THE NEXT GENERATION OF INTERNATIONAL TRADE AGREEMENTS

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ARTICLES

DISPUTE SETTLEMENT UNDER THE NEXT GENERATION OF FREE TRADE AGREEMENTS

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I. INTRODUCTION

The present generation of free trade agreements (FTAs) suffers from a lack of innovation. Political and other limitations have created barriers to change. This path dependence, which finds its foundation in repetitive language in U.S. agreements and the proliferation of those agreements, has two primary effects. First, it is prompting normative convergence in international trade law as other states adopt principles repeatedly advanced by the United States. Many of the FTAs negotiated in the last twenty years by states around the globe track the U.S. model, at least in certain chapters. Ultimately, and perhaps counterintuitively, the opposite may be true, however. Going forward, convergence in norms may have a negative impact on the development of international trade law in the next generation because it is likely to lead to a disjointed and incoherent regime.

This Article demonstrates how and why the next generation of FTAs can and should adopt greater innovations that will benefit the world’s economies. Focusing on the second, detrimental effect of the present path dependence, I maintain that it is highly probable that the disparate use of boilerplate language in FTAs will create fragmentation among interpretations as the United States and other states engage in dispute settlement under those various agreements. For one, boilerplate language could call into question the parties’ meeting of the minds on the language. More important, because the agreements do not provide guidance on how or whether to consider interpretations of their sibling agreements, it is unclear what weight each dispute settlement panel would give to the interpretations of other panels. Because no single court or tribunal decides disputes under FTAs, including FTAs of a single country, the risk of divergent interpretations of shared terms and references drawn from those divergent interpretations is high—or is it? This Article examines how various elements of dispute design may dictate outcomes in the trade law regime.

Analyzing the process and structures through which states make instruments of international law—here, agreements governing trade and regulatory areas ancillary to trade—is a foundational element of the study of international law. In a system characterized by a lack of a legislative body, the “how” of international law-making is of singular importance. I argue that, here, the “how” has extensive troubling ramifications. In trade, the

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2 Twenty-first century trade agreements are also characterized by their topical expansiveness. See, e.g., Simon Lester, The Role of the International Trade Regime in Global Governance, 16 UCLA J. INT’L L. & FOREIGN AFF. 209 (2011).
influence of the U.S. congressional-executive trade law-making apparatus reaches as far as the contours of the entire international trade law regime. Given the alarming consequences previewed above, it may be time to rethink this system.

This Article begins by looking at the present generation of FTAs, beginning with the United States, and at the puzzling consistency across those agreements. It then turns to FTAs around the world. I describe the legal instruments that govern bilateral and plurilateral trade arrangements. I show that large portions of their text are repeated across diverse trading partners and different political leadership in the United States. The next Section looks to the future and predicts unsettling challenges in interpretation of these agreements. The Article then calls for urgent and crucial change. I propose some possible revisions to the trade law-making process that take proper account of the international trade regime and maximize the benefits of both consistency and innovation.

II. THE PRESENT GENERATION OF U.S. TRADE AGREEMENTS

The roots of the present generation of U.S. FTAs stretch back to the days of the North American Free Trade Agreement (NAFTA) 1.0. Substantively, these agreements have many features in common, irrespective of their diverse foreign representation. Procedurally, nearly all of these agreements were negotiated first between the branches of the U.S. government through the joint congressional-executive process known as fast track or trade promotion authority (TPA). At the global level, the present generation of international trade law instruments is characterized by the proliferation of bilateral and regional agreements of like character, enlarged scope, and common language.

Outside of the growth in the number of topics covered by these agreements, one observes considerable consistency in the text of several of

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4 This development is motivated in no small part by the failure to complete the World Trade Organization (WTO) rounds and the public backlash that dates back to WTO protests in Seattle in 1999. See, e.g., Gregory Messenger, Anti-Fragmentation Strategies: The Curious Case of the EU and World Trade Law, EJIL: TALK (Feb. 20, 2015), https://www.ejiltalk.org/anti-fragmentation-strategies-the-curious-case-of-the-eu-and-world-trade-law/(describing how “institutional deadlock at the WTO had led to a number of free trade agreements being concluded globally”); Alex Tizon, Monday, Nov. 29, SEATTLE TIMES (Dec. 5, 1999), http://community.seattletimes.nwsource.com/archive/?date=19991205&slug=2999667,(discussing the public response to the WTO negotiations occurring in Seattle that week).

the chapters that are repeated from agreement to agreement. Despite some new elements to recent agreements, there are large sections where the language remains the same as the last trade agreement negotiated by the United States and each of the agreements negotiated before that one. In other words, for some chapters, the first template has been the only template.

In prior and forthcoming work, I attribute this consistency to the congressional-executive relationship unique to the United States. The additional intermediate scrutiny of larger agreements passed under TPA, as it has evolved, has led to stagnation. Today, TPA exacerbates rather than ameliorates the politicization of trade agreements. The prospect for improvements and creative additions to agreements still to come is significantly tempered by this path dependence.

In fact, compared with most features of the international legal system, the plurilateral trade law system is in the early stages of its evolution. The proliferation of agreements, particularly bilateral and regional agreements is not unique to the United States. The European Union recently concluded trade agreement negotiations with Canada, Singapore, and Vietnam to add to its twenty-seven agreements in force and is negotiating approximately ten additional bilateral or multilateral agreements. In the Asia-Pacific region, the number of regional and bilateral FTAs has grown exponentially since the conclusion of the Association of Southeast Asian Nations (ASEAN) Free Trade Area of 1992. At that time, the region counted five such agreements in force. Today, the number totals 140 with another seventy-nine under negotiation or awaiting entry into force. The People’s Republic of China is negotiating half a dozen bilateral FTAs at present to top off the sixteen already in effect. India likewise is engaged in at least ten trade agreement negotiations. The World Trade Organization (WTO) reports 303 agreements of this sort in force among its members as of March 29, 2018.


Free Trade Agreements, ASIAN REGIONAL INTEGRATION CTR., Table 1 (2015), https://aric.adb.org/fta.

Id.

Id. at Table 6.

Id.

These statistics suggest that regional and bilateral FTAs are thriving.\textsuperscript{12} Regional and bilateral agreements have eclipsed the WTO in importance.\textsuperscript{13} The following Section examines agreements concluded by other states to determine whether non-U.S. agreements also exhibit a significant degree of consistency or, alternatively, customization. I then turn to the effect of U.S. path dependence on international trade law more generally.

