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SCOPING THE BOUNDARY BETWEEN THE TRADE LAW AND INVESTMENT LAW REGIMES: WHEN DOES A MEASURE RELATE TO INVESTMENT?

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ABSTRACT

The interaction between trade and investment dispute settlement proceedings has been described by investment tribunals and academic commentators as complex, and as at an infant stage. This article considers an aspect of this interaction; specifically the matter of how we should think about measures which are plainly capable of challenge in the trade regime and which also affect the economic interests of investors and their investments. The question is whether there is a compelling need to shift the review of such measures towards the trade regime, or whether such measures can be thought of as simply capable of challenge in both regimes. This article defends the second perspective.

I. INTRODUCTION

The complementary nature of trade and investment as business activities is a well understood idea. Producers can choose to retain all their activities in the home state such that only goods and services cross a border. However, the desire to increase sales in foreign markets or lower production costs routinely involves the commitment of capital in these markets through the establishment of a commercial presence to fulfil functions such as distribution and marketing or manufacturing. This gives rise to 'intra-firm' or 'related-party' trade under which companies trade to supply their affiliates abroad.[1] In turn, these affiliates amount to investments in host states. Trade and investment are therefore depicted as existing in a 'symbiotic and integrated relationship' or as 'two sides of the same coin'.[2]

It follows from the nature of this relationship that measures clearly capable of challenge in the trade law regime are frequently in the cross-hairs of investors as potential breaches of the investment law regime. This overlap has been depicted as a matter of concern by reason of the differing characteristics of trade law and investment law dispute settlement. While intergovernmental trade disputes often have significant implications for national regulatory autonomy, this intrusiveness is counter-balanced by the manner in which trade law is enforced. Complaining states can be expected to exercise restraint in the initiation and conduct of proceedings

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[1] An OECD Economic Outlook gives an impression of the scale of intra-firm trade, reporting that it 'accounts for around one third of goods exports from Japan and the United States, and a similar proportion of all US goods imports and one-quarter of all Japanese goods imports'. OECD Economic Outlook, Volume 2002 Issue 1, 163.

2 WTO NEWS: 1996 PRESS RELEASES, PRESS 42,13 February 1996, Foreign direct investment seen as primary motor of globalization, says WTO Director-General, at <http://www.wto.org/english/news_e/pres96_e/pr042_e.htm>.

based on the balance between a successful outcome, and possible damage to diplomatic relations with respondent states. The ultimate remedy in the event of recalcitrance in bringing measures into conformity is the suspension of concessions so that any injury to private interests which occurred during the life-time of the inconsistent measures goes un-redressed.

Dissatisfied with this position, private parties have brought actions before national and regional courts in search of stronger remedies such as the annulment of offending measures and damages. Across jurisdictions, courts have consistently declined to grant WTO law 'direct effect' so that these actions have been almost universally unsuccessful.[3] While 'indirect effect' via principles of consistent interpretation has been upheld, this has not tended to result in executive branch agencies having to depart from their preferred understandings of domestic law and WTO law.[4] These outcomes contribute towards state acceptance of the intrusion into regulatory autonomy which comes with WTO membership.

In contrast, the manner in which modern investment law is enforced tends to exacerbate concerns about adjudication of the policy space available to governments. The foremost development from the traditional international law system of diplomatic protection has been termed the 'individualization of claims'. As Van Harten writes, 'the claimant is no longer a publicly representative entity but a private party with full custody of the claim, who can decide the manner and extent to which international adjudication will be used to resolve a regulatory dispute'.[5] The position of investors is reinforced by the 'direct' theory under which they are the holders of both procedural and substantive rights under investment treaties independently of their home states. This theory is contrasted with the 'intermediate' theory under which investors possess only a procedural right to trigger arbitration against the host state, while the substantive protections remain inter-state. The question of which theory should prevail continues to divide investment tribunals[6] albeit that a preference for the intermediate theory is increasingly against the tide.[7] These are among the

[3] Claudio Dordi (ed) *The Absence of Direct Effect of WTO in the EC and in Other Countries* (Torino G. Giappichelli Editore, 2010).

[4] Giacomo Gattinara, 'The Relevance of WTO Dispute Settlement Decisions in the US Legal Order' 36(4) Legal Issues of Economic Integration (2009) 285

[5] Gus Van Harten, *Investment Law Treaty Arbitration and Public* Law (Oxford: Oxford University Press, 2007) 97. In similar terms, Douglas notes that, 'the investor is guided in the prosecution of its claim solely by the dictates of self-interest without necessary regard for any consequences to the diplomatic relationship between its national state and the host state'. Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) 18.

[6] Looking at the awards resulting from challenges against Mexico's High Fructose Corn Syrup (HFCS) tax and import permit requirement, the score is 2-1 in favour of the direct theory: *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc., v United Mexican States (ADM) (Award)* (ICSID Arbitral Tribunal, Case No. ARB(AF)/04/5, 21 November 2007) – intermediate theory preferred at 123; *Cargill Incorporated v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No. ARB(AF)/05/2, 18 September 2009) – direct theory preferred at 426; *Corn Products International, Inc. v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No. ARB(AF)/04/1, 15 January 2008) -direct theory preferred at 167.

[7] For a discussion of this issue, see Douglas, above note 3XX at 10-38. While noting divergences in the case law, the author (at 10) advances the following proposition as coming close to a codification: 'Where the contracting states to an investment treaty have agreed to a procedure for the judicial settlement of disputes between an investor and the host state, a claim advanced by the investor in accordance with such a procedure is its own claim and the national contracting state of the investor has no legal interest in respect thereof'.

considerations which have led commentators to identify 'a paradigm shift in international investment law'.[8]

The empowerment of private entities in the investment law regime has implications for the denial of direct effect of trade law. Measures which cannot be challenged by companies as trade law violations can nevertheless be challenged by investors as investment law violations. Of course, this does not mean that WTO obligations are granted direct effect before investment tribunals since the compatibility of the challenged measures with trade law obligations cannot be decisive in investment law disputes.[9] Nevertheless, it can but help the investor's case if the measures under consideration have previously been confirmed as trade law violations. The trade law adjudicatory findings will at least have a background relevance as interpretative context to the success of the claim, with investors likely to invoke Article 31(3)(c) of the Vienna Convention on the Law of Treaties in this regard.[10] This relevance will most obviously apply where measures previously confirmed as trade law national treatment violations, are then challenged under an investment law national treatment obligation. Verhoosel has also discussed whether a breach of WTO law could be used by an investor to establish a breach of the investment law fair and equitable treatment standard which requires treatment in accordance with international law, therefore including WTO law. As the author notes, this possibility means that the denial of direct effect of trade law 'cannot be replicated to Bilateral Investment Treaty arbitrations without further qualification'.[11]

With these differences between the trade and investment law regimes in mind, how should we think about measures which affect both trade and investment? Is it necessary, as Afilalo argues, to think of these measures as residing in a grey area between the two regimes, and in terms of a need to shift the review of the measure from the investment regime to the trade regime?[12] Alternatively, is it more appropriate to think about these measures as simply capable of review in both regimes?

These questions have been discussed in the case law and literature primarily with reference to a commonly occurring provision in free trade agreements with investment chapters and bilateral investment treaties. Under such provisions,

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[8] Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' 52(1) Virginia Journal of International Law (2011) 57 at 74.
[9] On this matter, the *Cargill* tribunal (above note XX at 193) noted as follows: '...although as Claimant suggests "like goods" or "like products" can be an important component of "like circumstances", the fact that an investor is producing a good that is "like" a domestically produced good does not necessarily mean that the investor is in "like circumstances" with the domestic producer of that good. Thus, the fact that a WTO panel in *Mexico-Tax on Soft Drinks* concluded that cane sugar and HFCS are "directly competitive or substitutable" products is relevant but not determinative of whether the producers of these products are in "like circumstances" for the purposes of Article 1102.'
[10] This provides that, in the process of Treaty interpretation, 'There shall be taken into account, together with the context: ...(c) any relevant rules of international law applicable in the relations between the parties'.
[11] Gaetan Verhoosel, 'The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law', 6(2) Journal of International Economic Law (2003) 493 at 496.
[12] In Afilalo's words, there is a need to 'shift the measures lying in the grey, "overlap" boundary between investment and trade in goods towards the realm of state-to-state litigation'. Ari Afilalo, 'Constitutionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter', 34(1) New York University Journal of International Law and Politics (2001) 1at 8.

government measures must relate to investment in order to be capable of challenge. This requirement has been considered as a jurisdictional issue in a number of investment cases, most frequently in the context of the NAFTA Article 1101 Scope and Coverage provision which specifies that the investment chapter 'applies to measures adopted or maintained by a Party relating to investors of another Party' and their investments. The nature and extent of the required nexus has been a source of disagreement. Unsurprisingly, claimants have presented interpretations likely to advance their cases to the merits without significant impediment while respondent states have preferred interpretations more likely to end the challenge at the jurisdiction stage. In attempting to navigate between the different positions, investment tribunals have developed solutions to fit the circumstances of the cases before them. However, for various reasons, these solutions are not capable of general application so that a convincing and workable test has yet to be identified.

