served to remind interpreters of NAFTA’s investment chapter that ‘the parties take both the environment and open trade very seriously and that means should be found to reconcile these two objectives’: *SD Myers, Inc v Canada*, UNCITRAL, Separate Opinion of Dr Bryan Schwartz (12 November 2000) para 118. Art 1114 of NAFTA was also considered in passing in *Metalclad Corp v Mexico*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) para 98.

<sup>101</sup> CETA art 8.9(1); EU–Vietnam Investment Protection Agreement (IPA) (2019) art 2.2(1); EU–Singapore IPA (2018) art 2.2(1); EU–Mexico Global Agreement (2020) ch 17, art 1; Rwanda–UAE BIT (2017) art 9(1); Colombia–UAE BIT (2017) art 10(1); Argentina–UAE BIT (2018) art 11; Brazil–UAE BIT (2019) art 17(1); Ethiopia–UAE BIT (2016) art 18(1); Colombia Model BIT (2017) ‘Chapeau on Investment and Regulatory Measures’; BLEU Model BIT (2019) art 1(2); Canada Model FIPA (2021) art 3; Slovak Republic Model BIT (2019) art 4(1). The following agreements add the nexus ‘necessary’: Argentina–Qatar BIT (2016) art 10; Netherlands Model BIT (2019) art 2(2); Hungary–Cabo Verde BIT (2019) art 3(1); Hungary–Belarus BIT (2019) art 3(1); Hungary–Kyrgyzstan BIT (2020) art 3(1). Some of Colombia’s investment treaties require that ‘such measures are proportional to the objectives sought’: eg Colombia–Turkey BIT (2014) art 11(1); Colombia–UK BIT (2010) art VIII.

investment protection obligations.<sup>102</sup> Nevertheless, by omitting the ‘otherwise consistent’ qualification, such provisions provide an even stronger basis for the claim that investment treaties, although constraining the means through which regulatory aims may be pursued, are intended to leave States with wide discretion to determine which aims to pursue, including selecting a particular level of protection for permissible aims.

Another element of contemporary investment treaties that supports this claim is the common preambular language concerning regulatory autonomy and levels of protection. For example, preambular language often reaffirms the treaty parties’ right to regulate,<sup>103</sup> or records the parties’ intention to reconcile trade and investment policies with high levels of environmental protection,<sup>104</sup> or the parties’ agreement that the economic development objectives of the treaty can be achieved without relaxing health, safety, or environmental standards.<sup>105</sup> Such language suggests that the object and purpose of the treaty is to preserve, rather than to undermine, the parties’ right to regulate.<sup>106</sup> Ultimately, preambular language serves as interpretative context that may influence how other treaty obligations (eg investment protection standards) are construed.<sup>107</sup>

A related and increasingly common feature of investment treaties that provides significant textual support for the claim being made are provisions recognising the treaty parties’ right to determine and implement their own levels of environmental or labour protection.<sup>108</sup> Such provisions have been routinely included in the environment or sustainable development chapters or side agreements of FTAs since NAFTA, including those concluded by the United States<sup>109</sup> and the European Union.<sup>110</sup> Numerous BITs concluded by

<sup>102</sup> C Titi, ‘The Right to Regulate’ in MM Mbengue and S Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019) 170–1 (suggesting the relevant provision in CETA ‘serves as an interpretive statement ... it does not appear to provide a concrete actionable right’); Johnson, Sachs and Lobel (n 97) 101 (suggesting the effect of provisions without the ‘otherwise consistent’ qualifier remain ambiguous).

<sup>103</sup> eg Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018) Preamble; CETA Preamble; USMCA Preamble; Netherlands Model BIT (2019) Preamble; BLEU Model BIT (2019) Preamble.

<sup>104</sup> eg CPTPP Preamble; USMCA Preamble; EU–Singapore IPA (2018) Preamble.

<sup>105</sup> eg Japan–Korea–China Trilateral Investment Agreement (2012) Preamble; Switzerland–Egypt BIT (2010) Preamble; US–Jordan BIT (1997) Preamble. For additional typology of preambular language see eg Martini (n 97) 560–3.

<sup>106</sup> S Schacherer, ‘The CETA Investment Chapter and Sustainable Development: Interpretative Issues’ in MM Mbengue and S Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019) 227 (making a similar point in relation to the joint interpretative instrument concluded when signing CETA).

<sup>107</sup> Titi (n 102) 169. Martini (n 97) 563–7.

<sup>108</sup> eg EU–China CAI section IV(2) art 1 and section IV(3) art 1; Ethiopia–UAE BIT (2016) art 12(1); CPTPP art 20.3(2); Slovakia–UAE BIT (2016) art 12(2); Iran–Slovakia BIT (2016) art 10(2). A similar provision appears in the EU’s text proposal within the ongoing negotiations to modernise the Energy Charter Treaty, entitled ‘Sustainable Development – Right to Regulate and Levels of Protection’ <[https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc\\_158754.pdf](https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf)>.

<sup>109</sup> eg North American Agreement on Environmental Cooperation (1993) art 3; DR–CAFTA (2004) art 17.1; Singapore–US FTA (2004) art 18.1; Jordan–US FTA (2000) art 5(2).

<sup>110</sup> eg EU–South Korea FTA (2011) art 13.3; CETA arts 23.2, 24.3.

the BLEU from 2004 onwards contain provisions that recognise ‘the right of each Contracting Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental legislation’.<sup>111</sup> While the drafting intention appears to be that such provisions would only be subject to consultations between the treaty parties,<sup>112</sup> such provisions would provide interpretative context when interpreting and applying the investment protection obligations contained in the relevant treaties.<sup>113</sup>

The equivalent provision in the 2019 Model BIT of the BLEU, which may serve as a basis for renegotiating its significant stock of investment treaties, contains notably stronger wording. This provision, entitled ‘Right to Regulate and Levels of Protection’, states:

Nothing in this Agreement shall in any way be construed as limiting the right of a Contracting Party or any of their competent authorities to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify its relevant laws and policies accordingly, consistently with the internationally recognised standards and agreements.<sup>114</sup>

The language here moves closer to constituting a true exception or defence (‘Nothing in this Agreement’ shall in any way be construed as limiting’) rather than necessarily being limited to providing interpretative context.<sup>115</sup> Consistently with this characterisation, the provision is qualified by the fact that it only covers conduct consistent ‘with the internationally recognised standards and agreements’, and the Parties ‘shall not apply labour and environmental domestic laws in a manner that would constitute a disguised restriction of investment or an unjustified discrimination’.<sup>116</sup> For present purposes, the key point is that this category of provisions provides a textual basis for the claim that investment treaties are intended to preserve the treaty parties’ right to determine which policy aims to pursue, including the right to select and implement a specific level of protection for permissible aims, such

<sup>111</sup> eg UAE–BLEU BIT (2004) art 5(1); BLEU–Mauritius BIT (2005) art 5(1); BLEU–Qatar BIT (2007) art 5(1).