III. CONVERGENCE IN NORMATIVE DEVELOPMENT

A review of trade agreements from select European and Asian states suggests that those states’ agreements do not appear to suffer from path dependence in the same way U.S. trade law-making suffers. In today’s domain of hundreds of agreements, it is challenging to trace the source of each provision; that exercise is beyond the scope of this Article.\textsuperscript{14} Commentators have referred to the present generation as a “spaghetti bowl”—a mass of regional or bilateral agreements concluded without consideration for each other or their implications for investment, potentially increasing both costs and regulation, and distorting conditions of competition for traders.\textsuperscript{15} The concern is not only economic, but also legal: the “spaghetti bowl” can garble the coherence of the trade law system.\textsuperscript{16}

Contrary to this perception, this work indicates convergence within the current “spaghetti bowl” rather than distortions in legal norms. Importantly, in some cases, European and Asian trade agreements have adopted language and chapter ideas from U.S. agreements. For example, the same labor obligations in the Trans-Pacific Partnership (TPP) form part of the recently concluded Canada-EU Comprehensive Economic Trade Agreement (CETA).\textsuperscript{17} There are a number of possibilities as to how these obligations both appeared in these respective texts. Without an inside view into the negotiating room, one could argue that perhaps the TPP adopted Canada’s suggested language and Canada simply re-used it in its CETA negotiations or

\textsuperscript{12} Bhagwati calls it a “pandemic.” \textit{Bhagwati, supra} note 3, at 15–47.
\textsuperscript{13} See, e.g., John Whalley, \textit{Why Do Countries Seek Regional Trade Agreements?, in The Regionalization of the World Economy} (Jeffrey A. Frankel ed., 1998) (TPP was an intrinsic part of Obama’s rebalancing strategy).
\textsuperscript{14} I elaborate on this study in forthcoming work. Kathleen Claussen, \textit{Boilerplate Treaties}, Working Paper (on file with author).
\textsuperscript{15} \textit{Bhagwati, supra} note 3, at 61–71.
\textsuperscript{16} Moreover, fragmentation will not be limited to the normative inter-state context but is likely to extend to the remedial channels for trade law claims, as well. Those domestic remedies have costs for stakeholders not yet foreseen by the branches that indirectly promote their proliferation.
\textsuperscript{17} See \textit{Comprehensive Economic and Trade Agreement} art. 23.4, Can.-EU, \textit{entered into provisional force} Sept. 21, 2017 [hereinafter CETA].
the same was true in the opposite order. Consistency across obligations should be more efficient for Canada as a result. Research by political scientists Todd Allee and Andrew Lugg indicates otherwise. They conclude from their text-as-data analysis that the United States had a disproportionate influence to the other negotiating parties in the TPP, suggesting that this language came from the United States and then was re-used in other agreements.18 The TPP/CETA language also appears in earlier U.S. agreements. Lending support to international political economy theories, Allee and Lugg’s study shows that the United States is setting the standards in these agreements and extending its reach even to those agreements to which it is not a party.19

It is not surprising that U.S.-initiated language appears in what I will call “third party agreements” concluded by states that already have FTAs with the United States. What is more surprising, however, is the appearance of U.S.-initiated language in agreements between states neither of which shares an FTA with the United States. For example, the same labor chapter language from TPP appears also in Article 15.10 of the Sustainable Development Chapter of the EU-Vietnam Free Trade Agreement.20 At the time the European Union and Vietnam concluded their agreement, the United States did not have a trade agreement with either country and yet the language appeared in almost every U.S. agreement in force at the time. One theory is that the European Union and Vietnam may have elected to adopt this language with the express purpose of standardizing or harmonizing across international trade and labor. Alternatively, they may have developed the same language on their own. At the time of the agreement’s conclusion, the United States was negotiating with Vietnam under the TPP and Europe was negotiating the CETA with Canada, so one cannot say conclusively that the influence of the U.S. language led the parties to that language, but the

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19 This study and similar observations lend credence to Susan Strange’s international political economy literature of the late 1980s in which she argues that the entity or individual that sets the rules maintains the greatest strength and, therefore, the United States remains in a position of strength vis-à-vis other states through its control of international institutions. See SUSAN STRANGE, STATES AND MARKETS: AN INTRODUCTION TO INTERNATIONAL POLITICAL ECONOMY (1988). President Obama employed this rhetoric in seeking passage of the TPP saying that the United States cannot let China set the rules of the trade world and that TPP would prevent that from happening. Barack Obama, Opinion, President Obama: The TPP Would Let America, Not China, Lead the Way on Global Trade, WASH. POST (May 2, 2016), https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html?utm_term=.f464758e89ba.
20 The 2009 international trade objectives set by the EU Council reflect the same principles.
language appeared first in U.S. agreements before any of the others came on the scene.\(^\text{21}\) A still better example comes from the EU-Ukraine Association Agreement (a less traditional trade agreement) which entered into force in May 2014 and includes the same text for labor and environment as the TPP.\(^\text{22}\) In general, the influence of the repeated use of the same language in U.S. agreements appears to have influenced at least the EU’s trade agreements such that the European Union has adopted the same language and now incorporates it into its own trade agreements.

Borrowing language from other legislation or international instruments is not a new phenomenon. Fortunately for legal development, there are no plagiarism rules in treaty-making. Borrowing could have an impact on interpretation, however. In the United States, courts will assume that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording.\(^\text{23}\) Here, there is more than “borrowing” at play. Rather, the proliferation of regional and preferential trade agreements has led to a normative cascade in certain areas.\(^\text{24}\)

Taken together, the present generation of trade agreements exhibits signs of convergence in respect of shared principles across agreements and across geographic areas.\(^\text{25}\) This convergence has legal resonance with two primary effects for the innovation to standardization pathway described in the previous Section. These effects are distinct in their policy and legal implications.

\(^{21}\) Even the use of the term “agreement” for free trade pacts has proliferated as a result of the U.S. influence.

\(^{22}\) The same language appears in a number of other agreements around the world including the following: EU-Peru/Colombia FTA; EU-Singapore FTA; EU-Korea FTA; Korea-Peru FTA; Korea-Turkey FTA; Korea-Australia FTA; Korea-New Zealand FTA; and, Korea-Colombia FTA. See, e.g., EUR. COMM’N, Negotiations and Agreements (Apr. 10, 2018), http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#partly-in-place.