This article contends that the only test capable of application in a clear and consistent manner, and without adverse consequences, is that advanced by claimants. Under this test, there is a sufficient nexus when measures affect the economic interests of the investment. As such, and contrary to Afilalo's position, there is no compelling need to bestow the 'relating to' requirement with the task of distinguishing between government measures which should be reviewed (if at all) in the trade law regime, and measures which might also (or alternatively) be reviewed as possible violations of the investment law regime. On the contrary, the appraisal of measures which affect an investment can safely proceed to the merits.[13]

The analysis begins in Section II with a commonly advanced approach towards the 'relating to' requirement. Respondent states have argued that measures do not relate to investment if they are capable of challenge under the trade in goods or services chapters. Tribunals have correctly rejected this approach. However, they have done so in an equivocal and cryptic manner. The section offers a view on what a more complete analysis might look like with reference to NAFTA provisions of relevance to the relationship between different Chapters. Of course, dismissing an argument about when measures do not relate to investment creates the need for a positive test to reveal when measures do so relate. Section III begins to appraise the prevailing test which requires a 'legally significant connection' between the measures and the investment. With some reluctance, the recent *Cargill*[14] tribunal used this test and considered that it was satisfied. However, based on the tribunal's brief statements, it cannot be accepted that a generally applicable approach (as opposed to one which worked in the case at hand) was identified.

Section IV considers the earlier *Methanex*[15] case from which the idea of 'relating to' as 'legally significant connection' originates. The section is critical of this tribunal's rationale for the 'legally significant connection' test as responding to the need for a 'practical limitation' on the volume of claims. Also criticized are the tribunal's attempts to develop a workable conception of the test. Indeed, there is a

[13] This comment is made subject to the fulfilment of other jurisdictional requirements which have been considered at length in the standard works such as Douglas above note XX.

[14] *Cargill Incorporated v United Mexican States* above note XX.

[15] *Methanex Corp. v U.S.A (Final Decision on Jurisdiction and Merits)* NAFTA / UNCITRAL. See, Todd Weiler, 'Methanex Corp. v U.S.A. Turning the Page on NAFTA Chapter 11?' 6 Journal of World Investment and Trade (2005) 903.

sense that the tribunal, having apparently settled on one conception, later realized that it would need to settle on an alternative conception. This shift at least enabled the tribunal to avoid a problem of ‘fit and compatibility’ in terms of ensuring that its jurisdiction test was no stricter than standards encountered in the merits. However, the tribunal’s eventual understanding of the ‘legally significant connection’ test failed on its own terms. This understanding does not control claims any more than a test based on mere adverse impact on the investment.

Section V questions whether there might be an alternative and more workable conception of ‘relating to’ as ‘legally significant connection’. With reference to analogies with WTO law, it is argued that all possible conceptions of the test blur the boundary between the jurisdiction and merits analyses. Section VI questions whether there is any compelling reason for thinking about the ‘relating to’ standard as requiring something more than adverse impact. Certainly, if it were not possible to consider regulatory purpose within the merits analysis, the ‘relating to’ standard would need to have a strong role in preventing the incursion of the investment law regime into the public regulatory sphere. However, there would appear to be ample scope for such consideration within the merits analysis. Section VII concludes.

II. MEASURES DO NOT RELATE TO INVESTMENT IF CAPABLE OF CHALLENGE UNDER OTHER CHAPTERS

Respondent states have sometimes argued that measures should not be reviewed under Chapter 11 if they could alternatively be analysed as possible violations of other chapters. Under this argument, the possibility of review under a non-investment Chapter means that the measure does not relate to investment thereby depriving an investor-state tribunal of jurisdiction.

The argument was most recently aired in the *Cargill* case which illustrates the overlap between the trade law and investment law regimes as well as the complementary nature of trade and investment as business activities. The subject matter was closely connected with a long-running trade dispute between the US and Mexico beginning with a successful challenge at the WTO of Mexican anti-dumping duties imposed on high fructose corn syrup (HFCS) from the US.[16] The eventual withdrawal of these duties was followed by a 20% tax on soft drinks containing a sweetener other than cane sugar, which was therefore applicable to HFCS. This tax was again successfully challenged by the US as a GATT Article III national treatment violation.[17] The same tax, along with an import permit requirement, for which published details on eligibility and application procedures were not available, was also at the heart of the *Cargill* case. The claimant was an American food company with a subsidiary in Mexico employing over a thousand people in ten Mexican cities. The business of the subsidiary was to sell HFCS imported from its parent company in the US. This activity was severely affected by the tax and import permit requirement to the extent that all HFCS orders by Mexican bottling plants were cancelled.[18] The claimant alleged a number of NAFTA Chapter 11 violations. These were confirmed,

[16] WT/DS132/R, *Mexico – Anti-Dumping Investigation on High Fructose Corn Syrup from the United States*, adopted 24 February 2000.
[17] WT/DS308/AB/R, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, adopted 24 March 2006.
[18] *Cargill* above note XX at 107.

and damages of $77,329,249 were awarded in a report released to the parties some three years after the adoption of the WTO Appellate Body report which had addressed the tax. In terms of the nature of the measures at issue as affecting both trade and investment, the case is entirely typical and representative.[19]

It is immediately obvious that the measures at issue could be reviewed in inter-governmental dispute settlement under NAFTA Chapter 20 as possible violations of Chapter 3 on National Treatment and Market Access for goods. Complainant states also have the alternative of WTO dispute settlement by virtue of NAFTA Article 2005. As noted, this option had already been exercised by the United States through the successful challenged of the tax as a GATT Article III national treatment violation. Clearly, therefore, it is possible to think of the measures at issue as trade related, and even primarily trade related given that the measures address the movement of goods across a border and the conditions of internal sale. The question is whether this possibility precludes or trumps the possibility of also thinking about the measures as investment related.

Echoing views expressed by respondent states in earlier cases, Mexico's contention was that 'any harm resulting from a measure related to trade in goods can only be the subject of a claim between the States concerned pursuant to the Chapter 20 dispute resolution process and would not fall within Chapter 11'.[20] This contention places the trade and investment chapters, together with their respective dispute settlement methods, in a hierarchical and mutually exclusive relationship and raises the question of whether there is any evidence of such a relationship in the treaty text. On this matter, the tribunal found as follows:

> The fact that trade in goods/services and investment are dealt with in separate Chapters of the NAFTA does not *ipso facto* mean that there can be no overlap between the two. It is true that Article 1112(1) of the NAFTA provides that 'in the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency'. However, the primacy of the non-investment Chapters only applies in the event of an inconsistency and an overlap is not necessarily an inconsistency.[21]

The tribunal here offers a limited view of the Article 1112(1) 'conflict clause'. A fuller appraisal of the provision is offered below.

A. Appraising the Article 1112(1) 'conflict' clause

The basic argument here is that Article 1112(1) cannot be understood as precluding the review of measures under the investment Chapter on the basis that they could be reviewed under a non-investment Chapter. It can therefore be contrasted with another NAFTA provisions (Article 1901(3)) which operates in exactly this manner.

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[19] See Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: the WTO-NAFTA "Spaghetti Bowl" is Cooking' 9(1) Journal of International Economic Law (2006) 197 at 199-200.
[20] *Cargill* above note XX at 143.
[21] *Ibid*. At 148.

Article 1112(1), and identical provisions in FTAs with investment chapters,[22] have yet to be subject to a detailed review in the jurisprudence. The provision was briefly considered by the *Canfor*[23] tribunal in its examination of an aspect of the trade law / investment law boundary; specifically the relationship between Chapter 19 review of antidumping and countervailing duty determinations,[24] and Chapter 11 investor-state arbitration. The question was whether the tribunal had jurisdiction to decide on Chapter 11 claims to the extent that they encompassed matters clearly falling under the coverage of Chapter 19. For reasons which can be deferred for the moment, the tribunal decided that it did not have jurisdiction. However, it did not agree with all the arguments invoked by the United States to support the lack of jurisdiction. In particular, the tribunal considered that Article 1112(1) did not strengthen the case for lack of jurisdiction.

In rejecting the reliance on Article 1112(1), the tribunal cited Canada's Statement of Implementation which provides that the provision '...ensures that the specific provisions of other chapters are not superseded by the general provisions of this [the investment] chapter'.[25] This view of Article 1112(1) as a *lex specialis* principle was cited by the *Canfor* tribunal as supporting its assessment of the provision:

> The language of Article 1112(1) ... is limited to 'any inconsistencies'. That limitation appears to be confined to differences in text, possibly as interpreted, and not to decisions resulting from dispute resolution mechanisms contemplated by those texts.[26]

Therefore, the suggestion is that Article 1112(1) operates at the level of irreconcilable differences between the texts of the non-investment and investment chapters, rather than at the level of differences in decisions emanating from different dispute resolution mechanisms.

This interpretation gives effect to the argument of this section – Chapter 11 review is not precluded by the possibility of review under another Chapter. Nevertheless, the interpretation may well be a misunderstanding of the provision. This is because there is no clear distinction between, on the one hand, textual differences and, on the other hand, differences in decisions emanating from different dispute mechanisms. If a measure violates the investment chapter, but not other chapters under which it might also be challenged, this can only be because of textual differences, or differences in the interpretation of the same legal terms. The *Canfor* tribunal's interpretation does not therefore provide a basis for dismissing the application of Article 1112(1) at the level of inconsistent decisions. Indeed, there is no

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[22] The provision is replicated, for example, in the following FTAs: US – Singapore, Article 15.3.1; US – Chile, Article 10.1.2; US – Dominican Republic - CAFTA, Article 10.2).

