



Convergence of International Trade and Investment Law in Practice:

How Should Investor-State Arbitral Tribunals
Engage With Trade Norms?

Jonathan Chevry

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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À Danièle & Marguerite

ABSTRACT

This thesis aims to provide an analytical framework to which investor-State arbitral tribunals can refer in cases where international trade law is invoked.

The starting point of the present study is the trend in commentary on international trade and investment law, which makes the argument that international trade and investment law should be reconciled due to the clear "convergence" between (some of) their constitutive elements.

This convergence argument is not misguided: there are similarities between the underlying principles of global trade and investment and, as such, a better coordination of these principles would be helpful for several reasons. Such reasons include legal certainty, reduction of transaction costs, better coherence in the operation of international agreements that now combine both trade and investment provisions, to name a few.

However, no matter how reconcilable or converging the two disciplines may be, their enforcement mechanisms are structurally different and are likely to remain so even if the reforms towards a modernization of the investment dispute settlement (currently discussed at the EU policy level) are eventually implemented in the near future.

In light of this last point, it is possible to claim that integration between trade law and investment law will only have limited or even negative effects if the trade and investment adjudicators continue to exercise their functions in an isolated manner, without taking cognizance of (i) the norms contained in the other discipline and (ii) the other adjudicator's scope of authority. Effective convergence of trade and investment entails a two-way process pursuant to which one adjudicator can use (i.e. take into account, refer to, apply, interpret and enforce) the law of the other and vice-versa. The thesis envisages one of the two dimensions of this process, namely the use of trade law by the investment adjudicator.

Looking into the details of the convergence argument, the role of investment dispute settlement mechanism and the use of trade norms over the past two decades by litigants and arbitrators, the present study identifies both the legal techniques and obstacles these actors shall apply or go beyond in order to use trade norms in the most appropriate way and, more importantly, benefit from this use.

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*It was all a dream...**

Starting a PhD program at the EUI in September 2011 certainly felt like a dream. Moving to one of the most beautiful and peaceful regions in Europe, getting to know wonderful people, having only a very vague idea of what writing a thesis really meant... My project, back then, was nothing but a jumble of blurry ideas.

Thanks to Professor Petros C. Mavroidis, this project became something real and concrete. His reactivity, his understanding of my needs and ambitions, and the confidence he has shown in my ability to develop this work have been even more impressive than his great humor and our common passion for *l'Olympique de Marseille*. He has been the best mentor I could have wished for.

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Doing a PhD at the EUI is more than writing a dissertation, it is a social adventure. For me this adventure would take place on a boat. And on that boat I would certainly call for all the EUI Rowing Club members, and in particular for my coach Edo Gattai and my co-captains Martin (the *enormest*, without a doubt) Alassane, Jonas, Jurek and Benedikt. The memories of EUI *barche* flying over the Arno, the Laguna Veneta and the Seine as well as the *aperitivi* in the garden of the SCF (my second 'home'), will surely stick around for a long time !

* Christopher G. L. "Biggie" Wallace, *Juicy* (1994), available at <<https://vimeo.com/58515797>>, at 0'20".

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...And if you don't know, now you know, reada'!

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LIST OF ABBREVIATIONS

AB	Appellate Body
AD	anti-dumping
AFDI	Annuaire Français de Droit International
Am. J. Int'l L.	American Journal of International Law
Am. Rev. of Int'l Arbitration	American Review of International Arbitration
Arb. Int'l	Arbitration International
ASCM	Agreement on Subsidies and Countervailing Measures
ASEAN	Association of Southeast Nations
ASIL Proceedings	American Society of International Law Proceedings
Australian YB of Int'l L.	Australian Yearbook of International Law
Austrian Arb. YB	Austrian Arbitration Yearbook
Berkeley J. Int'l L.	Berkeley Journal of International Law
BITs	bilateral investment treaties
Brit. YB Int'l L.	British Yearbook of International Laws
California L. Rev.	California Law Review
CETA	Comprehensive Economic and Trade Agreement
Chicago J. Int'l L.	Chicago Journal of International Law
Chicago-Kent L. Rev.	Chicago-Kent Law Review
CJEU	Court of Justice of the European Union
Columbia J. Transn'l L.	Columbia Journal of Transnational Law
Com. Market L. Rev.	Common Market Law Review
Connecticut J. Int'l L.	Connecticut Journal of International Law
Contemporary Asia Arb. J.	Contemporary Asia Arbitration Journal
Cornell Int'l L. J.	Cornell International Law Journal
CVD	countervailing duty
DSB	WTO Dispute Settlement Body
DSU	Dispute Settlement Understanding
Duke J. Comp. & Int'l L.	Duke Journal of Comparative and International Law
Duke L. J.	Duke Law Journal
ECT	Energy Charter Treaty
EC	European Commission
EU	European Union
Eur. J. Int'l L.	European Journal of International Law
Eur. J. Int'l Relations	European Journal of International Relations
Eur. Law Journal	European Law Journal
FCN treaties	Friendship, Commerce and Navigation treaties
FDI	foreign direct investment
FET	fair and equitable treatment
Finnish YB Int'l L.	Finnish Yearbook of International Law
FIRA	Foreign Investment Review Act
FIT	Feed-in Tariff
Fordham L. Rev.	Fordham Law Review

Abbreviations

FTAs	free trade agreements
FTC	Free Trade Commission (of the NAFTA)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
Georgetown J. Int'l L.	Georgetown Journal of International Law
Glob. Community YB Int'l L. & Juris.	The Global Community Yearbook of International Law & Jurisprudence
Gottingen J. Int'l L.	Gottingen Journal of International Law
Harvard Int'l L. J.	Harvard International Law Journal
Hastings L. J.	Hastings Law Journal
IBA	International Bar Association
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965
ICSID Rev.-FILJ	ICSID Review – Foreign Investment Law Journal
IFC	International Finance Corporation
IAs	international investment agreements
IIL	international investment law
IISD	International Institute for Sustainable Development
ILC	International Law Commission
ILSA J. Int'l & Comp. L.	ILSA Journal of International and Comparative Law
Int'l J. Cultural Property	International Journal Cultural Property
ISDS	investor-state dispute settlement
ITO	International Trade Organization
JDI	Journal du droit international (Clunet)
J. Int'l Arb.	Journal of International Arbitration
J. Int'l Dispute Settlement	Journal of International Dispute Settlement
J. Int'l Eco. L.	Journal of International economic Law
J. Legal Stud.	Journal of Legal Studies
J. Transnat'l L. & Pol'y	Journal of Transnational Law and Policy
JWIT	Journal of World Investment and Trade
L. & Eth. Of Human Rights	Law and Ethics of Human Rights
L. & Practice Int'l Court & Tribs	Law and Practice of International Courts and Tribunals
LCIA	London Court of International Arbitration
Leiden J. Int'l L.	Leiden Journal of International Law
Max Planck YB UN L.	Max Planck Yearbook of United Nations Law
MAI	Multilateral Agreement on Investment
MEA	multinational environmental agreement
Melb. J. Int'l L.	Melbourne Journal of International Law
MFN	most-favoured nation
Mich. J. Int'l L.	Michigan Journal of International Law

Abbreviations

The Modern L. Rev.	The Modern Law Review
NAFTA	North American Free Trade Agreement
NCCR	National Centre for Competence in Research
NEMs	non-equity modes
Neth. Int'l L. Rev.	Netherland International Law Review
Netherlands YB Int'l L.	Netherlands Yearbook of International Law
NGOs	non-governmental organizations
Northwestern U. L. R.	Northwestern University Law Review
OECD	Organization for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Penn. State L. Rev.	Pennsylvania State Law Review
PTAs	preferential trade agreements
PTIAs	preferential trade and investment agreements
Rev. Arb.	Revue de l'arbitrage
RGDIP	Revue Générale de Droit International Public
Santa Clara J. Int'l L.	Santa Clara Journal of International Law
SCC	Stockholm Chamber of Commerce
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SIAC	Singapore International Arbitration Centre
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPs Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
Tulane L. Rev.	Tulane Law Review
U. Chicago L. R.	University of Chicago Law Review
UCLA L. Rev.	UCLA Law Review
UNCITRAL	United National Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
Uni. Chicago L. R.	University of Chicago Law Review
U. Penn. L. Rev.	University of Pennsylvania Law Review
Vanderbilt J. Trans'l L.	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
Virginia J. Int'l L.	Virginia Journal of International Law
WGTI	Working Group on the relationship between Trade and Investment
WTO	World Trade Organization
World Trade Rev.	World Trade Review

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Note: Unless otherwise indicated, ICJ decisions have been extracted from the ICJ website, accessible at < <http://www.icj-cij.org/docket/index.php?p1=3&p2=2>> (last consulted 1 Aug. 2015).

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CHAPTER 1.

INTRODUCTION

"In diverse and sometimes contradictory ways, the body of international law is rapidly moving in new directions. Whether or not we accept the most gloomy prognostications of those who fear material growth, we cannot deny that tensions and conflicts are likely to be intensified and that international norms and procedures will have to be developed in response. We can expect a more uncertain, untidy, more confusing international legal system. For the coming generation of international lawyers the challenge will be great and the result –we all hope– will be more rewarding than ever before."

O. Schachter

I. GENERAL OVERVIEW

A. THE CLAIM: INVESTOR-STATE TRIBUNALS MUST EMBRACE ENGAGEMENT WITH INTERNATIONAL TRADE LAW

The international investment legal regime is evolving. Like public international law, the broader legal system to which it belongs, international investment law is 'moving in new directions.' Commentators have observed that one of these directions points towards the trade legal regime.¹ This bears various consequences, or 'challenges' to use the word of O. Schachter, for international investment lawyers.² This thesis proposes to address the most important of these challenges, which is the capacity for investor-State arbitral tribunals to engage with international trade norms.

The present thesis analyses the behavior of investor-State arbitral tribunals in their engagement with international trade law and aims to outline the analytical framework, which investor-State arbitral tribunals can refer to in cases where international trade law is invoked.

In that sense, the general narrative this research aims to develop can be formulated in the following terms. International investment law and international trade law are converging. They share the same roots, and interconnections and mutual influence between the two disciplines are increasing. Convergence can be considered as positive, as it allows one to better address the realities and problems international economic actors encounter today. Yet, convergence is also necessarily limited, because of the institutional demarcation existing between the trade and investment legal regimes and the diverging function of their enforcement mechanisms. These mechanisms are structurally different

¹ See *infra* pp.10-25 and references therein.

² O. Schachter 'New Directions in International Law' (1972) 49 *Chicago-Kent L. Rev.* 13, 10-11.

and are likely to remain so, even if the reforms towards a modernization of the investment dispute settlement are eventually implemented in the near future.³

In light of this last point, it is possible to claim that integration between trade law and investment law will only have limited effects if the trade and investment adjudicators continue to exercise their functions in an isolated manner, without taking cognizance of (i) the norms contained in the other discipline and (ii) the other adjudicator's scope of authority. Effective convergence of trade and investment entails a two-way process, pursuant to which one adjudicator can use (*i.e.* take into account, refer to, apply, interpret and enforce) the law of the other and vice-versa. This thesis envisages one of the two dimensions of this process, namely the use of trade law by the investment adjudicator. It identifies both the legal techniques and obstacles these actors should apply, or overcome, in order to use trade norms in the most appropriate way and, more importantly, benefit from this use.

B. METHODOLOGY

1. Focus on Practice and Dispute-Settlement

As stated above, this thesis address the ways investor-State tribunals should engage with trade law and therefore attempts to provide an analytical framework which these tribunals can refer to in cases where international trade law is invoked. This proposition necessarily implies a focus on the law of international dispute settlement, and more precisely on investor-State arbitration and its actors.

This choice seemed justified because investment agreements, like trade agreements, can be considered as incomplete contracts, and in consequence adjudication is the most frequently used form of 'completion'.⁴ Unless a major reform is undertaken to re-design the entire institutional structure of international economic law, the convergence of international trade and investment law necessarily implies the participation of international trade and investment adjudicative bodies. In other words, if one desires convergence between international trade and investment law, one has to demonstrate how this convergence might ultimately take place within the courts. Consequently, anyone convinced that convergence is happening, or that it should happen, needs to first explain the concept to international economic law dispute settlement actors, and, more specifically, to international investment arbitration actors.

The arguments developed in this dissertation are therefore targeted at these actors, *i.e.* arbitrators, parties to procedures and their counsel, as well as observers and commentators of the system. In that sense, the thesis aims to introduce (or re-introduce)

³ For a discussion on the attempts to reform the international investment legal regime, *see infra* p.8 and n.22.

⁴ For an economic analysis of investment agreements leading to this conclusion, *see*, A. Van Aaken 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 *J. Int'l Eco. L.* 507.

trade law to investment specialists. Anyone interested in an academic discussion and examination of the functions of the trade judge as compared to those of investor-State arbitral tribunals can benefit from the analytical developments made in Chapter 2. Researchers focusing on actual references to international trade law by investor-State tribunals should find value in Chapter 3. Chapters 4 and 5 are more technical and specifically addressed to practitioners with an interest in the way interaction of international investment law and other international legal disciplines – and more specifically the trade discipline – are regulated, or should be regulated, in arbitral proceedings.

The primary tools used for the research undertaken to build up these arguments have been International Investment Agreements (IIAs) and the provisions contained therein on dispute settlement, as well as the body of investor-State decisions and awards available in the public domain.⁵ In addition to these treaties and awards, I have also used decisions of other international adjudicative bodies, most notably ones issued by WTO panels and the Appellate Body, published drafts of future investment agreements and academic commentary. These other materials have played an important role in finding support for the analysis made while looking at existing international investment rules and case law.

Focusing on these bodies of materials, and especially on case law, presented for me the best option to better understand and describe how investor-State tribunals have reacted in the past when facing the possibility, or necessity, to refer to international trade law and how they should react in the future. In that sense, the thesis both presents an objective examination of the work performed by investment tribunals and develops, at times, a normative affirmation on how these references to trade law might be undertaken without risking any normative conflicts between the disciplines. I have attempted to 'alert' the reader each time I make such a normative statement.

I have also used the text of existing investment agreements, as well as model treaties and the drafts of future investment agreements, and especially future potential investment agreements, such as the ones currently negotiated by the European Union (EU).⁶

⁵ The 'ITA Law' database, created and operated by the University of Victoria, has been the main source for finding and accessing awards and other dispute-settlement materials. The 'Investor-State-Law-Guide database' ('ISLG'), available upon subscription, has also been extremely useful for locating, within selected awards and other dispute-settlement materials, information related to one given topic or subject matter. As further explained in Chapter 3, ISLG has allowed me to conduct broad, quantitative research on the current use of international trade law by investor-State arbitral tribunals.

⁶ The focus on European agreements seemed justified, because the EU can today be seen as one of the most active actors in the reformation of the international investment legal regime. Since the Lisbon Treaty, investment is part of the EU's common commercial policy and therefore belongs to the competence of the EU. The EU approach toward the regulation of investment was first outlined in a communication released by the EU Commission 2010. In this communication, and in the various documents published since then, the EU Commission has taken the stance that the current international investment legal framework has to be reformed. Since then, the EU has negotiated and completed the draft of several international agreements (or preferential trade agreements with investment chapters), which are intended to reflect this stance. *See*, for the EU Commission 2010 Communication, European Commission, 'Towards a

Examining drafts of future investment agreements has been challenging, since many of the provisions contained in these drafts, and especially the ones examined in the current thesis, have been written and modified, sometimes several times, during the writing process of my dissertation. This made the research all the more interesting, as it has allowed me to acknowledge potential changes in the field and therefore anticipate, *lege feranda*, how investment tribunals will behave in the future. Nevertheless, a caveat is necessary in this respect. These draft agreements are still being discussed and it is possible that the final version of the text adopted by the parties to these agreements differs from the one discussed in the present work.

2. Theoretical Stance on the International Investment Legal Regime and on International Dispute Settlement

International Investment Law as a Decentralized Legal System

Numerous authors have discussed the nature of the international investment legal regime, and more specifically of international investment arbitration.⁷ The goal of the present thesis is certainly not to come up with a new way of conceptualizing investment arbitration, provided that this is still possible. Arguably, however, any serious forensic examination on the behavior of investor-State arbitral tribunals requires a definite theoretical stance with regard to the nature of international investment law.

comprehensive European international investment policy' (Jul. 2010), *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions*, N° COM(2010)343, available at < <http://ec.europa.eu/trade/policy/accessing-markets/investment/> > (last accessed 1 Aug. 2015). For recent studies on the EU investment policy and the way it may influence the international investment legal regime in general, see e.g., J. Griebel, 'The New EU Investment Policy Approach' in M. Bungenberg et al. (eds.), *International Investment Law - A Handbook* (2015) 304 ; A. Reinisch 'The EU on the Investment Path, Quo Vadis Europe-The Future of EU BITs and Other Investment Agreements' (2013) 12 *Santa Clara J. Int'l L.* 111 ; J. Chaisse 'Promises and Pitfalls of the European Union Policy on Foreign Investment—How will the New EU Competence on FDI Affect The Emerging Global Regime?' (2012) *J. Int'l Eco. L.* 1.

⁷ See e.g., Z. Douglas, who was one of the first authors proposing a theoretical analysis of investment arbitration, affirming that investor-State arbitration is a hybrid system. Z. Douglas 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *Brit. YB Int'l L.* 151. G. Van Harten and S. Schill have pleaded that investment arbitration should be conceptualized as a new form of global administrative law. See e.g. G. Van Harten & M. Loughling 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *Eur. J. Int'l L.* 121 and S.W. Schill 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2010) 23 *Leiden J. Int'l L.* 401. E. De Brabandere, for his part, argues that investment arbitration is nothing more than an elevated form of public international law. E. De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (2014). A. Sykes, in an article comparing investment arbitration with trade dispute settlement, offers an economic analysis to the mechanism and explains that investment arbitration can be used to lower the cost of capital. A.O. Sykes 'Public versus Private Enforcement of International Economic Law: Standing and Remedy' (2005) 34 *J. Legal Stud.* 631. In an article that today stands as a masterpiece in the field, A. Roberts attempts to summarize all existing conceptions and concludes that investment-arbitration, like the Australian platypus, which has a duck's bill, but a beaver body and is warm-blooded like a mammal, but lays eggs like birds, is a species of its own and cannot be considered as a sub-category of already existing international legal systems. A. Roberts 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *Am. J. Int'l L.* 45.

Amongst the recent publications on the issue, I find the one J. Pauwelyn offered in last year's (2014) volume of the *ICSID Review* particularly compelling, convincing and pertinent with regard to the ideas developed in the present dissertation.⁸ Pauwelyn argues that investment arbitration is a decentralized system,⁹ "with self-organizing qualities which have emerged through the interaction of its constituent components."¹⁰ He further explains that international investment law has evolved through "small, genetic mutations" to address the challenges and criticisms it has faced.¹¹ For Pauwelyn, examples of these "minor mutations" include new and more detailed provisions in revised version of arbitration rules and recently adopted or renegotiated investment agreements, as well as "controversial dissents or reversals of precedents in arbitration awards."¹² According to Pauwelyn, this evolving characteristic fits with the basic features of the investment legal regime and, notably, the fact that, unlike other regimes of international law, it lacks centralized global control.¹³ This theoretical stance is interesting, in the sense that it insists on the diffused nature of investment law and stresses the possibility, and even the necessity, for investment law to be reformed *via* small tweaks and adaptations.¹⁴ These two descriptive claims have influenced my understanding of the disciplines and inspired several of the arguments developed in the present dissertation.

Cross-Fertilization and International Judicial 'Interpretative Dialogue'

In addition to looking at international investment law as a decentralized system, developing through various minor changes, I consider cross-fertilization, or judicial dialogue between international courts, to be a positive phenomenon. This statement will not be examined further in the body of this dissertation and shall be considered as axiomatic. The idea is certainly not eccentric. It has been developed at length in the

⁸ J. Pauwelyn 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' (2014) 29 *ICSID Rev.* 372.

⁹ More precisely, Pauwelyn uses the term 'complex adaptive system'. This term is borrowed from 'complexity theory', a concept used in physics, biology, economics and political science, and employed to describe phenomena for which reductionism is inappropriate. *Ibid.* 382-83. According to Pauwelyn, the defining features of international investment law match with the main characteristics usually found in complex adaptive systems. Like complex adaptive systems, international investment law "is made up of dispersed interactions between many agents, institutions and instruments." *Ibid.* 384. Further, international investment law has emerged through evolution, without major constitutional moments. This is feature, labeled as 'organic emergence', is usually found in complex adaptive systems. Third, similarly to complex adaptive systems, international investment law lacks a global controller. Finally, a parallel may be drawn between the way international investment law continues to evolve while being highly criticized and considered as deeply sub-optimal, and the fourth main characteristic of complex adaptive systems: "continual adaptation with out-of-equilibrium dynamics". *Ibid.* 382; 385-86.

¹⁰ Pauwelyn (*supra* n.8) 375.

¹¹ *Ibid.* 380.

¹² *Ibid.* 381.

¹³ *Ibid.*

¹⁴ *Ibid.* 412.

literature and, to some extent, in practice as well.¹⁵ The expression 'cross-fertilization' refers to the idea that sub-systems of public international law do not stand in isolation from each-other and that a given international court or tribunal operating in one of these sub-systems may refer to, or rely upon, the law of another. While there are several reasons for doing so, it is generally considered that looking at what other international courts are doing is an appropriate method of avoiding conflicts in the application of a sub-field of international law. Moreover, it enhances the quality of the decisions issued by these courts and, in turn, increases their legitimacy.¹⁶ This idea has been used as a ground for the research performed in the present work.

II. SCOPE AND TERMINOLOGY

1. The Scope and Delimitation of the Present Study

The Scope – What Is This Thesis About?

The present thesis focuses on international investment arbitration, that is, the dispute settlement mechanism existing in the great majority of existing international investment treaties, which allows a private party (an individual, or a company) to initiate proceedings against a sovereign State before an international arbitral tribunal on the basis of an alleged breach of international law. Investor-State tribunals (also called 'investment tribunals' or 'treaty tribunals' in the present dissertation) decide the case by applying the international investment treaty used to initiate the proceedings. This thesis focuses on the work and behavior of these treaty tribunals. The activity of other arbitral tribunals, whose authority is based on other legal instruments (for instance a contract, an investment domestic law) has been excluded from the scope of the present research. Some investment law-related awards and decisions issued by these other tribunals have been used for illustrative purposes. I have attempted to notify the reader whenever such references are made.

The present works does not make a distinction between ICSID and non-ICSID arbitration. I have looked at awards issued by ICSID tribunals, as well as by arbitral tribunals administrated by other arbitral institutions (for instance the PCA or the SCC), or constituted upon and applying other arbitral rules (for instance the UNCITRAL arbitration rules). I do not claim that there are no differences whatsoever between ICSID

¹⁵ R. Teitel & R. Howse 'Cross-judging: tribunalization in a fragmented but interconnected global order' (2008) 41 *NYU J. Int'l L. & Politics* 959 ; F. Fontanelli, G. Martinico & P. Carrozza (eds.), *Shaping Rule of Law Through Dialogue, International and Supranational Experiences* (2009) ; E.-U. Petersmann 'Competing "Principles of Justice" in Multilevel Commercial, Trade and Investment Adjudication: Need for More "Judicial Dialogues" and Legal "Cross-Fertilization"' (2013) 1 *Glob. Community YB Int'l L. & Juris.* 163 ; J.A. Huerta-Goldman, A. Romanetti & F.X. Stirnimann, 'Cross-Fertilization and Reciprocal Opportunities: An Overview' in J.A. Huerta-Goldman, A. Romanetti & F.X. Stirnimann (eds.), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (2013) 1. See also, C. Brown, *A Common Law of International Adjudication* (2007).

¹⁶ See e.g., Teitel & Howse (*supra* n.15) ; Petersmann (*supra* n.15).

and non-ICSID arbitration.¹⁷ However, for the purpose of the present thesis, using a general demarcation between the two subcategories of investment arbitration and/or focusing only on one of them is neither useful nor pertinent. I have always attempted to indicate when differences in the law applicable to the tribunals and practice exist, and when these differences may have an impact on the ideas developed in this study. In the absence of such difference however, I have assumed the work and behavior of ICSID and non-ICSID tribunal to be similar. The thesis, therefore, relates to the use of trade law by investor-State arbitral tribunals in general.

The present dissertation has attempted to be current up until August 2015. Considering the extremely rapid growth of materials relating to international investment law over the last years, it is, however, impossible to guarantee full coverage of all relevant awards or decisions, scholarly work, international treaties, or other developments.¹⁸ I take full responsibility for any omission in that respect.

Delimitation – What This Thesis Is Not About

Writing a book about the evolving relationship between international trade law and international investment law, in a period when both disciplines are changing rapidly and are subject to various heated academic debates, might lead to high expectations. To satisfy these expectations in the best possible way, I have decided to trade off exhaustiveness for precision in the analysis. As a consequence, many aspects of the interrelation between trade and investment and, more generally, several recent questions and debates relating to the two disciplines, are not examined in this thesis.

First of all, this thesis looks at the use of trade law in investment arbitration. It does not look at the other side of the relation, namely the use of investment law in trade dispute settlement. Authors have attempted to demonstrate that influence between the two disciplines should be reciprocal, and that WTO panels and the Appellate Body may find guidance by looking at the way investment arbitral tribunals have used international law,¹⁹ or, more generally, that international trade actors could draw some lessons from

¹⁷ Several authors have written about the difference between these two types of investor-State arbitration, their pros and cons. See, C.F. Dugan *et al.*, *Investor-State Arbitration* (2008) 86-91 ; P. Bernardini 'ICSID Versus Non-ICSID Investment Treaty Arbitration' in D. Arias & M.A. Fernández-Ballesteros (eds.) *Liber Amicorum Bernardo Cremades* (2010) 159-188.

¹⁸ In this respect, I need to acknowledge here that the publication of a monograph on the convergence of international trade and investment law is scheduled for November 2015. See J. Kurtz, *The WTO and International Investment Law* (forthcoming, November 2015) <<http://www.cambridge.org/us/academic/subjects/law/international-trade-law/wto-and-international-investment-law-converging-systems?format=HB>> (last consulted 1 Aug. 2015). Although I have been in touch with the author and I am relatively familiar with his work, I have not been able to consult the manuscript of this future publication.

¹⁹ M. Footer, 'On the Laws of Attraction: Examining the Relationship Between Foreign Investment and International Trade' in R. Ehandi & P. Sauvé (eds.), *Prospects in International Investment Law and Policy* (2013) 105, 137. Footer refers for instance to the law of State of responsibility and the rules on attribution.

the development of international investment law.²⁰ Nevertheless, reference to investment standards by WTO judges seems less likely, as the WTO regime is more elaborate, and the case-law more established, than that of investment law. In addition, and more technically, WTO judges appear to be less responsive toward non-WTO law, principally because of the wording of governing law clauses in the WTO DSU.²¹ Finally, one might reasonably admit that it is simply unrealistic, or overly ambitious to pretend to be able to study both aspects of the trade-investment relationship in a single PhD dissertation.

More generally, the thesis is not to be read as a method for solving the problem of the fragmentation of international law (provided that fragmentation is actually a problem that needs to be solved), through dialogue between international courts and tribunals.

As briefly explained above, I consider, in an axiomatic manner, that dialogue between international courts is positive. Throughout the present work, I also discuss the need for coordination between the international investment and trade adjudicative bodies and further argue that cross-fertilization between trade and investment adjudicators may foster coherence between the international trade and investment legal regimes. I, however, do not attempt to extrapolate from these results that the same applies in relations between international investment tribunals and other international courts (for instance human rights courts, the International Court of Justice (ICJ), the Court of Justice of the European Union), or between international courts in general.

Finally, this thesis is also not a manifesto in favor of the reform of international investment law. I am certainly convinced that international investment law is, like any other branch of international law, not picture-perfect. I also accept that investment arbitration has shown weaknesses that need to be corrected. Yet, I will not attempt to demonstrate that the credibility of investment tribunals will be enhanced if and when they refer to other international legal norms. The thesis assumes that this is the case. Nonetheless, I am certainly too modest to pretend that I found the key to solving investment arbitration's legitimacy crisis. Numerous serious institutions as well as respectful authors have worked, and are still working, on this problem.²² The chances of finding the solution amongst their suggestions are certainly greater than in the following pages.

²⁰ A.M. Johnston & M.J. Trebilcock 'Fragmentation in International Trade Law: Insights from the Global Investment Regime' (2013) 12 *World Trade Rev.* 621.

²¹ See e.g., L. Bartels 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 *J. World Trade* 419.

²² See i.e., the UNCTAD 2015 'toolbox' propositions, in UNCTAD, *World Investment Report 2015 – Reforming International Investment Law Governance* (June 2015) pp.164-73 available at: <http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf> (last consulted 1 Aug. 2015). For scholarly work on the reform of the current investment legal system, see, J. E. Kalicki & A. Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System - Journeys for the 21st Century* (2015) ; J.E. Alvarez *et al.*, *The Evolving International Investment Regime: Expectations, Realities, Options* (2011) ; S.R. Franck 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham L. Rev.* 1521 ; M. Waibel *et al.*, *The Backlash against Investment Arbitration : Perceptions and Reality* (2010).

2. Semantic and Terminology

The way I refer, in the present work, to several key terms and expressions needs to be briefly clarified.

The thesis relates to the 'use' of 'trade' 'norms' in investor-State arbitration. The term 'use' is understood broadly. I employ it as a generic word that encompasses the various 'actions' that investor-State tribunals have had to take with trade law, *e.g.* 'refer to', 'take into account', 'apply', 'interpret' or 'enforce'.

Certainly, these different 'actions' bear different consequences. It is not the same to ask a investment tribunal to refer to trade law in order to interpret a given investment law standard than to ask the same tribunal to enforce a norm contained in a trade treaty.²³ Several authors have insisted on the distinction between *applying* a given norm of international law and *referring to* that norm of international law for the purpose of *interpreting* another legal obligation.²⁴ The ICJ for instance, in the *Oil Platform Case*, accepted *to refer to* general rules of international law relating to the use of force to interpret the treaty the parties to the disputes requested the court to apply.²⁵ The Court however refused *to apply* these general rules; extraneous to the treaty it had to apply, because it had no jurisdiction to do so.²⁶ These different 'actions' and different consequences are further explained throughout the course of the thesis. The term 'use' is employed however whenever I refer to all of these actions in general.

The term 'trade law' is also understood broadly and refers to all the existing rules contained in international trade agreements and in particular in WTO agreements. In that sense, it is often the case that the expressions 'trade law' and 'WTO law' are used as equivalent.

I use also the term 'norm' in a general manner to refer generically to legally binding instruments. I do not attach any specific theoretical connotation to the term. The reason I decided to employ it is a pragmatic one, as I need an expression that could encompass

²³ The discussion between the tribunal and the counsel of one of the parties during the hearings of the *Canfor & al. v. US* dispute is interesting in that respect: elaborating of the opportunity to refer to a trade jurisprudence to better capture the sense of an investment rule, one of the arbitrator asks the US' representative to confirm that the tribunal is not bound by trade law. The representative agrees but notes that the tribunal can nevertheless take into account the ruling of the trade adjudicator if this is somehow relevant in the dispute at hands. *See Canfor Corporation v. United States of America; Tembec et al. v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL (Transcript of Hearing - Day Two, 12 Jan. 2006) pp.188-189.

²⁴ J.P. Trachtman 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard Int'l L. J.* 333, 342 ; J.P. Trachtman 'Book Review' (2004) 98 *Am. Rev. Int'l L.* 855 (*reviewing* J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of international Law* (2003)) 858. *See also*, A. Gourgourinis 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 *J. Int'l Dispute Settlement* 31,

²⁵ *See, Case Concerning Oil Platforms (Iran v. US)*, ICJ Report 90 (Judgment, 12 Dec. 1996) ¶¶39-41.

²⁶ *Ibid.* In *Total v. Argentina*, an ICSID Tribunal reached a similar conclusion when request to look at WTO law to interpret an investment obligation contained in the France-Argentina BIT. *See, Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 Dec. 2010) ¶122.

all types of 'rules' –whether it is a treaty, or a specific obligation within the treaty, or a principle affirmed by a court of law– which can be referred to by one international adjudicator when dealing with a given dispute.

III. THE STARTING POINT: THE CLAIM FOR CONVERGENCE OF INTERNATIONAL TRADE AND INVESTMENT LAW

The narrative of this work draws upon the claim pursuant to which international trade and investment law are converging towards each other.²⁷ This claim is not my own, and it has been developed in scholarship over the last decade.²⁸ In the following developments, I briefly schematize the basis of this convergence argument. I do not attempt, here, to develop this argument any further. I simply observe that there are reasons to believe this argument is far from being misguided (A), and that convergence might have some positive aspects (B). I explain, however, why convergence remains

²⁷ This section was originally planned to be a chapter of its own. For time and space constraints, as well as for the sake of clarity, I have shortened it and included it in the introduction of this thesis. I do not exclude the possibility of extending it again, nor that of updating it in order to take into account the above-mentioned future publication of the main advocate of the convergence's argument, and consequently relocating this section to the main body of this work, should I persevere with an attempt to publish it as monograph.

²⁸ For a discussion on the merits of the convergence argument and on the relation between trade and investment more generally *see e.g.*, R. Adlung & M. Molinuevo 'Bilateralism in Services Trade: Is There Fire behind the (BIT-)Smoke?' (2008) 11 *J. Int'l Eco. L.* 365 ; A.K. Bjorklund 'Convergence or Complementarity' (2013) 12 *Santa Clara J. Int'l L.* 65 ; T. Broude, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law?' in R. Echandi & P. Sauvé (eds.), *Prospects in International Investment Law and Policy* (2013) 139 ; T. Broude 'Toward an Economic Approach to the Consolidation of International Trade Regulation and International Investment Law' (2013) 9 *Jerusalem Rev. Legal Studies* 24 ; S. Cho & J. Kurtz 'Converging Divergences: A Common Law of International Trade and Investment' (2014) *Chicago-Kent College of Law Research Paper* ; N. DiMascio & J. Pauwelyn 'Nondiscrimination in Trade and Investment Treaties: World Apart or Two Sides of the Same Coin?' (2008) 102 *Am. J. Int'l L.* 48 ; Footer (*supra* n.19) ; R. Howse & E. Chalamish 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz' (2009) 20 *Eur. J. Int'l L.* 1087 ; Huerta-Goldman *et al.* (*supra* n.15) ; J. Kurtz 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents' (2009) 20 *Eur. J. Int'l L.* 749 ; J. Kurtz 'Charting the Future of the Twin Pillars of International Economic Law' (2013) 9 *Jerusalem Rev. Legal Studies* 36 ; J. Kurtz, 'On the evolution and slow convergence of international trade and investment law' in G. Sacerdoti *et al.* (eds.), *General Interests of Host States in International Investment Law* (2014) 104 ; D. McRae 'The World Trade Organization and International Investment Law: Converging Systems—Can the Case for Convergence be Made?' (2013) 9 *Jerusalem Rev. Legal Studies* 13 ; G. Sacerdoti 'Trade and Investment Law: Institutional Differences and Substantive Similarities' (2013) 9 *Jerusalem Rev. Legal Studies* 1 ; Sykes (*supra* n.7) ; F. Weiss, 'Trade and Investment' in P. Muchlinski, F. Ortino & C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) 183 ; M. Wu, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime' in Z. Douglas, J. Pauwelyn & J.E. Viñuales (eds.), *The Foundations of International Investment Law* (2014) 169 ; A.R. Ziegler, 'Investment Law in Conflict with WTO Law' in M. Bungenberg *et al.* (eds.), *International Investment Law - A Handbook* (2015) 1784. *See also*, the various contributions in the TDM 2011 special issue on "Intersections: Dissemblance or Convergence between International Trade and Investment Law" available upon subscription at <<http://www.transnational-dispute-management.com/journal-categories-articles.asp?cat=15>> (last consulted 1 Aug. 2015).

limited, and why it seems, today, premature to claim that investment and trade could be 'consolidated' (C).²⁹

A. THE MERITS OF THE CONVERGENCE ARGUMENT

The various works in which the convergence claim is developed follow the same general storyline. They look, first, at the history of the two disciplines and note that trade and investment law share a common origin (1). Looking then at today's international trade and investment legal frameworks, they argue that numerous and increasing inter-connections continue to exist between the two disciplines, and it is therefore possible to claim that trade and investment are converging, despite their institutional differences and separation (2).

1. Once Upon a Time, there were Two Sisters...: A Brief Historical Background

In a recent contribution, T. Broude draws an entertaining parallel between international trade law and international investment law on the one side, and 'Lottie' and 'Lisa', the two main characters of a children's novel published in the late forties, on the other.³⁰ Like Lottie and Lisa, two twin sisters who are separated at birth, because of their parents' divorce, but who meet again by chance at a summer camp and eventually manage to reunite their family, trade and investment law share the same origin, have been bifurcated for circumstantial reasons, and now converge back towards each-other.³¹ Broude is not the only one raising an argument on the basis of the 'same origin' of trade and investment law. Several authors have indeed explained that rules for the regulation of foreign investment and trade were once blended in single instruments.³² The main example of these instruments were Friendship, Commerce and Navigation (FCN) treaties, concluded during the post-Industrial Revolution era, which allowed Western powers to promote and protect investment and trade. These FNC treaties, often presented as the ancestors of today's Bilateral Investment Treaties (BITs),³³ were comprehensive and broad agreements covering a whole range of disciplines, including

²⁹ The term 'consolidated' is used by Broude, who argues that "from a policy perspective, it seems difficult to justify such a continued bifurcation." See, Broude 'Investment and Trade...' (*supra* n.28) 165.

³⁰ Broude 'Investment and Trade...' (*supra* n.28) 130-40, citing E. Kästner, *Das Doppelte Lottchen: Ein Roman für Kinder* (1949).

³¹ Broude concludes his piece as follows: "The regulation of trade and investment has been separated for historical and political reasons. These causes are no longer relevant, either to economic theory or contemporary international economics. It makes little sense to continue the separation of trade and investment today, anymore than Lisa and Lottie should have grown up apart." *Ibid.* 155.

³² Broude 'Investment and Trade...' (*supra* n.28); Footer (*supra* n.19); Cho & Kurtz (*supra* n.28). See also, for a broad overview of trade and investment law history, M. Herdegen, *Principles of International Economic Law* (2013) 13-15.

³³ See e.g., W. Alschner 'Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law' (2013) 5 *Goettingen J. Int'l L.* 455; K.J. Vandavelde 'A brief history of international investment agreements' (2005) 12 *UC Davis J. Int'l L. & Policy* 157. See also, J.W. Salacuse, *The Law of Investment Treaties* (2010) 78-125.

investment and trade, as well as navigation, intellectual property, and even sometimes human rights.³⁴ Without entering into the complexities of these agreements, it is worth noting that the common practice at that time was to include in these agreements both investment protection rights (including non-discrimination, security and due process), which private parties could enforce using diplomatic protection, as well as trade provisions, similar to those which would later be found in bilateral and multilateral trade agreements.³⁵ The following extract from the Permanent Court of International Justice's (PCIJ) judgment in the *Oscar Chin* case sheds light on this practice with respect to investment and trade disciplines:

"Freedom of trade, as established by the Convention, consists in the right –in principle unrestricted– to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries."³⁶

According to the authors who look at the FCN treaties as evidence of a common past between the trade and investment discipline, having single instruments made sense, because the need for international regulation of investment and trade is based on the same justification, that is, the efficient international allocation of resources.³⁷ Broude notes, for instance, that:

"Adam Smith's 'invisible hand' and David Ricardo's comparative advantage are not only theories of international trade – the international mobility of goods (and services) – but also theories of investment, because they may concomitantly be understood as explanations of investor responsiveness to market returns from manufacturing activities (*i.e.*, the decision to invest in production of cloth or wine). The goals of trade law, and investment law, with all their nuances, are strikingly similar, ultimately concerned with the facilitation of economic efficiency through international economic activity."³⁸

³⁴ In the *Oil Platforms* case, the ICJ had to interpret the broad notion of "freedom of commerce and navigation" and more generally construe the scope of the FCN treaty between the US and Iran. The Court affirmed that the FNC treaty "cover[ed] a vast range of matters ancillary to trade or commerce, such as shipping, transit of goods and persons, the right to establish and operate business, protection from molestation, freedom of communication, acquisition and tenure of property [...]". See, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment (6 Nov. 2003), ICJ Reports 2003, 361, at ¶¶40-46. See also, on the scope of FNC treaties, J.F. Coyle 'Treaty of Friendship, Commerce and Navigation in the Modern Era' (2012) 51 *Columbia J. Transn'l L.* 302, 311-16.

³⁵ These treaties would provide, for instance, for custom duties and tariff provisions for goods imported from a treaty partner as well as National Treatment (NT) and Most-Favored-Nation (MFN) treatment provisions. Interestingly, the language of these provisions mirrors the one found in today's free trade agreements, including the General Agreement on Tariffs and Trade (GATT). *Ibid.* 312-13.

³⁶ *The Oscar Chinn Case (Britain v. Belgium)* P.C.I.J. (Ser. A/B) No. 63 (Judgment, 12 Dec. 1934) 64, at 84.

³⁷ Broude 'Investment and Trade...' (*supra* n.28) 141-42; Footer (*supra* n.19) 108; Kurtz—*On the evolution* (*supra* n.28) 36-38; Cho & Kurtz (*supra* n.28), 13.

³⁸ Broude 'Investment and Trade...' (*supra* n.28) 141-42.

Moving to the post Second World War period, Footer explains that the drafters of the preparatory works on a founding Charter for an International Trade Organization (ITO) were aware of the common history and necessary inter-connections between trade and investment law.³⁹ As a result, Footer explains, the ITO's Havana Charter addressed both the regulation of trade and investment law (liberalization and protection).⁴⁰ For reasons that are known to everyone, the ITO, however, did not see the light of day and ever since, trade and investment legal regimes have been institutionally separated. While the adoption of the GATT in 1947 paved the way for the creation of a centralized multilateral forum from which the WTO would emerge, the international investment legal regime took the form of a multitude of bilateral and regional agreements.⁴¹

2. "Avec des 'si', on mettrait Paris en bouteille": Today's Dynamics of the Connections Between Trade and Investment Disciplines

The French adage referred to above,⁴² illustrates the limits of an abusive use of the conditional. Brodeur might be right when he makes the following prediction:

"Had the need (or opportunity) emerged today to draw an international system of international economic law from scratch, it is unlikely that trade and investment would have been treated so separately."⁴³

But he might equally be wrong, and no one can prove this point. Arguably though, this demonstration is not necessary to understand the convergence argument and its merits. Interconnections do exist between international trade and investment. Proponents of the convergence argument have argued that these interconnections are more than simple points of similarity and should rather be regarded as mutual influence patterns or convergence factors.

The Same Conceptual Narrative

In a recent paper, S. Cho and J. Kurtz argue that international trade and investment law have a "common jurisprudential ontogenesis."⁴⁴ With the use of this expression, they mean that the way trade and investment law have evolved over time, and more specifically in the last decades, can be conceptualized in a similar manner. Cho and Kurtz

³⁹ Footer (*supra* n.19) 108, *citing* Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, UN Doc. E/PCT/1986 (Geneva 1947).

⁴⁰ *Ibid.*

⁴¹ For an overview of the failed attempts to conclude an investment multilateral agreement, *see e.g.* C. Brown 'The Evolution of the Regime of International Investment Agreements: History Economics and Politics' in M. Bungenberg *et al.* (eds.), *International Investment Law - A Handbook* (2015) 153; Vandeveldel (*supra* n.33).

⁴² This adage would translate literally as "using 'if', one could put the whole city of Paris within a bottle." An English equivalent would be "if pigs could fly...". *See* <https://en.wikipedia.org/wiki/Flying_pig> (last consulted 1 Aug. 2015).

⁴³ Brodeur 'Investment and Trade...' (*supra* n.28), 140.

⁴⁴ Cho & Kurtz (*supra* n.28) 13-25.

acknowledge that "different historical paths bestowed the two systems with different institutional apparatus in the postwar era."⁴⁵ Yet, they explain that the two disciplines followed the same conceptual narrative since their institutional separation. According to them, while the same pro-market, anti-protectionist bias influenced the development of the two disciplines during in following decades after World War II, both trade and investment legal regimes have since then been, or are still, subject to a 'rebalancing' to better safeguard the public interest of States through a process of 'maturation'.⁴⁶ For Cho and Kurtz, the creation of the WTO at the end of the Uruguay round operated as a 'paradigm shift'. The multilateral trade system appears, today, more "integrated, more viable and durable".⁴⁷ For the two authors, this new conceptualization has implicitly influenced the work of WTO judges, who now take the reconciliation between trade and non-trade values more seriously.⁴⁸ Cho and Kurtz argue that the international investment legal system is now being subjected to the same paradigm shift, which is manifested in today's investment case law and in the drafting of new IIAs, which are both "increasingly accommodative of public interest."⁴⁹

Cho and Kurtz's reasoning, which is based on a broad and theoretical observation of the two disciplines' recent history, is rather inductive. It cannot be falsified and therefore hardly qualifies as 'scientific'. Yet, it presents some interesting points in the way it highlights the fact that a parallel can be drawn between the way actors and commentators of the two disciplines conceive their fields and deal with their evolution. The example they give, on the use of the notions of 'proportionality' and 'margin of appreciation' in the case-law and by commentators of both disciplines to show the cultural shift happening in these disciplines, is particularly interesting.⁵⁰

The Same (or at least, Complementary) Underlying Economic Rationale

Still, in a rather theoretical way, several authors have attempted to demonstrate that investment and trade law share the same underlying economic rationale. According to Broude, for instance, both systems share a 'common purpose', which is "the fundamental promise to extend and safeguard competitive opportunities to foreign traders and investors."⁵¹ Kurtz makes a similar claim.⁵² Both Broude and Kurtz agree that, like all

⁴⁵ *Ibid.* 13.

⁴⁶ *Ibid.* 17-20.

⁴⁷ *Ibid.* 19.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* 24.

⁵⁰ *Ibid.* 23, citing A. Stone-Sweet & J. Mathews 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia J. Transn'l L.* 72.

⁵¹ Broude 'Towards an Economic Approach...' (*supra* n.28) 28. See also, R.P. Alford 'The Convergence of International Trade and Investment Arbitration' (2013) 12 *Santa Clara J. Int'l L.* 35, 37. Alford argues that the international trade and investment legal regimes "promote similar objectives—globalization, economic integration, trade promotion, and investment protection."

branches of international law, the trade and investment disciplines serve various aims and purposes.⁵³ They accept that this common goal is not the only one achieved by each regime, but consider that it nevertheless remains "significant and important from an economic perspective."⁵⁴ Sacerdoti, in a similar manner, posits that "international regulation in both areas is inspired by the same approach in favor of liberalization and nondiscrimination between domestic and foreign actors of cross-border business activity, while preserving the competence of importing or host States to regulate the economy and safeguard paramount general interest."⁵⁵

The rather broad formulation these authors have used when identifying the 'common purpose' of trade and investment is certainly intentional. The assertion that trade and investment share the same economic DNA is controversial and has been debated. A. Sykes, for instance, convincingly demonstrated that important differences could be identified between the political economy of some of the main constitutive elements of investment and trade dispute settlement mechanisms.⁵⁶ Similarly, DiMascio and Pauwelyn suggest that the investment and trade legal regimes have focused on different objectives.⁵⁷ They accept that these objectives might be considered as 'complementary', but in their view, trade "is about overall welfare, efficiency, liberalization, state-to-state exchanges of market access, and trade opportunities—not individual rights",⁵⁸ whereas investment "is about protection, not liberalization, and about individual rights, not state-to-state exchanges of market opportunities."⁵⁹

Commenting on Pauwelyn and DiMascio's arguments, McRae argues that the individual-right oriented image that IIAs may convey is evoked due to investor-State dispute settlement, which clearly appears as a tool to protect individual rights. He explains, nonetheless, that investor-State dispute settlement is only a component of the investment law regime, and international investment law cannot be reduced to this component. For him, IIAs deal fundamentally with political and economic issues and, in a

⁵² Kurtz, 'Converging Systems...' (*supra* n.17) cited in Broude 'Towards an Economic Approach...' (*supra* 28) 28.

⁵³ See e.g., Y. Shany 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *Am. J. Int'l L.* 225. In *Saluka v. Czech Republic*, the tribunal acknowledged the diversity of goals the investment legal regime could promote when it noted that "the protection of foreign investment is not the sole aim of the treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and intensifying the parties' economic relations." See, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) ¶300.

⁵⁴ Broude 'Towards an Economic Approach...' (*supra* 28) 28.

⁵⁵ Sacerdoti (*supra* n.28) 11.

⁵⁶ Sykes (*supra* n.7). See also, J. Trachtman, 'FDI and the Right to Regulate: Lessons from Trade Law (2003) in UNCTAD, *The Development Dimensions of FDI: Policy and Rule-Making Perspectives*, UN Doc. UNCTAD/ITE/IA2003/4, available at <http://unctad.org/en/Docs/iteia20034_en.pdf> (last consulted 1 Aug. 2015) 189.

⁵⁷ DiMascio & Pauwelyn (*supra* n.28) 53-58.

⁵⁸ *Ibid.* 14.

⁵⁹ *Ibid.* 56.

way, the substantive provisions they offer may be analyzed as provisions designed to preserve competitive opportunities.⁶⁰

To this day, the shared economy–DNA debate seems to remain open. To provide a definitive answer to this debate would certainly require a verification of whether the economic rationales of all the specific rules and components of both systems are compatible, and more generally, a broad study of the economic rationales for government incentives to foreign investment. This would lead us into economic theory of cross-boundary contracting and of multinational firms, which R. Howse, M. Trebilcock and A. Eliason have excellently summarized in the chapter of their manual on the 'Regulation of International Trade' dedicated to 'Trade and Investment'.⁶¹ However interesting this exercise would be, it does not fit within the scope of the present thesis. Facing this lack of a definite answer, we should accept that trade and investment law may share the same, or a very similar, general underlying economic rationale. This is especially true if this economic rationale is broadly formulated. It is possible, however, that the political economy of some of the components of the regimes differs. It is even possible that the two regimes differ significantly. Yet, even if and when they do so, they are hardly described as un-complementary.⁶²

Structural Interlinkage Between Foreign Investment Activities and Trade Flows

More pragmatically, scholars, as well as specialized institutions, have produced several empirical studies on the correlation between foreign investment and trade flows. The following affirmation seems to emerge from these studies: Foreign trade and foreign investment are interdependent and sometimes complementary economic activities. In one of its first reports published on the directions to be given to the new EU investment policy, the European Commission explained that "[a]round half of world trade today takes place between affiliates of multinational enterprises, which trade intermediate goods and services."⁶³ The WTO Working Group on the relationship between trade and investment tends to agree with this conclusion as well.⁶⁴ For the Working Group, foreign direct investment (FDI) is often used to minimize the overall production costs of

⁶⁰ McRae (*supra* n.28), 15.

⁶¹ M.J. Trebilcock, R. Howse & A. Eliason, *The Regulation of International Trade* (4th ed., 2013) 566–604.

⁶² For landmark economic studies on these arguments, see J.N. Bhagwati, R.A. Brecher & E. Dinopoulos 'Quid Pro Quo Foreign Investment and Welfare' (1987) 27 *Journal of Development Economics* 127 and B.H. Baltagi, P. Egger & M. Pfaffermayr 'Estimating Regional Trade Agreement Effects on FDI in an Interdependent World' (2007) 145 *Journal of Econometrics* 194. For a legal and practical analysis see N. Van Den Broek, 'Protection of Investors in International Trade and Investment Regimes: A Practical Comparison' in J.A. Huerta-Goldman, A. Romanetti & F.X. Stirnimann (eds.), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (2013) 14.

⁶³ European Commission 'Towards a Comprehensive European International Policy' (July 2010) *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions – COM(2010) 343*, 3.

⁶⁴ WTO (Working Group on the Relationship Between Trade and Investment) 'The Relationship Between Trade and Foreign Direct Investment' (1997), WT/WGTI/W/7, ¶4.

a given economic actor.⁶⁵ In that case, FDI is 'trade-creating', because it subdivides the production process in different stages between countries, and because this necessarily implies trade exchanges between the different production units. Scholars who have examined the issue have reached similar results. Footer, for instance, argues that investment may have a discernible effect on patterns of trade in terms of exports of final goods, as well as parts and components.⁶⁶ Similarly, Kurtz affirms that "trade and foreign investment are increasingly inter-dependent."⁶⁷ To illustrate his claim, he notes that "non-tariff barriers such as anti-dumping duties constitute equally significant obstacles to export and thereby naturally favor FDI."⁶⁸

Investment activities may trigger trade flows. The opposite may also be true. In a recent work criticizing the convergence argument, M. Wu nevertheless admits that trade exchange might influence investment treaty formation,⁶⁹ which in turn may result in more investment. Looking at the possible connections between the conclusion of international trade agreements and the conclusions of investment agreements, Wu asks whether "[p]atterns of trade, driven by increasing supply-chain fragmentation [...] could shape the formation of investment treaties."⁷⁰ Wu explains that the role of trade exchanges in the selection of investment treaty partners may vary greatly. He concludes, however, that there is empirical evidence to claim that several major economic powers may be engaged in negotiating potential investment agreements with each other as a result of prior trade-related interests and the conclusion of PTAs.⁷¹

In a more general manner, G. Sacerdoti explains that, in today's globalized economy, trade and investment regulation are necessarily interconnected.⁷² To bolster his claim, he identifies several sectors of activities (financial markets, cross-border services, trade in goods etc.), for which regulation cannot be isolated. Although he concedes that the regulation of the international dimension of these activities requires several institutional settings, which may be divergent, he argues that models of convergence between trade and investment law may be justified, given the fact that investment and trade share a

⁶⁵ *Ibid.* The Working Group mentioned refers to the following examples: "[E]xtraction of raw material is for natural reasons located wherever the raw material is bountiful and easily extractable; energy-intensive processing wherever energy costs are low; labor intensive stages in countries with low labor costs; human capital stages in countries with an abundance of skilled labor, and so on."

⁶⁶ Footer (*supra* n.19) 119-22. See also, Trebilcock *et al.* (*supra* n.61) 572, where the three authors note and explain why "[t]here is a complex interaction between foreign investment and trade protection."

⁶⁷ Kurtz 'On the evolution...' (*supra* n.28) 118.

⁶⁸ *Ibid.* 119. Kurtz relies on empirical evidence that shows that anti-dumping duties and safeguard actions taken by the US in the eighties and nineties greatly influenced Japanese FDI into the US market. *Ibid.*, citing P. Arzak and K. Wynne, 'Protectionism and Japanese Direct Investment' (1995) 17 *J. Politic Modeling* 293.

⁶⁹ Wu (*supra* n.28) 185-95.

⁷⁰ *Ibid.* 185.

⁷¹ *Ibid.* 195.

⁷² Sacerdoti (*supra* n.28) 10-11.

common object, which is the regulation of international movements of economic factors and the exchanges of goods, services, and economic activity such as investment, all undertaken by private actors and necessarily interconnected."⁷³

Parallel and Subsequent Proceedings

The interconnections between investment and trade activities, as well as between the regulation of these activities, may give occasion for one singular government measure to spawn parallel trade and investment proceedings. The consequences of such parallel proceedings, and the way they can be regulated, are addressed in further detail in a later section.⁷⁴ At this stage, it is only important to note that, as a result of international investment operations, international economic actors may engage in the international trade of both goods and services. If and when these actors suffer a prejudice from a measure taken by the State in which they have invested, they will certainly explore all possible legal avenues to address the issue and stop the disturbance or obtain compensation. There is a real prospect that the actors try to initiate simultaneous proceedings before investment and trade adjudicative bodies, in order to maximize their chances of success. This has happened in several instances over the last decade. Authors commenting on these cases have affirmed that they were pertinent illustrations for the convergence of trade and investment disciplines.⁷⁵

A different, yet connected, issue relates to the use of trade proceedings to secure compliance with investment arbitration awards. Indeed, as Alford, as well as C. Rosenberg, have observed in recent publications,⁷⁶ one of the most significant illustrations of the intersection of international trade and international law, is the use of trade remedies to constrain an investment treaty partner to comply with a decision relating to the application of international investment law. Alford explains that "[t]his is done primarily when a developed country threatens to remove preferential trade benefits to a developing country if that country does not honor its international arbitration commitments."⁷⁷ To date, there is only one example of such an endeavor. Over the spring of 2012, the US decided to suspend preferential trade status granted to Argentina under a trade program that provides for a formal system of exemption for certain

⁷³ *Ibid.* 11.

⁷⁴ See Chapter 4.

⁷⁵ See e.g., Kurtz 'On the evolution (*supra* n.28) 122; S. Puig 'International Regime Complexity and Economic Law Enforcement' (2014) 17 *J. Int'l Eco. L.* 491; A. Antoni & M. Ewing-Chow 'Trade and Investment Convergence and Divergence: Revisiting the North American Sugar War' (2013) 1 *Latin American J. of Int'l Trade L.* 315; L. Guglya 'The Interplay of International Dispute Resolution Mechanisms: The Softwood Lumber Controversy' (2011) 2 *J. Int'l Dispute Settlement* 175.

⁷⁶ Alford (*supra* n.51) 50-55; C.B. Rosenberg 'The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards' (2012) 44 *Georgetown. J. Int'l L.* 503.

⁷⁷ Alford (*supra* n.51) 50.

developing States.⁷⁸ This decision was driven by Argentina's refusal to comply with investment arbitration awards issued in two cases between US investors and the government of Argentina. Both Alford and Rosenberg endorse the position taken by the US and seem to affirm that this approach might be reproduced in the future.⁷⁹

Trade Influence on the Drafting of New-Generation Investment Agreements

Another factor of convergence is the common denominator that can be found in the formulation of specific norms to be included in both trade and investment international agreements,⁸⁰ and the guidance that the formulation of a provision in one discipline can offer to the drafters of the other. Wu notes, for instance, that "[t]he trade regime has the potential to exert its influence on a treaty-specific level with respect to the substantive provision(s) of particular treaty."⁸¹ The most prominent example of this influence is probably the practice of inclusion of a general exceptions clause in new generation IIAs, modeled on GATT Article XX or GATS Article XIV.⁸² This practice is still limited, but has grown over the last years. General exceptions have indeed been included in several recent bilateral, as well as regional IIAs.⁸³

Further, the trade legal regime, and the WTO Dispute Settlement Body in particular, is often referred to as a model for those discussing the architecture of dispute settlement provisions to be included in these new generation preferential trade agreements. An interesting example is the recent debate on the possibility to create an appeals mechanism, inspired by the WTO Appellate Body (AB) for the dispute settlement mechanism, to be included in the investment chapter of the Transatlantic Trade and Investment Partnership (TTIP). In that sense, one could claim that the trade legal regime also influences the architecture of international investment law dispute settlement.

The Merging of Trade and Investment Agreements

The last factor of convergence discussed in the literature is the increasing practice of merging trade and investment provisions into single international agreements.⁸⁴ The

⁷⁸ See, Proclamation No. 8788, 77(61) *Fed. Reg.* 18899 (29 Mar. 2012), available at <<http://www.gpo.gov/fdsys/pkg/FR-2012-03-29/pdf/FR-2012-03-29.pdf>> (last consulted 1 Aug. 2015).

⁷⁹ Rosenberg (*supra* n.76) 63 ; Alford (*supra* n.51) 55.

⁸⁰ Alford (*supra* n.51) 40.

⁸¹ Wu (*supra* n.28) 195.

⁸² See e.g., B. Legum & I. Petculescu, 'GATT Article XX and international investment law' in R. Echandi & P. Sauvé (eds.), *Prospects in International Investment Law and Policy* (2013) 340; C. Lévesque, 'The inclusion of GATT Article XX exceptions in IIAs: a potential risky policy' in R. Echandi & P. Sauvé (eds.), *Prospects in International Investment Law and Policy* (2013) 363; A. Newcombe, 'General Exceptions in International Investment Agreements' in M.C.C. Segger, M.W. Gehring & A. Newcombe (eds.), *Sustainable Development in World Investment Law* (2011) 351.

⁸³ Wu (*supra* n.28) 197-99, referring to Canada Model BIT, the Investment Agreement for the COMESA Common Investment Area, the ASEAN Comprehensive Investment Agreement and several existing BITs.

⁸⁴ Alford (*supra* n.51) 38-40 ; Wu (*supra* n.28) 185-95.

main example of this trend is provided by the growing number of preferential trade agreements (PTAs), incorporating a robust set of rules relating to investment liberalization and investment protection, embedded in a specific chapter.⁸⁵ These global agreements are sometimes referred to as Preferential Trade and Investment Agreements (PTIAs). This trend is verified both quantitatively and qualitatively. Empirical research indeed shows that since the adoption of the North-Atlantic Free Trade Agreement in 1994 – which has been qualified as "the archetype for investment commitments tied to a trade treaty" – there has been a rise in the conclusion of PTIAs.⁸⁶ According to the United Nation Committee for Trade and Development ('UNCTAD') contrary to the conclusion of BITs, which has declined since the early 2000s, the conclusion of 'other IIAs' – *i.e.* "economic agreements other than BITs that include investment-related provisions"⁸⁷ – has remained stable.⁸⁸ Further, one should note that the world's most advanced economic hubs have embraced this practice, and seek to conclude comprehensive agreements with investment chapters integrated to trade disciplines, rather than stand-alone BITs. The UNCTAD notes in this respect that,

"[b]y the end of 2011, the overall IIA universe consisted of 3,164 agreements, which included 2,833 BITs and 331 "other IIAs". In quantitative terms, bilateral agreements still dominate international investment policymaking; however in terms of economic significance, there has been a gradual shift towards regionalism."⁸⁹

To give but one example of this trend, the main trade agreements the EU is negotiating at the moment, *i.e.* the Comprehensive Economic and Trade Agreement (CETA) with Canada and the Transatlantic Trade and Investment Partnership (TTIP) with the US, will include investment chapters.⁹⁰

⁸⁵ For an empirical study of the numbers of PTAs with investment chapters see S. Miroudot, 'Investment' in J.-P. Chauffour & J.-C. Maur (eds.), *Preferential Trade Agreement - Policies for Development* (2011) 307. For broader studies on this trend, see *e.g.*, R. Hofmann, C.J. Tams & S.W. Schill, *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (2013).

⁸⁶ Miroudot (*supra* n.85) 307-08.

⁸⁷ UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (2012), 84. The report is available at <http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx> (last consulted 1 Aug. 2015). According to UNCTAD, investment chapters in PTAs are the main example of these 'other IIAs'.

⁸⁸ UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (2015) 106. The report is available at <<http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245>> (last consulted 1 Aug. 2015).

⁸⁹ UNCTAD, *World Investment Report 2012* (*supra* n.87) 84.

⁹⁰ For a recent broad overview of EU investment policy, see, Griebel (*supra* n.6). See also, T.R. Braun, 'Investment Chapters in Future European Preferential Trade and Investment Agreements: Two Universes or an Integrated Model' in R. Hofmann, C.J. Tams & S.W. Schill (eds.), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (2013).

B. THE QUESTION OF THE 'GREAT DESIDERATUM' IN CONVERGENCE

The descriptive claim that trade and investment are converging does not seem completely unfounded. Yet, the argument is not flawless and contains several pitfalls, the main one being the question of the convergence's *'bien-fondé'* – or to use the expression of J. Madison in the federalist papers –⁹¹ its 'great desideratum'. Is convergence something the States would like? What would be the true benefits of merging the two disciplines? Are there any? Quite surprisingly, although, as we have seen in the previous sections, several authors have spent time commenting on the issue, no one seems to address the question as to whether convergence is something actors engaged in international trade and/or investment desire, and if so, for what reasons?

The two following lines of thought could be used to address the issue. As we have seen previously, the rise of international agreements including both trade and investment rules is described by many as the main factor of convergence. Looking at the motivations for the negotiation and conclusion of these comprehensive agreements might be a good starting point to understand why international investment and trade law legal regimes need to be better integrated. Several authors have worked on these motivations.⁹² It results from their writings that PTIAs represent interesting regulating instruments for States as they bring different means of liberalization closer together, allowing for greater internal consistency and institutional linkage between trade and investment disciplines.⁹³ Further, PTIAs allow for a comprehensive approach towards investment regulation, covering not only post-investment concerns of foreign investors, but also market access liberalization.⁹⁴ They also warrant better control of activities connected both to trade and investment. It makes sense to have rules in the same agreement when, for instance, FDI may be used as manner to trade goods or to deliver services into a foreign market.⁹⁵ In addition, one could argue that the negotiation of comprehensive agreements allows for a broader margin of manoeuvre for negotiations and might ultimately reduce

⁹¹ This expression is employed in the Federalist Paper N°10 discussing the forms a government can take and the necessity to have safeguards against domestic factions and insurrections. See, I. Shapiro (ed.), *A. Hamilton, J. Madison & J. Jay: The Federalist Papers* (2009) 51.

⁹² R. Hicks & K. Johnson, 'When a BIT Just Isn't Enough: Why We See Investment Chapters in Preferential Trade Agreements (2012) *Unpublished Working Paper*, available at <<http://www.princeton.edu/~pcglobal/conferences/FDI2011/papers/hj.pdf>> (last consulted 1 Aug. 2015); E. Deters, 'Preferential Trade and Investment Treaties' in T. Gazzini & E. De Brabandere (eds.), *International Investment Law. Sources of Rights and Obligations* (2012) 49; J.L. Tobin & M.L. Busch 'A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements' (2010) 62 *World Politics*; L.S. Poulsen 'Bilateral Investment Treaties and Preferential Trade: Is a BIT Really Better than a Lot?' (2010) 1 *Investment Treaty News* 16.

⁹³ F. Baetens, 'Preferential Trade and Investment Agreements and the Trade/Investment Divide: Is the Whole More than the Sum of Its Parts?' in R. Hofmann, C.J. Tams & S.W. Schill (eds.), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (2013) 91, 96.

⁹⁴ R. Hofmann, S.W. Schill & C.J. Tams 'Preferential Trade and Investment Agreements – The New Frontier of Investment Law' in R. Hofmann, C.J. Tams & S. Schill (eds.), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (2013), 9.