<sup>112</sup> Typically, the relevant provision specifies that it is subject to consultations between the Parties, but it is not explicitly removed from investor-State or State–State dispute settlement: eg UAE–BLEU BIT (2004) arts 5(3), 12–13. In some agreements, any obligations arising from the provision are explicitly removed from the treaty’s dispute settlement mechanisms: eg BLEU–Colombia BIT (2009) art VII(5).

<sup>113</sup> T Gazzini, ‘Bilateral Investment Treaties and Sustainable Development’ (2014) 15 JWIT 929, 952.

<sup>114</sup> BLEU Model BIT (2019) art 15(1). The provision is excluded from the investor-State dispute settlement mechanism under the model treaty, but would be relevant as interpretative context, and could be subject to inter-State dispute settlement: arts 19(1), 23(1)–23(3).

<sup>115</sup> For discussion of the typical structure of exceptions and defences see eg C Henckels, ‘Should Investment Treaties Contain Public Policy Exceptions?’ (2018) 59 BCLRev 2825, 2827–9.

<sup>116</sup> BLEU Model BIT (2019) art 15(6).

as environmental or labour protection. While such provisions are currently only found in a relatively small number of investment treaties, it is conceivable that future investment treaties, or a future statute of a multilateral investment court, could provide that the treaty preserves the parties' right to determine their own level of protection for permissible regulatory aims.<sup>117</sup>

Another aspect of recent investment treaties that is supportive of the claim being made is that there is little sign of States using investment treaties to require parties to implement the same level of protection for permissible regulatory aims. Rather, while newer treaties contain an increasing number of references to sustainable development issues, such provisions are largely focused on preserving domestic regulatory autonomy,<sup>118</sup> although they do impose some outer limits on the parties' right to regulate in certain areas (typically environmental and labour protection).<sup>119</sup>

For example, so-called non-regression provisions, whereby the treaty parties recognise that it is inappropriate to lower the level of protection provided by their environmental or labour laws in order to encourage trade or investment,<sup>120</sup> at most prevent a State regressing from its current level of protection, but only for the purposes outlined.<sup>121</sup> Accordingly, such provisions are reconcilable with the above-mentioned common provision recognising each party's right to determine its own level of environmental or labour protection.<sup>122</sup>

Other provisions that impose an obligation on the treaty parties to pursue high levels of environmental protection, or to strive to improve their existing levels of protection, often include hortatory or imprecise language, which weakens the obligation.<sup>123</sup> Even where such provisions are more definitive, they simply require the treaty parties to ensure that their laws provide for high levels of

<sup>117</sup> For suggestions on this point see F Ortino, 'Taming the Chaos in Investment Treaty Protection' (2020) *Columbia FDI Perspectives* No 294. Titi (n 5) 535.

<sup>118</sup> W Kidane, 'Sustainable Development Obligations and Access to Treaty Remedies in Contemporary Investment Treaties and Models' in JE Kalicki and M Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration* (Kluwer Law International 2019) 297, 303.

<sup>119</sup> G Marín Durán, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues' (2020) 57 *CMLRev* 1031, 1036–40 (suggesting the various categories of obligations, discussed in this paragraph, can be interpreted as imposing distinct limitations on the sovereign right to regulate in environmental or labour matters).

<sup>120</sup> eg EU–China CAI section IV(2) art 2(2), section IV(3) art 2(2); CETA arts 23.4(1), 24.5(1); BLEU Model BIT (2019) art 15(3); Netherlands Model BIT (2019) art 6(4).

<sup>121</sup> Some argue that there is a difference, in terms of the mandatory nature of the obligation, between those treaties where the parties merely recognise it is inappropriate to lower their levels of protection to encourage trade or investment, and those treaties where the parties agree not to do so: eg B Melo Araujo, 'Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality' (2018) 67 *ICLQ* 233, 249. For examples of the latter type of provision see eg CARIFORUM–EU EPA (2008) arts 188(1)(a) and 193(a); UK–EFTA FTA (2021) art 13.4(1).

<sup>122</sup> Mitchell and Munro (n 42) 688–90.

<sup>123</sup> eg CETA art 24.3 (obligation to 'seek to ensure'), CPTPP art 20.3(3) ('strive to ensure'); Iran–Slovakia BIT art 10(2) (obligation to ensure 'appropriate levels of environmental protection'); Japan–India CEPA art 8.1 ('adequate levels of environmental protection').



environmental and labour protection, rather than requiring all treaty parties to adopt the same level of protection, or the same laws and policies.<sup>124</sup>

Finally, right to regulate provisions that qualify the parties' right to set their own level of protection, by stating that this right must be exercised in a manner consistent with a party's multilateral environmental or labour commitments,<sup>125</sup> do not represent an agenda of harmonisation, because the referenced multilateral commitments generally leave States with substantial discretion concerning their domestic standards.<sup>126</sup>

In summary, the provisions analysed in the preceding three paragraphs do not evidence an intention to require treaty parties to adopt the same levels of environmental or labour protection, or the same laws and policies, although they do place some outer limits on States' right to regulate in these areas.

Finally, the increasingly widespread use of WTO-style general exceptions provisions in investment treaties<sup>127</sup> also provides some support for the argument that investment treaties should be interpreted as preserving a State's ability to determine its own level of protection for permissible regulatory aims. The significance of general exceptions provisions is that they either remove regulatory conduct falling within the provision from the scope of the treaty obligations or immunise otherwise treaty-inconsistent conduct.<sup>128</sup> Accordingly, they can be understood as an attempt by States to preserve their ability to pursue a range of recognised legitimate policy aims, despite having undertaken investment treaty obligations that constrain the means through which such aims may be pursued.

Furthermore, as seen in Part III, WTO necessity jurisprudence under GATT Article XX/GATS Article XIV has for 20 years explicitly recognised that WTO members retain the prerogative to set the desired level of protection for permissible regulatory aims.<sup>129</sup> Accordingly, an argument can be made that

<sup>124</sup> eg Netherlands Model BIT (2019) art 6(2); BLEU Model BIT (2019) art 15(2); DR-CAFTA art 17.1.

<sup>125</sup> See eg EU-China CAI section IV(2) art 1 and section IV(3) art 1; CETA arts 23.2, 24.3.

<sup>126</sup> M Bronckers and G Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24 JIEL 25, 32; Panel of Experts Constituted under Article 13.15 of the EU-Korea Free Trade Agreement, Report of the Panel of Experts (20 January 2021) paras 80–4 (finding that an obligation to respect fundamental principles concerning labour rights merely qualified the Parties' right to regulate and to set their own levels of protection and did not require harmonisation of labour standards).

<sup>127</sup> See eg A Keene, 'The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements' (2017) 18 JWIT 62, 65, 69 (finding in a sample of all publicly available investment treaties concluded between 2010–15, 45 per cent of agreements included a WTO-style general exceptions provision).

<sup>128</sup> On this question see C Henckels, 'Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law' (2020) 69 ICLQ 557.