[23] *Canfor Corporation, Terminal Forest products Ltd v U.S.A. (Decision on Preliminary Question)* NAFTA / UNCITRAL, 6 June 2006.

[24] Among the NAFTA Parties, these binational panels replace national judicial review of final antidumping and countervailing duty determinations and decide on the compatibility of agency determinations with the antidumping or countervailing duty law of the importing party. NAFTA, Article 1904(1)(2).

[25] Department of External Affairs, *North American Free Trade Agreement: Canadian Statement of Implementation, in* Canada Gazette 68 (1 January 1994), p. 152.

[26] *Canfor* above note XX at 228.

reason to be uncomfortable about the provision operating at this level, provided the correct manner of operation is understood.

In understanding the provision's role at the level of inconsistent decisions, the key point is that it is difficult to know for sure whether there is an 'inconsistency' between Chapters to which Article 1112(1) could attach until the decision of the investment tribunal is known. Prior to this, inconsistencies are merely possible as opposed to established, at least when (as will usually be the position) the relevant norms are to any extent open to interpretation. Therefore, the provision cannot be interpreted as insulating measures from review on the basis of the possibility or actuality of review under a non-investment Chapter. Rather, the provision is correctly understood as operating at the conclusion of investment disputes in the event of a decision which impugns state conduct clearly or required by another Chapter.

An example of how a provision such as Article 1112(1) might operate can be found in one of Pauwelyn's shorter contributions. He refers to a non-investment feature of the US – Singapore FTA which envisaging state-to-state proceedings to force parties to implement their labor and environmental laws, subject to monetary damages.[27] He notes that '[t]his could theoretically lead to the following odd result: one arbitration panel may condemn a party for failure to enforce its environmental or labor law, while another investment tribunal under the same FTA might find that this very same law violates the investment provisions of the FTA'.[28] This is seen as a possible scenario in which the 'conflict clause' might operate. A fuller treatment can be found in the author's monograph with the example above falling within the scope of a 'conflict in the applicable law'. The essential question here is whether the exercise of rights or compliance with one norm [*in casu* the non-investment norm] breaches an obligation under another norm [the investment norm]. In this situation, there is a conflict or inconsistency which needs to be resolved in some way.[29] Suppose that the challenged measures in the investment dispute are the labor and environmental laws as well as their dutiful enforcement. The situation here is posited as follows: 'a state has acted in a certain way, two norms apply to the act in question, under one norm the act is "illegal", under the other it is not; which one of the two norms must be applied?' Article 1112(1) provides the answer here; the non-investment norm would prevail or, in Pauwelyn's terms, 'the state in question made the right choice and it incurs no responsibility'.[30] Reliance on these extracts clearly does not provide a complete account of the provision's possible scope of operation. However, the example is enough to demonstrate the operation of the provision at the end of the investment dispute rather than to prevent the case from proceedings to the merits. It is simply not possible to know whether there is any inconsistency which could activate Article 1112(1) until the investment law norms have been interpreted.

This analysis has implications for the advice which should be provided to investors in terms of avoiding the cost of litigation which cannot generate a positive outcome. If the very same measure of concern to the investor has already been unsuccessfully challenged under a non-investment Chapter, it is arguable that this

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[27] The possibility of an 'annual monetary assessment' is provided for by Article 20.7.
[28] Pauwelyn, above note XX at 200.
[29] Joost Pauwelyn, *Conflict Norms in Public International Law* (Cambridge: Cambridge University Press, 2003) 177.
[30] *Ibid.* 276

measure ought not to give rise to state responsibility under Chapter 11. ***Is it appropriate to suggest a distinction here? The statement would have to be correct if the challenged measure was something expressly required or permitted by another Chapter. But what if the measure is not within this description but rather is just something which does not violate another Chapter? Here, I think there would be scope for arguing that state responsibility could ensue if the measure is found to violate the investment Chapter. This would be on the basis that the investment Chapter protects different values which in turn means that the measure is reviewed from a different angle under this Chapter.*** Article 1112(1) would prevent this outcome.[31] The best advice might therefore be to refrain from a Chapter 11 challenge. It could then be argued that, in the event of a challenge, the investment tribunal should bring the dispute to an end at the jurisdiction stage on the basis that, even if a violation were established, state responsibility could not ensue. It is submitted however that this *arguendo* approach would not be valid since it relies on Article 1112(1) before it is known whether it is activated by an established conflict. Therefore, there is a difference between the content of practical advice, and the duty of the investment tribunal to adjudicate on the matters before it should this advice not be heeded.

On this matter, the 'inconsistency' which can trigger Article 1112(1) can be expected to be rare. Measures which are capable of review in both regimes tend either to be compliant or non-compliant with both regimes so that there will not routinely be differing and inconsistent decisions. The avoidance of inconsistency is assisted by the standard technique of interpretation set out in Article 31(1) of the Vienna Convention under which Treaty terms must be interpreted 'in their context'. While the example above illustrates how a provision such as Article 1112(1) could operate, it is also possible that it would not be required. The US – Singapore FTA sets out the acknowledgement of the parties that 'it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic Lobor [and environmental] laws'.[32] These provisions would be undermined if positive enforcement of these domestic laws led to a violation of the investment chapter, and it can be expected that investment tribunals would take account of these provisions as interpretive context.

B. The implications of the *Canfor* ruling

It is important to return to *Canfor* as some of the tribunal's statements and reasoning are contrary to the analysis presented above. As noted, the tribunal rejected Article 1112(1) as supporting the view that matters covered by Chapter 19 cannot be reviewed under Chapter 11. However, it proceeded to find a clear demarcation between the Chapters and, therefore, declined jurisdiction. The tribunal considered that, '…when it comes to NAFTA's mechanisms for dispute settlement, it cannot be presumed that the drafters intended to create an open-ended, multiple fora system',[33] and that '…the presumption of the NAFTA is that, in the absence of an express

[31] A good example here would be a measure challenged in the trade regime as a possible GATT Article III national treatment violation which is justified under Article XX. The measure is then challenged under NAFTA Chapter 11 as a possible national treatment violation. Even if the investment tribunal confirmed a violation, state responsibility ought not to ensue by reason of Article 1112(1).
[32] Articles 17.2.2. and 18.2.2.
[33] *Canfor* above note XX at 241.

provision to the contrary, concurrent or parallel proceedings are to be avoided'.[34] The tribunal conceded that proceedings under Chapters 19 and 11 have a 'different object' with Chapter 19 panels applying domestic law and Chapter 11 tribunals applying international law.[35] However, it attributed more weight to the fact that the measures before it were clearly within the scope of Chapter 19. The two sets of proceedings were therefore viewed as '…concurrent or parallel … even though the applicable law and available remedies differ'.[36]

Understood as general statements, which could also be applied to the relationship between the investment and goods and services chapters, I am inclined to disagree with the tribunal's views. NAFTA negotiators would have understood the inseparable nature of trade and investment as business activities. In turn, they would have foreseen the high propensity of measures capable of review in the trade regime to impact upon investors and their investments. Had they intended to insulate such measures from review in the investment regime, this would have been explicitly provided for, or, at least a reasonably strong indication of this position would have been provided. On the other hand, the *Canfor* tribunal's position becomes easier to accept if viewed as restricted to the relationship between Chapters 19 and 11. Indeed, it is quite straightforward to so restrict the tribunal's position.

The exact issue before the tribunal was the correct interpretation of Article 1901(3) which, like Article 1112(1), is relevant to the relationship between different NAFTA Chapters. It provides that '…no provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party's antidumping law or countervailing duty law'. This provision seems to clearly require that the review of these laws be retained within Chapter 19. Review under any other chapter would impose obligations on a Party contrary to the provision's language. This statement is self-evidently correct in the event of a successful outcome for the claimant under Chapter 11. In addition, the natural tendency of governments to defend Chapter 11 claims can be regarded as imposing an obligation regardless of the outcome. If this can be accepted as a plausible 'ordinary meaning' of the provision, the tribunal's presumption is arguably the wrong way round. Why would Article 1901(3) be required if there is a generally applicable presumption that concurrent or parallel proceedings are to be avoided unless expressly envisaged? The inclusion of the provision is more consistent with the accommodation of concurrent proceedings unless excluded.

Such a presumption in favour of concurrent proceedings is also consistent with the approach of other Chapter 11 tribunals. When confronted with the argument that a Chapter 11 claim was prevented by the possibility of review under the goods or services chapters, the *Myers*[37] tribunal drew inspiration from the approach of WTO panels and the Appellate Body under which, 'WTO obligations are generally cumulative [so that] Members must comply with all of them simultaneously unless

[34] *Ibid*. at 242.
[35] *Ibid*. at 245.
[36] *Ibid*. at 246.
[37] *S.D. Myers, Inc. v Government of Canada (First Partial Award)* NAFTA / UNCITRAL, 13 November 2000.

there is a formal "conflict" between them'.[38] The *Myers* tribunal relied on this notion of cumulative obligations when discussing the relationship between Chapters 11 and 12 (services). It considered that the '...grant of a right generally does not take away other rights unless they are mutually exclusive, or the grant is stated expressly to abrogate another right'.[39] Therefore, the right of the NAFTA state Parties to challenge measures as breaches of the services Chapter, did not take away the right of investors to challenge them as breaches of the investment Chapter. The rights are not mutually exclusive and there is no provision which abrogates one right in favour of another.