⁹⁵ *Ibid.*

transaction costs. Further research is needed to confirm this assumption but, looking only at the numbers, one has to accept that the increase in the conclusion of PTIAs must, in one way or another, be justified on the basis of State interest. In conclusion, and without entering too much into the details of a debate that relates more to political economy than international law, from the State's perspective, several reasons might justify combining trade and investment provisions into single agreements.

From the economic actors' perspective, having single comprehensive instruments might also be preferable, as these instruments foster clarity and legal certainty. Arguably, any economic operator who plans to invest abroad and realizes that it is highly likely that he might also be involved in international trade, would rather have to look at only one articulated legal framework, rather than two, entirely distinct and not necessarily coherent frameworks.

These propositions show that there are at least some lines of argument to address the question of the real advantages of combining trade and investment rules. Although further research is certainly needed to address the question in a more rigorous manner, it seems that this obstacle is not insurmountable.

C. THE LIMITS OF THE CONVERGENCE ARGUMENT: SO CLOSE, YET SO FAR AWAY

1. Dissociated Epistemic Communities?

The convergence argument not only raises some questions, but also faces some definite limits. The first one relates to the differences between the practitioners and experts in each field and the absence of exchanges between them. Both international investment law and international trade law are highly specific disciplines of public international law.⁹⁶ Becoming an expert in one of these two fields usually implies a form of specialization that makes it difficult, in practice, to also fully comprehend the other. Consequently, only a few investment lawyers are also proficient in international trade law and *vice versa*. For instance, a brief survey of major global law-firms with expertise in trade law and in investment would show that the two disciplines are taken care of by two different teams or departments, and that the members of one of these teams or departments are seldom invited to 'commute' to, or to get involved in, the work of the other. Of course, exceptions exist.⁹⁷ But generally speaking, investment arbitration practice is usually associated with international commercial arbitration, or in some

⁹⁶ In a paper relating to the sociology of the investment epistemic community, S. Schill notes that the international investment arbitration community is evolving in its composition. He argues, indeed, that investment "is no longer an esoteric topic open to only a few specialists, but has reached the mainstream of international law." Schill accepts, however, that international investment law remains a full discipline, "at par with other specialized areas, such as WTO law, human rights, or environmental law". S.W. Schill 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 *Eur. J. Int'l L.* 875, 903.

⁹⁷ There are indeed lawyers and experts who seem fluent in both trade and investment law. In Chapter 3, we give several examples. These 'bi-lingual' lawyers remain, however, few and far between.

instances, with public international law, whereas international trade law remains the concern of individuals with a sharp understanding of basic economic principles, market access regulation and other regulatory and policy matters.

The difference that exists between investment and trade practice is far from being insurmountable. While the teams in specialized law firms remain separated, one might observe intermingling within the staff of governmental agencies in charge of international economic legal issues. To give an example, trade and investment legal issues are addressed by the same team within the French Ministry of Economic Affairs, and the French negotiation experts and representatives to the EU institutions for international trade and investment issues work hand-in-hand. Referring to the EU, the organization of the Commission is another pertinent example. There, the units in charge of the negotiations and monitoring of investment treaties have integrated within DG Trade. Wu notes in this instance that it is often the case that the same government agency "takes the active lead in WTO, PTA and BIT negotiations."⁹⁸ In addition, we have seen also that individuals appointed as panelist to address a given trade dispute may be appointed as arbitrator in the other field.⁹⁹ Finally, as we have seen in the present section, there is a nascent and growing community of scholars writing about both investment and trade law. Yet again, these examples remain too isolated to perceive a real trend in the reconciliation of trade and investment lawyers' communities. They remain apart, and the general feeling within these communities is that they basically have nothing to do with each other.¹⁰⁰

Arguably, the separation between the two communities bears consequences on the design and articulation of the international legal regimes to which they belong.¹⁰¹ For instance, one could argue that, while economists were greatly involved in the design and architecture of trade agreements, the drafting of investment agreements have been, until recently, the sole concern of lawyers. These differences in praxis might result in the formulation of rules that do not always appear compatible. Kurtz argues for example that investment law has remained "a field dominated by a very particular group of lawyers,

⁹⁸ Wu (*supra* n.28) 185.

⁹⁹ The main example being the appointment of G. Sacerdoti, former AB president, as arbitrators or president in several investment arbitration disputes. For a discussion on these disputes, *see infra* Chapter 3.

¹⁰⁰ Scheueur and Dolzer, in their landmark textbook on international investment law, reach this conclusion in their short section on investment and trade law. According to them, "[i]n terms of legal methodology, the difference between the two fields calls for caution in assuming commonalities between foreign investment law and trade law." R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2012) 19.

¹⁰¹ McRae, for instance, explains that "[t]he fact that it was lawyers drafting a legal regime may have had an impact on what was drafted. They were thinking about core provisions and process, not directing their attention to reconciling the application of core provisions with governmental regulation and social values. There was not the investment policy community in governments at least at that time comparable to the trade policy community that surrounded the negotiation, implementation, and interpretation of GATT [...]." McRae (*supra* n.28) 17.

which has resulted in a highly distinct and troubling thinness to the analysis of legal protections aimed fundamentally at economic and political issues."¹⁰²

These differences are certainly to be seen as an important obstacle to the convergence of the two disciplines.

2. Institutional Separation and Distinct Dispute Settlement Mechanisms

The second obstacle to the convergence of international trade and investment law is the strong difference between the function and role of the existing mechanisms of dispute resolution in both fields. The substantive norms of trade and investment law may have common roots, but the way these norms are articulated, applied, and enforced is different, and there are good reasons for that.

Certainly, the trade legal regime, and notably the WTO, contains rules relating to international investment regulation. This has already been explained at length, and there is no need to repeat here what the most prominent experts in the field have already demonstrated.¹⁰³ WTO investment related provisions are limited in scope,¹⁰⁴ focused on market-access and establishment (through the regulation of trade in services), and do not cover investment protection, which is the main objective of IIAs.

The last obstacle to the convergence argument, the one I consider the most important, is the difference between the architecture and functions of the trade and investment dispute settlement mechanisms. This difference is examined at length in Chapter 2 of the present dissertation.

Because of these obstacles, it seems idealistic to plead for a formal, institutional reconciliation of international trade and investment law. Not because they relate to totally different substantive norms, but because several of the institutional features of their legal regimes remain different.

Yet, one must accept that several of the 'converging factors' we discussed are concrete and difficult to rebut. In that sense, even if absolute consolidation of the two disciplines remains an abstract idea, the line between investment and trade law continues to fade.

The trade and investment adjudicative bodies, which play a central role in the development of these disciplines, need to be aware of this phenomenon and, therefore,

¹⁰² Kurtz 'On the evolution...!' (*supra* n.28) 113.

¹⁰³ P.C. Mavroidis, 'Regulation of Investment in the Trade Régime: From ITO to WTO' in Z. Drabek & P.C. Mavroidis (eds.), *Regulations of Foreign Investment - Challenges to International Harmonization* (2013) 13. See also, Weiss (*supra* n.28), M. Hahn, 'WTO Rules and Obligations Related to Investment' in M. Bungenberg *et al.* (eds.), *International Investment Law - A Handbook* (2015) 653.

¹⁰⁴ *Canada: Administration of the Foreign Investment Review Act* (FIRA), BISD 30S/140 (1984) where the pre-WTO panel concluded that GATT provisions (and more particularly the ones on non-discrimination) do not apply to foreign persons or firms. For a detailed analysis of this case, see Trebilcock *et al.* (*supra* n.61) 581-83.

should place themselves in a position to better deal with rules from the other system. In this book, I explain how this should be done for investor-State tribunals.

IV. THE PLAN OF THIS BOOK

We have seen in the present **Chapter 1** that the convergence argument is not misguided: There are similarities between the underlying principles of global trade and investment and, as such, a better coordination of these principles would be helpful for several reasons. Such reasons include enhancement of legal certainty, the reduction of transaction costs, and better coherence in the operation of international agreements that now combine both trade and investment provisions, to name a few.

However, no matter how reconcilable or converging the two disciplines may be, their enforcement mechanisms are structurally different and are likely to remain so, even if the reforms towards a modernization of the investment dispute settlement (currently discussed at the EU policy level) are eventually implemented in the near future. **Chapter 2** focuses on these differences and demonstrates that coherence and convergence between the trade and investment law disciplines can only be achieved through the development of soft integration techniques (rules that allow an adjudicator from one discipline to take into account what an adjudicator from the other discipline is saying).

Chapter 3 presents the results of an exhaustive research into the actual use of trade law in investment arbitration. The main finding of this research is that references to trade norms, in investment arbitration, are made more often than one might think, and can be categorized into different situations. Chapter 3 explains these situations and attempts to demonstrate that the use of trade norms by investment tribunals is not problematic, if undertaken carefully; 'undertaken carefully' meaning that the specific situation, in which the reference is made, is taken into account.

Chapter 4 and **Chapter 5** discuss the techniques that can be used to integrate trade norms in investment arbitration and to regulate possible interactions and conflicts between the trade and investment legal regimes. **Chapter 4** focuses on the concept of jurisdiction and argues that (i) the use of trade norms in a given investment dispute does not necessarily affect the jurisdiction of the investment tribunal dealing with that dispute, (ii) investment tribunals may even have jurisdiction over claims that refer directly to trade law and (iii) techniques exist to address potential conflicts of jurisdiction between trade and investment adjudicators in cases of parallel or subsequent proceedings. **Chapter 5** addresses the issue of substantive interactions between investment and trade law. The goal is to demonstrate how an investment tribunal should deal with trade norms once these norms have 'entered', and are being discussed, at the merits stage of an investment dispute. The main argument defended there, is that, when it is assumed that trade law has a direct bearing on a given investment dispute, the arbitral tribunal may, and should, engage in a better integration of the trade norms bearing upon the dispute at hand.

The last Chapter, **Chapter 6**, summarizes the results of this study and offers concluding observations on the relationship between international investment law with international trade law and, more generally, with other branches of public international law.

CHAPTER 2.

DIFFERENT INSTITUTIONAL SETTINGS: THE SPECIFICITIES OF TRADE AND INVESTMENT DISPUTE SETTLEMENT MECHANISMS

I. INTRODUCTION

Several authors writing about international trade and investment law have made the argument that international trade and investment law should be reconciled due to the clear "convergence" between (some of) their constitutive elements. As we have seen in the previous chapter, this argument is not misguided: there is a form of coherence between the underlying principles of global trade and investment regulation, and a better coordination of these principles might be beneficial for several reasons (legal certainty, reduction of transaction costs, etc.).¹

The present chapter argues that, no matter how reconcilable, or converging, these two disciplines may be, their dispute settlement and enforcement mechanisms, as well as the objectives underlying these mechanisms, are fundamentally different in their structure. In other words, I take the view that while substantive rules of trade and investment may present similarities, the way they are enforced is necessarily different. Taking this into account, the focus made on litigation in the present chapter is a conscious decision. I do not argue for a change in substantive rules, nor do I try and anticipate what would be the result of such a change. I take the law as it is, and observe how the methods available to enforce this law differ.

This chapter seeks to demonstrate why the *harmonization* of trade and investment dispute settlement mechanisms is unwarranted. Coherence and convergence between the trade and investment law disciplines can only be achieved through the development of soft integration techniques (rules that allow an adjudicator from one discipline to take into account what an adjudicator from the other discipline is saying). In addition, this Chapter highlights the role of investment tribunals, which are the main actors this

¹ In Chapter 1, we have explained that the principal reason for this coordination is a better harmonization between interdependent rules and increase in legal certainty and, ultimately, to avoid disproportional transaction costs. The structure of modern PTAs is certainly the best example of States' willingness to concentrate rules for the regulation of trade and investment in one single instrument.

research focuses upon, and compares their role with that of trade dispute settlement bodies.

Furthermore, the chapter will adopt an original approach by combining a positivistic presentation of the basic rules of both mechanisms, with an analysis of their (political and economic) rationale. Section II studies the general functions of the adjudicator in the two disciplines. For this purpose, I focus on the intention of the parties to the agreements, upon which the adjudicators are established, and on how these adjudicators have interpreted the rules within which these intentions have been crystallized. Section III then presents an analysis on the issue of standing, in relation to the two dispute settlement mechanisms, and their jurisdiction. There, I explain how the rules designed to bring a claim before the WTO DSU or an investment tribunal, and the underlying basis of these rules, are fundamentally different. In Section IV, I scrutinize the instruments available to enforce the decisions adopted by the dispute settlement bodies, the remedies available and the possible avenues of recourse and appeal. Section V concludes upon how the composition of the two dispute settlement mechanisms is largely different, and how it is premature to suggest that that formal and institutional convergence of trade and investment norms, as they operate today, should occur.

II. FUNCTION AND VOCATION

A. THE PRIVATE VS. PUBLIC FUNCTION OF INTERNATIONAL COURTS

Understanding the Prerogatives of International Courts

The terms 'function' and 'vocation' are used to designate the general mission that the litigants expect a given adjudicator to undertake. In other words, the question that is addressed here is: what do the treaty makers and litigants (if different) seek to achieve by establishing, and going before, a tribunal?²

Before answering this question, a first preliminary remark is in order. One may recall that, traditionally, studies on the functions of international courts focused on the different artifacts that international judges could use to achieve the general task entrusted to them, of assisting sovereign states in settling their disputes. Hence, these studies focused on the 'powers' or 'prerogatives' of the courts rather than on their role.³

² Arguably, other intakes could be taken into account in order to fully capture the function of international adjudicative bodies. For instance, one may argue that the perception the adjudicative body has about their role, might differ from that of their stakeholders, and thus needs to be examined. See J.E. Alvarez, 'What are International Judges for? The Main Functions of International Adjudication' in C. Romano, K.J. Alter & Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2014) 158, 159. I explain below why priority is given here to the conception of the parties to international agreements instituting international courts and/or to the litigants before such courts.

³ For classical studies, that are related to the ICJ, see R.P. Anand, 'Role of International Adjudication' in L. Gross (ed.), *The Future of the International Court of Justice* (1976) vol. I, 1; T. Sugihara, 'The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues' in A.S. Muller (ed.), *The International Court of Justice* (1997) 117. Recently, authors revisited this approach. See e.g., L. Boisson De Chazournes & S. Heathcote 'The Role of the International Adjudicator' (2001) 05

In light of this approach, understanding the function of international judges required an examination of what type of powers they held, as well as the sources of these powers (that is to say, an examination of the statute of each court or tribunal). The results of these studies would often be presented in list form, delineating the limited prerogatives envisaged in each court's constitutional instrument. Modern studies and surveys, of practices of the various international courts and tribunals that exist today, show that today's international adjudicators serve broader functions. More importantly, they show that the compilation of a simple catalog of the prerogatives granted to a given court is insufficient to fully appreciate what said court is supposed to do.⁴ For instance, scholars have affirmed that international courts may "exercise constitutional, enforcement and administrative review; stabilize normative expectations and legitimate the exercise of public authority; improve state compliance with primary legal norms; engage in judicial lawmaking to clarify substantive obligations; and enhance the legitimacy of international norms and institutions."⁵ Accordingly, an examination of the functions of tribunals, nowadays, requires one to (i) identify the categories of missions international tribunals may undertake,⁶ and (ii) to see if one given judge fulfills all of these missions, or, if said judge primarily focuses on the fulfillment of one mission over any other, to what extent, and for what reasons, the judge choose to do so.⁷ To accomplish this, scholars have used both efficiency and goal oriented approaches, methods that generally borrow analytical tools from political science,⁸ and/or law and economic analysis.⁹ Their idea is that courts

ASIL Proceedings 129; D. Shelton 'Form, Function, and the Powers of International Courts' (2008) 9 *Chicago J. Int'l L.* 571.

⁴ These modern studies often take as point of departure the methodology M. Shapiro developed in his seminal analysis of domestic courts in different political systems. See, M. Shapiro, *Courts: A Comparative and Political Analysis* (1981).

⁵ L. Helfer, 'The Effectiveness of International Adjudicators' in C. Romano, K.J. Alter & Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2014) 464, 465. For a similar observation, see Y. Shany 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *Am. J. Int'l L.* 225, 246. Alvarez (*supra* n.2) gives an interesting example when he claims that "[t]he determination by a chamber of the ICC that defendants retain certain rights even when presented by evidence produced by intermediaries [...] might be categorized (1) as settling an interpretative dispute between the prosecutor and the defense; (2) as assisting in furthering the truth of what actually occurred in a particular case; (3) as providing an authoritative interpretation of that tribunal's rules; or (4) as purporting to guide how future prosecutors need to behave." Alvarez then explains that this decision can be explained in terms of one of the various functions (dispute settlement, fact-finding, lawmaking, governance, etc.) courts may be considered to have. See, *ibid.* 176.

⁶ The labeling of categories varies depending on the studies. We usually always find two broad functions discussed in the present paper: settling a dispute and develop the rule of law within the regime in which they operate, and then, depending on the authors: a fact-finding function, a governance function or stabilizing normative expectation function, an interpretative function, etc. See, Alvarez (*supra* n.2).

⁷ See e.g., A. Guzman 'International Tribunals: A Rational Choice Analysis' (2008) 157 *U. Penn. L. Rev.* 171.

⁸ L. Johns 'Courts as Coordinators: Endogenous Enforcement and Jurisdiction in International Adjudication' (2011) 56 *J. Conflict Resolution* 257. See also, Shany (*supra* n.5) 229. To go one step further in the theory of international courts, one should refer to the distinction between international courts as agents of States and international courts as trustees of these States. On this distinction, see e.g. K.J. Alter 'Agents or Trustees? International Courts in their Political Context' (2008) 14 *Eur. J. Int'l Relations* 33.

are efficient if they are able to duly perform the missions their stakeholders assigned to them and *vice-versa*; an efficient court is one that performs well at the tasks it was assigned.

Although both approaches, traditional and modern, may provide interesting results when comparing the work of trade and investment courts, it is the modern approach that is the more pertinent for our present purpose, as it reveals an interesting difference between the vocation of the two mechanisms. I use therefore this goal-oriented approach in the following developments.¹⁰

The Two (Non-Necessarily Exclusive) General Functions of International Courts

As a second preliminary remark, it seems warranted to recall that when using this modern approach for a general study of international courts, two opposing views often arise.¹¹ Courts can be regarded as 'deciders' or as 'information providers'.¹² By assigning the notion 'decider' to a court, one means that the court's main focus leans towards the enforcement of a given rule, by settling a dispute between two international actors. Alternatively, by viewing the court as an 'information provider', one views the court as more likely to engage in normative clarification, if not creation, in addition to adjudication.¹³ To distinguish between these two views, the terms 'private function' and 'public function' have been used.¹⁴ Brown for instance explains that:

"On one view, the function of international courts is a private function; that is, that international courts are created in order to settle disputes referred to them. In other words, their task is 'to do justice' between the litigant states, and to render a

⁹ See e.g., E.A. Posner & J.C. Yoo 'Judicial Independence in International Tribunals' (2005) 93 *California L. Rev.* 1, A.T. Guzman, *How International Law Works: A Rational Choice Theory* (2007) 49-54. See also, to a broader extent, Shapiro (*supra* n.4) 34-39.

¹⁰ For a similar approach, see A. Von Bogdandy & I. Venzke 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 *Leiden J. Int'l L.* 49, 72. Here the authors conclude their study explaining that what they call multi-functional analysis, i.e. the analysis of the different functions of international courts, "helps to better understand the differences between international judicial institutions."

¹¹ The distinction between public and private function is often framed within the broader debate of the international judge as a lawmaker. Studies related to this debate are countless. Ginsburg addresses it in an interesting piece in which the ultimate goal is to test the limits of this debate and concludes that it is notable how not all international courts have such authority. T. Ginsburg 'Bounded Discretion in International Judicial Lawmaking' (2005) 45 *Virginia J. Int'l L.* 631. For more general and recent surveys, see G. Born 'A New Generation of International Adjudication' (2012) 61 *Duke L. J.* 775 and Alvarez (*supra* n.2).

¹² Johns (*supra* n.8) 258. Commenting on virtually the same distinction, others have talked about 'party-originated institutions' and 'community-originated institutions'. See e.g., D. Caron 'Towards a Political Theory of International Courts and Tribunals' (2006) 24 *Berkeley J. Int'l L.* 401, 403-04.

¹³ The constituent instruments of a given international dispute settlement body are the most important sources of information in order to determine the extent of a body's power to interpret the law they apply. However, treaties are not the only source of powers for international courts to engage in normative clarification. On this issue, see C. Brown 'The Inherent Powers of International Courts and Tribunals' (2005) 76 *Brit. YB Int'l L.* 195.

¹⁴ S. Schill 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2010) 23 *Leiden J. Int'l L.* 401.

judgment or award which takes account of all relevant facts, which is limited to the *petitum* of the dispute, and which is made with final and binding force. [...] On another view, international adjudication also has a public function, which goes beyond the settlement of the dispute. According to this view, the goal of the mere settlement of the dispute is too focused on the private aspect of disputes, and is not conducive to the positive creation of norms which can generate obedience among members of the community being regulated by that system of norms."¹⁵

An international court has a private function in the sense that it serves, above all, the interests of the two disputing parties that have been referred to their judgment. By contrast, when performing tasks belonging to the 'public function', the court engages in activities that do not serve the sole interest of the parties to the dispute, but rather the legal system in which the adjudicator operates in, as a whole. For that, the court may have to look beyond case law, and engage in the application of unwritten procedures and common law of international adjudication.¹⁶

This distinction, between the public and private functions, appears useful when one engages in a comparison of the functions of dispute settlement organs.¹⁷ If all international courts and tribunals have the ability to assume both a private and a public function, the repartition, or importance of one towards the other, might differ depending on the vocation of said court and on the legal framework in which the court operates. Some international dispute settlement bodies will appear to use their public function more than others, whether it be, because they enjoy a broader sense of freedom to do so, because the legal systems in which they operate require it, and/or because of their design. The predominance of one function over the other reflects both, the underlying structural framework that provides the guidelines for the adjudicator in question (*viz.* the statute, the mandate given by the parties and the applicable procedural rules), and the way this adjudicator interprets this framework. Thus, if one wishes to establish which international court orients itself more towards assuming a public function, and which is more private-function oriented, one needs to look at the framework from which the authority originates, as well as the case law related to said framework.¹⁸ That is the

¹⁵ Brown (*supra* n.13) 230-31.

¹⁶ C. Brown, *A Common Law of International Adjudication* (2007) 226-35.

¹⁷ Arguably, other distinctions and approaches may be used to distinguish the activity of investment tribunals from that of the WTO dispute settlement body. For instance, some authors have used the agent/trustee to claim that investment tribunals act as agents of the State whereas the WTO mechanism (or at least the WTO AB) acts more as a trustee. *See e.g.* J. Kurtz, 'Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law' in Z. Douglas, J. Pauwelyn & J.E. Viñuales (eds.), *The Foundations of International Investment Law: Bridging Theory Into Practice* (2014) 257, 267-68.

¹⁸ Brown (*supra* n.13) 234-37. *See also*, Alvarez (*supra* n.2) 177. Alvarez concludes his survey admitting that "the extent to which judges and arbitrators can pursue the main functions of adjudication varies with the *ex ante* and *ex post* institutional constraint within each court or arbitral institution. These constraints, as well as their own views of their function, determine how judges and arbitrators exercise their often-considerable discretion." *Ibid.* [references omitted].

approach adopted in the present chapter and, having made these two preliminary remarks, it is now possible to clarify the first argument put forward in this chapter.

In the light of the above, it is contended that the WTO dispute settlement mechanism has a more salient public function than that of international investment law.¹⁹ The WTO dispute settlement mechanism has a general function regarding the WTO legal regime as a whole and, more generally, the regulation of international trade. Contrastingly, investment tribunals are focused on a dispute between two parties, where one of the parties is a private entity seeking (monetary) reparation because of an alleged breach of its own private rights.

In the following sections, I present the legal rules on which this affirmation is based and the way they have been interpreted. Then, I address a recent trend in the literature, that argues for a paradigm shift in the investment arbitration field that would lead to an increase in investment tribunals using their public function, and I explain why these normative conclusions should be tempered.

B. 'PRESERVE AND CLARIFY' VS. 'SETTLING A DISPUTE BETWEEN TWO PARTIES'

By concentrating on legal instruments appertaining to WTO and international investment law, this section identifies specific provisions that can be used to understand the general functions of the adjudicator in both disciplines. I examine these provisions, by looking at the case law and its economic rationale, and assess which function (private or public) can be considered as predominant within each discipline. By doing so, I do not intend to draft a list of all the possible tasks performed by these bodies.

The rules associated with the WTO legal regime appear to be more explicit and therefore easier to capture, and therefore, for the sake of clarity, I begin with an assessment of the predominant function of the WTO dispute settlement body. I then turn to international investment arbitration and explain what elements are missing in order to claim that investment arbitrators have a similar vocation to that of a WTO adjudicator.

1. WTO Dispute Settlement: Preserve and Clarify

The Law

The text of the DSU provides several useful provisions that capture the role of the WTO dispute settlement mechanism. Article 3.2 is the first and most explicit of them. Its first sentence reads:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.

¹⁹ It should be clear that WTO Dispute Settlement Mechanisms refer to the work of (i) the Panels and (ii) the AB. The consultation phase of a dispute, which occurs before the constitution of a panel to hear a given dispute, is essentially private.

This provision is particularly instructive. The WTO dispute settlement mechanism is institutionalized as an organ, embodied with the general assignments of *providing security* and *predictability* to the multilateral trading system, that goes beyond the interests of the sole parties to a given WTO dispute. The WTO dispute settlement mechanism, therefore, not only incurs obligations towards the parties to a given dispute, but also *vis-à-vis* the *multilateral trading system*, as a whole. It ought to perform its duty in a fashion that will provide legal security and predictability to the system. Of course, *ex officio* complaints are not possible. Therefore, these obligations are to be seen as secondary: WTO dispute settlement provides security and predictability while it settles a dispute between two parties. Yet, these obligations exist. On several occasions the panels and the AB have affirmed that these assignments were central and part of the general function of the WTO adjudicative system. For instance in the *US — Section 301 Trade Act* case, the panel,²⁰ while considering how to interpret DSU Article 23,²¹ addressed the question of the object and purpose of the DSU. The answer given was twofold. Firstly, the panel noted that the most relevant of these objectives were

"those which relate to the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system."²²

Referring to Article 3.2, the panel then added that:

"[p]roviding security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators."²³

Article 3.2 is thus construed as requiring all WTO adjudicative bodies to act in a fashion that is compatible with the general objectives of the WTO legal system as whole. The WTO judge has a duty towards the system as a whole. As it will be demonstrated later, the obligations that investment arbitrators may have towards the international investment legal system, should one exist, are less evident.

The second sentence of Article 3.2 is even more insightful, as it confirms the additional duty towards the WTO legal regime. This sentence reads as follows:

The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of

²⁰ *United States — Sections 301–310 of the Trade Act 1974*, WT/DS152/R, Panel Report (22 Dec. 1999) (hereinafter: Panel Report, 'US–Section 301').

²¹ This Article prohibits unilateral redress and more generally that WTO disputes shall only be resolved through the WTO DSU mechanism.

²² Panel Report, *US–Section 301*, ¶7.71.

²³ *Ibid.* ¶7.75 [emphasis added].

those agreements in accordance with customary rules of interpretation of public international law.

In the light of this provision, and its interpretation by the WTO panels and the AB, it becomes clear that the WTO dispute settlement mechanism is more than a simple forum for the settlement of one given dispute.

Remarks

The WTO dispute settlement mechanism contributes to the operation of the legal system put in place by the WTO. In addition to its primary role, which is to help the parties coordinate their behavior in the enforcement of the trade obligations included in the WTO instruments, the agents of the WTO dispute settlement system shall clarify and articulate the rules contained in the instrument, while taking into consideration the general objectives of the WTO instruments. This is clearly a public function.

This function can be apprehended as follows. Most of the rules contained in WTO instruments are not self-explanatory, as WTO legal provisions are often drafted in general terms so as to be of general applicability and to cover a multitude of individual cases. Having rules that are too specific would impede the regulation of narrow cases, rather than enhances it. Assessing the violation of a legal requirement contained in a particular provision by following a certain set of facts is, therefore, a question that is not always easy to answer. Further, WTO Members need to coordinate their understanding of whether or not their actions (*e.g.* the issuance of trade-related measures) are within the scope of the WTO legal instruments. In international trade law, like in many other domains of international law, the negotiation process results in a text that can be understood in more than one way, so as to satisfy the interests of all the parties involved in the process, which are inevitably driven by different domestic interests. In these circumstances, the WTO judge has to clarify WTO law,²⁴ as well as act as a 'downstream coordinator',²⁵ that is making sure that the way parties to the WTO agreement understand their obligations can be synchronized.

²⁴ In other words, the WTO adjudicator is competent to interpret WTO law, and shall do so "in accordance with Public International Law". The extent to which this provision implies that the WTO judge has to import international legal standards in its analysis when applying WTO law is discussed in the literature, and it is usually accepted that this provision means 'in accordance with the principles provided for by the VCLT'. See P.C. Mavroidis 'No outsourcing of law? WTO law as practiced by WTO courts' (2008) 102 *Am. J. Int'l L.* 421.

²⁵ Ginsburg (*supra* n.11) 652. Ginsburg relies on law and economics principles and explains that international trade can be described as an 'iterated prisoners' dilemma'. In this configuration, it is only the repetition of the game that allows the players to develop cooperative strategies. Ginsburg argues that, nevertheless, this repetition requires coordination, and that the WTO Dispute Settlement Undertaking is the institution that primarily undertakes this coordination: the WTO dispute settlement regime can be used by the parties when they dispute whether a particular course of action should be counted as a defection or cooperation in the ongoing repeated prisoner's dilemma". Hence, the WTO DSB provides "a signal to the parties as to the state of the world, and the parties can coordinate accordingly". *Ibid.*, 650-52. See also, W.F. Schwartz & A.O. Sykes 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization' (2002) 31 *J. Legal Stud.* 179.

To do so, WTO adjudicative bodies may have to refer to previous disputes and the way they have been settled, and the law of WTO dispute settlement authorizes such references. In *US — Stainless Steel (Mexico)*, the AB explained that the Panel had to follow previously adopted Appellate Body reports addressing the same issues, as a failure to do so would undermine the development of a coherent and predictable body of jurisprudence, clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.²⁶

Again, this demonstrates that the WTO DSU encompasses general objectives related to the harmonization and coherent development of the norms belonging to the WTO legal regime. When implementing such general objectives, the WTO adjudicator accomplishes prerogatives that belong to its public function.²⁷

It is important to note that while performing this task, the WTO dispute settlement mechanism does not enjoy unlimited, normative, creative power. This is made clear in the last sentence of Article 3.2. The WTO dispute settlement system's "recommendations and rulings [...] cannot add to or diminish the rights and obligations provided in the covered agreements." As Mavroidis puts it, when interpreting WTO law, "the agents [WTO adjudicative bodies] cannot undo the balance of rights and obligations as struck by the framers [WTO Members]."²⁸

Notwithstanding this, there shall be no doubt that the above mentioned provisions provide the WTO dispute settlement body with a public function for it to exercise along with its other duty, which is to settle the dispute between the parties in question.²⁹

²⁶ *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, Appellate Body Report (30 Apr. 2008) (hereinafter '*AB Report, US–Stainless Steel*').

²⁷ In *US–Stainless Steel*, the AB noted that clarification was a task that could not be properly undertaken if limited to the frame of the settlement of a given dispute:

"Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case."

AB Report, *US–Stainless Steel*, ¶ 161. Arguably, this statement can be interpreted as an implicit recognition of the WTO dispute settlement mechanism public function the AB shall have.

²⁸ Mavroidis (*supra* n.24) 426. This principle was affirmed in several WTO disputes. *See e.g. United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Appellate Body Report (25 Apr. 1997) p.19 (hereinafter '*AB Report, US–Wool Shirts*') and *United States — Subsidies on Upland Cotton*, WT/DS267/AB/R, Appellate Body Report (3 Mar. 2005) ¶ 509.

²⁹ Article 3.7 clarifies that the "aim of the dispute settlement mechanism is to secure a positive solution to a dispute". The AB in the *US–Wool Shirts* dispute affirmed very clearly that: "the basic aim of dispute settlement in the WTO is to settle disputes". *See*, AB Report, *US–Wool Shirts*, p.19. It is therefore obvious that the WTO shares a private function, alongside its public function. As mentioned in the introduction of the present section, it can be argued that all international courts have both functions. However, it is interesting to note that this disposition is located after the other provisions (3.2) that are discussed in the present development. One could therefore make the argument that the drafters of the text sought to emphasize the public function of the WTO dispute settlement mechanism.

These basic considerations have been developed in the literature. Trachtman has published important work on the function of the WTO dispute settlement body, in which he insists on the role that WTO dispute resolution has in completing the 'contract' that WTO agreements represent.³⁰ In this regard, Trachtman notes that "one must recognize that dispute resolution is not simply a mechanism for neutral application of legislated rules but is itself a mechanism of legislation and of governance."³¹

Finally, it can be noted that this conception is also compatible with a formal analysis of international trade law, as a regime. Economic studies of trade agreements, such as the WTO, show that such agreements are endogenously incomplete contracts, and that completeness is better achieved through dispute-settlement. Horn, Maggi and Staiger have recently voiced these arguments.³² They demonstrate that in trade, contracting is costly, and that an optimal trade agreement may, in fact, be an incomplete trade agreement.³³ Furthermore, they each recognize that dispute settlement plays a role in helping complete the rules embodied in trade agreements. More precisely, they note that the adjudicator will necessarily have to "*interpret* ambiguous obligations, *fill gaps* in the agreement, and *modify* rigid obligations."³⁴ In both studies, the GATT/WTO agreement is used as the main example of a legal regime. Hence, the WTO judge is compelled to assume functions that go beyond the simple settlement of a dispute between two parties. However, as we will now explore, investment tribunals are not driven by these same concerns.

2. Investment: Settle a Dispute Between Two Parties

The (Absence of) Law

Unlike in trade instruments, it is difficult to isolate, in IIAs, a provision, or a set of provisions, that can be considered to provide for a clear identification of what the main function of an international investment tribunal may be. It is, therefore, even more difficult to identify a provision that could be interpreted as providing international investment tribunals with a 'public function'. The dispute resolution provisions of IIAs are indeed starkly written procedural tools, that aim to give a private individual the possibility to challenge the international liability of a sovereign State before an international tribunal, created for that precise purpose. A few (modern) IIAs include provisions regarding the 'function' of investment arbitration. Nevertheless, these provisions remain relatively basic and do not allow for the affirmation that investment

³⁰ J.P. Trachtman 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard Int'l L. J.* 333.

³¹ *Ibid.* 336.

³² See H. Horn, G. Maggi & R.W. Staiger 'Trade Agreements as Endogenously Incomplete Contracts' (2010) 100 *American Eco. Rev.* 394 ; G. Maggi & R.W. Staiger 'The Role and Design of Dispute Settlement Procedures in International Trade Agreements' (2011) 126 *Quarterly J. Economics* 475.

³³ Horn *et al.* (*supra* n.32) 394.

³⁴ The study actually aims to identify which of these three tasks is the more desirable for future trade agreements. Maggi & Staiger (*supra* n.32) 476.

tribunals have a far greater role than that of adjudicating investor-State dispute settlement resolution. A good example of this can be found in NAFTA Chapter 11 Section B (Articles 1115 to 1138). The first provision of this section, Article 1115, which relates to the 'purpose' of the NAFTA investor-State dispute settlement mechanisms, reads as follows:

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

To be clear, this provision only introduces a general function for investment tribunals, which is the duty to respect basic principles of due process when settling a dispute between an investor and a party to the NAFTA. This provision, as well as any of the other articles of Section B, does not make reference to general duties towards the legal regime of international investment law that could be construed as giving the possibility to an investor-State tribunal to engage in a public function.

Conversely, the 2012 US Model BIT, a 'new-generation' model BIT,³⁵ does not refer to the purpose of investment arbitration. The arbitration clause (Article 24) and the other provisions related to arbitral proceedings (Articles 25 to 36) focus mainly on the procedural aspects of investment claims, such as, for example, the consent of the parties and the selection of arbitrators. The explicit references, in the model BIT, to the protection of the environment, international labor standards (Article 13), and to the necessary transparency of arbitral proceedings (Article 29), are elements that seem to open the doors for an argument that an investment tribunal based on this type of BIT would embody certain functions that go beyond the settlement of a given dispute. Yet, these references remain very specific and cannot be construed as providing an investment tribunal, constituted pursuant to a similar agreement, with public functions.

The Canadian 2004 Model BIT includes, in its Article 20, a provision on the 'purpose' of investor-State dispute settlement. The text of this provision is, however, very modest:

"Without prejudice to the rights and obligations of the Parties under Section D (State to State Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes."³⁶

³⁵ As mentioned in the Introduction of this dissertation, this expression, used by the UNCTAD and other commentators of the investment legal regime, refer to IIAs concluded in the last five to ten years; agreements that are more sophisticated than those concluded during 80s and 90s, in the way they introduce features (*e.g.* investor obligations regarding human rights or environmental concerns, right for the state to regulate) that are supposed to restore the balance in investment arbitration. *See i.e.* UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (2012), available at <<http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>> (last consulted 1 Aug. 2015), pp. 99 *et seq.*

³⁶ Section D, to which this Article 20 relates to Inter-State Disputes Settlement. The 2004 Canadian Model BIT is available online at <<http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>> (last consulted 1 Aug. 2015).

No mention is made of the investment regime, or even to general investment policy objectives. Nor is any mention made of the role investment tribunals play in the clarification and maturation of international investment law, as a legal regime. Rather, this provision is merely an introduction to the section dealing with the settlement of disputes, a section that focuses only on the different procedural steps that shall be followed by the adjudicators when presented with an investment claim.

Remarks

Given the minimalist appearance of these investor-State arbitration clauses, and their focus on the dispute – and only the dispute – the following assumption can be made: the primary role of an investment tribunal is to settle a dispute between two parties. This, of course, sounds glaringly obvious, and is very simplistic compared to the various avowals made here and there.³⁷ It seems *à la mode* to claim that investment arbitral tribunals serve a much wider function.³⁸

However, one may recall that numerous investment tribunals have insisted on this basic idea, whereas no tribunals, to this day, have accepted, nor endorsed, the role many scholars would like them to have. In *Glamis Gold v. US*,³⁹ the tribunal, *inter alia*, proceeded to review the cases in which the scope of the function of investment arbitration was questioned.⁴⁰ The tribunal investigated whether its mandate, under NAFTA Chapter 11, would limit it to a case-specific analysis of problems related to the dispute, or if it implied a need to take into account the general legal context in which the tribunal operated.⁴¹ The tribunal did not use the terms 'private function' or 'public

³⁷ To give one example, an author has recently attempted to demonstrate that investor-State arbitration could be used as a tool to protect international cultural heritage rights. See V.S. Vadi 'Investing in Culture: Underwater Cultural Heritage and International Law' (2009) 42 *Vanderbilt J. Trans'l L.* 853 (arguing that synergy between public and private actors can be found in providing an alternative framework for protection of undersea heritage). More generally, in a recent article, T. Schultz and C. Dupont investigate the instances in which investment arbitration can be considered as a tool to promote the international rule of law. See, T. Schultz & C. Dupont 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2014) 25 *Eur. J. Int'l L.* 1147.

³⁸ In my view, this trend is due, in part, to the investment arbitration legitimacy crisis, further discussed later in the paper, which necessarily triggers discussion on the role of investment tribunals. In these discussions, many argue that investment tribunals do more than settle disputes. Ironically, the claim is used both ways. Detractors would tend to affirm that arbitral tribunals do too much: in their view, while ruling on a given, tribunals hinder justice and democracy by threatening States' regulatory autonomy. See, on these claims and their shortcomings, the recent contribution of Filippo Fontanelli in the Italian International Law Society blog, available at <<http://www.sidi-isil.org/sidiblog/?p=1360>> (last consulted 1 Aug. 2015). Others argue that it is by doing more, for instance by engaging in global governance, that investment tribunals will regain legitimacy. See B. Kingsbury & S. Schill 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) *NYU School of Law - International Law and Justice Working Papers 2009/6*, available at <<http://www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf>> (last consulted 1 Aug. 2015), pp.40-50.

³⁹ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 Jun. 2009).

⁴⁰ The very first development of the awarded are devoted to "The Tribunal's Understanding of its Task: Undertaking a Case-Specific Arbitration with Awareness of the NAFTA Chapter 11 System". *Ibid.* ¶¶3-9.

⁴¹ *Ibid.*

function'. Nonetheless, it indirectly referred to these concepts, by addressing the debate about which function – 'case-specific' vs. an analysis with an 'awareness of other systemic implications' – should be given priority.⁴² The tribunal noted that it could not ignore the singularity and the entirety of the NAFTA system. Yet, it insisted on its duty to focus on the specific case before it:

"Therefore, this Tribunal, in undertaking its primary mandate of resolving this particular dispute, does so with an awareness of the context within which it operates. *The Tribunal emphasizes that it in no way views its awareness of the context in which it operates as justifying (or indeed requiring) a departure from its duty to focus on the specific case before it.* Rather it views its awareness of operating in this context as a discipline upon its reasoning that does not alter the Tribunal's decision, but rather guides and aids the Tribunal in simultaneously supporting the system of which it is only a temporary part."⁴³

Commenting on the decision, which reflects a position shared by other tribunals,⁴⁴ Reisman argues that the way in which reference was made to the court's awareness of the context (or in other words, to the public function), by the arbitrators, was rather surprising, even if rather limited.⁴⁵ Reisman thus insists on the importance of a case-specific analysis of investment arbitration.⁴⁶

In the non-NAFTA context, tribunals have also recalled that their role was limited to the settlement of a dispute between the two parties who had brought their case forward for arbitration. In *Romak v. Uzbekistan*,⁴⁷ the tribunal was quite explicit in this regard:

"Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of "arbitral jurisprudence." *The Arbitral Tribunal's mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general. It is for the legal doctrine as reflected in articles and books, and not for arbitrators in their awards, to set forth, promote or*

⁴² Schill (*supra* n.14).

⁴³ *Glamis Gold v. US* (*supra* n.39) ¶6 [emphasis added].

⁴⁴ See e.g., *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 Sept. 2006) ¶95, where the tribunal highlighted the limits of referring to other BITs concluded by the host-State to determine the general investment policy of that state, in order to interpret provision of the BIT at stake in the dispute, and thus providing that its task "was to interpret the BIT and [...] to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties."

⁴⁵ W.M. Reisman 'Case Specific Mandates' versus 'Systemic Implications': How Should Investment Tribunals Decide?' (2013) 29 *Arb. Int'l* 131.

⁴⁶ Reisman concludes that the 'awareness' the tribunal is referring to does not affect the modus operandi a case-specific approach that investment tribunal should follow. *Ibid.* 138.

⁴⁷ *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award (26 Nov. 2009).

criticize general views regarding trends in, and the desired evolution of, investment law."⁴⁸

The justification given by the tribunal is particularly insightful. The tribunal referred to the parties to the arbitration, and how they did not confer upon the tribunal a mandate to clarify or develop investment law. Rather, the tribunal was entrusted with a specific mission: to settle their dispute.

The text of the ICSID Convention does not contradict the assumption developed in this section, and illustrated with these cases. Although, the preamble of the Convention does mention general objectives, such as the pursuit of global economic development, it does not relate to the function of investment tribunals. Instead, the functions of arbitral tribunals are listed in Chapter 5, Section III of the Convention, which relates to the 'Powers and Functions of the Tribunal'. But again, the provisions in Section 5 are relatively basic (for instance, the first provision of this section, Article 41 announces the fundamental principle of *compétence de la compétence*), or procedurally oriented (other provisions relate to applicable laws, the production of documents, the application of arbitration rules, default, counter claims and provisional measures) and therefore cannot be taken to affirm that investor-State tribunals shall be entrusted with a public function.⁴⁹

The above-mentioned assumption seems to be confirmed: the primary role of investor-State tribunals is to settle a dispute between a private party and a sovereign State, and to do so according to the norms chosen by the parties to an IIA. It is not contested that, in order to accomplish this function, tribunals may conduct their analysis based on precedents. However –and this is key – if and when they do so, it is in order to accomplish their primary task of settling the dispute between an investor and a State.

One last remark may be made regarding the *stare decisis* discussion. Indeed, the use of *stare decisis* arguably strengthens the argument according to which tribunals give priority to a case-specific approach and to their private function. It is largely accepted that there is no *stare decisis* principle in investment arbitration. The tribunal *may* rely on prior decision to consolidate their reasoning, but they have no *obligation* to do so. The extent to which this possibility shall be seen as a duty, more than an option, has been widely discussed.⁵⁰ In a recent award, the tribunal explained:

⁴⁸ *Ibid.* ¶171 (emphasis added). Referring to *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 Apr. 2005)(hereinafter '*AES v. Argentina*') ¶¶30-31, where the tribunal explained that although it was useful to consider former investment cases, especially where they concerns similar issues, the principle of *stare decisis* did not apply and the tribunal was not bound by previous case law.

⁴⁹ In its commentary of these provisions, Schreuer does not refer to such 'public function'. C. Schreuer et al., *The ICSID Convention: A Commentary* (2009) 34-43.

⁵⁰ See numerous doctrinal references in Chapter 5. In practice, the two sides of the debate have been crystalized in already cited *AES v. Argentina* (*supra* n.48) in which the tribunal is very skeptical about the possible existence of a requirement to follow previous decisions, and in *Saipem v. Bangladesh* where the tribunal expressly referred to a duty "to seek to contribute to the harmonious development of investment

"While there is no system of precedent, it is a fundamental principle of the rule of law that like cases should be decided alike, unless a strong reason exists to distinguish the current case from previous ones."⁵¹

This affirmation is consistent with the famous excerpts of the award in *AAPL v. Sri Lanka*. In that seminal case, the arbitrators explained that their task was primarily to settle the dispute brought before the tribunal, and to do that 'in the light of' identified precedent and international legal authority applicable in the dispute.⁵²

It follows from these cases, that tribunals may well refer to precedent, in order to arrive at a decision, but are not strictly bound by them. Arguably then, tribunals have little incentive to take into consideration the legal system in which they operate. Yes, one may argue that tribunals gain credibility when issuing a decision consistent with previous decisions, awarded for similar cases, but nevertheless, they have (i) no obligation to follow such decisions, and (ii) no guarantee that their decision will be followed in the future.⁵³ These factors can be viewed as obstacles to the fulfillment of a public function by investment tribunals.

In addition to the discussion on the role of precedent in investment arbitration, other considerations can be used to highlight the limited impact of the public function of investment tribunals. For instance, when looking at the relation between international investment law and national law for instance, or when examining claims on the ripeness of a claim, tribunals have repeatedly highlighted that their role was bound by the parties agreement, and that they consider themselves to be a forum to settle a specific dispute, not a supranational body, assuming an appeal function.⁵⁴

Against this backdrop, it can be concluded that an investment tribunal's main function is to settle the disputes brought before it according to the terms of the parties agreement, on the basis of which it has jurisdiction. In other words, an investment tribunal's main function is a private function.

Contrary to the WTO legal system, in the investment agreements of today, there exist no clear legal provisions, such as the WTO DSU Article 3.2, that would warrant the affirmation that investment tribunals should engage in a public function, *viz.* act in a way

law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law" *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (30 Jun. 2009) ¶90.

⁵¹ *SGS Société Générale de Surveillance S.A. v. Paraguay*, ICSID Case No. ARB/07/29, Award (10 Feb. 2012) ¶52.

⁵² *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) ¶78.

⁵³ Several scholars have criticized such limitations, as they can be viewed as the major cause of malfunction for the investor-State arbitration system. See F. Ortino 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 *J. Int'l Dispute Settlement* 31.

⁵⁴ See e.g. *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 Jan. 2006) ¶125, where the tribunal held that it was not its function to act as a court of appeal or review in relation to the Mexican judicial system.

that is coherent with general considerations about the international investment legal regime as a whole. In international trade dispute settlement, this public function is predominant, and can be viewed as one that is equally as important as that regarding the settlement of the dispute. In international investment dispute settlement, this public function primarily exists, if at all, as an accessory. Claims to the contrary are purely normative.

Certainly, one may view this as a regrettable conclusion. Several authors have pleaded in favour of a reform of the system, in order to compel arbitral tribunals to be more deferent towards the investment legal regime as a whole. These claims are interesting, especially in the light of numerous critiques formulated against investment arbitration.

3. Changes Ahead? The (Limited) Practical Resonance of The Argument on the Public Function of Investment Tribunals

International Investment Law as Global Public Law: The Claim...

For several years, investment arbitration has faced numerous critiques and is going through what one might call 'a legitimacy crisis'.⁵⁵ The reasons for these critiques, and their substance, fall outside the scope of the present chapter. It shall only be noted that some authors have argued that one way to overcome this 'crisis' would be to recognize that investment tribunals do, in fact, enjoy a public function. Schill has recently developed this argument, using as a starting point the differences between commercial arbitration and investment arbitration. He explains that the activity of investment treaty arbitrators is not limited to the settlement of disputes between two parties, unlike the activity of commercial arbitrators. Rather, an investment tribunal operates "in a larger framework of international investment protection and has effects as a governance mechanism on stakeholders that are not parties to the proceedings."⁵⁶ The basic idea underlying this conception is that an investment tribunal's activity has far reaching consequences, which have an impact upon other stakeholders in the international investment legal regime as a whole, and not just the parties to the dispute. Therefore, the function of investment tribunals should be conceptualized differently. This reasoning is certainly appealing. It does, indeed, seem difficult to refute the fact that investment awards and decisions, when taken all together, constitute a body of rules that affects far more than the interests of one single investor and one single respondent State before a given investment tribunal. In my view, however, this observation does not suffice in order to claim that investment tribunals are endogenously embodied with a public function, let alone one as important as that which can be identified within the WTO's dispute settlement mechanisms.

⁵⁵ For a broad overview and an insightful evaluation of these critiques see M. Waibel *et al.*, *The Backlash against Investment Arbitration : Perceptions and Reality* (2010). The expression 'legitimacy crisis' has been used by several authors. See e.g., S.R. Franck 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham L. Rev.* 1521.

⁵⁶ Schill (*supra* n.14) 428.

To clarify, I am not claiming that investment arbitral tribunals should not have such public function. Neither do I argue that, from the point of view of an external observer, it is invalid to say that an investment arbitrator might proclaim upon issues that usually fall within the scope of public law.⁵⁷ I simply argue that this observation cannot imply that investment arbitration tribunals *should* be empowered with a public function or should consider themselves as being granted with this power. Claims as to the contrary are purely normative: no matter the perception of academics, practice has not changed. Nor can we identify arbitration rules or IIA's that *today* encapsulate this idea.⁵⁸ Furthermore, it may be argued that there still remain several obstacles in the way of a claim that such changes will occur *in the future*.

...And its Difficult Application in Practice

Firstly, it seems difficult to believe that tribunals themselves could expressly claim such power. An arbitral tribunal's authority necessarily derives from the consent of the parties to an international agreement, that clarifies what body will have the authority to settle a legal dispute between the parties, should such arise. In principle, the powers of any international arbitral tribunal are those conferred upon it by the parties to the arbitration agreement themselves, within the limits allowed by the applicable laws to the said arbitration agreement.⁵⁹ Additionally, it is admitted that, limited powers may be conferred to the tribunals by operation of rules originating from the legal system within which the tribunal is operating.⁶⁰

In investment arbitration, it is the consent of both parties, that conclude the IIA upon which the dispute is initiated, as well as the parties to the dispute itself that shall be considered. State-parties to IIAs frame a tribunal's *marge de manoeuvre*. They do so

⁵⁷ For instance, it is not questionable that an investment tribunal can be competent to examine the validity of a public regulatory measure, or a public contract, in light of international law. Cases in which this type of question has been raised are numerous. See on this issue, the recent survey of the International Institute for Sustainable Development ("IISD"): L. Johnson and O. Volkov, *State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law* (Jan. 2014) *IISD – Investment Treaty News*, available at <<http://www.iisd.org/itn/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law/>> (last consulted 1 Aug. 2015).

⁵⁸ Interestingly, the current German Ministry of Economics Affairs affirmed, during a meeting with current European Trade Commissioner C. Malmström in February 2015, that his teams were working "on a way to replace the conventional arbitration court system with one based on public law". The EU commissioner found that "it was a very good idea, but noted that "[a]t the same time, it cannot be implemented from one day to the next" and affirmed that, meanwhile, the new EU investment policy will include 'less ambitious reforms' of the arbitration system. See EurActiv, 'Malmström: Germany's TTIP debate 'more heated'', 24 Feb. 2015, available at <<http://www.euractiv.com/sections/trade-society/malmstrom-germanys-ttip-debate-more-heated-312354>> (last consulted 1 Aug. 2015).

⁵⁹ Gaillard E. Gaillard & J. Savage (eds.), Fouchard, Gaillard, Goldman on International Commercial Arbitration (1999) ; A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* (2004) 947.

⁶⁰ For studies on general international litigation, see C. Brown, 'Inherent Powers in International Adjudication' in C. Romano, K.J. Alter & Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2014) 828. For a more detailed enquiry on international investment arbitration, see e.g. M. Paparinskis, 'Inherent Powers of ICSID Tribunals: Broad and Rightly So', in I. Laird and T.J. Weiler, *Investment Treaty Arbitration and International Law – Vol. 5* (2012) 43.

directly when they tailor *ad hoc* arbitration clauses and procedural rules within their agreement, or indirectly when they simply refer to existing arbitration rules or centers (i.e. ICSID, UNCITRAL, etc.). When a claimant initiates the arbitration proceedings to the dispute, and possibly adapts them, provided the Respondent State agrees, the claimant validates the scope of these powers. As we have seen earlier, existing investment rules do not seem to expressly provide arbitral tribunals with a public function. Rather, they emphasize the private function of investment tribunals, as these rules refer to specific procedural tools shaped exclusively to settle disputes.

A particularly interesting example is the final draft of the investment chapter that will be included in the EU-Canada FTA, or Comprehensive Economic and Trade Agreement ("CETA"). The CETA investment chapter seeks to reflect a modern approach towards investment arbitration.⁶¹ Indeed, one of the most important goals of the EU Commission in concluding this agreement has been to establish the 'most progressive' system of investor-State dispute settlement.⁶² One may thus argue that it was the perfect opportunity for stakeholders of the investor-State arbitration system to expressly grant tribunals with a public function. The CETA drafters could have included, in the investment chapter, a provision like that which can be found in WTO-DSU Article 3, giving arbitral tribunals broader authority to go beyond the settlement of disputes and engage in normative clarification. Yet, this did not happen. The available draft of the investment chapter in no way refers to such authority. The first provision of the dispute settlement section, entitled 'purpose' in previous versions of the draft, but now called 'Scope of a Claim to Arbitration' read as follows:

"Without prejudice to the rights and obligations of the Parties under Chapter [XY] [Dispute Settlement], an investor of a Party may submit to arbitration under this Section a claim that the respondent has breached an obligation under:
Section 3 (Non-Discriminatory Treatment) [...]
Section 4 (Investment Protection) of this Chapter; and
where the investor claims to have suffered loss or damage as a result of the alleged breach. [...]."⁶³

Similarly to the various agreements mentioned before, the provision of this last-generation investment agreement focuses only on the dispute-settlement aspect of investment arbitration.

Furthermore, while it is admitted that tribunals also have prerogatives conferred to them by the operation of law,⁶⁴ or even powers that are inherent to their missions,⁶⁵ these

⁶¹ European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement', *DG Trade Factsheet*, 26 Sept. 2014, available at <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf> (last consulted 1 Aug. 2015).

⁶² *Ibid.*

⁶³ The current draft of the CETA is available on the EU Commission website, at the following address <<http://ec.europa.eu/trade/policy/in-focus/ceta/>> (last consulted 1 Aug. 2015).

powers and prerogatives are not without limits. In an ICSID arbitration case, a 'manifest excess of power' from the tribunal is a basis for the annulment of the award. A tribunal that would start regulating in light of the system's interest, rather than in light of that of the parties to the dispute, would undoubtedly take the risk of seeing the award annulled.⁶⁶ It is not surprising then to notice that tribunals have been very careful when examining the scope of their prerogatives. In *Frontier Petroleum v. Czech Republic*,⁶⁷ the tribunal introduced its discourse on the merits affirming that "[i]n assessing the Parties' arguments on the interpretation of the relevant BIT provisions as well as Claimant's treaty violation claims, this Tribunal's task is limited to applying the relevant provisions of the BIT as far as necessary in order to decide on the relief sought by the Parties."⁶⁸ In *Lemire v. Ukraine*, while examining whether measures taken by the Ukrainian parliament amounted to a violation of the FET standard of the US-Ukraine BIT, the tribunal insisted on its 'limited' powers:

"The Arbitral Tribunal naturally respects the legislative function of the Ukrainian Parliament. It certainly is not the task of this Arbitral Tribunal, constituted under the ICSID Convention, to review or second-guess the rules which the representatives of the Ukrainian people have promulgated. The powers of this Tribunal are much more limited: they only encompass the authority to decide on a case-by-case basis whether Ukraine has violated certain guarantees, offered to American investors under the BIT, and to establish the appropriate remedies."⁶⁹

Moving on to consider the scope of its authority, regarding the possibility of enforcing FET protection, the tribunal repeated that it could not consider itself as a regulator.

"The arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies applying national laws. The international tribunal's sole duty is to consider whether there has been a treaty violation."⁷⁰

In my view, these affirmations are compelling examples of how tribunals perceive their own function. This function is limited and focused on dispute-settlement.

A second obstacle to a possible change in the conception of the function of investment tribunals, is the concurrence that exists amongst the international arbitration centers used for investment disputes, and the diverse costs this change would imply. The best

⁶⁴ Redfern & Hunter (*supra* n.59) 280-82; G. Cordero Moss, 'Tribunal's Powers versus Party Autonomy' in P. Muchlinski, F. Ortino & C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2009) 1207.

⁶⁵ *See generally*, Brown (*supra* n.13).

⁶⁶ This has not happen so far. Nevertheless, the ICSID Appellate Committee has already decided that a failure in the application of the law chosen by the parties could lead to an excess of powers. *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (also know as "Lucchetti") v. Peru*, ICSID Case No. ARB/03/4 (Decision on Annulment, 5 Sept. 2007) ¶¶ 111-14.

⁶⁷ *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award (12 Nov. 2010).

⁶⁸ *Ibid.* ¶25.

⁶⁹ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 Jan. 2010) ¶240.

⁷⁰ *Ibid.* ¶283.

way to grant a public function to investment tribunals, is to introduce changes to either IIAs or arbitration rules, or both. For instance, one option could be the introduction, to the ICSID convention for example, of provisions with a similar language to that of Article 3.2 WTO-DSU. However, this type of change comes at a cost.

Firstly, such a change has a cost for the arbitration centers and institutions themselves. Amending the text of the ICSID Convention for instance, can be complex, since amendments can only occur when a consensus is reached amongst all the parties to the convention. Similarly, a given State eager to give more authority to investment tribunals would have to change its model-BIT, and either amend its existing agreements or reach interpretative agreements with all its counter-parts in such agreements, operations that would bear a certain cost for both parties. It is therefore reasonable to assume that not all the procedural rules, or IIAs would be changed at the same time.

Secondly, the widening of the function of investment tribunals would also bear a cost for the parties to the dispute. Arguably, the burden that would be carried by investment tribunals, having been requested to clarify the law in a coherent manner for international investment law as a whole, in addition to settling the dispute at hand, would weigh heavy, with the added possibility of the former outweighing the latter. Such costs would, necessarily, be borne by the disputing parties. However, given the voluminous pleading, massive legal costs already common in investment arbitration proceedings, and the burdens placed upon parties, even a modest increase in expenses could be seen as a possible obstacle, that any player would like to eschew.⁷¹ Therefore, it would not be surprising to observe parties, and primarily claimants, trying to avoid the *fora* in which the proceedings are burdened because of the costly authority granted to the tribunals. A claimant who is not interested in a *forum* where the adjudicator embodies the power of normative creation or clarification prerogatives, might seek arbitration before another institution. To do so, the claimant would simply have to initiate the claim through a corporate subsidiary of the appropriate nationality, and thus use another BIT that offers another option for dispute settlement. The jurisprudence regarding access to 'mailbox companies' to BIT protections in certain circumstances being relatively liberal, the risk of strategic initiation can be seen as particularly acute. Thus, without even discussing the negative consequences of this possible behavior, known as 'treaty shopping', it seems clear that any attempt to give investment tribunals more powers, in order to enhance their public function could be undermined, as such improvement could be seen as costly for the parties to an investment dispute, arguably leading parties to seek possibilities which would allow them to avoid such costs elsewhere.

To be clear, and as already mentioned, it is undisputed that developing the public function of investment tribunals would have some advantages. In my view, this is therefore desirable. But the sole desire of (young) academics is not enough to modify the

⁷¹ N. Rubins 'Opening the Investment Arbitration Process: At What Cost, for What Benefit?' (2009) 2009 *Austrian Arb. YB* 483, 491.

behavior of investment tribunals. Provided that no major structural reforms are taken in context of the new EU investment policy, the function of investment arbitrators is not likely to change in the foreseeable future.

III. STANDING AND JURISDICTION

In this section, I will extend the analysis to include the structural differences between trade and investment dispute settlement mechanisms, whereby I will seek to prove that these differences are too grave for us to entertain the notion of convergence between the two disciplines. The dynamics of investment arbitration (how the mission that has been identified in section one is put into practice), will be put to scrutiny and compared with trade dispute settlement. In order to accomplish this, I will be comparing the issue of *standing* before the adjudicative bodies and the basic aspects of their *jurisdiction*.⁷² Here again, I focus on the rationale of the existing general rules and principles which delineate the conditions for an allegedly aggrieved player to bring a dispute before an investment tribunal or WTO Dispute Settlement Body, and those delimiting the scope of authority for the adjudicators in both disciplines.

A. STANDING: STATE-TO-STATE VS. INVESTOR-STATE

In this section, I will be following the same methodology assumed in the previous section, by first providing a brief description of the WTO regime, followed by a more detailed examination of the international investment regime. The reasons for this repartition are the same as those presented above: standing in WTO dispute settlement is more straightforward than investment arbitration, the latter being subject to ideological considerations.

1. WTO Dispute Settlement: State Exclusive Right to Initiate Proceedings

The Law

Pursuant to the text of the WTO agreements, only countries that are signatories to the WTO Agreements –*i.e.* 'WTO Members'– are subject to the obligations enshrined in them, and may benefit from the rights recognized therein.⁷³ In *Japan – Film*, the Panel explicitly insisted on this affirmation:

⁷² As noted by Schneider, the first of these two elements (standing) is one of the principal factors that allow for the differentiation between international economic dispute resolution regimes. *See*, A.K. Schneider 'Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations' (1999) 20 *Mich. J. Int'l L.* 697, 705-06. The second (jurisdiction) is analyzed here as a corollary of *standing*. Once the parties, that can appear before the tribunal, have been identified, it is indeed necessary to understand how the tribunal will exercise its authority upon the case brought before it. This cannot be done without a careful presentation of the jurisdictional principles before the two mechanisms.

⁷³ According to Article XII.1 of the Marrakech Agreement "[a]ny State or separate customs union possessing full autonomy in the conduct of its external commercial relations" to become a Member of the WTO. As only WTO members to the WTO can initiate dispute pursuant to the DSU, it follows that only States have standing before the WTO judge.

"[t]he WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations."⁷⁴

Consequently, the rights and obligations on dispute settlement procedures as covered by the DSU are reserved to WTO Members. The text of the DSU refers exclusively to the 'Members', allowing them to take part in the dispute settlement proceedings either as a claimant, a respondent, or a third-party. Private entities (natural or juridical persons), and countries that are not WTO Members, are not granted any standing rights in the dispute settlement mechanism. As affirmed by the AB in the *US – Shrimp case*:

"only Members may become parties to a dispute of which a panel may be seized, and only Members 'having a substantial interest in the matter before the Panel' may become third parties in the proceedings before the Panel."⁷⁵

The WTO dispute settlement procedures are thus foreseen purely for the resolution of State-to-State conflicts. The obligations enshrined in the WTO agreements apply exclusively to WTO Members, and so do the rights enshrined in said agreements, along with the ability to seek their enforcement. Legal standing in WTO disputes is, therefore, relatively straightforward.⁷⁶ It remains an exclusive right of States.

Remarks

To be clear, the law of the WTO only allows Members, *i.e.* States, to bring claims before the WTO adjudicators. However, this should not be understood as implying that only States have interests, and are consequently the only ones engrossed, in WTO litigation. Against this backdrop, it is clear that WTO dispute settlement is an intergovernmental forum and that private parties have no right of standing in WTO disputes.⁷⁷ Yet, this does not mean that private parties do not get involved in WTO disputes. In fact, it is generally accepted that even though the WTO dispute settlement mechanism is reserved for States, private interests are usually found at the very origins of many (not to say every) disputes,⁷⁸ this is so because the beneficiaries of multi-lateral trade regulation are to be found, ultimately, amongst private entities.⁷⁹ To confirm this assertion, one can for

⁷⁴ *Japan — Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, Panel Report (31 Mar. 1998) ¶10.52.

⁷⁵ *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (AB Report, 12 Oct. 1998) ¶101 (hereinafter '*AB Report, US–Shrimp*').

⁷⁶ WTO judges have had to address several legal and technical questions about legal standing, for instance about the legal interest of the claimant in the dispute. For a clear overview of these questions that touch upon considerations that are not directly related to the present development, see *e.g.* M.J. Trebilcock, R. Howse & A. Eliason, *The Regulation of International Trade* (2013) 183-87.

⁷⁷ Scholars have demonstrated that the State-to-State structure of WTO litigation was actually consistent with the objective of the WTO legal regime. See *e.g.* A.O. Sykes 'Public versus Private Enforcement of International Economic Law: Standing and Remedy' (2005) 34 *J. Legal Stud.* 631, 646-54.