<sup>129</sup> AD Mitchell, J Munro and T Voon, 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks' in L Sachs, L Johnson and J Coleman (eds) *Yearbook on International Investment Law and Policy 2017* (Oxford University Press 2019) 329–31 ('the defining feature of the necessity test in WTO law is substantial deference to the respondent's chosen "level of protection"').

States, by including in their investment treaties exceptions modelled on GATT Article XX/GATS Article XIV, intend to transpose this aspect of regulatory autonomy into the investment treaty context.<sup>130</sup> In sum, there is a case for interpreting WTO-style general exceptions provisions in investment treaties in light of WTO necessity jurisprudence, including the case law's emphasis on preserving States' ability to determine the desired level of protection for permissible regulatory aims.<sup>131</sup> This subsection has demonstrated why the overall claim being made concerning States' autonomy to determine the level of protection for permissible regulatory aims is the correct approach when interpreting more recent investment treaties.

*B. Investor-State Case Law Supporting State Autonomy to Determine Regulatory Aims, including Levels of Protection*

This subsection addresses case law that provides varying degrees of support for this claim. In short, as in the WTO context, investment law adjudicators have often recognised that investment treaties discipline the means employed by States, while leaving States largely free to determine regulatory ends.

*SD Myers v Canada* is an influential early award that provides direct support for this proposition. In this case, having regard to the preamble of NAFTA, and the environmental side agreement to NAFTA, the North American Agreement on Environmental Cooperation, the Tribunal held that 'specific provisions of the NAFTA should be interpreted in light of' several principles. These principles included that: 'Parties have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states', and that 'where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade'.<sup>132</sup> These principles informed the Tribunal's finding regarding a breach of the national treatment standard: while Canada's aim of maintaining domestic facilities for processing certain kinds of hazardous waste was permissible, there were other means, consistent with NAFTA, for achieving this goal.<sup>133</sup> In a separate opinion, Arbitrator

<sup>130</sup> Keene (n 127) 78 ('Negotiators may well have adopted these exceptions, at least in part, on the assumption that their interpretation was predictable based on the WTO Appellate Body's [AB] established jurisprudence on general exceptions'). Consider also UAE–Israel BIT (2020), which includes a general exceptions provision largely modelled on art XX GATT and art XIV GATS and provides that, where reference to the WTO Agreement arises in a dispute, an investor-State tribunal constituted under the treaty must consider WTO jurisprudence concerning 'substantially equivalent rights or obligations': arts 14(2), 24(3).

<sup>131</sup> A Newcombe, 'General Exceptions in International Investment Agreements' in M-C Cordonier Segger, MW Gehring and A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 363–4.

<sup>132</sup> *SD Myers, Inc v Canada*, UNCITRAL, Partial Award (13 November 2000) paras 220–1.

<sup>133</sup> *ibid* para 255.

Schwartz further observed that ‘dispute settling bodies have found that states are free to set high standards. A dispute settling body has no authority to hold public safety and welfare measures invalid merely because they strike that body as being unreasonably demanding’, and a breach would require a finding that a Party had a less restrictive means reasonably available to achieve its chosen level of protection.<sup>134</sup>

*Bilcon v Canada* is a controversial award that highlights that while the parties to investment treaties retain wide discretion in selecting regulatory objectives, investment treaties impose substantial constraints on how States may pursue their chosen aims. The majority concluded that a domestic environmental review panel had fundamentally departed from its mandate under Canadian law when assessing and denying environmental approval for the investor’s project, and in doing so breached the international minimum standard, as well as the national treatment standard.<sup>135</sup> Notably, despite this finding, it stressed that ‘NAFTA parties can set environmental standards as demanding and broad as they wish’. In justifying this conclusion, the Tribunal highlighted the reference in NAFTA’s preamble to the Parties’ desire to ‘strengthen the development and enforcement of environmental laws and regulations’ and ‘promote sustainable development’.<sup>136</sup>

*Muszynianka spółka z ograniczoną odpowiedzialnością v Slovak Republic* is a recent Award that highlights the extent to which investment treaties leave States free to pursue a wide range of policy aims, despite imposing restrictions on the means that may be used. Notably, this was a case decided under the Poland–Slovak Republic BIT, which unlike NAFTA or other more recent investment treaties considered above, does not include a right to regulate provision nor any provisions addressing policy concerns besides investment protection. The claimant argued that the Slovak Republic’s adoption of a constitutional amendment, which prohibited the cross-border transport of non-bottled water, violated the BIT.

In determining whether the constitutional amendment complied with the reasonableness strand of the FET standard, the Tribunal began by emphasising that ‘Investment treaty arbitration tribunals owe deference to States in determining what serves as a legitimate public purpose ... the presumption is that State conduct seeks to attain a legitimate common good’.<sup>137</sup> Applying this approach to the case at hand, the Tribunal found that ‘Environmental preservation, public health, and seeking to regulate the use of natural resources

<sup>134</sup> *ibid* (Sep Op Schwartz) para 115.

<sup>135</sup> *William Ralph Clayton v Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) paras 450–2, 591, 594, 600–4, 696–7, 724–5. Compare: Dissenting Opinion of Professor Donald McRae.

<sup>136</sup> *ibid* paras 595–6, 598, 737–8. NAFTA Preamble.

<sup>137</sup> *Muszynianka spółka z ograniczoną odpowiedzialnością v Slovak Republic*, PCA Case No 2017-08, Award (7 October 2020) para 546. Compare: Partial Dissenting Opinion of Professor Robert G Volterra.

in an informed and optimal fashion all represent core State functions and thus legitimate policy objectives'.<sup>138</sup> Significantly, the Tribunal also accepted that 'States need not wait for their natural resources to be at risk or depleted to take action. Precautionary measures are more than appropriate with respect to vital resources such as water.'<sup>139</sup> Subsequently, in scrutinising whether the impugned measures had a reasonable relationship to these legitimate public purposes, the Tribunal emphasised that 'it is not the role of an arbitral tribunal to "weigh the wisdom of legislation" ... arbitral tribunals must pay deference to the choices States make when deciding how to implement policy objectives'.<sup>140</sup>

Overall, these remarks suggest that even older-style investment treaties are correctly interpreted as preserving States' autonomy to determine which regulatory aims to pursue. While the case does not squarely address autonomy concerning the level at which to pursue permissible aims, the remarks of the Tribunal, particularly regarding the permissibility of precautionary action, suggest that investment treaties should be interpreted as preserving this aspect of regulatory autonomy.

### *C. Does the Argument Hold for Older Investment Treaties?*

As many of the provisions considered above are only found in investment treaties concluded in the last 15 years or so, it might be wondered whether the approach advocated for in this article is similarly applicable to older investment treaties. Such older treaties typically only refer, in their preambles, to aims of economic growth or prosperity, and their substantive provisions are limited to issues of investment protection.<sup>141</sup> Nevertheless, there are several reasons why the claim remains applicable to older investment treaties, despite their not having the same explicit textual basis to support an interpretation favouring State autonomy in setting the level of protection for permissible regulatory aims.