The difference in *Canfor* is that Chapter 19 can be viewed as granting a right which abrogates rights under Chapter 11. Article 1904 grants private entities whose goods are subject to final antidumping and countervailing duty determinations the right to request panel review of these determinations for conformity with the importing Party's laws. By virtue of Article 1901(3), the grant of this right can be seen as abrogating any rights under Chapter 11 is so far as it might otherwise extend to the review of antidumping and countervailing duty determinations. The key point is that this abrogation occurs by virtue of Article 1901(3). Therefore, there was no need for the *Canfor* tribunal to invoke a generally applicable presumption against concurrent proceedings. On the contrary, Article 1901(3) could have been presented as a provision whose ordinary meaning rebuts a presumption of cumulative application.

C. From a more theoretical perspective

It can also be argued that the possibility of concurrent review must generally be accommodated when the same measure is reviewed for compatibility with two sets of rules which have different objectives, and which protect different values.

On these differences, DiMascio and Pauwelyn see the trade regime as about enhancing 'overall welfare' and 'efficiency' by focusing on the macro-issues of 'liberalizing trade flows through the reciprocal exchange of market access concessions between governments'. In contrast, the investment regime is more about the 'micro issues of attracting and protecting investments made by individual investors' with a view to the accelerated economic development of the host state.[40] The values pursued by the trade law regime are generally thought to be sufficiently protected by an inter-governmental system of dispute settlement which is directed towards the prospective removal of the offending measure on pain of suffering a suspension of concessions. In contrast, attracting foreign investors in order to enhance economic development is thought to be facilitated by the availability of investor-state arbitration and compensation to address the economic harm caused by offending measures. While both dispute settlement processes correspond well with the

[38] WT/DS98/R, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, adopted 12 January 2000, para. 7.38, cited by the *Myers* tribunal at 291.
[39] *S.D. Myers, Inc. v Government of Canada (Second Partial Award)* NAFTA / UNCITRAL, 21 October 2002, at 132.
[40] Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin' 102 American Journal of International Law (2008) 48 at 53-56.

underlying objectives and values of each regime, neither sufficiently protects the totality of these objectives and values.[41]

This idea can be used in support, not only of concurrent review, but also of the validity of the decisions generated by the two review processes – even if the investment decision impugns a measure found not to infringe the trade rules. After all, if the same measure is assessed for compatibility with two sets of different rules, then different but equally valid outcomes ought to be a legal possibility, just as when the same misconduct is contemporaneously or sequentially reviewed as a possible crime and as a possible tort. However, there is an important caveat here related to the previous two subsections. The validity of different and inconsistent decisions under different NAFTA Chapters must be considered in light of Treaty provisions directed towards this situation. As has been argued, in the event of a Chapter 11 decision being at odds with a decision under a non-investment Chapter by reason of a conflict of norms, no state responsibility ought to follow from the investment decision.[42]

Drawing together the threads of the Section II discussion, the conclusion is that the preclusive effect of any particular provision in terms of concurrent review, depends on the terms of the clause in question. While Article 1112(1) can operate at the level of inconsistent decisions, it cannot be known whether the decision of the investment tribunal is inconsistent with a non-investment right or obligation until this decision is rendered. It is therefore difficult to understand the provision as precluding Chapter 11 review on the basis of the possibility of review under another Chapter. In contrast, Article 1901(3) is an example of a clause whose plain language prevents the review of matters within the scope of Chapter 19 under any other Chapter. Overall, there is little support for a general proposition that trade related measures cannot also relate to investment for the purposes of Article 1101.

III. BUT WHEN DOES A MEASURE RELATE TO INVESTMENT?

The analysis above dismisses a possible objection to establishing the required nexus between the measure and the investment. Measures are not precluded from 'relating

[41] Diebold has recently offered some views on the implications of the different emphases of the trade and investment regimes for interpreting the respective non-discrimination obligations. He considers it '...not entirely apparent ... why arguably different objects of protection in investment and trade law ... should also explain different substantive standards of non-discrimination obligations'. To the extent that Diebold argues that the non-discrimination obligations should sometimes be interpreted in the same way, this supports the first argument at the end of Section II:A. Measures which are capable of review in both regimes tend either to be compliant or non-compliant with both regimes so that there will not very often be different / inconsistent outcomes. Nicolas F Diebold, 'Standards of Non-Discrimination in International Economic Law' 60 International and Comparative Law Quarterly (2011) 831, 844-845.

[42] I do not present this as the only possible perspective. Indeed, it could be argued that there cannot be a conflict of norms and resulting inconsistent decisions as between the trade and investment Chapters which would activate Article 1112(1). Conflict of norms is generally discussed in an inter-state setting. This raises the question of the extent to which conflict principles carry over when the state obligation breached is owed, not to another state, but (at least under the prevailing view) directly to investors. Why should compliance with a norm in an inter-state system mean that state responsibility cannot ensue from non-compliance with a norm in an investor-state system? For this article, my only response is that Article 1112(1) must have some scope of operation. It is difficult to see what this scope might be if not that depicted in the main text.

to' investment because they deal with trade in goods.[43] This position does not positively answer the question of when the nexus requirement *is* satisfied, or what the test might be.

The *Cargill* tribunal's subsequent engagement with the positive meaning of the 'relating to' standard appears to begin promisingly with the finding that the import permit requirement 'affected Claimant's investment in Mexico'.[44] Unfortunately, however, the tribunal proceeds to clarify that this finding did not pertain to the 'relating to' standard, and that a further test was required:

> Article 1101 has a causal connection requirement as well: the measures adopted or maintained by Respondent must be those "relating to" investors of another Party or investments of investors of another Party. The tribunal in *Methanex Corp. v. United States* explored is some details the requirement of "relating to". In paragraph 147 of its Partial Award, the *Methanex* tribunal determined that the phrase "relating to" signifies "something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them."
>
> Regardless of whether or not the test espoused in *Methanex* is too restrictive, it is satisfied in this case. The import permit requirement not only had an immediate and direct effect on the business of Cargill de Mexico but also constituted a legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico.[45]

In this passage, some unease is expressed about the 'legally significant connection' test as possibly being too restrictive. However, the test was satisfied because the measure 'constituted a legal impediment' to the claimant's business. The core idea here is that there is a difference between a measure which merely affects an investment, or which has 'an immediate and direct effect' on an investment, and a measure which legally impedes an investment. However, it is difficult to see what this difference might be. When will a government measure which merely affects an investment ever not also legally impede an investment?

The only suggestion which comes to mind is that the form of the measure is relevant. In other words, there will be a legal impediment when the measure takes the form of a 'law' and probably also a 'regulation', but not a 'procedure, requirement or practice'.[46] If this is what the tribunal had in mind, then it can be taken to have concluded that there was a legal impediment because the import permit requirement was in the form of a decree.[47] However, the most that can be accepted is that a solution was found to fit the circumstances of the case at hand, rather than that a

[43] In the *Cargill* tribunal's words, 'there is no express or implied presumption that measures dealing with goods cannot *ipso facto* be alleged to be measures "relating to" investors or investments per Article 1101'. Above note XX at 153.
[44] *Ibid.* at 173.
[45] *Ibid.* at 174-175.
[46] NAFTA Article 201 defines 'measure' using these familiar terms.
[47] *Cargill* above note XX at 117.

workable general test was identified. The protection afforded to investors cannot depend on the form of the government measure at issue.[48] It must therefore be possible to satisfy the 'relating to' requirement regardless of the form of the measure. This brings us back to the question of what the requirement can mean if it is interpreted as something different from mere effect. The *Cargill* tribunal referenced the 'legally significant connection' test from *Methanex* but failed to identify a workable elaboration of this test. The discussion now turns to whether the *Methanex* tribunal had fared any better.

IV. THE *METHANEX* TEST: 'RELATING TO' AS LEGALLY SIGNIFICANT CONNECTION

In common with *Cargill*, the *Methanex* case also involved a measure plainly capable of review in inter-governmental dispute settlement as a possible violation of the NAFTA trade in goods Chapter. At issue was a Californian ban on the sale of gasoline containing methyl tertiaty-butyl ether (MTBE). This was based on the environmental risks posed by this oxygenate as demonstrated by a previously commissioned study by the University of California. The ban was challenged under Chapter 11 by Methanex, a Canadian firm with facilities in the US and several other countries. Methanex specialized in the production, marketing and transportation of methanol – a liquid petrochemical used to produce MTBE. It considered that the ban was 'a disguised trade and investment restriction intended to achieve the improper goal of protecting and advantaging the domestic ethanol industry through sham environmental regulations disadvantaging MTBE and methanol'.[49] Methanex claimed compensation of US$ 970 million.