⁷⁸ F. Orrego-Vicuña 'Individuals and Non-State Entities before International Courts and Tribunals' (2001) 5 *Max Planck YB UN L.* 53, 63.

⁷⁹ In *US–Section 301*, the Panel explicitly recognized that "[t]he multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security

instance refer to the procedures involved in registering trade complaints before the Office of the US Trade Representative⁸⁰ or before the DG Trade of the European Commission.⁸¹ These procedures are open to private parties and clearly aim at introducing an investigation, which will be led by the competent public authority (the USTR, or DG Trade) and which might result in the lodging of a claim before the WTO DSB. The DG Trade factsheet on how to file a Trade Barrier Regulation complaint is instructive in this regard, as it explains, in its very first development, that the purpose of such a complaint is the launch of an investigation and the attempt from the European Commission "to use bilateral contacts, WTO dispute settlement, or other dispute settlement procedures to remove the trade barrier."⁸²

Additionally, authors have noted that private parties may assist governments in the conduct and treatment of a trade dispute,⁸³ as well as at the end of the dispute when counter-measures are imposed.⁸⁴ Finally, private parties can also be more directly involved in WTO dispute-settlement, as *amicus curiae* briefs have been accepted in WTO disputes.⁸⁵

and predictability affects mostly these individual operators. Trade is conducted most often and increasingly by private operators. It is through improved conditions for these operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it". Panel Report, *US–Section 301*, ¶¶7.76-77.

⁸⁰ The USTR Webpage includes a section on enforcement, which explains the various steps that need to be taken in order to report a trade barrier and request the government to initiate proceedings before the WTO. See, <<https://ustr.gov/issue-areas/enforcement>> (last consulted 1 Aug. 2015). See also, the webpage of the US Department of Commerce which includes a specific 'on-line' form dedicated to private agents who wish to report a trade barrier: <http://tcc.export.gov/Report_a_Barrier/index.asp> (last consulted 1 Aug. 2015).

⁸¹ The EU Commission DG Trade offers a webpage dedicated to trade barrier investigations. See, <http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/trade-barrier-investigations/index_en.htm> (last consulted 1 Aug. 2015).

⁸² EC Commission – DG Trade '*Trade Barriers Regulation – Filing a Complaint*' (2013) available at <http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150984.pdf> (last consulted 1 Aug. 2015).

⁸³ G.C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003) 143. Schaffer indeed explains that "WTO legal rights affect company and industry-specific interests. Details of market shares and legal arguments are the province of business executives and legal advocates, not State–or more remote European Community– diplomats. The more legalized international trading system creates stringer incentives for well-placed private actors to engage public legal processes. To litigate effectively, in the WTO system, government officials need the specific information that business and their legal representatives can provide. Officials therefore strive to establish better working relations with industry on trade matters. The engagement of private firms, in turn, helps nations public officials render international public law more effective– hence the reciprocal relationship between WTO public law and private interest".

⁸⁴ B. Hoekman & P. Mavroidis 'Bite the Bullet: Trade Retaliation, EU Jurisprudence and the Law and Economics of 'Taking One for the Team' (2013) *EUI Working Paper No.RSCAS2013/32*, available at <http://cadmus.eui.eu/bitstream/handle/1814/27034/RSCAS_2013_32.pdf> (last consulted 1 Aug. 2015).

⁸⁵ The impact of *amicus curiae* participation on the structure of the WTO settlement mechanism has been discussed, see Sykes (*supra* n.77) 641 and references therein. For a critical appraisal of the tradeoffs of *amicus* participation see P.C. Mavroidis, 'Amicus Curiae Briefs Before the WTO: Much Ado About Nothing' in A. Von Bogdandy, P.C. Mavroidis & Y. Mény (eds.), *European integration and international co-ordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann* (2002) 317.

However, the fact that private parties can participate directly (through *amicus briefs*) or indirectly (when shadowing governments involved in trade disputes), does not confer onto them the right to bring a dispute before a WTO adjudicator. Contrary to 'legal standing', the operation of *amicus curiae* submissions does not concern the execution of a right of individuals to be heard defending their particular interests, but rather it is understood as providing a form of assistance to the tribunals that allows for the expression of interests –private or public – not otherwise formally represented in the jurisdictional process. Similarly, when private actors are indirectly involved in disputes, because they advocate for the case to be brought before the WTO adjudicators, they do not legally act as litigants to the dispute, and thus the WTO agreements do not confer them any rights with regards to the possibility of bringing a case forward.⁸⁶ To conclude, private parties can, in a way, be involved in WTO disputes, but nevertheless, have no right of standing before a WTO dispute settlement body.

2. Investment Arbitration: Hybrid Mechanisms and a Private Right of Action

The Law

Dispute resolution clauses in investment treaties usually share the same purpose and structure: they give a private entity the possibility to initiate a legal action before an international court, usually through the format of an arbitral tribunal, against a State in the territory in which an investment has been made.

Thus, from a technical point of view, standing, in investment arbitration, is associated with the notions of investments and investors. It is accepted that the definition of these two connected notions delineates who has standing in investment arbitration.⁸⁷ In IIA language, and to simplify,⁸⁸ an *investor* is a private person (whether an individual or a legal person), national of the party to an investment agreement that has been made to cover an *investment* in the territory of the other party to the agreement, according to the terms of said agreement. Hence, a full presentation of the concept of standing in investment arbitration requires (i) a detailed definition of 'investment', and (ii) an examination of the conditions under which a private persons can be qualified as a 'national', and is thus allowed to benefit from the protection of the investment

⁸⁶ It is indeed well admitted that the conditions for a State to accept/refuse to espouse a case and bring it over to the WTO adjudicator are not regulated by WTO law, but by domestic law.

⁸⁷ B. Legum 'Defining Investment and Investor: Who is Entitled to Claim?' (2006) 22 *Arb. Int'l* 521.

⁸⁸ The issue of standing and jurisdiction is particularly complex and is usually dealt by investment tribunals on a case-by-case basis, as it relates to definitions of basic notions that differ from one BIT to another. For a recent study on jurisdiction in investment arbitration, which covers all the aspects of standing in investment arbitration, with notably review of the notion of incorporation, shareholders' right of action and public-entities as potential claimants, see M. Waibel 'Jurisdiction and Admissibility' in M. Bungenberg *et al.* (eds.), *International Investment Law - A Handbook* (2015) 1212.

agreement. This double-analysis goes beyond the scope of the present study.⁸⁹ That being said, what should be kept in mind is that international investment agreements allow *investors*, usually private parties, to bring, before an arbitral tribunal, a dispute against a sovereign State when such dispute regards an *investment* made within the territory of said State. This mechanism reflects the very essence of an investment protection agreement, which is to provide private entities with the possibility of claiming damages for an international wrongdoing, before an international court.

The ICSID Convention provides additional information regarding the concept of standing in investment arbitration. Article 25(1) of the Convention, which relates to the jurisdiction of the Center, reads as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Accordingly, under Article 25(1) of the ICSID Convention, the ICSID Convention applies to investment disputes between, on the one hand, contracting States, and on the other, 'nationals' of other contracting States. The two elements of 'investment' and 'foreign national', identified earlier, are present in this text as well. Commenting on this provision, A. Broches, who was the General Counsel of the World Bank at the time when the Convention was being prepared, highlighted that the basic feature of ICSID arbitration was to create a forum to settle disputes between States and private parties. Broches indeed noted that the requirement upon which ICISD arbitration shall be used to settle disputes between 'contracting States' and 'nationals of other contracting States' is in keeping with the purpose of the Convention, to create an international forum for the settlement of disputes between states and foreign investors."⁹⁰ He then added that "the facilities of the Centre are neither available for disputes between private parties who can either have recourse to national courts or to commercial arbitration, nor for disputes between states who can bring their disputes before the International Court of Justice or can agree to submit them to conciliation or arbitration through conventional arrangements."⁹¹ It should be clear that IIAs, as well as the ICSID, create the possibility for *investors* – *viz.* private parties – to bring actions against sovereign States.

⁸⁹ For a comprehensive study of these two notions, see E.C. Schlemmer, 'Investment, Investor, Nationality, and Shareholders' in P. Muchlinski, F. Ortino & C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) 49.

⁹⁰ A. Broches, *Selected Essays, World Bank, ICSID, and other Subjects of Public and Private International Law* (1995) 167.

⁹¹ *Ibid.*

Remarks

Investment agreements vest the right for foreign nationals and legal entities to bring a claim directly against a sovereign State before an investment tribunal. This affirmation is fundamental and needs to be further examined.

Soon after the first investment treaty cases arose, several authors have attempted to theorize the mechanism instituted by these clauses.⁹² According to these authors, investor-State arbitration was an innovative mechanism of international adjudication that needed to be conceptualized accordingly.⁹³ Z. Douglas' 2003 article is usually seen as one of the first important attempts of forming such a conceptualization.⁹⁴ Two general observations can be identified in Douglas's work. The first, is that investment arbitration cannot be "*rationalised* either as a form of public international or private transnational dispute resolution."⁹⁵ The second, is that investment arbitration is a mechanism that allows for the enforcement of obligations directly owed by a private entity.

The first observation is straight-forward: investment arbitration embodies elements of both public and private international law, and so can be qualified as a hybrid mechanism of dispute settlement. In Douglas' own words:⁹⁶

"Investment treaties are international instruments between states governed by the public international law of treaties. The principal beneficiary of the investment treaty regime is most often a corporate entity established under a municipal law, while the legal interests protected by the regime are a bundle of rights in an investment arising under a different municipal law. The standards of protection are fixed by an international treaty, but liability for their breach is said to give rise to a 'civil or commercial' award for enforcement purposes."⁹⁷

Hence, the presence of the state, along with the fact that the basis of arbitration relies on an international agreement, do not allow for the apprehension of investor-State arbitration as identical to international commercial arbitration.⁹⁸ On the other hand,

⁹² See e.g., G. Sacerdoti 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 *Hague Recueil* 251 ; J. Paulsson 'Arbitration Without Privity' (1995) 10 *ICSID Rev.-FILJ* 232 ; E. Gaillard 'L'arbitrage sur le fondement des traités de protection des investissements' (2003) *Rev. Arb.* 853.

⁹³ B. Legum 'The Innovation of Investor-State Arbitration Under NAFTA' (2002) 43 *Harvard Int'l L. J.* 531; see also T.W. Wälde, 'The Specific Nature of Investment Arbitration' in T.W. Wälde & P. Khan (eds.), *New Aspects of International Investment Law* (2007) 43. Authors also generally refer to 'the specific' or '*sui generis*' nature of international investment litigation, see e.g. *Ibid.* See also the thesis, in French, of W. Ben Hamida, *L'arbitrage transnational unilatéral* (2003) thèse de doctorat, Paris 2. Finally, for a recent study on the paradigm shift in the literature about the conceptualisation of the mechanism, see A. Roberts 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *Am. J. Int'l L.* 45.

⁹⁴ Z. Douglas 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *Brit. YB Int'l L.* 151.

⁹⁵ *Ibid.* 161.

⁹⁶ *Ibid.* 161 [emphasis added], citing Paulsson (*supra* n.92).

⁹⁷ *Ibid.* 163.

⁹⁸ In order to emphasize the specific nature of such investor/state arbitral tribunals, some have referred to the *Iran-US* tribunals or even to *mixed arbitral tribunals* created by the Treaty of Versailles after the second world-war to settle claims arising out of damage or injury inflicted upon property, rights or interests of Allied nationals in German territory. See e.g. G. Cuniberti 'Parallel Litigation and Foreign Investment Dispute Settlement' (2006) 21 *ICSID Rev.* 381, 391.

investor-State arbitration cannot be considered as a specific kind of diplomatic protection claim because, ultimately, private persons control the arbitration, and because the regime and conditions of the functioning of these two mechanisms are different.⁹⁹ From this primary observation we arrive at the second idea in Douglas' work: Investor-State arbitration does not derive from diplomatic protection, where private interests are espoused by the State, which can initiate an action before an international adjudicator. Rather, IIAs create rights that are directly owned by private persons, individuals or, more likely, legal persons. And it is up to persons such as these to initiate the dispute. By way of consequence, the 'functional control of the claim' belongs to the individual, and to the individual only,¹⁰⁰ and the national state of the investor does not have standing before the investor-State tribunal.¹⁰¹

As Douglas notes,¹⁰² contrary to diplomatic protection, the national State is not supposed to have discretion as to whether to introduce a claim before an arbitral tribunal on behalf of its allegedly injured investor. Nor can it interfere in the arbitral proceedings: "[i]n pursuing its own claim, the investor is under no obligation to inform its national state of the existence of the arbitral proceedings, nor to consult with its national-State on the substantive and procedural issues that arise in the proceedings."¹⁰³ One could certainly argue that the term 'obligation' here is straightforward and that investors are simply not used to informing their national states. Yet, it still remains that, today, home governments have no formal influences on the process, once the investment proceedings begin.¹⁰⁴

Of course, the national-State can intervene as a non-disputing party,¹⁰⁵ or issue, together with the other party to the international treaty, interpretative statements.¹⁰⁶ But these

⁹⁹ Douglas explains that "[t]he functional assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national state. In these circumstances it is untenable to super-impose the Mavrommatis formula of diplomatic protection over a triangular relationship between investor, its national state and the host state of the investment in order to rationalize 'arbitration without privity' under investment treaties." Douglas (*supra* n.94) 182, referring to *The Mavrommatis Palestine Concessions (Greece v. UK)*, Judgment on Objection to Jurisdiction of the Court (30 Aug. 1924), PCIJ Series A No 2, at 12.

¹⁰⁰ *Ibid.* 183.

¹⁰¹ *Ibid.* 183.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Interestingly, new generation IIAs might change this practice as obligations to inform home-State are being included as conditions to initiate the investment proceedings. See for instance the CETA Current Draft Article X.18.

¹⁰⁵ In theory, the home-State could participate to the proceedings as an *amicus curiae*. In at least one case, between a Dutch investor and the Slovak Republic, in which the validity of the BIT was challenged by the host-State, the Netherlands submitted observations to the arbitral tribunal about their view on the question. *Eureka B.V. v. Slovak Republic (also known as 'Achmea B.V. v. Slovak Republic [I]')*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 Oct. 2010) ¶¶ 145-175.

¹⁰⁶ A. Roberts has published a comprehensive study on the role of States (home-State and host-States) in investment arbitration, in which she explains the under-estimated function they can play in interpreting

actions do not affect the right of the investor to bring the case before the tribunal.¹⁰⁷ Hence, the possible participation of the national-State does not change the configuration of the mechanism. To the contrary, the above-mentioned cases show that the investor, and its national-State, may have diverging opinions regarding an opportunity to bring an investment claim.

Sykes, in an already mentioned article, has demonstrated that the nature of investment arbitration, as described above, is coherent with the political economy of investment agreements. According to him, the investor is guided, in bringing forward its claim, solely by the dictates of self-interest, without necessarily having regard for any consequences that such may have for the diplomatic relationship between its nation-State and the host-State.¹⁰⁸ The investor bears, exclusively, the 'functional control' of the claim, and by consequence the financial burden of presenting such a claim falls exclusively on said investor. Damages recovered in the award are transferred to the account of the investor and the nation-State has no legal interest in the compensation fixed by the arbitral tribunal. Furthermore, the home-State (who concluded the agreement in the first place) does not have to engage in the diplomatic protection of its investor and saves the costs of doing so (selecting which investors 'deserve protection', engaging in the disputes, and finding a way to compensate its investor in case of success of the claim, etc.).

B. JURISDICTION: RESTRICTIVE VS. EXTENSIVE

Another interesting way to compare the dynamics of investment arbitration with that of WTO dispute settlement, is to look at the scope of their jurisdictional powers. Article 23 prohibits WTO members from referring a case to another international adjudicative body when the case concerns a dispute arising from the application or interpretation of WTO agreements. It thus gives 'exclusive competence' to WTO judge for the examination of a possible breach of WTO rules. Conversely, the scope held by the WTO

investment agreements and, by doing so, frame the tribunal's margin of action. See A. Roberts 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 *Am. J. Int'l L.* 179.

¹⁰⁷ Douglas actually explains that in several instances, national-State have voiced their disagreement with the arbitral proceedings. Douglas (*supra* n.94), 170. The author notes for instance that in two NAFTA cases *Gami v Mexico*, and *Mondev International Ltd v. United States*, the National states of the investor, the US in *Gami* and Canada in *Mondev*, intervened pursuant to Article 1128 to contend that tribunals had no jurisdiction to the investors' claims. See *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award (15 Nov. 2004), ¶22 ; *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) and Second Submission of Canada Pursuant to NAFTA Art. 1128 (6 July 2001).

¹⁰⁸ Sykes (*supra* n.77) 642-45. For Sykes, the establishment of a private right of action is 'obvious' since the central objective of investment agreements is "to induce foreign investors to make new investments in developing countries at a lower interest rate [...] A promise of monetary compensation to investors is [...] a cheap commitment device for states with benign intentions toward investors and a cheap way for states with more benign intentions than others to signal their type. As long as the capital-importing nation is confident that it does not wish to engage in prohibited behavior, then the private right of action on behalf of foreign investors is not a burden on it but a clear benefit". *Ibid.*

judge can be seen as restricted, since they are strictly limited to the sole enforcement of WTO norms.

By contrast, investment tribunals do not have any kind of exclusive jurisdiction over an investment breach. International investment law, as a regime, is decentralized and there is no one single adjudicator that can claim exclusive competence to implement and enforce investment protection rules. Additionally, the scope of the power of investment arbitration review is relatively broad, and can even be enlarged by mechanisms crafted in practice: investment tribunals are regularly asked to review claims that are based on legal rules which are not to be found in investment agreements, but that are 'imported' into the dispute.

1. Jurisdiction of the WTO Adjudicator: Compulsory, Exclusive and Specialized

The jurisdiction of the WTO Panels, and the AB, has been qualified as "compulsory, exclusive and not general."¹⁰⁹ *Compulsory* because when WTO members access the WTO organization, they consent to the jurisdiction of the WTO adjudicative bodies and, according to the basic principle of international litigation, cannot then refuse to appear before it.¹¹⁰ Compulsory does not mean absolute, and in the WTO, like for any other international adjudicators, the jurisdiction of dispute settlement body is not without limits. Firstly, WTO panels and AB's jurisdiction is materially limited to WTO disputes. This simple affirmation has been recalled by the AB itself in *Mexico – Taxes on Soft Drinks*, in response to Mexico's argument about the necessity to take into account prior NAFTA proceedings related to the dispute.¹¹¹ Secondly, as noted by Van Damme, general principles such as *non ultra petita*, and the principle according to which it is for the State to decide how to implement a given ruling issued by an international court, can also be used to delineate the jurisdiction of the WTO panels and AB.¹¹² In any event, and according to another general principle of international litigation, it is the WTO panels

¹⁰⁹ I. Van Damme, 'Jurisdiction, Applicable Law, and Interpretation' in D. Bethlehem et al. (eds.), *Oxford Handbook of International Trade Law* (2009) 298, 299.

¹¹⁰ This basic principle was affirmed by the ICJ in the *Corfu Channel* case. In this landmark case, the world court affirmed that consent provides the cornerstone for the exercise of jurisdiction by any international court or tribunal *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment on Preliminary Objection (25 Mar. 1948), ICJ Reports 1948, 15. The principle was re-affirmed by the Court in the *Peace Treaty Interpretation* Advisory Opinion. The Court declared it was "well established" that "no judicial proceedings relating to a legal question pending between States can take place without their consent", *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion – 1st Phase (30 Mar. 1950), ICJ Reports 1950, 65, at 71.

¹¹¹ *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, Appellate Body Report (6 Mar. 2006) (hereinafter 'AB Report, *Mexico – Soft Drinks*').

¹¹² Van Damme (*supra* n.109) 300.

and AB that have the power to determine their own jurisdiction,¹¹³ and thus to determine if these principles ought to be applied.

More importantly, the WTO adjudicative body can be considered as having *exclusive* jurisdiction over a WTO Dispute.¹¹⁴ Indeed, the Article 23 of the DSU provides that:

1) When members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules of procedures of this Understanding.

2) In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreement has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding.

[...]

Van Damme's comment on this provision is instructive. She explains that "[t]he language used in Article 23 (the term 'shall' and the prohibition against utilization of alternative procedures) thus appears to indicate an inflexible exclusive jurisdiction regime, barring referral of cases arising under the GATT/WTO legal system to any outside judicial forum."¹¹⁵

The WTO DSB has confirmed the exclusive nature of Article 23(1). In *US – Section 301 Trade Act*, the Panel explicitly affirmed that Article 23.1 required WTO Members

"to "have recourse to" the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call "exclusive dispute resolution clause", is an important new element of Members' rights and obligations under the DSU."¹¹⁶

Although it can be argued that this exclusive character is not strictly absolute,¹¹⁷ the role of Article 23 is particularly important. By virtue of WTO law, WTO members are

¹¹³ This principle has repeatedly been affirmed by WTO panels and the AB. *See e.g. US – Anti-Dumping Act of 1916*, WT/DS136/AB/R (AB Report, 28 Aug. 2000), ¶54 and references therein; *Mexico – Soft Drinks*, ¶45.

¹¹⁴ Van Damme (*supra* n.109) 300. *See also*, G. Marceau 'Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35 *J. World Trade* 1081, 1101; Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) 183-86.

¹¹⁵ Van Damme (*supra* n.109) 300.

¹¹⁶ Panel Report, *US–Section 301*, ¶7.43.

¹¹⁷ One might question the exclusive character in light of the growing use of amicable settlement of WTO disputes, tolerated under DSU Article 3.7. *See* W. Alschner 'Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System' (2013) 13 *World Trade Rev.* 65. Shany also makes a four-fold argument about the non-absolute character of WTO jurisdiction arrangement. He notes that "[f]irst, it should be realized that the DSU permits parties to agree to settle their dispute by way of arbitration, *i.e.* outside the ordinary structure of WTO dispute-settlement institutions (but still subject to control by the DSB). Hence, the DSU itself allows for some measure of flexibility in forum selection. Secondly, the

limited to WTO dispute settlement mechanisms when they seek the enforcement of a WTO rule.¹¹⁸

Finally, the jurisdiction of the WTO DSB can be labeled as *restrictive*, or *not-general*, in the sense that it is specialized and limited to WTO claims only. In *Mexico–Soft Drinks*, the AB clearly expressed this principle when stating that there is "no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes."¹¹⁹ In that case, Mexico argued that since the US had acted inconsistently with NAFTA law, and the measures targeted before the WTO were taken as a consequence of the US's action, WTO law could not apply to them. The AB decided that accepting this argument would imply that the WTO dispute settlement system could be used to make a determination under NAFTA law. In the words of the AB, this is not possible pursuant to Article 3.2 of the DSU, which makes clear that said system "serves to preserve the rights and obligations of Members under the *covered agreements*, and to clarify the existing provisions of *those agreements*."¹²⁰ This basic and simple idea is fundamental for the present paper. The Panels and the AB have jurisdiction only over WTO claims, i.e. claims related to an alleged breach of an obligation issued from WTO instruments. They can certainly review the facts of cases, and make the necessary determination to rule the case (Articles 7.1 and 11 DSU), but they cannot rule upon another norm, be it international or not. As we will see in the next development, this is slightly different for investment arbitration.

language used in Article 23(2) is somewhat ambiguous since it only bars 'determinations' by external dispute-settlement procedures concerning breach of GATT law, loss of benefits thereunder, or defeat of its object. The Article does not explicitly oust the possibility of referring disputes over the interpretation of the GATT/WTO agreements to external courts and tribunals (the same observation is valid under Article 23(1), since it only seems to address violation type disputes). Thirdly, it is not clear whether dispute settlement under regional trade arrangements, involving the application of provisions, which provide for identical trade benefits to those granted under the GATT and its related agreement, is precluded. On the contrary, it is at least arguable that the language of Article 23(2) would not bar recourse to alternative procedures if the determinations were formally adopted in the context of a different legal regime, as long as it is accepted that they could not produce a *res judicata* effect under GATT/WTO law. Finally, according to Article 1(2) of the DSU, specific dispute-settlement rules found in the covered agreements override the provisions of the DSU. As a result, it would seem that specific jurisdiction-regulating clauses, such as Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPSM Agreement) providing for non-exclusive jurisdiction of the GATT/WTO dispute-settlement machinery should prevail." Shany (*supra* n.114) 183-85 [references omitted]. Finally, according to Pauwelyn, a WTO member, as a defendant in a dispute, could satisfactorily challenge the jurisdiction of a panel or of the AB when (i) a non-WTO agreement concluded between the said member and another WTO member, claimant in the case, would either forbid the reference to the WTO dispute settlement or confer (exclusive or compulsory) jurisdiction to another international body, provided that the said agreement covers matter that connected to the case, or (ii) because of the *res judicata* effect of other rulings. See J. Pauwelyn 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (2003) 37 *J. World Trade* 997, 1005-19.

¹¹⁸ Here, it is important to recall that Article 23 is binding upon WTO Members, and only upon WTO Members. WTO does not prevent non-WTO Members (private parties for instance) to claim for a breach of WTO before a DSB that would declare itself competent to rule the case.

¹¹⁹ AB Report, *Mexico – Soft Drinks*, ¶ 56

¹²⁰ *Ibid.* [emphasis used by the AB in its report]. See also, Van Damme (*supra* n.114) 300.

2. Jurisdiction of Investment Tribunals: Non-exclusive, Expandable and Highly-contestable

Non-Exclusive

Contrary to WTO dispute settlement, investor-State tribunals do not have any kind of *exclusive jurisdiction* to settle FDI disputes. On the contrary, today it is largely accepted that, whilst being the most common and arguably most effective way of resolving such a dispute, investor-State arbitration is not the only option for investors. Unlike in the WTO regime, the international investment law regime does not select one specific method of dispute settlement. Investment arbitration was created in order to provide an alternative avenue for redress than that of the courts of the host state. But IIAs hardly ever exclude all recourse to state courts. Additionally, nothing prevents investors from bringing an investment claim before another international adjudicatory body. Indeed, it is because the provisions of IIAs are generally broad, that they can be enforced through different types of domestic and/or international courts. International arbitration, therefore, remains but one choice among many different available *fora*. Bishop, Crawford and Reisman identify no less than sixteen *fora* in which investment disputes can, or could be, brought, in addition to national courts.¹²¹ Such a number can be seen as a positive: it reflects the different possibilities given to private persons to act against States that do not respect the international obligations to which they have consented. This 'open option' is likely to be used by the investors, since it increases the chances of obtaining compensation. However, the downside is that it favors forum shopping and heightens the potential for parallel proceedings.

Expandable

The jurisdiction of investment tribunals can also be qualified as *expandable*. IIAs contain several features that can be used by investors to request a tribunal to rule upon legal obligations that are not contained, *per se*, in the investment treaty. In other words, where it is crystal clear that WTO DSBs can only adjudicate upon WTO claims, investment tribunals have even been relied upon to address claims that are only indirectly linked to BIT provisions, such as claims regarding umbrella clauses, MFN clauses and preservation of right clauses, to name but a few examples.

This idea of 'expandable jurisdiction' is fundamental and will be further developed later in the thesis.¹²² At this stage, it is important to note that the scope of the jurisdiction of

¹²¹ R.D. Bishop, J. Crawford & W.M. Reisman, *Foreign investment disputes: cases, materials, and commentary* (2005) 317-490. This range of *fora* includes: the ICSID, arbitration under the ICSID additional facility rules, the Permanent Court of Arbitration, the Iran-U.S. Claims Tribunal, the ICC, the LCIA, the SCC, the American Arbitration Association, arbitration under UNCITRAL Arbitration Rules, arbitration under *ad-hoc* arbitration rules, the Permanent Court of Justice, the International Court of Justice, the European Court of Human Rights, the Inter-American Commission and Court on Human Rights, the European Court of Justice, the U.S. Foreign Claims Settlement Commission and finally, domestic courts. If all these *fora* are not available for all the investors (regional courts, Iran-US Claims Tribunal) or if some of them are not operating anymore (PCIJ), the number of available bodies for investors remains relatively high.

¹²² See *infra* Chapter 4, pp.174 *et. seq.*

investment tribunals is largely malleable. The rules and criteria (*personae, materiae, and temporis*) that have been used to establish the jurisdiction of one given tribunal are well established. A broad interpretation of IIA provisions have, nevertheless, allowed tribunals to expand their jurisdiction over matters that are not directly referred to in IIAs.

Highly-Contested

The third and last characteristic that needs to be mentioned regarding the jurisdiction of investor-State tribunals, is that in practice, jurisdiction is highly contested. Contrary to WTO disputes in which the jurisdiction of panels, or of the AB, is rarely challenged, the ratio of investment claims that are challenged at the jurisdictional stage is relatively high, as is the ratio of claims failing at this stage. For instance, in ICSID proceedings, tribunals have declined jurisdiction in about 25% of cases.¹²³ In its 2014 annual report, the UNCTAD notes that of the 23 public decisions issued by investment tribunals in 2013, 14 principally addressed jurisdictional issues, with 7 decisions upholding the tribunal's jurisdiction (at least in part), and 7 decisions rejecting jurisdiction.¹²⁴

There are several reasons for these numerous challenges. In general, the highly contested jurisdiction of investment tribunals can be seen as the counterpart to the potentially broad jurisdiction these same tribunals might enjoy. As mentioned in previous developments, IIA provisions related to the scope of investment claims can be drafted in broad terms. As a consequence, the scope of a State's consent to arbitration can be seen as enlarged and of an imprecise nature.¹²⁵ When the actual dispute presents itself, a State might very readily assert that such a dispute was not the kind of dispute it contemplated when it signed the applicable treaty. Further, and still generally, investment arbitration is usually considered as a costly and time consuming method of settling a dispute. At the same time, arbitration rules allow for the 'bifurcation' of proceedings, which entail tribunals to examine preliminary objections (such as jurisdictional objection) first, and to proceed with the merits of the dispute only if these objections are rejected. States, therefore, have an incentive to eliminate, or at least narrow down, a case at an early stage. More specifically, IIAs provide for relatively detailed jurisdictional requirements and conditions, as well as having temporal limitations and restrictions based on nationality. Cases governed by the ICSID Convention offer even more opportunities for jurisdictional objections. To give only one

¹²³ ICSID, *The ICSID Caseload – Statistics (Issue 2013-2)*, (June 2013), available at <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/01/15/000333037_20140115155248/Rendered/PDF/839910NWP0ICSI0Box0382124B00PUBLIC0.pdf> (last consulted 1 Aug. 2015), p. 14.

¹²⁴ UNCTAD, 'Recent Developments in Investor-State Dispute Settlement' (Apr. 2014) UNCTAD IIA Issue Note, available at <http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf>, (last consulted 1 Aug. 2015) p. 10.

¹²⁵ A.K. Bjorklund 'The Emerging Civilization of Investment Arbitration' (2008) 113 *Penn. State L. Rev.* 1269, 1274-75.

example, investors must satisfy the definition of investment under the ICSID Convention, as well as under an investment treaty, if one applies. The same is true with respect to nationality requirements. In addition, the ICSID Convention, as well as last generation IIAs, have special provisions on frivolous claims that permit states to have expedited hearings on claims that are apparently without merit, or that fail to state a cause of action on which relief can be granted. Defending States thus have numerous tools that they can use to challenge the jurisdiction of investment tribunals, and therefore attempt to derail investment claims.

IV. REMEDIES, ENFORCEMENT AND APPEAL

Using the same approach as the one adopted in the previous sections, the following developments do not examine the details of all the procedural steps related to the enforcement and appeal mechanisms in trade and investment dispute settlement. Neither will I discuss the intricacies of these mechanisms, nor the debate surrounding their legitimacy. Rather the following section focuses only the main consequences of a ruling on the inconsistency of a given State measure. Thus, I use this basic presentation to explain how, and why, mechanisms of compliance with a ruling on inconsistency, along with the operation of these mechanisms in practice and the procedure to challenge this ruling, differ substantially in international trade and investment disciplines.

A. REMEDIES: CHANGE IN THE LAW VS MONETARY COMPENSATION

1. Remedies in WTO Dispute Settlement

The Law

There are different ways to present the remedial regime set in place by the DSU. However, Van den Bossche's and Zdouc's approach seems to be the one that squares the most with the objective of the present chapter.¹²⁶ According to them, the WTO DSU provides for three types of remedy: The withdrawal of the measure, which is final, and two temporary remedies in the form of compensation and retaliation.¹²⁷

Pursuant to WTO DSU Article 3.7 (the first objective of WTO dispute settlement is to withdraw the inconsistent measure) and to WTO DSU Article 19.1 (the end result of a successful WTO complaint is a ruling to the defaulting State to bring the measures into conformity), the first remedy to be adopted, in *principle*,¹²⁸ is the withdrawal (or

¹²⁶ P. Van Den Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 156-311.

¹²⁷ *Ibid.* Referring to the case in *US–Cotton Subsidies on Upland Cotton*, one could argue that this classification is not complete as a WTO party can always decide to pay the price of retaliation and never comply with the decision. This argument is sound. Nonetheless, it does not need to be further inquired for the purpose of the present section, which is to present the main features of the remedies available under the WTO dispute settlement mechanism.

¹²⁸ This type or remedy is contained in Article 3.7 of the WTO DSU. The fourth sentence of this provision provides:

modification) of the measure that is in breach of the WTO obligation. This remedy is final, and is the only remedy that is supposed to bring an end to the dispute. This usually implies a change in the legislation of the defending State, even though the WTO DSU does not specifically require that change, as the State enjoys latitude in the method to be used to satisfy the ruling.¹²⁹

Pursuant to the language of Article 3.7 of the DSU, and in principle, the withdrawal of the WTO-inconsistent measure should be 'immediate'.¹³⁰ However, when the defaulting State cannot take immediate action, Article 21.3 provides for a 'reasonable period of time for implementation'. Pursuant to this Article, this 'reasonable period of time' is either agreed between the parties (which has been the case in the vast majority of trade disputes to date), or determined through binding arbitration (approximately thirty cases to date).¹³¹ Although parties to WTO disputes seem to agree on the length of this period in the majority of cases, in slightly less than thirty cases to date, the length of this period has been decided through binding arbitration pursuant to WTO DSU Article 21.3(c). According to WTO settlement experts, the average time granted for implementation following this arbitration procedure is less than twelve months.¹³²

If a defaulting State does not withdraw or modify the WTO-inconsistent measure by the end of the reasonable period of time, the DSU provides for two alternative remedies: (i) compensation, and (ii) suspension of concessions or other obligations, also called 'retaliation'. These two alternative remedies have to, as their principal objective, induce the defaulting State to eventually comply with the ruling of the WTO judge, and henceforth bring an end to the dispute. In that sense, these two remedies are only temporary. Rules related to the first of these two alternative remedies are contained in WTO DSU Article 22. Pursuant to these rules, compensation is voluntary (the complainant does not have to accept the remedy) and applies only for the future, which is to say that compensation here shall not be considered as a form of reparation. This

"In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measure concerned if these are found to be inconsistent with the provisions of any of the covered agreements."

¹²⁹ This latitude is reduced if the Panel/AB suggest a method to comply in addition to the recommendation. Still, it is usually considered that, contrary to the recommendation, these suggestions on the procedure to be followed to comply with a ruling are not binding on the defaulting State. See P.C. Mavroidis 'Remedies in the WTO legal system: between a rock and a hard place' (2000) 11 *Eur. J. Int'l L.* 763, 789-90.

¹³⁰ This is suggested by the language of WTO DSU Article 3.7, in the fifth sentence, which states that one of the two alternative remedies to withdrawal of the WTO-inconsistent measures, compensation should be envisaged "only if the immediate withdrawal of the measure is impracticable".

¹³¹ Van Den Bossche & Zdouc (*supra* n.126) 196-97.

¹³² World Trade Law has monitored implementation periods in all WTO disputes. The results of their study is available upon subscription at the following address <<http://www.worldtradelaw.net/databases/implementationperiod.php>> (last consulted 1 Aug. 2015).

remedy has been used very sporadically in practice.¹³³ The early case of *Japan–Alcoholic Beverage II*, where the parties agreed compensation through temporary additional market access concession, is usually mentioned as the best examples of compensation.¹³⁴

WTO members have made more use of retaliation. This remedy, which is labeled as a measure of 'last resort' in the DSU,¹³⁵ implies the intervention of the DSB. The complainant shall request authorization to retaliate against the resilient defaulting-State. Authorization is virtually automatically granted, since the decision is taken by reverse consensus. Note, however, that pursuant to DSU Article 22.4, the DSB can only authorize retaliation measures equivalent to the level of nullification or impairment. The major difficulty here relates to the determination of the level of the nullification. In that respect, Article 22.6 provides that disagreements between disputing parties, on this level, are to be arbitrated by the original panel. To date, while requests for authorization to retaliate have been filed in 22 cases, authorization from the DSB have been issued in only nine of them (in all other cases, the requests have not been pursued any further), with the complainant State suspending concessions in only four of these nine cases.¹³⁶

If the answer given by the responding party is considered to be unsatisfactory, compliance proceedings can be subsequently initiated and can result in authorizing retaliatory trade sanctions to the prevailing parties, until measures deemed to comply with the original ruling are implemented. These compliance proceedings are exposed further below.

Remarks

The remedial mechanism of WTO dispute settlement favors continuity. The main concern of this mechanism is, in theory, the withdrawal of the inconsistent measure. Consequently, one could argue that its main objective is to maintain a balance, a level playing field, between all the members of the organization. In theory, the defaulting WTO Member has only to re-establish the *status quo* that trade negotiations allowed to institute. In theory, again, compensation and retaliation are only temporary and a member cannot simply 'buy' its way out of a violation.

¹³³ To my knowledge, it has been used only once in the *United States — Section 110(5) of US Copyright Act* case. See, *United States — Section 110(5) of US Copyright Act - Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1, Award of the Arbitrators (9 Nov. 2001).

¹³⁴ Van Den Bossche & Zdouc (*supra* n.126) 200.

¹³⁵ Article 3.7 last sentence states that:

"The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis *vis-à-vis* the other Member, subject to authorization by the DSB of such measures."

¹³⁶ Van Den Bossche & Zdouc (*supra* n.126) 201.

This remedial mechanism is certainly not perfect.¹³⁷ It has been criticized for several reasons. For instance, in a few cases, strong players did manage to 'buy' their way out, using their economic power and capacities to resist enforcement.¹³⁸ Mavroidis and Hoekman have also demonstrated the limits of the mechanism and its negative effects for private economic actors, which can suffer the consequences of retaliation measures, without having the possibility to obtain compensation.¹³⁹ Yet, overall the mechanism works and that compliance is generally achieved in majority of disputes.¹⁴⁰

Another remark is in order. The WTO remedial mechanism focuses on prospective remedies. In theory retroactive remedies, which are in line with general principles of international law regarding state liability and reparation, could be available, as the DSU does not expressly prohibit them. Yet, there is very limited practice in that respect.¹⁴¹

Because of that, the WTO dispute settlement mechanism is usually seen as deviating from the consequences that international law attaches to the breach of an international obligation. As we will see in the next section, the breach of an international agreement, under general international law, entails the obligation of full reparation. This may further entail an obligation of compensation, as a rule, through the awarding of monetary damages for those adverse consequences that cannot be retroactively redressed. By contrast, in the WTO dispute settlement system, the recommendations are limited to bringing an objectionable measure into conformity with the covered agreement, the first objective of the dispute settlement being to secure the withdrawal of the measure in breach with WTO law. The effect of the decision is, therefore, limited to the future.

2. Compensation in Investment Arbitration

The Law

In contrast to the WTO mechanism of dispute settlement, international investment law does not create a specific remedial regime of State responsibility.¹⁴² Contrary to the

¹³⁷ For a recent study on the work of the WTO Dispute Settlement Body, see, P. Mavroidis, 'Dispute Settlement in the WTO (Mind Over Matter)' (May 2015) *Robert Schuman Centre for Advanced Studies Research Paper*, available upon subscription at <http://cadmus.eui.eu/bitstream/handle/1814/35980/RSCAS_2015_34.pdf> (last consulted 1 Aug. 2015). See also, D. Palmeter & S.A. Alexandrov 'Inducing Compliance in WTO Dispute Settlement' in D.L.M. Kennedy & J.D. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (2002) 647.

¹³⁸ For a review of these cases and their consequences, see e.g. D.J. Townsend & S. Charnowitz, 'Preventing Opportunistic Uncompliance by WTO Members' (2011) 14 *J. Int'l Eco. L.* 437.

¹³⁹ Hoekman & Mavroidis (*supra* n.84).

¹⁴⁰ For a critic of this type of affirmation, see Mavroidis (*supra* n.137) 28-33.

¹⁴¹ See, the Report of the Panel in *Australia–Subsidies Provided to Producers and Exporters of Automotive Leather Recourse to Article 21.5 of the DSU by the United State WT/DS126/RW* (Panel Report, 11 Feb. 2000). See also, Mavroidis (*supra* n.137) 37-40.

¹⁴² For a different position, see Z. Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID' in J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (2010) 815. But see J. Kurtz 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25 *ICSID Rev.* 200 and J. Crawford 'Investment

WTO, investment law instruments (IIAs and Arbitration Rules) are generally silent on issues regarding remedies and compensation.¹⁴³

As a consequence, investment tribunals generally turn to customary international law to address these issues.¹⁴⁴ The PCIJ *Chorzow Factory* case¹⁴⁵ is cited quasi-systematically and serves as a starting point for any discussion on the remedial regime to be applied.¹⁴⁶ Investment tribunals may also refer to the ILC Draft Articles on State Responsibility to illustrate the content of general rules of international law on remedies.¹⁴⁷ Relying on

Arbitration and the ILC Articles on State Responsibility' (2010) 25 *ICSID Rev.* 127. The latter envisages, in a systematic way, all the cases in which the ILC Articles have been referred to. He thus identifies numerous disputes in which the tribunals used ILC Article provisions, related to the consequences of an international breach, as the basis for their reasoning when addressing remedy issues. *See, ibid.* 182-95. On the nature of State Responsibility in investor-State arbitration more generally, see the very informative PhD thesis of French author M. Raux. M. Raux, *La Responsabilité de l'Etat sur le Fondement des Traités de Promotion et de Protection des Investissement* (2010) Thèse pour l'obtention du grade de docteur en droit public de l'Université Panthéon-Assas (Paris II). As to the applicability of ILC Articles in Investment Arbitration, Raux is quick to remind that the ILC Articles provide for the *Lex Specialis* principle in Article 55, and that the Commentary of these articles refers expressly to investment arbitration. He explains nonetheless that Article 55 does not mean that investment tribunals should never refer to these rules: "les traités de promotion et de protection des investissements peuvent déroger au régime général codifié par la C.D.I. sans les exclure nécessairement et intégralement." *See, ibid.* 11. Through his work, Raux then distinguishes situations where ILC Articles can be applied because of no existing *lex specialis* rules from the ones where their application is not appropriate. *Ibid.* 49; 81-97 ; 328-36. When addressing remedial issues, Raux notes that references to ILC are 'omnipresent'. *Ibid.* 435.

¹⁴³ One should note however that new generation IIAs include provisions on remedies. *See* for instance the CETA Current Draft Article X.36.

¹⁴⁴ As mentioned above, Douglas refutes this affirmation and argues that "the law applicable to an issue relating to the consequences of the host state's breach of an investment treaty obligation is to be found in a *sui generis* regime of state responsibility for investment treaties." Z. Douglas, *The International Law of Investment Claims* (2009) 94; *see also* Douglas (*supra* n.94) 121-29. Yet, even a cursory analysis of investment arbitration case law considering this issue confirms that customary international law remains the most prominent source of inspiration for a tribunal's analysis on remedies in investor-State arbitration. To mention only one case, *see Impregilo S.p.A. v. The Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011) ¶361. ("As regards compensation, the basic principle to be applied is that derived from the judgment of the Permanent Court of International Justice in the *Chorzow Factory* case. According to this principle, reparation should as far as possible eliminate the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed").

¹⁴⁵ *The Factory at Chorzow (Germany v. Poland)*, Judgment on Jurisdiction, No. 8 (26 Jul. 1927), PCIJ Series A No. 9, 47.

¹⁴⁶ It is impossible to list here all the cases that referred either specifically (by quoting for instance parts of the decision) or generally to the *Chorzow* decision. Amongst most recent examples, one can for instance mention *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 Sept. 2014) ¶678, where the tribunal noted quite explicitly that "it is well accepted in international investment law that the principles espoused in the *Chorzow Factory* case, even if initially established in a State-to-State context, are the relevant principles of international law to apply when considering compensation for breach of a BIT. It is these well-established principles that represent customary international law, including for breaches of international obligations under BITs, that the Tribunal is bound to apply"; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award (18 July 2014) ¶1587-89 ; *SAUR International S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/4, Award (22 May 2014) ¶86 and references thereunder.

¹⁴⁷ *See contra, Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) ¶113, where the tribunal refused to apply the ILC article because it "contains no rules and regulations of State responsibility vis-à-vis non-State actors: Tribunals are left to determine 'the ways in which State responsibility may be invoked by non-State entities' from the provisions of the text of the particular treaty under consideration." But as already mentioned, the ILC Articles are frequently cited and

these two legal sources, tribunals have found that restitution and compensation are the two forms of reparation to be elected in investment arbitration.¹⁴⁸

Although restitution appears as the primary remedy for a State's breach of international law pursuant to the two above-mentioned sources, and although it is, in principle, available in investor-State arbitration,¹⁴⁹ it can be argued that there are some practical and legal impediments for this type of remedy in investment arbitration.¹⁵⁰ Generally speaking, it is usually considered that if a dispute between an investor and a State was so important as to lead to the initiation of arbitral proceedings (which are long, costly and which will necessarily reveal, and exacerbate, legal, factual and commercial disagreements between the parties), then it is difficult for a tribunal to impose a form of reconciliation that is necessarily implied with restitution. For instance, one may argue that even if a State is required to give an investor back their property, after a finding of unlawful expropriation, it would be difficult to convince the investor to keep its business and pursue its activities in the State against which it legally battled, in probably not the most amicable of manners, during the proceedings. There are, of course, exceptions.¹⁵¹ On two occasions, tribunals did uphold claims for restitutions.¹⁵² But these cases are in the minority.¹⁵³ Furthermore, even in such cases, tribunals envisage contingent remedies either because monetary compensation is impossible, or because of the peculiarity of the

applied by investment tribunals. *See e.g. ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (3 Sept. 2013) ¶339 ("ILC Articles, supported in their commentaries by reference to the authorities, have been regularly referred to in subsequent decisions including ICSID awards and decisions, as codifying or declaring international law"); *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007) ¶42, where the tribunal decided that questions related to the responsibility of the respondent had to be decided in accordance with "applicable norms of general international law, including the customary rules recognized in the Final Draft of the International Law Commission of the UN (hereinafter referred to as "the ILC") Draft Articles on the Responsibility of States".

¹⁴⁸ *See e.g., LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award (25 July 2007) ¶32. Satisfaction, the third form of reparation mentioned in the ILC Articles is sometimes acknowledged as well. *See e.g., Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) ¶790. To my knowledge, this form has never been used in past investment disputes.

¹⁴⁹ For the tribunal, restitution would have been the preferred remedy had it not been for Moldova's uncertainty as to whether restitution would be possible, and the tribunal's lack of power to effectively supervise and enforce restitution. Eventually, the tribunal granted Moldova a period to effect restitution; failing which, it would be required to pay compensation to the investor.

¹⁵⁰ B. Sabāhī, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (2011) 61-62. In *CMS v. Argentina*, the tribunal acknowledged the difficulties for restitution in practice. *See, CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005) ¶406.

¹⁵¹ *See e.g., U. Kriebaum, 'Restitution in International Investment Law' in R. Hofmann & C.J. Tams (eds.), International Investment Law and General International Law : From Clinical Isolation to Systemic Integration?* (2011) 201.

¹⁵² For a recent analysis of the two cases in which restitution has been envisaged, see E. De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (2014) 189-90.

¹⁵³ *Ibid.*

claim,¹⁵⁴ or as an alternative to restitution should the latter fail in practice. For instance, in *Arif v. Moldova*,¹⁵⁵ while addressing remedy issues for a breach of the FET standard, the tribunal noted that both parties agreed, during the proceedings, that restitution was possible. The tribunal explained that it would prefer to support this remedial method, but that it lacked the power to effectively supervise and enforce orders in that regard.¹⁵⁶ Eventually, the tribunal granted Moldova a period to effect restitution; failing which, Moldova would be required to pay compensation to the investor.¹⁵⁷

For these reasons, compensation is usually considered "as the most common type of remedy sought and awarded in investment arbitration."¹⁵⁸ Once this type of remedy is chosen, tribunals then have to decide on the proper standard of compensation applicable in the circumstances of the dispute. Here again, the tribunals are left without detailed guidance as to how to proceed, and this is usually perceived as problematic, since it further complicates the settlement of investment disputes. As Ripinsky and Williams wrote, in one of the major studies on compensation in international investment arbitration, the "lack of a coherent and systematic approach to compensation issues [...] contributes to the uncertainty of the legal environment and the unpredictability of outcomes of disputes."¹⁵⁹ Accordingly, tribunals exercise some discretion, when identifying the standard best suited to the nature of the breach, in the disputes they encounter.

The standards chosen, and the final amount of damages awarded, will usually depend on the cause of action (standards applicable for an exportation claim are not necessarily the same as the ones for the FET standard), on the type of damages (whether the damages relate to investment expenditure, lost profit, incidental expenses, etc.), and on many other technical aspects with which parties and arbitrators are often assisted by experts, and which certainly go beyond the scope of the present studies. What needs to be underlined here is that tribunals have largely agreed that damages can cover both actual damage (*damnum emergens*) as well as profits that were not realized because of the occurrence of the illegal act (*lucrum cessans*).

Remarks

Sykes, in the above-mentioned study, explains why monetary compensation is pertinent in dispute settlement such as investment arbitration. In his view, "the promise of monetary compensation to investors is [...] a cheap commitment device for states with benign intentions toward investors and a cheap way for states with more benign

¹⁵⁴ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010).

¹⁵⁵ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013).

¹⁵⁶ *Ibid.* ¶571.

¹⁵⁷ *Ibid.* ¶572.

¹⁵⁸ Sabāhī (*supra* n.150) 91.

¹⁵⁹ S. Ripinsky & K. Williams, *Damages in International Investment Law* (2008) xxxv.

intentions than others to signal their type."¹⁶⁰ In his views, because investor-State arbitration is about protection ex-post of investors, it is pertinent, to focus on the rights they lose because of State wrongful behavior.

Another reason might be used to explain why monetary damages are favored in investment arbitration. Investment arbitration, even when institutionalized under the ICSID or another arbitral institution, remains of *ad hoc* nature. There is no central institutional of investment arbitration which can be used to continuously monitor the implementation of non-pecuniary remedies. If a (ICSID or non-ICSID, it does not make a difference) tribunal issues an award enjoining the defaulting State to do something, for instance give back the property that has been unlawfully expropriated from the investor, rather than to pay damages to the investor, and if the State refuses to comply, the tribunal has no authority to take any additional decision to force the State to obey with its ruling. The investor is left with no other options than re-litigating the case, either before another investor-State tribunal, trying to demonstrate that the refusal to comply with the award amounts to a breach of an investment obligation, or more likely before domestic courts, using the original award to obtain another form of compensation. Furthermore, one may argue that it has never been envisaged to formally give the opportunity to the tribunals to ask for withdrawal, as it would imply that tribunals have some form of power over regulatory measures. In today's discussion about a possibility to reform investment arbitration, many have insisted that investor-State tribunals do not have such power and that shall not have it in the future.

B. COMPLIANCE: THE AUTOMATICITY OF WTO RULING IMPLEMENTATION VS. THE INTRICACY OF ARBITRAL AWARDS ENFORCEMENT

1. The Effectiveness of the Centralized WTO Mechanism

The WTO DSU centralizes compliance procedures within the WTO system. The DSU provides rules for the application and enforcement of the decisions of either the Panels or the AB. Consequences of non-application or misapplication of WTO court rulings by defaulting States, are spelt out in the DSU. Similarly, the DSU also provides for procedures to monitor compliance with the recommendation.

As explained above, any responding party that is found to act inconsistently with WTO law has a 'reasonable period of time' (or 'RPT') to implement the Panel's or AB's recommendation. Article 21.6 provides that during this RPT (which is determined either by consent between the parties or by arbitration pursuant to WTO DSU Article 21.3(c)), the DSB keeps the implementation of adopted recommendation and rulings under surveillance. In practice, this rule provides an opportunity for all WTO members,¹⁶¹ through the DSB, to exercise a form of multilateral control on the outcomes of a dispute.

¹⁶⁰ Sykes (*supra* n.77) 644.

¹⁶¹ Article 21.6 provides states indeed that "the issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption".

The defending state is required to provide written reports of its progress in the implementation of rulings and recommendations. Arguably, these reports create an incentive for the State to comply with the ruling.

When a defaulting state attempts to comply, and therefore withdraw or modify the inconsistent measure, it is possible that the original complainant considers that such an attempt does not satisfy the ruling. Thus, new disagreement between the parties can arise. Parties can for instance disagree as to whether implementation measures have been taken, or on the consistency of these measures with the WTO.¹⁶² In that case, Article 21.5 provides for recourse to a WTO panel. New proceedings, usually called 'compliance proceedings', are initiated, and the rules set out in the DSU are applicable, with only few deviations related to the delays, in order to make these compliance proceedings more expeditious.

As mentioned previously, if the defending party refuses to comply with the ruling either at the end of the RPT or at the end of the one opened subsequent to the compliance proceedings, the other party has the possibility of requesting compensation. If no agreement is found for compensation, then the winning party may request to create, or raise, tariffs against the violating State, equivalent to the injury suffered. The authorization for retaliation is given by the DSB. New disagreements on the proportionality and effect of the retaliation measures may arise, but the DSU again provides for rules to overcome these difficulties.

2. The Intricacy of the Enforcement of Investment Arbitral Awards

Once an investment tribunal issues an award in which the defending State is ordered to pay compensation to the investor, the defending State may either voluntarily comply with the award, or refuse to do so. It is usually preached that investment arbitration awards are voluntarily complied with at a high rate.¹⁶³ Amongst the incentives to voluntarily comply with awards, one can mention, for instance, the upholding of a State's reputation, the possibility of political embarrassment, the reluctance of States to send the wrong message to potential investors and business partners more generally, the possible pressure that may be applied by international community, and the high costs involved in resisting compliance. These incentives are real, but their effects are not unconstrained. Recent examples have shown that States may, nevertheless, refuse to comply with

¹⁶² Van Den Bossche & Zdouc (*supra* n.126) 293.

¹⁶³ See e.g., A. Reinisch, 'Enforcement of Investment Awards' in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2010) 671, 671; S.A. Alexandrov & I. Laird, 'Compliance and Enforcement' in P. Muchlinski, F. Ortino & C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) 1171, 1174. Although precise numbers are missing, only few enforcement proceedings regarding investment awards have come to light. Such proceedings necessarily imply that the investor is taking action to constrain the State, so to make it comply with the adverse-award, and their rarity can be used to claim that the belief according to which 'States will comply' is not unfounded.

arbitral rulings.¹⁶⁴ In that case, the investor has to take action to enforce the award, and the mechanism to do so, depends on the applicable rules governing the arbitral award.

The Law and the Distinction between ICSID and Non-ICSID Awards

According to last UNCTAD statistics, approximately 55% of investment disputes are brought before ICSID tribunals.¹⁶⁵ Chapter IV, Section 6, of the ICSID Convention, entitled 'Recognition and Enforcement of the Award', offers what seems to be an efficient mechanism for the recognition of awards. This section gives investors the possibility to seek the enforcement of awards, against a respondent State's assets, before the domestic courts of all ICSID contracting parties (approximately 160 States).

Article 53 of the ICSID Convention provides that "the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." This provision refers to the ICSID annulment procedure as the only remedy against the award.¹⁶⁶ Other, external, remedies to challenge, set aside, or review an ICSID award before domestic courts or elsewhere, are thus excluded.¹⁶⁷ This control, over the remedies against the award, is usually presented as one the greatest advantage of the ICSID Convention.¹⁶⁸

Pursuant to Article 54, each contracting party to the ICSID Convention "shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." In practice, this means that the investor may go 'hunting' for commercial assets belonging to the recalcitrant State, not only within the jurisdiction of that State, but wherever such assets are held, provided that they are held in a State that is party to the ICSID Convention.

Despite the apparent automaticity created by Articles 53 and 54, the execution and enforcement of ICSID awards is not limitless. The most important obstacles are the rules relating to State immunities. Indeed, the ICSID does not derogate from these rules as

¹⁶⁴ See, T.-Y. Lin 'Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?' (2012) 5 *Contemporary Asia Arb. J.* 1. On the issue of non-compliance with investment awards more generally, see V.J. Tejera Pérez 'Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards' (2012) 3 *J. Int'l Dispute Settlement* 1; C.B. Rosenberg 'Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards' (2012) 44 *Georgetown. J. Int'l L.* 503.

¹⁶⁵ See UNCTAD, 'Recent Developments in Investor-State Dispute Settlement' (Apr. 2014) UNCTAD *IIA Issue Note*, p.4, available at <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf> (last consulted 1 Aug. 2015).

¹⁶⁶ As we will see in the last development of the present section, this procedure permits *ad hoc* committees to review award on specific grounds.

¹⁶⁷ *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment (6 Jan. 1988) ¶4.2 ("The post-award procedures (remedies) provided for in the Convention [...] are to be exercised within the framework of the Convention and in accordance with its provisions. It appears from these provisions that the Convention excludes any attack on the award in national courts").

¹⁶⁸ Reinisch (*supra* n.163) 674.

applicable under the law of the State where execution is sought. The language of Article 55 is clear in that regard:

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

In practice, the investor, facing non-compliance from the defending State, who initiates enforcement proceedings before a domestic court, will have to target commercial assets, because most jurisdictions distinguish between sovereign and commercial property, and allow execution only on the latter.¹⁶⁹

In theory, the possibility of relying on State immunity from execution does not alter the fact that non-compliance with an award is a violation of the ICSID Convention. ICSID Article 53 is clear in that regard. The obligation to comply with an award is independent of any potential defense that could be used at the enforcement stage, including ones on immunity. This was clearly stated in one of the first ICSID arbitration cases, *MINE v. Guinea*,¹⁷⁰ and reaffirmed more recently in *Mitchell v. Congo*, where it was stated that:

"The immunity of a State from execution (Article 55 of the Convention) does not exempt it from enforcing the award, given its formal commitment in this respect following signature of the Convention."¹⁷¹

In practice however, when the defending State succeeds in invoking its immunity from execution, the award, whilst still binding, cannot be enforced. Therefore, the investor cannot be compensated.

The ICSID convention indirectly contemplates what can be considered as two alternative enforcement methods, for when a defending State refuses to comply. The non-observance of the ICSID Convention obligation to comply with ICSID awards, clearly constitutes a violation of an obligation pursuant to the ICSID Convention. As the *MINE v. Guinea* tribunal noted, this violation can attract its own sanction.¹⁷² Firstly, it can be used "to revive the right of diplomatic protection of the home-State of the prevailing investor."¹⁷³ In that case, ICSID Article 27 could be referred to, as the latter expressly allows home-States to initiate international actions against a host-State that is failing to abide by, and comply with, an ICSID award.¹⁷⁴ Secondly, inspired by Article 64

¹⁶⁹ *Ibid.*

¹⁷⁰ *MINE v. Guinea* (*supra* n.167), Interim Order No.1 on Guinea's Application for Stay of Enforcement of the Award (12 Aug. 1988) ¶25.

¹⁷¹ *M. Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award (30 Nov. 2004) ¶41.

¹⁷² *MINE v. Guinea* (*supra* n.167), Interim Order No.1 on Guinea's Application for Stay of Enforcement of the Award (12 Aug. 1988) ¶25.

¹⁷³ Reinisch (*supra* n.163) 690.

¹⁷⁴ ICSID Convention Article 27(1) reads as follows:

"No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall

of the Convention, the investor could also attempt to persuade its home-State to initiate proceedings against the host-State before the ICJ. Article 64 provides for referral to the ICJ when regarding the 'interpretation and application' of the Convention. These two alternative methods were envisaged in *Mitchell v. Congo*. The *ad hoc* Committee in that case affirmed that:

"If [the defending State] does not enforce the award, its behavior is subject to various indirect sanctions. Precisely, reference is made to Articles 27 and 64 of the Convention. The investor's State has the right, according to Article 27 to exercise diplomatic protection against the State which does not respect its obligation to enforce an arbitral award of the Centre; but also, according to Article 64, to have recourse to the International Court of Justice. Moreover, a State's refusal to enforce an ICSID award may have a negative effect on this State's position in the international community with respect to the continuation of international financing of the inflow of other investments."¹⁷⁵

Until recently, these alternative methods had remained textbook hypotheses. With the resilience of certain States, in not enforcing ICSID awards, investors have started to consider making use of them. For instance, following Argentina's refusal to comply with ICSID awards, several US investors have petitioned their government, requesting that their government acts on their behalf, by imposing trade sanctions against Argentina.¹⁷⁶

For cases falling outside the ICSID system, arbitral awards will be subject to rules applicable under the New York Convention on Recognition and Enforcement of Arbitral Awards, provided that the State where enforcement is sought is party to the Convention.

The core provision of the New York Convention is the obligation to recognize and enforce foreign arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon" and under the conditions established by the Convention itself.¹⁷⁷ This obligation, to enforce awards, is subject to a limited number of exceptions, all listed in Article V of the Convention. Generally speaking, these exceptions relate either to serious defects of the arbitral process, or to fundamental vales of the State where enforcement is sought. More precisely, Article V(I) allows domestic courts to refuse enforcement when the party challenging enforcement can prove (a) the invalidity of the arbitration agreement; (b) lack of notice or violation of due process; (c) excess of power by the arbitral tribunal; (d) irregular composition of the arbitral tribunal; or (e) that the award has not yet become binding, or was set aside or suspended in the

have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

¹⁷⁵ *Mitchell v. Congo* (supra n.171) ¶41.

¹⁷⁶ See R.P. Alford 'The Convergence of International Trade and Investment Arbitration' (2013) 12 *Santa Clara J. Int'l L.* 35, 50-55. See also, Rosenberg (supra n.164).

¹⁷⁷ The first sentence of the New York Convention Article III reads as follows:

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."

country of origin. In addition, pursuant to Article V(II), the recognition and enforcement of an award may be refused if the subject matter of the dispute is considered 'not capable of settlement by arbitration', or if it would be contrary to the public policy of the country of enforcement.

Finally, Article III of the New York Convention does not exclude obstacles to enforcement measures based on the rules on State immunity. In a similar way as to what has been discussed earlier, defending States may thus rely on these rules to resist the execution of awards and seizure of their assets.

Challenges against non-ICSID awards (investment awards which have been issued by tribunals acting upon arbitration rules other than those in the ICSID convention; for instance UNCITRAL Arbitration rules) have been attempted on several occasions. In general, domestic courts have been reluctant to exercise too strict a review, and have focused on the most serious breaches of the grounds provided for by the New York Convention to set aside the award.¹⁷⁸ It is generally accepted that the standard of review to be used, by domestic courts that are called upon to enforce foreign awards, should be a deferential one, permitting refusal only in exceptional situations.¹⁷⁹

Remarks

The first remark that needs to be made is that investment award enforcement mechanisms are not dualistic. There is the ICSID mechanism on one side, which aims at automaticity, and the rest on the other. This is something that investors need to take into account at the very beginning of the dispute, when they introduce the claim.

Second, it is important to keep in mind that the mechanics for enforcement of investment awards are largely decentralized. In the event of a State not complying with an award, even if the award has been issued by an ICSID tribunal, the investor will necessarily have to go before a domestic court to enforce the award. In such a case, domestic procedural rules, which differ from one State to another, will apply. Of course, the New York Convention is supposed to provide some guidance, by standardizing the requirements for the enforcement of awards. However, these requirements are applied by the domestic courts. Furthermore, it is important to note that case-law on the

¹⁷⁸ Reinisch (*supra* n.163) 676.

¹⁷⁹ *Czech Republic v. CME Czech Republic BV*, Sweden, Svea Court of Appeal (15 May 2003), published in ICSID Report vol.9, 439, at 493 (where the Swedish Appellate Court acknowledged that "has adopted a restrictive approach towards the possibilities to successfully have an arbitration award declared invalid or set aside based on a challenge" and added that "[o]n the international plane, this restrictive approach has been expressed in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and in UNCITRAL's Model Law". Citing the CJEU decision in *Eco Swiss* [CJEU, Case C-126/97, *Eco Swiss*, ECR 1999, I-3055], the Swedish court further affirmed that "in this context, it may be noted that, the European Court of Justice stated that 'it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances.'" See also, *Mexico v. Feldman Karpa*, Canada, Ontario Court of Appeal (11 Jan. 2005), published in ICSID Reports vol.9, 508, ¶34 ("[n]otions of international comity and the reality of the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly").

Convention might differ from one State to another. As we have seen recently in the *Micula v. Romania* arbitration, investment awards are not foreign to that notion, and the divergences in its interpretation might be seen as problematic.

Thus, it is possible to conclude, in that respect, that in comparison with the WTO mechanism, in investment arbitration, non-compliance from a State is more difficult to handle, and is subject to more uncertainties.

C. ANNULMENT AND APPEAL: CENTRALIZED VS. DECENTRALIZED

1. The WTO Appellate Body and its Principal Function

The WTO AB was created in 1995 in the framework of the Uruguay Round. At that time, it was an innovative feature in international trade dispute settlement, and remains so to this day. This innovative character is represented by the rules governing the structure of this organ and the way it operates. The rules are set out in WTO DSU Article 17. They can be presented in the following synthetic manner:

- This article provides for a standing, permanent, international tribunal. It is made of seven 'members', appointed for four years,¹⁸⁰ with the possibility of being re-appointed once.¹⁸¹
- Cases are heard by divisions of three members,¹⁸² the AB thus never sits in the *Assemblée Plénière* to decide on a case.¹⁸³
- Pursuant to Article 17.7, and the internal procedure rules applicable to it, the AB has its own secretariat, which is both separate and independent from, the WTO secretariat.¹⁸⁴ This secretariat is composed of full time lawyers who assist the AB members with legal research and related assistance with pending cases.