First, the right to regulate matters falling within a State's domestic jurisdiction, of which autonomy to determine the level of protection is a part, is an inherent aspect of sovereignty.<sup>142</sup> While investment treaties clearly place constraints on the manner in which the right to regulate is exercised, they 'were never intended to do away with their signatories' right to regulate'.<sup>143</sup> Perhaps the best evidence of this is that tribunals have frequently interpreted the investment protections contained in older treaties in

<sup>138</sup> *ibid* para 550.                      <sup>139</sup> *ibid* para 553.                      <sup>140</sup> *ibid* paras 557–8 (citations omitted).

<sup>141</sup> As Ortino notes, traditionally investment treaties characterised investment protection as a means to economic growth or prosperity: F Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2017) 30 *LJIL* 71, 76–8.

<sup>142</sup> *eg Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, paras 258, 263; *SD Myers, Inc v Canada* (n 132) para 263; Appellate Body Report, *China – Publications and Audiovisual Products* (n 33) para 222.

<sup>143</sup> *Invesmart, BV v Czech Republic*, UNCITRAL, Award (26 June 2009) para 498.

light of the regulatory powers retained by States, despite there being little in the text of these treaties that explicitly preserves regulatory space. The *Muszynianka spółka z ograniczoną odpowiedzialnością v Slovak Republic* Award, discussed above, is a recent example of this. Another example is the widespread acceptance over the last 15 years of a police powers doctrine within case law concerning indirect expropriation, again almost entirely under older treaties that do not address the relationship between indirect expropriation and other regulatory aims.<sup>144</sup>

Seen in this light, the suggestion that investment treaties should be interpreted as preserving States' autonomy to determine the level at which to pursue permissible regulatory aims amounts to an application of interpretative approaches that have already been adopted by a significant number of tribunals under older treaties.

Second, as Federico Ortino has argued, the purpose of older investment treaties, where the preamble only refers to economic development or prosperity, can be interpreted in an evolutionary manner to encompass the broader and more balanced notion of sustainable development.<sup>145</sup> This, in turn, has direct implications for State autonomy in setting the level of protection, because the concept of sustainable development leaves States with substantial discretion to determine 'the appropriate balance between [the partially conflicting interests of] economic growth, environmental protection and social development'.<sup>146</sup>

Overall, this Part has made the case that investment treaties are, properly interpreted, consistent with the idea that States retain autonomy to determine the desired level of protection for permissible regulatory aims. The next Part will demonstrate that this has direct implications for the balancing techniques that should be utilised by adjudicators, and, accordingly, for certain clarifications that States, as treaty drafters, should adopt.

#### V. IMPLICATIONS FOR OPERATIONALISING HOST STATE AUTONOMY IN SELECTING THE LEVEL OF PROTECTION: AGAINST PROPORTIONALITY BALANCING *STRICTO SENSU*

This Part addresses a key area where investment treaties and arbitral jurisprudence can be refined to minimise the potential for adjudicatory second-guessing of the regulatory aims that States choose to pursue, including a specific level of protection for a regulatory aim. It suggests that treaty drafters should remove the basis that currently exists, within the FET and indirect expropriation standards, for direct balancing of the regulatory interests furthered by a State measure against the measure's impact on protected investments.

<sup>144</sup> eg *Philip Morris v Uruguay* (n 15) paras 295–301.

<sup>145</sup> Ortino, 'Sustainable Development' (n 141) 81–3. See also Titi (n 5) 535.

<sup>146</sup> See Ortino, 'Sustainable Development' (n 141) 86–91.

As Henckels and Ortino, among others, have previously argued in the investment treaty context, where a proportionality-based test extends beyond considering whether a measure is necessary, to asking whether the costs of a measure outweigh, or are disproportionate to, the regulatory benefits of the measure, a State's ability to decide which regulatory goals to pursue is undermined. In contrast, adjudicatory scrutiny that does not go beyond the necessity, or least restrictive means, stage of analysis, avoids putting into question the regulatory aim pursued by a State, and confines itself to scrutinising the means utilised for pursuing the desired regulatory aim.<sup>147</sup> This was a key lesson emerging from the analysis of WTO necessity jurisprudence in Part III, which has, despite some ambiguities, been limited to a least-restrictive means test, and has avoided second-guessing the regulatory objectives pursued by WTO members, including the level of protection pursued by a member.

This Part demonstrates that regulators can have no such confidence in the investment treaty context, where the two most commonly invoked standards, FET and the protection against indirect expropriation, are both increasingly being interpreted in ways that provide for proportionality balancing *stricto sensu*, and, accordingly, for adjudicators potentially second-guessing States' regulatory goals. Certain treaty-drafting clarifications to the two standards, intended to safeguard regulatory space, have also, counterproductively, provided a clear basis for proportionality balancing *stricto sensu*, and thus the potential downgrading of States' regulatory aims.

Until relatively recently only a handful of investment treaty awards had endorsed the proposition that the FET standard includes a free-standing requirement that a State's measures must be proportionate, taking into account the regulatory aim pursued and the impact on protected investments.<sup>148</sup> However, in recent years, and mostly in the context of the

<sup>147</sup> *ibid* 88–9. F Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (Oxford University Press 2019) 104, 173; Henckels, *Proportionality* (n 52) 25–6, 164, 168; Kurtz (n 12) 368–9. Some have raised more fundamental objections to any form of balancing test that requires adjudicators to determine whether a State genuinely pursued a legitimate objective, or to evaluate the effectiveness of a State's measures: see J Bonnitcha and E Aisbett, 'Against Balancing: Revisiting the Use/Regulation Distinction to Reform Liability and Compensation under Investment Treaties' (2021) 42 *MichJIntL* 231, 268–72. In response, this author would highlight that, while such determinations are challenging, the analysis of WTO jurisprudence in Part III suggests that international adjudicators are capable of answering such questions and a deferential standard of review is frequently applied. Furthermore, the alternative approach to liability under investment treaties advanced by Bonnitcha and Aisbett conflates (albeit deliberately) the issues of breach of obligation and reparation for breach: see especially 234, 254–60.