On the Article 1101 'relating to' requirement, the US (with Canada and Mexico in agreement) argued for a 'legally significant connection' between the disputed measure and the investment. In advancing this test, it is interesting to note that the concern was as previously identified by Afilalo in the literature. According to the US, there was a need to prevent the incursion of the investment regime into the public regulatory sphere. The 'legally significant connection' test would prevent measures designed to protect human health or the environment from being treated as 'relating to' an investor or investment merely by reason of an 'incidental impact'.[50] Methanex in contrast, at least initially, advanced the looser connection that the measures should 'affect' the investor or its investment.

A. Legally significant connection as a response to the need for a 'practical limitation'

[48] Other tribunals applying NAFTA Chapter 11 have referred to the breadth of the Article 201 definition of measure. For example, the *Ethyl* tribunal noted that, 'Clearly something other than a law, even something in the nature of a practice, which may not even amount to a legal stricture may qualify' (para. 66). *Ethyl Corporation v The Government of Canada (Award on jurisdiction)* NAFTA / UNCITRAL, 24 June 1998 at 66.The *Loewen* tribunal noted that, 'The breadth of this inclusive definition, notably the references to "law, procedure, requirement or practice", is inconsistent with the notion that judicial action is an exclusion from the generality of the expression 'measures'. (para. 40) *The Loewen Group, Inc. and Raymond L. Loewen v U.S.A. (Decision on hearing of Respondent's objection to competence and jurisdiction)* (ICSID Arbitral Tribunal, Case No. ARB(AF)/98/3, 5 January 2001) at 40.
[49] *Methanex Corp. v U.S.A. (First Partial Award)* NAFTA / UNCITRAL, 7 August 2002 at 46.
[50] *Ibid.* at 130.

The tribunal favoured the 'legally significant connection' test. However, its rationale was not explicitly based on any need to prevent the incursion of the investment law regime into the public regulatory sphere. Rather, the tribunal considered that the 'affecting' standard, '…imposes no practical limitation; and an interpretation imposing a limit is required to give effect to the object and purpose of Chapter 11'.[51] Therefore, in the case at hand, '…the affecting standard could be met by suppliers to Methanex who suffered as a result of Methanex's alleged losses, suppliers to those suppliers and so on, towards infinity'.[52]

This explanation for favouring the stricter test can be depicted as insufficiently contextual. Regardless of how the 'relating to' standard is interpreted, it is first necessary to know whether there is an investor or investment, and this aspect of Article 1101 has a role in controlling the volume of claims and the over-reach of investment law into the trade sphere. On the journey from Methanex towards infinity, it can be questioned how often along the supply chain one might expect to encounter firms mainly serving their home markets and perhaps engaging also in purely international *trade* related activities – firms which, in other words, would not be able to show the existence of an investment under Article 1101.

Typologies of treaty definitions of investment give the impression of the breadth and uncertain scope of this concept.[53] While there is a significant measure of convergence in the definitions, there are also textual differences so that generalizations about whether assets arising from any specific activity or transaction amounts to an investment must be treated with some caution. However, it is a reasonable generalization that assets arising from transaction where only goods cross a border, as opposed to also services and capital, are outside the definition of investment in most treaties.[54] The usual assets in this context are either the seller's right to payment, or possible damages claims by the buyer or seller for breach of contract. Such assets typically fall outside positive treaty definitions of investment. They also fall under a fairly common express exclusion such as that found in NAFTA 1139 which excludes 'claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party'.[55]

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[51] *Ibid.* at 139.
[52] *Ibid.* at 137.
[53] See, Jedwald W. Salacuse, *The Law of Investment Treaties* (Oxford, Oxford University Press, 2010) 158-166.
[54] The reference to 'most treaties' is deliberate as the definition of investment in some BITs call into question the claim that assets arising from transaction where only goods cross a border are outside the definition of investment. For example Article 1 of the UK-Egypt BIT defines investment as including 'every kind of asset and in particular, though not exclusively, includes: … (iii) claims to money or to any performance under contract having a financial value'.
[55] There is much more that could be written about the definition of investment in terms of limiting the extent to which assets arising from ordinary commercial contracts qualify as investments. Of significance here is the relationship between the treaty definition in question and Article 25 of the ICSID Convention which extends the jurisdiction of the Centre to 'any legal dispute arising directly out of an investment'. While the term 'investment' in Article 25 is left undefined, a number of criteria have been established and applied in the ICSID jurisprudence. As stated by the tribunal in *Bayindir*, these overlapping criteria comprise 'a contribution [in the sense of a substantial commitment on the part of the investor]; a certain duration over which the project is implemented; sharing of the operational risks, and a contribution to the host State's development'. *Bayindir Insaat Turizm Ticaret*

Thus if we change the facts of Methanex and imagine the absence of the company's activities in the US, leaving only Methanex in its home market (Canada) exporting methanol to the US, there would have been no investment.[56] The economic interests of Methanex in the US would still have been severely affected by the Californian MTBE ban, but challenges against the ban could only then have occurred in the domain of intergovernmental trade law dispute settlement. To the extent that US firms might have responded to the ban by breaching supply contracts with Methanex, the assets in the form of possible damages actions would not fall within the definition of investment and could only, therefore, be subject to a private law dispute.

It follows that the need to show the existence of an investment under Article 1101 presents an initial hurdle to jurisdiction independently of the 'relating to' language. Both Cargill and Methanex clearly had investments in their host states. However, producers are not always investors any more than their suppliers are always investors.

It is also sometimes overlooked that success at the jurisdiction phase does not eliminate the formidable challenges likely to be encountered in the mertis – challenges which will surely deter claims even if the 'relating to' language is liberally interpreted.[57] In sum, the extent of the 'gate keeping' function which the 'relating to' standard needs to have depends on the ease with which the claimant arrived at the gate, and what they are likely to encounter beyond it.

B. The decision to combine the jurisdiction and merits decisions

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ve Sanayi A.Ş. v Islamamic Republic of Pakistan (Decision on Jurisdiction) (ICSID Arbitral Tribunal, Case No. ARB/03/29, 14 November 2005) at 130. The relationship between these criteria and the BIT definition of investment is not altogether clear. The cases give the strong impression that the two stages are separate and independent, thereby admitting the possibility of an alleged investment passing the BIT definition test, but failing on the Article 25 criteria. *Bayindir* 122; *Joy Mining Machinery Limited v The Arab Republic of Egypt (Award on Jurisdiction)* (ICSID Arbitral Tribunal, Case No. ARB/03/11, 6 August 2004) at 48-50. However, there is no unequivocal confirmation of this hierarchy between the two stages since the Article 25 criteria seem always to have confirmed the result of the first stage. The present article does not comment further on these matters primarily because separate contributions can be foreseen in light of the recent *Abaclat* jurisdiction ruling. *Abaclat v The Argentine Republic (Decision on Jurisdiction and Admissibility)* (ICSID Arbitral Tribunal, Case No. ARB/07/05, 4 August 2011) at 343-371; *cf.* Dissenting Opinion Professor George Abi-Saab 34-72. See, By Karen Halverson Cross, 'Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims against Argentina' American Society of International Law Insight, 21 November 2011.
By Karen Halverson Cross

[56] The recent *Grand River Enterprises* NAFTA Ch 11 claim provides an actual example of this type of scenario as indicated by the following extract: 'The Tribunal finds that it does not have jurisdiction over the claims of Kenneth Hill, Jerry Montour and Grand River, because they did not have an investment in the United States as defined by NAFTA. The evidence did not establish that these Claimants had constituted an enterprise in the United States or engaged in other significant activities there satisfying the definition of investment in Article 1139 of NAFTA. Instead, the record shows that, as relevant here, their activities centered on the manufacture of cigarettes at Grand River's manufacturing plant in Canada for export to the United States. The Tribunal concludes that such activities and investments by investors in the territory of one NAFTA party do not satisfy the jurisdictional requirements for a claim against another NAFTA party.' *Grand River Enterprises Six Nations Ltd. v U.S.A. (Award)*, 12 January 2011 at 5 with the tribunal discussing the matter at 80-122.

[57] This was a theme of Methanex's *Request for Reconsideration of the Partial Award* of 28 January 2004.

When it came to elaborating on, and applying the legally significant connection test, the tribunal seized on 'a measure of common ground' between the US and Methanex. The parties agreed that the tribunal would have jurisdiction if the ban was motivated by the subjective intention to benefit the US ethanol industry, and to penalise foreign producers of methanol and MTBE.[58] The tribunal found itself unable to reach a conclusion on this alleged intention without hearing evidence from the parties, rather than working from 'a jigsaw of assumed facts and inferences'.[59] Methanex was invited to submit a fresh pleading and Article 21(4) of the UNCITRAL Arbitration Rules, permitting a jurisdictional plea to be decided in the final award, was invoked.[60]

This decision to combine the jurisdiction and merits decisions brought with it a problem which can be described in terms of 'fit and compatibility'. In other words, deferring the jurisdiction decision created the need to ensure that the jurisdiction test was no stricter than those applicable in the merits. This was the main theme of Methanex's request for reconsideration of the first partial award. As it is conventionally understood that national treatment obligations in trade and investment treaties such as NAFTA Article 1102 can be violated without any need to demonstrate intent to engage in nationality based discrimination,[61] Methanex questioned how such a requirement could be imposed at the jurisdiction stage. It amounted to creating 'a new requirement for proof of a national treatment violation' previously unknown in NAFTA and other international jurisprudence.[62] It is not inconceivable that the NAFTA Article 1102 jurisprudence will develop some kind of intent based approach, since there are valid arguments to the effect that national treatment obligations in investment treaties should be interpreted more strictly than in trade treaties.[63] However, it is surely beyond doubt that such a development should occur within the national treatment analysis, rather than within the 'relating to' language at the jurisdiction stage.[64] In the aftermath of the first partial award, the question was therefore whether and how the tribunal would remedy the fit and compatibility problem.