\(^{23}\) Willis v. Eastern Trust & Banking Co., 169 U.S. 295, 307 (1898). For a more recent statement of the rules with respect to Congress re-using language, see \textit{Lorillard v. Pons}: “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” 434 U.S. 575, 580 (1978) (citations omitted).

\(^{24}\) On normative cascades, see Martha Finnemore & Kathryn Sikkink’s seminal work on \textit{International Norm Dynamics and Political Change}, 52 INT’L ORG. 887 (1998).

\(^{25}\) At the global level, however, the same may not be true when considering also the WTO regime. Cho maintains that the current generation faces fragmentation as a result of the proliferation of regional agreements apart from the WTO. Cho, \textit{supra} note 3, at 42 (“[T]he ‘spaghetti bowl’ of mushrooming mercantilist blocs under Neo-Regionalism . . . stress the global trade by raising new barriers to extra-bloc trade and disassociating a bloc from the rest of the world due to its preferential nature.”).
The first effect of the normative convergence in U.S. and other trade agreements is standard-setting across trade environments. The adoption of labor and environmental standards generally in trade agreements has become normal practice across polities. Most trade agreements now include provisions that seek to avoid a race to the bottom in both labor and environment. According to the International Labour Organization, as of December 2015, seventy-six agreements covering 135 economies include labor provisions. Over eighty percent of agreements that came into force since 2013 contain such provisions.26 As discussed above, TPP, CETA and other EU agreements all contain labor obligations. In each agreement, the parties are obligated to adopt and maintain labor laws that afford workers certain fundamental, internationally recognized labor rights and to effectively enforce those laws.27 The fact that these agreements share these provisions across their disparate parties has a further modeling effect for states looking to borrow from these and others in shaping new trade agreements. Including provisions that powerful states have adopted may also have political capital. In sum, trade policy has evolved to incorporate certain terms as a matter of course.

The second effect of convergence toward the U.S. text is the law-creating character of the repeated appearance of these provisions. Trade agreements, while not typical law-making treaties,28 contribute to normative development in their repetition. As the International Court of Justice has described in the North Sea Continental Shelf Cases, certain treaty provisions can be of a “norm-creating character” such that they form the basis of a general rule of law where certain other criteria are met.29 From a social science perspective, Wolfgang Alschner and Dimitriy Skougaevskiy, looking at bilateral investment treaties, conclude that developed countries have more coherent treaty networks than their developing counterparts, which, together with the idea that those countries are both more prolific, lends credence to the

26 INT’L LABOUR ORG., ASSESSMENT OF LABOUR PROVISIONS IN TRADE AND INVESTMENT ARRANGEMENTS 19 (2016).
27 The International Labour Organization notes that the “great majority” of trade agreements with labor provisions include language like this. Id. at 2.
29 North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.) 1969 I.C.J. 3 ¶¶ 72–78 (Feb. 20) (requiring in particular evidence that states that adopted a course of action based on the norm felt an obligation to do so). See also Anthony D’Amato, Manifest Intent and the Generation by Treaty of Customary Rules of International Law, 64 AM. J. INT’L L. 892, 895 (1970) (arguing that the North Sea Continental Shelf test is based on intent: “If the treaty manifests an intent to have a particular provision create customary law, that manifested intent is controlling.”).
hypothesis that they contribute more to the development of custom. They are not just more prolific or more consistent in the language to which they agree; rather, they are both. It is too early to assert a general rule of law from the common provisions in trade law, but their repetition constitutes state practice and in that sense they add to what may develop as customary law.

The facilitation of normative development through standardized language also has an important ripple effect for other areas of law, particularly those areas like labor and environment that do not benefit from enforceable commitments elsewhere. For example, commitments in trade agreements related to fundamental, internationally recognized worker rights in binding agreements go a long way toward crystallizing international labor norms. Regardless of multiple conventions on labor law, the International Labour Organization’s pronouncements on these issues do not have the same strength as the statements in binding trade agreements given their status as soft law. The widespread binding commitments across agreements to a set of labor norms contribute to customary international labor law and a shared understanding of internationally recognized labor rights. The multi-disciplinarity of trade agreements has a reverberating effect in these other

30 Wolfgang Alschner & Dmitriy Skougarevskiy, The New Gold Standard? Empirically Situating the TPP in the Investment Treaty Universe (Ctr. for Trade and Econ. Integration, Working Paper N IHEIDCTEI2015-08, 2015). See also Lauge Poulsen, Bounded Rationality and the Diffusion of Modern Investment Treaties, 58 INT’L STUD. Q. 1, 2 (2014) (concluding that “developing countries often accepted the treaty template offered by their developed country treaty partner without meaningful negotiation”). In contrast with trade agreements, the United States has concluded most of its bilateral investment treaties with developing or least-developed countries with asymmetric trading relationships with the United States. UNITED STATES BILATERAL INVESTMENT TREATIES, https://www.state.gov/e/eb/ifd/bit/117402.htm (last visited Apr. 9, 2018). Some have characterized the BIT system’s power differential as creating “contracts of adhesion” or “consumer protection” models, arguing that investment treaties represent asymmetrical, standard form bargains between fundamentally unequal parties (capital exporting states and capital importing states). Jose E. Alvarez, A BIT on Custom, 42 N.Y.U. J. INT’L L. & POL. 17, 26 (2010).

31 On the development of customary law or general principles through this process, Mark Villiger takes issue with reading too much into texts. See MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A STUDY OF THEIR INTERACTIONS AND INTERRELATIONS, WITH SPECIAL CONSIDERATION OF THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (1985). In support of the proposition, see Michael Akehurst, Custom as a Source of International Law, 47 BRIT. YB. INT’L L. 1 (1974); D’Amato, supra note 29, at 896.

32 See also David P. Vincent, The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche?, 23 MINN. J. INT’L L. 1, 45 (2014) (describing how “outside of large economic agreements such as the TPP, there is little hope for effective international environmental law, putting more pressure on the negotiators of the TPP to succeed in including effective environmental provisions. Although world leaders have signed over 500 international environmental agreements in the last fifty years, there has been little progress toward environmental goals.”).
areas. One effect is that the U.S. Congress, with its considerable control over the U.S. FTA text, is effectively creating international non-trade norms.