¹⁸⁰ The members are not full time judges. Yet, they must be available for the needs of any case. They can exercise other duties in parallel to their work in the AB but strict rules regarding conflict of interest apply. They also have to be independent from any government, and are not receive instruction from any government either.

¹⁸¹ Pursuant to Article 17, and the recommendation made by the DSB at the time of the establishment of the AB in 1995, the composition of the AB shall be representative of the membership of the WTO. Factors such as the geographical areas, the level of development, and the legal system of potential candidates and actual members' country of origin have thus to be taken into account when appointing a new member. *See*, Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, *Establishment of the Appellate Body*, 10 February 1995, WT/DSB/1, date 19 June 1995, ¶5 (hereinafter "Recommendations – *Establishment of the AB*"). The composition of the Appellate Body at the time of the drafting is as follows: Mr. Ujal Singh Bhatia (India), Mr. Peter Van den Bossche (European Union), Mr Seung Wha Chang (South Korea); Mr. Thomas R. Graham (US); Ricardo Ramírez-Hernández (Mexico); Mr. Shree Baboo Chekitan Servansing (Mauritius); Mrs. Yuejiao Zhang (China).

¹⁸² Three members to hear a given case are selected on a rotating basis, taking into account the principles of random selection and unpredictability and opportunity for all Members to serve, regardless of their nationality.

¹⁸³ Informally, members consult each other and exchange their views on each appeal. Van Den Bossche & Zdouc (*supra* n.126) 234. Additionally, pursuant to the rules on the Working Procedures of the AB, the seven members convene on a regular basis to discuss issues of policy, practice and procedure.

¹⁸⁴ *Ibid.* 234, citing Recommendations – *Establishment of the AB* (*supra* n.181) ¶17.

- Proceedings before the AB are organized through rounds of written pleadings and a hearing. Although proceedings are defined as confidential, following GATT practice, the AB has taken it upon itself – in the absence of an applicable rule – to provide transparency. The AB has thus admitted *amicus curiae* briefs, and when the parties agree, allowed for the viewing of hearings, as well as the representation of parties by private lawyers.
- Article 17.6 states that appellate review "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". In other words the AB may uphold, modify or reverse the legal findings and conclusions of the Panels. In that regard, it may complete the analysis of the Panels should they be uncontroversial.
- The AB does not bear the power to remand.
- Finally, the AB has the same prerogatives as the Panels in term of the remedies it can grant. If the AB concludes that a measure is inconsistent with a covered agreement, it recommends that the member concerned brings the measure into conformity with it.

Beyond this schematic description, the AB may be perceived as one of the pillars of the trade regulation system. Historically, the AB was created to give the parties to a dispute a 'second shot'. Studying the *travaux préparatoires* of the WTO DSB, today's structure shows that several countries were worried about the instauration of negative consensus for decision making, with regard to recommendations to be made following a finding of a violation of WTO obligations, and the automaticity it implied.¹⁸⁵ They thus insisted upon the introduction of this second degree of jurisdiction, which would be used to control the work of the panels. Today, several authors argue that the AB has transcended this strict 'watchdog' function and plays a major role in guaranteeing the proper application and interpretation of the law, in the interest of all the members of the organization.¹⁸⁶ According to them, appellate review by a standing body composed of permanent judges is meant to ensure consistency, over time, in the application and interpretation of the laws within the organization. In that sense, these authors argue that it is the AB that ought to carry out the public function described in the first section of this chapter, that is "to preserve and clarify the existing provisions of those agreements."¹⁸⁷ Recently, two authors have worded this idea as follows: the "Appellate Body has laid down a systematic and consistent interpretation of the WTO agreements

¹⁸⁵ D. Palmeter, P.C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (2004) 305.

¹⁸⁶ For an interesting and recent study on the extension of the AB's authority, see G.C. Shaffer, M. Elsig & S. Puig 'The Extensive (but Fragile) Authority of the WTO Appellate Body' (2014) University of California - Irvine School of Law Legal Studies Research Paper Series No. 2014-54.

¹⁸⁷ *Ibid.*

that has increased the reliability, predictability and stability of the WTO system as the tool of governance of the multilateral trading system."¹⁸⁸

A close look at the jurisprudence emanating from the AB, shows that these affirmations cannot be systematically verified. For as regards several WTO obligations, there has been fluctuation in the analysis proposed by the judges. Horn and Mavroidis have reviewed the literature on this issue and,¹⁸⁹ relying on the work of various experts, and on studies on the American Law Institute project,¹⁹⁰ demonstrate that several flaws can easily be identified in establishing a consistent approach to the interpretation of WTO rules of given WTO rules.¹⁹¹

Divergences in AB case law certainly exist and should not be overlooked. After all, the AB is not bound by the rule of *stare decisis*.¹⁹² Whilst the AB may attach significance to the reasoning provided in previous panel and AB reports, it remains free to adapt its jurisprudence to the development of new arguments presented by the parties and their counsels, and to correct possible errors made in previous decisions.

Nonetheless, practice shows that the AB systematically relies on previous case-law. Reports issued by the AB now include a list of all the cases mentioned and cited in the reasoning of the judges. In addition, one might accept that lines of reasoning that almost always justified by a reference to previous reports in contemporary decisions. Of course, commentators frequently note that reliance on previous case law is not always sound and that the AB itself does not develop a perfectly coherent jurisprudence. Yet, it is difficult to deny that the AB does refer, extensively, to its previous decisions. In that sense, it is

¹⁸⁸ G. Sacerdoti & M. Recanati, 'From Annulment to Appeal in Investor-State Arbitration: Is the WTO Appeal Mechanism a Model?' in J.A. Huerta-Goldman, A. Romanetti & F.X. Stirnimann (eds.), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (2013) 327, 333.

¹⁸⁹ P.C. Mavroidis & H. Horn, 'International Trade: Dispute Settlement' in A.T. Guzman & A.O. Sykes (eds.), *Research Handbook in International Economic Law* (2008) 177, 207-08.

¹⁹⁰ *Ibid.* 207, citing A.O. Sykes 'The Least Restrictive Means' (2003) 70 *U. Chicago L. R.* 403; A.O. Sykes 'The Safeguards Mess: A Critique of WTO Jurisprudence' (2003) 2 *World Trade Rev.* 261 and the 2004, 2005 and 2006 annual report of the American Law Review.

¹⁹¹ In their 2008 study, Horn and Mavroidis refer notably to the absence of systematic criteria for the analysis related to the necessity test and the less restrictive approach, or the incoherent case law of the AB on the textual preconditions for the use of safeguards. Several other inconsistencies in the AB jurisprudence may be identified. For instance, Pauwelyn and DiMascio in their studies on non-discrimination in trade and investment explain how the approach of the WTO AB regarding the concept of likeness in GATT Article III:4 has "cycled through varying degrees of strictness and laxity". DiMascio & Pauwelyn 'Nondiscrimination in Trade and Investment Treaties: World Apart or Two Sides of the Same Coin?' (2008) 102 *Am. J. Int'l L.* 48, 62-66. Still in the context of National Treatment, even a brief study of the AB reports in *Dominican Republic—Cigarettes* and in *EC—Seal Products* show two largely diverging approaches with regard to the notion of 'less favorable treatment'. See *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, Appellate Body Report (25 Apr. 2005) ¶¶96-100 and *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R; WT/DS401/AB/R, Appellate Body Report (22 May 2014) ¶¶5.79-82.

¹⁹² As explained in *US—Stainless Steel*, relying on previous decisions can be used to "to promote 'security and predictability' in the dispute settlement system". See, *US—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (AB Report, 31 Apr. 2008) ¶161.

possible to argue that the existence of a centralized body, such as the AB, does more good than harm in respect of consistency.

2. The Absence of an Appellate Mechanism in Investment Arbitration

The Law

The ability to appeal, in investment arbitration, is one of the discipline's most talked about issues at the moment, especially because it entered the scope of proposed reform and suggestions for the emerging EU investment arbitration policy. Today, international investment arbitration does not provide for a centralized mechanism of appeal.

As mentioned earlier, ICSID awards are subject only to limited remedies laid down in Articles 50 to 52. Articles 50 and 51 provide for rules regarding the interpretation or revision of an award, provided that the latter contains information that needs to be clarified,¹⁹³ or that new facts capable of changing the outcome of the dispute have come to the knowledge of one of the parties.¹⁹⁴ More importantly, Article 52 gives to parties the possibility to seek the annulment of an award before an *ad hoc* Committee established pursuant to the ICSID Convention. This internal 'annulment committee' will consider a request for annulment on strictly limited grounds, set out in Article 52(1):

- a. the tribunal was not properly constituted;
- b. the tribunal has manifestly exceeded its powers;
- c. there was corruption on the part of a member of the Tribunal;
- d. there has been a serious departure from a fundamental rule of procedure; or
- e. the award has failed to state the reasons on which it is based.

Tribunals and investment arbitration experts have been adamant when highlighting the distinction between annulment and appeal. Annulment does not mean a review of a tribunal's original legal analysis. Rather, *ad hoc* committees have to exercise great care in ensuring that the reasoning of an arbitral tribunal is clearly understood, and must guard against the annulment of awards for trivial matters.¹⁹⁵ As the tribunal in *AES v. Hungary* noted:

¹⁹³ Article 50(1) of the ICSID convention on Interpretation reads as follows:

"(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General."

¹⁹⁴ Article 51(1) of the ICSID convention on Revision states that:

"(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence."

¹⁹⁵ In this sense, see e.g. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), ICSID Case ARB/97/3, Decision on Annulment (3 July 2002) ¶¶61-63; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case ARB/98/4, Decision on Annulment, 5 Feb. 2002) ¶18 ("It has been stated in earlier published decisions made on requests for annulment of ICSID awards, the remedy of Article 52 is in

"With respect to [Article 52] the drafters have taken great care to use terms which clearly express that annulment is an exhaustive, exceptional and narrowly circumvented remedy and not an appeal. The interpretation of the terms must take this object and purpose into consideration and avoid an approach which would result in the qualification of a tribunal's reasoning as deficient, superficial, sub-standard, wrong, bad or otherwise faulty, in other words, a re-assessment of the merits which is typical for an appeal."¹⁹⁶

When a committee upholds an application for annulment, the original award is set aside. The annulment decision does not replace the original award. It nullifies the ruling(s) of this original award and leaves the parties in the same position as before arbitration was initiated. Article 52(6) makes it clear: if one of the parties still wants a decision on the dispute, it shall initiate new arbitration proceedings.

For cases falling outside the ICSID system, as mentioned earlier, arbitral awards may be subject to challenge proceedings before domestic courts, on potentially broader grounds than ICSID annulment proceedings. Again, in most domestic systems, the scope of review will be rather limited and, generally, domestic courts will be reluctant to decide again upon a case, when examining whether the award shall be annulled.

Remarks

The absence of a centralized appellate mechanism for international investment arbitral awards, is seen by many as a problem, most notably in light of several inconsistent decisions issued over the last years on the application and interpretation of investment norms.¹⁹⁷ The introduction of an appellate mechanism in investment arbitration has been suggested on numerous occasions,¹⁹⁸ and there is an abundant number of studies and reports produced by authors and institutions on this issue, as well as on how to proceed towards the creation of such mechanism.¹⁹⁹

no sense an appeal. The power for review is limited to the grounds of annulment as defined in this provision. These grounds are to be interpreted either narrowly nor extensively.").

¹⁹⁶ *AES Summit Generation Ltd. and AES-Tisza Erőmű Kft. v. Hungary*, ICSID Case No. ARB/07/22, Decision on Annulment (29 June 2012) ¶17.

¹⁹⁷ Franck (*supra* n.55) 1528; A. Joubin-Bret, 'The Growing Diversity and Inconsistency in the IIA System' in K. Sauvant & M. Chiswick-Patterson (eds.), *Appeals Mechanism in International Investment Disputes* (2008) 137.

¹⁹⁸ See e.g., ICSID Secretariat, *Possible Improvement of the Framework for ICSID Arbitration* (Discussion Paper, 22 Oct. 2004), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&Announce_No=14_1.pdf> (last consulted 1 Aug. 2015).

¹⁹⁹ See e.g., the various studies compiled in K.P. Sauvant & M. Chiswick-Patterson, *Appeals Mechanism in International Investment Disputes* (2008) and in J.E. Kalicki & A. Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (2015). See also, UNCTAD, *IIA Issue Note – Reform of Investor State Dispute Settlement: In Search of a Roadmap*, UNCTAD IIA Issue Note (June 2013), available at <http://unctad.org/en/publicationslibrary/webdiaepcb2013d4_en.pdf> (last consulted 1 Aug. 2015); K. Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement', OECD Working Papers on International Investment No. 2006/01, OECD Publishing available at <http://www.oecd.org/china/WP-2006_1.pdf> (last consulted 1 Aug. 2015).

The main argument in favor of an appellate institution is that this institution could strengthen confidence in the dispute settlement system, and therefore facilitate the acceptance of, and compliance with, adverse outcomes in particular cases, as well as ensuring consistency in interpretation from one dispute to the next.²⁰⁰

Contrastingly, the skeptics underline the costs involved in the creation of an appellate mechanism, and how it would necessarily imply a reform of the ICSID convention and so too, possibly, amendments to all existing IIAs, which do not envisage the possibility of an appeal of arbitral awards. Furthermore, in the eyes of the skeptics, this mechanism could be systematically used by States (which would have a political incentive to challenge an adverse award at whatever cost) and could alter the general balance that exists today in investment disputes.²⁰¹

Overall, there is a shared understanding that if this appellate mechanism should see the light of day, the framers of this mechanism will have to pay the closest attention in building its essential aspects and technical features. Issues, such as those related to the possibility of remand, costs and length of the proceedings, application of the *stare decisis* principle, and the appointment of appellate judges, will need to be carefully addressed before moving forward with the creation of a standing international investment arbitration appellate court. Interestingly, many authors argue that the WTO AB could be used as a model for crafting such a court.²⁰²

V. CONCLUSIONS

This chapter has shown that the institutional designs of the dispute settlement mechanisms of the international trade and investment legal regimes are very different.

In fact, their dispute settlement mechanisms can be used as a catalyst to understand the differences between the two disciplines.

More importantly, the underlying principles, and economics, of both disciplines seem to justify their different institutional designs. The substantive norms of trade and investment law may have common roots, but the way these norms are applied and enforced is different, and there are good reasons for that.

Because of that, it seems unrealistic to plead for a formal, institutional reconciliation of trade and investment law. Not because they apply totally different substantive norms, but because their dispute settlement mechanisms operate differently.

Against this background, and having in mind the axiom presented in the introduction (coordination between trade and investment norms is positive), and the conclusions made in the previous chapter (international investment law and international trade law, as

²⁰⁰ B. Legum, 'Options to Establish an Appellate Mechanism for Investment Disputes' in M. Chiswick-Patterson & K. Sauvart (eds.), *Appeals Mechanism in International Investment Disputes* (2008) 231, 235.

²⁰¹ *Ibid.*

²⁰² Sacerdoti & Recanati (*supra* n.188).

disciplines, share the same roots when it comes to substantive rules), we will need to look into what I call soft integration techniques, which are the rules allowing the adjudicator of one discipline to better apprehend norms applied in the other.

The next chapter demonstrates that investment tribunals have often found themselves in situations where they have to apply, or at least refer to, trade norms, emphasizing the need for trade norms in the international investment discipline.

CHAPTER 3.

MAPPING THE CURRENT USE OF TRADE NORMS IN INVESTMENT ARBITRATION

I. INTRODUCTION

Investment arbitration actors frequently refer to trade norms. Reflecting upon these references, some scholars have argued that the use of trade law in investment arbitration should be welcomed, whilst others have argued the opposite.¹ Interestingly, no one has, so far, attempted to conduct an exhaustive research on all of the investment cases where trade norms have actually been referred to. Instead, they focus on a limited sample of cases, in which one type of reference (for instance a reference to one specific GATT rule) is made.

This chapter seeks to fill this gap, and present the results of such exhaustive research. The main finding, is that references to trade norms, in investment arbitration, are made more often than one might think and can be categorized into four different situations. Trade norms have been used (i) to illustrate a factual or incidental legal element of the investment dispute, (ii) to interpret a substantive investment norm, (iii) to counter a claim relating to a breach of an investment obligation and, finally, (iv) as the basis of a claim relating to a breach of an investment obligation. Further, the research, which I have conducted, allows me to present the reasoning of investment tribunals, when using WTO law, and to address the following question: what is the rationale, or more accurately, what are the rationales, behind the use of trade law in investment practice? By addressing this question, I highlight the reasons why referring to trade norms can be pertinent.

¹ See e.g. J. Kurtz 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents' (2009) 20 *Eur. J. Int'l L.* 749 ; R. Howse & E. Chalamish 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz' (2009) 20 *Eur. J. Int'l L.* 1087 ; G. Tereposky & M. Maguire, 'Utilizing WTO Law in Investor State Dispute Settlement' in A.W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010* (2011) 247 ; D. Collins 'A New Role for the WTO in International Investment Law: Public Interest in the Post-Neo Liberal Period' (2010) 25 *Connecticut J. Int'l L.* 1 ; M. Wu, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime' in Z. Douglas, J. Pauwelyn & J.E. Viñuales (eds.), *The Foundations of International Investment Law* (2014) 169.

From these results, this chapter develops the following argument: the use of trade norms by investment tribunals is not problematic if undertaken carefully; 'undertaken carefully' meaning that the specific situation, in which the reference is made, is taken into account.

This argument fits into the broader narrative defended in the present thesis by putting forward the idea that a better apprehension of trade norms by investment tribunals will foster a more efficient convergence between the international trade and investment disciplines and enhance the legitimacy of investment arbitration.

This brief introduction is followed by the presentation of the methodology I used to perform this research and the general results I have obtained (Section II). I then analyze, in four different sections, the four situations in which investment tribunals have made use of trade norms: as a factual or incidental legal element (Section III) as an interpretative element (Section IV), as part of a claim (Section V) and as part of a defense (Section VI). The last section (Section VII) concludes.

II. SETTING THE SCENE: RESEARCH, METHODOLOGY AND FINDINGS

A. RESEARCH AND METHODOLOGY

The following developments introduce the results of an empirical analysis on the use of WTO law in investment treaty disputes. The data was collected from all the dispute materials available on the Investor-State Law Guide database. The period covered for the search runs from 20 July 1987 (date on which the first BIT dispute was introduced)² to 1 August 2015.

The main objective of this work is to determine when, and why, investment arbitration actors use WTO norms. In order to do this, I chose to identify precisely when, and how, investment arbitration actors 'refer to' (in the literal sense) WTO norms.

This research was performed in three stages. First, I identified all the disputes in which the term 'World Trade Organization', and/or acronym 'WTO', were used. Once this first enquiry was completed, I then ran additional rounds of research, looking for references to the main WTO multilateral agreements, *i.e.* those referred to in Annexes I and II of

² I refer to the seminal case *AAPL v. Sri Lanka*, which is known today to be the first case in which an international arbitration tribunal has accepted jurisdiction on the basis of an international investment agreement. For information on the proceedings about this case, *see* the case webpage on the ICSID website available at <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/87/3> (last consulted 1 Aug. 2015). According to my research the first case in which a trade norm has been referred is *Ethyl Corporation v. Canada*, a NAFTA dispute initiated before a UNCITRAL tribunal in 1997. In its notice of arbitration, the claimant referred to GATT jurisprudence to elaborate on how National Treatment should be interpreted. *See Ethyl Corporation v. Government of Canada*, UNCITRAL, Notice of Arbitration (14 April 1997) ¶¶ 16-17.

the Marrakesh Agreement as well as the Government Procurement Agreement.³ Hence, I looked for all the materials in which 'WTO' did not appear and at least one of the following fourteen other terms and/or acronyms did:

- (i) General Agreement on Tariff and Trade/GATT;
- (ii) General Agreement on Trade in Services/GATS;
- (iii) Trade-Related Aspects of Intellectual Property Rights/TRIPS;
- (iv) Agreement on Trade-Related Investment Measures/TRIMS;
- (v) Technical Barriers to Trade/TBT;
- (vi) Sanitary and Phytosanitary Measures Agreement/SPS;
- (vii) Agreement on Agriculture;
- (viii) Agreement on Textiles and Clothing;
- (ix) Agreement on Preshipment Inspection;
- (x) Rules of Origins;
- (xi) Agreement on Import Licensing Procedures;
- (xii) Agreement on Subsidies and Countervailing Measures;
- (xiii) Understanding on Rules and Procedures Governing the Settlement of Disputes; and
- (xiv) Government Procurement Agreement.⁴

After identifying all available materials referring to WTO norms, the third step of the research consisted in identifying and classifying which of the WTO Appellate Body (hereinafter "AB") and Panels decisions have been used in investment arbitral decisions and awards. This third step had three objectives: on a practical basis, it was used to cross-reference the results of first two steps and, more interestingly, to draw comparison with the use of other international courts and tribunals jurisprudence. Finally – and on a

³ The present dissertation is about the relation between investment arbitration and trade dispute settlement. Therefore, it made sense to look at investor-State arbitral tribunal references to all the agreements that can be applied by the WTO adjudicator, *i.e.* those referred to as the 'covered agreements' in the WTO DSU. These 'covered agreements' are listed in the Appendix 1 of the WTO DSU and include the multilateral agreements referred to in Annexes I and II, and the plurilateral agreements for which a decision by their parties setting out the terms for the application of the DSU has been adopted. Such a decision has been taken for the Government Procurement Agreement (GPA). It is the only plurilateral agreement which can be subject to WTO DSU proceedings. The Committee on Trade in Civil Aircraft for the Agreement on Trade in Civil Aircraft, did not take a decision in that respect and the two other existing plurilateral agreements, the International Dairy Agreement, and the International Bovine Meat Agreement, are no longer in force. *See*, the information relating to the substantive scope of the dispute settlement system on the WTO website, available at <www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c1s5p1_e.htm> last consulted (1 Aug. 2015).

⁴ For the thirteen additional rounds of research (those for each of the main multilateral agreements), apart from the two ones relating to the GATT (49 documents) and GATS (height documents), the results were limited (between zero and four of documents for each terms/acronym). Henceforth, I assumed that searches for references to any of the other multilateral WTO agreements (without mention being made to the WTO itself), *i.e.* the various understandings and agreements on implementation of specific provisions of the GATT 1994, were not necessary as they would most probably be inconclusive.

more substantial basis – it allowed for the identification of different categories of references to WTO case law.

The research, in an effort to encapsulate more than what could be achieved by concentrating solely on arbitral awards, covers all, publically available, 'dispute materials'.⁵ It was assumed that WTO norms can be discussed during proceedings, and thus influence, in a certain way, the conduct of said proceedings, even if they are referred to only in a limited manner, if not at all, in the final decisions and awards. This assumption has been confirmed by the study as, in several cases, WTO rules were extensively referred to in the pleadings but then disregarded, or partially disregarded, in the awards. To take only one example, in the NAFTA dispute *Grand River v. United States*,⁶ the claimant relied on WTO law on two occasions. The first, when stressing the opportunity to refer to WTO Panel and AB jurisprudence on National Treatment to interpret NAFTA Article 1102, and the second, to buttress arguments on 'procedural fairness' in the framework of NAFTA Article 1105.⁷ The tribunal addressed both questions, but did not elaborate upon either.⁸ Further, the *Grand River* tribunal did discuss the trade cases cited by the investor, and chose rather to focus only on NAFTA case-law.⁹

At this stage, it is important to recall that known disputes do not necessary reflect the full universe of existing investment treaty cases because it is not possible to know the exact number of confidential cases that exist. Even when the cases are known and the final awards available, the dispute documents (pleadings, etc.) very often remain unpublished. In virtually all cases outside the NAFTA system, party submissions are not published.¹⁰ This is rather problematic, especially in the light of the remark made in the previous paragraph (trade norms are frequently referred in all the steps that lead to an

⁵ By 'dispute materials', I refer to arbitral decisions (on procedural matters, on interim measures, on admissibility and jurisdiction...) and awards (partial, final, on costs...), submissions from the parties (notices of intent/arbitration, briefs, memorials, pleadings, post-hearing submissions...) *amicus curiae* and non-party submissions, expert opinions, procedural orders, hearings' transcripts and separate opinions, and finally, ICSID annulment committee decisions.

⁶ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 June 2011) (hereinafter '*Grand River v. US*').

⁷ *Grand River v. US* (Claimants Statement of Claim, 30 June 2005), [Part A] ¶¶43-44 and [Part B] ¶¶108-10.

⁸ *Grand River v. US* (Award, 12 June 2011), ¶¶166-72; 204-236.

⁹ *Ibid.*

¹⁰ One may regret this feature of investment-treaty arbitration. Arguably, Investor-State arbitration should be based on a presumption of openness to ensure both independence and transparency and to ensure also that the state decision-making with significant implications for public policy and for resource allocation, as well as for rights and interests of actors other than the disputing parties, is known and accountable to those who are affected. Still in that regard, one may note that the claims for more transparency have been, or are –to some extent– considered as last generation's rules (IIAs, Procedural Rules, etc.) on investment arbitration favours the publication of dispute documents. The last version of UNCITRAL procedural rules or the affirmations of the EU Commission for a greater transparency provided in future EU investment agreements are interesting examples.

award, but not necessarily in the award). However, looking at the results of the study, it is safe to assert that when a given award refers to WTO rules, even if only briefly, it usually means that a great deal of arguments referring to trade norms were being developed at length during the proceedings, either in writing or orally at the hearing stage.

In the light of these remarks, the results presented below shall be tempered: It remains impossible to assess with exactitude the number of cases in which WTO norms have been used. That being said, the high number of references found in the available cases, especially compared to references to other non-investment rules, seems significant and deserves to be analyzed.

A. SUMMARY OF RESULTS

1. Figures: Number of WTO Law References Higher than References to other Branches of International Law

As of 1 August 2015, I have been able to identify 310 investment dispute documents in which the keywords 'World Trade Organization', or the acronym WTO, has been used at least once. Amongst these, more than 50 investment disputes documents include more than 15 references. In addition, 49 documents include the term 'GATT' (while not referring to 'WTO'), height documents refer to 'GATS', two to 'TRIMS', four documents to 'TRIPS', one to TBT, one to the Understanding on Rules and Procedures Governing the Settlement of Disputes and zero to any other WTO agreements.

Theses documents belong to – *at least* – 60 investment disputes, which amount to approximately 10% of all existing investment arbitrations.¹¹ Looking at the occurrence of at least on these terms in final awards and decisions only, that number would 38. This last figure confirms the necessity to look at all dispute materials and not only final decisions. There are more references to WTO law in the pleadings, and in other proceeding materials, than there are in the awards.¹²

¹¹ Tables on file with the author. I emphasize the term 'at least' for four reasons: (i) some of the cases are pending and it is difficult to say how they will develop, (ii) some cases have been consolidated (and two cases become one), (iii) as previously explained not all dispute materials are in the public domain, and (iv) because a margin of error should be left. On this last reason, the amusing example of the reference to 'TRIPS' may be mentioned. If there are four documents relating to investment disputes that refer to the agreement on Trade-Related Aspects of Intellectual Property Rights, there are many more documents referring to the "trips" that one protagonist in the case may have taken. Of course, those documents have not been counted. Although many checks and controls have been carried out, it nevertheless seems prudent to avoid claiming that no mistake has been made whilst processing all of the materials covered in the research.

¹² Two explanations can be given. The first one, which is discussed in more detailed in the following sections of the present Chapter, regards the willingness of tribunals to enter in discussions relating to trade norms. It may be the case that a tribunal disregards trade norms because it does not see how referring to them may help it arrive at a decision for the case in question. This assumption is difficult to verify: tribunals will not always express clearly their aversion for trade norms. Yet, looking at the case law discussed in this chapter, one may assume that such aversion, to referencing trade norms, may actually exist. The second, is that it may be the case that tribunals cannot afford (because they lack the expertise,

These numbers allow for a first preliminary remark. Trade instruments seem to play an important role in investment disputes. Indeed, they are referred to more often than the majority of other non-investment international law instruments. To offer a comparison, 110 documents include references to the European Convention on Human Rights (ECHR), 59 documents to the American Convention on Human Rights, 11 documents to UNCLOS. The ECHR is referred to in 23 investment arbitration decisions and awards, whilst the UN Charter is referred to in only 8 cases. The ILC Articles and the VCLT are the only international instruments which are referred to at a significantly higher rate than WTO agreements.¹³

Similarly, WTO AB or Panel decisions have had a significant influence on international investment arbitration. WTO case-law has been referred to in 33 investment disputes,¹⁴ which is more than decisions of the ECHR (30), the CJEU (25), the International Chamber of Commerce (non-investment treaty awards – 11 cases) the ITLOS (5 cases), the Inter-American Court of Human Rights (four cases). The case-law of the ICJ (virtually all cases),¹⁵ and of the Iran-US claim tribunal (more than 70 cases) are the only non-investment treaty international jurisprudences that have been referred to on more occasions than that of the WTO.¹⁶

the time, or the resources) to dig into trade arguments made by the parties. As explained at length in the previous chapters, whilst it may be the case that trade and investment dispute settlement mechanisms share the same roots, they have not been codified in a similar manner and it is impossible to think that all arbitrators have mastered both international investment and trade disciplines (*see* Chapter 1). If verified, this second assumption could be very problematic. Indeed, one may argue that tribunals have a duty to address all arguments and allegations made by the parties.

¹³ An extensive research – which I could not afford to undertake – would be needed to have the exact figures for these two instruments. They are, indeed, referred to in the vast majority of existing disputes. Crawford has recently discussed the role of the ILC Articles in investment arbitration. *See* J. Crawford 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 *ICSID Rev.* 127. For a discussion on the use of the VCLT as tool to interpret investment agreement, *see* J.R. Weeramantry, *Treaty Interpretation in Investment Arbitration* (2012) 37-114.

¹⁴ This number highlights the fact that WTO rules are referred to in addition to WTO decisions. Recall that references to WTO norms in general (rules and case law) are to be found in 60 disputes.

¹⁵ Virtually all investment arbitration awards refer, directly or indirectly, to ICJ case-law. Investment jurisprudence has thus been qualified as 'porous', absorbing ICJ precedents. *See* A. Pellet 'The Case Law of the ICJ in Investment Arbitration' (2013) 28 *ICSID Rev.* 223, 240.

¹⁶ The high number of references to the Iran-US tribunal can be explained by the close similarity between the rules and obligations to be found in the Algiers Accords of 1981 and in classic BITs. Several authors have described the Iran-US tribunal as an ancestor of BIT arbitral tribunals. Another explanation could be that several of the judges in the Iran-US tribunal have acted as arbitrators in various BIT disputes. For studies relating to the relation between disputes before those tribunals and investment arbitration, *see* C.S. Gibson & C.R. Drahozal 'Iran-United States Claims Tribunal Precedent in Investor-State Arbitration' (2006) 23 *J. Int'l Arb.* 521 ; D. Caron, 'The Iran – U.S. Claims Tribunal and Investment Arbitration: Understanding the Claims Settlement Declaration as a Retrospective BIT' *in* C.S. Gibson & C.R. Drahozal (eds.), *The Iran-United States Claims Tribunal at 25: The Cases Everyone Needs to Know for International and Investor-State Arbitration* (2007) 375. For a more general study comparing the references to other international courts by (a limited number of) ICSID tribunals, *see* O.K. Fauchald 'The Legal Reasoning of ICSID Tribunals - An Empirical Analysis' (2008) 19 *Eur. J. Int'l L.* 301.

A large number of the cases that refer to the WTO are NAFTA Chapter 11 disputes (28 disputes, app. 45%). Although one might think that this number is explained by the normative connections between NAFTA and WTO law, and the references to WTO in the text of the NAFTA itself,¹⁷ it seems that the reasons are more circumstantial, relating to the factual proximity of certain disputes with trade concerns (all four of the investment disputes initiated by Canadian wood exporters against the US have referred to WTO law and WTO proceedings in what is usually called the *Softwood Lumber* saga) and to the persistence of certain NAFTA lawyers with experience in trade, relying on trade law in each of their disputes. For instance, numerous reference to WTO law have been made in virtually all the known disputes in which T. Weiler, or the firm *Appleton & Associate*, were counsel to one of the parties. B. Appleton and T. Weiler are usually considered to be fluent in both international investment and trade law.¹⁸ Arguably, this dual expertise might influence the way they, and in turn the tribunal, handle the case.

WTO law is also present in 'classic' BIT disputes (by opposition to NAFTA), and the famous *Continental v. Argentina* case,¹⁹ further discussed in Section 3 below, is a prominent example. It is tempting to highlight how a 'circumstantial element' was present in that specific case, with the president of the arbitral tribunal, Pr. G. Sacerdoti, having previously served as the chairman of the WTO AB.²⁰ Yet, there are numerous disputes that refer to WTO law and in which the actors – whether it be the litigants, their counsels or arbitrators – have no direct connection to the trade world (or at least, less obvious connections than those mentioned in the present section). Hence, if it is possible to argue that the participation of an actor with strong trade expertise in a given investment dispute might trigger reference to WTO law, the opposite argument, that the lack of participation from an actor with strong trade expertise would most likely mean the absence of a reference to WTO law is not necessarily valid: the participation of such an actor is not a prerequisite for the cross-fertilization of the two disciplines.

¹⁷ Various NAFTA provisions refer to WTO law. See for instance the references to the GATT in the 7th paragraph of its Preamble, as well as in Article 103 (Chapter 1: Objectives – Relation to other Agreements), Article 201 (Chapter 2: Definitions – Definitions of General Application), Article 301 (Chapter 3: National Treatment and Market Access for Goods – National Treatment), Article 317 (Chapter 3 – Third Country Dumping), Article 704 (Chapter 7: Agriculture and Sanitary and Phytosanitary Measures – Domestic Support), and Article 2005 (Chapter 20: Institutional Arrangements and Dispute Settlement Procedures – GATT Dispute Settlement).

¹⁸ B. Appleton describes himself as a lawyer specialized both in international trade law and international investment law. See the webpage of his law firm at <<http://www.appletonlaw.com/bappleton.html>> (last consulted 1 Aug. 2015). Similarly, while T. Weiler describes himself as working 'exclusively' in the field of international investment law, his past experiences and publications denote strong experience in international trade. See the webpage of his law firm at <<http://toddweiler.com/page6/index.html>> (last consulted 1 Aug. 2015).

¹⁹ *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 Sept. 2008) (hereinafter '*Continental v. Argentina*').

²⁰ As mentioned in a later section, detractors of the approach adopted in *Continental* have actually implied that the only reason for reference to WTO law in the case was the 'accessibility' of this law to G. Sacerdoti. See *infra*, pp. 110 *et seq.*

The arbitral forum for the dispute does not seem to impact much on the propensity of investment arbitration actors to rely on WTO law: amongst the 60 disputes identified, app. 55% have been settled by ICSID Tribunals or under the ICSID Additional Facility Rules and app. 45% under UNICTRAL or other Arbitration Rules, either in an institutional center such as the PCA or the SCC, or *ad hoc* tribunals.

More interestingly, WTO law is referred to at all stages of the proceedings, and for various reasons. This is particularly important, especially because the works relating to the interconnection of WTO law and investment arbitration have usually been limited to one phenomenon; that being the use of WTO norms when interpreting given investment standards –for instance National Treatment– at the merit stage of the claim.²¹ However, the present study shows that WTO law has penetrated investment arbitration in a much more profound and intricate way.

2. Four Different Scenarios

WTO law has been used in four different situations. In addition to the one mentioned above, wherein WTO law or jurisprudence is used as an interpretative element, trade norms have been relied upon as rules to be enforced by investment tribunals. In this second situation, the investor affirms that WTO norms have been breached, that this breach has a consequence on its rights as protected in the investment agreement, and that the Tribunal shall rule on this breach and grant the investor some form of compensation. In other words, in this situation the breach of a WTO obligation is supposed to result in the breach of an investment obligation.

WTO law also appears in arguments raised by respondent States. In this third situation, the idea is to affirm that the State was somehow compelled to take the measures alleged to be violations of investment law in order to comply with WTO law, or more generally that the investors claim is without merit because inconsistent with a given WTO obligation. In this situation, WTO law is supposed to trump investment law.

Finally, WTO has been mentioned either by the claimant, the respondent or the tribunal itself, when (i) elaborating on a basic principle (procedural, relating to treaty interpretation, etc.) that is not connected *per se* to investment norms, or (ii) more simply, when going through the factual matrix of the case (because this matrix includes elements that are to be found in the international trade law arena). In this situation, reference to WTO law serves only as an accessory or illustrative tool, it does not bear any consequence on the direct application of a substantive norm of investment law.

Arguably, these four situations have different causes and consequences. Referring to an isolated WTO AB in order to explain how the burden of proof shall be applied in international arbitral proceedings is different to arguing that the investor failed to provide technical assistance as required by relevant WTO standards as incorporated into

²¹ See e.g., Kurtz (*supra* n.1).

the agreements between the investor and the host-State, and thus cannot benefit from the treaty protection. Similarly, asking a tribunal to declare that the State has breached the TRIPS agreement and consequently violated the legitimate expectations of an investor, which are protected by investment law, has nothing to do with relying on GATT Article XX jurisprudence to construe how a BIT reservation clause is supposed to apply. Thus, each of these four situations or 'scenarios', as I will call them from now on, deserves to be analyzed separately. For the sake of clarification, they will be numbered as follows:

- **Scenario No.1:** WTO law as a factual or accessory legal element, used to construe rules or principles that are not substantive investment standards, *e.g.* general principles of procedures);
- **Scenario No.2:** WTO law as an interpretative element, for substantive investment norms;
- **Scenario No.3:** WTO norms in the claim, *viz.* breach of WTO triggers a breach of investment law;
- **Scenario No.4:** WTO norms as a defense, *viz.* WTO law trumps investment law.

A disclaimer needs to be made regarding this categorization. One may argue that it is artificial to make distinctions between these scenarios, because there is no clear-cut situation where WTO law may be referred to in different ways in one given case. This affirmation would not be ill-founded. In many cases, WTO law might be referred to in the factual description on the case, and then later within the arguments on the merits. In *Methanex v. US* for instance,²² a case that deals with elements that, in the present study, fall under 'Scenario No.3', there were, nevertheless, numerous references to WTO law in order to interpret investment norms (a 'Scenario No. 2' situation).²³ Thus, it may well be that once an issue of trade law enters into an investment case, it gradually grows in importance over the proceedings and references to trade law become more recurrent. In *Methanex*, trade concerns were first introduced in the claimant's submissions. The investor argued that NAFTA Article 1105 could be used to incorporate GATT obligations.²⁴ References to trade law then spread rapidly throughout the case. It is

²² *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (3 Aug. 2005)(hereinafter '*Methanex v. US*').

²³ *Ibid.* Part II, Chapter B, ¶¶3-6.

²⁴ *Methanex v. US* (Claimant Draft Amended Claim, 12 Feb. 2001), pp. 58-65.

mentioned in expert opinions,²⁵ in one of the amicus submission,²⁶ during the hearings,²⁷ and in the award,²⁸ each time for different purposes.

Another example is found in *Merrill v. Canada*.²⁹ In the hearings, WTO law has been referred to on numerous occasions. Robert Howse, a well-known expert in international economic law, participated as an expert witness. In his oral submissions, when discussing issues relating to the extents of NAFTA obligations such as National Treatment (hereinafter NT) or Most-Favored-Treatment (hereinafter MFN), Howse referred several time to GATT provisions.³⁰ It is difficult to assess whether and, if so, to what extent, Howse presentation was actually taken into consideration by the tribunal when reaching its decision. The award does refer to WTO law, but not to the texts and provisions Howse used in his submissions.³¹

In *Continental v. Argentina* the tribunal justified its reference to WTO law when interpreting the necessity clause contained in the BIT (Scenario No.2), most notably because the claimant, itself, used WTO in its argumentation.

Scenarios can overlap, and references to WTO law may occur throughout all of the different stages of a dispute, and for various reasons. This is not disputed. Nevertheless, it is important to keep these four categories separated. As we will see, the reactions of investment tribunals differ slightly, depending on the situation in which trade norms are referred to. Therefore, it seems pertinent to approach each scenario individually.

Bearing this in mind (that scenarios can overlap) the following represents the amount of times each scenario has occurred in international investment arbitration.

- Scenario No1: at least 20
- Scenario No2: at least 25

²⁵ *Methanex v. US*, Expert Opinion of Pr. C-D. Ehlermann (4. Nov. 2002) pp. 31-34.

²⁶ *Methanex v. US*, International Institute for Sustainable Development Second Amicus Curiae Submission, (9 March 2004), ¶¶ 12-24.

²⁷ *Methanex v. US*, Transcript of Hearing on Jurisdiction and Admissibility (11 July 2001), various references, see e.g. pp. 11; 19-23; 88-90; 182; 259 and 385.

²⁸ *Methanex v. US*, Final Award (3 Aug. 2005), Part II, Chapter B, ¶¶ 3-6.

²⁹ *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, Award (31 Mar. 2010) (hereinafter '*Merrill v. Canada*').

³⁰ *Merrill v. Canada*, Hearing Transcripts n°5. pp.1295-97.

³¹ It does so when analysing the meaning of the notion of 'requirement', or when drawing attention to the possibility that one of the measures under scrutiny could be considered as an 'actionable subsidy' under the WTO Agreement on Subsidies and Countervailing Measures. See, *Merrill v. Canada*, Award (31 Mar. 2010) ¶ 102. The tribunal nuanced the approach taken in *Pope & Talbot v. Canada*, another NAFTA Chapter 11 case, in which it was affirmed that the word 'requirement', as used in NAFTA Article 1106(1), had a mandatory nature, with the approach taken in a *Indonesia–Certain Measures Affecting the Automotive Industry*, a WTO dispute, in which the panel considered that 'requirement' could include various forms of governmental action that could influence the conduct of private parties. There, the tribunal simply affirmed that if the measure was "a direct transfer of funds from the Canadian government to the industry there might be, *mutatis mutandis*, a case for an actionable subsidy under the WTO Agreement on Subsidies and Countervailing Measures." *Ibid.* ¶ 222 & note 151

- Scenario No3: 4
- Scenario No4: 1 + 3 potential

We will now proceed to individually address each scenario.

III. TRADE NORMS AS EITHER FACTUAL OR ACCESSORY LEGAL ELEMENTS

In Scenario No.1, WTO law is mentioned as part of the factual matrix, or context of the case. I also include in this first scenario, what I call accessory legal references to WTO law, which are isolated references to WTO law, used to underpin a legal argument that is not directly linked to investment standards or law. A prominent example of this second subcategory is when investment arbitration actors make reference to WTO case law to support their understanding of treaty interpretation methods. Beside this main example, isolated legal references are relatively disparate, but remain numerous.

A. CONTEXTUAL UNDERSTANDING OF THE CLAIM

Reference to WTO law can be included in the description of the factual development of a given investment dispute. As mentioned elsewhere in this work, international investment law and trade law, as disciplines, can be considered as interdependent, at time even overlapping.³² As a consequence, trade and investment disputes addressing the same subject matter may be initiated simultaneously, or sequentially. The 'sugar war', between the US and Mexico,³³ or the 'soft-wood lumber saga', between the US and Canada, are notorious examples.³⁴ In both cases, a State measure, or set of measures, triggered disputes before both trade and investment dispute settlement bodies.³⁵ It is not surprising then to see one body, of one system, referring to the undertakings of the other, in order to shed light on the factual background of the dispute at hand.

³² See Chapter 1, pp.10-25 and references therein. The interrelationship between investment and trade has been recognized within the WTO itself, with the creation of a Working Group on trade and investment. In the first report issued by this Working Group, it is demonstrated that regulations in one discipline may affect the economics of the other, and vice-versa. See WTO Working Group on the Relationship Between Trade and Investment, Note by the Secretariat (WTO Doc. WT/WGTI/W/7, 8 Sept. 1997). See also, M. Footer, 'On the Laws of Attraction: Examining the Relationship Between Foreign Investment and International Trade' in R. Ehandi & P. Sauvé (eds.), *Prospects in International Investment Law and Policy* (2013) 105, 105-06.

³³ For a recent study on this widely commented case, see A. Antoni & M. Ewing-Chow 'Trade and Investment Convergence and Divergence: Revisiting the North American Sugar War' (2013) 1 *Latin American J. of Int'l Trade L.* 315.

³⁴ For a recent and broad overview of this 'saga', see L. Guglya 'The Interplay of International Dispute Resolution Mechanisms: the Softwood Lumber Controversy' (2011) 2 *J. Int'l Dispute Settlement* 175.

³⁵ Joost Pauwelyn has provided an excellent overview of the disputes and their repercussions on each other. See J. Pauwelyn 'Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking' (2006) 9 *J. Int'l Eco. L.* 197.

In the three disputes initiated by US Sugar exporters against Mexico, in the *soft drink* dispute, the tribunals elaborated on WTO proceedings in which the same measure was also challenged.

Similarly, in the arbitration between Canadian lumber producers and the US, the parties and the arbitrators extensively referred to the trade proceedings in which the US imposition of anti-dumping measures and countervailing duties had been previously ruled to be in breach of WTO agreements. Determining the nature of the measures contested by the investors proved a crucial element in the arbitration. The investors alleged that the countervailing duty and antidumping measures on Canadian import of softwood lumber to the US were in breach of NAFTA Article 1102 (NT), 1103 (MFN Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation).³⁶ These measures were taken by the US trade authorities in order to compensate for the effect of Canadian lumber subsidy programs, which was allegedly favoring local industries over US producers. They consisted in a series of determinations, made by the Department of Commerce (DoC) and the International Trade Commission (ITC),³⁷ which resulted in countervailing duties, as well as provisions contained in the 'Byrd Amendment', according to which the duties, assessed pursuant to countervailing duty or antidumping orders, should be distributed annually to affected US domestic producers. The US objected to the jurisdiction of the tribunal arguing that, because such countervailing duty and antidumping laws were contemplated under another NAFTA Chapter (*viz.* Chapter 19, which included its own dispute settlement mechanism), Chapter 11 tribunals were not competent to rule on their international legality. The question therefore became, whether each contested measures should be considered as a 'countervailing duty and antidumping law' in the sense of NAFTA Article 1901.³⁸ Looking closely at the language of that provision, the tribunal came to the conclusion that the DoC and ITC determinations were indeed to be classified as 'countervailing duty and antidumping law', and that consequently, Chapter 19 was the only venue for any challenge to them. The

³⁶ *Canfor Corporation v. United States; Tembec et al. v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, (Decision on Preliminary Question, 6 Jun. 2006)(hereinafter '*Canfor & al. v. US*') ¶86.

³⁷ Pursuant to the US Tariff Act of 1930, and to the U.S. ITC Antidumping and Countervailing Duty Handbook, the US procedure to be followed where dumping and subsidies investigations are requested is twofold: First, the DoC determines whether goods are being sold at less than fair value (dumped) and whether a foreign government has provided countervailable subsidies to the industry manufacturing the goods under review. Second, the ITC determines whether the domestic industry is injured by reason of the subject imports. Each administrative agency must make an affirmative determination before the DoC issues a countervailing duty or antidumping order.

³⁸ This relevant provision of this Article reads as follows:

"Article 1901. General Provisions

[...] 3. Except for Article 2203 (Entry into Force), 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."

conclusion was however different for the Byrd Amendment, over which the tribunal retained jurisdiction.

Interestingly, this Byrd Amendment (officially, the "Continued Dumping and Subsidy Offset Act" or "CDSOA") had also been challenged before a WTO panel, in a dispute of the same name. In these WTO proceedings, the US argued that the act was merely a 'payment program' and that it was therefore covered by either the WTO Anti Dumping or the Subsidies and Counter-Measures Agreements. Both the Panel, and the AB, rejected the argument, and found that the said act was a non-permissible specific action against dumping within the meaning of the WTO Anti Dumping (Article 18.1) and the Subsidies and Counter-Measures Agreements (Article 32.1).³⁹ Addressing the NAFTA Arbitral Tribunal, the US attempted to develop the opposite argument, saying that the act had to be qualified as countervailing duty and antidumping law. The tribunal referred extensively to the WTO findings⁴⁰ and noted that before the WTO panel, the US asserted that the Byrd Amendment "had nothing to do with the administration of the anti-dumping and countervailing duty laws."⁴¹ Of course, as the US pointed out in the arbitral proceedings, the WTO Panel and AB disagreed with the US's characterization of the Byrd Amendment. However, the tribunal retorted that its charter was "to determine whether the Byrd Amendment is antidumping or countervailing duty law for purposes of Article 1901(3) and not for purposes of the separate WTO agreements in respect of which the WTO Panel and AB made their findings."⁴² The tribunal clarified its position in the following terms:

"While the conduct of the United States before the WTO and the findings of WTO Panels and its Appellate Body have *no binding effect* upon this Tribunal, they constitute *relevant factual evidence* which the Tribunal *can and should appropriately take into account*, especially in the case of positions advocated by the United States before the WTO that amount to admissions against interest for purposes of this NAFTA case."⁴³

³⁹ For the AB decision on this particular issue, see *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217-DS234/AB/R, Appellate Body Report (16 Jan. 2003) ¶¶254–56. As a result, the AB found the measure to be in breach of WTO law (it did not belong to the categories of measures mentioned in GATT Article VI.2) and ordered the US to bring their measures into compliance with their WTO obligations. Subsequent to the failure of the United States to repeal the Byrd Amendment within the required time, Canada, as well other WTO Members, were authorized to levy retaliatory duties reflecting the 'trade effect' of the CDSOA. Note that the AB decision has been criticized in scholarship, especially because it looked at the consequences of the measure (who gets the results of the AD duties in the US) rather than the rationale underlying the decision to dump. See, H. Horn & P.C. Mavroidis 'United States-Continued Dumping and Subsidy Offset Act of 2000' (2005) 4 *World Trade Rev.* 525.

⁴⁰ An entire section of the arbitral decision relates to the WTO proceedings. See *Canfor and all v. US* (*supra* n.36) ¶¶85-94.

⁴¹ *Ibid.* ¶325.

⁴² *Ibid.* ¶326.

⁴³ *Ibid.* ¶327 (emphasis added).

This statement, which led the tribunal to conclude that the Byrd Amendment was not covered by NAFTA Chapter 19, is particularly instructive. The tribunal acknowledges the jurisdictional boundary that exists between NAFTA Chapter 11 and the WTO, but explains that WTO findings have no 'binding effect' upon the investment dispute because these determination were made in accordance with legal agreements that the tribunal does not have the jurisdiction to review to review. The tribunal does, nevertheless, accept that said findings have factual value. A factual value that happened to be decisive, as the tribunal's own determinations were closely connected to the ones in the WTO proceedings. During the hearings, the tribunal paid very special attention to these proceedings, asking the parties counsels, on several occasions, to clarify to what extent the WTO proceedings should be taken into consideration.⁴⁴ Further, at the post-hearing stage, the tribunal sent a series of supplemental questions to the parties regarding the Byrd Amendment, three of which were related to the qualification of the Byrd Amendment in the trade dispute and the effect it could have on the investment proceedings.⁴⁵ The answers to these questions were an important element in the determination of the dispute outcome, as the tribunal cites directly from them in its decision.⁴⁶

This dispute, which is not isolated,⁴⁷ illustrates how a WTO legal element (in that case, adjudicator findings) can influence investment proceedings, even if not considered as a legal 'norm' *per se*. The reference is only factual. Yet, the content remains particularly important for the investment tribunal.

⁴⁴ See for instance, the discussion between Arbitrator Robinson and US counsel A. Menaker, and Arbitrator Robinson and claimant counsel, *Canfor & al. v. US*, Transcripts of Hearing - Day Two (12 Jan. 2006) pp.188-190 ; 196-198.

⁴⁵ *Canfor & al. v. US*, Response of Canfor Corporation and Terminal Forest Products Ltd. to Additional Questions by the Tribunal Regarding the Byrd Amendment (19 May 2006), Questions J(a), J(b) and K.

⁴⁶ *Canfor & al. v. US* (Decision on Preliminary Question, 6 Jun. 2006) ¶¶294-95.

⁴⁷ For other Scenario No.4 cases, see e.g. *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Separate Opinion of T. Wälde (1 Dec. 2005) (hereinafter '*Thunderbird v. Mexico*') ¶¶18-20, where the dissenting arbitrator made various references to WTO law to highlight differences and similarities between trade and investment law disciplines; as well as the three decisions on jurisdiction, issued on the same day (Interim Award on Jurisdiction and Admissibility, 30 Nov. 2009) in the case known as the 'Yukos' dispute, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility (30 Nov. 2009) ; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility (30 Nov. 2009), in which the tribunal referred to expert opinions in which comparisons between the drafting history of the ECT and the GATT were made. See also the pending dispute between a renewable energy company and Canada, where both parties have heavily relied on the WTO proceedings on the same subject. *Mesa Power Group, LLC v. The Government of Canada*, UNCITRAL, PCA Case No. 2012-17(hereinafter '*Mesa v. Canada*').

B. WTO AS AN ACCESSORY LEGAL ELEMENT

1. Emphasis on Interpretation Methods

Another sub-category of references that can be included in Scenario No.1, is the use of WTO panels or AB decisions that shed light on the application of legal principles not relating to substantial rules of trade, investment, or even economic, law. I call these references 'accessory' legal references. The main example of this sub-category is the use of WTO decisions to support investment tribunals in their understanding of rules, principles and methods of treaty interpretation.

On numerous occasions, investment tribunals have referred to WTO panel and AB reports, as well as scholarly writing about interpretation of WTO agreements,⁴⁸ when elaborating on basic principles of treaty interpretation.

Arguably, the same basic rules of treaty interpretation are applicable in WTO dispute settlement, as are in investment dispute settlement. Investment tribunals may, therefore, rely on the findings of trade adjudicators, to underline interpretative considerations. For instance, the *SGS v. Pakistan* tribunal referred to the AB position on the necessity to adopt a 'prudential approach' when interpreting an international agreement.⁴⁹ Another example, is how in two disputes, litigants and arbitrators have relied upon AB findings in the *US–Shrimps* and *EC–Hormones* cases, to explain that both the preamble and first chapter of the NAFTA, should be used to construe provisions of Chapter 11.⁵⁰

In the same vein, investment tribunals have largely referred to WTO considerations on Articles 31 and 32 of the VCLT. The section of the AB Report that focuses on treaty interpretation in *Japan – Alcoholic Beverages*, one of the first disputes brought before the WTO dispute settlement body, has been quoted in at least three different investment disputes. In that case, the AB, while explaining that it had to refer to the principles of the VCLT when interpreting WTO covered agreements, elaborated on said principles. Referring to scholarly work, as well as to decisions of the ICJ, the AB notably affirmed that:

⁴⁸ See e.g., *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 Sept. 2007) ¶¶385, note 149, where the tribunal relies on the writing of M. Matsushita, T. J. Schoenbaum and P. Mavroidis to support its reasoning on the interpretation of so-called 'self-judging' provisions.

⁴⁹ See *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R; WT/DS48/AB/R; WT/DS320/AB/R, Appellate Body Report (16 Jan. 1998) (hereinafter 'AB Report, *EC–Hormones*') ¶¶163-165. This statement was quoted both in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 Aug. 2003) ¶171.

⁵⁰ In the two WTO cases, the AB explained that it could rely on the preamble, or the 'objectives' provision of an agreement, for the purpose of establishing the meaning of an expression contained in a substantive provision of that agreement. See *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body WT/DS58/AB/R (AB Report, 12 Oct. 1998) (hereinafter 'AB Report, *US – Shrimp*') ¶114 and AB Report, *EC – Hormones* ¶¶165; 181. These cases were cited in *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1 (Award, 9 Jan. 2003) ¶147 and in *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Respondent Counter-Memorial (17 Feb. 1998) ¶775.

"Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretive process: interpretation must be based above all upon the text of the treaty. The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions. A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness [...]. One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."⁵¹

The tribunal in *Pope & Talbot v. Canada*, a NAFTA Chapter 11 dispute, expressly referred to this statement to interpret NAFTA Article 1106 (performance requirements) and to stress the necessity to first look at the wording of an agreement before turning to supplementary means of interpretation.⁵² Similarly, in her dissenting opinion in *Garanti Koza v. Turkmenistan*, L. Boisson de Chazournes referred to the AB findings regarding the adjudicator's leeway when interpreting several provisions of an international treaty.⁵³

Still in *Japan–Alcoholic Beverages*, the AB held that subsequent practice, within the meaning of Article 31 VCLT, required a 'sequence' of acts or statements, sufficient enough to establish a 'discernible pattern'. In *Telefónica S.A. v. Argentina*, the tribunal quoted this passage when rebuffing Argentina's argument that both its position regarding the use of Most Favored Nation (MFN) clauses for procedural purpose, and the one of the investor home State (*in casu*, Spain), had changed and that the tribunal should therefore proceed with a narrow interpretation of the MFN clause in Argentina–Spain.⁵⁴

⁵¹ *Japan — Taxes on Alcoholic Beverages*, WT/DS8,10,11/AB/R, Appellate Body Report (4 Oct. 1996) (hereinafter 'AB Report, *Japan–Alcoholic Beverages*'), pp.11-12 (references omitted).

⁵² *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award (26 Jun. 2000) (hereinafter '*Pope & Talbot v. Canada*') ¶¶68-9.

⁵³ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Dissenting Opinion of L. Boisson de Chazournes (3 July 2013) ¶12, n.17.

⁵⁴ *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Objections to Jurisdiction (25 May 2006). The question was about the use of a MFN clause to bypass procedural requirements contained in the dispute settlement clause. The argument, which is increasingly contested, is to say that MFN treatment applies to the procedural rights of the investor, and that the latter can invoke such a clause to refer to another BIT. Argentina argued that both the Spanish and its own government had shared, in their defensive briefs, filed in an international direct arbitration initiated against them by investors, the same positions about the inability to use an MFN to circumvent the procedural condition of a multi-tier arbitration clause. Argentina claimed that these shared positions amounted to subsequent practice, as this requirement is understood in public international law. The tribunal recalled what it considered to be the conditions for 'subsequent practice' pursuant to Article 31.3(b) and concluded as follows, quoting from the AB report in *Japan–Alcoholic Beverages*: "the Tribunal finds therefore that those positions, though concordant at least in appearance, do not entail a 'concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties

WTO findings on interpretation have also been referred to when applying substantive rules that are specific to international economic law. As explained above however, these references belong to another scenario and will be examined later.

It remains that the aforementioned numbers show that WTO jurisprudence has proved an interesting source of inspiration when investment tribunals must engage with treaty interpretation. The AB and WTO panel decisions have been prolific on these issues,⁵⁵ and it is therefore very likely that references to such decisions by investment tribunals will continue.

2. Miscellaneous References

Isolated references to WTO law have been made, in investment arbitration, for many other purposes. For instance, in one dispute, WTO law was referenced to support the general view that different provisions in a treaty should be treated as cumulative and complementary, except in the case of a clearly identified conflict.⁵⁶

Still, in *Phoenix v. Czech Republic*,⁵⁷ the tribunal argued that like other international legal instruments, BITs and the ICSID Convention "had to be analyzed with due regard to the requirements of the general principles of law, such as the principle of non-retroactivity or the principle of good faith."⁵⁸ Quoting from the WTO AB decision in *US – Gasoline*, the tribunal added that international investment should not "be read and interpreted in isolation from public international law, and its general principles."⁵⁹

[to a treaty] regarding its interpretation' [...] as would be required under Art.31.3(b) of the Vienna Convention." *Ibid.* ¶114.

⁵⁵ More than a hundred decisions refereeing to the interpretation principles codified in Section 5 of the VCLT could be identified. On the issue of interpretation of trade agreements *See* I. Van Damme 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 *Eur. J. Int'l L.* 605.

⁵⁶ *S.D. Myers v. Government of Canada*, UNCITRAL, Partial Award (13 Nov. 2000) (hereinafter '*SD Myers v. Canada*'). In that case, the tribunal, referring to the Panel report in *Korea–Definitive Safeguard Measure on Import of Certain Dairy Product*, noted as follows:

"In *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, the Panel summarized the line of WTO cases as follows, at paragraph 738 of its report "It is now well established that the WTO Agreement is a 'Single Undertaking' and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously unless there is a formal 'conflict' between them. The chapters of the NAFTA are part of a 'single undertaking'. There appears to be no reason in principle for not following the same preference as in the WTO system for viewing different provisions as 'cumulative' and complementary. The WTO Panel in the *Korean Dairy Products* case adopted the definition of "conflict" in several earlier cases, including the report of the Appellate Body of the WTO in *Guatemala Cement*, at paragraph 65.51 The latter case suggests that provisions of agreements in the WTO system should be read as complementary unless there were a conflict in the sense that adherence to one provision would cause a violation of the other." *Ibid.* ¶¶291-93. For the WTO case, *see, Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R Panel Report (21 June 1999).

⁵⁷ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009).

⁵⁸ *Ibid.* ¶77, citing J. Pauwelyn 'The Role of Public International Law in the WTO: How far can we go?' (2001) 95 *Am. J. Int'l L.* 535, 539.

⁵⁹ *Ibid.* ¶78, citing *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (AB Report – 29 April 1996) p.18.

More specifically, in *Champion Trading Co. v. Egypt*,⁶⁰ the tribunal had to address an argument made by the claimant on the 'lack of transparency' it allegedly suffered. The tribunal referred to WTO AB jurisprudence in order to elaborate on that argument. According to the claimant in that case, pursuant to settlements concluded with the Egyptian government, its competitor received compensations for a failure in the regulation of the market it was involved in (cotton industry). The claimant did not receive this form of compensation and claimed that the conclusion of these settlements, which allegedly occurred behind closed doors, was contrary to international law. The claimant stated that Egypt's treatment of its investment "in terms of the secretive and non-transparent manner in which it intervened to compensate a limited group of select companies – fell below the minimum standard of treatment, constituting an abuse of right under customary international law and violated the international law *principle of transparency*."⁶¹ Quoting the AB decision in *U.S.–Underwear*, the tribunal explained how that principle found expression in the WTO regime:

"The essential implication is that Members and other persons affected, or likely to be affected, by Governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and, accordingly, to protect and adjust their activities, or alternatively to seek modification of such measures."⁶²

The tribunal went on to examine other grounds on which this principle of transparency is based, and eventually ruled that whilst the principle also applied in investment arbitration, the claimant in that case had not "produced any evidence or even pertinent arguments that Egypt violated the principle of transparency under international law."⁶³ It therefore dismissed the claim.

There have also been cases where arbitral tribunals have referred to WTO law in order to seek guidance on the interpretation of 'necessity' or 'emergency' clauses, and to support the conclusion that 'self-judging' emergency clauses must be expressly stated in the terms of the treaty. Self-judging clauses have been defined in the literature as "clauses that allow states to reserve to [*sic*] themselves a right of non-compliance with

⁶⁰ *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt (formerly Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt)*, ICSID Case No. ARB/02/9, Award (27 Oct. 2006), ¶161.

⁶¹ *Ibid.* ¶35 (emphasis added). One should note that the principle of transparency in WTO law might have a scope that is slightly different from what the tribunal in *Champion Trading Co. v. Egypt* had in mind, especially since it is expressly referred to in WTO agreements and therefore cannot be qualified as customary. For a general overview on this principle in the jurisprudence of the WTO, See, A.I. Padideh 'From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance?' (2008) 11 *J. Int'l Eco. L.* 779.

⁶² *Ibid.* ¶161, citing *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, Appellate Body Report (10 Feb. 1997) 21.

⁶³ *Ibid.* ¶164.

international legal obligations in certain circumstances".⁶⁴ They are called 'self-judging' because the discretion is with the state to determine that, in particular circumstances, it is not obliged to comply with certain obligations it has accepted under a particular international agreement. Examples of these particular circumstances include situations such as when a state considers that compliance with certain obligations will harm its sovereignty, security, public policy, or more generally, its essential interests.⁶⁵ The use of clear language in the clause, is usually considered to be important in order to determine whether it is self-judging or not. For instance the inclusion of expression such as 'if the state considers', or 'if the state determines' are decisive.⁶⁶

In five investment disputes based on the US-Argentina BIT, tribunals have struggled to determine whether the (unclear) exception clause, found in the BIT, should be considered as "self-judging".⁶⁷ Four out of the five tribunals referred to Article XXI of the GATT and discussions relating to it, in order to affirm that the language of a provision had to be very precise in order to lead to a conclusion about its self-judging nature.⁶⁸

Finally, investment tribunals have referred to the way WTO to clarify general procedural rules applicable to investment proceedings. They have for instance done so in order to frame the conditions applicable to the *participation of non-dispute parties* to the proceedings,⁶⁹ or to clarify the rules relating to the *burden of proof*. As to this latter

⁶⁴ R. Briese & S. Schill 'Djibouti v. France - Self-Judging Clauses before the International Court of Justice' (2009) 10 *Melb. J. Int'l L.* 308-328, 308.

⁶⁵ *Ibid.*

⁶⁶ For an exhaustive taxonomy of self-judging clauses in international agreements, see S. Schill & R. Briese 'If the State Considers': Self-Judging Clauses in International Dispute Settlement' (2009) 13 *Max Planck YB UN L.* 61, 81-93.

⁶⁷ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005) ¶¶349-52 (hereinafter '*CMS v. Argentina*'); *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006) ¶¶208-09 (hereinafter '*LG&E v. Argentina*'); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 Sept. 2007) ¶¶364-91 (hereinafter '*Sempra v. Argentina*'); *Enron Corporation Ponderosa Assets, L.P. v. The Argentine Republic* (also known as *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. The Argentine Republic*), ICSID Case No. ARB/01/3, Award (22 May 2007) ¶¶324-26 (hereinafter '*Enron v. Argentina*'); *Continental v. Argentina*, Award (5 Sept. 2008) ¶¶182-88.

⁶⁸ *CMS v. Argentina* (Award, 12 May 2005) ¶368; *Enron v. Argentina*, Award (22 May 2007) ¶336; *Sempra v. Argentina*, Award (28 Sept. 2007) ¶¶383-85; *Continental v. Argentina*, Award (5 Sept. 2008), ¶184.