<sup>148</sup> *Occidental Petroleum Corporation v Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012) paras 404–52; *Electrabel SA v Republic of Hungary*, ICSID Case No ARB/07/19, Award (20 November 2015) para 179. See also *EDF (services) Ltd v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) para 293; *Total SA v Argentina*, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010) paras 123, 162, 309(h), 429; *Philip Morris v Uruguay* (n 15) paras 409–10, 419–20.

numerous disputes concerning European States' changes to renewable energy subsidies, several tribunals have endorsed such a requirement in order to satisfy the FET standard.<sup>149</sup> In contrast, one tribunal in the renewables cases has—correctly, it is suggested—questioned whether a free-standing requirement of proportionality forms part of the FET standard, particularly where general legislative measures are at issue.<sup>150</sup>

Some tribunals in renewable energy disputes have also suggested that proportionality is a relevant consideration when applying the stability and legitimate expectations components of FET.<sup>151</sup> For example, numerous tribunals have held that changes made to a regulatory regime designed to attract investors to a sector must not be disproportionate, having regard to the regulatory aim pursued by the changes and the burden placed on investors who have reasonably relied on the prior regulatory scheme when investing.<sup>152</sup> A requirement to avoid disproportionality when altering a regulatory regime that has been relied on by investors is significantly less wide-ranging than a

<sup>149</sup> *Hydro Energy 1 SÀRL v Spain*, ICSID Case No ARB/15/42, Award (9 March 2020) paras 568, 573–4; *Cavalum SGPS, SA v Spain*, ICSID Case No ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (31 August 2020) paras 411, 414–15; *Watkins Holding SÀRL v Spain*, ICSID Case No ARB/15/44, Award (21 January 2020) paras 601–3; *Muszynianka v Slovak Republic* (n 137) paras 566–76; *Naturgy Energy Group, SA v Colombia*, ICSID Case No UNCT/18/1, Award (12 March 2021) paras 449–51, 492–5. Some of these remarks have concerned the obligation not to impair investments through unreasonable measures, however tribunals have emphasised that the requirement of proportionality is part of both the non-impairment and FET standards: eg *Hydro Energy v Spain*, paras 567–8, 573; *Cavalum v Spain*, paras 410–11, 414. Other tribunals have referred to proportionality but appeared to apply it as a least-restrictive means test, eg an obligation to have the minimum negative effect on the competing interests protected by the State's investment treaty obligations in order to achieve a permissible regulatory aim: eg *RREEF Infrastructure (GP) Limited v Spain*, ICSID Case No ARB/13/30, Decision on Responsibility and on the Principles of Quantum (30 November 2018) paras 460, 463, 465.

<sup>150</sup> *OperaFund Eco-Invest SICAV PLC v Spain*, ICSID Case No ARB/15/36, Award (6 September 2019) para 555. See also *Stadtwerke München GmbH v Spain*, ICSID Case No ARB/15/1, Award (2 December 2019) paras 323–5, 354 (initially responding to the claimants' argument that Spain's measures were disproportionate by noting that the term 'proportionate' did not appear in the treaty provision to be applied, nor had the claimants offered 'an operational means of' applying the concept. Nevertheless, the Tribunal went on to find that Spain's measures were proportionate to their aim, taking account of the impact on the claimants).

<sup>151</sup> eg *OperaFund v Spain* (n 150) para 555.

<sup>152</sup> *Blusun SA v Italy*, ICSID Case No ARB/14/3, Award (27 December 2016) paras 318, 319(5), 372; *SolEs Badajoz GmbH v Spain*, ICSID Case No ARB/15/38, Award (31 July 2019) paras 316–18, 462; *RWE Innogy GmbH v Spain*, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (30 December 2019) paras 570–1, 589, 598–600, 649; *PV Investors v Spain*, PCA Case No 2012-14, Final Award (28 February 2020) paras 582–3, 624; *BayWare Renewable Energy GmbH v Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019) paras 460–3; *Eurus Energy Holdings Corporation v Spain*, ICSID Case No ARB/16/4, Decision on Jurisdiction and Liability (17 March 2021) paras 335–8; *Eiser Infrastructure Ltd v Spain*, ICSID Case No ARB/13/36, Award (4 May 2017) para 370, approving *Charanne BV v Spain*, SCC Case No 062/2012, Award (21 January 2016) paras 514, 517. See also *RREEF v Spain* (n 149) paras 475, 547.

requirement that all State conduct must be proportionate to the regulatory aim pursued in order to comply with the FET standard.<sup>153</sup>

At the level of treaty drafting, a range of responses could limit the role for proportionality balancing *stricto sensu*, and potential second-guessing of States' regulatory aims, within the FET standard. One option would be to omit any reference to FET, and to the extent that treaty drafters wish to reaffirm protections contained in the international minimum standard, such as the protection against denial of justice, to specify these elements in an exhaustive manner.<sup>154</sup> This drafting strategy may remove the basis for the link that has been established by arbitral interpretations between a reference to FET and concepts such as proportionality or an absence of disproportionality. Another option used in some recent treaties is to retain a reference to FET but to specify its contents exhaustively.<sup>155</sup>

Whether this approach will be successful in preventing States' regulatory aims from being second-guessed remains to be seen. If States provide for FET, they could attempt to preclude strict balancing, for example by providing that a measure will only breach the FET standard where an alternative measure, which would make an equivalent contribution to the relevant regulatory aim but be less restrictive of the interests protected by the FET standard, was reasonably available to the State.<sup>156</sup> As was shown in Part III, requiring a complainant to identify an alternative measure that was reasonably available and would make an equivalent contribution to the relevant regulatory aim, but be less restrictive of the competing treaty-protected interest of trade liberalisation, has been a key method by which WTO jurisprudence has preserved members' regulatory autonomy.

The protection against indirect expropriation has also been interpreted by arbitral tribunals in a manner that provides a strong basis for proportionality balancing *stricto sensu*. Specifically, in distinguishing non-compensable exercises of a State's police powers from indirect expropriations that must be compensated, tribunals have increasingly referred to a requirement that, in order to fall within the police powers exception, a measure must be

<sup>153</sup> Others have also noted that a requirement to avoid (manifest) disproportionality is a significantly less intrusive test for adjudicators to apply: eg Foster (n 85) 267. Henckels, *Proportionality* (n 52) 161, 168.

<sup>154</sup> Brazil and India have both followed this approach in their recent investment treaties. See eg Brazil–India BIT (2020) art 4.1; Belarus–India BIT (2018) art 3.1. Some of Brazil's recent treaties also clarify that 'For greater certainty, the standards of "fair and equitable treatment" ... are not covered by this Agreement and shall not be used as interpretative standards in investment dispute settlement procedures': eg Brazil–UAE BIT (2019) art 4(3).

<sup>155</sup> CETA art 8.10(2); EU–Vietnam IPA (2019) art 2.5(2); EU–Singapore IPA (2018) art 2.4(2); EU–Mexico Global Agreement (2020) ch 17, art 15(2); Rwanda–UAE BIT art 4(2); UAE–Israel BIT art 2(3).