Transnational convergence contributes to and benefits from the innovation to standardization pathway. Standardized or boilerplate language contributes to the development of custom. States benefit from lower costs and perhaps expertise. This view does not take into account the quality of the norm, however, or the ease of implementation or application of the legal text. Nor does it take account of the benefits of diversity in language among agreements in a disparate system. As noted above, one argument for bilateral and regional trade agreements is to use them as experimental laboratories to accomplish goals that cannot be accomplished at the WTO. Advocates in favor of using agreements in this way promote experimentation over convergence. What is clear is that as these agreements are applied and disputed, the processes that lead to recycled language may need to be reexamined.

IV. DIVERGENCE IN DISPUTE SETTLEMENT

The prospects for the next generation of agreements point to a fascinating cluster of issues illustrative of larger developments in international law. While the present generation exhibits convergence in the development of new agreements, the next generation of trade agreements will be motivated by the application and interpretation of those agreements in the years ahead. This application and interpretation may lead to discursive divergence.

The United States has been a party to a state-to-state dispute under an FTA other than the NAFTA just one time, and under the NAFTA only three times, but the increase in the number of FTAs and of FTA size is likely to prompt more dispute settlement in the near term. Even with the consistency of language, the chance of dispute is high, particularly given that this generation of agreements creates multiple enforceable commitments, some of which can be initiated in a sense by non-state actors. In the last three years, for example, the United States has received public...

33 See, e.g., Nadia Gire, The Trans-Pacific Partnership Agreement: A Revival in United States Trade Policy Reform, 20 CURRENTS INT’L TRADE L.J. 60 (2012) (commenting that the effect of concluding TPP will be to push non-Asia/Pacific countries to recognize the importance of completing the Doha Round of negotiations for WTO advancement).


communications advocating dispute settlement with Mexico, Honduras, Peru, Colombia, and the Dominican Republic over labor issues.

At a minimum, the next generation will be characterized by what I call “forum proliferation”: a shift in interpretive power from treaty parties to a plethora of ad hoc, independent tribunals unrestricted by precedent and unsupervised by any superior authority. This shift draws attention to a tension between states’ authority to make law and their subsequent delegation of law-making power. Notwithstanding that most provisions of trade agreements are rule-like rather than standard-like, constraining the interpreter’s discretion, this generation of agreements provides little to no guidance on how repeated language should be interpreted and particularly how to interpret the interpretations that each independent tribunal develops. Upon receipt of those interpretations, states may choose to reexamine their repeated language and norms.

One difficulty tribunals are likely to face in the interpretation of these agreements is a lack of guidance as to how to handle standard form language analyzed in the prior Part. The customary international law rules on treaty interpretation provide general guidance to arbitral tribunals in their analysis of agreement language. These rules as reflected in the Vienna Convention on the Law of Treaties (VCLT) provide that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Just as in the common law contract doctrine, the VCLT presumes that the text is the “authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text.”

International and domestic courts and tribunals have approached issues of interpretation and intent inconsistently. This diversity has created a friction...
among interpretations that go beyond the plain text to illuminate intent and those that seek to divine it from the text alone. Some adjudicators have cautioned against going beyond the text in interpreting agreements: “The starting point of all treaty-interpretation is the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources (such as by reference to the travaux préparatoires, or any predilections based on presumed intention).”\(^{39}\) This ordinary meaning-focused approach has been adopted in many international arbitrations to confirm that the supposed intentions of the parties should not be used to override the explicit language of a bilateral investment treaty (BIT), for example,\(^{40}\) or to override a textual framework,\(^{41}\) or be used as an independent basis of interpretation.\(^{42}\)

In certain circumstances, however, the VCLT expressly permits an interpreter to consult supplementary means including the preparatory work of the treaty “and the circumstances of its conclusion.”\(^{43}\) These “circumstances” could refer to the “negotiating context.”\(^{44}\) Supplementary means could include internal government negotiating documents, indications regarding the model nature of the text, or even, other agreements with the same text. At a minimum, such documents may provide insight into one side’s intended interpretation, but it may be difficult to decipher if a certain view represents the parties’ shared intention. An even greater challenge with a model text is the dearth of evidence with respect to one party’s intent to the model’s prescribed terms. As Will Moon has observed, model texts are

\(^{39}\) Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, ¶ 78 (Dec. 8, 2008) [hereinafter Wintershall v. Argentine Republic] (“Even before the entry into force of the 1969 VCLT (in 1980), the Institute of International Law had adopted a textual approach to treaty interpretation - le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties.”).

\(^{40}\) Fraport v. Republic of the Philippines, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶ 340 (Dec. 23, 2010).

\(^{41}\) Daimler Financial Services v. Argentine Republic, ICSID Case No. ARB/05/1, Award, ¶ 164 (Aug. 22, 2012).


\(^{43}\) See Vienna Convention on the Law of Treaties, supra note 36, art. 32.

\(^{44}\) This position is consistent with Hersch Lauterpacht’s view that “in no circumstances ought preparatory work to be excluded on the ground that the treaty is clear in itself. Nothing is absolutely clear in itself.” H. Lauterpacht, Some Observations on Preparatory Work in the Interpretation of Treaties, 48 HARV. L. REV. 549, 571 (1935). See generally Detlev F. Vagts, Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court, 83 AM. J. INT’L L. 546 (1989).
“often devoid of distinctive terms that would limit the range of possible meanings that may be ascribed.”

The issues surrounding one-sided template agreements have long occupied scholars of contract law. The fact that one party brought to the negotiation a standardized text calls into question whether certain potentially material terms were “negotiated.” The concept of unconscionability stands out as one doctrine developed to address the inequities of the power differential underlying many form contracts. At common law, superior bargaining power alone rarely stands as a basis for interpreting a contract a particular way. Disparities in power leading to imbalanced agreements that favor one party are permitted by courts unless the disparities produce an “unconscionable bargain.” A court may invalidate a contract or some of its terms where one side demonstrates the bargain to be unconscionable such as in a situation where one party’s freedom of contract is exploited by a stronger party that has control of the negotiations due to a weaker party’s ignorance, feebleness, unsophistication, or general naïveté. None of these conditions is a good fit for modeling trade agreement negotiations. Even where a state considering boilerplate language from a proposing state finds limited room to maneuver to amend that language and may adopt provisions not necessarily out of preference, the exploitative principle underlying the unconscionability doctrine does not have application to the state-to-state trade agreement negotiations or interpretations of today.