[58] *Methanex (First Partial Award)* 151-152. The intent alleged by Methanex was in the nature of the subjective intent of the then Governor of California, rather than objective intent derived from the overall structure, content and operation of challenged measures.
[59] *Ibid.* 167.
[60] This provision is now contained in Article 23(3) of the 2010 revision of the UNCITRAL Arbitration Rules. Article 41(2) of the ICSID Convention provides for an equivalent provision.
[61] Methanex referred here to national treatment jurisprudence under NAFTA Chapter 12, Article 1202 and GATT Article III both dealing with trade in goods. *Request for Reconsideration of the Partial Award* 17-18. Based on a review of the cases, DiMascio and Pauwelyn (above note XX) confirm that investment treaty national treatment violations can be established without needing to prove protectionist intent, viewing this as an aspect of convergence in the development of investment and trade law. (76-77)
[62] *Request for Reconsideration of the Partial Award* 33.
[63] Di Mascio and Pauwelyn above note XX 53-58. The authors correctly do not envisage that investment tribunals should require evidence of subjective intent. This is an area where inspiration could be taken from the WTO Appellate Body's approach of distinguishing between the '*subjective* intentions inhabiting the minds of individual legislators or regulators' and the '*objective* expression in the statute itself' as 'discerned from the *design*, the *architecture*, and the revealing *structure* of a measure'. WT/DS87,110/AB/R *Chile-Taxes on Alcoholic Beverages,* adopted 12 January 2000, para. 62.
[64] In this regard, Methanex invoked *generalia specialbus non derogant* maxim of treaty interpretation as advising that 'a specific provision controls a more general one as to the same subject matter'. It followed that 'Article 1102's specific focus removes the "matter" of national treatment and what it requires from the purview of Article 1101'. *Request for Reconsideration of the Partial Award*, 28-32 .

The need for a solution in the case at hand would have been avoided if Methanex had been able to establish malign intent. This would have satisfied the jurisdiction test, and the subsequent finding of an Article 1102 national treatment violation would then have been a foregone conclusion – at least in practice if not in strict legal theory.[65] The problem, of course, is that cases where malign intent can be established on the evidential record are few and far between.[66] Methanex was a typical case in this respect since none of the claims of malign intent on the part of the then Governor of California could be substantiated.[67]

A solution was therefore required to reconcile the jurisdiction and merits analyses. The first hint towards a solution was the tribunal's statement in its Final Award that, '[t]here could be cases of a "legally significant connection" without … malign intent'.[68] The solution was later revealed as the strong suggestion of an alignment of the 'legally significant connection' jurisdiction test, with the standards embodied in the substantive protections. Thus, if a violation of one or more of the substantive protections could be established, this could conceivably provide evidence relevant to a determination as to whether the "relation" required by NAFTA Article 1101 exists'.[69] The tribunal proceeded to the alleged violations of the substantive protections finding that none could be substantiated, so that Methanex's case under Article 1101 was not assisted.[70] Therefore, having considered and dismissed the alleged violations of the substantive protections, the tribunal concluded that it lacked jurisdiction to determine these claims.[71]

C. Observations on the *Methanex* tribunal's overall approach

It can first be clarified that the argument is not that jurisdiction and merits phases must be separate and distinct. It is clear from the ICDID and UNCITRAL arbitration rules that tribunals have the discretion to join jurisdictional objections to the merits. At this level of generality, an argument could be made that the use of this discretion in *Methanex* was an entirely typical occurrence which can be observed in a significant proportion of investment cases. However, when the focus is on the extent to which matters of jurisdiction and merits were intertwined in *Methanex*, the case is

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[65] On this point, it is notable that the earlier *Myers* tribunal noted that '[t]he existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produce no adverse effect on the non-national complainant'. (above note XX at 254). While correct, this statement is of little practical concern since cases of protectionist intent without adverse effect are vanishingly few.

[66] It is possible that the *Myers* case is a rare example. Within the national treatment analysis, the tribunal noted Canada's concern 'to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future'. The maintenance of this ability was described as an 'understandable' 'indirect motive' thereby creating the strong inference that the direct motive was protectionism. (above note XX 234).

[67] *Methanex (Final Award)* 3 August 2005, Part III – Chapter B – page 27, Para. 60; Part IV – Chapter E – Pages 8-10 of Final Award.

[68] *Ibid.*, Part II – Chapter E – Page 5, para. 8. As for why a more definitive analysis of Article 1101 had not been provided earlier in the proceedings, the tribunal relied on Methanex's pleadings which had strongly focused on malign intent.

[69] *Ibid.*, Part IV – Chapter B – Page 1, para. 1.

[70] *Ibid.*,Part IV – Chapter B – Page 19, para. 38; Part IV – Chapter C – Page 12, para. 27; Part IV – Chapter D – Page 8, para. 18.

[71] *Ibid.*, Part IV – Chapter E – Page 10, para. 22.

atypical in investment jurisprudence. There are decisions which resemble *Methanex* to the extent that decisions on jurisdiction are deferred pending a full review of evidence presented in the merits.[72] However, *Methanex* was not only such a case, but also one in which jurisdiction was declined on the basis that there were no substantive violations. In other words, it was a case in which jurisdiction and merits tests were conflated and, in this respect, the case may be unique.

Based on this distinctive characteristic, an argument along the following lines can be advanced. If jurisdiction tests can be interpreted to avoid overlap with tests applicable in the merits without adverse consequences, then so much the better.[73] A torrent of claims would certainly qualify as an adverse consequence and outweigh the value of a distinct boundary achieved by a test based on mere adverse impact. However, as argued above, there is ample protection against this danger outside of the 'relating to' language.

More fundamentally, the tribunal's eventual compromise and retreat from malign intent as the jurisdiction test, led its analysis to fail on its own terms – the need for a 'practical limitation'. A jurisdiction test which is very probably satisfied if there is a substantive violation does not control claims, and what some depict as the incursion of the investment law regime into the public regulatory sphere, any more than a test based on mere adverse impact. The analysis proceeds to the merits phase under both tests with the only difference being that, under the more lenient test, it is known that the tribunal has jurisdiction at the commencement of the merits phase.

In sum, if 'relating to' requires a legally significant connection, this cannot mean malign intent because jurisdiction tests cannot be stricter than those applied in the merits. If, on the other hand, there is a legally significant connection when there is a substantive violation, this is no different in any practical sense from interpreting the 'relating to' standard as requiring only adverse impact. The question therefore raised is whether there is any approach towards the 'relating to' standard as requiring a legally significant connection, to which these observations would not apply.

IV. ALTERNATIVE APPROACHES TOWARDS THE 'RELATING TO' STANDARD AS REQUIRING A LEGALLY SIGNIFICANT CONNECTION

Methanex did in fact suggest a possible alternative test. It submitted that it was targeted by the ban, because '…the measure had such a significant impact on Methanex that [it] should be treated as relating to Methanex and its investments in circumstances where the harm was foreseeable and direct'.[74] This possible approach was not discussed in the case, with the most likely explanation being that Methanex

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[72] See, for example, *Ioannis Kardassopoulos v Republic of Georgia (Decision on Jurisdiction)* (ICSID Arbitral Tribunal) Case No. ARB/05/18, July 6, 2007) paras. 253-261.

[73] Indeed, the *Methanex* tribunal seemed to recognize the value of a distinct boundary between the jurisdiction and merits phases at a fairly early stage of its analysis. Within an extensive discussion under the heading of 'Jurisdiction: The Tribunal's General Approach', the tribunal noted: '...there is no necessity at the jurisdictional stage for a definitive interpretation of the substantive provisions relied on by a claimant: the jurisdiction of the arbitration tribunal is established without the need for such interpretation. Indeed a final award on the merits where a NAFTA tribunal determines that the claimant has failed to prove its case within these substantive provisions cannot signify that the tribunal lacked jurisdiction to make that award.' *First Partial* Award, 121.

[74] *Ibid,* 132.

did not seem to present it as distinct from both the mere effect test, and the malign intent based test. The most appropriate inference is therefore that the tribunal did not detect that an intermediate approach had been advanced,[75] rather than that this approach was rejected.

A test along these lines is subject to the same criticism as the jurisdiction tests used in *Methanex*. The boundary between the jurisdiction and merits phases would remain blurred since findings about foreseeable and direct harm involves causation related analysis which is specifically provided for by Articles 1116 and 1117.[76] **(be careful with this – the Methanex tribunal describes 1116 as a jurisdiction clause at 120)**There would again be problems of fit and compatibility in terms of needing to ensure that the rigour of the jurisdiction test did not exceed that of the merits test. Similarly, an insufficient evidential record would likely result in the joining of the jurisdiction and merits phases, with the tribunal declaring whether or not it had jurisdiction to hear the claim, having completed the hearing of the claim.