⁶⁹ Without entering into the details of an issue that has been broadly covered, the arbitral rules applicable in investment arbitration proceedings used to not refer expressly to the participation of non-parties to the said proceedings. Facing numerous criticisms on the opacity of their activity, investment tribunals started to accept non-party submissions. In the absence of clear rules to be used to justify acceptance of such submissions, investment tribunals relied on the way WTO adjudicators had dealt with the issue. In UNCITRAL proceedings, See, the interpretation of UNCITRAL Rules (1976) Article 15(1) in *Methanex v. U.S.*, Decision of the Tribunals on Petitions from Third Persons to Intervene as "Amicus Curiae" (15 Jan. 2001), ¶33 and in *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (17 Oct. 2001) ¶64. In ICSID Proceedings, see *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005) ¶15. Interestingly, the conditions for participation developed by investment tribunals differ from the ones emanating from WTO dispute settlement, where it is usually

example, the statement of the AB in *US–Wool Shirts and Blouses*, on the basic rule according to which "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defense",⁷⁰ has been echoed by three investor-State tribunals.⁷¹

Arguably, the list of legal notions that WTO adjudicators have elaborated upon and which are particularly important for investment arbitration is extensive.⁷² It is thus very likely that the number of cases that could be classified as belonging to Scenario No. 4 will grow in the future. As explained in the following remarks, this should not be a problem.

C. REMARKS

In my opinion, Scenario No.1 references are not problematic. On the contrary, these references should be encouraged.

By referring to trade norms, tribunals acknowledge the existence of another international legal system, which is interconnected to theirs. Using international trade law in their reasoning, investment arbitral tribunals show some openness towards other branches of international law, whilst arguably engaging in a form of dialogue that is necessary for the integration of international economic law and a reduction of transaction costs.⁷³ When doing so, arbitral tribunals gain positive credits from the commentators and even actors of the discipline. Awards referring to other international norms are more likely to be cited and 're-used'. In that sense, Scenario No. 1 references represent a gain for the arbitral tribunals.

This gain is not very high. After all, the references are only incidental and –with one exception in the *Canfor* case–⁷⁴ do not have a huge impact on the outcome of cases.

considered that, whilst anyone can send a submission to the panels, said panels are under no obligation to consider the submissions. Tribunals first referred to WTO case-law to justify their decisions to accept *amicus*, but then built up a different framework for such acceptance than the one existing in WTO law. Soon after these cases, the ICSID Arbitration rules were modified to warrant, upon the satisfaction of certain conditions, the participation of *amicus curiae* in ICSID proceedings. The UNCITRAL revised its arbitration rules in 2010. The new version of these rules includes, in Article 17, an express provision on the participation of third parties to the arbitral proceedings.

⁷⁰ *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Appellate Body Report (25 Apr. 1997) p.14.

⁷¹ *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No.ARB(AF)/99/1, Award (16 Dec. 2002)(hereinafter '*Fieldman v. Mexico*') ¶177 ; *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America (formerly Canfor Corporation v. United States of America; Tembec et al. v. United States of America; Terminal Forest Products Ltd. v. United States of America)*, UNCITRAL, Order of the Consolidation Tribunal (7 Sept. 2005), ¶93; *Thunderbird v. Mexico*, UNCITRAL, Arbitral Award (26 Jan. 2006) ¶95.

⁷² See Tereposky & Maguire (*supra* n.1).

⁷³ See Chapter 1, pp.10-25

⁷⁴ Recall that in that case, part of the *Softwood Lumber saga*, the tribunal repeatedly referred to WTO proceedings that were related to the substance of the dispute and that these references seemed to play an important role in the tribunal's decision.

Additionally, the costs of these accessory references are relatively low. First, these references do not represent an excessive commitment for the judges: they are basic (the presentation of one general principle or one GATT article, one citation from one case or set of case, etc.) and the arbitrators do not need to enter into lengthy demonstrations of the rules that are used. They do not *apply* these rules *per se*; they barely refer to them. Further, arbitrators risk little when sporadically referring to trade norms. In Scenario No.1, trade norms do not enter in the scope of the law applied by the tribunal.

Therefore, the chance of being sanctioned, either formally by having the award annulled or informally by having the award criticized is relatively low.

In the light of these two remarks (reasonably high gain / relatively low risk) it is easier to understand why Scenario 1 references are not to be considered as problematic. They are, I argue, a good example of successful (and/because 'cheap') cross-fertilization. Further, I argue that these references should even be encouraged. An interesting way of doing so could be to look at the techniques that can incentivize tribunals to make these references. This is done in Chapters 5 and 6.

IV. TRADE NORMS AS AN INTERPRETATIVE ELEMENT

Scenario No.2 situations (references to WTO law when discussing the interpretation of investment norms) have been slightly more frequent than Scenario No.1 situations. In about 20 disputes, investment arbitration actors have referred to WTO law, or jurisprudence, arguing that the latter may provide guidance on how a given investment rule should be interpreted. This should not come as a surprise. It has been argued that the international investment regime, being a developing and diffused regime, tends to be influenced by the dynamics of other international legal regimes.⁷⁵ In that sense, the reason why WTO law is used in investment arbitration, may not necessarily be because WTO law is easily exportable, but rather because the investment legal regime is, presently, easily influenced by other disciplines of international law.

The use of WTO law as an interpretative element in investment arbitration has been discussed in several scholarly contributions. While some authors consider cross-fertilization between trade and investment as a positive, and a development that should be welcomed and enhanced,⁷⁶ others seem more reluctant, shedding light on the dangers of 'boundary crossing'.⁷⁷ However, a broad survey of the literature shows that no one has

⁷⁵ The best work to understand the way other international disciplines have shaped the conceptual framework that is commonly used to apprehend investment arbitration, is certainly A. Roberts' recent article on the clash or paradigms in investment arbitration. A. Roberts 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *Am. J. Int'l L.* 45.

⁷⁶ See J.A. Huerta-Goldman, A. Romanetti & F.X. Stirnimann, 'Cross-Fertilization and Reciprocal Opportunities: An Overview' in J.A. Huerta-Goldman, A. Romanetti & F.X. Stirnimann (eds.), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (2013) 1.

⁷⁷ J.E. Alvarez, 'Beware: Boundary Crossings' in T. Kahana & A. Scolnicov (eds.), *Boundaries of Rights, Boundaries of State* (forthcoming) 14.

attempted to take into account all of the disputes in which such references are made. Commentaries and/or critiques are usually made about one case, or a group of cases that all refer to the same WTO rules or principles, potentially leading to misleading analyses. It would, for example, be incorrect to affirm that the ICTY has not been influenced by public international law, because it disregarded the approach of the ICJ regarding the notion of 'control' in one given case.⁷⁸ Likewise, it is wrong to assert that trade jurisprudence has no impact whatsoever on the way investment actors construe investment norms, because one tribunal once refused to look at the treatment of 'likeness' by the AB. It is, I argue, necessary to look at all investment arbitration decisions, in their entirety, if we are to fully apprehend the issue of the use, or misuse, of WTO law in investment law.⁷⁹

M. Wu has recently conducted a more comprehensive analysis on the influence of WTO Law on investment treaty interpretation.⁸⁰ He notes that investment tribunals consider jurisprudential concepts developed in the case law of the trade regime "on only select occasions for a very limited set of substantive issues",⁸¹ and concludes "cross-regime borrowing [...] often may turn out to be inappropriate."⁸²

The empirical research, conducted for this thesis, warrants challenging this affirmation. In fact, it appears that investment tribunals have had recourse to trade law on several occasions, in order to interpret various sets of investment norms. The following subsections will present these cases in an attempt to explain why references, such as these, are relatively frequent, and why their importance should not be understated.

A. THE VARIOUS REFERENCES TO WTO LAW WHEN INTERPRETING INVESTMENT NORMS

The two main examples of Scenario No.2 references are, the interpretation of the NT standard, and the notion of 'necessity', along with the question of the proportionality analysis that needs to be used when applying preclusion clauses. These two major examples are presented below, but should not be considered as isolated. The last development of this section addresses the other cases in which guidance has been found, or at least looked for, in WTO legal norms.

⁷⁸ See, on the issue of case-law borrowing by international courts and tribunals, G. Guillaume 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 *J. Int'l Dispute Settlement* 5, 18-23.

⁷⁹ The expression 'misuse' is employed by Kurtz, in one the most prominent papers on the use of WTO case law by investment tribunals to interpret the likeness comparator. Kurtz (*supra* n.1).

⁸⁰ Wu (*supra* n.1) 201-07.

⁸¹ *Ibid.* 201.

⁸² *Ibid.* 208.

1. National Treatment

Under the NT standard, which exists in both investment and trade disciplines, governments are obliged to treat foreign and national entities (e.g. goods, services suppliers and investors) in an indiscriminate manner.

When asked to rule whether this obligation has been respected, and depending on the exact wording of the provision in which it is included, an adjudicator has to first *compare* the foreign goods, services suppliers, or investors with the national ones. In the words of DiMascio and Pauwelyn, "[n]ational treatment provisions take various forms, but their basic requirement is that nations treat foreign individuals, enterprises, products, or services no less favorably than they treat their domestic counterparts."⁸³ This comparison is made through the consideration of the treatment of the products, services, or investors being 'like' or operating in 'like circumstances'. Finally, one needs to establish whether the foreign products, services or investors have received treatment that is, in effect, *less favorable*. For instance, pursuant to GATT Article III.4, there exists a NT violation, if the (i) imported and domestic products at issue are 'like products' and (ii) the imported products are accorded 'less favorable' treatment than that accorded to like domestic products.⁸⁴

Over time, WTO panels and the AB have developed a particularly dense, and detailed, approach about how the comparison should be made, or in other words, how it is to be determined that two products, or services, are 'like'.⁸⁵ Similarly, there is a considerable amount of international trade jurisprudence that touches upon the meaning of 'less favorable' treatment, including a long list of measures which have been examined in the context of such treatment.⁸⁶ Of course, said jurisprudence has not developed in a linear manner and there still lie identifiable inconsistencies in today's WTO DSB approach on the term of 'likeness'.⁸⁷ However, the numerous discussions from within international trade dispute settlement mechanisms on the issue, have made for particularly dense and interesting case law. It is not surprising then, to see parties to investment disputes frequently referring to these analyses when arguing about the application of NT, especially since there is very little indication in IIAs about how this standard should be enforced.

⁸³ N. DiMascio & J. Pauwelyn 'Nondiscrimination in Trade and Investment Treaties: World Apart or Two Sides of the Same Coin?' (2008) 102 *Am. J. Int'l L.* 48, 58.

⁸⁴ The third criteria being: if the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use. See, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, Appellate Body Report (11 Dec. 2000) ¶133.

⁸⁵ P.C. Mavroidis & M. Wu, *The Law of the World Trade Organization* (2013) 232-40

⁸⁶ *Ibid.* 240-45.

⁸⁷ See e.g., H. Horn & P.C. Mavroidis 'Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination' (2004) 15 *Eur. J. Int'l L.* 39.

Traditional Cases and Critiques of Textual Comparisons Between Trade and Investment Norms

SD Myers v. Canada is the first investment dispute in which reference to the WTO, as regards NT, were made.⁸⁸ In this NAFTA dispute, between a US corporation engaged in the treatment of hazardous chemical compounds and the government of Canada, arising from the enforcement by the latter of a measure prohibiting the investor to import chemical waste from Canada, the investor suggested that the tribunal to seek guidance from WTO law in interpreting the NAFTA Article 1102 expression "in like circumstances".⁸⁹ The tribunal did refer to WTO decisions,⁹⁰ but only to emphasize the importance of taking into consideration the context in which this rule is applied. According to the tribunal, such an approach was shared by the WTO itself. The tribunal then explained that said 'context' was different in an investment dispute on NT, from that of a trade dispute on the same standard. Consequently, the tribunal concluded that the application of the standard differed.⁹¹ In other words, and to simplify, pursuant to the decision in *SD Myers*, investment arbitrators may look to the jurisprudence of the WTO for guidance, but only to emphasize the differences between trade and investment disciplines, and to justify their course of action, in establishing their own analysis or tests when applying NT. The tribunal did not state that reference to WTO law must be avoided, but it certainly limited the possibility for such references being made in the future.

Scholars usually refer to this case in order to highlight how tribunals should be cautious about importing principles '*en bloc*' from trade jurisprudence.⁹² The same scholars advance that, tribunals may refer to trade jurisprudence, and sometimes even quote from panel or AB decisions. However, they nevertheless refute that the analyses or the tests that investment tribunals have to make when applying NT standard in an investment dispute, is the same as those made in trade disputes.

J. Kurtz goes on step further, stating that investment tribunals might err in their appreciation of trade concepts, and that these errors might have negative consequences on the development of investment law.⁹³ According to him, in several instances where investment tribunals have not been as rigorous as they should have been with their

⁸⁸ This case is particularly important, as virtually all the subsequent NAFTA Chapter 11 tribunals dealing with National Treatment and the relevance WTO law analysis refer to it. Further, one of the arbitrators in that case, Bryan Schwartz, issued a separate opinion, which has been regularly cited when examining relations between NAFTA Chapter 11 and trade law. *See SD Myers v. Canada* (Separate Opinion by Dr. B. Schwartz, 12 Nov. 2000).

⁸⁹ *SD Myers v. Canada*, Memorial of the Investor (20 July 1999) pp. 35-40.

⁹⁰ *SD Myers v. Canada*, Partial Award (13 Nov. 2000) ¶¶ 244-45.

⁹¹ *Ibid.*

⁹² See e.g. R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2012) 204-05.

⁹³ Kurtz (*supra* n.1) 763-69.

references to the trade regime, "the misuse of WTO was *the* controlling factor for critical inconsistencies in the legal tests applied to effect [NT]." ⁹⁴

The cases criticized by Kurtz are *Occidental v. Ecuador* and *Methanex v. US*. In both disputes, the tribunals categorically refused to look at how trade adjudicators deal with NT, arguing that textual differences prevented them to do so, and so developed their own analytical methods to compare investors. These methods were later condemned for being too broad (*Occidental*) or too restrictive (*Methanex*).⁹⁵ Interestingly, instead of looking at the context of WTO jurisprudence, in order to see whether such context could be informative, as the *SD Myers* tribunal had done, the arbitrators in the *Occidental* and *Methanex* cases focused on the textual differences between investment and WTO legal regimes, and arrived to conclusions that can be use of WTO law was inappropriate. In *Occidental v. Ecuador* the dispute arose from the cancellation of VAT reimbursements that had been granted to the investor, an oil exploration and production company, pursuant to Ecuadorian tax legislation. Occidental instituted UNCITRAL proceedings against Ecuador under the Ecuador–US BIT, claiming multiple violations of BIT provisions, including one relating to non-discrimination, and requested to be reimbursed for all VAT amounts already paid on goods and services used for the production of oil for export, as well as for future VAT amounts. On the NT violation, the investor argued that Ecuador had breached its obligation, given that various companies involved in the export of other goods (*e.g.*, flowers, mining and seafood products), were still entitled to receive VAT refunds.⁹⁶ Naturally, Ecuador replied that the investor and the exporters mentioned in the claim were not 'in like situations', because operating in different markets. To interpret this expression, 'in like situation', the tribunal briefly referred to the WTO discipline, but did so in order to explain that, in said discipline, the purpose of national treatment was different, additionally emphasizing the differences between the text of GATT Article III and the BIT provision:

"[T]he reference to "in like situations" used in the [BIT] seems to be different from that to "like products" in the GATT/WTO. The "situation" can relate to all exporters that share such condition, while the "product" necessarily relates to competitive and substitutable products."⁹⁷

For the tribunal, 'like situation' is broader than 'like product', and could not be narrowly interpreted: 'like situations' should not be limited to situations where the investor is

⁹⁴ *Ibid.* 751.

⁹⁵ Kenneth Vandeveld notes, for instance, that a narrow approach to identifying a comparator presents difficulties and stated that "ensuring competitive equality does not exhaust the purpose of a non-discrimination provision." K.J. Vandeveld, *Bilateral investment treaties : History, Policy, and Interpretation* (2010) 341.

⁹⁶ *Occidental Exploration & Production Company v. The Republic of Ecuador*, UNCITRAL, LCIA Case No. UN 3467, Final Award (1 July 2004) ¶168.

⁹⁷ *Ibid.* ¶176.

competing with a domestic enterprise.⁹⁸ Rather, one should focus on comparisons between broad categories of national and foreign exporters.⁹⁹ This method led the tribunal to agree with the claimant's demonstration, comparing the treatment it was offered with that offered to "all exporters", and to conclude on a breach of NT.¹⁰⁰

In *Methanex v. US*, the tribunal, accentuating the differences between the wording of NAFTA Article 1102 and GATT Article III, again interpreted the expression 'in like circumstances' in an overly narrow way. It dismissed the claimant's argument that because the products it imported competed directly with products manufactured by domestic companies, it thus stood 'in like circumstances' with said domestic producers and should not be treated differently. The tribunal refused such a competitive-based approach, and adopted a much more restrictive method, looking for identical comparators:

"Given the object of Article 1102 and the flexibility which the provision provides in its adoption of "like circumstances", it would be as perverse to ignore identical comparators if they were available and to use comparators that were less "like", as it would be perverse to refuse to find and to apply less "like" comparators when no identical comparators existed."¹⁰¹

The tribunal justified this position by highlighting the differences between NT in WTO law and in international investment law. The tribunal explained that, because the language of the NAFTA is not exactly the same as that used in GATT law, the tests used to apply the provisions ought to differ.¹⁰² The result is the application of a test, which stands at odds with previous determinations on NT by other investment tribunals, which seems difficult to put into practice.

In his review of the two cases, Kurtz concludes that "the interpretative failures exhibited in *Occidental* and *Methanex* come down to an absence of knowledge on the part of the adjudicators of the specific features of the treaty text and jurisprudence of the WTO."¹⁰³

However, I argue that these critiques and words of caution, about references to WTO law when applying NT, should not be over-emphasized. The problem in these two cases was not the application of WTO law, but the non-application, or to use Kurtz's expression the 'misuse' of WTO law. More recent cases have shown that reference to WTO law might be useful.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* ¶ 179.

¹⁰¹ *Methanex v. US*, Final Award (3 Aug. 2005) Part IV, Chap. B, ¶ 16.

¹⁰² *Ibid.*

¹⁰³ Kurtz (*supra* n.1) 770.

More Recent Disputes and the Contextual Appreciation of WTO and Investment Norms Relating to National Treatment

In several disputes – post *Methanex* and *Occidental* – investment tribunals have continued to refer, with caution, to WTO law, and have done so in a satisfying manner. In the three investment cases of the already mentioned *Sugar saga*, the tribunals took into considerations the findings of the WTO DSB in that dispute, as well as its reasoning. In *Corn Products v. Mexico*,¹⁰⁴ the tribunal acknowledged the differences between the trade and investment regime, and explained that the investor, a producer of HFCS – the particular sweetener that had been banned in Mexico – could not succeed in its claim under Article 1102 by merely showing that HFCS and sugar were 'like products' for the purposes of GATT Article III. However, it did affirm that, the WTO Panel and AB's decision to consider HFCS and sugar as 'like products' for the purposes of GATT Article III, should not be viewed as "irrelevant".¹⁰⁵ It reasoned as follows:

"While the Tribunal would not suggest that the fact that a foreign investor and a domestic investor are producing like products will necessarily mean that they are to be considered as being in like circumstances for the purposes of Article 1102, or that differential treatment will necessarily entail a violation of that provision, where the measure said to constitute the violation of Article 1102 is directly concerned with the products and designed to discriminate in favour of one and against the other then that is a very strong indication that there has been a breach of Article 1102."¹⁰⁶

The tribunal proceeded in a reflective and interesting way: the context of WTO law was taken into consideration, and an interesting demonstration on the way WTO panels had applied this law could be given. From there, the tribunal explained why it was relevant to depart from the analysis undertaken in the trade discipline and how NT shall be applied in the investment discipline.

In a more recent dispute, *Merrill v. Canada*, the investor dedicated an entire section of its pleadings on the relevance of WTO law,¹⁰⁷ not limiting itself to GATT law, but also referring to GATS and other WTO agreements.¹⁰⁸ The claimant sought to argue that the determinative element in the establishment of likeness is whether the investors are in direct competition in the marketplace, as is the case in trade jurisprudence. The investor also referred to trade law in order to demonstrate that Canada's interpretation of the NT

¹⁰⁴ *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (redacted) (15 Jan. 2008) (hereinafter '*Corn Products v. Mexico*').

¹⁰⁵ *Ibid.* ¶ 122.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Merrill v. Canada*, Reply Memorial of the Investor (15 Dec. 2008) ¶¶ 138-149. The GATS references are interesting, especially as GATS extends, in a certain manner, to investment. One should note however that the investor did not overemphasize the differences between the text of the GATS and the GATT. On these differences, see, N.F. Diebold, *Non-Discrimination in International Trade in Services: 'Likeness' in WTO/GATS* (2010) 118-26.

¹⁰⁸ *Ibid.* ¶ 140.

provision, when suggesting that there should also be a fourth step to the analysis, namely to determine whether any "less favorable treatment" accorded to Merrill was motivated by discriminatory intent was misguided.¹⁰⁹ According to the investor, this obligation was not present in the NAFTA text, and furthermore, "it has been explicitly rejected in GATT and WTO jurisprudence on national treatment".¹¹⁰ The tribunal did not directly address the argument. Rather, it offered a general explanation of how in the trade context it makes sense to take in consideration a competition element, but that in the investment context, more elements should be considered.¹¹¹ The tribunal did not categorically refuse to borrow from the trade discipline, but rather highlighted the differences between the tests that need to be operated while looking at the context of both disciplines. This approach, I argue, is appropriate. When looking at how NT works in trade law, one needs to be careful not to draw upon over-simplified analogies and rigid textual comparisons. Rather, the contextual elements of provisions in both disciplines should be taken in consideration. In that sense, trade law should not be disregarded. On the contrary, a careful analysis of how trade law applies might trigger a better appreciation and understanding of an investment norm.

A. Antoni and M. Ewing-Chow share a similar view. They argue that if 'superficial convergence' should be avoided, one should attempt to understand "how these different regimes and DSMs fit together",¹¹² especially when a measure, or a set of measures, results in multiple claims before different international trade and investment dispute settlement mechanisms.

Looking at the broader issue of non-discrimination in trade and investment treaties, DiMascio and Pauwelyn reach a similar conclusion. While they do not favor the outright borrowing of the WTO's tests regarding NT, they do argue that the investment regime would benefit from a better understanding of trade jurisprudence on the issue. According to them, such understanding would allow investment tribunals to examine the presence of nationality-based discrimination, a rationale that is present in both disciplines, and therefore depart from solely concentrating on the narrow comparison of identical investors.¹¹³

These pertinent remarks seem to have been taken into consideration by investment arbitration actors. In at least two pending disputes, the parties have relied on trade norms to interpret NT in investment agreements in a more sophisticated and interesting way.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* ¶ 153.

¹¹¹ *Merrill v. Canada* (Award, 31 Mar. 2010) ¶¶ 87-88.

¹¹² Antoni & Ewing-Chow (*supra* n.33) 341.

¹¹³ DiMascio & Pauwelyn (*supra* n.83) 89.

Pending Cases and More Sophisticated References

In two recent cases against Canada, one in which the award was issued very recently and one still pending, the investors have urged the tribunal to seek guidance from WTO law. In both cases, investors refer to the GATT, as well as to the GATS.¹¹⁴

In *Bilcon & al v. Canada*,¹¹⁵ the investor acknowledges that the language in the GATT, or GATS, is not identical to that of NAFTA Chapter 11, but maintains that this should not prevent the tribunal from drawing from trade jurisprudence. The investor refers to VCLT Article 31(3)(c) to bolster this argument:

"That provision requires that a treaty be interpreted in light of "any relevant rules of international law applicable in the relations between the parties." If this provision were to be construed to permit consideration of other relevant rules of international law in the interpretation of treaties only where those other rules were expressed in identical language, it would be rendered largely inutile, since the only situations in which it would apply would be ones of actual direct incorporation. In such situations, however, Article 31(3)(c) of the Vienna Convention would be inapplicable, since the intent of the parties to import one legal regime into another would be manifestly clear."¹¹⁶

In a recently released award, the tribunal acknowledged the investor's reference to trade jurisprudence, but refused to elaborate on this reference, arguing that the language of NAFTA Article 1102 differed from that in "other trade-liberalizing agreements, such as those that refer to 'like products'",¹¹⁷ and that "Article 1102 refers to the way in which either the investor or investment is treated, rather than confining concerns over discrimination to comparisons between similar articles of trade."¹¹⁸ Quite interestingly, however, the tribunal's majority in the case sided with the investor's conception of 'likeness', even though it refused to agree with the investor that this conception was influenced by trade jurisprudence.¹¹⁹

¹¹⁴ See e.g., *Mesa v. Canada*, Memorial of the Investo (20 Nov. 2013) ¶¶255-68; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Memorial of the Investors (25 Jan. 2011)(hereinafter '*Bilcon & al. v. Canada*') ¶¶384-425 ; *Bilcon & al. v. Canada* (Reply Memorial of the Investors, 21 Dec. 2011) ¶¶255-61.

¹¹⁵ *Bilcon & al. v. Canada*, Award on Jurisdiction and Admissibility (17 Mar. 2015).

¹¹⁶ *Bilcon & al. v. Canada*, Reply Memorial of the Investors (21 Dec. 2011) ¶261.

¹¹⁷ *Bilcon & al. v. Canada*, Award on Jurisdiction and Admissibility (17 Mar. 2015) ¶692.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* ¶¶701-12. Even more interestingly, the tribunal did refer to trade law later in its analysis of national treatment when looking at the absence of reasonable justification. The tribunal noted that NAFTA Article 1102 was not "attached to any 'justification' clause, such as Article XX of GATT, 1947, which permits an exception to its norms in cases where a state has adopted reasonable measures to pursuing certain domestic policy objectives" but that "NAFTA Chapter 11 case law on the issue would seem to provide legally appropriate latitude for host States, even in the absence of an equivalent of Article XX of the GATT, to pursue reasonable and non-discriminatory domestic policy objectives through appropriate measures even when there is an incidental and reasonably unavoidable burden on foreign enterprises." *Ibid.* ¶¶721-23.

In *Mesa v. Canada*, an investment dispute relating to Canada's renewable energy feed-in-tariff programs, the investor has attempted to rely on the connection between the two disciplines, and insists on the importance of taking trade law into consideration. However, rather than simply quoting from WTO/GATT law, the investor has developed a more complex demonstration, based on a comparison between GATT and GATS law, and the context in which the conclusion of these instruments may have influenced the wording of NAFTA.¹²⁰

Whether the tribunal will address this argument remain to be seen, but it is highly likely that the decision of that tribunal will be particularly interesting.

The application of the NT standard in investment law, especially in NAFTA law, has been propitious for references to WTO law. The test operated in the trade discipline to determine whether products or services are alike is not identically replicated in investment arbitration, which is a good thing. Nonetheless, arbitrators may engage in compelling contextual and systematic comparisons. If they do so, I argue, they are more likely to apply the NT standard in a more satisfying way.¹²¹

2. Proportionality Analysis and the Notion of Necessity

In addition to the guidance investment tribunals may receive from WTO law when interpreting National Treatment and the 'notion' of likeness, it has been suggested that they could also turn to WTO jurisprudence when required to examine whether a measure alleged to be in breach of an investment treaty obligation, was in fact 'necessary' for the state in order to protect public interest.¹²²

This type of defense is usually based on non-precluded measures provisions that may be included in IIAs. These clauses set out the circumstances in which a state may promulgate a measure, or otherwise act in a manner inconsistent with its substantive obligations towards an investor, because it has to, for 'permissible' objectives such as human rights, public morals, intellectual property, the health of humans, animals, and plants and other environmental concerns, etc.¹²³ The way these non-precluded clauses

¹²⁰ *Mesa v. Canada*, Memorial of the Investor (20 Nov. 2013) ¶¶260-62.

¹²¹ This conclusion is shared by Diebold, who demonstrates that thoughtful comparison, between the approaches of trade and investment adjudicators in applying NT standards, warrants the deification of coherent factor-based application of non-discrimination rules suitable for all fields of international economic law. See, N.F. Diebold 'Standards of Non-Discrimination in International Economic Law' (2011) 60 *ICLQ* 831.

¹²² For a recent contribution to a much debated issue, see A.D. Mitchell & C. Henckels 'Variations on a Theme: Comparing the Concept of Necessity in International Investment Law and WTO Law' (2013) 14 *Chicago J. Int'l L.* 93.

¹²³ W. Burke-White & A. Von Staden 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2007) 48 *Virginia J. Int'l L.* 307, 329.

operate is not always clear and tribunals have struggled to find the best way to apply such clause.¹²⁴

To perform this exercise, it may be argued that one could look at how similar provisions operate in other treaty-based regimes, and notably in the framework of GATT Article XX. The tribunal did so in the *Continental v. Argentina* dispute,¹²⁵ one of the many investment cases brought by US investors against Argentina for actions taken by the government during the 2001-2002 economic crisis.

In all these cases, Argentina invoked Article XI of the US-Argentina BIT in its defense. This provisions reads in its entirety:

"This Treaty shall not preclude the application by either party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."¹²⁶

In the four pre-*Continental* awards, tribunals looked into customary international law for interpretive guidance to the necessity defense.¹²⁷ They relied notably on the text of Article 25 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts,¹²⁸ considering that the latter "adequately reflect[ed] the state of customary international law on the question of necessity."¹²⁹

¹²⁴ Arguably, the principal cause of this struggle is the variety in the formulation of these clauses in IIAs, which impede general approaches towards them. As Mitchell and Henckels note, NPM clauses may for instance "differ in the requirement as to the nexus between a measure and its objective: some require that a measure be 'necessary to' achieve the objective, whereas others require only that the measure be 'proportional to,' 'directed to,' 'for,' or 'designed and applied' to further one of the permissible objectives." They thus explain that it is this "'nexus' which will be used to determine both the required relationship between the measure and its objective and, consequentially, the level of scrutiny that a tribunal would be expected to direct at the relationship between the policy objective and the measure selected to achieve it." Mitchell & Henckels (*supra* n.122) 106-07.

¹²⁵ *Continental v. Argentina*, Award (5 Sept. 2008).

¹²⁶ The text of the BIT can be accessed on the website of the US DoS at the following address <<http://www.state.gov/e/eb/afd/bit/117402.htm>> (last consulted 1 Aug. 2015).

¹²⁷ For a detailed analysis of these cases and an interesting critique of the approach used in these tribunals see A. Stone Sweet & G. Della Cananea 'Proportionality, General Principles of Law and Investor-State Arbitration' (2014) *SSRN Paper*, available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435307> (last consulted 1 Aug. 2015).

¹²⁸ Article 25 of the ILC Articles on State Responsibility reads as follows:

"Article 25 - Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) the international obligation in question excludes the possibility of invoking necessity; or
- (b) the State has contributed to the situation of necessity."

¹²⁹ See e.g. *CMS v. Argentina*, Award (12 May 2005) ¶315.

Reference to this article, which one might consider to be more restrictive than Article XI Argentina-US BIT,¹³⁰ was criticized and served as a basis to challenge the awards in three of these four cases.¹³¹

The *Continental* tribunal followed a different approach. Rather than looking at customary international law, it relied on the WTO method to adjudicate the defense under Article XX of the GATT:

"Since the text of the Art. XI derives from the parallel model clause of the U.S. Friendship, Commerce, and Navigation treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law."¹³²

In other words, the tribunal in *Continental* considered that the rationale under GATT Article XX was rather similar to the one in Article XI of the Argentina-US BIT. This non-precluded-clause, in a similar manner to what the GATT Article XX does, provides a carve-out exemption from BIT obligations for state acts 'necessary' for achieving certain, specified, state purposes. The tribunal, which was aware that in the WTO regime the panels and the AB have developed an operational and – arguably – well-engineered method to determine when the measure is indeed 'necessary',¹³³ decided to refer to this method.

The tribunal applied the so called proportionality analysis, the method employed by WTO panels and the AB when dealing with GATT Article XX arguments. First, it considered that the economic crisis fell within the scope of the non-preclusion clause of the BIT, under both the 'maintenance of public order' and 'essential interests' headings. The tribunal then referred to the decisions in *Korea–Beef* and *Brazil–Tyres*, and affirmed that "a process of weighting and balancing factors"¹³⁴ was required in order to establish the necessity of a measure and that this process should include "the relative importance of interests furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued, and the restrictive impact of the measure on

¹³⁰ Stone Sweet and Cananea explains for instance that, under Article 25, "necessity may be invoked to excuse an act that violates international law when it is the "only way" a state can "safeguard an essential interest" in the context of a "grave and imminent peril". According to them, "Article XI [of the Argentina-US BIT] expressly permits State measures under headings that cover a broader range of contexts". Stone Sweet & Della Cananea (*supra* n.127) 12. See also, Mitchell & Henckels (*supra* n.122) 97.

¹³¹ On the annulment procedures, see E. Martinez 'Understanding the Debate over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Gas Cases' (2012) 23 *Duke J. Comp. & Int'l L.* 149. The challenges were successful in two cases (*Enron* and *Sempra v. Argentina*). In the last case (*CMS v. Argentina*) the tribunal did not annul the case, but criticized the deficiencies of the connection established between Article XI of the BIT and ILC Article 25.

¹³² *Continental v. Argentina*, Award (5 Sept. 2008) ¶ 192.

¹³³ Mitchell & Henckels (*supra* n.122) 145-59.

¹³⁴ *Continental v. Argentina*, Award (5 Sept. 2008) ¶ 193

international exchange".¹³⁵ The next step was to compare the state measures under review with a list of alternatives that, the claimant had argued, were just as effective and reasonably available, but which would have caused less harm to the investor. Guided by the principles on which the necessity analysis is based in WTO jurisprudence, the tribunal noted that it needed to determine:

"whether Argentina had reasonably available alternatives, less in conflict or more compliant with its international obligations, 'while providing an equivalent contribution to the achievement of the objective pursued,' to the Measures challenged by Continental as inconsistent with the BIT. If so, the Measures adopted would be deprived of a fundamental element underpinning their alleged necessity."¹³⁶

The Tribunal refused to consider the claimant's less restrictive argument and ruled that all of Argentina's measures, but one, were covered by Article XI of the BIT.¹³⁷

Continental is probably the case in which WTO law has had the biggest influence on investment treaty interpretation¹³⁸, and the approach taken in the award has been largely debated.

For instance, J. Alvarez and T. Brink have sharply criticized the result ensuing from the reference to WTO law, arguing that the consequence of this reference was a misapplication of the text of Article XI.¹³⁹ One of their arguments lies on an emphasis of the role of the president of the tribunal G. Sacerdoti, former member of the AB. According to them, the *Continental* "tribunal simply reached for an off-the-shelf model of

¹³⁵ *Continental v. Argentina*, Award (5 Sept. 2008) ¶¶193-95, citing, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, Panel Report (12 June 2007) ¶7.104 (hereinafter '*Brazil-Tyres*'), which sums up the AB case law on this issue and elaborated in *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, Appellate Body Report (11 Dec. 2000) ¶164; *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, Appellate Body Report (12 Mar. 2001) ¶172; *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, Appellate Body Report (7 Apr. 2005) ¶¶306-307; *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (AB Report, 25 Apr. 2005) ¶70.

¹³⁶ *Continental v. Argentina*, Award (5 Sept. 2008) ¶198, citing AB Report, *Brazil-Tyres*, WT/DS332/AB/R, Appellate Body Report (3 Dec. 2007) ¶156.

¹³⁷ *Continental v. Argentina*, Award (5 Sept. 2008) ¶304. As for the other Argentinean cases above mentioned, the case was later challenged before an Annulment Committee. This challenge was dismissed by the Committee who did not consider that the reference to WTO/GATT jurisprudence was a basis for annulment. On this issue, see Stone Sweet & Della Cananea (*supra* n.127).

¹³⁸ Wu (*supra* n.1) 207. Wu concludes his studies affirming that "only in one decision (*Continental*) do we see any influence directly exerted by the trade regime on the jurisprudence of the evolving investment regime".

¹³⁹ J.E. Alvarez & T. Brink, 'Revisiting the Necessity Defense' in K. Sauvant (ed.), *Yearbook of International Investment Law & Policy 2010/2011* (2011) 315, 355. They identify the five following flaws in the reasoning of the tribunal, (i) the failure to explain reasons for the reference to WTO law, (ii) an erroneous reading of the history of the GATT and the conclusion of the BIT, (iii) the failure to consider the text of Article XX and relevant GATT jurisprudence, (iv) the failure to consider the differing purposes of BITs and the GATT, and (v) the failure to consider the structural differences between investor-State and WTO dispute settlement. They conclude that reference to customary international law was better suited to interpret Article XI of the BIT. *Ibid.* 335-52.

balancing presumably because it was familiar—at least to the president of that tribunal."¹⁴⁰

A. Stone-Sweet and G. della Cananea have recently challenged Alvarez's and Brink's position.¹⁴¹ They claim that reference to WTO law and the introduction in investment arbitration of proportionality analysis, "a widely-recognized general principle of law that judges in the most powerful international courts use to adjudicate derogation clauses",¹⁴² would allow investor-State tribunals to meet the present challenges of the international investment legal regime.¹⁴³

These writings show that the academic debate on the legitimacy of the use of proportionality analysis principle and the concept of necessity as applied in WTO dispute settlement, is still ongoing.¹⁴⁴ Furthermore, contrary to the other decisions in which the notion of 'necessity' in the US-Argentina BIT Article XI was interpreted in the light of customary law, the *Continental* award has survived the ICSID Article 52 annulment procedure it was subject to. The *ad hoc* annulment committee that examined the *Continental* award, did look into the issue of the tribunal having referenced WTO law and refused to consider that the tribunal "erred in its analysis of the law of GATT-WTO."¹⁴⁵ The committee made it clear that "the Tribunal was clearly not purporting to apply that body of law, but merely took it into account as relevant to determining the correct interpretation and application of Article XI of the BIT."¹⁴⁶

To date, no other references have been made to proportionality analysis as applied in the *Continental* award. In *El Paso v. Argentina*,¹⁴⁷ the most recent case concluded on the basis of the Argentina-US BIT, the majority did not rely on the reasoning in the *Continental* case.¹⁴⁸ One should note, however, that although the award in this case was issued after the *Continental* award was published (*i.e.* 5 September 2008), the merits exchange of briefs and pleadings in *El Paso* occurred *before* (the final hearing on the merits was held from 4 to 13 June 2007). It was therefore impossible for the parties, and notably for Argentina,

¹⁴⁰ *Ibid.* 356.

¹⁴¹ Stone Sweet & Della Cananea (*supra* n.127); *see also* A. Stone Sweet 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4 *L. & Eth. of Human Rights* 47.

¹⁴² Stone Sweet & Della Cananea (*supra* n.127) 18.

¹⁴³ *Ibid.*

¹⁴⁴ Interestingly, none of these authors have looked at the preparatory work of the US-Argentina BIT and whether the framers were influenced by trade law when drafting Article XI. Because of this missing information, it is difficult to adopt a clear position on this debate.

¹⁴⁵ *Continental v. Argentina* (Annulment, 16 Sept. 2011) ¶ 133.

¹⁴⁶ *Ibid.*

¹⁴⁷ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 (Award, 31 Oct. 2011)(hereinafter '*El Paso v. Argentina*').

¹⁴⁸ As emphasized by Stone Sweet and Della Cananea, the tribunal did not rely on the ILC Articles and customary international law either, hence rejecting the approach adopted in pre-*Continental* disputes: "The Tribunal, citing to *Continental*, focused on Article XI BIT, treating Article 25 ILC as "secondary law" (to be applied only" if Article XI is found not to apply)." Stone Sweet & Della Cananea (*supra* n.127).

to advance arguments based on the approach taken in the *Continental* case, as it was yet to transpire. Eventually, the *El Paso* majority rejected Argentina's defenses, finding that its measures had "contributed to the crisis of a substantial extent, so that Article XI cannot come to its rescues."¹⁴⁹ Arbitrator B. Stern dissented on this issue, explaining that she was inclined to adopt the same conclusion as in *Continental*.¹⁵⁰ On should note, finally, that the third dispute, and to date the last in which G. Sacerdoti sat as an arbitrator (*Continental* was the second one), *Total v. Argentina*, arose on the basis of the Argentina-France BIT, which does not include a non-precluded measure clause.¹⁵¹ In that case, the tribunal did not refer to the analysis made in *Continental* when examining Argentina's defense on necessity (which are based on customary international law).¹⁵²

3. Others References

National treatment and necessity are not the only concepts contained in investment instruments for which tribunals have seen it fit to refer to WTO law, when in need of interpretative guidance. The following examples may also be mentioned.

Measures 'Relating to' an Investment

In *Methanex v. US*, the tribunal referred to WTO case law to interpret the expression 'relating to' contained in NAFTA Article 1101. This article limits the scope of the measures that can be challenged before investor-State tribunals pursuant to NAFTA Chapter 11. Only measures 'relating to' an investment, or an investor, are subject to review. The core idea behind this provision is that a measure that merely affects an investment cannot be subject to arbitration, whereas a measure that legally impedes that investment can. In *Methanex*, what was at issue was a Californian ban on the sale of gasoline containing a substance called MTBE. The investor, a Canadian firm with facilities in the US, and that was specialized in the production and importation of methanol – one component of MTBE –, challenged the ban, alleging that it 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."¹⁵³ Referring to Article 1101, the US argued that the measure did not 'relate to the investment' because it did not have a legally significant connection with it. In its reply to that defense, the investor pointed that in the WTO case *US–Gasoline*, the US themselves had interpreted the words

¹⁴⁹ *El Paso v. Argentina*, Award (31 Oct. 2011) ¶665.

¹⁵⁰ *Ibid.* ¶670.

¹⁵¹ *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012)(hereinafter '*EDF v. Argentina*').

¹⁵² One shall note, however, that the tribunal did refer, at least implicitly, to proportionality analysis, as it sought 'alternative measures' that would not have been in breach of the BIT. *Ibid.* ¶345. See also, *ibid.* ¶484, where the tribunal notes that one of the measures found to be in breach of investment obligations, had not been proven to be 'the only way' to safeguard the essential interest at stake.

¹⁵³ *Methanex v. US*, First Partial Award (7 Aug. 2002) ¶46.

'relating to' as merely suggesting "any connection or association existing between two things."¹⁵⁴

Assessing the arguments of both parties, the tribunal took the opportunity, bearing in mind the reference to WTO law, to recall that interpretation must be made in context.¹⁵⁵ Citing other sources and instruments that need to be taken in consideration in that regard, the tribunal refused to give particular importance to the *Methanex* reference. Eventually, the tribunal ruled that that the phrase 'relating to' in Article 1101(1) NAFTA, signified something more than the mere effect of a measure on an investor or investment, and that it required a legally significant connection between them.¹⁵⁶

Public Procurement

In the pending *Mesa Power Group v. Canada* dispute, the investor relied on WTO law to define the notion of 'public procurement'. The dispute in that case arose from the application of various government measures relating to the regulation and production of renewable energy in Ontario. The claimant, a Delaware company, alleges that Ontario imposed sudden and discriminatory changes to the established scheme for renewable energy, namely the Feed-In-Tariff Program (FIT Program). This program, pursuant to which suppliers of renewable energy would be granted long-term contracts with an advantageous remuneration to be calculated over time, had already been challenged before the WTO, and the AB issued a decision in 2013 against Canada.¹⁵⁷ In that decision, the AB upheld the panel decision, though on different grounds, finding that some elements of the FIT program violated several of Canada's trade obligations (including NT obligations under GATT Article III.4 and performance requirements under TRIMS 2.1).¹⁵⁸ The AB notably dismissed an objection from Canada according to which the elements of the program under review were covered by the exception for government procurement in GATT Article III.8. In brief, the AB ruled that the measures fell outside the GATT Article III.8 exception, because the object being 'procured' (the electricity) was different from the object being discriminated against (equipment for the generation of electricity).¹⁵⁹

From the outset of the investment case, Canada had attempted to raise a similar objection, relying on NAFTA Article 1108.¹⁶⁰ This provision carves out government

¹⁵⁴ *Ibid.* ¶ 131.

¹⁵⁵ *Ibid.* ¶ 144-145.

¹⁵⁶ *Ibid.* ¶ 147.

¹⁵⁷ For a recent comment of the Panel and AB decisions, see A. Cosbey & P.C. Mavroidis 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy - The Case for Redrafting the Subsidies Agreement of the WTO' (2014) 17 *J. Int'l Eco. L.* 11.

¹⁵⁸ *Canada — Measures Relating to the Feed-in Tariff Program*, WT/DS412-426/AB/R, Appellate Body Report (6 May 2013) ¶ 5.85.

¹⁵⁹ *Ibid.* ¶ 5.75-80. For a discussion of this finding, see Cosbey & Mavroidis (*supra* n.157) 12-13.

¹⁶⁰ *Mesa v. Canada*, Canada – Outlines of Potential Issues (31 Jul. 2012) ¶ 22.

procurement from several NAFTA Chapter 11 obligations (including NT, MFN and restrictions on performance requirements). As a reply to this defense, the investor relied on GATT law and the WTO reports, in order to define the scope of public procurement.¹⁶¹ As mentioned earlier, the case is pending. The decision of the tribunal will be instructive as to whether these references are pertinent and to whether the recent WTO decisions will be taken into account in the interpretation of the notion.

The Right to Regulate

In *Total v. Argentina*,¹⁶² the tribunal referred to WTO law in order to stress an argument made regarding the need to take into consideration the host State's right to regulate domestic matters in the public interest when examining an alleged breach to the legitimate expectations of investors under the standard of Fair and Equitable Treatment.¹⁶³ The tribunal explained that the evaluation of the fairness of the conduct of the host country towards an investor could not be made 'in isolation', by only considering the bilateral relations of the investor and the host-State.

"The context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account."¹⁶⁴

The tribunal turned to the WTO and brought forward the following idea:

"[a]dditional criteria for the evaluation of the fairness of national measures of general application as to services are those found in the WTO General Agreement on Trade of Services (GATS). The Tribunal recalls that Article VI of the GATS of 1994 on 'Domestic regulation' provides that 'In sectors where specific commitments are undertaken, each member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner' [...]. This reference concerning services (as undoubtedly Total's operations in the gas transportation and electricity were) in a multilateral treaty to which both Argentina and France are parties offers useful guidance as to the requirements that a domestic regulation must contain in order to be considered fair and equitable."¹⁶⁵

The tribunal was quick to note that it referred to GATS law 'just as guidance', and clearly stated that "it has not been submitted that the GATS law was "directly

¹⁶¹ *Mesa v. Canada*, Memorial of the Investor (20 Nov. 2013) ¶¶474-79 ; *Mesa v. Canada*, Investor's Reply Memorial and Rejoinder on Jurisdiction (30 Apr. 2014) ¶¶233-39 ; 258-66.

¹⁶² *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 Dec. 2010) (hereinafter '*Total v. Argentina*').

¹⁶³ It was not the first time investment arbitration actors referred to WTO law when interpreting the meaning of 'legitimate expectations' in the context of fair and equitable treatment. In his Separate Opinion in *Thunderbird v. Mexico*, Thomas Wälde extensively cited WTO law and jurisprudence, to demonstrate that legitimate expectation has been recognized as an important principle guiding the interpretation of other obligations in international economic law. See *Thunderbird v. Mexico* , Walde's Dissenting Opinion (*supra* n.47) ¶29.

¹⁶⁴ *Total v. Argentina*, Decision on Liability (27 Dec. 2010) ¶123.

¹⁶⁵ *Ibid.* ¶123.

applicable" in the dispute."¹⁶⁶ The tribunal did look into the context and these additional criteria, and established that the changes made by Argentina, to the regulatory framework of gas pricing and distribution, constituted a breach of fair and equitable treatment.

Good Faith, Abuse of Right and Procedural Fairness as Components of Fair and Equitable Treatment

The vast majority of existing IIAs contain an obligation for their signatories to provide 'fair and equitable treatment' (FET) to foreign investors. This standard, which has not been defined in IIAs until recently,¹⁶⁷ is today one of the most prominent elements of the investment protection regime and is invoked quasi systemically as a cause of action before an arbitration tribunal. As recently noted by UNCTAD, "[t]he wide application of the FET obligation has revealed its protective value for foreign investors but has also exposed a number of uncertainties and risks."¹⁶⁸ And amongst those risks, lays the capacious wording of most FET provisions, which many tribunals have used to interpret the standard broadly, and which often include in their scope a variety of specific requirements, such as a State's obligation to act consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an even-handed manner, to ensure due process in decision-making and respect investors' legitimate expectations.

In order to interpret FET standards and decide whether they cover a specific obligation, tribunals may be tempted to look at other branches of international law which may include such standards, or at least obligations that are similar to it.

In *Mobil v. Venezuela*, for instance, the tribunal referred to several other international legal regimes, including WTO law, to explain that the principle of good faith, a component of FET, was widely applied in international law. The tribunal first pointed at the ICJ case law and noted how the world court recognized that principle as "one of the basic principles governing the creation and performance of legal obligations."¹⁶⁹ The tribunal then turned to other regimes and noticed that the WTO AB used that principle as well.¹⁷⁰

¹⁶⁶ One may note, in this statement, an anticipation of potential critics about the reference to the WTO legal regime. As mentioned in previous developments, critics against the *Continental* award, and to the president of the tribunal in that case, G. Sacerdoti (also chairman in the *Total v. Argentina* tribunal) were numerous. With this caveat, the tribunal (and its president) tries to protect itself from attacks on misapplication of the law governing the dispute.

¹⁶⁷ See CETA Draft Article X.9 which enumerates, exhaustively, all the situations in which the FET standard can be breached.

¹⁶⁸ UNCTAD 'Fair and Equitable Treatment – A Sequel' (2012), *UNCTAD Series on Issues in International Investment Agreements*, xiii.

¹⁶⁹ *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010) ¶170.

¹⁷⁰ *Ibid.*

Finally, in the recent *Apotex v. US* dispute, the claimant attempted to refer to WTO jurisprudence in order to bolster an argument on the existence of an international obligation for procedural fairness. The investor argued that principles of fair administration were embodied in supra-national legal orders, such as the laws of the European Union (EU) and the jurisprudence of the WTO, and should therefore be recognized in international investment law, as a part of the FET standard.¹⁷¹ The tribunal did not refer to this specific part of the argument, and focused instead on the extensive investor-State case on that issue.¹⁷² The tribunal eventually accepted that such obligation existed and was, to some extent, protected pursuant the NAFTA Chapter 11 provision on FET (Article 1105), but ruled that it had not been breached in the present case.¹⁷³

B. REMARKS

1. Substantial Similarity

As explained in the first Chapter of the present thesis, international investment and trade norms are based on principles that share the same roots.¹⁷⁴ B. Schwartz's dissenting opinion in *SD Myers* is instructive on this point, stating,

"International trade agreements tend to address the liberalized or free movement of one or more of four different economic factors: goods, services, people and investment. NAFTA addresses all four in various ways. Chapter 11 (Investment) of NAFTA focuses on the free and nondiscriminatory treatment of investors and investment.

NAFTA does not stand in isolation from other developments in international trade law. Many of the ideas and legal phrases in NAFTA are drawn from the global trade law system that used to be called the GATT system. That system was expanded and consolidated in the Uruguay round of negotiations in 1994, leading to the creation of the WTO."¹⁷⁵

These statements reflect the basic idea expressed in Chapter 1, that investment and trade are both factors of production.¹⁷⁶ That these common ground principles have been transposed in rules that are not identically formulated, is not contested. Yet, the cases examined in the present section show that there exists a certain proximity in the formulation of trade and investment legal norms, and that this proximity should not be

¹⁷¹ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Memorial of Claimants (30 July 2012) (hereinafter '*Apotex Inc. v. US*') referring to AB critics of the unfairness of the US procedure for certifying the shrimp industries of particular States. See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (AB Report, 12 Oct. 1998) ¶ 180.

¹⁷² *Apotex Inc. v. US*, Award (25 Aug. 2014) ¶¶ 9.41-47

¹⁷³ *Ibid.* ¶ 9.65.

¹⁷⁴ See Chapter 1.

¹⁷⁵ Schwartz Separate Opinion in *SD Myers* (*supra* n.88), ¶¶ 65-66.

¹⁷⁶ See, Chapter 1 pp.10-25.

disregarded.¹⁷⁷ On the contrary, it should be seen as an invitation for investor-State tribunals to look at the trade discipline, and assess whether guidance can be found in it, by comparing the rationale of each norm and the context in which they have been established, and by referring, when possible, to the interpretation of these trade norms by the judge competent to apply them. I argue that tribunals should not hesitate to use the norms from this other discipline, and that it will allow them to better apply the ones in theirs. In my opinion, it is in this sense that the following statement in *Methanex* should be read:

"[The tribunal] may derive guidance from the way in which a similar phrase in the GATT has been interpreted in the past. Whilst such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant."¹⁷⁸

2. The Quality of WTO Jurisprudence

A reason that has been put forward for referencing to trade law in investment arbitration, and more specifically WTO jurisprudence, is the alleged quality of the jurisprudence of international trade. This claim is debatable.

On the one hand, one could argue that the WTO is supported by a permanent Secretariat comprised of knowledgeable, and experienced, legal and trade policy professionals, its role in the maintenance of an institution, going back as far as to the conclusion of the GATT in 1947, having been recognized by many.¹⁷⁹ For instance, Tereposky and Maguire explain that

"the Secretariat includes a legal staff that assists in the resolution of trade disputes involving the interpretation of WTO rules and jurisprudence and it supports *ad hoc* panelists and arbitrators in dispute settlement. The Appellate Body, which is not *ad hoc*, but rather is composed of seven members who are appointed by the DSB to serve four-year terms, has its own Secretariat that provides administrative and legal support and maintains its institutional memory. This institutional structure fosters uniformity and consistency in WTO jurisprudence."¹⁸⁰

According to the same people, the result of this structural organization of the WTO dispute settlement mechanism is that the reports, awards and decisions it issues, are

¹⁷⁷ See, for a similar argument, G. Sacerdoti, 'The Application of BITs in Time of Economic Crisis: Limits to their Coverage, Necessity and the Relevance of WTO Law' in G. Sacerdoti *et al.* (eds.), *General Interests of Host States in International Investment Law* (2014) 3, 20.

¹⁷⁸ *Methanex v. US*, Final Award (3 August 2005), Part II, Chapter B ¶6.

¹⁷⁹ See e.g., JHH Weiler's piece on the role and legitimacy of the WTO dispute settlement system in general, where he weights the pros and cons of the influence the secretariat can have on the panels. J.H.H. Weiler 'The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 *J. World Trade* 191, 205-06.

¹⁸⁰ Tereposky & Maguire (*supra* n.1).

usually presented in a uniform manner that addresses the arguments of the parties at a relatively high level of detail.¹⁸¹

On the other hand, it remains that WTO case law is subject to certain fluctuations and that the approach taken by trade adjudicators are not always crystal clear to the observer. As already mentioned, the jurisprudence on the interpretation of the main rules discussed in the present section (NT and necessity in the language of GATT Article XX) is far from consistent.¹⁸²

Without entering into this debate, which lies outside the scope of the present chapter, one has to reckon that the WTO offers a multilateral setting of comprehensive interconnected agreements and its dispute settlement mechanism represents a multilateral, inter-State, and permanent, judicial mechanism.¹⁸³ The WTO DSB is generally seen as a balanced mechanism, whose integrity and legitimacy is difficult to challenge.¹⁸⁴ In contrast, investor-State tribunals are often criticized for their lack of legitimacy. Conversely, one may consider that, when appropriate, investment tribunals may benefit from referring to this authoritative jurisprudence of the WTO AB, for interpretative guidance, so as to promote legitimacy (if not consistency) in investment case law.¹⁸⁵

3. The (non-)use of VCLT Article 31(3)(c) and Systemic Integration Doctrine

Interestingly, in Scenario No.2 cases, tribunals have rarely used VCLT Article 31(3)(c) to justify reference to the trade disciplines. This might come as a surprise, as an argument can be made that tribunals should be compelled to take WTO law into consideration when interpreting a norm contained in a BIT, pursuant to the application of VCLT Article 31(3)(c).

This provision requires a tribunal, engaged in treaty interpretation, to take into account "any relevant rules of international law applicable in the relations between the parties." In the words of Sinclair, pursuant to this Article, "[e]very treaty provision must be read

¹⁸¹ *Ibid.*

¹⁸² *See e.g.*, on national treatment, Horn & Mavroidis (*supra* n.87). On GATT Article XX, *see* the discussion of the AB about the interpretation of the 'chapeau' of Article XX in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (AB Report, 22 May 2014) ¶¶5.296-306. *See also*, for a recent analysis of the GATT Article XX jurisprudence, L. Bartels 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 *Am. J. Int'l L.* 95.

¹⁸³ *See* Chapter 2.

¹⁸⁴ Of course, the WTO DSB is not immune from all forms of criticism, and trade dispute settlement specialists usually agree that several features of the system could be performed. To mention just one example, that is relevant for our discussion here, it can be argued that, because of the basics economics of trade retaliation, it is usually difficult for small players to impose countermeasures against big players, if the latter refuse to conform with WTO decisions. On this issue, *see e.g.* K. Bagwell, P.C. Mavroidis & R.W. Staiger 'The Case for Auctioning Countermeasures in the WTO' (2003) *NBER Working Paper No. 9920*.

¹⁸⁵ Sacerdoti (*supra* n.177) 23.

not only in its own context, but in the wider context of general international law, *whether conventional or customary*."¹⁸⁶

Considering the number of States that are members to the WTO (161 since April 2015), the likeliness of the parties to a BIT, being interpreted by a given tribunal, also being parties to the WTO agreements, is relatively high. In that situation, the given tribunal would be well advised to use Article 31(3)(c) when taking into account the WTO obligations of the parties. This has happened only on a very limited number of occasions. The best example is *Feldman v. Mexico*, where the tribunals sought to identify the relevance of WTO jurisprudence through the application of the VCLT's interpretation rules.¹⁸⁷

Another, more recent, example is *Merrill v. Canada*.¹⁸⁸ In that case the tribunal reacted rather positively to the claimant's expert suggestion that the doctrine of systemic integration, which is embodied in Article 31(3)(c), could be applied to refer to trade norms.¹⁸⁹ Recall that, in this case, the claimant invited the tribunal to turn to trade jurisprudence to interpret several rules included in NAFTA law, applicable to the dispute (including NT). In his reports, Howse, who acted as the claimant's legal expert, addressed the doctrine of systemic integration to support a reference to trade principles. He was then asked during the hearings to elaborate on the said doctrine.¹⁹⁰ He explained that, given the diffused nature of the international legal system, a 'treaty interpreter' in one particular regime of international law, may –and Howse stresses 'where relevant'– bring principles and rules from outside that regime to bear on the interpretation of the provisions in question in that regime.¹⁹¹ In the award, the tribunal acknowledged the reference to that doctrine and noted that one should not exclude taking other international agreements into consideration when interpreting the rules applicable in the case.

Such infrequent reference to Article 31(3)(c) may be seen as surprising, as it would certainly allow the tribunals to strengthen their reasoning when referring to trade norms.

¹⁸⁶ I.M. Sinclair, *The Vienna Convention on the Law of Treaties* (1984) 139.

¹⁸⁷ See *Feldman v. Mexico*, Award (16 December 2002) ¶165.

¹⁸⁸ *Merrill v. Canada* (supra n.29).

¹⁸⁹ C. McLachlan 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279.

¹⁹⁰ *Merrill v. Canada*, Hearing transcripts vol. 5, 22 May 2009, pp.1290-1294.

¹⁹¹ *Ibid.* 1291. Howse further explains that behind this doctrine lies "the idea that one should avoid conflicts, one should assume that States negotiating in one forum and making solemn treaty obligations to each other are not doing so in such a way as to undermine or render ineffective obligations to each other that they have made [...] in some other context that are equally solemn and have an equal status in terms of the hierarchy of norms in international law". *Ibid.* 1293.

V. TRADE NORMS IN THE CLAIM

In a 2003 article, G. Verhoosel evaluated the possibility of using an investment agreement to seek relief for breaches of WTO obligations.¹⁹² At that time, the question had been asked to one tribunal only, and an answer was still pending. An answer has now been provided, and it is in the negative. The tribunal refused to consider that a breach of a trade obligation could pertain to a breach of an investment obligation. Yet, in three recent and pending investment claims, investors have tried, again, to rely to IIA standards to 'import' WTO obligations. These four cases are examined below.

This study will allow us to show that the limits to directly importing trade obligations into investment claims are real, and that the possibility explored by Verhoosel more than ten years ago is still not likely to occur. Yet, such a possibility should not be entirely forgotten. A brief look at other attempts to import other international obligations (although not WTO obligations), show that tribunals might be inclined to import non-investment obligations under certain circumstances. Should it be expanded to trade norms, important concerns regarding WTO enforcement mechanisms would need to be addressed.

A. ATTEMPTS TO IMPORT WTO NORMS TO INVESTMENT CLAIMS

1. *Methanex v. US*: WTO Obligations and Fair and Equitable Treatment

The already mentioned dispute in *Methanex v. US*, staged a Canadian producer of chemical products operating in California against the US government. Methanex initiated arbitration in 1999 before a UNCITRAL tribunal arguing that measures taken by the State of California to ban MTBE, a chemical used in the composition of gasoline, were in breach of several NAFTA Chapter 11 obligations.

The proceedings in that case developed slowly and rather chaotically. From the very outset, the US insistently challenged the jurisdiction of the tribunal on various grounds. These challenges led the investor to, on several occasions, reformulate its statement of claim and the structure of its argumentation. Claims that WTO obligations entailed a breach of the BIT were made in the first versions of its claim only (before the Tribunal

¹⁹² G. Verhoosel 'The Use of Investor–State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law' (2003) 6 *J. Int'l Eco. L.* 493. Verhoosel framed an interesting discussion. First, he argued that WTO law could be considered as *applicable* to the investment dispute, "when the BIT governing the dispute sets a standard of regulatory treatment which is defined by reference to existing or future rules of international law applicable as between the parties." He then contented that "even if WTO law could not be construed as 'applying to' the investment dispute, it may still inform the interpretation of the regulatory treatment obligations in BITs as interpretative context", and, he added, "pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties". *See, ibid.* 496. As we have seen in the previous section, this second hypothesis has been largely verified, at least the first part of it, since the investor-State tribunals have been rather reluctant to use VCLT Article 31(3)(c).

issued a First Partial Award in which it directed Methanex to produce a 'fresh pleading').¹⁹³

These claims were articulated as follows: the investor argued that the ban against MTBE was illegal in light of the WTO SPS and TBT agreements. Essentially, the investor attempted to demonstrate that the measure was (i) discriminatory, (ii) did not achieve the legitimate objective it was based upon (*i.e.*, the protection of the environment), (iii) was not the least trade-restrictive alternative which could achieve that legitimate objective and (iv) constituted a disguised restriction on trade.¹⁹⁴ According to Methanex, this illegality was tantamount to a breach of the FET standard: "any violation of an international principle intended for the protection of trade or investment is also a violation of the NAFTA Article 1105 requirement that State measures be fair, equitable, and in accordance with international law."¹⁹⁵

Recall that NAFTA Article 1105 reads as follows:

"Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. [...]"

Methanex relied on *SD Myers*, and notably on B. Schwartz's separate opinion, to interpret Article 1105 of the NAFTA. Bryan Schwartz had affirmed that the application of this provision must "also take into account the letter or spirit of widely, though not universally, accepted international agreements like those in the WTO system and those typical of BITs."¹⁹⁶ Relying on this statement, the investor argued that "to the extent that state measures that violate other principles of international law also affect NAFTA investors or their investments adversely, they violate Article 1105 as well", concluding that the ban violated the TBT and the SPS agreements, and that the measures were "unfair and inequitable, and thus a violation of NAFTA Article 1105."¹⁹⁷

The US, replying to Methanex's arguments, stated that "Article 1105(1) did not incorporate WTO requirements". According to the US, WTO agreements were not part

¹⁹³ *Methanex v. US*, Partial Award (7 Aug. 2002) ¶172.

¹⁹⁴ *Methanex v. US*, Claimant Draft Amended Claim (12 Feb. 2001) pp.59-65. The investor cited extensively from WTO panel and AB reports to do so (with an emphasis *Australia—Measures Affecting the Importation of Salmon*, WT/DS18/AB/R, Appellate Body Report (20 Oct. 1998) ¶194 and *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R, Panel Report (18 Sept. 2000) ¶8.43) as well as commentators of these two instruments (K. Kennedy 'Resolving International and Phytosanitary Dispute in the WTO' (2000) 55 *Food & Drug L.J.* 81, 99-100).

¹⁹⁵ *Methanex v. US*, Claimant Draft Amended Claim (12 Feb. 2001) p.58.

¹⁹⁶ *Ibid.* The claimant here cites Schwartz's Separate Opinion in *SD Myers*. Methanex argues that the *SD Myers* Tribunal reached the same conclusion: "In some cases, the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied "fair and equitable treatment", but the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105."

¹⁹⁷ *Ibid.* p.65

of the customary international law minimum standard of treatment, and are therefore not incorporated into Article 1105(1). Rather, the US thought the suggestion that WTO agreements are incorporated into Article 1105(1), as treaty obligations, could not be supported in light of the NAFTA text. Specifically, the US argued that:

"the limited consent to arbitration granted in Chapter 11 cannot reasonably be extended to the international law obligations embodied in those [WTO Agreements]. Otherwise, the NAFTA parties would potentially be subject to a vast number of claims for monetary damages based on obligations that were not assumed with the understanding that their breach could give rise to such claims."¹⁹⁸

In response, the investor argued that the incorporation of "legal principles relevant to investment protection will not create a private right of action for any breach of any GATT, WTO, or other multilateral obligation."¹⁹⁹ Indeed, according to the investor because "regardless how fair and equitable is eventually defined, a Chapter 11 claimant must always meet the specified requirements, including that the measure complained of actually damaged a covered investment."²⁰⁰

Methanex eventually dropped this part of the claim later in the proceedings. Nevertheless, the tribunal did refer to the interconnection between trade and investment law in its final award. The tribunal made a distinction between its jurisdiction and the law applicable to the dispute. It thus explained that, although trade law could be seen as relevant to interpret substantive provisions of Chapter 11 of the NAFTA, applying trade norms, as the claimant requested, would be seen as an expansion of its jurisdiction outside what the relevant provisions of the NAFTA provide for.²⁰¹ The tribunal therefore concluded that it disclaimed any power to decide the investor's allegation that the US had violated provisions of the GATT.²⁰²

2. WTO Obligations and Specific Undertaking / Umbrella Clauses: *The Philipp Morris cases*

The two cases opposing the tobacco company Philip Morris International against Uruguay and Australia, after the governments of these two states passed new regulation on tobacco control, have been widely covered by the media.²⁰³ For many detractors of international investment arbitration they are infamous examples of how the system may

¹⁹⁸ *Methanex v. US*, Reply Memorial of the US (12 Apr. 2001) pp. 31-32.