Power differentials resulting from one side’s advancement of a model and inability to demur from the model are not an issue that international interpreters have taken up. In the dispute settlement phase, trade agreement negotiations are often one-sided and may not be subject to the same scrutiny as domestic contract negotiations. The lack of equivalent terms to address the power imbalance may make it difficult for weaker parties to challenge the terms of the agreement.

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49 At least with standardized terms in contract law, uncertainty levels should be lower, but that is again not the case for trade agreements as explained infra Section V.
parties have equal stature toward an independent arbitral tribunal charged with interpreting the relevant provision of their agreement.\textsuperscript{50} The aforementioned customary international law rules do not provide guidance on the point of the power differential between the parties at the negotiation stage.\textsuperscript{51} Even if some terms are imported by one party without having been discussed with the other parties to the agreement, it is unlikely a tribunal would consider that fact to be part of the “context” as it is traditionally understood in such a way that would inform an interpretation. U.S. courts also interpret treaties as contracts between two or more rational parties at arm’s length. The U.S. Supreme Court has held that treaties are to be interpreted “to carry out the apparent intention of the parties to secure equality and reciprocity between them.”\textsuperscript{52} Thus, the power differential that may have led to the appearance of certain terms in an agreement and which could inform the parties’ intent is not, under international law and contract principles, a traditional factor in interpretation of those terms.

An adjudicator could seek guidance regarding the parties’ intent from documents internal to the state presenting the model. Here, too, international and domestic courts and tribunals have demurred on the question of whether internal governmental records regarding the agreement belonging to one party could serve as sources of interpretation. Most adjudicators, however, were not examining documents contemporaneous to the negotiations or preceding them.\textsuperscript{53} In thinking about how to treat U.S. internal documents

\textsuperscript{50} Rachel Brewster comments that powerful states are advantaged in negotiations in a way they are not in dispute settlement. See Rachel Brewster, \textit{Rule-Based Dispute Resolution in International Trade Law}, 92 VA. L. REV. 251, 251 (2006).


\textsuperscript{52} Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766–68 (1985); De Geofroy v. Riggs, 133 U.S. 258, 271 (1890). The Court has not commented on the possibility that those two elements would be at cross purposes. The Court’s interpretation of a treaty normally is, like a contract’s interpretation, a matter of determining the parties’ intent. Air France v. Saks, 470 U.S. 392, 399 (1985) (courts must give “the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties”).

\textsuperscript{53} Examining legislative statements at the time of implementation of the applicable language in \textit{Mondev Int’l Ltd. v. United States}, the investment tribunal commented:

\begin{quote}
Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the \textit{travaux préparatoires} of the treaty for the purposes of its interpretation, they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence \textit{opinio juris}.
\end{quote}

\textit{Mondev Int’l Ltd. v. United States}, ICSID Case No. ARB(AF)/99/2, Award, ¶ 111 (Oct. 11, 2002). Another investment tribunal faced with the same question also declined to answer the question. HICEE B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2009-11, Partial Award (May 23, 2011). The tribunal in \textit{CMS Gas Transmission Co. v. Republic of Argentina} referred to representations made to the legislature by one party’s president with regards to the
reflecting decision making within the Congress, John Norton Moore has posited that an adjudicator would need to ask whether the materials were available to all contracting parties, among other conditions.\(^5^4\) Thus, applying the agreements of the current generation, dispute settlement tribunals generally lack guidance from customary international law, the agreements themselves, or other model sources to understand the parties’ intent in trade agreements resulting from templates.

A second interpretive challenge facing tribunals is whether the fact that certain language is repeated in other agreements requires tribunals to take account of other decisions interpreting the same language. Some trade agreements include forum selection clauses to guide jurisdictional choices of litigants but no U.S. trade agreement provides what I will call “interpretation selection clauses” to guide the contours of interpretational jurisdiction for decision makers, particularly with respect to the appearance of the same terms elsewhere. Most U.S. trade agreements neglect to address how to treat other trade jurisprudence at all.\(^5^5\) The European Union’s proposal for the Transatlantic Trade and Investment Partnership (TTIP) suggested guidance


\(^5^5\) Article 1.2.2 of the TPP provides for inconsistency with existing agreements, though a party apparently can choose to seek to correct this problem informally or formally:

If a Party considers that a provision of this Agreement is inconsistent with a provision of another agreement to which it and at least one other Party are party, on request, the relevant Parties to the other agreement shall consult with a view to reaching a mutually satisfactory solution. This paragraph is without prejudice to a Party’s rights and obligations under Chapter 28 (Dispute Settlement).


BIT and the meaning thereof. CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Objections to Jurisdiction (July 17, 2003). Likewise, in Quasar de Valors v. Russia, an arbitrator referred to Spanish legislative history concerning the ratification of the Spain-Russian Federation treaty and to a paper published by a member of the Russian negotiating team on the relevant language as a basis for his interpretation. Quasar de Valors SICCA S.A. v. The Russian Federation, SCC Case No. 24/2007, Separate Opinion of Charles N. Brower, ¶ 18 (Mar. 20, 2009). The Rompetrol v. Romania tribunal expressed doubt as to how the respondent’s treaty-making practice could be taken in itself as positive confirmatory evidence of an intention to give the applicable treaty a certain meaning. Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Objections on Jurisdiction and Admissibility, ¶ 108 (Apr. 18, 2008). The U.S. Supreme Court has held that in the federal courts “it is appropriate to look to extrinsic evidence of the negotiation history” in the interpretation of certain congressionally approved agreements because such agreements are both contract and statute. Oklahoma v. New Mexico, 501 U.S. 221, 235 n.5 (1991).
for interpreting and accommodating WTO jurisprudence.\textsuperscript{56} The CETA similarly directs tribunals as to how to consider WTO case law.\textsuperscript{57} The EU-Singapore trade agreement includes some guidance but is more limited.\textsuperscript{58} Although the Dominican Republic-Central America-United States FTA (CAFTA-DR) does not provide parameters for citing other sources, in the United States v. Guatemala case, both sides referred to WTO jurisprudence and looked to the other CAFTA-DR case law for procedural guidance.\textsuperscript{59} Even WTO-accommodating provisions can be subject to debate, however.\textsuperscript{60} These provisions do not offer guidance with respect to the decisions of other FTA tribunals—guidance that may soon be needed. Under current conditions, a tribunal may or may not seek to reach consistent outcomes and states have no way to predict how an individual tribunal will proceed in this respect.