Indeed, these problems apply equally to any generally applicable test for revealing the existence of a legally significant connection. The question is what can give a connection between a measure and an investment the quality of being legally significant. In particular cases, the connection could be legally significant if the measure identifies the claimant by name, or if it is clear that the measure was directed towards and motivated by the claimant's activities.[77] However, these tests could not possibly exhaust the reach of a legally significant connection[78] and, therefore, leave

[75]It is clear that 'significant impact' in the nature of 'foreseeable and direct' harm is a more difficult test to satisfy than mere effect. The distinction between malign intent and foreseeable and direct harm is a little less clear, since this harm can be presented as evidence towards establishing intent, which was probably what Methanex had in mind. However, the case was fundamentally about possible subjective malign intent on the part of the Governor of California. Harm which is objectively foreseeable can be present without any suggestion of subjective intent. It can therefore be seen how a 'foreseeable and direct harm' jurisdiction test could have been presented and analysed as an intermediate approach.
[76] These provisions refer to an investor or enterprise incurring 'loss or damage, by reason of, or arising out of' a substantive breach.
[77] The S.D. Myers arbitration is again illustrative here. According to the tribunal: 'In this case, the requirement that the import ban be "in relation" to SDMI and its investment in Canada is easily satisfied. It was the prospect that SDMI would carry though with its plans to expand its Canadian operations that was the specific inspiration for the export ban. It was raised to address specifically the operations of SDMI and its investment.' (Myers 234 Partial Award)
[78] This point has emerged from a number of the cases brought by investors against Argentina. An objection to jurisdiction has been raised in these cases to the effect that measures of general application not directed specifically at the claimants' investments are not actionable. In advancing this objection, Argentina has relied on *Methanex*. Some tribunals have dismissed this reliance as irrelevant on the basis that the *Methanex* tribunal was interpreting NAFTA Article 1101 where the required nexus is between 'measures' and investments. In contrast, Article 25 of the ICSID Convention extends the Centre's jurisdiction to '...any legal dispute arising directly out of an investment'. However, some of the statements in these cases can be used to refute the suggestion that there can only be a 'legally significant connection' under NAFTA Article 1101 when the measures identify, or are directed towards the investments of claimants. Thus, Argentina's objection to jurisdiction has been rejected on the basis that it '...would exclude from ICSID jurisdiction disputes caused by a governmental act of general expropriation while a governmental act expropriating a specific investment would be within the jurisdiction of the Centre'. ICSID Case No. ARB/03/19 (Decision on jurisdiction) Suez, Sociedad General de Aguas de Barcelona S.A., Vivendi Universal S.A., AWG Group Ltd. (UNCITRAL) (Claimants) v The Argentine Republic (Respondent) (August 3, 2006) para. 30. This position is just as untenable under NAFTA Chapter 11 as it is under the BITs in question. It is also interesting to note that, when applying ICSID Article 25, Argentina's objection has always been rejected with reference to

the question of what a generally applicable test might look like. All one can say here is that the need for a legally significant connection seems to envisage the making of a legal determination, as opposed to the more factually oriented determination of whether the measure has affected the investment. However, this begs the question of what legal determination could be made at the jurisdiction stage, which would not bring forward analysis required in the merits.

The same observation then re-surfaces. If, under the legally significant connection test, it is not known whether there is jurisdiction to hear a claim until the hearing of the claim is completed, then the test is the functional and practical equivalent of a jurisdiction test based on mere effect. Both tests have the same implications in terms of controlling the volume of claims and of responding to what some commentators present as the incursion of the investment regime into the public regulatory sphere.

The illusiveness of a distinct legal determination at the jurisdiction stage which would not bring forward the merits analysis can be illustrated with analogies to WTO law. In the investment context, the argument under Article 1101 is that the challenged measure does not relate to investment because it is primarily directed towards the regulation of goods or services. Something approaching the mirror image of this argument can be seen in a number of WTO disputes in which it has been argued that the challenged measure does not apply directly to goods or services, but rather to enterprises which engage in trade. For example, in *Korea – Beef,*[79] the dual-retail system did not apply directly to beef, but rather to sellers of beef who, for the most part, had to choose between selling domestic or imported beef. The argument is that the measure is directed towards traders (rather than goods or the importation of goods) and that the WTO legal system does not seek to regulate the choices of traders and consumers. Panels and the Appellate Body have implicitly assessed whether there is a sufficient connection between the challenged measures and trade in goods by simply asking whether the measures violate the terms of the treaty protections. The generality of this approach is shown by following passage from the Appellate Body report in *China – Audiovisual*:

> '…measures that did not directly regulate goods, or the importation of goods, have nonetheless been found to contravene GATT obligations. Thus, for example, restrictions imposed on investors, wholesalers, and manufacturers, as well as on points of sale and ports of entry, have been

a passage from *CMS v Argentina*: '[w]hat is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments [given to the investor in treaties, legislation or contracts]. CMS Gas Transmission Co. v. The Republic of Argentina (ICSID Case No. ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction (July 17, 2003) para. 27. Other tribunals which might similarly have rejected reliance on *Methanex* on the basis that it was interpreting a NAFTA provision, have been prepared to engage with the decision. In particular, while the *BG Group* case was decided under the Argentina – UK BIT, whose coverage under Article 8(1) extends to 'disputes with regard to an investment', the tribunal nevertheless provided its views on why *Methanex* was a misinterpretation of NAFTA. It also refused to apply *Methanex* to the matter before it on the basis that it '...would discharge Argentina of its BIT obligations simply because its measures do not, on their face, target any investor, and it would render the promises used to attract foreign investment meaningless'. Again, this is a generally applicable statement. Final Award in the Matter of an UNCITRAL Arbitration BG Group Plc. (Claimant) v Argentine Republic (Respondent) (December 24, 2007) paras. 219-233.

[79] WT/DS161,169/AB/R *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*.

found to be inconsistent with Article III:4 or Article XI:1 of the GATT 1947 or 1994'[80]

A possible response is that WTO tribunals have no choice other than to adopt this approach of proceeding directly to the question of whether there is a substantive violation. This is because the WTO dispute settlement process does not envisage distinct jurisdiction and merits phases.[81] However, there is at least one example in the WTO legal texts of a provision which strongly resembles NAFTA Article 1101. Article 1 of the Agreement on Trade-Related Investment Measures (TRIMs) provides that it 'applies to investment measures related to trade in goods only'. While this provision has not been interpreted in terms of imposing a separate jurisdiction test, it raises two questions which are analogous to the Article 1101 nexus requirement. First, when is a measure an investment measure? Secondly, when does an investment measure relate to trade in goods?

The leading statements on these questions are provided by the panel in *Indonesia – Autos*.[82] The measures at issue here included tariff benefits for imported parts and components used in cars incorporating a certain percentage value of domestic products.[83]

On the first question, it was not necessary for the panel to explore the full scope of the term 'investment measure'. The text of the measures revealed to the panel that they were clearly 'aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia'. As such, the panel considered that they would 'necessarily have a significant impact on investment in these sectors' and that the measure would, 'fall within any reasonable interpretation of the term "investment measures"'. Nevertheless, the panel's further statements indicate that it was inclined towards a broad interpretation. Thus it noted the possibility of 'other measures which qualify as investment measures ... because they relate to investment in a different manner'.[84] Indonesia's view that the measures could not be regarded as investment measures because the government did not regard the programmes as such was also rejected.[85] Therefore, the possible view that

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[80] The Appellate Body noted as follows in WT/DS363/AB/R *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*:. (para. 227 notes omitted).

[81] Despite the absence of separate jurisdiction and merits phases, respondent states frequently raise objections to the jurisdiction of panels and a number of DSU provisions have been identified as relevant to the authority of panels to hear disputes and adjudicate on specific aspects of disputes. Of particular note in terms of Appellate Body engagement with panel jurisdiction is WT/DS308/AB/R *Mexico – Tax Measures on Soft Drinks and other Beverages* 40-57. There does not appear to be an example of the Appellate Body having overruled a positive finding of jurisdiction by a panel.

[82] WT/DS54, 55, 59, 64/R *Indonesia – Certain Measures Affecting the Automobile Industry* adopted 23 July 1998.

[83] Given the nature of these measures as local content requirements and as therefore clearly falling under the Illustrative List of TRIMs that are inconsistent with the GATT Article III:4 and XI, it is possible (and probably likely) that no initial and separate engagement is required with whether the measures are in fact TRIMs. However, as the panel in *Indonesia – Autos* noted, it is also possible that '...the TRIMs Agreement requires a separate analysis of the nature of a measure as a trade-related investment measure before proceeding to an examination of whether the measure is covered by the Illustrative List'. (14.71)

[84] *Ibid*. 14.80.

[85] *Ibid*. 14.81.

investment measures under the TRIMs agreement are measures which, to any extent, affect investment has not been excluded.

The panel's brief consideration of the second question under TRIMs Article I is a more direct analogy to NAFTA Article 1101, by reason of the 'related to' requirement:

> We now have to determine whether these investment measures are 'trade-related'. We consider that, if these measures are local content requirements, they would necessarily be 'trade-related' because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade.[86]

Therefore, investment measures are 'related to trade in goods' when they affect trade in goods, rather than when there is a legally significant connection.