<sup>156</sup> This could be inspired by the footnote to art 5.6 of the SPS Agreement, quoted above at (n 69). There is a question of whether any assessment of less restrictive means should be made with a focus on the impact of a measure on an individual claimant investor, or on the interests protected by the FET standard viewed in a wider perspective: see above (n 92).



proportionate to the public interest pursued, taking account of the impact on protected investments.<sup>157</sup>

One of the starkest examples is *PL Holdings v Poland*, where the Tribunal considered the proportionality of measures adopted by a banking regulator purportedly to address wrongdoing by the claimant, by asking whether the measures satisfied the tests of suitability, necessity and, finally, not being ‘excessive in that its advantages are outweighed by its disadvantages’.<sup>158</sup> Another oft-cited example is *Tecmed v Mexico*, where the Tribunal, in determining whether Mexico’s conduct constituted an indirect expropriation, noted that it had to consider:

whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments ... There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realised by any expropriatory measure.<sup>159</sup>

Significantly, the Tribunal proceeded to weigh the public interest pursued by the decision to deny the renewal of the operating permit for the claimant’s hazardous waste facility against the impact on the claimant’s investment. Within this exercise, the Tribunal emphasised that the public opposition to the landfill’s location, which it determined was the real reason for the non-renewal of the permit, was not massive, and could not justify the decision to prevent the facility being operated.<sup>160</sup>

Engaging in this kind of balancing exercise is controversial because it involves ‘placing the competing interests on a scale [namely the regulatory aim pursued by a State and the interests protected by relevant investment treaty protections] and effectively determining whether one takes precedence over another’.<sup>161</sup> In contrast, under a necessity test, so long as

<sup>157</sup> eg *Philip Morris v Uruguay* (n 15) paras 305–6; *Marfin Investment Group Holdings SA v Cyprus*, ICSID Case No ARB/13/27, Award (26 July 2018) paras 826–30; *El Paso Energy International Co v Argentina*, ICSID Case No ARB/03/15, Award (31 October 2011) paras 241, 243; *Azurix Corp v Argentina*, ICSID Case No ARB/01/12, Award (14 July 2006) paras 310–12; *Continental Casualty Co v Argentina*, ICSID Case No ARB/03/9, Award (5 September 2008) para 276; *Deutsche Bank AG v Sri Lanka*, ICSID Case No ARB/09/2, Award (31 October 2012) para 522; *Mohamed Abdel Raouf Bahgat v Egypt*, PCA Case No 2012-07, Award (23 December 2019) paras 224, 226, 230–2; *Les Laboratoires Servier, SAS v Poland*, UNCITRAL, Final Award (14 February 2012) paras 569–70.

<sup>158</sup> *PL Holdings SÅRL v Poland*, SCC Arbitration No V 2014/163, Partial Award (28 June 2017) paras 354–91. Another stark example is *Olympic Entertainment Group AS v Ukraine*, PCA Case No 2019-18, Award (15 April 2021) paras 87–90. Essentially, while finding that Ukraine’s measure was a *bona fide* regulatory measure, the Tribunal held that it was not proportionate and therefore not a valid exercise of police powers: paras 95–101.

<sup>159</sup> *Técnicas Medioambientales Tecmed, SA v Mexico*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 122.

<sup>160</sup> *ibid* paras 132–3, 144, 147–9. The Tribunal emphasised that despite some breaches of the operating permit, there was no evidence that these violations had endangered the environment or public health: paras 124, 144, 148–9.

<sup>161</sup> Ortino, *Origin* (n 147) 159.

the regulatory aim pursued by a State was a permissible one, adjudicators would not be permitted to second-guess that aim and would be limited to asking whether there were alternative, reasonably available means for achieving the goal that were less restrictive of the competing interests protected by relevant investment treaty obligations. As was seen in Part III, the WTO necessity jurisprudence has, despite some ambiguities, generally amounted to a least-restrictive means test. Importantly, despite the references to ‘weighing and balancing’, WTO adjudicators have avoided directly balancing the public interest pursued by a measure against its trade restrictiveness, whereby the regulatory aim pursued by a member could be downgraded. Investment tribunals can learn from this jurisprudence, by avoiding direct balancing of the regulatory benefits of a measure against its impact on protected investments.

Treaty drafting over the past 15 years in relation to protection against indirect expropriation has also, and problematically, introduced an explicit basis for balancing of the public interest pursued by a measure against the measure’s impact on protected investments or even a particular claimant investor. This has occurred within the expropriation annexes that first appeared in the United States and Canadian model investment treaties of 2004, to provide further guidance on the distinction between indirect expropriations and non-compensable regulatory measures, which have since been drawn upon with some modifications by a wide range of States.

When providing for a police powers exception, by excluding non-discriminatory regulatory conduct from constituting an indirect expropriation ‘except in rare circumstances’, several States have repeatedly utilised language that either refers to proportionality or disproportionality, or which is prone to be interpreted as permitting proportionality balancing *stricto sensu*.

For example, South Korea has included the following language in many of its investment treaties of the last decade:

Except in rare circumstances, such as, for example, *when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect*, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization ... do not constitute indirect expropriations.<sup>162</sup>

In defining such ‘rare circumstances’, this provision instructs adjudicators to consider whether a measure is ‘disproportionate in light of its purpose or effect’. This would most likely involve weighing the benefits to be secured

<sup>162</sup> United States–Korea FTA Annex 11-B(3)(b) (emphasis added) (2007, unchanged in 2018 amendments). From many similar examples see eg India–Korea CEPA (2009) Annex 10-A(3)(b); Japan–Korea–China Trilateral Investment Agreement (2012) Protocol, para 2(c); China–Korea FTA (2015) Annex 12-B(3)(b); Korea–Vietnam FTA (2015) Annex 9-B(c)(ii); Central America–Korea FTA (2018) Annex 9-C(4)(b).

by a measure, perhaps in light of an assessment of the relative importance of the relevant regulatory aim, against the effect of the measure on the claimant's investment. This interpretation is confirmed by other parts of the annex, which clarify that, in determining whether a measure constitutes an indirect expropriation, consideration must be given to 'the economic impact of the government action', 'the extent to which the government action interferes with distinct, reasonable investment-backed expectations', and:

the character of the government action, including its objectives and context. Relevant considerations could include *whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest*.<sup>163</sup>

In several of its treaties South Korea has expanded on this wording by referring to 'whether the investor bears a disproportionate burden'.<sup>164</sup>

These features of the relevant annexes leave no doubt that, in making the case-by-case determination of whether a measure constitutes an indirect expropriation, or should be covered by the language indicating that non-discriminatory regulatory actions are generally not indirect expropriations, adjudicators are being instructed to weigh the regulatory objectives furthered by the impugned measure against the burden imposed on the complainant investor.<sup>165</sup> There is nothing in these provisions that would prevent an adjudicator from determining a measure to be 'extremely severe or disproportionate', and thus to constitute an indirect expropriation, even where the measure passes a least-restrictive means test. Relatedly, the provision leaves open the possibility that adjudicators might find that an alternative measure, making a lesser contribution to the selected regulatory aim but involving a lesser burden on the claimant investor, could have been utilised by the State.

It bears emphasising that it is not only South Korea which had adopted such an approach. For example, several investment treaties concluded by the Association of Southeast Asian Nations (ASEAN) refer, in the paragraph of the expropriation annex concerning 'the character of the government action',

<sup>163</sup> United States–Korea FTA Annex, 11-B(3)(a) (emphasis added). For the same language see eg India–Korea CEPA Annex 10-A(3)(a)(iii); Korea–Myanmar BIT (2014) Annex, para 3(a)(iii).