Similarly situated tribunals in the investment space have not expressly addressed whether to take into account interpretations of other tribunals confronted with the same language in other agreements. Where such an interpretive issue has arisen, at least two investment tribunals have rejected reliance on decisions from other similar-looking treaties.\textsuperscript{61} At least two other


\textsuperscript{57}CETA, supra note 17.

\textsuperscript{58}Messenger calls it the “multilateral elephant in the room.” Messenger, supra note 4.

\textsuperscript{59}See In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, supra note 34, Written Submissions of the United States and Guatemala.

\textsuperscript{60}Simon Lester, CETA Dispute Settlement: Reference to WTO Jurisprudence, INT’L ECON. L. & POL’Y BLOG (Aug. 15, 2014), http://worldtradelaw.typepad.com/ielpblog/2014/08/ceta-dispute-settlement-reference-to-wto-jurisprudence.html (“How exactly should CETA panels ‘take into account’ WTO panel and Appellate Body interpretations? Cite to them, but feel free to go their own way? Follow them as closely as possible? What if the customary rules of interpretation lead the CETA panel to a different result than what the WTO panel/Appellate Body found? And what happens when—don’t be shocked—WTO panel and Appellate Body interpretations are a bit unclear?”).

\textsuperscript{61}When urged to follow the view adopted by another panel, the tribunal in Nations Energy v. Panama noted that it had to resolve the dispute between the parties based on the clauses of the BIT and the facts of that case without being bound by prior decisions in cases based on different bilateral treaties whose provisions may be similar. The tribunal commented that other tribunals have adopted a different interpretation of the relevant clause. Nations Energy Inc. v. Panama, ICSID Case No. ARB/06/19, Award, ¶ 471 (Nov. 24, 2010). In deciding whether to adopt an interpretation of another panel, the SGS v. Philippines tribunal found that “there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals.” Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 97 (Jan. 29, 2004). In two other cases, arbitrators
tribunals have found it appropriate to look to those decisions for guidance. In the 
HICEE case, the claimant referred to two contemporaneous BITs and argued that one of the two contained the same phrase in the same position in the text. For that treaty, the claimant argued that the tribunal should take into account explanatory notes on the treaty’s submission to the Dutch Parliament because, in the claimant’s view, they would be meaningful to the tribunal’s interpretation of the same phrase in the agreement under consideration.

While the tribunal did not find value in that reference, a dissenting arbitrator commented that “evidence of a State’s interpretation of a term in treaties with third States can be used as an interpretive aid.”

A third interpretive challenge brings us to the normative question faced by dispute adjudicators in the trade and investment landscape: is consistency in interpretation important as a principle of international decision making? Are divergent decisions potentially harmful? Given the lack of rules or hierarchical norms, we should expect tribunals to provide mixed answers. Some tribunals are likely to seek to maintain consistency across agreements in their interpretations of identical language, while others may take no regard and instead adopt divergent interpretations as the natural consequence of their application of the VCLT or in consideration of the arguments of the parties.

The arbitrators that will soon fill the ranks of the trade dispute settlement panels are likely to apply frameworks of thought from other areas of law, including commercial law, human rights law, or investment law, in which they work. In the same way, investment tribunals have referred to non-investment case law for interpretive guidance, although I have criticized this made the same point: “The integrity of this interpretative process must not be compromised by the pronouncements of other arbitral tribunals in their interpretation of different treaties in wholly unrelated factual and legal contexts. Other awards or decisions are no more than illustrative of the implications of a standard form of treaty wording.” Fraport, supra note 40, Dissenting Opinion of Arbitrator Bernardo Cremades ¶ 7.5: “[G]reat caution is needed when identifying cases as alike, especially . . . when, moreover, the BITs often contain significant differences despite their similarity.” Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, ¶ 24 (July 30, 2010).

Daimler, supra note 41, ¶ 52 (“[I]t is a fundamental principle of the rule of law that ‘like cases should be decided alike.’ ” (quoting Suez, supra note 61, ¶ 189)). The tribunal in Quasar de Valors v. Russia noted that the it was not bound by other arbitral or international judicial decisions; nevertheless, it commented that the other decisions go over much of the same ground and it was natural to examine them in the light of the parties’ arguments in that case. Quasar de Valors, supra note 53, ¶ 24.


Id. Dissenting Opinion of Charles Brower, ¶ 40.
approach.65 Anthea Roberts additionally has observed that the dispute settlement stage in the investment context has involved bringing in a number of diverse “paradigms” or cognitive frameworks to the field, even if the parties to those treaties may not have intended that to be the case and even though this trend may have contributed to backlash toward investment dispute settlement more generally.66 From a private, commercial law perspective, diverse results are commonplace and would likely not be seen as troubling. Public international lawyers, on the other hand, may find diverse interpretations of the same language problematic and may be inclined to seek consistency in interpretations.

Proponents of public international law will find inconsistent interpretations troubling because inconsistency compromises the idea that trade law is predictable and stable and that it constitutes a legal system with an ordering function.67 They argue that the trade regime needs a coherent, uniform set of rules to create a clear expectation among governments and stakeholders. Without such uniformity, those actors could be subject to conflicting obligations or rights.68 If arbitrators were to adopt a public international law perspective, seeing themselves as engaged in institution-building, operating within a trade law regime, they may be motivated to seek to render consistent interpretations.69 In the words of Martti Koskenniemi,

67 See, e.g., Stephan Schill, Whither Fragmentation? On the Literature and Sociology of International Investment Law, 22 EUR. J. INT’L L. 875 (2011). Writing of the investment law regime, Schill observes that “[u]nlike in commercial arbitrations that are rooted in a domestic legal system, the international law of investment treaties appeared too uniform to justify such different outcomes.” Id. at 890.
69 This view, that trade law works as a regime, is widely held. As the number of regional trade agreements increases, and as dispute settlement becomes more frequent, these agreements begin to take the shape of massive regulatory regimes. In the investment law context, commentators have likewise raised concern about “conceptual coherence” across the “regime” of international investment law, suggesting that divergent interpretations of similar language resulting from the independent tribunal framework have undermined the system’s legitimacy and resulted in a decreased reliability of outcomes. Andrea K. Bjorklund & Sophie Nappert, Beyond Fragmentation, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 439 (Todd Weiler & Freya Baetens eds., 2011). See also Schill, supra note 67, at 890 (“While these developments were a rather natural consequence of the applicable law being enshrined in bilateral treaties and their interpretation and application by one-off arbitral tribunals, the problem of inconsistencies developed into the most important single theme in the internal discourse on investment law.”). Whether characterized negatively (as “fragmentation”),
“[t]reaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict.”70 Under this view, a regime involving the same provisions with different dispute settlement is a zero sum game: divergent interpretations of the same language make agreements more difficult to implement because the lack of consistency makes dispute settlement outcomes less predictable. The network benefit of having the same language is thus self-defeating.