¹⁹⁹ *Methanex v. US*, Rejoinder (25 May 2001) p.56, fn. 23.

²⁰⁰ *Ibid.*

²⁰¹ *Methanex v. US*, Final Award (3 Aug. 2005) Part II, Chap. B, ¶¶4-5.

²⁰² *Ibid.* ¶5.

²⁰³ To give only one example, in February 2015, the US news satire/TV show "Last Week Tonight" starring the British anchor John Oliver dedicated one episode on these dispute. The twenty minute report is available on the show's website at the following address <<http://www.hbo.com/last-week-tonight-with-john-oliver/episodes/02/26-february-15-2015/video/ep-26-clip-big-tobaccos-still-at-it.html?autoplay=true>> (last consulted on 1 Aug. 2015).

be abused, where a multinational brings a State before an international adjudicator because of a regulation that aims to protect public health.²⁰⁴ The dispute against Australia has been discussed even more extensively amongst the international legal community, as it provides a recent example of the existence of parallel and somehow competing jurisdictions, with the measures involved having also been challenged before domestic courts and the WTO.²⁰⁵

In these two cases, which at the time of writing are still pending, the claimants have asked the investment tribunal to hold the States responsible for a breach of WTO law. In the case against Uruguay, the claimants are two Philip Morris holding companies incorporated in Switzerland. In their request for arbitration, they claim, *inter alia*, that the Uruguayan ordinance prohibiting different packaging or presentation of cigarettes sold under a given brand is unfair and inequitable, and therefore in breach of the Swiss-Uruguay BIT FET provision, because it is incompatible with Uruguay's obligations under the TRIPS agreement.²⁰⁶

In the case against Australia, Philip Morris Asia, the Hong-Kong based branch of the multinational corporation, challenges Australia's plain-packaging regulation. Amongst the investor's claim, is a claim under the broad umbrella clause in the BIT, which provides that "[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party". According to the claimant's Notice of Arbitration:

"This [umbrella clause] is broader than specific obligations ... made by the host State to investors.... It also encompasses other international obligations binding on the host State that affect the way in which property is treated in Australia. [T]he relevant obligations are those enshrined in TRIPS [...] and TBT. [The Claimant] as an owner of the investments is entitled to expect Australia to comply with its obligations pursuant to those treaties. By adopting and implementing plain packaging legislation, Australia has failed to observe and abide by those obligations."²⁰⁷

In response, Australia argued that:

²⁰⁴ See e.g., I.A. Eberhardt & C. Olivet, *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fuelling an Investment Arbitration Boom* (2002) available at <<http://corporateeurope.org/publications/profitting-from-injustice>> (last consulted on 1 Aug. 2015). The report was then published by several NGOs including the Corporate Europe Observatory and the Transnational Institute. See for more information, the Corporate Europe Observatory <<http://corporateeurope.org/about-ceo>> (last consulted on 1 Aug. 2015); and the Transnational Institute (TNI), <http://www.tni.org/abouttni> (last consulted on 1 Aug. 2015).

²⁰⁵ For a general discussion about the dispute, see A. Ritwik 'Tobacco Packaging Arbitration and the State's Ability to Legislate' (2013) 54 *Harvard Int'l L. J.* 523.

²⁰⁶ *Philip Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Request for Arbitration (19 Feb. 2010) ¶¶85-86. Claimants also rely on Article 11 of the BIT pursuant to which parties to the treaty have to observe commitments they have entered into with respect to foreign investment.

²⁰⁷ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Notice of Arbitration (21 Nov. 2011) ¶¶7.16-17 (hereinafter '*Philip Morris v. Australia*').

"The meaning and scope of such provisions is a matter of great controversy. However, it is clear in the instant case that ... the "umbrella clause" ... only covers commitments that a host State has entered into with respect to specific investments ... [T]he obligations under these multilateral treaties ... are not "obligations" which have been entered into with regard to investments of investors" of Hong Kong, but rather obligations that operate on the inter-State level, with their own particular inter-State dispute resolution procedures."²⁰⁸

In the Australian case, it appears that the investor has dropped the claim based on the TRIPS argument. This was revealed in a Procedural Order decision on bifurcation issued by the tribunal in May 2014.²⁰⁹ However, that document has not been published and the parties have not released any other dispute materials since the notice of arbitration and the first statement of defense. Therefore, it is difficult to speculate about the investor's change in strategy. No information has been release on the possible trade claim in the Uruguay case.

It is too early to affirm whether the tribunal in the Australian case will address, or not, the arguments made by the parties in their original submissions. It is further impossible to assess the likely success of this possible claim. Similarly, it is difficult to predict how the Uruguay case will unfold. It all depends on the interpretation, made by the tribunals, of the scope of the 'umbrella clause'. As mentioned earlier in this work, these clauses can be broadly interpreted.²¹⁰ Arbitral tribunals have, for instance, considered that they could encompass 'unilateral undertakings'.²¹¹ Should the tribunals adopt this interpretation, chances are that PMI claims could be upheld.²¹² In an article devoted to the convergence of trade and investment law published before the May 2014 decision on bifurcation, Roger Alford reached this conclusion: according to him a claim such as the one made in *Philipp Morris v. Australia*, where the investor relies on the broad wording of the umbrella clause to import a trade obligation, would be "at least colorable."²¹³

²⁰⁸ *Philip Morris v. Australia*, Australia's Response to the Notice of Arbitration (21 Dec. 2011) ¶58.

²⁰⁹ J. Hepburn 'Philip Morris v. Australia: New Ruling Explains Why Jurisdictional Questions to Be Reviewed First; Umbrella Clause Is No Longer Being Used to Import WTO Law' (June 2014) *Investment Arbitration Reporter*, available upon subscription at <<http://www.iareporter.com/articles/philip-morris-v-australia-new-ruling-explains-why-jurisdictional-questions-to-be-reviewed-first-umbrella-clause-is-no-longer-being-used-to-import-wto-law/>> (last consulted 1 Aug. 2015).

²¹⁰ The term "colorable" is used by Alford. See R.P. Alford 'The Convergence of International Trade and Investment Arbitration' (2013) 12 *Santa Clara J. Int'l L.* 35.

²¹¹ See Chapter 2, pp.58 *et. seq.* See also M. C. Gritón Salias' article, where she concludes that "tribunals overwhelmingly accept the application of umbrella clauses to obligations assumed unilaterally by host States", no matter if these unilateral acts are "contained in legislation or otherwise." See, M.C. Gritón Salias, 'Do Umbrella Clauses Apply to Unilateral Undertakings?' in C. Binder *et al.* (eds.), *International Investment Law for the 21st Century: Essays in Honor of C. Schreuer* (2009) 490, 495-96.

²¹² In a recent article devoted to the convergence of trade and investment law, Roger Alford reaches this conclusion: according to him a claim such as the one made in *Philipp Morris v. Australia*, where the investor relies on the broad wording of the umbrella clause to import a trade obligation, would be "at least colorable".

²¹³ Alford (*supra* n.210) 56-58.

3. WTO Obligations and the Prohibition of Expropriation: *Eli Lilly v. Canada*

In a pending NAFTA dispute that is gaining popularity, an investor is attempting to import TRIPS obligations through the FET standard, as well as the interdiction of expropriation. Eli Lilly, a US pharmaceutical company, is complaining about patentability requirements, as applied by the Canadian Courts since 2005, being too strict. Specifically, the investor alleges that Canadian courts have construed the utility standard for patent protection (one of three criteria an invention must meet to be patentable) and the requirement to disclose the invention (necessary to put the invention into practice) in a way that leads to the frequent invalidation of pharmaceutical or biopharma patents.

Its claim, on NAFTA Article 1110 (Expropriation), is based on the concept of judicial expropriation, pursuant to which measures or series of measures taken by domestic courts of the host-State can be tantamount to indirect expropriation under certain circumstances (for instance, if they are discriminatory or if they are not taken under due process of law).²¹⁴ In its notice of intent, Eli Lilly attempts to affirm that the judicial decisions invalidating the patents for its pharmaceutical product constitute an expropriation because they are illegal from the perspective of international law, including international trade law.²¹⁵ For that, it relies on several obligations contained in the Article 27 of the TRIPS Agreement, including *inter alia*, the obligation to make patents available when the conditions precedent to patentability by those agreements are met and the obligation to enforce valid patents, the obligation to make patents available and to enforce patent rights without discrimination as to field of technology, and the national treatment obligation.²¹⁶ Although in later pleadings the investor slightly changed the structure of its argument, references to TRIPS are still present.²¹⁷ Similarly to what happened in *Methanex* or the *Philipp Morris* cases, the investor attempts to use investment arbitration to enforce trade obligations.

Whether it is possible remains to be addressed, nevertheless these attempts raise several questions and comments.

²¹⁴ For a recent study of the notion of judicial expropriation, see M. Sattorova 'Denial of Justice Disguised?: Investment Arbitration and the Protection of Investors from Judicial Misconduct' (2012) 61 *ICLQ* 223, 234-40.

²¹⁵ *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Notice of Intent (7 Nov. 2012) (hereinafter "*Eli Lilly v. Canada*") ¶¶90-93.

²¹⁶ *Ibid.* ¶¶87-88 ; 91-96.

²¹⁷ Unsurprisingly, Canada objects, claiming the tribunal lacks jurisdiction over alleged breaches of non-NAFTA international legal obligations. See *Eli Lilly v. Canada*, Canada Statement of Defence (30 June 2014) ¶¶ 85-87. In reply, Eli Lilly choses to focus on alleged breaches of NAFTA Chapter 17 and their implication on Chapter 11 obligations. *Eli Lilly v. Canada*, Claimant's Memorial (29 Sept. 2014) ¶¶ 204-06.

B. REMARKS

In the light of the *Methanex* holding, it is difficult to affirm that attempts to hold a State liable under investment law because of alleged breaches of trade obligations in investment disputes are likely to succeed. Arguably however, it is allow difficult to claim that they would always be dismissed. The importation of non-investment rules have been considered possible in other instances and one tribunal, using the broad language of investment agreements, may, in the future, accept an invitation to proceed with such an importation for trade obligations and, furthermore, enforce them.

This would certainly raise numerous questions. As we have seen in the previous Chapter, investment tribunals serve different functions from that of trade dispute settlement bodies and they are not supposed to function as an alternative forum for right-holders to challenge trade obligations. Doing so would certainly alter the landscape of both trade and investment dispute settlement.

1. Enforcement of Trade Obligations in Investment Arbitration: Not Likely, but not Impossible Either

Importing trade obligations *via* FET standards may be viewed as prohibited, at least in the NAFTA context. In 2001, the NAFTA Free Trade Commission (the FTC), a body created by the NAFTA, and entitled to give binding interpretative statements upon the latter,²¹⁸ issued a binding statement on Article 1105. The FTC used the expression 'in accordance with international law' to affirm that the NAFTA parties' original meaning of that Article was that it prescribed only 'customary international law minimum standard of treatment of aliens'.²¹⁹ Although it did not address all of the issues regarding diverging interpretations of Article 1105,²²⁰ the FTC's notes on interpretation have led tribunals to qualify the FET standard more narrowly. An overview of the NAFTA case law on this issue, shows that NAFTA tribunals have emphasized the high level of severity, and gravity, that is required, in order to rule on whether a FET breach has occurred, and that only a limited number of elements are part of the FET obligation under this provision.²²¹ The violation of international obligations, alone, does not seem to be included as one of these elements. The *Mondev v. US* tribunal was explicit in this regard. Citing from the FTC notes on interpretation, it affirmed that:

"Article 1105(1) refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA Parties.

²¹⁸ On the role of the NAFTA FTC in interpreting NAFTA Chapter 11 provisions, see G. Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' in F. Bachand & E. Gaillard (eds.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (2011) 175, 177-81.

²¹⁹ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, 31 July 2001, available at <<http://www.state.gov/s/1/c3439.htm>> (last consulted 1 Aug. 2015) ¶B.3.

²²⁰ See generally, P. Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (2013).

²²¹ P. Dumberry 'The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 1105 *J. Int'l Arb.* 47, 49-50.

There is no difficulty in accepting this as an interpretation of the phrase "in accordance with international law". Other treaties potentially concerned have their own systems of implementation. Chapter 11 Arbitration does not even extend to claims concerning all breaches of NAFTA itself [...]. If there had been an intention to incorporate by reference extraneous treaty standards in Article 1105 and to make Chapter 11 arbitration applicable to them, some clear indication of this would have been expected."²²²

Nonetheless, it would be ill founded to assert that no arbitral tribunals will ever enforce trade obligations through the application of an investment norm. The language used in Article 1105 of the NAFTA and its reference to the minimum standard of treatment and international law are specific.²²³ There might be different formulations of the FET standards, that are broader and give more leeway to arbitral tribunals.²²⁴ This leeway could be used to consider whether established breaches of other international obligations, would be tantamount to a breach of the FET standard.²²⁵

More generally, investors willing to enforce trade norms can always try to rely on other investment standards. As we have seen with the *Philipp Morris* cases, investors can try to use umbrella clauses to apply trade obligations. No tribunal decision has yet been issued on this particular question, but looking at the general case law on umbrella clauses, it is possible that a tribunal may accept such an import.

Another possibility, that has yet to be put into practice, is to use 'preservation of rights' clauses, which operate in a similar fashion to umbrella clauses, except that they not only apply to specific undertakings granted through a contract or through other instruments, but also to obligations existing pursuant to the host-State's domestic law, as well as

²²² *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) ¶121.

²²³ Dumberry (*supra* n.221) 44. In his book, Dumberry undertakes a survey of the formulation of FET standards in 370 IIAs, and notes that the "explicit reference to 'international law' contrasts with the vast majority of BITs which contain FET clauses that do not make any reference to 'international law'."

²²⁴ For instance, some authors have argued that there is a difference in the application of FET standards with reference to Minimum Standard of Treatment (like NAFTA Article 1105 does) and FET standards with no such conditions. *See, ibid.* 31–34; 44–46. *See also*, H. Haeri 'A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law' (2011) 27 *Arb. Int'l* 27.

²²⁵ Interestingly, in the drafts of several future EU trade and investment agreements, the language of the FET standards exclude, expressly, this possibility. For instance, the paragraph of the FET provision in the draft of the agreement with Singapore reads as follows:

"A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article". The text of this draft agreement is available online at the following address <<http://trade.ac.europa.eu/doclib/press/index.cfm?id=961>> (last consulted on 1 Aug. 2015).

One may argue that the drafters of these agreements were aware of the effects of drafting to broad a provision, and reckoned that, in the absence such clarification, it would be possible for an arbitral tribunal to include violations of non-investment obligations as an element of the FET standard. For further discussions on this provision, *see* Chapter 5.

provisions of international law.²²⁶ In *Roussalis v. Romania*,²²⁷ the tribunal left open the possibility that this type of clause could be used to import human rights obligations into investment disputes.²²⁸

In the light of the above, even if this has yet to occur, it is difficult to assert that a claim based on trade obligations could not succeed before an investment tribunal.

2. The Direct Effect Question and other Concerns

Finding the proper 'gateway' that can be used in order to import trade obligations, is not the only legal obstacle to the enforcement of trade obligations in investment arbitration.

First, one might argue that giving investors the possibility to seek recourse for violations of trade obligations before an investment tribunal, would be equal to creating an avenue for private action. However, as it was highlighted in the previous chapter; individuals have been purposely excluded from the WTO dispute settlement system, for reasons to be found in the economic rationale of trade regulation principle.²²⁹ One could therefore understand why there may be a certain reluctance to the granting of such a such possibility before another a dispute settlement mechanism.²³⁰

Second, under the framework of the WTO, the parties to the organization control decisions with respect to the adjudication and resolution of the dispute. With a possibility to invoke trade rules before a non-WTO adjudicator, investors could be accused of circumventing the WTO dispute settlement system. This could be problematic since, in principle, the WTO prohibits the recourse to non-WTO dispute

²²⁶ A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties : Standards of Treatment* (2009) 477-78.

²²⁷ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 Dec. 2011). For a detailed analysis of the case and of the tribunal's reasoning on the 'preservation of rights' clause, see P.F. Henin 'The Jurisdiction of Investment Treaty Tribunals over Investors' Human Rights Claims: The Case Against *Roussalis v. Romania*' (2013) 51 *Columbia J. Transn'l L.* 224.

²²⁸ This type of clause, as well as the *Roussalis* case is addressed more fully in Chapter 4 below.

²²⁹ As mentioned earlier in this work, the fact that individuals do not have standing before the WTO dispute settlement mechanism, and can therefore be considered as 'excluded' from the organization, does prevent WTO Members from acknowledging, on an individual basis, direct effect of WTO law within domestic legal systems. It is important to recall that the WTO does not provide anything to the contrary, but that . WTO law simply does not address the question.

²³⁰ To use another expression, if arbitral tribunals accepted that they could enforce trade norms, they could be considered as giving 'direct effect' to these norms. Private parties would be allowed to invoke these norms directly before an adjudicator. The majority of domestic courts that have been asked to address this question have usually refused to give such 'direct effect' to WTO norms. In a recent paper on the boundaries between trade and investment, Davies uses the expression 'direct effect'. However, he refuses to consider that applying WTO law in investment arbitration could be qualified as direct effect, as he considers that "the compatibility of the challenged measures with trade law litigation cannot be decisive in investment law disputes." To support this argument, Davies refers to cases where tribunals have refused to refer to WTO law when requested to interpret investment norms. This is misleading. The cause and consequences for a tribunal to use trade law as an interpretative elements are indeed different from the ones associated with applying trade law in the merits of a dispute. Contrary to what Davies is claiming, a tribunal would indeed confer the trade norm with 'direct effect' if it decides to enforce this trade norm. A. Davies 'Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does A Measure Relate to Investment?' (2012) 15 *J. Int'l Eco. L.* 793.

settlement mechanisms. Article 23 of the DSU provides that Member States "shall not make a determination to the effect that a violation has occurred [...] except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding." Of course, one could argue that both investors and non-WTO arbitral tribunals, are not technically bound by this rule. Similarly, one could also argue that investment arbitration cannot be considered as a unilateral remedy imposed in response to a WTO violation.²³¹ However, it is difficult to imagine that a tribunal, willing to enforce a given WTO obligation, would totally disregard the rules and principles applicable to WTO dispute settlement.

Finally, one may argue that this recourse to investment arbitration in order to litigate WTO matters, could be seen as problematic with regard to the consistent interpretation that the WTO AB is implicitly required to provide.²³² An arbitral tribunal enforcing WTO law, would have to do so in a way that is coherent with that of a trade dispute settlement body. Failing that, the tribunal would certainly be criticized for breeding inconsistency in the application of WTO law.

None of these three obstacles are insurmountable, but they might complicate the work of any tribunal willing to proceed with the importation of trade obligations. A more problematic obstacle may be represented by the hypothesis where an investor manages to convince an investment tribunal to apply trade law, and eventually wins the case on this basis, but where it is later discovered, or established (for instance, by a trade adjudicator) that the investment tribunal's application of trade law was misguided. This hypothetical situation has not occurred in practice. Nonetheless, it represents a serious obstacle to the 'import' of trade norms in investment arbitration.

In his paper, Alford does not refer to this obstacle. Instead, he argues that "investment arbitration may provide a vehicle for compensating or attenuating the harm caused to investors without offending the WTO restrictions on unilateral trade remedies."²³³ The way in which the pending disputes, that were mentioned in this section, will unfold, may reveal whether this statement is justified. What remains certain, however, is that investment tribunals should be extremely cautious when facing Scenario No.3 situations. As we will see in the next chapter, legal tools exist in order to make sure that risks are minimized.

VI. TRADE NORMS AS A DEFENSE

WTO law has finally been referred to by the respondent, or by the tribunal, in response to an argument made by the claimant (Scenario No.4). Two situations might be

²³¹ Alford (*supra* n.210) 59.

²³² See Chapter 2.

²³³ Alford (*supra* n.210) 59.

distinguished at the outset:²³⁴ one where WTO is used to contest the jurisdiction of the tribunal (we will call it "Scenario No.4.A"), and one where WTO is used as proper argument on the merits of the case ("Scenario No.4.B"). These two situations are examined sequentially. The third part of the present section comments on these two situations.

A. DEFENSE ON JURISDICTION

In international dispute settlement, the jurisdiction of a given international adjudication body can be challenged, when it is demonstrated that another adjudicative body is vested with exclusive jurisdiction.²³⁵ To do so, one has to demonstrate that the treaty in which the cause of action is found confers such exclusive jurisdiction to another international tribunal. In our case, a defendant could thus attempt to show that the investor's claim relates to WTO law and then guide the tribunal towards WTO DSU Article 23.2 which – as explained elsewhere in this work – is supposed to confer exclusive jurisdiction to WTO Panels for any breach of the WTO panels and AB.²³⁶ This, however, has yet to occur.

Of course, such a textbook hypothesis, where the claimant's claim would be blatantly and independently based only on a WTO norm, has not occurred, and is not likely to do so in the future. Whether a claim is based on WTO law or not, any investor-State tribunal would refuse jurisdiction if the cause of action is not connected to an investment agreement. Investor-State tribunals do enjoy relatively broad jurisdiction, but they are not courts of general jurisdiction. Although issued in a different setting, the award in *Biloune v. Ghana* is instructive in this regard.²³⁷ The claimant, who was a Syrian national, alleged that Ghana's action towards the company he invested in, as well as towards himself,²³⁸ constituted a violation of his human rights.²³⁹ The tribunal recognized that modern international law did contained provisions for the protection for human and that the parties had relied on international law in their submissions, yet it declined jurisdiction over Mr. Biloune's claim:

²³⁴ Pauwelyn makes this assumption when studying how public international law can be used in WTO proceedings. See J. Pauwelyn 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (2003) 37 *J. World Trade* 997.

²³⁵ Pauwelyn (*supra* n.234) 1008-12. Pauwelyn explains, for instance, in which situations the WTO Panels would have to bow to the jurisdiction of the European Court of Justice. See also, Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003).

²³⁶ The extent to which Article 23.2 may be applied in investment arbitration is further discussed in Chapter 4.

²³⁷ *Antoine Biloune & Marine Drive Complex Ltd v. Ghana Investments Centre & the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability (27 Oct. 1989).

²³⁸ Soon after the first measures had been taken, preventing his company from operating, Mr. Biloune was arrested and held in custody for 13 days without charge. He was eventually deported from Ghana to Togo, and forbidden to return to Ghana and carry out any further work on the project. *Ibid.* pp. 199-200.

²³⁹ *Ibid.* 203.

"[C]ontemporary international law recognizes that all individuals, regardless of nationality, are entitled to fundamental human rights [...] which no government may violate. Nevertheless it does not follow that this Tribunal is competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled, or that this Tribunal is authorized to deal with allegations of violations of fundamental rights. The Tribunal's competence is limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code. As noted, the Government agreed to arbitrate only disputes "in respect of" the foreign investment. Thus, other matters –however compelling the claim or wrongful the alleged act– are outside this Tribunal's jurisdiction. Under the facts of this case it must be concluded that, while the acts alleged to violate the international human rights of Mr Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights."²⁴⁰

Further, and less generally, the establishment of jurisdiction over a given dispute implies a direct connection with the IIA. IIA arbitration clauses are usually worded so that the arbitral tribunal constituted, in the event of a dispute, has competence only when said dispute arises from the treaty, or relates to obligations that are included in the text of treaty. In other words, even if arbitral tribunals do enjoy some latitude in the qualification of the dispute (notably in determining the notion of investment, which conditions the qualification), and even if numerous non-investment laws might be used in this process, it is not possible to request an investment arbitration tribunal to rule on a non-investment law claim, that is not – at least indirectly – related to an obligation in an IIA.

As we have seen in the previous section, it is, nonetheless, possible to incorporate a WTO element within an investment claim. An investor may seek to demonstrate that a WTO violation constitutes a predicate to an investment claim. Recall that this happened in *Methanex v. US*, where the investor argued that the host-State's actions were contrary to WTO law and, consequently, contrary to NAFTA Article 1105 on Fair and Equitable Treatment.²⁴¹ In that case, however, the respondent did not have to rely on provisions of the WTO DSU, as the claimant did not develop its WTO incorporation argument extensively. The US defense was therefore limited to the narrow scope of the NAFTA Chapter 11 Arbitration Clause. The US did refer to WTO agreements, but only to mention that these agreements did not "include an agreement analogous to NAFTA's Chapter Eleven or any investor-State dispute resolution process."²⁴²

As new disputes, in which investors have developed 'incorporation' arguments similar to the one made in *Methanex*, are looming, it is likely that DSU Article 23.2 will be referred

²⁴⁰ *Ibid.*

²⁴¹ See *Methanex v. US*, Final Award (3 Aug. 2005) Part II, Chapter B, ¶¶3-6.

²⁴² *Methanex v. US*, Reply Memorial of Respondent (12 April 2001) p.32.

to by investment arbitration tribunals. In the aforementioned *Philipp Morris v. Australia* arbitration, the Australian response to the notice of arbitration introduced a defense on jurisdictional issues that would tend to follow this path. Addressing the Philipp Morris claim, that Australia's plain cigarette packaging legislation was contrary to WTO obligations and thus gave rise to a violation of the umbrella clause contained in Article 2(2) of the Hong-Kong–Australia BIT, the Australian government reasoned as follows:

"Even if it were correct (which it is not) that Article 2(2) could somehow be understood as extending an arbitral tribunal's jurisdiction to obligations owed by Australia to other States under various multilateral treaties, the treaties that PM Asia seeks to invoke all contain their own dispute settlement mechanisms. It is not the function of a dispute settlement provision such as that contained at Article 10 of the BIT to establish a roving jurisdiction that would enable a BIT tribunal to make a broad series of determinations that would potentially conflict with the determinations of the agreed dispute settlement bodies under the nominated multilateral treaties. This is all the more so in circumstances where such bodies enjoy exclusive jurisdiction."²⁴³

The way this argument could be developed in the proceedings, as well as how the tribunal answers in this regard, will have to be examined. It is doubtful that the tribunal will rely on Article 23.2 WTO DSU. Indeed, as we will look into in further detail in the next Chapter, Article 23.2 WTO DSU binds, in principle, only WTO Members. It is not binding upon (i) private parties and –more controversially– (ii) other international tribunals.²⁴⁴ It would therefore be difficult for a defending State, party to an investment arbitration, to rely directly and only on Article 23.2 WTO DSU to challenge the jurisdiction of the tribunal. However, it is still possible that the tribunal may make a general statement, as the *Methanex* tribunal did, on the general relations between the jurisdiction of investment tribunals and trade adjudicative bodies. Such a statement would help clarify these relations and should therefore be encouraged.

In addition to the 'exclusive jurisdiction' argument, one might argue that references to ongoing proceedings before WTO courts could be made in situations of jurisdictional overlap, or parallel and subsequent proceedings. In these hypotheses, however, the jurisdictional challenges are usually based on general principles of international law and dispute settlement. A State that is being sued by an investor before an arbitral tribunal on the basis of an IIA, and at the same time before the WTO DSB by the home-State of the investor, because the latter has convinced its government to espouse its claim, would rely on principles such as *lis pendens* or *forum non conveniens* which – arguably – apply to this type of situations.²⁴⁵

²⁴³ *Philip Morris v. Australia*, Australia's Reply to Notice of Arbitration (21 Dec. 2011) ¶35.

²⁴⁴ See Chapter 4.

²⁴⁵ On these issues, see Chapter 4.

In these situations, there may be references to WTO proceedings, but they would be incidental. Recall how this occurred in the two known situations of parallel or subsequent proceedings between an international investment adjudicative body and a WTO adjudicative body: the already discussed *Softwood Lumber* dispute and the *Soft Drink* dispute. The references to WTO proceedings made during the arbitration proceedings were incidental. Neither the US in *Tembec*, nor the investor, in one of the investment dispute in the *Softwood Lumber Saga*, nor Mexico, in the three cases filled by US sugar producers in the *Sugar War*, developed jurisdictional arguments on the basis of WTO law.

Against this background, it can be concluded that references to WTO law in a jurisdictional defense might only occur when a claim incorporate a WTO law element. In that situation, the defendant could try to use WTO DSU Article 23.1. However, as this has not yet occurred, it is difficult to predict how an investor-State would react.

B. DEFENSE ON THE MERITS

A straightforward '*it's not my fault, it's because of the WTO!*' type argument has been made in only one case, and it did not work. In *Eastern Sugar v. Czech Republic*,²⁴⁶ the claimant argued that three decrees taken by the Czech government in order to liberalize the sugar market were implemented in a way that harmed its investment in that industry. In response, the respondent claimed that it was required to open its market in order to comply with its WTO obligations.²⁴⁷ The Czech government however did not develop this argument any further and it was quite easy for the tribunal to dismiss such an assertion. The issue was about the implementation of the decree and not its origin. The Tribunal therefore affirmed that it was not clear whether WTO law did play a role in the implementation process and rejected this defense.²⁴⁸

However, in several other disputes, respondent states have used trade norms in their defenses in a more indirect way, relying on WTO rules to undermine a claimant's position. The three following NAFTA cases, all involving Canada, are interesting examples of this type of reference to WTO law.

²⁴⁶ *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004, Partial Award (27 Mar. 2007)(hereinafter '*Eastern Sugar v. Czech Republic*').

²⁴⁷ *Ibid.* ¶262.

²⁴⁸ *Ibid.* One commentator has criticized the tribunal's analysis on this point, and explained that the arbitrators should have at least enquired into the role of 'prominent transnational actors', like the WTO, on the evolution and regulation of the sugar market, as was done in a NAFTA Chapter 11 dispute relating to sugar production regulations. See, J. Chalker 'Case Note: *Eastern Sugar B.V. v. The Czech Republic*' (2009) 6 *Transnational Dispute Management*, available online at <www.transnational-dispute-management.com>, 6th unnumbered page, citing *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award (15 Nov. 2004).

In the already mentioned *Mobil & Murphy v. Canada*,²⁴⁹ the respondent attempted to draw on TRIMS submissions (submission by WTO members to the TRIMS commission) to bolster arguments on the notion of performance requirements. The dispute in that case arose following the adoption, by a Canadian province, of guidelines requiring investors in offshore petroleum projects to spend a fixed percentage of project revenues, on an annual basis, on research and development (R&D), and on education and training (E&T). Until then, the Canadian province had encouraged oil companies to commit to 'a series of basic principles' instead of imposing specific requirements. Mobil and Murphy, who had been operating the province's oil fields for a number of years, challenged the provisions of the guidelines and the enforcement of these requirements under Chapter 11 of the NAFTA. They claimed, *inter alia*, that the measures constituted breaches of NAFTA Article 1106 on performance requirements.²⁵⁰ The tribunal was thus request to rule on the scope of this article and on the definition of the notion of performance requirements. In its submission, Canada argued that the tribunal should look in the TRIMS agreement, as it provided the context regarding requirements imposed on investments that concern WTO members, and what is generally understood by local content requirements.²⁵¹ Canada pointed out that the US (the home-State of the investors) had provided views on that notion in submissions that had been submitted to the TRIMS Negotiating Group. Canada thus explained that according to the US, local content requirements and R&D requirements were distinct.²⁵² The tribunal refused to take into account these considerations. In its analysis of how Article 1106 should be construed, the tribunal explained that references to other treaties, agreements and sources as the ones used by the Canada did not assist in confirming either of the parties' views and were of no relevance for the purposes of confirming the NAFTA text.²⁵³

²⁴⁹ *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4 (hereinafter '*Mobil & Murphy v. Canada*').

²⁵⁰ Relevant provisions of NAFTA Article 1106 read as follows:

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor [...].

3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

(a) to achieve a given level or percentage of domestic content [...].

4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

²⁵¹ *Mobil & Murphy v. Canada*, Canada Rejoinder (9 Jun. 2010) ¶28.

²⁵² *Ibid.* ¶¶28-29.

²⁵³ *Mobil & Murphy v. Canada*, Decision on Liability and on Principles of Quantum (22 May 2012) ¶¶226-32.

In *SD Myers v. Canada*,²⁵⁴ the dispute involved a US corporation specialized in the process and treatment of PCB waste, (an environmentally hazardous chemical compound) alleging that Canada's ban on the export of PCB wastes, from Canada to the United States, in late 1995, breached Canada's obligations under several NAFTA Chapter 11 provisions. Canada argued that its investment obligations had to be conciliated with its other international obligations, including the ones contained in the international environmental agreements it had concluded. In this regard, Canada defended the position that NAFTA Chapter 11 obligations were to be read 'in context', and that the language of the Preamble of the NAFTA had to be taken into consideration.²⁵⁵ It developed its argument explaining that the language of the Preamble shows that the environment was a key consideration of the parties to the NAFTA. Hence, according to Canada "[t]he Parties intended to ensure a predictable commercial framework for business planning and investment but only in a manner consistent with environmental protection".²⁵⁶ To support this line of reasoning, Canada referred to WTO case law and recalled that:

[i]n its report on the case of [*US-Import Prohibition of Certain Shrimp and Shrimp Products*] in interpreting the rights and obligations of the WTO members under the [GATT], the Appellate Body took the Preamble of GATT into account and noted : "the preamble attached to the GATT shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy."²⁵⁷

Canada concluded that "[c]learly, this was the case in the context of the NAFTA."²⁵⁸

In its award, the tribunal did not specifically address this argument. It did, however, look at the other environmental agreements that Canada referred to, but ruled that they all contained principles according to which if a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade.²⁵⁹ Interestingly, the tribunal noted that this principle was "consistent with the language and the case law arising out of the WTO family of agreements."²⁶⁰

²⁵⁴ *SD Myers v. Canada* (*supra* n.56).

²⁵⁵ *SD Myers v. Canada*, Canada Counter Memorial (7 June 2001) ¶¶187-88. Canada cites a WTO AB decision in *US-Gasoline* to support this assertion explaining that it "is also a well-established practice for WTO Panels and the WTO Appellate Body to rely on the preamble or objectives provision of an agreement to interpret the meaning of a provision of the agreement". *Ibid.* ¶188 and references thereunder.

²⁵⁶ *Ibid.* ¶191.

²⁵⁷ *Ibid.* [citations omitted].

²⁵⁸ *Ibid.*

²⁵⁹ *SD Myers v. Canada*, Partial Award (13 Nov. 2000) ¶221.

²⁶⁰ *Ibid.*

In *Pope & Talbot v. Canada*, a NAFTA Chapter 11 case, concerning the allocation of quotas for softwood lumber exporters operating in Canada, as part of the already discussed Softwood Lumber Agreement, the investor claimed that the way the quotas were implemented was discriminatory, as Canadian exporters received more favorable treatment, and so constituted a breach of the non-discrimination standard included in NAFTA Article 1102. One of respondent's defenses was based on the necessity for the Tribunal to apply a 'disproportionate advantage' test, a test based on WTO law, regarding national treatment. Canada asserted that, to apply this test in the case at hand, the tribunal had to determine whether there were domestic investors that were accorded the same treatment as the foreign investor in question. Then, the size of that group of Canadian investors would have to be compared to the size of the group of Canadian investors receiving more favorable treatment than the one received by the claimant. According to Canada, such test would lead the tribunal to rule that the investor did not receive a less favorable treatment than the Canadian investors taken as a group, and that Canada did not discriminate against the claimant.²⁶¹

During the proceedings, Canada acknowledged that such a test did not appear in the NAFTA text itself, but that it was to be found in, and was likely imported from, applicable GATT and WTO precedents.²⁶²

The Tribunal examined carefully the WTO cases brought forward by Canada,²⁶³ but eventually considered that they did not support Canada's argument on the disproportionate advantage test as applied to NAFTA. It is interesting to note that the tribunal did not refuse Canada's argument, *en bloc*, because it was essentially based on WTO case-law. On the contrary, the tribunal engaged in the analysis of the decisions referred to by Canada, which permitted the Tribunal to highlight the differences between the application of the national treatment standard in trade and investment.²⁶⁴ And it is the consideration of these differences that led the tribunal to conclude that Canada's defense was flawed.

B. REMARKS

The various cases presented in this section warrant the following two general remarks. First, when it comes to the use of WTO law by the respondent in a defensive argument, tribunals appear to be more cautious than in the situation of Scenario No.1, presented earlier. If the tribunals do mention or use the rules in their reasoning, they do so without

²⁶¹ *Pope & Talbot v. Canada*, Award on the Merits of Phase 2 (10 April 2001) ¶44.

²⁶² *Ibid.* ¶45.

²⁶³ *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, Panel Report on the Complaint of the US (19 May 2008); *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R, Panel Report (18 Sept. 2000); *United States—Measures Affecting Alcoholic and Malt Beverages*, DS23/R - 39S/206, Report of the Panel adopted (19 June 1992).

²⁶⁴ *Pope & Talbot v. Canada*, Award on the Merits of Phase 2 (10 April 2001) ¶¶66-67 ; 77-82.

extensively elaborating on them. Second, it interesting to see that in none of the disputes identified as belonging to the Scenario No.2 category, have tribunals considered that there could be a conflict between the content of an investment obligation and the content of a trade obligation and so, no tribunal has applied the international rules (which can be found in the VCLT for instance) that are supposed to apply in such cases of conflict.

1. Cautious Referral

When WTO norms are used in the pleadings of a defending State to a dispute, investment tribunals seem to have taken a cautious approach. In Scenario No.4 cases, arbitral tribunals address the arguments raised by the respondents and therefore address the concerns relating to WTO norms, but do not engage in extensive demonstrations on the application of these norms. In *SD Myers*, the tribunal did briefly refer to the arguments made by Canada, but only to refute them. Interestingly, whereas Canada was trying to use WTO norms to explain how the NAFTA should not be applied (*i.e.* without taking into consideration other international instruments) the tribunal took the opportunity of this reference to recall another test applied in international law when two norms interact. The tribunal indeed explained that the so called 'least restrictive alternative' test as applied by WTO courts,²⁶⁵ could be used in the case."²⁶⁶

In *Pope & Talbot*, the tribunal also referred to the respondent's arguments based on WTO rules. As mentioned, the tribunal actually very carefully reviewed the three different WTO cases produced by Canada. The tribunal did not disregard trade norms, but explained that they applied in a different context.²⁶⁷

In those two cases, tribunals did refer to WTO norms in the awards, especially to explain the content of the arguments made by the parties and to carefully discuss the potential use of these norms.

2. No Apparent Conflict between Trade and Investment Law

Another interesting remark that can be made about Scenario No.4 cases, is that States, and in turn tribunals, have not tried to argue on a potential conflict between international investment law on the one side and international trade law on the other, and thus have not relied upon rules that regulate such conflicts. It is broadly accepted that international treaties can interact in a conflicting manner.²⁶⁸ International law

²⁶⁵ For a discussion of this test in WTO case-law, *see* for instance, Mitchell & Henckels (*supra* n.122) 132-35 ; A.O. Sykes 'The Least Restrictive Means' (2003) 70 *U. Chicago L. R.* 403

²⁶⁶ *SD Myers v. Canada* (Partial Award, 13 Nov. 2000) ¶221.

²⁶⁷ *Pope & Talbot v. Canada*, Award on the Merits of Phase 2 (10 April 2001), ¶¶44; 66-67.

²⁶⁸ For classic approaches to conflicts between international treaties, *see e.g.* C. Rousseau 'De la Compatibilité des Normes Juridiques Contradictoires dans l'Ordre International' (1932) 39 *RGDIP* 133 ; C.W. Jenks 'The Conflict of Law-Making Treaties' (1953) 30 *Brit. YB Int'l L.* 401. *See also*, for presentation of the *problématique* and the definition(s) of conflict in modern international law, J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of international Law* (2003) 5-24 ; 164-69.

actually envisages situations of conflict and provides for different rules depending on the type of conflict.²⁶⁹

Normative conflicts are not alien to the international investment law regime and international tribunals have had to apply these conflict rules in various situations.²⁷⁰ An argument could thus be made that one State would attempt to escape liability from an investment breach by referring to a trade norm. A. Van Aaken, for instance, puts forward the hypothesis where an investor would argue that State measures regarding compulsory licenses in the pharmaceutical industry would be tantamount to indirect expropriation. She explained that in such a situation, a State may try to rely on TRIPS law to justify the imposition of the compulsory licenses.²⁷¹ As previously mentioned however, a defense that is based directly and solely on the existence of a WTO norm, has only partially been made in a dispute and the tribunal did not engage in the discussion.

On the one hand, this absence of an argument on a possible 'conflict' between trade and investment norms might be seen as surprising. With investment tribunals being creatures of public international law, it naturally happens that parties to disputes ask tribunals to look either at, apply, or not misapply, obligations from other branches of international law. In various investment disputes, tribunals have been requested by the defending State to rule on a potential conflict between an investment norm and other international norms, and to give priority to the application of the latter.²⁷² This type of defense has been used very frequently in situations where EU norms were involved. Without entering into any details regarding this on-going topic that has been widely covered,²⁷³ we may simply recall that in several disputes, defending States have relied on EU law to either escape liability from a alleged BIT violation or to challenge the jurisdiction of the investment tribunal relying on the exclusive jurisdiction of the Court of Justice of the EU (CJEU) to apply EU law.²⁷⁴ In these instances, tribunals have been requested to elaborate on the relation between investment law and EU law,²⁷⁵ or on the

²⁶⁹ The extent to which general rules and principles relating to conflict of norms in international law may be applied in that contest, is further discussed in Chapter 5.

²⁷⁰ See J. Kammerhofer, 'The Theory of Norm Conflict Solutions in International Investment Law' in M.C.C. Segger, M.W. Gehring & A.P. Newcombe (eds.), *Sustainable Development in World Investment Law* (2011) 83

²⁷¹ A. Van Aaken 'Fragmentation of International Law: The Case of International Investment Law' (2006) 17 *Finnish YB Int'l L.* 91

²⁷² This issue is discussed at length in Chapter 5.

²⁷³ For a recent review of the various issues and doctrinal discussion on this theme, see the 2013 special issue of *Transnational Dispute Management* on 'EU, Investment Treaties, and Investment Treaty Arbitration - Current Developments and Challenges', available at <<http://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=47>> (last consulted 1 Aug. 2015).

²⁷⁴ See e.g., S. Hindelang 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39 *Legal Issues of Eco. Integration* 179.

²⁷⁵ See e.g. *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Hungary*, ICSID Case No. ARB/07/22 (Award, 23 Sept. 2010)(hereinafter '*AES Summit Generation v. Hungary*') ¶¶7.6.1-12.

supposed conflict between the two disciplines by applying for instance VCLT Articles 59 (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty) and 30 (Application of successive treaties relating to the same subject-matter),²⁷⁶ or finally on the scope and limits of their jurisdiction in the light of the jurisdiction of the CJEU.²⁷⁷ The reasoning of the tribunals in these cases can be seen as a manifestation of openness towards the EU legal order and warrants better legal security in the use of EU law in investment disputes.²⁷⁸ Hence, one could only hope that more references to WTO law will be made by defending States in investment disputes, as it would push arbitral tribunals to engage more extensively on the relation between trade and investment law.

On the other hand, the common roots that the two disciplines share, and which were highlighted in previous developments, could justify this absence of apparent conflict between international investment and trade norms.²⁷⁹ Another possibility could be the high degree of deference that investment tribunals have towards the WTO adjudicative bodies.

The increase in cases which we have classified as belonging to our Scenario No.4, may support this assumption. Such increase would certainly warrant a better understanding of the relations between the two disciplines.

VII. CONCLUSIONS

To sum up the results of the research on which this chapter is based, the following concluding remarks can be made.

Trade norms are widely used in investment arbitration. The parties as well as the tribunals refer, sometimes extensively, to trade norms. They do so at all the stages of the dispute and for various reasons. References are not limited to WTO case law. In fact, investment arbitration actors rely on trade rules contained in many existing WTO legal instruments. The examples of national treatment and proportionality analysis, which have been subjected to widespread comment, are not isolated. Investment actors have used trade norms when elaborating on numerous other investment rules and principles.

Trade norms are used in four different situations or scenarios: To illustrate a factual or incidental legal element of the investment dispute (Scenario No.1), to interpret a substantive investment norm (Scenario No.2), as a basis of a claim relating to a breach of an investment obligation (Scenario No.3), and finally, to counter a claim relating to such

²⁷⁶ See e.g., *Eureko B.V. v. Slovak Republic* (also known as '*Achmea B.V. v. Slovak Republic* [I]'), UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 Oct. 2010).

²⁷⁷ See e.g. *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable and Liability (30 Nov. 2012) ¶¶ 5.01-22.

²⁷⁸ S.W. Schill 'Luxembourg Limits: Conditions For Investor-State Dispute Settlement Under Future EU Investment Agreements' (2013) 10 *Transnational Dispute Management*, available upon subscription at <www.transnational-dispute-management.com> 17.

²⁷⁹ See Chapter 1.

a breach (Scenario No.4). Arguably these four situations carry four different consequences. The use of trade norms is not problematic for the first situation (trade norms as a factual or incidental legal element) and should even be encouraged, as (i) it does not raise legal concern and (ii) it is a manifestation of international judicial dialogue, something that, arguably, enhances the legitimacy of international investment arbitration. On the other hand, the use of investment arbitration to enforce a trade norm (Scenario No.3) is more challenging, since it raises several questions and legal obstacles. In between, we find scenarios No.4 (trade norms used as a defense) and 2 (trade norms used as an interpretative element). In these situations references might be of some interest, but must be 'handled with care'.

Finally, I argue that, whatever the situation, if trade norms are used by investment tribunals, they should be used in the most appropriate way. In light of the four scenarios identified, and the conclusions we have reached for each of them, I argue that this would be facilitated with two types of legal techniques: techniques that allow for better coordination between the jurisdiction of investment tribunals and trade adjudicative bodies, and techniques that allow for better coordination between substantive investment norms and substantive trade norms. These two sets of techniques are examined in the following two chapters.

CHAPTER 4.

TRADE IN INVESTMENT ARBITRATION: COORDINATING JURISDICTIONAL INTERACTIONS

I. INTRODUCTION

The main purpose of the present Chapter is to challenge the following contention: investor-State arbitral tribunals should decline jurisdiction over disputes that relate to international trade law.¹ We have seen in the previous chapter that when the possibility to use trade law is raised before an investment tribunal, a symptomatic reaction is to look at the tribunal's scope of authority and object to the tribunal's competence to rule on the matter. Chapter 5 questions this reaction and advances the three following counter arguments.

First, the possible use of trade law in a dispute (like, for example, in the scenarios identified in the previous Chapter) shall not affect the jurisdiction of an investment arbitral tribunal. Second, these tribunals may even have jurisdiction over claims, which refer directly to trade law (Scenario No.3). Third, the jurisdiction of the trade adjudicator over a dispute sharing the same subject matter as the one of an investment dispute brought before an arbitral tribunal does not necessarily affect the jurisdiction of that arbitral tribunal. The competence of the trade adjudicator and the investment adjudicator may overlap (rather than compete), but legal techniques exist that can help address the interaction between them. These techniques are not optimal but their use remains beneficial. In addition, promising suggestions and attempts for reform have been made both in scholarship and in practice. These suggestions shall be seen as an improvement compared to currently used techniques.

Defending these three arguments implies a broad understanding of the rules relating to jurisdiction in international investment arbitration. Then, the following question arises as to if and how these rules are used to tackle problems relating to jurisdictional overlap and parallel proceedings. Chapter 5 undertakes this task and, in doing so, identifies the principles and techniques that arbitral tribunals need to employ when they use trade law.

¹ The broad term 'relating to' is used on purpose. It encompasses all the scenarios referred to in the previous chapter.

This is where this Chapter fits within the general narrative of the present thesis, by explaining how the rules relating to jurisdiction of investor-State tribunals can be used to better integrate trade law in investment arbitration.

The Chapter is organized as follows: Section II below defines the notion of jurisdiction and explains how it relates to the notion of applicable law. Section III examines the principal rules that govern jurisdiction and suggests that the simple connection of a dispute to trade law cannot be used as a basis for challenging the jurisdiction of an investment tribunal. Section IV addresses the relation between the jurisdiction of the investment and trade adjudicators. We will see that if there is no competition *per se* between the two dispute settlement mechanisms, interactions may occur, especially in situations of parallel proceedings. These interactions might have negative consequences, but principles exist to manage and limit these consequences. Section V concludes.

II. THE (ABSENCE OF) CORRELATION BETWEEN JURISDICTION AND APPLICABLE LAW

Before entering into the presentation of the rules governing jurisdiction in investment arbitration and examining further how these rules shall be used to regulate the interactions with the trade legal regime, it is crucial to shed light on the often misunderstood distinction between jurisdiction and applicable law. Looking at both law and practice is necessary in order to illuminate this distinction and to address the following questions: to what extent may a decision on jurisdiction influence the choice of law applicable to the dispute? And what are the consequences of this influence on the interaction between the trade and investment disciplines? As we will see, the jurisdiction of an investment tribunal does not necessarily lead to the narrowing down of applicable law. The rules that are potentially applicable in an investment dispute are defined separately from the elements that need to be taken into consideration in order to establish the jurisdiction of an arbitral tribunal. Sometimes, the applicable law will not be defined at all. In that case, the arbitral tribunal will have to identify this law. This identification process should not, necessarily, be influenced by the scope of the jurisdiction clause.

A. THE DISTINCTION BETWEEN JURISDICTION AND APPLICABLE LAW

1. A Well Established Distinction

In International Dispute Settlement

As further explained below, jurisdiction, in the context of international dispute settlement, refers to the power to state the law in relation to a dispute between opposing

parties. Hence, the term connotes the authority of a court to hear and dispose of a disputed claim, or claims.²

Generally speaking, in international dispute settlement, the establishment of jurisdiction for a given court requires prior demonstration of the existence of a dispute between, as least, two parties, as well as the establishment of the consent of said parties' to have their dispute settled by the court in question.³ More specifically, this second requirement implies the need for the court to establish the validity of the agreement in which the consent is given, in order to enquire if, and how, this consent is delimited, as well as to confirm the existence of a connection between the dispute and the said agreement.⁴

When this process is completed, and should the court decide to retain jurisdiction, it can then move on to the examination of the merits of the case. To simplify, the court can then decide in which party's favor the dispute is to be settled. To do so, the court will apply the body of rules applicable to the dispute, *i.e.* the applicable (or governing) law. This body of rules is normally identified pursuant to the applicable law provision contained in the agreement. To clarify, this body of rules is usually composed by the agreement itself, or 'principal norm',⁵ completed by various rules of international law (interpretation norms, unwritten procedural principles, mandatory rules, rules that do not belong to the agreement but which are referred to by the said agreement) as well as others sources (for instance domestic law) when the dispute so requires.⁶

Going one step further, one shall note that in international dispute settlement, the jurisdiction of a given adjudicator is necessarily connected to the principal norm(s) said adjudicator is supposed to decide upon.⁷ That is, for instance, the European Convention on Human Rights and Fundamental Freedoms [ECHR] for the European Court of Human Rights [ECtHR], The UN Convention of the Law of the Sea (UNCLOS) for the International Tribunal for the Law of the Sea (ITLOS), WTO Agreements for the WTO-DSB and a given investment treaty for an ICSID tribunal. The applicable law, on

² S. Rosenne, *The Law and Practice of the International Court, 1920-2005* (2006) 152; C.F. Amerasinghe, *Jurisdiction of International Tribunals* (2003) 51-52.

³ C. Santulli, *Droit du contentieux international* (2005) 105-23.

⁴ *Ibid.* 106-07.

⁵ The expression is used by Bartels in a recent study on this matter. *See*, L. Bartels, 'Jurisdiction and Applicable Law Clauses: Where does a Tribunal find the Principal Norms Applicable to the Case before it?' in T. Broude & Y. Shany (eds.), *Multi-sourced equivalent norms in international law* (2011) 115. A caveat shall be offered about this expression. One may ask what is the principal norm for the ICJ? Of course, it could be argued that the ICJ has no principal norm. In that sense this expression would make sense for specialized courts only. Yet, Bartels would probably respond that the principal norm is necessarily subjective. In case of a given dispute before the ICJ, the principal norm would be the treaty that is used to refer the dispute to the Court.

⁶ Hersch Lauterpacht in his *magnus opus* had a great discussion of this issue, so did Sir Gerald Fitzmaurice. *See* H. Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht Systematically Arranged and Edited by Elihu Lauterpacht – Vol. 5* (2009) 212-13 ; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986) 428-432.

⁷ Bartels (*supra* n.5) 117.

the other hand, regards the norms that the dispute settlement body is going to apply in order to fulfill its function (that is, to settle the case). These norms are not limited to the principal norm upon which an international tribunal has been constituted. In actual fact, this applicable law can include various norms that are not necessarily connected to the general norm, nor compatible with it.⁸

Several examples can be used to illustrate this point. The UNCLOS is particularly pertinent. Pursuant to UNCLOS Article 288(1), the ITLOS, or any other dispute settlement body established under UNCLOS Article 287, has "jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."⁹ As such, pursuant to this provision, the ITLOS has jurisdiction over disputes arising from the application, interpretation or enforcement of the UNCLOS. This is crystal clear. The UNCLOS is the 'principal norm' of the ITLOS. Nevertheless, in order to settle UNCLOS disputes, the ITLOS is provided with legal tools that are not limited to the text of UNCLOS. UNCLOS Article 293(1) provides that, in determining an UNCLOS dispute the ITLOS (or any other adjudicator chosen by the parties) "shall apply this Convention *and* other rules of international law not incompatible with this Convention." Hence, when ruling on a UNCLOS dispute, the ITLOS will not be limited to the rules included in the UNCLOS. It also has the obligation to apply 'other rules of international law', provided that these rules are not conflicting with the text of the UNCLOS.

The relationship between these two articles, and the distinction that shall be made between the obligations they create, has been discussed by the arbitral tribunal established pursuant to the UNCLOS in the famous *MOX Plant* case:

"The Parties discussed at some length the question of the scope of Ireland's claims, in particular its claims arising under other treaties (e.g. the OSPAR Convention) or instruments (e.g. the Sintra Ministerial Statement, adopted at a meeting of the OSPAR Commission on 23 July 1998), having regard to articles 288 and 293 of the Convention. The Tribunal agrees with the United Kingdom that there is a *cardinal distinction* between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand. It also agrees that, to the extent that any aspects of Ireland's claims arise directly under legal instruments other than the Convention, such claims may be inadmissible. However, the Tribunal does

⁸ *Ibid.* 119-20.

⁹ UNCLOS Article 287 provides for different dispute-settlement options. The ITLOS is one of them. Pursuant to the said provision, parties to the Convention also have the possibility to go before the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII of the UNCLOS, or a special arbitral tribunal constituted in accordance with Annex VIII of the UNCLOS, but only for one or more of the categories of disputes specified therein.

not agree that Ireland has failed to state and plead a case arising substantially under the Convention."¹⁰

This example shows that an international body can have limited jurisdiction, in respect of the disputes to be resolved, and yet not be limited with regards to the law it is bound to apply in resolving these disputes.

The World Court itself also highlighted the importance of the distinction between jurisdiction and applicable law. In Part IV of the 2007 judgment of the *Genocide* case, entitled "The Applicable Law: The Convention on the Prevention and Punishment of the Crime of Genocide",¹¹ the court affirmed that:

"146. Article IX provides for certain disputes to be submitted to the Court:

'Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.' [...]

147. The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction [...]. It follows that the Court may rule only on the disputes between the Parties to which that provision refers. The Parties disagree on whether the Court finally decided the scope and meaning of that provision in its 1996 Judgment and, if it did not, on the matters over which the Court has jurisdiction under that provision. The Court rules on those two matters in following sections of this Judgment. It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. [...]

149. The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those 'relating to the interpretation, application or fulfillment' of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts."¹²

¹⁰ *Ireland v. United Kingdom* (The MOX Plant Case), PCA Administered Case (Procedural Order No.3, 24 June 2003) ¶19 (emphasis added).

¹¹ One might say that this title is misleading. According to Forteau, the court should have either limited the title to 'Applicable law', as the convention was not the only applicable law, or substituted "Applicable Law" for "Basis of Jurisdiction". See, M. Forteau, 'The Diversity of Applicable Law before International Tribunals as a Source of Forum Shopping and Fragmentation of International Law: An Assessment' in R. Wolfrum & I. Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?* (2013) 417, 153.

¹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections, Judgment, 18 Nov. 2008) 2008 ICJ Reports, p. 43 at ¶¶146-149.

Judge Koroma, in a separate opinion in the Fisheries Jurisdiction Case, expressed a similar idea, in a much more synthesized way:

"[T]he question whether the Court is entitled to exercise its jurisdiction must depend on the subject-matter and not on the applicable law, or the rules purported to have been violated."¹³

The last example that can be mentioned here is the *Eurotunnel* case.¹⁴ This dispute was initiated by the two companies operating the Channel tunnel. These were The Channel Tunnel Group Ltd. and France Manche S.A. which, pursuant to Article 40 of a Concession Agreement, entered into in 1986 between the French and UK governments (the "Concession Agreement"). Eurotunnel claimed that France and the UK had breached their obligations under the Concession Agreement and the Treaty of Canterbury (a treaty signed February 12, 1986 by France and England to provide a legal framework for the construction of the Channel Tunnel). The Concession agreement included a dispute resolution clause stating that "[a]ny dispute between the [parties] relating to this Agreement shall be submitted to arbitration."¹⁵ There was also an applicable law clause stating that:

"[I]n order to resolve any disputes regarding the application of this Agreement, the relevant provisions of the Treaty and of this Agreement shall be applied. The rules of English law or the rules of the French law may, as appropriate, be applied when recourse to those rules is necessary for the implementation of particular obligations under English law or French law. In general, recourse may also be had to the relevant principles of international law and, if the parties in dispute agree, to the principles of equity."¹⁶

The two claimants based their case on various provisions set out in this very broad applicable law clause, which did not form part of the instruments described in the jurisdiction clause. The tribunal rejected this approach, referring to the aforementioned sections of the decision in the *MOX Plant* case, and affirmed that the distinction between jurisdiction and applicable law was 'familiar' in international dispute settlement. Thus, the tribunal concluded that it only had jurisdiction to rule on claims relating to obligations to be found in the Concession Agreement. The tribunal further noted that:

"The conclusion that the Tribunal lacks jurisdiction to consider claims for breaches of obligations extrinsic to the provisions of the Concession Agreement (and the Treaty as given effect by the Concession Agreement) does not mean that the rules of the applicable law identified in Clause 40.4 are without significance. They instruct the Tribunal on the law which it is to apply in determining issues

¹³ *Fisheries Jurisdiction (Spain v. Canada)*, Separate Opinion of Judge Koroma (4 Dec. 1998), ICJ Reports 1998, 486 ¶4.

¹⁴ *The Channel Tunnel Group Limited and France-Manche S.A. v. France and the United Kingdom ("The Eurotunnel Case")*, PCA Administered Case (Partial Award, 30 Jan. 2007).

¹⁵ *Ibid.* ¶97.

¹⁶ *Ibid.* ¶99.

within its jurisdiction. They provide the legal background for the interpretation and application of the Treaty and the Concession Agreement, and they may well be relevant in other ways. But it is the relationship between the Principals and the Concessionaires as defined in Clause 41.1 on which the Tribunal is called to pronounce."¹⁷

As such, the distinction between applicable law and jurisdiction seems to be well accepted in international dispute settlement. This distinction derives from the distinction made between jurisdiction and choice of law clauses in international treaties.¹⁸ International courts have a clear and valid understanding of the way they operate.

In Investment Arbitration

Like other international courts, investment tribunals have recognized the distinction. It is quite natural to do so for ICSID Tribunals, as the ICSID Convention itself lays down the basis for this recognition. Article 25(1) of the Convention governs the jurisdiction of arbitral tribunals, whereas Article 42(1) relates to the law the tribunals are bound to apply in deciding disputes. These two provisions have led tribunals to rule that, if in a given dispute the BIT is the legal instrument over which a given arbitral tribunal has jurisdiction (what was called above "the principal norm"), the law this tribunal may refer to, at the merit stage, extends to a variety of legal instruments in addition to the BIT.¹⁹ This type of affirmation has also been made in non-ICSID disputes.²⁰ Other arbitral rules, upon which an investment tribunal can be constituted, will also usually include a provision relating to jurisdiction, and a provision relating to applicable law.

In investment arbitration, as in general international dispute settlement, jurisdiction and applicable law are, in principle, two separate concepts. An investment tribunal has the jurisdiction to verify whether a State has respected its obligations pursuant to an IIA. In order to do so, it might be necessary for the tribunal to apply, or to refer to, legal norms that are not contained in the IIA. However, when the tribunal uses other legal norms, it does not act beyond its jurisdiction. In principle, the tribunal's jurisdiction is not

¹⁷ *Ibid.* ¶151.

¹⁸ Bartels explains, for instance, that in the case of ICJ disputes the different wording of Article 36 and Article 38 of the ICJ Statute emphasizes this distinction. Article 36 enumerates the conditions under which the ICJ can assume jurisdiction over the dispute while Article 38 mentions the different sources that the court can use to settle a dispute. See Bartels (*supra* n.5) 121-22. His findings are based, *inter alia*, on the *Serbian Loan* case, where the Court admitted that its jurisdiction should be established in accordance with Article 36, no matter if the dispute brought before the court implied the application of a law that is not directly referred to in Article 38. See, *The Payment of Various Serbian loans Issued in France (France v. Serbia)*, Judgment (12 Jul. 1929), PCIJ Series A, Nos. 20/21, at 18.

¹⁹ See e.g. *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award on Jurisdiction (17 July 2003)(hereinafter '*CMS v. Argentina*') ¶¶88-89; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award on Jurisdiction (8 Dec. 2003) ; *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) and The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) (hereinafter '*Abaclat v. Argentina*') ¶430.

²⁰ C. Schreuer 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1 *McGill J. Dispute Resolution* 1, 22-23.

contingent upon the legal norms that might be applied to decide the case.²¹ In other words, an arbitral tribunal does not exceed its jurisdiction when it uses non-investment law, in order to adjudicate an investment claim. By the same token, the conditions under which non-investment law can be used, are normally independent from the conditions upon which the jurisdiction of an arbitral tribunal is established.²²

2. A Non-Absolute Distinction

Of course, the distinction is not watertight. As Waibel notes "[e]ven though jurisdiction and applicable law are conceptually distinct, in practice compromissory clauses sometimes function as the gatekeepers of the law to be used by the court. The dispute passes through the gate of the jurisdictional clause, which in turn influences the tribunal's determination of the applicable law."²³ In other words, the degree to which reference to other norms ('other rules of international law' in the ITLOS for example) is possible, depends on the text of the principal norm (the UNLCOS in my example). Indeed, it is within the principal norm that an international tribunal will find the governing law provision that can guide it in determining which law can be applied to the dispute at hand. Hence, some treaties will give broad leeway to the adjudicator as regards the law applicable to the dispute, others will be more restrictive.²⁴ In this respect, reference to other rules (domestic or international) will only be possible through interpretation, and might thus be relatively limited.²⁵ The same remark applies to investment arbitration. Schreuer notes in this regard that "[i]n some treaties the provisions concerning jurisdiction and applicable law seem to correspond: narrow jurisdictional clauses, which refer only to disputes over the treaty's substantive standards, go hand in hand with narrow clauses on applicable law which refer only to the treaty and to general international law."²⁶

In practice, the distinction can be blurred.²⁷ Jurisdiction can have an influence over applicable law. The reverse is also true. Applicable law can influence the way a given tribunal will exercise its jurisdiction, especially when the jurisdictional clause is not

²¹ *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 Mar. 2007) ¶68.

²² The conditions upon which jurisdiction is established in investment arbitration are discussed in the present chapter. The conditions upon which non-investment law can be applied in non-investment arbitration are discussed in the next chapter.

²³ M. Waibel, 'Investment Arbitration: Jurisdiction and Admissibility' in M. Bungenberg *et al.* (eds.), *International Investment Law - A Handbook* (2015) 1212, 1221, citing M. Papadaki 'Compromissory Clauses as the Gatekeepers of the Law to be 'used' in the ICJ and the PCIJ' (2014) 5 *J. Int'l Dispute Settlement* 1-45.

²⁴ A large part of Chapter 5 is dedicated to this discussion in investment arbitration.

²⁵ See, in the context of WTO, L. Bartels 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 *J. of World Trade* 419; P.C. Mavroidis 'No outsourcing of law? WTO law as practiced by WTO courts' (2008) 102 *Am. J. Int'l L.* 421; I. Van Damme, 'Jurisdiction, Applicable Law, and Interpretation' in D. Bethlehem *et al.* (eds.), *Oxford Handbook of International Trade Law* (2009) 298.

²⁶ Schreuer (*supra* n.20) 24-25.

²⁷ Waibel (*supra* n.23) 1221-22

drafted in broad terms. Waibel notes, in this respect, that "the content of the applicable law clause can have a feedback effect on the scope of jurisdiction, by way of interpretation."²⁸ For instance, a tribunal dealing with the interpretation of the nationality requirement mentioned in the arbitration clause of a BIT, that also includes an applicable law clause referring expressly to the domestic law of the host-State, might not reach the same result as a tribunal interpreting an identical arbitration clause in a BIT, which includes an applicable law clause that excludes the application of domestic law for the settlement of all disputes relating to the application of that BIT. Schreuer explains that this is often the case in investment arbitration when tribunals decide whether their jurisdiction extend to contractual disputes.²⁹

B. WHY ALL THE FUSS? THE 'CINDERELLA' PROBLEM

One of the main contentions in this work is that an investor-State arbitral tribunal may, and sometimes should, refer to international trade law. A reaction to this affirmation is to say that investment tribunals do not have jurisdiction over trade law. However, the distinction between jurisdiction and applicable law informs us that this reaction is not always relevant.