<sup>164</sup> eg Central America–Korea FTA Annex 9-C, para 4(a)(iii), fn 16; Korea–Peru FTA (2010) Annex 9B(c)(i)(C); Korea–Turkey Investment Agreement (2015) Annex B(c)(i)(C); Korea–Colombia FTA (2013) Annex 8-B(3)(a)(iii). Compare: Japan–Korea–China Trilateral Investment Agreement Protocol, para 2(b)(iii) ('character and objectives of the [government] action' includes 'whether such action is proportionate to its objectives'); Korea–Indonesia CEPA (2020) Annex 7-B(3)(a)(iii) (character of the government action includes 'whether the action is disproportionate to the public purpose').

<sup>165</sup> On the potential pitfalls of focusing on the effects of a measure on a particular claimant investor see above (n 92).

to ‘whether the action is disproportionate to the public purpose’ pursued.<sup>166</sup> Australia’s FTAs with Indonesia and Malaysia also contain the same wording.<sup>167</sup> Similarly, some newer Chinese investment treaties, when considering ‘the character and purpose of a measure’, refer to whether the measure ‘was proportionate to its purpose’.<sup>168</sup> A handful of other recent investment treaties, in provisions excluding non-discriminatory regulatory measures from constituting indirect expropriation, also refer to measures that are ‘disproportionate’ to the regulatory purpose pursued.<sup>169</sup>

As is more widely known, the equivalent paragraph in recent investment treaties concluded by the EU provides:

except in the rare circumstance *when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive*, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.<sup>170</sup>

The reference to the ‘impact of a measure’ appears to require consideration of the impact of a measure on the particular claimant investor.<sup>171</sup> As Ortino has highlighted, the annex does not make it clear whether adjudicators should employ a necessity test, (eg whether the impugned measure involves the lowest possible burden on protected investments to achieve the relevant policy aim) or some form of cost–benefit analysis, which, for example, asks if the impact on a claimant investor is ‘manifestly excessive’ in light of the regulatory aim pursued.<sup>172</sup> There is a risk that a non-discriminatory measure pursuing what a tribunal considered to be a relatively unimportant purpose and which placed a heavy burden on a claimant investor, might be classified as ‘manifestly excessive’, (and thus as an indirect expropriation), even where

<sup>166</sup> ASEAN Comprehensive Investment Agreement (2009) Annex 2(3)(c); ASEAN–Australia–New Zealand FTA (2009) Annex on Expropriation and Compensation, para 3(c); Hong Kong–ASEAN Agreement on Investment (2018) Annex 2(3)(c).

<sup>167</sup> Indonesia–Australia CEPA Annex 14-B(3)(c); Australia–Malaysia FTA (2012) Annex on Expropriation, para 3(c).

<sup>168</sup> China–Tanzania BIT (2013) art 6(2)(d); China–Turkey BIT (2015) art 5(2)(d); China–Korea FTA Annex 12-B(3)(a)(iii); Japan–Korea–China Trilateral Investment Agreement Protocol, para 2 (b)(iii).

<sup>169</sup> Japan–Morocco BIT (2020) Annex, para 4; Hungary–Cabo Verde BIT (2019) art 6(4)(c); Hungary–Belarus BIT (2019) art 6(2)(c); UK–Colombia BIT (2010) art VI(2)(c). Note that a requirement to avoid disproportionality is arguably less intrusive, in terms of regulatory autonomy, than a positive requirement that State measures are proportionate to their aim: see above text at (n 153).

<sup>170</sup> CETA Annex 8-A(3) (emphasis added); EU–Singapore IPA Annex 1(2). Similar: EU–Vietnam IPA Annex 4(3); EU–Mexico Global Agreement (2020) ch 17, Annex on Expropriation.

<sup>171</sup> Other parts of the Annex confirm this interpretation: CETA Annex 8-A(2)(a)(c).

<sup>172</sup> F Ortino, ‘Defining Indirect Expropriation: The Transatlantic Trade and Investment Partnership Approach and the (Elusive) Search for “Greater Certainty”’ (2016) 43 LIEI 351, 360–3.

no alternative measure involving a lesser restriction of the treaty-protected interest of investment protection was reasonably available.<sup>173</sup>

The lessons to be learnt for drafting provisions concerning indirect expropriation are as follows. First, if States do not intend that the regulatory purpose of a measure should be directly weighed against, and potentially downgraded in light of, the competing interest of investment protection, they should make this clear. For example, expropriation annexes could make it clear that if a measure is to be considered ‘manifestly excessive’ or ‘extremely severe and disproportionate’, the tribunal must be able to identify an alternative measure which was reasonably available, would have made an equivalent regulatory contribution, and been significantly less restrictive of the treaty-protected interest of investment protection.<sup>174</sup>

Another approach is that found in more recent Canadian investment treaties, which specify that the ‘rare circumstances’ in which a non-discriminatory measure designed and applied to protect a legitimate regulatory objective can constitute indirect expropriation refers to situations ‘when a measure ... is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith’.<sup>175</sup> This wording suggests that only measures that ‘cannot be reasonably viewed as having been adopted in good faith’ could amount to ‘rare circumstances’, and thus constitute indirect expropriation. This may mean that there is no real scope for weighing the regulatory interests furthered by a measure against the interest of investment protection, unless it is determined that the measure ‘cannot be reasonably viewed as having been adopted in good faith’. Canada advanced such an interpretation in a recent non-disputing party submission in the *Eco Oro v Colombia* dispute under the Canada–Colombia FTA, submitting that such wording ‘reflects the deference given to States in their determination of the level of protection they seek to achieve and the regulatory choices to achieve these objectives’.<sup>176</sup>

<sup>173</sup> Contrast Stone Sweet and Grisel’s argument that retaining the possibility of proportionality balancing *stricto sensu* is desirable because it ensures that a State does not destroy an investment ‘in the name of securing a relatively trivial measure of a social good’: A Stone Sweet and F Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 249–50.

<sup>174</sup> See above (n 156). A few Chinese BITs invite a deferential necessity test within the inquiry into whether a measure constitutes an indirect expropriation, as they refer, in explaining the type of measures that are not covered by the police powers clarification, to ‘rare circumstances, such as where the measures adopted substantially exceed the measures necessary for maintaining reasonable public welfare’: China–Tanzania BIT art 6(3); China–Uzbekistan BIT (2011) art 6(3); China–Turkey BIT art 5(3).

<sup>175</sup> eg Canada–Colombia FTA (2008) Annex 811(2)(b); Canada–China FIPA (2012) Annex B.10(3). See below (n 177) regarding the changes to this wording in Canada’s new 2021 Model FIPA.

<sup>176</sup> *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41, Non-Disputing Party Submission of Canada (27 February 2020) para 11, referring to Canada–Colombia FTA Annex 811(2)(b).