The resulting mix of divergence and consistency is problematic for states. From one perspective, the United States and its trading partners ostensibly intended to set up free-standing dispute settlement mechanisms through their diverse regional trade agreements. In each instance, the parties should have the opportunity to argue the interpretation of the agreement without having to differentiate precedent from other agreements. Applying interpretations from other tribunals in disputes between third states imposes on states that did not argue those cases intentions and obligations to which they did not subscribe or have an opportunity to debate. At the same time, not knowing whether a tribunal may seek consistency or may diverge will leave states without any predictability in respect of its pro forma obligations.

That a degree of homogeneity across trade agreements would exacerbate fragmentation in the law is in some respects counter-intuitive.71 It is non-obvious that it would be more problematic to have panels interpreting the same language differently as compared to panels interpreting different language differently. One counterargument is that it would be better to

positively (as “legal pluralism”), scientifically (as “functional differentiation”) or neutrally (as “specialization”), this phenomenon was once the subject of a major debate among international lawyers, generally. On embracing fragmentation, see Steven Ratner, Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law, 102 AM. J. INT’L L. 475 (2008). As noted by Martti Koskenniemi in his ILC Report, “fragmentation” is a very frequent topic of academic writing and conferences in the last two decades. See Martti Koskenniemi (Finalized Report), Report of the Study Group of the Int’l Law Comm’n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, n.14, UN Doc. A/CN/4/L.682 (Apr. 13, 2006). Some commentators have noted some convergence among the otherwise fragmented regime. See, e.g., Roger P. Alford, The Convergence of International Trade and Investment Arbitration, 12 SANTA CLARA J. INT’L L. 35 (2014). Koskenniemi comments that “fragmentation and coherence are not aspects of the world but lie in the eye of the beholder.” Koskenniemi, supra note 69, ¶ 20. Today, some scholars have embraced the multiplicity of decisions as providing a “rich tapestry” of jurisprudence. Bjorklund & Nappert, supra note 69, at 479.

70 Koskenniemi, supra note 69, ¶ 37.

71 The focus of the academy has been on how fragmentation and conflict, rather than consistency and uniformity, could be problematic. On conflict, see Christopher J. Borgen, Resolving Treaty Conflicts, 37 GEO. WASH. INT’L L. REV. 573 (2005); PAUWELYN, supra note 68; and Jan B. Mus, Conflicts Between Treaties in International Law, 45 NETH. INT’L L. REV. 208 (1998).
operate in a zone of similarity with diverse interpretations of uniform commitments rather than to work with diverse interpretations of diverse commitments. The experience of the investment regime suggests otherwise. The investment regime demonstrates the difficulties of inconsistent interpretations of the same language. For example, litigants have successfully challenged the appointment of arbitrators in investment cases where those arbitrators were seen to be partial in an arbitration for not adopting consistent interpretations, while other commentators have found such challenges to be unfaithful to the basic principles of the regime—that every investment treaty operates in its own right. 72 The courts of medieval England similarly developed multiple inconsistent interpretations of the same language, but they had the Crown to sort out those discrepancies. Ultimately, the question of consistency is up to the state. A strong procedural argument can be made that a state should prefer arguing from zero than risk having to argue away bad de facto precedent. It may be intellectually untidy but more reliable, nevertheless.

Andrea Bjorklund and Sophie Nappert point out that the challenges of diverse outcomes may be rectified “through techniques of international lawyers that have been used to deal with normative conflicts in the past.” 73 These lawyers and decision makers may “cherry pick” and use other strategies to drive the case law that argues for a precedential system when convenient and against one when inconvenient to do otherwise. Some tribunals may find, just as some U.S. courts have found with respect to form contracts in markets of sophisticated parties, 74 that the market will respond to bad interpretations 75 and on that basis they may find it appropriate to rely on past interpretations that have not been so addressed. 76 Some panels will see the value in consistency and strive to be consistent either out of a feeling of confirmation or out of a commitment to uniform case law. Self-referencing may be seen as a way to build legitimacy and confidence in the decision-making process. In short, the public international lawyer is likely to consider that the plurilateral trade law field is soon to become a conceptual mess.

72 See Devas (Mauritius) Ltd. v. India, PCA Case No. 2013-09, Decision on Challenge, ¶ 64 (Sept. 30, 2013) and subsequent commentary.

73 Bjorklund & Nappert, supra note 69.

74 Choi & Gulati, supra note 37, at 1130 (citing Broad v. Rockwell Int’l Corp., 642 F.2d 929, 947 (5th Cir. 1981) (en banc)).

75 See Choi & Gulati, supra note 37, at 1131 (“[I]f the market had had a problem with the prior court interpretation, the market would have corrected the language.” (citing Morgan Stanley & Co. v. Archer Daniels Midland Co., 570 F. Supp. 1529, 1541–42 (S.D.N.Y. 1983))).

76 This may be true despite that U.S. courts are not especially useful points of reference given that there is no similar market response among international trade agreements.
One thing is certain: to the extent states seek to remain in control of the meaning of their trade agreements, additional work is required to provide the necessary guidance to arbitrators. It remains to be seen whether states seek to and are able to respond to undesirable arbitral pronouncements with a recalibration of their own. In the current environment, change after dispute settlement may be difficult. Unlike in dispute settlement under bilateral investment treaties where a loss to a state may motivate both parties to effect change in the interests of their respective investors, when a state loses in a state-to-state dispute under a trade agreement, the other side may be less willing to agree to a clarification.77

V. A WAY FORWARD: SOME TENTATIVE RECOMMENDATIONS

While the future is not fully predictable, the central proposition remains that the trade agreement regime may face both normative convergence and discursive fragmentation. Two moments for improvements present themselves: the “front-end”—at the root of the problem where trade agreements are made—or at the “back-end” in the dispute settlement phase.