It might be justified in Scenario No.3 disputes.³⁰ Recall that in such disputes, the investor refers directly to a trade obligation in its claim, arguing that the non-respect of the trade obligation causes the breach of an obligation contained in an IIA. For instance, an investor could argue that if a regulatory measure prohibiting the import of a given product appears to be illegal in the light of the WTO SPS agreement,³¹ then the said measure is to be considered unfair and inequitable and, therefore, in breach of the FET standard contained in a given BIT. This hypothesis, which is virtually the same as the claim the investor made in *Methanex*,³² is a typical manifestation of what can be called the first 'Cinderella problem', in reference to the eloquent statement from Judge Greenwood in a recent presentation given at Cambridge University:

"Because there is no real system of compulsory jurisdiction in international law, jurisdictional disputes occupy a quite disproportionate part of the Courts' time [...] [This] also give rise to real difficulties in great many cases in trying to squeeze a case that is really about one subject into a jurisdictional clause that was designed to deal with something else. [...] Suffice it to say that there is one legal

²⁸ *Ibid.*

²⁹ Schreuer (*supra* n.20) 22. For instance, according to him, reference to the domestic law of the host State in the applicable law case might favor a broad interpretation of the jurisdictional clause.

³⁰ See Chapter 3.

³¹ For instance, because it is discriminatory, it does not achieve a legitimate objective, it is not the least trade-restrictive alternative that can achieve the legitimate objective, and constitutes a disguised restriction on trade and the measure.

³² As explained in more details in the previous chapter, a very similar hypothesis was made in the *Methanex* dispute. *Methanex Corporation v. United States of America*, UNCITRAL, Claimant's Drafted Amended Claim (12 Feb. 2001) pp.58-65.

authority which beautifully encapsulates the problem. That is the well known legal authority of Cinderella [...]. Most of the time in international law you find that you have to try and squeeze a rather large, perhaps ungainly force, into the glass slipper of a jurisdictional clause that really is far too small for the case you want to bring."³³

In our hypothesis, the tribunal might certainly qualify the problem as a jurisdictional one. Addressing the investor's claim requires a final determination about the law contained in the SPS agreement, and therefore an assessment of whether the tribunal has the authority to do that or not. To do so, the tribunal will have to decide whether it has jurisdiction over the application of the law contained in the SPS agreement. In other words, this implies deciding whether the claim fits within the tribunal's jurisdictional 'glass slipper'. In order to do so, the tribunal shall look at the arbitral clause and identify the conditions for establishing jurisdiction in the case. Certainly, it would be tempting for the investor to refer the tribunal to the applicable law clause as well. Assuming that this clause is broadly drafted,³⁴ the investor could use this broad language to claim that the tribunal may apply SPS law. In principle, the tribunal should dismiss this type of reasoning since jurisdiction differs from applicable law. This was made clear in *Methanex*, where the tribunal affirmed that it would not construe the NAFTA Chapter 11 choice of law clause, Article 1131, "as creating any jurisdiction to decide on alleged violations of the GATT."³⁵ According to the tribunal, "interpreting Article 1131(1) to create a jurisdiction extending beyond Section A of Chapter 11 would indeed be to transform it [...] into an unqualified and comprehensive jurisdictional regime, in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under Chapter 11 NAFTA."³⁶

Another problem is that the same type of reasoning has been made when the parties request the application of trade law for reasons other than its mere enforcement (in non-Scenario No.4 situations). Certain tribunals have also hidden behind a jurisdiction clause when requested to refer to rules extrinsic to the IIA use to initiate the dispute. They brandished the 'glass slipper' in a situation that does not require it. In *Grand River v. US* for instance, the tribunal referred to the limited jurisdiction of NAFTA Chapter 11 tribunals when explaining its approach on applicable law, and in order to claim that non-

³³ Sir Christopher Greenwood CMG QC, 'Friday Lunchtime Lecture: *Challenges of International Litigation*' (7 Oct. 2011) at 30:31 available at <<http://itunes.apple.com/itunes-u/lcii-international-lawseminar/id472214191>> (last accessed 1 Aug. 2015). This quotation is used in the introduction of a recent and interesting paper published by M. Papadaki on the World Court's case law, relating to the interplay between the limitation of jurisdiction and that of applicable law. See Papadaki (*supra* n.23) 1-2.

³⁴ For instance, it provides – as does the above-mentioned UNCLOS Article 293-1 – that the tribunal shall apply the IIA and other rules of international law not incompatible with the IIA.

³⁵ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (3 Aug. 2005) Part. II, Chap. B, ¶5.

³⁶ *Ibid.* citing *Ireland v. United Kingdom* (The MOX Plant Case), PCA Administered Case (Procedural Order No.3, 24 June 2003) ¶19.

NAFTA case law on the notion of investment has little importance in construing the language of Chapter 11.³⁷ I argue that the distinction between jurisdiction and applicable law makes the reference to jurisdiction in these situations inappropriate. As we saw earlier, jurisdiction informs applicable law discourse, but a jurisdictional clause in an IIA cannot be used to bar the possibility to apply extraneous norms, for instance trade norms.

Of course, it is not always easy to know and determine when reference to trade law is made for interpretative purposes, or if it is actually in the claim and thus implies jurisdictional control. A good example for this is the *Eli Lilly* case. Here, the investor first relied expressly on the TRIPS agreement, arguing that the breach of that agreement by the Canadian courts was tantamount to expropriation, but then 'tuning down' its demonstration, choosing to focus rather on a breach of NAFTA Chapter 17 (on Intellectual Property), and to refer to WTO law in a more indirect manner, in order to illustrate how an obligation in NAFTA Chapter 17 should be interpreted.³⁸

So far this question of the determination when non-investment law is referred to for interpretative purposes or for something else has not been addressed in the case law. Looking at the definition of jurisdiction, the answer could be that when the tribunal is requested to give a final determination on the violation of a trade norm, it becomes a jurisdictional problem, and the use of the slipper is justified. But this is just a suggestion.³⁹ What is clear, however, is that even if a tribunal does not have jurisdiction over trade law, it may nevertheless refer to trade law.⁴⁰ Furthermore, the application of

³⁷ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 June 2011) ¶¶62-68.

³⁸ *Eli Lilly and Company v. Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 (Claimant's Memorial, 29 Sept. 2014) ¶¶204-206 ; 216-226. For a more detailed analysis of the case, see Chapter 3.

³⁹ Of course, adopting this suggestion would lead to another question, which is the definition of 'final determination'. Here again, existing case-law offers no answer. One may further suggest that a final determination implies a determination that is legally binding on the parties to the dispute. But again, this is just a suggestion and it would need to be confirmed in practice.

⁴⁰ In the context of the EU law – investment law relationship, this has been made clear by the tribunal in *Eureko v. Slovak Republic*. In that case, the investor complained that various legislative measures introduced by Slovak Republic after a change in government in July 2006 constituted a systematic reversal of the 2004 liberalization of the Slovak health insurance market that had prompted its company to invest in the Slovak Republic's health insurance sector. According to the investor, these actions amounted to an unlawful indirect expropriation of its investment. The Slovak Republic raised several objections to the jurisdiction of the tribunal, arguing that the measures taken were the result of EU law application. The respondent hence argued that the tribunal had no jurisdiction on the ground that the dispute should be brought before the European Court of Justice, the only competent organ to apply EU law. Arguably, this objection was the result of the confusion between applicable law and jurisdiction. The tribunal reacted in an appropriate manner by distinguishing a conflict of law from the possible conflicts of jurisdiction and affirmed that (i) "its jurisdiction [was] confined to ruling upon alleged breaches of the BIT" and that it did not "have jurisdiction to rule on alleged breaches of EU law as such" and (ii) "[t]he fact that, at the merits stage, the Tribunal might have to consider and apply provisions of EU law [did] not deprive the Tribunal of jurisdiction." See, *Eureko B.V. v. Slovak Republic (also known as 'Achmea B.V. v. Slovak Republic [I]')*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 Oct. 2010) ¶¶283; 289.

law extraneous from the 'principal norm' (the IIA) shall not be seen as an extension of a tribunal's jurisdiction.

It seems also undisputable one requires a good understating of the concepts of jurisdiction and applicable law to answer that question. This is undertaken in the present and following chapters.

III. THE JURISDICTION OF INVESTOR-STATE TRIBUNALS OVER TRADE-RELATED DISPUTES AND TRADE-RELATED CLAIMS

The present section aims to address the general question of the jurisdiction of investor-State tribunals over investment disputes relating to trade. The word 'relating' here is understood broadly. 'Trade-related' disputes may be investment dispute that are simply 'connected' to the trade discipline. This connection may be purely factual, for instance the dispute relates to a discipline that is usually associated with the regulation of international trade (*e.g.* the regulation of import/exports of specific goods, tariffs, countervailing and anti-dumping duties, etc.), or may imply an element of trade law (trade law of jurisprudence is expressly referred to in the case). The cases labeled as 'Scenario No.1' in the previous Chapter typically belong to this category. Further, trade-related disputes also include disputes in which trade law is part of the claim (Scenario No.3 cases).

Tackling this question requires us to understand how jurisdiction works in investment arbitration. To do that, I will briefly explain where to find the rules applicable to jurisdiction in investment arbitration (A.) and what the basic principles underlying these rules are (B.). I will then examine the specific issue of investor-State tribunals jurisdiction over trade-related disputes. The main argument that will be defended, is that the simple connection of a dispute to trade law cannot be used as a basis for challenging the jurisdiction of an investment tribunal (C.). Finally, we will see that the issue of trade-related claims (or Scenario No.3) is slightly more complex. Relying on recent scholarship on the distinction between jurisdiction and admissibility, I argue that if, in principle, investment tribunals may accept jurisdiction over these claims, they may nevertheless decline to rule on their substance, based on the inadmissibility of the claims (D.).

A. THE LAW APPLICABLE TO JURISDICTION IN INVESTMENT ARBITRATION

The question of the law applicable to jurisdiction is rather straightforward and does not require a long development. From what precedes, we know that the law applicable to jurisdiction is not necessarily the same as the law applicable to the merits. Hence, as Schreuer notes, the "questions of jurisdiction are governed by their own system which is defined by the instruments containing the parties' consent to jurisdiction."⁴¹ The *CMS* award, which was issued in the ICSID context is very clear in that regard. In that case,

⁴¹ Schreuer (*supra* n.20) 3.

the tribunal distinguished the ICSID provision applicable to jurisdiction from the one applicable to applicable law and went on to explain that:

"Article 42 is mainly designed for the resolution of disputes and, as such, it is in principle independent from the decision on jurisdiction, governed solely by Article 25 of the Convention and those other provisions of the consent instrument which might be applicable, in the instant case the Treaty provisions."⁴²

It is well accepted in the case law that the rules applicable to questions relating to jurisdiction originate from three main sources: (i) the IIA upon which arbitration has been initiated, (ii) the tribunal's constitutive instrument or arbitral rules (*e.g.* the ICSID Convention, the UNCITRAL Arbitration Rules, etc.) and (iii) general principles of international law.⁴³ In the ICSID context, the following affirmation of the tribunal in *Daimler v. Argentina* is particularly relevant.

"For purposes of the Tribunal's jurisdiction [...] the proper law to be applied is the German-Argentine BIT itself, in concert with the ICSID Convention, as interpreted in the light of general principles of international law."⁴⁴

Commenting on this decision, Schreuer concludes that "it is clear that, independent of any law chosen by the parties with respect to the merits of their claims, jurisdictional issues including the existence of an investment, the presence of an eligible investor and the parties' consent to arbitration, must be determined by reference to the legal instruments establishing jurisdiction and by general international law."⁴⁵ In some instances, the tribunal might have to look into to the domestic law of the host-State. This would be the case for example, when a question relating to the nationality of the claimant is raised. Yet, these references will only be the result of the application of rules contained in the instruments mentioned above.⁴⁶ For instance, it is because the jurisdiction of an ICSID tribunal is limited to a "national of the party" pursuant to Article 25, and because international law provides that the nationality of a given individual is determined according to domestic law, that the tribunal will refer to the domestic law of the investor's home-State. This question will be addressed in further detail at a later stage. What needs to be remembered here, is that addressing a given jurisdictional objection usually implies subsequent verification of the rules contained in the BIT, in the constitutive instrument, and in general international law. As for the last element, we will

⁴² *CMS v. Argentina*, Award on Jurisdiction (17 July 2003) ¶88.

⁴³ See *e.g.*, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (Award, 2 Aug. 2006) ¶¶222-24; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) ¶135; *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary*, ICSID Case No. ARB/07/22 (Award, 23 Sept. 2010) ¶¶7.6.1-7.6.4.

⁴⁴ *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 Aug. 2012) ¶172.

⁴⁵ Schreuer (*supra* n.20) 4.

⁴⁶ See *e.g.*, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8 (Decision on Jurisdiction, 8 Mar. 2010) ¶54.

see for instance that tribunals refer constantly to the case-law of the world court as well as other international adjudicators.

B. JURISDICTION IN INVESTMENT ARBITRATION

1. Generalities and Principles Relating to Jurisdiction in Investment Arbitration

Definition of Jurisdiction

As mentioned earlier in the context of international dispute settlement, and in its broader sense, jurisdiction means the 'legal power' of a court, or judge, "to 'state the law' [...] in an authoritative and final manner",⁴⁷ or again, the "power of a court or judge to entertain an action, petition or other proceedings."⁴⁸ C. Amerasinghe notes, in a rather sophisticated way, that the term 'jurisdiction' usually connotes "the authority of a tribunal to proceed judicially to decide an international dispute."⁴⁹ He then explains that this authority covers three general matters:

"first, the authority to proceed to exercise the power to apply rules of procedure and substance to decide the dispute referred to the tribunal, secondly, the power to grant what in the broadest terms may be called remedial measures once a decision has been taken on the merits and, thirdly, sometimes to select particular rules of substance or procedure in deciding the merits."⁵⁰

Investment tribunals have been more concise in their appreciation of the notion. If it is possible to identify, within arbitral decisions, implicit reference to all the elements Amerasinghe mentions on the scope of the concept of jurisdiction,⁵¹ the few decisions that have attempted to expressly define the term are more straightforward. In *Achmea v. Slovak Republik [II]* for instance, the tribunal incisively stated that jurisdiction refers to "the power to decide a specific dispute."⁵²

⁴⁷ *Prosecutor v. Dusko Tadic*, ICTY Appeals Chambers (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995), *ICTY: Judicial Reports 1994-1995*, p. 367, ¶10.

⁴⁸ Waibel (*supra* n.23) 1213, citing J. Burke, *Jowitt's Dictionary of English Law* (1977), vol. 1, 1034, B.A. Garner, *Black's Law Dictionary* (1999) and Z. Douglas, *The International Law of Investment Claims* (2009) ¶293.

⁴⁹ Amerasinghe (*supra* n.2) 55

⁵⁰ *Ibid.*

⁵¹ For a recent in-depth study of the scope of jurisdiction in investor-State arbitration, see P. Ghaffari, *Jurisdiction and Admissibility in International Investment Arbitration*, (August 2012, Thesis in partial fulfillment of the requirements of Anglia Ruskin University for the degree of Doctor of Philosophy) available at <<http://angliaruskin.openrepository.com/arro/bitstream/10540/297161/1/Ghaffari+PhD+Thesis.pdf>>.

⁵² *Achmea B.V. v. Slovak Republik [II]*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014)(hereinafter *Achmea B.V. v. Slovak Republik*) ¶114.

Like in other international dispute settlement mechanisms, the concept of jurisdiction is intrinsically related to the disputing parties' consent to bring the case before an arbitral tribunal.⁵³ In *ST-AD v. Bulgaria*, the tribunal insisted on this particular point:

"[I]t is of the utmost importance not to forget that no participant in the international community, be it a State, an international organization, or a physical or legal person, has an inherent right of access to a jurisdictional recourse. Just as a State cannot sue another State unless there is a specific consent to that effect, [...] in the same manner, within the framework of BITs, investors cannot intervene at the international level against States for the recognition of their rights unless the States have granted them such rights under conditions that they determined."⁵⁴

The importance of consent in investment arbitration, which plays a crucial role in determining the jurisdiction of the tribunal, has been recognized from the outset of the discipline, being included in provisions of the ICSID Convention, pursuant to which both parties to the dispute must give their consent to arbitration.⁵⁵ Today, this role remains unchallenged⁵⁶ and is commonly accepted. The consent of the respondent State is, indeed, given in the offer to arbitrate, which is provided for in the IIA between the host-State and the national State of the investor. For its part, the investor gives its consent when it accepts the offer by initiating the proceedings.⁵⁷ The consent is 'dissociated' (*i.e.*

⁵³ Schreuer and Dolzer explains for instance that "[c]onsent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction". R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2012) 254.

⁵⁴ *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013) ¶361.

⁵⁵ First and foremost, the preamble of the Convention provides that "[n]o Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration". The consent requirement is then included in Article 25 of the Convention on the Jurisdiction of the tribunal. The first paragraph of this article reads as follows:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

In their Report to the Bank's member governments in view to the ICSID Convention signature and ratification, the World Bank executive directors insisted on the importance of consent for jurisdictional matters, explaining that it was 'the cornerstone' of ICSID jurisdiction. The Report is available on the ICSID webpage at <<https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>> (last consulted 1 Aug. 2015). On the importance of consent, *see also* A. Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (1995) 199-200.

⁵⁶ *Abaclat v. Argentina*, Dissenting Opinion, Georges Abi-Saab (28 Oct. 2011) ¶¶8-10. Two French authors have recently attempted to challenge this idea assessing whether investment arbitration could be initiated without a BIT, on the sole basis of customary international law. They conclude that a customary international law rule providing for a general arbitration offer in foreign investment matters does not exist and that "still today it seems rather difficult to separate the consent to arbitration from BITs." M. Audit & M. Forteau 'Investment Arbitration without BIT: Toward a Foreign Investment Customary Based Arbitration?' (2012) 29 *J. Int'l Arb.* 581, 597.

⁵⁷ It is in this line of action that J. Paulsson has famously described investor-State arbitration as "arbitration without privity". The investor has not concluded a specific agreement to arbitrate with the State prior to the existence of the dispute. Hence, the investor is not in privity with the host-State. The investor simply accepts the offer that the host-State is making in the IIA and does so after the dispute has

the offer and the acceptance do not happen at the same time) but there is, eventually, an agreement to go before the international tribunal.⁵⁸ In *Hochtief v. Argentina*, the tribunal recalled this principle explaining that there must be an agreement to arbitrate which provides the basis for its jurisdiction.⁵⁹

The Competence-Competence Principle and its Corollaries

Pursuant to the competence-competence principle (traditionally *Kompetenz-Kompetenz* principle), it is widely accepted in international dispute settlement, since its first affirmation in the *Betsey* case at the end of the eighteenth century,⁶⁰ that the adjudicator is vested with the authority to decide upon the existence and the extent of its jurisdictional authority. This principle, which has been inserted in Article 41(1) of the ICSID Convention,⁶¹ as well as in other arbitration rules used in investment arbitration,⁶² is of particular importance to the investment arbitration discipline. Indeed, not recognizing the principle would result in having the domestic courts of the State party –i.e. the same courts whose authority is sought to be avoided through international arbitration– deciding on the jurisdiction of the tribunal. Therefore, it is not surprising to see that investor-State tribunals have firmly reiterated the principle and its critical function in investment arbitration cases.⁶³

arisen, when initiating the arbitral proceedings. R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2012) 254.

⁵⁸ The first such-known arbitration, *Asian Agricultural Products v. Sri Lanka*, was initiated in 1987. The tribunal in this case ruled that the investment protection treaty, concluded by the State in which the investment was made and the home-State of the investor, could be considered as the expression of consent of the host-State to go before arbitration. In other words, in *AAPL v. Sri Lanka*, the tribunal ruled that private entities could use a bilateral investment treaty as a basis to initiate proceedings against a State before an international arbitral tribunal *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990). On the notion of 'dissociated consent' see J. Paulsson 'Arbitration Without Privity' (1995) 10 *ICSID Rev.-FILJ* 232.

⁵⁹ *Hochtief A.G. v. The Argentine Republic*, ICSID Case No. ARB/07/31 (Decision on Jurisdiction, 24 Oct. 2011)(hereinafter '*Hochtief A.G. v. Argentina*') ¶¶22-24.

⁶⁰ The case was decided in 1797 by a British-US Mixed Commission under Article 7 of the "Jay Treaty" (officially "Treaty of Amity, Commerce and Navigation, between His Britanic Majesty and the United States of America, 1794). Extracts can be found in A. Geouffre De Lapradelle & N. Politis, *Recueil des arbitrages internationaux* (1905) vol. I, 52, 63 *et seq.*; 99 *et seq.* Since then, the PICJ, the ICJ and other international adjudicators have reaffirmed the principle. See, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Reprinted, 2006) 275-78.

⁶¹ ICSID Article 41(1) reads as follows: "The tribunal shall be the judge of its own competence".

⁶² To give only one example, Article 23 of the UNCITRAL Arbitration Rules provides that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

⁶³ In *LESI v. Algeria* the tribunal for instance noted that it could not be contested that it was well within a tribunal's jurisdiction to determine its own competence. See, *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 July 2006) ¶75. In *SGS v. Pakistan*, the tribunal stressed the importance of ICSID Article 41(1) when it explained that this provision established a rule of fundamental importance for the proper operation of the ICSID arbitral system. See, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ARB/01/13, Procedural Order No. 2 (16 Oct. 2002) ¶22. In the non-ICSID case of *Quasar de Valores v. Russia*, the tribunal affirmed that the authority of international arbitral tribunals to rule on questions

One of the corollaries of this competence-competence principle is that the tribunal may look at whether the conditions for jurisdiction are satisfied *proprio motu*.⁶⁴ In ICSID Arbitration, this possibility is expressly mentioned in Rule 41(2) of the ICSID Arbitration Rules⁶⁵, and although the question has yet to be raised outside the ICSID context, this possibility should be considered to be open outside the ICSID context as well, as it is largely recognized in international dispute settlement.⁶⁶

Another consequence of the competence-competence principle is the affirmation that arbitral tribunals have a duty to exercise jurisdiction. *Corn Products v. Mexico* made it clear.⁶⁷ The tribunal in that NAFTA case noted that Mexico did not challenge the tribunal's competence and that there should be no doubt that the investor's claim did fall within the jurisdictional provision of NAFTA Chapter 11. Therefore, the tribunal affirmed that it should proceed to examine the claim on the basis that it had jurisdiction and that, in principle, it had to exercise that jurisdiction.⁶⁸ In the decision on jurisdiction in *Alemanni v. Argentina*, the tribunal clearly described this principle and explained that it was connected to the duty to not exceed its powers:

"As a matter of basic principle, if a claim raised before an ICSID tribunal is found to lie within its jurisdiction, the tribunal is under a duty to exercise the jurisdiction. This is the necessary (though often unspoken) corollary to the

pertaining to their own jurisdiction was a constant attribute that was "universally recognized norms and principles of international law". See, *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections (20 Mar. 2009), ¶80.

⁶⁴ *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 Mar. 2002) ¶56. Some tribunals went one step further and affirmed that tribunals were under a duty to verify their jurisdiction, and that this duty had to be performed *ex officio*. See e.g., *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 Oct. 2013) ¶123 and *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 Aug. 2008) ¶163.

⁶⁵ This provision reads as follows:

"The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence." For an application of this rule and a clear affirmation of the principle, see, *Mihaly v. Sri Lanka* (*supra* n.64) ¶56.

⁶⁶ See e.g., *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14 (Award, 8 Dec. 2008) ¶68 (where the tribunal relies on PCIJ and ICJ decisions to affirm that an international court must always examine *proprio motu* the question of its own jurisdiction; even where one of the parties does not appear before it or fails to defend the case). For decisions of the World Court on this issue, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment on Jurisdiction of the Court and Admissibility of the Application (20 Dec. 1988), ICJ Reports 1988, 69, at 76 and *Fisheries Jurisdiction (Spain v. Canada)*, Judgment on Jurisdiction of the Court (4 Dec. 1998), ICJ Reports 1998, 432, at 450 where the court affirmed that "[T]here is no burden of proof to be discharged in the matter of jurisdiction." See also, in the WTO context, *United States — Anti-Dumping Act of 1916*, WT/DS136/AB/R; WT/DS162/AB/R, Appellate Body Report (28 Aug. 2000) ¶ 54 and reference thereunder; and in international criminal proceedings *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-AR72 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995) ¶¶ 15, 18.

⁶⁷ *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (redacted) (15 Jan. 2008)(hereinafter '*Corn Products v. Mexico*').

⁶⁸ *Ibid.* ¶75.

principle reflected in the annulment provisions in Article 52 of the Convention that a tribunal may not exceed its powers."⁶⁹

In principle, this duty implies that a tribunal has little discretion to disregard a case once it has been found that the case falls within its jurisdiction.

This is fundamental, especially in light of the *problématique* of the present Chapter. However, this 'duty to exercise jurisdiction' principle is not absolute. But, as we will see in later developments below, grounds for denying jurisdiction are limited and strictly framed. In this regard, the tribunal in *Alemanni v. Argentina* stated that any reason to refuse jurisdiction must be a 'strong' one.⁷⁰ Similarly, the tribunal in *Occidental Petroleum v. Ecuador* found that any exception to the duty to exercise jurisdiction requires clear language to that effect.⁷¹ Potential interferences between the investment dispute and another international legal system (for instance, the international trade legal regime), or between the said investment dispute and the jurisdiction of another international adjudicator to deal with another facet of that dispute, are not likely to be considered as 'strong' reasons for the investment tribunal to dismiss the case at the jurisdictional stage.⁷² As a result, the raising of an objection to the jurisdiction of the tribunal would not be the most efficient tool to deal with jurisdictional interactions between investment arbitration and other international dispute settlement mechanisms. This assumption will be further discussed over the present Chapter. At this stage, it is nonetheless important to bear in mind that this assumption is based, *inter alia*, on the *competence-competence* principle.

Primary–Jurisdiction, Incidental Jurisdiction and Inherent Powers

The last general point that needs to be made with respect to the jurisdiction of investment tribunals relates to the scope of investment tribunals' authority. Conventionally, investment tribunals, like any other existing international adjudicative bodies, do not have general jurisdiction, but rather 'attributed jurisdiction', or *compétence*

⁶⁹ *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction & Admissibility (17 Nov. 2014) ¶320.

⁷⁰ *Ibid.*

⁷¹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction (9 Sept. 2008) ¶¶71-72.

⁷² A similar conclusion was reached in the intra-EU BIT case *Eureko B.V. v. Slovak Republic*. There, the respondent attempted to use the connection between the case and the EU legal order to challenge the jurisdiction of the arbitral tribunal. The Czech Republic based this challenge on the ground that the dispute should be brought before the European Court of Justice, the only competent organ to apply EU law. The tribunal looked at the applicable law clause of the case and noted that EU law could be taken into consideration to examine the merits of the case, but this should not have an impact on its jurisdiction. To this extent, it stated very clearly that "[t]he fact that, at the merits stage, the Tribunal might have to consider and apply provisions of EU law does not deprive the tribunal of jurisdiction. *See, Eureko B.V. (also known as Achmea B.V. [I].) v. Slovak Republic*, UNCITRAL - PCA Case No. 2008-13 (Decision on Jurisdiction, 26 Oct. 2010) ¶283.

d'attribution.⁷³ This means that the exercise of a given tribunal's adjudicative power is limited under (i) the IIA and (ii) the arbitration rules (ICSID, UNCITRAL, etc.) used to initiate the dispute. An investment treaty tribunal is not endowed with general jurisdiction to hear claims based on any source of law arising at any point in time.⁷⁴ The jurisdiction of investment tribunals is limited to investment disputes (however qualified). As we will see later on, this 'limitation' can be more or less strict, depending on the wording of the IIA. Some agreements reserve the use of arbitration to claims that find their cause of action in specific legal instruments (the investment treaty, an investment agreement between the host-State and the investor, etc.). Some others are more broadly drafted, and permit all types of investment-related disputes to be submitted to arbitration.⁷⁵

Yet, even in the absence of a strict limitation in the investment agreement, it is impossible to conceive that a tribunal constituted in virtue of an IIA will accept to review any type of claim, regardless of their cause of action. The dispute needs to be about invoked measures of the host-State party to the IIA, and relating to the claimant's investment as characterized in the investment agreement. The tribunal in *Generation Ukraine v. Ukraine* insisted on this particular point.⁷⁶ In that case, the claimant argued that Ukrainian authorities obstructed and interfered with the realization of its investment in a manner that was tantamount to expropriation. Referring to the wording of the BIT used to initiate the proceedings (the Ukraine-U.S. BIT), the tribunal explained that its jurisdiction was limited to disputes relating to alleged breaches of any right conferred or created by the BIT with respect to an investment.⁷⁷ The Ukraine-U.S. BIT does include a provision prohibiting expropriation, however, many of the alleged expropriatory acts occurred before the BIT entered into force. The tribunal explained that its jurisdiction was limited to the acts that occurred only after the date of entry into force of the BIT. Interestingly, the award added that even if several of the standards included in the BIT, including the prohibition against expropriation, were simply a conventional codification of standards that have long existed in customary international law, the tribunal did not have "general jurisdiction over causes of action based on the obligations of States in customary international law."⁷⁸

⁷³ See e.g., *Abaclat v. Argentina*, Dissenting Opinion of Georges Abi-Saab (28 Oct. 2011) ¶12 ; *Impregilo S.p.A. v. The Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern (21 June 2011) ¶53. See also, V. Heiskanen 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' (2014) 29 *ICSID Rev.* 231.

⁷⁴ *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award (16 Sept. 2003) ¶8.10.

⁷⁵ Douglas (*supra* n.48) 234.

⁷⁶ *Generation Ukraine Inc. v. Ukraine* (*supra* n.74) ¶8.10.

⁷⁷ *Ibid.* ¶8.10. The arbitration clause also referred to disputes arising out of, or related to, investment agreements and investment authorizations. The claimant however did not refer to either of these two options.

⁷⁸ *Ibid.* ¶11.3.

To refer to this limited 'class of cases' a given tribunal has the power to decide, authors have used the notions of 'primary jurisdiction', 'principal jurisdiction' or 'field jurisdiction'.⁷⁹ In that sense, the *primary jurisdiction* of a given investment tribunal covers potential breaches of the investment agreement upon which it is constituted, and one might insist, only those breaches.⁸⁰ This limitation, however, shall not prevent the tribunal from deciding on questions that, whilst possibly falling outside the scope of its primary jurisdiction, are necessary to answer in order to guarantee the proper treatment of the dispute. This other 'sphere of jurisdiction' will usually be called the 'incidental' or 'inherent' jurisdiction of international tribunals.⁸¹ It refers to matters that are decisive to some of the case's issues, but whose answers will not be necessarily final or decisive for the whole controversy. In the words of Pauwelyn and Salles, "incidental jurisdiction is asserted when an international tribunal faces a question that affects its ability to exercise the judicial function assigned to it. This sphere of jurisdiction guarantees that a tribunal maintains the integrity of its judicial function in exercising the limited jurisdiction granted to it."⁸² Of course, the key word in Salles and Pauwelyn definition is 'affects'. Alas, the two authors do not shed much light on this score. One could argue that, at one end of the spectrum, the term 'affects' refers only to the issues that, if not discussed, would frustrate the court or tribunal in deciding the case it is supposed to deal with. At the other end of the spectrum, 'affects' would mean anything that could, in principle at least, be worth discussing.

How the court or tribunal envisages, or understands, its function, will determine whether it will adopt the former or the latter understanding of the word.

Closely connected to the notion of incidental jurisdiction is the notion of 'inherent powers'.⁸³ Some constituent instruments and procedural rules expressly foresee instances of incidental jurisdiction (*i.e.* how the ICJ Statute refers to the authority of the Court to issue jurisdictional measures, or how the WTO-DSU provides for the panels' authority to seek information and technical advice from any expert which they deems appropriate), whilst others are silent on the issue. Yet it does not mean that the courts or tribunals acting in virtue of these silent constituent instruments do not have jurisdiction over incidental matters. Under the doctrine of the inherent powers, this authority may derive from the very essence of international tribunals, as courts of law. B. Cheng explains that "[w]here a tribunal has jurisdiction in a particular matter, it is also competent with

⁷⁹ J. Pauwelyn & L.E. Salles 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions' (2009) 42 *Cornell Int'l L. J.* 77, 98, citing G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986) 434.

⁸⁰ To give another illustration, the primary jurisdiction of the ECtHR covers breaches of the ECHR and only those breaches.

⁸¹ Pauwelyn & Salles (*supra* n.79) 100-01. See also, Rosenne (*supra* n.2) 578-579.

⁸² Pauwelyn & Salles (*supra* n.79) 101.

⁸³ On this notion, see C. Brown 'The Inherent Powers of International Courts and Tribunals' (2005) 76 *Brit. YB Int'l L.* 195.

regard to all relevant incidental questions, subject to express provision to the contrary."⁸⁴

The doctrine of inherent powers has been recognized in investment arbitration.⁸⁵ Tribunals have relied on it to grant binding provisional measures,⁸⁶ to prevent an abuse of process,⁸⁷ to accept submission from non-parties,⁸⁸ and more generally, to deal with procedural matters and the submission of evidence.⁸⁹ Like in general international law jurisprudence,⁹⁰ investment tribunals have also used the doctrine to address substantive questions. In *World Duty Free v. Kenya* for instance, the tribunal noted that it had no jurisdiction to decide upon the legality of acts taken by the former president of Kenya. Yet, the tribunal explained that it was necessary to verify whether the president did corruptly favor the investor, when the latter concluded a contract with its country, in order to decide on the admissibility of the investor's claim.⁹¹ The recent cases against Russia in the *Yukos* controversy provide another interesting example. In these three parallel ECT cases, the claimants have referred to human rights law in their claims, arguing that Russia had carried out a campaign of harassment and intimidation against the employees of the investors' companies.⁹² Russia, unsurprisingly, object to the jurisdiction of the tribunal affirming that "the alleged violation of [...] human rights [...] are outside the scope [of the tribunals' jurisdiction]."⁹³ The tribunal recognized that it was not a human rights court, but explained that it was within the scope of its

⁸⁴ Cheng (*supra* n.60) 266.

⁸⁵ M. Paparinskis, 'Inherent Powers of ICSID Tribunals: Broad and Rightly So', in I. Laird and T.J. Weiler, *Investment Treaty Arbitration and International Law – Vol. 5* (2012) 11.

⁸⁶ See e.g., *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Request for Provisional Measures (28 Oct. 1999)(hereinafter *Maffezini v. Spain*) ¶9.

⁸⁷ *Waste Management, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection Concerning the Previous Proceedings (2 June 2000) ¶¶48-50.

⁸⁸ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005) ¶6.

⁸⁹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 Nov. 2008) ¶261.

⁹⁰ The most prominent example is certainly the ICJ *Namibia* opinion. Although the Court reckoned that it did not have the authority to control the legality of decisions taken by the United Nations Security Council and General Assembly decisions, it did accept the authority to assess objections to the two political organs "before determining any legal consequences arising from those resolutions." The Court justified its position explaining that this has to be done "in the exercise of its judicial function and since objections have been advanced." See, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (21 Jun. 1971), ICJ Reports 1971, 16, at ¶89.

⁹¹ *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 Oct. 2006) ¶3.

⁹² *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award (18 July 2014); *Yukos v. Russia*, PCA Case No. AA 227, *Veteran Petroleum v. Russia*, PCA Case No. AA 226, (Final Awards, 8 July 2014) ¶¶761-764.

⁹³ *Ibid.*

jurisdictions "to consider the allegations of harassment and intimidation as they form part of the factual matrix of claimants' complaints that the Russian Federation violated its obligations under [...] the ECT."⁹⁴ Although the tribunal did not refer expressly to the notion of incidental jurisdiction, it seems clear that the concept was employed. The tribunal reviewed whether non-investment obligations have been violated or not, in order to better understand the factual matrix of the case. These cases can be presented as interesting examples of incidental jurisdiction or inherent powers extending to substance. A tribunal might use this doctrine when it finds it necessary to address a question that does not belong to its primary jurisdiction, in order to decide upon a claim that does belong to it.

This is particularly important in light of the present Chapter's objectives. A claim based on the sole breach of international trade law, brought before an international investment tribunal, will not be considered. The investment tribunal does not have the power to entertain such claim. Nonetheless, should the claim be based on an investment treaty and refer, incidentally, to another international rule, the tribunal may use its incidental jurisdiction to assess this non-investment rule and decide on the merits of the case. Of course, the question then becomes, when does a claim qualify as a principal claim, and when does it qualify as an incidental claim? To my knowledge, this question has not been addressed in the case law. The discussions below on the nature of jurisdiction and the admissibility of claims might help to address this issue.

2. Five Variables to Determine Jurisdiction under Investment Treaties

Now that the general notions and concept relating to jurisdiction have been defined, we can turn to the specific elements that constitute jurisdiction under investment treaties. The jurisdiction of investment tribunals has been conceptualized in the four categories or 'dimensions' that are traditionally found in international dispute settlement: jurisdiction *ratione personae* (personal jurisdiction), jurisdiction *ratione materiae* (subject-matter jurisdiction), jurisdiction *ratione temporis* (temporal jurisdiction), and jurisdiction *ratione loci* (spatial or territorial jurisdiction).⁹⁵ In some international arbitral disputes, tribunals have added a fifth dimension by referring to the notion of jurisdiction *ratione voluntatis* (the extent of the parties' consent to arbitration), in order to emphasize the importance of consent.⁹⁶ Indeed, it should be clear that if a tribunal does not have the latter, there is no point in inquiring into any of the prior four.

These categories have proven to have an important practical role in investment arbitration. They seem to be useful analytical tools for practitioners, as they warrant a

⁹⁴ *Ibid.* ¶765

⁹⁵ Amerasinghe (*supra* n.2) 193-99.

⁹⁶ See e.g., *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) ¶54; *ST-AD v. Republic of Bulgaria* (*supra* n.54) ¶¶334-75.

more methodical examination of jurisdictional objections. A brief overview of each of these categories will show that the connection of an investment dispute to the trade discipline cannot be considered, *per se*, as a jurisdictional obstacle.

Rationae Personae, Rationae Loci, and Rationae Temporis

The jurisdiction *ratione personae*, *ratione loci* and jurisdiction *ratione temporis* elements, are only of a limited interest for the central question of the present Chapter and therefore will not be examined in detail. It is, however, important to recall that jurisdiction *rationae personae* relates to persons who can avail themselves of the arbitration mechanism. There, it is commonly admitted that disputes based on an IIA must include a State party to the agreement and a national of another party to the agreement. This generally requires the tribunal to enquire into the nationality of the claimant, which might necessitate looking into the domestic law of the alleged national State of the investor, especially when the investor is a natural person. When the investor is a company, the tribunal will need to look at where the company is incorporated, how it is structured, and if and how it is controlled by other entities. Jurisdiction *rationae personae* also covers the other party to the dispute, *viz.* the respondent State. The tribunal might thus have to address questions relating to the notion of 'attribution', for instance when the measure has not been taken by the State directly, but rather by one of its subdivisions or agencies,⁹⁷ or more generally as to whether the measure at stake is subject to the international responsibility of the respondent State.⁹⁸ With respect to the notion of *ratione loci*, the tribunal has to examine whether the investment has been made within the territory of the host-State. This requirement is not always expressly mentioned in IIAs (NAFTA Article 1101 refers to it, but it remains an exception⁹⁹), nonetheless it is admitted that the need for a territorial link is implicit in the notion of investment.¹⁰⁰ Finally, jurisdiction *rationae temporis* relates to the timing of the claim. In short, arbitral tribunals may decline

⁹⁷ In *Hamester v. Ghana*, the Tribunal recalled that an objection, founded on the defense that the conduct complained of was that of a State agency, and not that of the State itself, could be characterized as an objection based on the lack of jurisdiction *ratione personae*. See, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010) ¶91. On questions of attribution more generally, see e.g., Y. Shany, *Assessing the Effectiveness of International Courts* (2014) 68. and L. Schicho 'Attribution and State Entities: Diverging Approaches in Investment Arbitration' (2011) 12 *JWIT* 283.

⁹⁸ For an examination of this type of question and its characterization as a 'jurisdiction *ratione personae*' objection, see *Nordzucker AG v. The Republic of Poland*, UNCITRAL, Partial Award (10 Dec. 2008) ¶¶129-32.

⁹⁹ NAFTA Article 1101 provides, in its relevant parts (emphasis added):

Article 1101: Scope and Coverage

"1. This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;
- (b) investments of investors of another Party *in the territory* of the Party; and
- (c) with respect to Articles 1106 [Performance Requirements] and 1114 [Environmental Measures], all investments in the territory of the Party."

¹⁰⁰ G. Petrochilos, 'Attribution' in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements - A Guide to the Key Issues* (2010) 287.

jurisdiction for temporal reasons when (i) the IIA under which the dispute is brought, or the tribunal's constitutive instrument (e.g. the ICSID Convention), has not come into force when the events complained of by the investor occurred, (ii) when this agreement or instrument has expired, or (iii) when the IIA includes a clause delimiting a tribunal's jurisdiction based on time (for instance, when it is stated in the IIA that the treaty covers all investments made by investors prior to or after its entry into force but is limited to disputes having arisen after its entry into force).¹⁰¹

Rationae Materiae

More important are the notions of *ratione materiae* and *ratione voluntatis*. The former relates to jurisdiction over the dispute's subject matter as identified in the IIA, used as the basis to initiate the arbitration.¹⁰² Investment treaties generally provide that only disputes 'arising from' an investment can be brought before an international arbitral tribunal. Other IIAs stipulate that arbitral tribunals may only hear disputes between an investor and a host-State. In that case, it is admitted that the investor shall be defined as a national of the other state, performing an investment. Either way, the focal question for the tribunal when addressing its subject matter jurisdiction is the existence of an investment.¹⁰³ Defining the notion of investment is a hard task, and although tribunals may find guidance in investment treaties, which sometime include definitions and/or closed-lists of examples of operations that would qualify as investments, they usually have to rely on complex 'tests' developed in the case law and which can be only briefly summarized here.¹⁰⁴ In short, for the purpose of international investment arbitration pursuant to IIAs, the notion of investment is perceived as relatively broad and articulated around the five following general components or basic characteristics: (i) a commitment of resources, (ii) an economic risk, (iii) an element of duration, (iv) the likelihood of return and profit and (v) a contribution to the economic development of the host-State.¹⁰⁵ Interestingly, once the activity is qualified as an investment and once it is established that the dispute relates to the investment, the *ratione materiae* dimension of

¹⁰¹ See, Waibel (*supra* n.23) 1251-58.

¹⁰² As we will see in the next development, Article 25 of the ICSID convention also includes jurisdictional requirements and notably one requirement relating to the dispute's subject matter. In ICSID disputes then, the tribunal will have to operate a double jurisdictional review: one that is based on the language of the IIA and one based on the language of ICSID Article 25.

¹⁰³ E. Savarese 'BIT Clauses Bearing on the Ratione Temporis Jurisdiction of ICSID Tribunals; A Survey on the Constituent Elements of Investor-State Legal Disputes under BITs' (2009) 10 *JWIT* 601, 601-02.

¹⁰⁴ For a recent study on the notion of investment, see, J.A. Bishoff & R. Happ, 'The Notion of Investment' in M. Bungenberg *et al.* (eds.), *International Investment Law - A Handbook* (2015) 495. See also, for a recent challenge of the general conception of the notion of investment, M. Dekastros 'Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention' (2013) 14 *JWIT* 286.

¹⁰⁵ These five elements were first expressly identified in the famous *Salini v. Morocco* dispute. *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001). While some tribunals agreed with the definition given in *Salini*, others preferred a more flexible approach, arguing that room shall be given to parties' consent. See, on this debate and on the case law in favor/against the "Salini test", Bishoff & Happ (*supra* n.104) 506-08.

the tribunal's jurisdiction is, in principle, satisfied. As we will see in the next development, this has an important consequence for the question at hand in the present chapter. In theory, the connection of the dispute with another branch of international law, such as trade law, should not be seen as a limit to the jurisdiction *ratione materiae* of the arbitral tribunal.¹⁰⁶

Rationae Voluntatis

The last dimension relates to the consent of the parties to the dispute, and more precisely, the scope of the consent. As previously mentioned, consent is of critical importance in international arbitration: if there is no consent, by the parties, to arbitration, the tribunal has no authority to hear the dispute.¹⁰⁷ One might, therefore, talk about jurisdiction *ratione voluntatis*. For instance, in her dissenting opinion in *Impregilo v. Argentina*, Stern noted that in addition to complying with the conditions *ratione personae*, *ratione materiae*, and *ratione temporis*, in order to benefit from the jurisdictional protection granted by an arbitration mechanism, there is a condition *ratione voluntatis*: "[T]he State must have given its consent to such a procedure which allows a foreign investor to sue the State directly on the international level."¹⁰⁸ Any investor tribunal may thus have to determine that the defending State has consented to arbitration. Should the defending State challenge the existence of this consent, the tribunal will have to look at the IIA and determine on what conditions the State parties to the agreement have given their consent to arbitration.

A State has the possibility of limiting the extent of its grant. Limited consent can take various forms: For instance, the parties to an IIA can limit their consent to arbitration for only particular provisions of the treaty, and explicitly exclude arbitration on certain classes of claims or include prerequisites to arbitration. NAFTA Art. 1116 limits the scope of the consent to arbitration to claims arising from alleged breaches of the NAFTA Chapter 11 itself. Similarly, pursuant to Art. 26.1 of the ECT, the scope of the consent is limited to claims arising from alleged breaches of the ECT. Including provisions such as NAFTA Article 1101 in an IIA, which provides that the chapter only applies to "measures *relating to* an investment", is also seen as a limitation to the scope of consent to arbitration and, by a consequence, to the jurisdiction of the tribunal.¹⁰⁹ These provisions have the effect of creating a requirement for "a nexus between the particular measure attributable to the host state and the particular rights and interests that comprise the claimant's investment."¹¹⁰

¹⁰⁶ See *infra* p.172.

¹⁰⁷ E. Gaillard & J. Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 253.

¹⁰⁸ *Impregilo v. Argentina*, Stern's Dissenting Opinion (*supra* n.73) ¶53.

¹⁰⁹ Douglas (*supra* n.48) 242-47.

¹¹⁰ *Ibid.* 242.

In last-generation IIAs, States have used this type of devices to prevent investors from relying on non-investment obligations when formulating their cause of action. However, in the absence of such limits, an attempt to connect the cause of action to non-investment obligations may not necessarily result in the tribunal declining jurisdiction.

3. Objections to Jurisdiction in Practice

Investment arbitral tribunals have applied the general principles, discussed above, broadly. A deeper examination of jurisdictional objections in practice warrants some additional remarks.

Preliminary Nature of the Objections

First of all, objections to jurisdiction are considered to be preliminary. This means that, in theory, the tribunal has to examine them before the merits, at the earliest stage of the dispute. The reason for that is simple: It is fundamental for the tribunal to make sure at the very outset of the dispute that it has the authority to deal with the dispute. Once this is established, in theory, that authority should not be questioned any further, so that the tribunal can deal with the merits and substance of the dispute without having its capacity to do so contested. Conversely, deciding these issues at an early stage removes, from the parties to the dispute, the burden of dealing with the entire case (which can be long and costly) when it appears that the tribunal lacks jurisdiction to do so.

The ICSID and other arbitration rules used in investor-State arbitration contain provisions pursuant to which the objections shall be made in a timely manner. For instance, Article 21 of the UNCTIRAL Arbitration Rules states that "[a] plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim." Similarly, ICSID Rule 41 provides that "[a]ny objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible".

Further, the ICSID and other arbitration rules also allow arbitral tribunals to 'bifurcate' arbitral proceedings, that is, to separate jurisdictional issues from the merits, having a separate jurisdictional phase to consider the jurisdictional and admissibility objections raised by the respondent.¹¹¹

The necessity to treat jurisdictional objections at the outset can be seen as problematic when the objection is based on the possible use of another legal discipline and therefore connected to the applicable law question, which, arguably, should only come into play once the tribunal has decided upon the issue of jurisdiction. Tribunals must be aware of that potential problem and they shall make sure that they differentiate questions relating

¹¹¹ On the practicalities of bifurcation, *see*, the information available on the ICSID webpage <<https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Bifurcation.aspx>> (last consulted 1 Aug. 2015).

to jurisdiction and those relating to applicable law, even when the jurisdictional objection is linked to applicable law.

The Role of ICSID Article 25 and the Specificities of ICSID Arbitration

Second, it is important to note that a specific framework applies to jurisdictional issues when the arbitration is conducted under the ICSID Convention, (by comparison to arbitration under other arbitration rules, such as the UNCITRAL, the SCC, etc.). The ICSID Convention contains a provision relating to jurisdiction, namely Article 25. This provision provides for an additional 'layer' of control for the arbitral tribunal.¹¹² The tribunal has to verify whether it has jurisdiction pursuant to the terms of the IIA used to initiate the dispute and, additionally, if the requirements of ICSID Convention Article 25 are satisfied. This article states that:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

As explained in *Vigotop v. Hungary*, it is generally considered that Article 25 of the ICSID Convention sets out four general requirements in order for ICSID tribunals to determine their jurisdiction: (i) the existence of a legal dispute; (ii) a dispute arising directly out of an 'investment'; (iii) a dispute between a contracting State and a national of another contracting State; and (iv) the existence of the written consent of both parties.¹¹³

There is certainly some overlap between these requirements and the general variables and dimension that tribunals have to verify pursuant to investment treaties, as mentioned above, especially as concerns the second ('dispute arising out of an investment' corresponds with the *rationae materiae* dimension), third ('national of another contracting State' corresponds to the *rationae personae* dimension) and fourth criteria ('consent of the State parties to the IIA' corresponds to the *rationae voluntatis* dimension). Similarly, the first requirement –*i.e.* the existence of a legal dispute–, although expressly mentioned in the text of the ICSID, is not exclusive to ICSID arbitration. As mentioned previously, it is inherent to all mechanisms of international dispute settlement, with both ICSID and non-ICSID investment arbitral tribunals having had to define the notion.

¹¹² One should note that ICSID Convention Article 41 and ICSID Arbitration Rule 41 also contain provision relating to the authority of the tribunals. ICSID Convention Article 41 and ICSID Arbitration Rule 41 refer to the 'competence' of the tribunals. However, they do not add any specific requirements that must be verified to decide whether a tribunal can hear a dispute or not. For a discussion of the interplay between these two provisions and ICSID Article 25 and more generally on the possible differences between the notions of jurisdiction and competence in ICSID arbitration, see Heiskanen (*supra* n.73) and A.M. Steingruber 'Some remarks on Veijo Heiskanen's Note: 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' (2014) 29 *ICSID Rev.* 675.

¹¹³ *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award (1 Oct. 2014) ¶245.

The way the tribunals deal with these potential overlaps varies from case to case. In some cases, the tribunals have interpreted the IIA and the Convention together, seeking compatibility between the requirements.¹¹⁴ In other cases, the tribunals have applied a so-called 'double-barreled test', whereby they verify whether a given requirement is satisfied under the wording of the IIA and whether the requirement is satisfied under the wording of the ICSID Convention.¹¹⁵ This has been the case for instance for the condition relating to the existence of an investment. In a large number of cases, tribunals verified first whether the operation referred to by the claimant qualified as an investment under the definition provided in the BIT, and then, whether it qualified as such within the meaning of ICSID Convention Article 25.¹¹⁶

At the end of the day, the discussion on the interplay between the jurisdictional requirements under the ICSID Convention and those under IIAs, is not of crucial importance for the present Chapter. What needs to be kept in mind is that in ICSID arbitration, the jurisdictional hurdle might be considered to be higher than in non-ICSID arbitration. Yet, there seems to be nothing in the requirements contained in Article 25 that can be used to deny jurisdiction because the dispute is connected to international trade law.

C. THE JURISDICTION OF INVESTOR-STATE TRIBUNALS OVER TRADE-RELATED CLAIMS

In light of the previous developments, it can be affirmed that the mere connection of an investment dispute to trade law is not an element that, by itself, prescribes the parameters of an arbitral tribunal's powers. In addition, it can be affirmed that even a direct reference to trade law in an investment claim does not, by itself, suffice to challenge the jurisdiction of an investment arbitral tribunal.

Jurisdiction of Investment Tribunals and Disputes Connected to other International Legal Systems

In Chapter 3, we saw that investor-State tribunals have used trade law in four different situations (or scenarios): To illustrate a factual or incidental legal element of the investment dispute (Scenario No.1), to interpret a substantive investment norm (Scenario No.2), as a basis of a claim relating to a breach on an investment obligation (Scenario No.3) and finally to counter a claim relating to a breach of an investment obligation (Scenario No.4).

¹¹⁴ See e.g., *Joseph Charles Lemire v. Ukraine*, ICSID Case No.ARB/06/18, Decision on Jurisdiction and Liability (14 Jan. 2010) ¶93.

¹¹⁵ See e.g., *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 Feb. 2011) ¶107.

¹¹⁶ See e.g., *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) ¶68; *Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013) ¶¶438-39.

All these situations imply a connection with the international trade legal discipline. In Scenario No.1, the connection is only minor; trade law is referred to as a fact, or as an incidental legal element. Yet, the investment dispute is, to some extent, connected to the trade discipline. In the three other scenarios, the connection is more obvious, and potentially more intricate. Trade law is part of the tribunal's reasoning (Scenario No.2), and directly referred to by the respondent State (Scenario No.3) or the investor (Scenario No.4).

In the previous developments of this present chapter, we discussed the basic principles relating to jurisdiction in investment arbitration and, more precisely, the conditions that need to be satisfied to establish the jurisdiction of an arbitral tribunal. As we have seen, while these conditions vary depending on the IIA and the arbitration rules used in the dispute, it is possible to identify general variables for the basis of jurisdiction. The connection of the dispute to another international legal discipline, and in particular to trade law, is not to be found in on these variables. Thus, it can be affirmed that, the mere use of trade law, absent any other considerations (Scenario No.1), cannot be considered as a basis to challenge the jurisdiction.

For the reasons given above, the jurisdictional conditions relating to the investor, the timing of the claim, and to the host-State territory, are not likely to be used as channels to contest the authority of a tribunal because of a connection of the dispute to another international legal discipline. More realistically, one could try to use the conditions relating to the subject matter of the dispute, claiming for instance that investment arbitration should only deal with investment disputes, or the conditions relating to the State's consent to arbitration.

As for the subject-matter element, we saw that once the operation at stake is qualified as an investment, the tribunal is considered to have jurisdiction *ratione materiae*. In principle, there are no other general limits to the authority of the tribunal with regards to the substantive aspect of the dispute. In theory then, and provided that the IIA includes a broad language on the scope of the tribunal's authority, the possible connection of the dispute with another branch of international law, for instance trade law, should not impact the jurisdiction of an arbitral tribunal.

The *rationae voluntatis* dimension is the other element that could be used to challenge or limit the jurisdiction of an international tribunal with regard to a dispute that shares a connection with the international trade legal discipline. The argument can be made that a State consents to arbitration in case of an investment dispute, but only according to the specific conditions in the IIA. In other words, the State establishes limits to its consent. As mentioned already, the vast majority of existing IIAs include arbitration clauses that are broadly drafted and that do not contain this type of limit.¹¹⁷ In such a case, any dispute relating to an investment (and provided that the other variables for jurisdiction

¹¹⁷ See e.g., Douglas (*supra* n.48) 234.

are satisfied) may be submitted to an arbitral tribunal, even when it is connected to trade law.

Recent agreements are more detailed and tend to restrict the scope of consent to arbitration to disputes based exclusively on alleged violations of the substantive provisions of the treaty itself.¹¹⁸ The draft text of the EU investment agreement with Singapore is interesting in that respect. Pursuant to Article 9.14 of the Draft (October 2014) version, the scope of the investor-State dispute settlement mechanism is limited to disputes concerning "treatment alleged to breach the provisions of [the Agreement's Section on Investor Protection], which allegedly causes loss or damage to the claimant, or its locally established company." The consent to arbitration here is therefore limited to disputes based on a breach of substantive provisions of the agreement.¹¹⁹ The 2012 US Model BIT is even more elaborate in the delimitation of investment disputes. Pursuant to Article 24.1 of the Model, only claims that relate to an obligation under 'Articles 3 through 10' of the agreement (*i.e.* substantive provisions for investment protections), or an investment authorization, or an investment agreement can be brought before an investor-State arbitral tribunal.¹²⁰ Yet, even these types of detailed provisions, which limit the scope of consent to arbitration considerably, cannot be seen as jurisdictional obstacles for disputes that relate to trade law, due to the simple fact that disputes relating to trade law (Scenario No.1) do not bear any consequence on the jurisdiction of an arbitral tribunal.

The Idea of 'Expandable Jurisdiction' (vs. General Jurisdiction) and Tribunals' Authority to Deal with Investment Claim Based upon Trade Law

Provided that a treaty does not provide otherwise, the simple fact that a dispute relates to trade law does not, by itself, suffice to challenge the jurisdiction of an investment arbitral tribunal. One could even take a step further and argue that absent clear limitations to the State's consent to arbitration in the IIA, it would be difficult for a tribunal to decline jurisdiction only because the cause of action of the investor's claim is founded upon a breach of trade law.

This affirmation is based on the notion of 'expandable jurisdiction', which I already employed and explained in Chapter 2. This notion refers to the idea that IIAs contain

¹¹⁸ As mentioned previously, these types of restrictions can be direct and explicit in the IIA (like in NAFTA Chapter 11 Articles 1116 and 1117, and in the ECT Article 26(1)) or indirect, through the definition of the type of dispute arbitrable under the IIA or via the identification of the exclusive legal sources for the investor's cause of action. *See*, Douglas (*supra* n.48) 234-35, *citing* the 2004 US Model BIT, which defines in its Article 4(1) an investment dispute as "a dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment".

¹¹⁹ The section referred to includes all the general substantive guarantees and treatment (although much more carefully defined and delimited) generally found in traditional IIA.

¹²⁰ The terms 'investment authorization' and 'investment agreement' are strictly defined and leave almost no room for interpretation.

several features that can be used by investors to request tribunals to rule upon legal obligations that are not contained, *per se*, in the relevant investment treaty.

To be clear, I do not argue that investor-State tribunals are tribunals of general jurisdiction. I already explained that this is unquestionable and has been affirmed on numerous occasions in the case-law.¹²¹ On the other hand, the broad wording of specific standards of protection included in IIAs (for instance, the FET standard) as well as legal instruments such as MFN clauses, Umbrella clauses and preservation of rights clauses, may be used to request the tribunal to evaluate claims founded on grounds other than those solely arising from obligations in the relevant investment treaty.

MFN clauses included in IIAs operate in a different manner than those contained in a WTO instrument (such as GATT Article I, GATS Article 2 or TRIPS Article 4). In investment law, it is usually accepted that MFN clauses can be used directly into the treaty used by the investor in the dispute the more favorable substantive treatment standards of another IIA treaty that the host-State is party to the benefit of the said investor.¹²² For instance, if a dispute is initiated on the basis of a BIT between State A and State B, and it appears that B, the defendant in the dispute, also concluded a BIT with State C, that includes a broader definition of the standard for full protection and security treatment (*e.g.* it contemplates legal security whereas the A-B BIT is limited to physical security), then the investor in the dispute, relying on the MFN clause in the A-B BIT, could invoke this B-C definition of the standard. More controversially, MFN clauses have been used to circumvent the limited subject matter jurisdiction granted to a tribunal under the arbitration clause of the treaty used to raise the dispute, by importing, *via* the clause, the broader subject matter jurisdiction granted under another treaty.¹²³ In that sense, the MFN clause is used to open-up, or to expand, the scope of the arbitral tribunal's jurisdiction, to disputes that were not necessarily contemplated in the original BIT.

Umbrella clauses are also frequently used to import, into the investment treaty, dispute rights that are not directly referred to in the IIA.¹²⁴ Umbrella clauses refer to specific obligations relating directly to the legal relationship between the parties to the investor-State arbitration, *viz.* the investor and the host-State. Broadly interpreted, they provide for an avenue through which investors can seek to import (the term 'elevate' has been

¹²¹ See *supra* pp. 162 *et seq.* and references thereunder.

¹²² For a broad review of MFN treaty in investment treaty arbitration, see UNCTAD, 'Most-Favored Nation, a Sequel' (2010) UNCTAD Series on Issues in International Investment Agreements II, available at < http://unctad.org/en/docs/diaeia20101_en.pdf > (last consulted 1 Aug. 2015).

¹²³ J.A. Maupin 'MFN-based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?' (2011) 14 *J. Int'l Eco. L.* 157.

¹²⁴ Investment tribunals have interpreted broad umbrella clauses to give investors treaty rights with respect to (i) contracts concluded between investors and the State or one of its entities and (ii) unilateral undertakings of the State embodied in municipal law. On this issue, see M.C. Gritón Salias, 'Do Umbrella Clauses Apply to Unilateral Undertakings?' in C. Binder et al. (eds.), *International Investment Law for the 21st Century: Essays in Honor of C. Schreuer* (2009) 490.

also employed), into their treaty claims, contractual rights, or rights deriving from unilateral obligations the State could have consented to.¹²⁵

Finally, 'preservation of rights' clauses have also been used to import standards recognized in other international agreements (and contrary to MFN clauses, not necessarily IIAs) into disputes, such as human rights agreements, or even trade agreements.¹²⁶ For instance, in *Roussalis v. Romania*,¹²⁷ the tribunal accepted that, in principle, the preservation of rights clause included in the BIT used to initiate the dispute could include obligations deriving from multilateral instruments to which those states are parties.¹²⁸ The tribunal therefore left open the possibility to use the preservation clause to refer to the European Convention of Human Rights and its Additional Protocol No. 1.¹²⁹

The second feature that can be mentioned is the broad wording of specific standards of protection included in IIAs. As a consequence of this broad wording, investment tribunals are considered to have a wide margin of action to review state action, and although their jurisdiction is limited to the enforcement of the investment provisions in the BIT, the tribunals have the possibility to rule on various other grounds. For example, it is recognized that the investment standards of protection are broad enough to encompass State economic regulatory power, to the extent, of course, that it relates to investment and/or investment protection, and that tribunals may therefore review a measure taken in the application of other international rules, such as a WTO rule.

¹²⁵ The literature is vast in this domain. See e.g., S.A. Alexandrov 'The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*' (2004) 5 *JWIT* 555; J. Crawford 'Treaty and Contract in investment Arbitration' (2008) 24 *Arb. Int'l* 351, 366-70; T. Wälde 'The Umbrella Clause in Investment Arbitration – A Comment on Original Intentions and Recent Cases' (2005) 6 *JWIT* 183; OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, WORKING PAPER ON INTERNATIONAL INVESTMENT N° 2006/3 (Oct. 2006), available at <<http://www.oecd.org/investment/internationalinvestmentagreements/37579220.pdf>> (last consulted 1 Aug. 2015).

¹²⁶ A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), 477-78.

¹²⁷ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1 (Award, 7 Dec. 2011). For a detailed analysis of the case and of the tribunal's reasoning on the 'preservation of rights' clause, see P.F. Henin 'The Jurisdiction of Investment Treaty Tribunals over Investors' Human Rights Claims: The Case Against *Roussalis v. Romania*' (2013) 51 *Columbia J. Transn'l L.* 224.

¹²⁸ *Roussalis v. Romania* (*supra* n.127) ¶312. The preservation clause was contained in Article 10 of the Greece-Romania BIT and read as follows:

"If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall, to the extent that it is more favourable, prevail over this Agreement."

¹²⁹ *Ibid.* The Claimant had argued that the preservation of rights clause could be used to import standards included in the ECHR, would lead the tribunal to hold these standards to be more protective and thus to declare that Romania's actions were contrary to European Human Right law. The tribunal accepted *in abstracto* the argument. It however refused to proceed as such, as it considered that the BIT level of protection was "higher and more specific" than the "more general protections offered to them" by the ECHR Protocol 1. *Ibid.* ¶312. See also Henin (*supra* n.127), 244-47.

Another example is given by the recent discussion on the possibility to bring claims based on customary international law.¹³⁰

These hypotheses are not textbook cases. As we have seen in the previous chapter, investors have already attempted to use these instruments to request a tribunal to apply trade norms. In *Methanex*, the investor tried to argue that a breach of WTO law could lead to a breach of the FET standard contained in NAFTA Chapter 11 Article 1105.¹³¹ In the *Philip Morris* case, the investor formulated claims based on alleged violations of the TRIPS agreement, arguing they led to a violation of umbrella clauses.¹³² In the *Eli Lilly* case, the investor also alleged that the host-State breached TRIPS obligations, and that these breaches, along with other acts, were tantamount to expropriation.¹³³

In light of the previous developments on the establishment of jurisdiction in investment arbitration, tribunals should normally refuse to decline these types of trade-related claims on jurisdictional grounds. Indeed, none of the jurisdictional requirements permit tribunals to categorically set aside a claim on the sole basis that elements of its cause of action are to be found in another international agreement. It is largely conceivable that an investor, and a dispute, satisfy all the conditions discussed above (*rationae materiae, personae, temporis, loci* and *voluntatis*) and yet have a claim that is based on the violation of a trade agreement. In that case, and assuming that the arbitration clause does not provide otherwise, the tribunal should normally accept jurisdiction over the dispute and deal with the claim.