It would be wrong to present these analogies with WTO law as dispositive of how the 'relating to' standard should be interpreted in investment law. Indeed, the analogy might be refuted with reference to the differences between the trade and investment regimes noted above. As Diebold writes, 'investment treaties are designed to protect the value of a specific investment, whereas international trade law protects a more abstract value of equal conditions of competition'.[87] Attributing significant weight to this idea could lead to the call for a close connection between the measure and the investment; closer than the connection between a measure and goods / services in the trade regime. As has been argued, however, the connection in the investment context cannot be so close as to be satisfied only if the claimant is identified by name, or if it is clear that the measure was directed towards and motivated by the claimant's activities. It has also been demonstrated that interpreting the 'relating to' standard as requiring anything more than mere effect is problematic. The final section now turns to whether the problems might be offset by countervailing advantages.

VI. ARE THERE ANY VALID REASONS FOR INTERPRETING THE 'RELATING TO' STANDARD AS SOMETHING OTHER THAN MERE EFFECT?

The advantages of interpreting the Article 1101 'relating to' standard as requiring only that measures affect the investment have now been explained. The test is capable of application in a clear and consistent manner. It seems unrealistic to associate the test with an opening of the floodgates and it is does not blur the boundary between the jurisdiction and merits analysis thereby raising the fit and compatibility issue. Is there anything of substance which can be placed in the opposite side of the balance in favour of a stricter interpretation? On this question, there is a need to comment further on Afilalo's contribution.

As noted, the author bestows the 'relating to' requirement with the task of distinguishing between government measures which should be subject to review in

[86] *Ibid*. 14.82.
[87] Diebold above note XX at 844.

the trade law regime, and measures which might also be reviewed as possible violations of the investment law regime. His view is that measures which advance a non-protectionist objective should not be regarded as satisfying this requirement. In other words, there should be an insufficient nexus between the challenged measures and investment if the measures are explicable on the basis of a non-protectionist objective. In these circumstances, as later argued by the US in *Methanex*, the effect of the measures on the investment is 'incidental' to the legitimate regulatory purpose.

If it were not possible in investment disputes to sufficiently consider regulatory purpose anywhere other than as a jurisdiction test under the 'relating to' language, Afilalo's suggested approach would have to be accepted. The alternative of interpreting Article 1101 as requiring mere effect would be inadequate to control what could then be accurately depicted as the incursion of the investment law regime into the public regulatory sphere.

The debate about considering regulatory purpose when appraising government measures is less well developed in the investment context than the trade context, but arguably of greater importance. This is not only because of the individualization of claims, but also because most BITs, in common with NAFTA Chapter 11, do not presently incorporate a general exceptions provision comparable to GATT Article XX.[88] In the trade context, a strong argument can be made that dispute settlement panels should not decide whether products are 'like' or whether there is 'less favourable treatment' without considering the underlying purpose of the challenged measures.[89] However, even if regulatory purpose is overlooked in the 'primary violation' analysis, respondent states are permitted to invoke the exception provisions in a second stage of the overall appraisal. For the most part, in investment disputes, the aim of the measure must either be considered when interpreting the substantive protections, or not at all – unless, of course, a strong role is attributed to the 'relating to' jurisdiction standard.

Encouragingly, the emerging literature gives the impression of considerable scope for engagement with regulatory purpose within the confines of the substantive protections. DiMascio and Pauwelyn note that 'every major interpretation of the "in like circumstances" or "in like situations" language in the national treatment provisions of investment agreements has rejected the trade law emphasis on alteration of the conditions of competition in favour of a test that focuses on whether an alleged discrimination is effectively based upon nationality rather than some other policy

[88] On the growing trend towards incorporating general exceptions provisions, see Suzanne A. Spears 'The Quest for Policy Space in a New Generation of International Investment Agreements 13 Journal of International Economic Law (2010) 1037 at 1059-1062.

[89] Robert Hudec, 'GATT / WTO Constraints on National Regulation: Requiem for an "Aims and Effects Test" 32(3) The International Lawyer (1998) 619; D. Regan, 'Regulatory Purpose and "Like Products" in Article III:4 of the GATT (With Additional Remarks on Article III:2)' 36(3) Journal of World Trade (2002) 44; Donald Regan, 'Further Thoughts on the Role of Regulatory Purpose Under Article III of General Agreement on Tariffs and Trade' 37(4) Journal of World Trade (2003) 737; Henrik Horn and Petros C. Mavroidis, 'Still Hazy After all These Years: The Interpretation of National Treatment in the GATT / WTO Case-law on Tax Discriminaiton' 15 European Journal of International Law (2004) 39; J. Pauwelyn, 'The Unbearable Lightness of Likeness' in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds.) *GATS and the Regulation of International Trade in Services* (Cambridge, Cambridge University Press, 2008) Chapter 15.

reason'.[90] Other authors have identified scope for engagement with regulatory purpose in protections other than national treatment. Voon and Mitchell focus on the prospects of investor claims against Australia's tobacco plain packaging measures. Based on an extensive review of the jurisprudence and literature, their view is that the public health dimension underpinning the new measures would play a strong role in the rejection of the possible expropriation and fair and equitable treatment claims.[91]

Therefore, regulatory purpose can either be considered at the jurisdiction stage when applying the 'relating to' standard, or it can be considered within the merits analysis when applying the substantive protections. When choosing between these options, the most relevant consideration may be that engagement with regulatory purpose is among the more sensitive aspects of the overall appraisal of measures. The idea that government measures which are challenged in the trade and investment regime should not be condemned if they advance a non-protectionist objective is simply stated and generally accepted. However, a careful analysis is required before a conclusion can be reached with any degree of confidence. This is understandably so bearing in mind the sensitivity of the measures under review, and the opprobrium of infringement findings from which a reasonable inference of nationality based discrimination can be drawn. It is perhaps unrealistic to consider that this analysis can be completed to the satisfaction of the parties at the jurisdiction stage.[92] Put differently, the extent to which regulatory purpose goes to the very essence of the dispute means that this matter gravitates strongly towards the terms of the substantive protections, rather than towards the 'relating to' standard in Article 1101.

VII. CONCLUSION

This article has considered an aspect of the relationship between the investment and trade regimes which is most frequently discussed with reference to NAFTA Article 1101. The central question has been how we should think about government measures which are plainly capable of review in the intergovernmental trade regime, and which also affect the economic interests of investors and their investments. Is there any compelling need to develop an interpretation of the Article 1101 'relating to' standard which precludes or limits the review of such measures in the investment regime?

The article has argued that, provided the existence of an investment is confirmed, and provided the government measures at issue affect the economic interests of that investment, the appraisal of these measures can safely proceed to the merits. This position should hold even if the measures are also plainly capable of review in the intergovernmental trade regime. In these circumstances, the concept of a boundary between the two regimes can and should be refuted.

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[90] Above note XX at 76. The consideration of regulatory purpose in investment disputes is also discussed at various points by Diebold above note XX.

[91] Tania Voon and Andrew Mitchell, 'Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia' 14(3) Journal of International Economic Law (2011) 515 at 532-536.

[92] The solution which may well be implicit in Afilalo's contribution is to delay the decision on jurisdiction until the completion of the merits. That this solution can be likened to 'opening a can of worms' is shown by the analysis of *Methanex* which has been provided.

This position is supported by three arguments. First, there is no strong evidence in the NAFTA Treaty of a general presumption that measures capable of review under a non-investment chapter are insulated from review under the investment chapter. The reliance by respondent states on the Article 1112(1) conflict clause, under which inconsistencies between the investment chapter and other chapters must be resolved in favour of the latter, is misplaced. Secondly, it does not appear to be possible to develop a workable conception of the Article 1101 'relating to' standard as requiring anything more than adverse impact. The now prevailing 'legally significant connection' test should be abandoned. The presence of such a connection cannot possibly be exhausted either when the measures at issue take the form of laws and regulations, or when a reasonable assumption can be made that the measures were motivated by the claimant's specific investment activities. Possible alternative conceptions of 'relating to' as 'legally significant connection' share the problem of prematurely considering legal matters which should be deferred to the merits. In turn, the problem then becomes one of 'fit and compatibility' in terms of ensuring that the jurisdiction standard is no stricter than those applicable in the merits. The third argument is the absence of a consideration which can be placed in the opposite side of the balance in favour of a strict jurisdiction test which would operate to shift the review of measures towards the trade regime. Considerable weight would need to be attributed to a lack of scope for considering regulatory purpose within the substantive protections. However, the significant extent of this scope is a recurring theme of the emerging literature.

As a closing thought, it is important to point out that this article does not seek to refute all aspects of a boundary between the trade and investment regimes. As has been discussed, if we change the facts of cases like *Cargill* and *Methanex* by removing the enterprises in the host states, the effect would most likely be to remove the existence of any investment. The measures at issue in these cases would then only be capable of review in the trade regime and it would be entirely appropriate to think in terms of a reasonably bright line demarcating the two regimes. However, there is no need for any demarcation if the existence of an investment is confirmed and there are government measures which affect the economic interests of the investment.