Another more clear-cut option, which has occasionally been used by some States in the last 10–15 years, is to remove ‘except in rare circumstances’ altogether, leaving the less qualified guidance that: ‘Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute [indirect] expropriation.’<sup>177</sup> Such provisions introduce a clearer hierarchy of values, according to which legitimate public welfare objectives take priority over the interest of investment protection, subject to a limited form of scrutiny of the means employed to achieve such objectives. Importantly, this approach removes any textual basis for directly weighing the regulatory benefits secured by a measure against its impact on protected investments.

This Part has suggested that proportionality balancing *stricto sensu* within the FET and indirect expropriation standards, which involves weighing the regulatory benefits secured by a measure against its impact on protected investments (or even a particular claimant investor), has the potential to undermine State autonomy in determining which regulatory aims to pursue. Proposals have been made, partly inspired by the earlier analysis of necessity jurisprudence in WTO law, for replacing it with a least-restrictive means test. This would reorient investment law by making the choice of regulatory aims, and the level at which to pursue such aims, largely non-reviewable. Adjudicatory scrutiny of the means employed does not undermine States’ autonomy in selecting regulatory ends in the same way.

## VI. CONCLUSION

The pace of reforms in the investment treaty regime in recent years leaves little doubt that many States remain concerned about its impact on their regulatory space, and options once viewed as marginal, such as widespread exit from investment treaties, are increasingly on the table. Against this backdrop, this article has analysed one foundational idea that has often been touched on but not fully explored: namely, that despite undertaking investment protection obligations, States retain autonomy to select which regulatory aims to pursue, and, crucially, the level at which to pursue permissible aims. Giving effect to this idea, which finds support in a range of provisions in newer investment treaties, will require rethinking how investment protection obligations are construed. In

<sup>177</sup> eg ASEAN–Australia–New Zealand FTA (2009) Annex on Expropriation and Compensation, para 4; Hong Kong–ASEAN Agreement on Investment (2018) Annex 2(4); Indonesia–Australia CEPA Annex 14-B(4); Regional Comprehensive Economic Partnership (2020) Annex 10B(4). A similar approach is adopted by Canada’s 2021 Model FIPA, which provides ‘A non-discriminatory measure of a Party that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation, even if it has an effect equivalent to direct expropriation’: art 9(3).

particular, there is an increasing need to allow in some circumstances a State's broader public-welfare interests to take priority over investment protection.

A core claim of this article is that proportionality balancing *stricto sensu* has no place in a setting where States retain the ability to determine and implement their desired level of protection for permissible regulatory goals. Accordingly, this article has made proposals for how the key investment treaty standards of FET and the protection against indirect expropriation could be reoriented to reflect a least-restrictive means test. These proposals can inform arbitral approaches under most existing investment treaties, which do not require tribunals to engage in proportionality balancing *stricto sensu*. WTO necessity jurisprudence provides an inspiration for this, as it has a wealth of experience in balancing treaty-protected interests of trade liberalisation with competing public welfare interests. Moreover, it has managed to achieve a desirable compromise between States retaining the ability to pursue their desired level of protection for permissible regulatory aims, whilst being subject to significant disciplines regarding the means utilised. While there are some difficulties with the approach, within WTO jurisprudence, to the concept of the level of protection, these are not so significant as to suggest that the concept should not be drawn upon for inspiration in the investment treaty context.

For some, this will still give too much priority to investment protection, since permissible, and often pressing, public welfare interests would have to be achieved through means involving the least possible restriction of the competing interests protected by relevant investment treaty obligations.<sup>178</sup> The requirement that alternative measures must be reasonably available and make an equivalent contribution to achieving the State's regulatory aim, combined with a degree of deference in making these assessments, as is practised in WTO necessity jurisprudence, can address this concern to some extent.<sup>179</sup> An alternative, which would preserve State autonomy in setting the level of protection and address concerns about the potentially intrusive nature of necessity testing, would be to reconceive investment treaty standards so that they only require a State's measures to be non-discriminatory and have a rational connection to a permissible policy aim.<sup>180</sup>

Another more fundamental objection to any form of balancing exercise, including a necessity test, in the investment treaty regime is that due to the

<sup>178</sup> eg J Bonnitca, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014) 304–8; Arato, Claussen and Heath (n 87). Contrast Henckels, *Proportionality* (n 52) 155–9.

<sup>179</sup> See above text at (n 33).  
<sup>180</sup> Bonnitca favours this approach to the part of the FET standard that concerns the substantive justification for State measures: Bonnitca (n 178) 310–14. He discusses some of the arbitral interpretations that have adopted such an approach: 216–20. A similar approach is adopted by the treaty provisions clarifying the indirect expropriation standard discussed above, text at (n 177). For suggestions in the trade context on moving away from a necessity test see eg T Meyer, 'A Political Theory of Legal Exceptions' (2021) Vanderbilt Law Research Paper No 21-18, at 63 and 66–7 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3817719](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817719)>.

lack of standing afforded to other actors affected by foreign investment activities (eg local communities), such third party interests are not adequately represented and thus not taken into account.<sup>181</sup> While there is substance in this objection, investor-State arbitration, or standing investor-State tribunals, are likely to remain with us in some form for the foreseeable future.<sup>182</sup> Accordingly, there is a pressing need to offer an interpretation of key investment protection standards that better protects the ability of States to determine and implement their own regulatory priorities, including levels of protection. Moreover, even in a system that afforded standing to other affected actors (eg local communities), or a system that only permitted State-State dispute settlement, the question of States' autonomy to determine and implement a desired level of protection for permissible regulatory aims would still arise.

Some might be concerned that these proposals would downgrade or relativise investment protections traditionally understood as absolute (eg FET and the protection against indirect expropriation). However, it must be remembered that these standards have increasingly been construed in ways that take account of the regulatory competences retained by States. In addition, investment treaties are increasingly drafted in ways that make it clear that investment protection is not their only concern, nor necessarily the interest that is to be given priority where trade-offs are required. It is suggested that the proposals made in this article show that investment law can be reoriented to respect States' autonomy to determine the level at which to pursue permissible regulatory aims.

<sup>181</sup> A Arcuri and F Violi, 'Public Interest and International Investment Law: A Critical Perspective on Three Mainstream Narratives' in J Chaisse, L Choukroune and S Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 21–3. Consider also the objections developed in D Davitti, 'Proportionality and Human Rights Protection in International Investment Arbitration: What's Left Hanging in the Balance?' (2020) 89 *NordJIntL* 343. Note, however, that the view that investment treaties do not confer direct rights on investors (stressed by Davitti at 349–51) does not undermine the case for employing some form of balancing technique. Rather, balancing techniques are frequently used in an inter-State context (for example, the WTO necessity jurisprudence considered in Part III). However, what would be being balanced is not the claimant investor's individual interest, but the treaty-protected interest of the home State concerning treatment of investments of its nationals. See further above (n 92).

<sup>182</sup> Similarly: A Kulick, 'Reassertion of Control: An Introduction' in A Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2016) 14.