On the front end, one possible solution is to update the domestic trade lawmaking processes to better accommodate change. In the United States, for example, lawmakers could reconsider the shared power engagement to accommodate the political and popular realities of the twenty-first century. The U.S. Congress and the U.S. executive should seek to develop a pragmatic mechanism to replace the current system for designing U.S. trade law instruments with one to which both branches can contribute with a principled approach to standardization and innovation. Such a process may go a long way to discontinuing the current path dependence in chapters that would benefit from customization.78 Just as scientific principles ought to be

77 Even if that were not the case, change may still not be forthcoming: in a study of modifications made to standard contracts, Robert Scott and Mitu Gulati have found that most lawyers did not take efforts to revise contract language even after it was shown to be a litigation risk. MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION 73–88 (2012). The early NAFTA cases are not good touchpoints for evaluating whether the same will be true in the trade disputes context given that they were highly fact specific challenges without an emphasis on any element of the legal language that was unique to that agreement.

78 Hal Shapiro and Lael Brainard adroitly put it this way: “A more effective fast track would require meaningful congressional input into negotiations, more selective application of fast track by the president, and closer targeting of fast-track provisions to particular agreements.” Lael Brainard & Hal Shapiro, Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More than a Name Change, 35 GEO. WASH. INT’L L. REV. 1, 43 (2003). Neither I nor they were the first to make suggested changes to TPA. See also Harold Hongju Koh, The Fast Track and United States Trade
modified to accommodate breakthroughs in science, procedural accommodations are needed for the new generation of trade practice. Recognizing the challenges to overcoming the path dependence on the front-end, a more realistic solution or stop-gap may present itself on the “back-end.” On the back-end, or post-agreement side, the next generation of trade agreements would benefit from changes to the way dispute settlement is handled. What is needed is some meaningful guidance for arbitral tribunals or a coordination mechanism.79

One useful option may be for states to develop rules like in conflict of laws to govern the relationship between different systems. Elaborating upon the VCLT guidance with specific instructions from states as to how trade should be governed would improve outcomes for states and allow them to maintain control over their public commitments. In the absence of formal rules, arbitrators could be encouraged by states in the course of litigation to apply a variation of relational contract theory in their interpretations to better accommodate ongoing relationships between disputing states and the existence of a larger regime. Relational contract theory posits two broad categories of contracts: discrete contracts and intertwined contracts. Discrete contracts are short-term contracts requiring “a minimum of future cooperation between the parties…. Everything is clearly defined and presented.”80 By comparison, intertwined contracts are intended for long-term relationships between the parties and a larger regime. They include broader terms in need of regular interpretation. “Intertwined contracts view the bargain as complex and dynamic, and as part of an interdependency whose meaning may be influenced by context.”81 In an intertwined contract, the contracting parties view the “relation as an ongoing integration of behavior which will grow and vary with events in a largely unforeseeable future.”82 Nearly any inter-state agreement or contract will be necessarily

79 See generally Messenger, supra note 4 (noting the chances that parties will use these other fora instead of the WTO to resolve their disputes: “One wonders whether either side would be comfortable with panels within the TTIP or CETA taking the lead from WTO reports that arose from other disputes ….”).


82 Id. at 945. See also William J. Aceves, The Economic Analysis of International Law, 17 U. PA. J. INT’L ECON. L. 995, 1013–14. Relational contract theory views the contractual relationship as dynamic, in contrast to classical contract law which views it as static.
Among this generation of trade agreements the relational elements extend beyond the individual parties to a single agreement and arguably reach other trading partners with agreements with similar terms in the larger regime the generation has created. C.J. Mahoney offers that the project of relational contract theorists has been “to construct distinct rules of interpretation that are best suited to effectuate the intent of the parties in relational situations.” This approach would shift the focus from the traditional sources set out in the VCLT to take into account the relationship between the parties and potentially among similar agreements. Such a strategy could lessen pressure on the negotiating language _travaux_ to look to the future, though it could make the interpretation process still more complex.

A second option would be to renegotiate existing agreements with clauses that accommodate divergence or consistency and to ensure that future agreements likewise provide guidance on what to make of decisions rendered under other agreements. The New Zealand-Brunei Side Agreement to the TPP is the only agreement of which I am aware that expressly provides for how arbitrators should treat other decisions (saying other agreements with the same language should be interpreted consistently). Apart from that, commentators have questioned what the TPP means for the NAFTA and pre-existing FTAs among the parties, for example, more generally.

Transparent _travaux_ and guidance on the interrelationship between and among agreements will be critical. An improved regime would involve a singular dispute mechanism or guidance as to how to manage divergent interpretations. An even better regime would accommodate customized provisions such that dispute settlement tribunals would employ customary rules of interpretation without seeking to accommodate different readings of the text. Having recognized such problems in the investment context, states have taken steps to rein in tribunals. As Roberts puts it, the United States has “draft[ed] a new breed of investment treaties in which [it and other states] spell out the extent and limits of their treaty obligations with greater specificity.” Parties should provide interpretative guidance to fill the gaps

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83 Ethan Leib has usefully analyzed the theoretical underpinning of relational contract theory in the context of consumer form contracts with lessons to be considered for the application of relational analysis should it be applied to standard form provisions in trade agreements. See Ethan Leib, _What is the Relational Theory of Consumer Form Contract?_, in _REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL_ 259 (Jean Braucher, John Kidwell & William Whitford eds., 2013).


85 Roberts, _supra_ note 66, at 79.
or update the VCLT in this respect. Given the diversity of practice on the question of whether to consider internal government documents or similar information that would reflect the thinking and intent behind select language, to the extent courts and tribunals engage in this practice, they will face difficulty in seeking to do so for standardized agreement language that they find to be ambiguous. Interpretations that draw from relational contract theory, taking into account the larger relationship among the parties and the regime in which the agreement is situated, could be an additional advantage to navigating the nascent regime.

VI. CONCLUSION

In this adolescent regional trade law regime, the structural features of negotiations and the substance of the resulting agreement are necessarily intertwined. At least in the United States, this dynamic is necessarily different from other types of international law-making. TPP is emblematic of the way in which a process designed to prevent failure has only exacerbated structural difficulties to the point of paralysis.

Dispute settlement may cause the United States and others to revisit the copy-paste approach, however. Now is the time to re-consider the values that motivate how we make our international trade agreements.