The *Eli Lilly* case is an interesting example. Recall that in this case, the claimant argued that the way Canadian courts had implemented judge-made doctrine relating to patent law, in order to invalidate two of its patents, should be considered as a breach of NAFTA Chapter 11 Articles 1105 (FET standard) and 1110 (prohibition of expropriation without compensation). Part of the claimant's argumentation related to international trade law. Indeed, according to the claimant, the doctrine the Canadian courts applied to its patent was inconsistent with Canada's obligations under NAFTA Chapter 17 on Intellectual Property and the TRIPS agreement.¹³⁴ Interestingly, while Canada first raised the argument in its first pleadings, based on the tribunal's lack of jurisdiction to rule on alleged violations of TRIPS, it then nuanced its position, accepting that this issue would be more relevant to the merits stage of the dispute, and not the jurisdiction phase.¹³⁵

¹³⁰ Audit & Forteau (*supra* n.56).

¹³¹ *See supra* Chapter 3, p.123.

¹³² *See supra* Chapter 3, p.125.

¹³³ *See supra* Chapter 3, p.128.

¹³⁴ As mentioned in Chapter 4, in its original round of pleadings, the investor did refer directly to TRIPS obligation. In its later submission, its reference to the TRIPS agreement were more indirect. The investor focused instead on NAFTA Chapter 17 and stressed that this NAFTA Chapter was consistent with the standards established at the multilateral level, notably in the TRIPS agreement. *See, Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2 (Claimant Memorial, 29 Sept. 2015) ¶¶204–206.

¹³⁵ *See, ibid.* ¶162 and references thereunder.

Ultimately, Canada did not raise a formal jurisdictional objection,¹³⁶ and the tribunal should therefore accept jurisdiction over the dispute.¹³⁷ The *Eli Lilly* case is still pending.¹³⁸ The outcome of that dispute, along with the possible clarification from the tribunal on the merits of the investor's argument on TRIPS obligations (whether the tribunal will actually deal with the TRIPS claim) will be particularly interesting and instructive.

Specifications in the Substantive Provisions of the IIA as a Potential Limit to Trade-related Claims

From what precedes, it can be concluded that general jurisdictional requirements are not the proper tool to set aside a claim on the sole basis that elements of its cause of action are to be found in another international agreement, for instance a trade agreement. Consequently, should a tribunal refuse to apply trade law, because it considers that this would exceed its mandate, it would have to use another basis than that of jurisdiction to do so.

For instance, one could argue that the specification in the substantive provisions of the IIA could be used to limit the reference to other international treaties. As mentioned in the previous chapter, the NAFTA FTC used this method for NAFTA Chapter 11 Article 1105, when it made clear that a determination, that there had been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of that agreement. The EU has followed this path as well. For instance, CETA Article X.9 "[f]or greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article."¹³⁹ Article 9.6.3 of the investment chapter in the Draft EU-Singapore FTA on expropriation is even more interesting. "This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, to the extent that such issuance is consistent with the [TRIPS Agreement]". This type of provision can clearly be seen as a reaction to disputes such as *Philip Morris v. Australia* or *Eli Lilly v. Canada*.

¹³⁶ *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Claimant's Memorial (29 Sept. 2014) ¶¶209-210.

¹³⁷ Unless, of course, the tribunal decides *proprio motu* (as it can always do) that it lacks jurisdiction. See *supra* p.160 and references thereunder.

¹³⁸ The case is not likely to end soon, as the parties still have to submit a round of pleadings. The investor's reply memorial is due to be filed in September 2015. Canada's Rejoinder should be submitted three months thereafter. The hearings are programmed for May 2016. The award should not be issued before the end of 2016-beginning 2017. See L. Johnson, 'In New Defence Pleading, Canada Couches Eli Lilly Case as an Unmeritorious Denial of Justice Claim, and Also Rejects Investor's Expropriation Claim' (08 Feb. 2015) *Investment Arbitration Reporter*, available at <<http://www.iareporter.com/articles/in-new-defence-pleading-canada-couches-eli-lilly-case-as-an-unmeritorious-denial-of-justice-claim-and-also-rejects-investors-expropriation-claim/>> (last consulted 1 Aug. 2015).

¹³⁹ The current draft of the CETA is available on the EU Commission webpage at <<http://ec.europa.eu/trade/policy/in-focus/ceta/>> (last consulted 1 Aug. 2015).

This type of specificity in a provision limits the possibility to refer to other agreements. This is not contested. Yet, they do not exclude these references. In any event, they cannot be seen as additional conditions to the jurisdiction of international tribunals. The NAFTA FTC did not rule that NAFTA Chapter 11 tribunals have no jurisdiction over claims including a reference to other international agreements. It only said that a reference to another agreement and the demonstration that the other agreement has been violated by the host-State, are not enough to establish a breach under NAFTA Chapter 11. Similarly, it is difficult to argue that future EU agreements will limit the jurisdiction of arbitral tribunals over these type of claims. They inform the tribunals about a way to proceed when they evaluate the merits of these claims.

Against this backdrop, it can be concluded that the fact that an investment claim is connected with a trade norm does not constitute, in itself, a default that bars an investment arbitral tribunal from exercising its jurisdiction.

D. THE CONCEPT OF ADMISSIBILITY AND ITS APPLICATION TO TRADE-RELATED CLAIMS

The last part of the present section relates to the notion of admissibility. As we will see, admissibility is a rather elusive concept in international dispute settlement. Understanding it, nonetheless, is important, as it can be used to better capture the opportunity and consequence of relying on trade law in a claim brought before an international arbitral tribunal. As Pauwelyn and Salles have explained in a 2009 article on forum shopping before international tribunals, the concept of admissibility might be seen as the 'key' to understanding questions relating to jurisdictional coordination.¹⁴⁰ This interesting argument, which was developed in the very specific context of interactions between the jurisdiction of the WTO and NAFTA adjudicators, is not uninteresting for the question the present chapter aims to tackle.

1. The Distinction between Jurisdiction and Admissibility in Investment Arbitration

The distinction between jurisdiction and admissibility has long been recognized in international legal scholarship.¹⁴¹ In his seminal study on the jurisprudence of the ICJ, Fitzmaurice explained that:

[A]n objection to the substantive admissibility of the claim is plea that the tribunal should rule the claim inadmissible on some ground other than its ultimate merit; an objection to the jurisdiction of the tribunal is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim.¹⁴²

¹⁴⁰ Pauwelyn & Salles (*supra* n.79) 78.

¹⁴¹ Cheng (*supra* n.60) 275-78.

¹⁴² Fitzmaurice (*supra* n.6) 438-39. *See also*, for a similar statement, J. Crawford, *Brownlie's Principles of Public International Law* (2012) 693.

In practice however, the distinction between jurisdiction and admissibility has not been easy to capture, both in general international dispute settlement and in investment arbitration in particular.¹⁴³ Contrary to the ICJ Rules of the Court,¹⁴⁴ the ICSID Convention and the other sets of procedural rules used in Investment Arbitration do not expressly refer to this distinction. Similarly, the great majority of IIAs do not provide for a distinction. Facing this silence, some tribunals in early cases nuanced the distinction and its practical implications.¹⁴⁵ Since then, many tribunals have used it, and while drawing a strict line between the two concepts is impossible,¹⁴⁶ it is today admitted, in investment arbitration case law, that a distinction may be made between issues of jurisdiction and admissibility.¹⁴⁷ Thus, it is possible for an investment tribunal with the jurisdiction to hear a case, to deny to rule on a claim because of its inadmissibility.¹⁴⁸

Whilst this distinction has been accepted, tribunals still struggle to identify the key element to decide the character of an objection. This is rather problematic, as the

¹⁴³ See e.g. I. Laird, 'A Difference without a Distinction? An Examination of the Concepts of Admissibility and Jurisdiction in *Salini v. Jordan* and *Methanex v. USA*' in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005) 201.

¹⁴⁴ Article 79.1 of the Rules of the Court reads as follows (*emphasis added*):

Any objection by the respondent to the *jurisdiction of the Court* or to the *admissibility of the application*, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial [...].

For examples of ICJ rulings on the admissibility of claims, see e.g. *Interhandel (Switzerland v. United States of America)*, Judgment on Preliminary Objections (21 Mar. 1959), ICJ Reports 1959, 6; *Nottebohm (Liechtenstein v. Guatemala)*, Judgment on Preliminary Objection (18 Nov. 1953), ICJ Reports 1953, 111, at 122-25 (nationality of the person whose claim is being espoused by the claimant) and *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment on Preliminary Objections (26 Jun. 1992), ICJ Reports 1992, 240, at 264-67 (whether the claim respect to the dispute submitted is a 'new' one).

¹⁴⁵ Paulsson talks about the 'twilight' zone when trying to pin-point the frontier between the two notions. See, J. Paulsson, 'Jurisdiction and Admissibility' in G. Aksen & al. (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (ICC Publishing, 2005) 601, 603 ("[I]t is vital to understand the fundamental distinction between the two concepts. They are indeed as different as night and day. It may be difficult to establish the dividing line between the two. There is a twilight zone. But only a fool would argue that the existence of a twilight zone is proof that night and day do not exist.") citing *Methanex v. US*, Partial Award (7 Aug. 2002) ¶139.

¹⁴⁶ *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Keith Highet (2 June 2000) ¶¶57-58.

¹⁴⁷ See e.g., *Generation Ukraine Inc. v. Ukraine* (*supra* n.74) ¶15.7; *Ioan Micula, Viorel Micula S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008)(hereinafter '*Micula v. Romania*') ¶63; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction (29 May 2009) ¶132.

¹⁴⁸ The main example is the *SGS v. Philippines* case, where the tribunal ruled that it had jurisdiction to decide upon a contractual claim under the so-called 'umbrella clause' of the bilateral investment treaty at issue. However, the SGS tribunal declined to exercise this jurisdiction after it found that the claim was not admissible, because of the existence in the contract of forum clause stating that contractual claims had to be brought to domestic courts. *SGS Société Générale de Surveillance S.A. v. Republic of Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 Jan. 2004) ¶¶113-29; 136-55. See also, Douglas (*supra* n.48) 306-12.

distinction carries important consequences, such as the greater procedural flexibility tribunals enjoy in respect of cases over which they have jurisdiction but in which they decide that one of the claim is inadmissible,¹⁴⁹ or the burden to raise an objection as a matter of jurisdiction or admissibility.¹⁵⁰ Indeed, it has been argued that whilst the tribunal must, if necessary, examine issues of jurisdiction of its own volition, questions of admissibility may only be examined if they are raised by the parties.¹⁵¹

Relying on the Fitzmaurice's writings, the *Hochtief* tribunal affirmed that "jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal."¹⁵² Recently, the tribunal in *Achmea B.V. v. Slovak Republic* attempted to summarize the case law and established that:

"Jurisdiction of a tribunal goes to the power to decide a specific dispute, whereas admissibility relates to the ability to exercise that power and speaks to the characteristics of a particular claim and whether it is fit to be heard by a tribunal."¹⁵³

In other words, jurisdiction depends on whether requirements included in the treaty for establishing the existence of adjudicative power are satisfied, whereas admissibility depends on the nature of the claim and whether impediments to a properly constituted tribunal, hearing the claim, exist or not.

One might argue, that, at the end of the day, the question of whether a particular legal issue falls in one and not the other category, is contingent on the meaning of the relevant provisions of the BIT.¹⁵⁴ Looking at the case law, authors have yet attempted to objectively delimitate these categories and identify matters that relate to one of the other.¹⁵⁵ For instance, according to Waibel, objections based on procedural prerequisites, on the failure to exhaust local remedies or more generally on the grounds that the same (or similar) claim is allocated to, or pending in, another forum relate to admissibility.¹⁵⁶

In theory, when it is established that a claim is inadmissible (for instance, because a procedural deadline for the presentation of the claim has not be respected) the tribunal should decline to rule on the claim. This is for instance what the tribunal did in *SGS v. Philippines*. The claim was related to the execution of a contract between the investor and an administrative agency of the government of the Philippines. That contract included a

¹⁴⁹ Waibel (*supra* n.23) 1218-20.

¹⁵⁰ *Ibid.*

¹⁵¹ *Achmea B.V. v. Slovak Republic [II]* (*supra* n.52) ¶ 120, citing *Micula v. Romania*, Decision on Jurisdiction & Admissibility, 24 Sept. 2008, ¶ 65.

¹⁵² *Hochtief A.G. v. Argentina*, Decision on Jurisdiction (24 Oct. 2011) ¶ 90.

¹⁵³ *Achmea B.V. v. Slovak Republic [II]* (*supra* n.52) ¶ 114-15.

¹⁵⁴ *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (19 Dec. 2012) ¶ 112.

¹⁵⁵ Waibel (*supra* n.23) 1219.

¹⁵⁶ *Ibid.*

dispute resolution clause, stating that any dispute related to the contract should be brought before domestic courts. The tribunal affirmed that although it had jurisdiction to deal with a contractual claim pursuant to the umbrella clause inserted in the treaty, the claim was inadmissible and that it could not exercise its jurisdiction until the domestic court had reached a decision on the performance of the contract.¹⁵⁷

Finally, one should always recall that investment arbitration usually features several claims. Investors rarely limit themselves to allegations based on one single treaty protection. For instance, it is very often the case that an investor will argue that a given measure is expropriatory and should result in compensation, and that in addition the State has breached the FET standard. Therefore, it is possible that one specific claim is declared inadmissible while the others are not.

2. (Non-)Admissibility of Claims Based on Trade Law Norms?

Can the argument be made that, in the absence of a detailed provision in the IIA delimitating the tribunal's scope of jurisdiction making it certain that the tribunal is incompetent to rule on a trade law-related claim, such claim should be analyzed through the prism of admissibility? In other words, can the connection between an investment dispute with trade law be used to formulate an objection to the admissibility of an investor's claim, rather than an objection to the jurisdiction?

Answering this question in the affirmative would result in two potential benefits. Firstly, determining that the inclusion of trade law within an investment claim pertains to the admissibility of that claim, rather than the jurisdiction of the tribunal, gives this arbitral tribunal more flexibility to examine and decide whether it may proceed with the claim. If the tribunal declines jurisdiction over a trade law related claim, it means that it rejects *en bloc* to deal with anything relating to this claim. The tribunal prevents itself from further enquiring about the details of the claim and the form it could take on the merits. Accepting jurisdiction over the claim and then deciding about its admissibility allows the tribunal to look into the attributes and details of the claim. The tribunal finds itself in a better position to determine whether the claim is only indirectly related to trade, and therefore no final determination of that law is required to rule on the investment breach (which is not problematic), or, instead, whether the claim is mainly about incorporating and applying non-investment norms directly into the investment dispute (which is problematic).

Second, and more theoretically, as Pauwelyn and Salles explain, conceptualizing an objection based on the connection of the claim to trade law as relating to admissibility rather than to jurisdiction "shifts the discussion away from a 'clash of legal regimes' or 'conflicts of law/conflicts of jurisdiction' perspective."¹⁵⁸ As we will see in greater detail

¹⁵⁷ *SGS v. Philippines* (*supra* n.148) ¶¶ 113–29 ; 136–55.

¹⁵⁸ Pauwelyn & Salles (*supra* n.79) 97, citing A. Fischer-Lescano & G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan J. Int'l L.* 999 and M.

in the next section of the present Chapter, conflicts of jurisdiction in international dispute settlement, and more particularly between trade and investment forum, have negative consequences and are difficult to tackle, due to the lack of efficient regulating techniques. When looking at the issue from the admissibility angle, the investment tribunal avoids the debate and the complicated tasks of determining whether another forum is, indeed, competent and, in the event of this being answered in the affirmative, on which grounds it shall decline jurisdiction to let the other forum deal with the case.

These advantages, however, come with limits. The first one relates to actual practice. To my knowledge, no tribunal has used the notion of admissibility to deal with a claim connected to non-investment law, let alone trade law. While several investment tribunals did rely on the notion of admissibility to stop the proceedings without finding on the merits, they did so on much more specific, often procedural, grounds (*i.e.* the claim is temporally defective, a formal condition for the formulation of the claim has not been respected, etc.).¹⁵⁹

The second limit is based on the rationale that should be advanced to use the notion of admissibility. As already mentioned, admissibility relates to the intrinsic quality of the claim. The problem in our hypothesis – the investment claim is based on an alleged violation of trade law – does not relate to the quality or nature of the claim, but to the fact that the cause of action identified in the claim is extrinsic to the investment agreement. The problem, here, is the law that is referred to in the claim rather than the claim itself. Admissibility may not be the most appropriate tool to address this question.

Of course, one could argue that the rationale for declaring a trade-related claim inadmissible is the existence of a 'legal impediment' (for instance, an exclusive jurisdiction clause in the trade agreement referred to, upon which only the trade adjudicator is competent to deal with disputes about that agreement) for the investor-State tribunal to rule on the merits of that claim.¹⁶⁰ As we have seen earlier, this is what the tribunal in *SGS v. Philippines* did when it declared an investment claim relating to contractual rights inadmissible, because of the existence of a forum selection clause in the contract.¹⁶¹ However, the issue in this case remains largely different from the one in our hypothesis. In *SGS*, the tribunal considered that the contractual rights targeted in the claim were to be considered as an investment, and that, pursuant to the umbrella clause,

Koskenniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden J. Int'l L.* 553.

¹⁵⁹ Waibel (*supra* n.23) 1278-79.

¹⁶⁰ Pauwelyn and Salles support this argument. They look at the possibility for a party to refer to non-WTO law in a WTO dispute, and the consequence of such reference on the jurisdiction of the WTO judge, and explain that said party can only be precluded from resorting to WTO dispute settlement "on the grounds that the claims is inadmissible" and not on the basis of a potential conflict with the jurisdiction of WTO judge. *See*, Pauwelyn & Salles (*supra* n.79) 98. For further discussion on the use and effect of a exclusive jurisdiction clause contained in provision extrinsic to the IIA, *see infra* pp.212 *et seq.*

¹⁶¹ *See supra* p.181.

it could decide breaches of these contractual rights. In our hypothesis, the investor does not argue that trade law created individual rights that can be qualified as an investment. Rather, in our hypothesis the investor argues that the State breached a trade agreement and that the consequence of that breach is a breach of a given obligation to be found in the investment agreement. The same reasoning as the one adopted in *SGS v. Philippines* seems therefore difficult to transpose in this situation.

In conclusion, even if one can argue that using admissibility to deal with a trade-related claim presents some interests, it seems difficult to affirm, in a purely normative manner, that investor-State tribunals should always rely on this concept when required to rule on this type of claim.

IV. REGULATING JURISDICTIONAL INTERACTIONS AND PARALLEL PROCEEDINGS WITH THE TRADE LEGAL REGIME

In the previous section, we have questioned whether the jurisdiction of investment tribunals can be challenged on the sole basis that the dispute is connected to trade law or that the investment claim is based on a potential breach of trade law. The present section envisages the more complex situations of Scenario No.4 and more precisely the sub-category labeled in the previous chapter as Scenario No.4.A,¹⁶² that is when the jurisdiction of an investment tribunal is challenged on the basis of the exclusive jurisdiction of the trade adjudicator to hear the dispute, or on the basis of parallel proceedings.

A. JURISDICTIONAL INTERACTIONS AND PARALLEL PROCEEDINGS IN INTERNATIONAL INVESTMENT LAW

The notion 'jurisdictional interaction' is used here as a generic expression that includes the narrower concepts of jurisdictional overlap and conflict of jurisdiction. It refers broadly to situations where two or more cases brought before international adjudicators involve a certain similarity, and because of that similarity the jurisdiction of one adjudicator can be challenged on the basis of the jurisdiction of the other. After briefly examining the general dynamics of jurisdictional interactions and parallel proceedings in investment arbitration (1), and the problems associated with these two phenomena (2), I will focus on the specificities of interactions between investment and trade (3).

1. Different Types of Multiple Proceedings and Jurisdictional Interactions

Investment arbitration has been described as prone to parallel proceedings and jurisdictional interactions.¹⁶³ The reasons for this 'vulnerability' are to be found in the

¹⁶² See Chapter 3, pp.133-136

¹⁶³ McLachlan, Shore and Weniger refer to the 'particular potential' of investment arbitration. See C. McLachlan, L. Shore & M. Weiniger (eds.), *International Investment Arbitration: Substantive Principles* (2007)

decentralized nature of the system, as well as the non-exclusivity of the investment tribunals' jurisdiction and the variety of legal sources applicable to an investment disputes.¹⁶⁴ All these aspects have already been discussed elsewhere in this work and do not need to be analyzed again. More important is the distinction that needs to be made between the different types of jurisdictional interactions that can occur between investment tribunals and other courts.¹⁶⁵ The first two types, vertical interactions and horizontal interactions, have been discussed at length, both in practice¹⁶⁶ and in scholarship.¹⁶⁷ They present real problems, yet they are only of limited interest for this work. I will mention them briefly for the sole purpose of highlighting the specificities of the third category, the transversal interactions, to which investment-trade interactions belong.

Vertical Interactions

'Vertical interactions' are the interactions that arise between an international tribunal, which claims jurisdiction over the dispute on the basis of an investment treaty, and a domestic court, which claims jurisdiction either on the basis of the normal procedure in force within the host-state in regard to foreign investments or, more likely, on the basis of a contract existing between the investor and the host-State or one of its subdivisions (a governmental authority, a regional or local entity, etc.). We have, on the one hand, an

¹²⁵ For other studies relating to parallel proceedings in investment arbitration, see e.g., W. Ben Hamida 'L'arbitrage Etat-investisseur face à un désordre procédural : la concurrence des procédures et les conflits de juridictions' (2005) 51 *AFDI* 564; G. Cuniberti 'Parallel Litigation and Foreign Investment Dispute Settlement' (2006) 21 *ICSID Rev.* 381; C. McLachlan, *Lis pendens in International Litigation* (2009) 253.

¹⁶⁴ McLachlan *et al.* (eds.) (*supra* n.163) 127. See also, R.H. Hansen 'Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties' (2010) 73 *The Modern L. Rev.* 523, 532-37; H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (2013) 17-43.

¹⁶⁵ Authors have used different ways to classify 'conflicts' or 'parallel proceedings'. Douglas for instance, refers to 'symmetrical' and 'asymmetrical' conflicts. See Z. Douglas 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *Brit. YB Int'l L.* 151, 237-38. Douglas explains that "'Symmetrical' conflicts of jurisdiction arise when a treaty tribunal is seized of a claim based upon a private law obligation and a different judicial forum has jurisdiction over the same claim" while "'Asymmetrical' conflicts of jurisdiction arise when a municipal court or arbitral tribunal has pronounced upon or is seized of a dispute relating to the existence, nature, or scope of the investor's interests in its investment and such interests are contested in an investment dispute before a treaty tribunal." *Ibid.* 283-84. Hansen, in a more recent article, instead differentiated "claims launched by (1) the same parties under the same treaty, (2) different parties under the same treaty, (3) the same parties under different treaties, or (4) different parties under different treaties." Hansen (*supra* n.164) 537.

¹⁶⁶ See e.g. the considerations of the tribunal in the recent case *British Caribbean Bank Ltd. v. Belize*, PCA Case No. 2010-18/BCB-BZ (Award, 19 Dec. 2014) ¶¶ 187-188.

¹⁶⁷ See, generally, Wehland (*supra* n.164). See also, M. Friedman, 'Treaties as Agreements to Arbitrate - Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration' in A.J. Van Den Berg (ed.), *International Arbitration 2006: Back to Basics?* (2007) 545 ; R.H. Kreindler, 'Parallel Proceedings: A Practitioner's Perspective' in M. Waibel *et al.* (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010) 127 ; A. Reinisch, 'The Issues Raised by Parallel Proceedings and Possible Solutions' in M. Waibel *et al.* (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010) 113 ; K. Yannaca-Small, 'Parallel Proceedings' in P. Muchlinski, F. Ortino & C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) 1008.

international tribunal created by virtue of an international agreement concluded by two sovereign States, and on the other, a domestic court of one of the two states, to which the dispute can be referred following two procedural paths. We can call the first of these two procedural paths 'legislative'. There the dispute has been initiated pursuant to the domestic law relating to investments, or on the basis of broader domestic legal provisions such those relating to the deprivation of property, establishment, and transfer of capital. The second procedural path is contractual. When investing in a foreign state, private persons often need to enter into contractual relationships with States or government authorities. These contracts, which might be, for instance, a concession or construction contract, usually include a dispute-resolution clause designating domestic jurisdictions.¹⁶⁸ In both situations, parties may be tempted to initiate domestic proceedings in addition to international ones. Even if domestic and/or contractual rights are different from those under BITs, and therefore the cause of action of a contractual claim is necessarily different from that of a treaty claim, it can be argued that both claims can lead to decisions that might be contradictory; thus they can be considered as interacting.¹⁶⁹ Neither situation is a textbook case.¹⁷⁰ Several cases have shown that procedures can be initiated simultaneously, before international tribunals and domestic courts, following one of the two-pronged schemes mentioned.¹⁷¹

Horizontal Interactions

'Horizontal interactions' occur when proceedings are subsequently brought before two investor-State arbitral tribunals. Like vertical interactions, horizontal interactions create a risk for inconsistent solutions, and, like vertical interactions, they can take different forms. First, there is horizontal interaction when the same or similar parties bring two or more claims under the same IIA. This can happen for instance when an investor initiates actions before two or more international tribunals.¹⁷² Second, and more likely,

¹⁶⁸ Such arbitration clauses inserted in States-contract, can also designate an international arbitral tribunal. This situation, that cannot be referred to as vertical interaction, will be studied in the next development. In theory, contracts concluded between the investor and the host-State could also designate domestic court of another State, the State of the investor for instance, or even a third State. This is however unlikely to happen.

¹⁶⁹ Cuniberti (*supra* n.163), 419-20.

¹⁷⁰ For an overview of the relations between domestic courts and international arbitral tribunals in investment disputes, see C. Schreuer, 'Interaction of International Tribunals and Domestic Courts in Investment Law' in A.W. Rovine (ed.), *Contemporary issues in international arbitration and mediation: The Fordham Papers* (2010) 71.

¹⁷¹ *Ibid.*

¹⁷² *Waste Management, Inc. v. Mexico*, ICSID Cases No. ARB(AF)/98/2 and No.ARB(AF)/00/3. In these cases, an investor tried to bring an action against Mexico under NAFTA Chapter 11. In 2000, a first ICSID tribunal refused to hear the case, because the investor did not waive its right to start an action before domestic courts, which is a necessary condition to start a dispute under NAFTA article 1121. In 2002, the investor went back to the arbitral tribunal and faced another negative decision regarding the jurisdiction of the tribunal. The tribunal affirmed that the principle of *Res Judicata* applied and that the first decision could not be overturned. Finally, in 2004, after the Mexican domestic courts dismissed all the actions brought by the investor, Waste Management initiated a third action, still under the NAFTA but

there is a risk of horizontal interaction when two claims are initiated before international bodies on the basis of different legal instrument. These instrument could be, for instance, an international treaty – *e.g.* an IIA – and a domestic law or a contract with the host-State.¹⁷³ This situation happened in one of the first case decided by the ICSID.¹⁷⁴ In *SPP v. Republic of Egypt* the investor brought a claim before the ICC on the basis of a contract concluded with the Egyptian governmental authorities and later started an action before the ICSID.¹⁷⁵

The norms could also be two international legal instruments – for instance, two IIAs. The same State measures can indeed be considered harmful by different investors or different entities participating in same investment, and this could lead to distinct but competing claims.¹⁷⁶ The famous *CME* and *Lauder* cases illustrate this possibility.¹⁷⁷ In these cases, the Czech Republic faced two different claims concerning governmental measures with regard to a local company that owned a TV license. The two claims were brought almost simultaneously: one by the final investor, Mr Lauder, under the US-Czech Republic BIT, and the other by the Dutch company that Lauder controlled, and which was actually operating in the host State under the Netherlands-Czech Republic BIT. Both claims were held admissible under the respective treaties and resulted in two conflicting awards.¹⁷⁸ Each claim was in relation to the same State measure and whilst one arbitration awarded damages to the investor, the other did not.¹⁷⁹

on the basis of another disposition, before the ICSID. In this third action, the tribunal decided that it had jurisdiction, but dismissed the claimant's action on the merits. *See* J. Fouret & D. Khayat, *Recueil des commentaires des décisions du CIRDI [2002-2007]* (2009) 28-34; 205-15.

¹⁷³ The difference here with vertical interaction, is that the tribunal would be 'international', and therefore the solutions relating to the interactions between international and domestic could not be applied.

¹⁷⁴ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (14 Apr. 1988).

¹⁷⁵ In this case, the ICSID arbitral tribunal did not exercise jurisdiction until an ICC award, previously rendered and concerning the same dispute, had been annulled. It formally stayed its own proceedings awaiting the eventual annulment of the ICC award by a French court. *See* E. Gaillard, *Chroniques des Sentences Arbitrales*, (1994) 121-1 *JDI* 217-229, 226-229.

¹⁷⁶ At least 3 different claims have been launched under investment agreements in the *Yukos* dispute. Investors have made claims under the UK-Russia BIT, Spain-Russia BIT and Energy Charter Treaty. *See*, Investment Arbitration Reporter of 22 January 2009 available upon subscription at: <<http://www.iareporter.com/Archive/IAR-01-22-09.pdf/>>. Treaty claims were also against Turkey in relation to business assets of the former Uzan business empire. *See* Investment Arbitration Reporter of 10 February 2009 available upon subscription at: <http://www.iareporter.com/Archive/IAR-02-10-09.pdf> and *Libanco Holdings Co. Limited v. Republic of Turkey*, ICSID No.ARB/06/8, Decision on Preliminary Issues (23 June 2008).

¹⁷⁷ For a detailed description of the case, *see* C.N. Brower & J.K. Sharpe 'Multiple and Conflicting International Arbitral Awards' (2003) 4 *JWIT* 211.

¹⁷⁸ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (3 Sept. 2001) and *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001).

¹⁷⁹ Brower & Sharpe (*supra* n.177) 216.

Transversal Interactions

Finally, 'transversal interactions' are interactions that occur between one investment tribunal and another international dispute resolution body that is not, strictly speaking, an investment tribunal. In other words, the interactions that arise between two international adjudicators that are not acting on the same plane, either because they are acting in a different mechanism of dispute settlement or because they have been created on the basis of international agreements that do not belong to the same branch of international law. These transversal interactions have been studied less than the two other types,¹⁸⁰ and this is unfortunate, as they raise particularly interesting questions and are equally problematic. Like the previous two types, different manifestation can be identified.

The first manifestation of transversal interaction occurs when one claim is launched by an investor against the host-State, while, at the same time, a dispute arises between the same host-State and the investor's home-State.¹⁸¹ IIAs are inter-State treaties. They necessarily include clauses regarding disputes that could take place between contracting-parties, *viz.* inter-State dispute settlement. This is generally the case for BITs and multilateral agreements.¹⁸² The NAFTA, for instance, created the Free Trade Commission, a consultation mechanism for contracting parties. According to NAFTA Chapter 20, the Commission can, among other things, supervise the implementation of the NAFTA Treaty and resolve disputes regarding its interpretation or application (Article 2001).¹⁸³ If the Commission cannot solve the dispute, the contracting states are able to request for the establishment of an arbitral panel (Article 2008). This panel will

¹⁸⁰ Wehland, who recently published a recent study on the issue of multiple proceedings in international investment arbitration, refused, from the outset, to address the relationship between investment treaty arbitrations and state-to-state dispute settlement proceedings, although admitting that "[c]learly, foreign investment issues can give rise to inter-state disputes before a number of forums, including arbitral tribunals, international courts and special dispute settlement mechanisms" and that "[s]uch inter-State disputes can in principle relate to facts and legal provisions that are also the subject of related treaty disputes and might thus in theory lead to conflicting decisions." Wehland (*supra* n.164) 14 (references omitted). Waibel who wrote a piece of the coordination of adjudication process in investment arbitration did not discuss the issue either. M. Waibel, 'Coordinating Adjudication Processes' in Z. Douglas, J. Pauwelyn & J.E. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 499.

¹⁸¹ For of recent study on this issue, see C.J. Trevino 'State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration Under the Same Treaty' (2014) 5 *J. Int'l Dispute Settlement* 199.

¹⁸² The ECT includes in its article 27 a clause for the settlement of disputes between contracting parties by diplomatic means and, failing this, by *ad hoc* arbitration. Article 27 paragraphs 1 and 2 read:

"(1) Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.

(2) If a dispute has not been settled in accordance with paragraph (1) within a reasonable period of time, either party thereto may, except as otherwise provided in this Treaty or agreed in writing by the Contracting Parties, and except as concerns the application or interpretation of Article 6 or Article 19 or, for Contracting Parties listed in Annex IA, the last sentence of Article 10(1), upon written notice to the other party to the dispute submit the matter to an *ad hoc* tribunal under this Article."

¹⁸³ Under articles 1131 and 1132 of the Chapter 11 on investments, the Commission is vested with the capacity to issue interpretations of NAFTA provisions that are binding on arbitral tribunals.

be competent to present a report with a suggested outcome that the commission will eventually implement. Such 'two-tier' mechanisms, one phase reserved for consultation/negotiation or even mediation, and another for arbitration, is the one usually settled for by BITs.¹⁸⁴ In the event that states are unable to settle a dispute through negotiations or alternative dispute-resolution mechanisms, nearly all the investment treaties give them the right to invoke arbitration to settle their conflict. These clauses follow the same, or at least a very similar, *ad hoc* interstate arbitration model which consists of, a three-arbitrator tribunal, each state appointing one arbitrator who then agree on the third; and if such an agreement cannot be reached, the said model refers to an appointing authority, such as the President of the ICJ or some other distinguished international figure,¹⁸⁵ the ECT nominating for instance the Secretary General of the Permanent Court of Arbitration.¹⁸⁶

Inter-State dispute-resolution mechanisms in IIAs have not been very popular. However, they are extremely important for the focus of this study. States might try to use such a mechanism to either delay or even block the proceedings relating to a claim raised by an investor. In 2003, Peru, in response to an ICSID claim brought against it by Chilean investors, instituted an interstate arbitration against Chile and requested the arbitral tribunal to suspend its proceedings until the interstate arbitration was resolved. This attempt was unsuccessful, with the ICSID arbitral tribunal declining the request, leading Peru to eventually withdraw its case against Chile.¹⁸⁷ Nonetheless, it should be noted that nothing need have prevented Peru from continuing its case before the *ad hoc* tribunal against Chile, and nothing need have prevented the interstate tribunal from issuing an award that did not conflict with that of the ICSID tribunal. This situation, which is contemplated in the ICSID procedural rules, as well as any other arbitral forum rules, is problematic and reflects one of the 'weaknesses' of the investment law dispute-resolution system towards transversal jurisdictional interactions.¹⁸⁸

The second type of transversal interactions concerns interactions between investment tribunals and other international adjudicative bodies belonging to another sub-system of international law. This type of interaction is based on the assumption that international investment law does not stand in isolation from other international legal regimes. Jurisdictional interactions between investment tribunals and other international courts can therefore occur. This last category of interaction is, of course, the one that interest us

¹⁸⁴ P. Peters 'Dispute Settlement Arrangements in Investment Treaties' (1991) 22 *Netherlands YB Int'l L.* 911, 25-29.

¹⁸⁵ See Douglas (*supra* n.48) 158.

¹⁸⁶ ECT Article 27(3)(d).

¹⁸⁷ *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v The Republic of Peru* (also known as *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v The Republic of Peru*), ICSID Case No.ARB/03/4, Award (7 Feb. 2005) ¶¶ 7-9.

¹⁸⁸ Yannaca-Small (*supra* n.167), 1012-13.

the most, as it includes, *inter alia* the potential interactions between trade and investment adjudicators. Before turning to this particular instance of interactions between state-to-state proceedings and investor-State proceedings, two other examples can be briefly discussed in order to illustrate and help us understand more fully the nature of the problem.

The first one relates to the relation between investment law dispute settlement and human rights dispute settlement. Today, it seems well established that analogies can be drafted between investment and human rights law, and their mechanisms of enforcement.¹⁸⁹ The most important of these analogies relates to the capacity given to a private person to start a legal action against a State before an international adjudicator and thus without the express consent of the State to this particular dispute. In both international investment law and human rights law, consent is given, *en amont*, in an international treaty, whether that be a BIT or a human rights convention. Thus, for instance, under the ECHR, and its Protocol 11, individuals are given the right to apply directly to the ECtHR. Further, parallels can be established between substantial provisions of investment and human rights laws. Both of these two disciplines aim to protect property rights, prohibit discrimination and condition expropriation. For these reasons, it is not surprising that investors try to use both mechanisms in order to protect their interests. Several cases have illustrated this possibility. For instance, in the *Yukos* and *Amtco/Eyum-10* disputes, investors have brought claims before the ECtHR in parallel with arbitral proceedings.¹⁹⁰ In both cases, the respondent States tried, in turn, to challenge the jurisdiction of the arbitral tribunals, arguing that because the disputes were litigated before another court they could not be heard again. In both cases, the arbitral tribunals rejected these arguments.¹⁹¹ Interestingly, the issue of conflicting and parallel proceedings has reappeared at the enforcement stage.¹⁹²

The second example relates to the relation between International Investment Law and European law. Concerns exist about the interaction between EU law and investment agreements,¹⁹³ and, by extension, about 'conflicts' that could occur between international

¹⁸⁹ See e.g. G. Burdeau 'Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant les États' (1995) *Rev. Arb.* 3 ; C. Tomuschat, 'The European Court of Human Rights and Investment Protection' in C. Binder et al. (eds.), *International Investment Law for the 21st Century: Essays in Honor of C. Schreuer* (2009) 636 and more generally, the complete study led by Dupuy, Francioni and Petersmann, P.-M. Dupuy, F. Francioni & E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (2009).

¹⁹⁰ Ben Hamida (*supra* n.163), 583-85.

¹⁹¹ *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA227, Interim Award (3 Nov. 2009) ¶¶598-600; *Limited Liability Company Amtco v. Ukraine*, SCC Case, No. 080/2005, Final Award (26 Mar. 2008)(hereinafter '*Amtco v. Ukraine*') ¶71-2.

¹⁹² J. Hepburn 'In-depth: Reviewing Russia's Arguments for Setting Aside \$50 Billion Yukos Awards' (Mar. 2015) *Investment Arbitration Reporter*, available at <<http://www.iareporter.com/articles/in-depth-reviewing-russias-arguments-for-setting-aside-50-billion-yukos-awards/>> (last consulted 1 Aug. 2015).

¹⁹³ See generally, M. Bungenberg, A. Reinisch & C. Tietje, *EU and Investment Agreements: Open Questions and Remaining Challenges* (2013). See also, C. Crépet Daigremont, 'Les interactions normatives dans le domaine

investment tribunals and the European Court of Justice.¹⁹⁴ In *Eastern Sugar v. Czech Republic*, the respondent State did raise an objection to the jurisdiction of the tribunal, arguing that the dispute should be brought before the European Court of Justice.¹⁹⁵

The argument of the Czech Republic was essentially based on the possible interactions between its EU law obligations and those existing under the bilateral agreement concluded with the Czech Republic. This argument has been used again in *Electrabel v. Hungary*,¹⁹⁶ but this time by the EU Commission, acting as *amicus curiae* in the case. Like the Czech Republic did in *Eastern Sugar*, the Commission challenged the jurisdiction of the tribunal on the basis of the potential conflicts between EU and Investment law, and the exclusive jurisdiction of the CJEU to deal with questions relating to EU law.¹⁹⁷ The two above-mentioned cases, among many other disputes,¹⁹⁸ have highlighted the potential jurisdictional interaction that can occur between IIA tribunals and the European Court. Like the other types of transversal jurisdictional interactions, they relate to the broader questions of competition between international courts and tribunals, a question that has been widely discussed in the past years, but that has not been properly addressed. As we will see in the next section, the same can be said for the interaction between investment tribunals and the WTO DSB.

2. General Concerns Relating to Parallel Proceedings and Jurisdictional Interactions

Parallel proceedings and jurisdictional interactions can lead to various problems.¹⁹⁹ In the context of forum shopping, in general international dispute settlement, Pauwelyn

des investissements: La remise en cause du droit international par le droit de l'Union européenne ' in L. Bugorgue-Larsen *et al.* (eds.), *Les interactions normatives: Droit de l'Union européenne et droit international* (2012) 167 ; S. Hindelang 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39 *Legal Issues of Eco. Integration* 179. *See also*, B. Poulain & M. Raux 'Actualité du droit européen des investissements internationaux' (2011) 115 *RGDIP* 113.

¹⁹⁴ *See* M. Burgstaller, 'European Law Challenges to Investment Arbitration' in M. Waibel *et al.* (eds.), *The Backlash against Investment Arbitration: Perception and Reality* (2010) 455.

¹⁹⁵ *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004, Partial Award (27 Mar. 2007) ¶25.

¹⁹⁶ *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable and Liability (30 Nov. 2012).

¹⁹⁷ *Ibid.* ¶¶4.89-4.110.

¹⁹⁸ For a recent overview of all the disputes on this issue, *see* S. Hobe & M. Bungenberg, 'The Relationship of International Investment Law and European Union Law' in M. Bungenberg *et al.* (eds.), *International Investment Law - A Handbook* (2015) 1602.

¹⁹⁹ Some authors have argued that jurisdictional competition and forum shopping in international law are less problematic than one might think. Their main argument is based on the potential outcomes of the competition in which international courts and tribunal may stand. *See*, J.K. Cogan 'Competition and Control in International Adjudication' (2007) 48 *Virginia J. Int'l L.* 411, 440-49 and R.M. Cover 'The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation' (1980) 22 *William & Mary L. Rev.* 639, 644-46. This claim has merit. As Pauwelyn and Salles note, it might well be the case that a healthy level of competition among international tribunals improves the quality of rulings and the expediency of the proceedings. *See*, Pauwelyn & Salles (*supra* n.79) 84-85. However, it seems largely accepted at the same time that, absent any form of regulation, overlapping jurisdiction do raise serious concerns, both for the

and Salles identify two main categories of negative issues: The first relates to the parties to the dispute, and contains five specific problems: (i) the cost of multiple proceedings, (ii) the finality of rulings/avoidance of oppressive litigation tactics, (iii) inconsistent rulings, (iv) avoidance of double jeopardy or double compensation and (v) party equality. In the second category, which relates to the system, they include (vi) waste of resources for the system's society as a whole, (vii) stability and security of the system and (viii) inconsistent rulings.²⁰⁰ Certainly, one could argue that all of these concerns belong to the same, unique broad category of transaction costs. Further, it is important to recall that forum shopping also exists in the domestic context. The phenomenon, as well as all the mentioned problems that may go with it, have been studied by a wide numbers of eminent jurists long before Pauwelyn and Salles.²⁰¹ Nevertheless, the classification they offer remains interesting. As we will see, not all the sub-categories they identified exist or have the same intensity in the case of competing proceedings in investment arbitration. The following ones seem particularly pressing.

Risk of Double Recovery

In his study devoted to multiple proceedings in investment arbitration, Wehland notes the first concern, when stating that "where investors manage to secure decisions granting them the same type of relief in several proceedings there is always a danger of double recovery."²⁰² He further explains that "[t]his risk is particularly acute where separate proceedings with regard to the same investment are initiated by formally separate entities situated at different levels of an investment structure."²⁰³

Conflicting Outcomes

Parallel proceedings and jurisdictional interactions might lead to inconsistent or even conflicting outcomes.²⁰⁴ Inconsistent outcomes include but are not limited to the solutions given to the dispute. As Reinisch notes, inconsistencies can take the form of conflicting assessments of the same facts. Two courts or tribunals can, for instance,

parties to the proceedings as well as for the international legal system as a whole. *See*, Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) 78-81.

²⁰⁰ Pauwelyn & Salles (*supra* n.79) 84-85.

²⁰¹ For a review of the traditional scholarship on the issue, *see e.g.* F. Juenger 'Forum Shopping, Domestic and International' (1989) 63 *Tulane L. Rev.* 553.

²⁰² Wehland (*supra* n.164) 8.

²⁰³ *Ibid.*

²⁰⁴ *See*, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 1985) ¶270. In that case, the tribunal denied a request from the respondent to stay the proceedings until the finalization of the parallel procedure before another arbitral tribunal about the contract between the investor and the host-State from which the investment originated. The tribunal affirmed that "[e]xactly like the arbitral tribunal sitting in Pakistan, this Tribunal should proceed with the merits of the case. This is an inevitable consequence of the principle of the distinct nature of treaty and contract claims. The Tribunal is aware that this system implies an intrinsic risk of contradictory decisions or double recovery." *See also*, Wehland (*supra* n.164) 11 ; Cuniberti (*supra* n.163) 395 ; Shany (*supra* n.199) 80 ; V. Lowe 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian YB of Int'l L.* 191, 195.

interpret the evidence differently. They may be provided with different evidence, and thus reach different conclusions on the facts. As mentioned in the previous chapter, in four cases relating to the Argentinian crisis, tribunals have reached different conclusions as to whether a state of necessity prevailed during the crisis.²⁰⁵

Inconsistent outcomes can also take the form of divergent reasoning. Different adjudicators may assess the facts in the same way, but apply different rules to determine whether the facts can be characterized as a wrong and thus allow the granting of the requested remedy. The divergence in the interpretation and application of MFN standards can be cited as an example: Several tribunals have been divided as to the correct interpretation of MFN clauses included in IIAs. In 2000, an ICSID tribunal held that a BIT's MFN clause was not limited to substantive standards of treatment, but extended to procedural issues and thus allowed an investor to rely on the more favorable waiting periods before instituting arbitration that were contained in another BIT of the host state.²⁰⁶ This particular reasoning has been used by some tribunals,²⁰⁷ and, at the same time, rejected by others.²⁰⁸ These divergences are not very problematic when the disputes are totally disconnected.²⁰⁹ However, they do contribute to question the legitimacy of the investment litigation system when the divergences occur in an identical, if not the same, dispute.

Finally, inconsistent outcomes can clearly occur if the solutions reached by two tribunals concerned with the same dispute are incompatible. This can happen, for example, when two solutions are simply conflicting, as when one adjudicator rules that the host-State shall compensate while the other rules it shall not. This can also be the case, however, when the remedies granted are conflicting, for example, if one tribunal orders that a host-State must pay 100 for damages while the other says it must pay only 50. These types of incompatible decisions are harmful because they damage the credibility, and thus the legitimacy, of the whole investment litigation system. The critiques that followed the conclusions of the *Lauder* and *CME* disputes are typical in this regard.²¹⁰

²⁰⁵ See Chapter 3, at pp.110-115.

²⁰⁶ *Maffezini v. Spain*, ICSID Case No.ARB/97/7, Decision on Jurisdiction (25 Jan. 2000) ¶¶38-64.

²⁰⁷ See e.g., *Siemens A.G. v. The Argentine Republic*, ICSID Case No.ARB/02/8, Decision on Jurisdiction (3 Aug. 2004) ; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006).

²⁰⁸ See e.g., *Salini Costruttori S.p.A and ItalStrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (29 Nov. 2004) ; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No.ARB/03/24, Decision on Jurisdiction (08 Feb. 2005) ; *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 Sept. 2006).

²⁰⁹ As explained above, one of the major characteristics is its *ad hoc* basis. Hence, it is normal that inconsistencies may appear in the approach used by different tribunals. One may argue that such divergences can actually contribute to the perfection of the system. See F. Orrego-Vicuña 'Foreign investment law: how customary is custom' (2005) 99 *ASIL Proceedings* 101, 101.

²¹⁰ The disputes have been qualified by the defendant State as "[a]bsolutely ludicrous, and highly regrettable for the fact that it makes the law looks stupid". 'Clifford Chance entangled in bitter lauder arbitration', *Legal Bus.*, Oct. 2001, 108; cited in Brower & Sharpe (*supra* n.177), 216.

Any of the above forms of inconsistencies can affect the legitimacy of the investment dispute system. They make the process of ensuring uniformity and predictability more complicated,²¹¹ and have thus been used by several authors to criticize the legitimacy of the arbitration mechanism to settle investment disputes.²¹²

Waste of Time and Costs

Even if they do not result in inconsistent outcomes, multiple proceedings can be seen as a waste of resources.²¹³ As Cuniberti notes, this is true for the parties as well as for society as a whole.²¹⁴

"For the parties, parallel litigation entails an obvious increase of the litigation costs, since they have to bring or to defend claims before two adjudicators instead of one. For society, it is also a waste of resources, because the state funds several adjudicators instead of one. In addition, in investment disputes, the state is one of the litigants. The increase of the litigation costs that it bears as a party is also a cost for society as a whole, since it will be funded by tax payers."²¹⁵

By the same token, one could also affirm that there is an opportunity cost that matters, since by doubling their efforts to litigate the case, litigants push administrative capacity to its limits, and probably contribute to worse judgments, since judicial resources are fixed in most democracies and not flexible. Although I am not aware of statistical research conducted on the length and costs of investment arbitrations when proceedings are involved, it can simply be noted that in nearly all known cases of parallel proceedings, procedural complications occurred.²¹⁶ These actions usually imply the service of additional lawyers, and will necessarily increase litigation costs and length of proceedings.

Parties' Satisfaction and Chances of Success

A French author, B. Rémy, has recently developed the argument that, jurisdictional interactions change, to the detriment of the arbitration, the cost/benefits analysis which may be undertaken by states and investors when considering whether to use this method of dispute resolution.²¹⁷ As explained above, jurisdictional interaction implies an increase

²¹¹ See e.g. S.R. Franck 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham L. Rev.* 1521. See also in particular to the 'state of necessity' issue in Argentinians cases: P. Di Rosa 'The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues' (2004) 36 *Uni. Miami Inter-American L. R.* 41, 65-67.

²¹² Reinisch (*supra* n.167) 117.

²¹³ Wehland (*supra* n.164) 10 and references thereunder.

²¹⁴ Cuniberti (*supra* n.163) 414.

²¹⁵ *Ibid.*

²¹⁶ These complications could take the form of repetitions of jurisdictional challenges, procedures for the challenge or enforcement of the decisions rendered by the competing court/tribunal, the requesting and granting of measures to 'stay the proceedings, etc.

²¹⁷ B. Rémy, 'La concurrence des procédures États-investisseurs' in Y. Kerbrat (ed.), *Forum shopping et concurrence des procédures contentieuses internationales* (2011) 15, 21.

in the procedure costs and length. At the same time, this increase does not necessarily imply a better quality of the dispute settlement mechanism. Such *décallage* can be considered as unsatisfying for the parties. Indeed, when initiating a dispute before an investment tribunal, the litigants have needs and expectations. Ultimately, the need is to have the dispute settled. Nevertheless, this need cannot be dissociated from the expectation of proper justifications.²¹⁸ This need, for proper justifications, has been included in procedural rules, such as the ICSID Convention or the UNCITRAL Model law, which both contained provisions obliging arbitrators to duly motivate their decisions. In *Amco v. Indonesia*, for instance, the tribunal explained that the "supporting reasons must constitute an appropriate foundation for the conclusions reached through such reasons".²¹⁹ Arguably, jurisdictional interactions may have a negative effect on these needs and expectations. As Rémy explains, different reasoning and/or conclusions may complicate the enforcement and render the execution process more complicated.²²⁰

Further, the different appreciations given by different tribunals with jurisdiction over the same dispute can be perceived by the parties as destabilizing. Wehland notes, in this respect, that "the very possibility that the same matter might be re-adjudicated with a different outcome may effectively deprive a successful party of the benefits of a decision, by failing to provide it with the required legal security."²²¹

3. Parallel Proceedings Between Investment Arbitration and Trade Dispute Settlement

The Hypothesis

Jurisdictional interaction and parallel proceedings may occur between a dispute brought before an investment arbitration tribunal and an adjudicative body of an international trade agreement, starting with the WTO. In Chapter 4, we saw that investment tribunals have referred to trade law in disputes for which proceedings have also been initiated before the WTO dispute settlement body.

As D. Price once noted, the same measure or series of measures taken by a government may give rise to violations of both IIA provisions and those of a WTO agreement.²²² Looking at the actual WTO DSB docket, and at the most recent disputes for which

²¹⁸ Rémy argues that without proper justification, the dispute settlement mechanism could be simply considered by the parties as a gamble. *Ibid.* 23. Very recently, another author has highlighted the importance of coherent reasoning and proper justification, see F. Ortino 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 *J. Int'l Dispute Settlement* 31.

²¹⁹ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad Hoc Committee Decision on the Application for Annulment (16 June 1986) ¶43.

²²⁰ Rémy (*supra* n.217) 23.

²²¹ Wehland (*supra* n.164) 10.

²²² D.M. Price, 'Some Observations on the Role of State in Investor-State Dispute Settlement' in B. Cremades & J.D.M. Lew (eds.), *Parallel State and Arbitral Procedures in International Arbitration* (2006) 73. See also, R. Adlung & M. Molinuevo 'Bilateralism in Services Trade: Is There Fire behind the (BIT-)Smoke?' (2008) 11 *J. Int'l Eco. L.* 365.

requests for consultations have been submitted, it is possible to argue that some of the measures contested in those instances could trigger a dispute before an arbitral tribunal. To take only one example, on May 2015, Japan requested consultations with The Republic of Korea (hereinafter 'Korea') pursuant to WTO-DSU Article 4, on the basis that a set of food import bans on Japanese seafood products were inconsistent with the SPS Agreement.²²³ Interestingly, Japan insists in its request on the 'fundamental lack of transparency' concerning the measures at issue, arguing that Korea failed to provide the information Japan is entitled to have, on the basis of the SPS agreement, about the bans' specifics.²²⁴ Hypothetically, the same set of facts could lead to an investment dispute. Korea and Japan are party to a BIT.²²⁵ This treaty is in force and provides for investor-State arbitration in case of an 'investment dispute' (Article 15).²²⁶ Further, The Korea-Japan BIT contains the traditional standards of protection generally found in IIAs, including FET (Article 10). A Japanese company operating in Korea (or a Japanese investor with shares in a local company) that is specialized in the import and distribution of food products, and affected by the bans, may well attempt to challenge the measures before a tribunal. Transparent and public exercise of government authority is, indeed, considered to be part of the FET standard and/or non-discrimination standards.²²⁷ In several cases, the lack of information on the implementation of a given governmental program has been used as a basis of a FET violation.²²⁸ In *Metalclad v. Mexico*, for instance, the tribunal found that the respondent breached NAFTA Chapter 11 Article 1105(1), because "it failed to ensure a transparent and predictable framework for Metalclad's business".²²⁹ More recently, in *Micula v. Romania*, the tribunal ruled that Romania breached the FET standard, because it acted in an un-transparent fashion,

²²³ *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides*, WT/DS495/1, Request for Consultations (21 May 2015).

²²⁴ *Ibid.* ¶4.

²²⁵ Agreement Between the Government of The Republic of Korea and the Government of Japan For The Liberalisation, Promotion and Protection of Investment (signed in Seoul on 22 Mar. 2002), available on the UNCTAD BIT database at <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1727>> (last consulted 1 Aug. 2015).

²²⁶ Article 15 of the Korean-Japan BIT defines an investment dispute as "a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any right conferred by this Agreement with respect to an investment of an investor of that other Contracting Party".

²²⁷ Dolzer & Schreuer (*supra* n.53) 149-52. Recall that in *Champion Trading Co. v. Egypt*, the tribunal actually referred to WTO law when reasoning on the existence of a general principle of transparency in international law and, more specifically, under international investment agreements. See *Champion Trading Co. v. Egypt*, ICSID Case No. ARB/02/9 (Award, 27 Oct. 2006) ¶¶161-164.

²²⁸ See e.g., *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award (13 Nov. 2000) ¶83 ; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006) ¶128; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award (25 Oct. 2012) ¶212 ; *Gold Reserve Inc. v. Bolivarian Republic*, ICSID Case No. ARB(AF)/09/1, Award (22 Sept. 2014) ¶570.

²²⁹ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000) ¶99.

when it delayed informing the investor that the investment incentives program it had benefited from had to be cancelled upon Romania's accession to the EU.²³⁰ Relying on this case law, the Japanese hypothetical investor could attempt to obtain damages from the Korean government, while at the same time, the measure would be under examination by a WTO panel.

Of course, in this hypothesis, there would be no actual competition between the WTO panel and the arbitral tribunal. Allen and Soave, who have published a paper on this specific question, have expressed this idea in a very clear manner. According to them, "WTO dispute bodies and investor-State tribunals do not compete for jurisdiction,"²³¹ because (i) the "WTO and investor-State disputes appear to involve different parties"²³² and (ii) "the legal grounds and relief will also defer."²³³ Yet, there is a form of interaction between the jurisdiction of each adjudicative body, and as we will see in the next development, this interaction can "give rise to certain tensions and inefficiencies."²³⁴

The Actual Cases

In recent years, there have been at least four cases that involved parallel or subsequent proceedings: (i) the softwood lumber dispute, which involved the US, Canada and Canadian investors; (ii) the dispute over sugar quotas between Mexico and the US, which also triggered actions from US companies against Mexico; (iii) the ongoing disputes about Australia's legislation on the packaging of tobacco products; and finally (iv) the recent on-going disputes relating to Canada's Feed-In Tariff program. These disputes have been discussed at length in the literature,²³⁵ and have already been encountered in Chapter 4. I will not, therefore, delve too much into the details of each, but simply highlight the most important aspects of each of these cases.

The first major instance of parallel proceedings arose with respect to a series of measures by the US, imposing tariff duties on Canadian softwood lumber, including the (in)famous "Byrd Amendment", a US legislative measure pursuant to which antidumping duties and countervailing tariff duties ('AD/CVD') collected from non-US lumber producers were to be reserved for, and distributed to, domestic competitors. All these measures, including

²³⁰ *Micula v. Romania*, Award (11 Dec. 2013) ¶¶864-70.

²³¹ B.E. Allen & T. Soave 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration' (2014) 30 *Arb. Int'l* 1, 14.

²³² *Ibid.* 14-15.

²³³ *Ibid.*

²³⁴ *Ibid.* 15.

²³⁵ See e.g., R.P. Alford 'The Convergence of International Trade and Investment Arbitration' (2013) 12 *Santa Clara J. Int'l L.* 35, 44-50; J. Pauwelyn 'Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking' (2006) 9 *J. Int'l Eco. L.* 197; A.K. Bjorklund 'Private Rights and Public International Law: Why Competition among International Economic Law Tribunals is not Working' (2007) 59 *Hastings L. J.* 241, 273-85.

the Byrd Amendment, were challenged in various procedures before the WTO adjudicative body.²³⁶

While WTO proceedings were ongoing, Several Canadian producers initiated arbitrations under NAFTA Chapter 11, arguing that the US measures were in breach of several investment protection standards (*inter alia* NT, MFN, FET and expropriation). The claims were consolidated and, with the exception of the Byrd Amendment, eventually dismissed. The tribunal found that NAFTA Article 1901(3) barred the submission of a claim with respect to antidumping and countervailing duty law to arbitration under Chapter 11 of the NAFTA, and therefore concluded that it lacked jurisdiction to assess the legality of AC/CVD measures. As regards the Byrd Amendment, the tribunal found that it was not, *per se*, a dumping and subsidies measure and that, therefore, it was not covered by NAFTA Article 1901(3). The tribunal, however, reserved the question of determining whether the investors were entitled to damages. In the end, the tribunal did not address the question. The US and Canada later reached a political settlement and concluded an international agreement (the Softwood Lumber Agreement or 'SLA'), the entry in force of which was subject to the withdrawal of the claim.

The second example of parallel proceedings arose in the context of a set of tax measures taken by Mexican authorities on various sweeteners contained in soft-drink beverages.²³⁷ The US challenged these measures before the WTO, arguing that they were discriminatory. Both the Panel and the AB found that the soft drink taxes violated WTO provisions on discrimination and could not be justified under any applicable exception.

Three US investors challenged the same tax measures in investment arbitration, under NAFTA Chapter 11. In the three cases, the tribunals found that the tax measures

²³⁶ *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/RW, Panel Report (13 Apr. 2004); *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, Panel Report (22 Mar. 2004); *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, Appellate Body Report (11 Aug. 2004) ; *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/AB/RW, Recourse to Article 21.5 of the DSU by Canada - Report of the Appellate Body (13 Apr. 2006) ; *United States—Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, Appellate Body Report (19 Jan. 2004) and *United States — Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, Panel Report (27 Sept. 2002). For a systematic overview of all these disputes, see L. Guglya 'The Interplay of International Dispute Resolution Mechanisms: the Softwood Lumber Controversy' (2011) 2 *J. Int'l Dispute Settlement* 175.

²³⁷ According to Mexico, these measures were adopted in order to evoke the cooperation of the US in a NAFTA Chapter 20 dispute relating to sugar quota allocated to Mexico the transatlantic agreement. Mexico thus challenged the jurisdiction of the WTO panel, arguing that the dispute, which involved two NAFTA parties and touched upon NAFTA provisions, should be treated before a NAFTA adjudicator rather than the WTO. The US argued that declining jurisdiction would have the effect of limiting its right to have the dispute settled, which under WTO law is not possible. The panel and, subsequently the AB ruled in favor of the US and dismissed Mexico's objection. See, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, Appellate Body Report (6 Mar. 2006) ¶¶44-57.

violated NAFTA investment provisions on non-discrimination and awarded damages to the investors.

The third instance of parallel proceedings involves the recent filing of WTO and BIT claims relating to Australia's legislation of tobacco plain packaging, which imposes trademark restrictions and other packaging requirements on tobacco products. This legislation has prompted legal actions both before trade and investment adjudicators. In 2012 and 2013, Ukraine, as well as the Dominican Republic, Cuba, Honduras, and Indonesia, initiated proceedings before the WTO-DSB against Australia, arguing that the Australian legislation was in breach of several provisions contained in the TRIPS agreement, as well as in the TBT agreement and in GATT Article III. Some of these proceedings are reportedly being funded by tobacco companies.²³⁸ Further, it appears that Philip Morris was directly at the origin of at least one of the cases. According to one source, it solicited the Dominican Republic to initiate the proceedings and is covering its legal costs.²³⁹

The proceedings in the case brought by Ukraine were interrupted in 2015, upon a request of the complainants, in order to try and find a mutually agreeable solution. Today, the proceedings in that case are still suspended. The proceedings in the other four cases are still pending.

In 2012, an investment tribunal was set up to hear a claim launched by the Asian branch of Philip Morris. As previously mentioned, in its request for arbitration, Philip Morris alleged that the Australian legislation constituted an unlawful expropriation of its intellectual property, and violated the FET and FPS standards, as well as the umbrella clause contained in the Hong-Kong Australia BIT. Since then, the claim has been reformulated, and the umbrella clause claim has been dropped. The proceedings have been bifurcated and the jurisdictional hearings were held in February 2015. Post-hearing submissions were submitted over the Spring of 2015 and a decision on jurisdiction is likely to be released in the next months.

The last significant example of parallel proceedings, involves the recent filing of WTO and BIT claims relating to Canada's Feed-in Tariff Program, which subjected renewable energy producers to domestic content requirements. The implementation of the program in Ontario gave rise to a trade dispute between Japan and the EU on the one side, and Canada on the other, before the WTO DSB. The Panel and the AB found that the Feed-in Program was inconsistent with Article 2.1 of the TRIMS Agreement (local content requirement) and GATT Article III:4 (NT).

²³⁸ See e.g., Mike Seccombe 'Big Tobacco's Plan to Stub Out Plain Packaging' (8 Mar. 2014) *The Saturday Paper* available at <<https://www.thesaturdaypaper.com.au/opinion/topic/2014/03/08/big-tobaccos-plan-stub-out-plain-packaging/1394197200>> (last accessed 1 Aug. 2015).

²³⁹ A. Martin, 'Philip Morris Leads Plain Packs Battle in Global Trade Arena' (22 Aug. 2013) *Bloomberg News*, available at <www.bloomberg.com/news/2013-08-22/philip-morris-leads-plain-packs-battle-in-global-trade-arena.html> (last accessed 1 Aug. 2015).

The same measures are being challenged in an investor-State arbitration between Mesa Power Group, a US investor, and the Government of Canada. Mesa claims that the wind farm projects in which it invested suffered economic loss due to the implementation of the program by the provincial government. The US companies allege that these measures are discriminatory and equal to a breach of the FET standard. The dispute is still pending. The hearings were held in October 2014, and in the last communication of the tribunal, a procedural order dated 10 November 2014, it was said that the cost submissions were due on February 2015. The award should be released soon.

The Specifics Problems Associated with Uncoordinated Trade and Investment Proceedings

Scenarios and situations like the four examples described above, are likely to recur.²⁴⁰ As Bjorklung notes, "[i]nvestors have every incentive to seek relief in multiple *fora* due to the differing nature of the remedies available."²⁴¹ One has to admit that investors operating abroad are, by definition, engaged in the international trade of goods and services. It is somehow natural for them to consider all relevant avenues of dispute resolution if, and when, they are adversely affected by a government measure.²⁴² From the investor's point of view, initiating an investment treaty dispute before an arbitral tribunal and, at the same time, managing to convince its home government to diplomatically espouse a WTO claim, might even be seen as complementary. If successful, the investment arbitration will most likely result in retrospective relief in the form of monetary damages. A successful action before the WTO, on the other hand, would result in prospective relief in the form of the removal of the offending measure (on pain of trade sanctions).²⁴³ Triggering the two actions will, of course, have certain costs. However, determined, or 'deep-pocketed', investors might want to run the risk and take shots at different *fora* in order to maximize their chances of compensation or other favorable outcomes.²⁴⁴ Even if two actions are not pursued, investors may appreciate the possibility of parallel proceedings, because they could use the opportunity of bringing a claim, or to lobby a government, as (one might say oppressive²⁴⁵) litigation tactics, possibly compelling the host-State to cooperate (for instance by accepting an advantageous settlement offer).

From a State's perspective, however, this supposed 'complementarity' might be seen as double jeopardy. The state may have to defend itself for the same measure before different *fora*, with the risk of facing different sanctions for the same measures or set of

²⁴⁰ Allen & Soave (*supra* n.231) 4.

²⁴¹ A.K. Bjorklund 'Convergence or Complementarity' (2013) 12 *Santa Clara J. Int'l L.* 65, 71.

²⁴² Alford (*supra* n.235) 44.

²⁴³ *Ibid.*

²⁴⁴ Waibel (*supra* n.180) 513.

²⁴⁵ Pauwelyn & Salles (*supra* n.79) 81.

facts. The *Feed-in* dispute is a good example. Canada has lost the case under the WTO as it was asked to change its regulation. This change will have a specific cost. At the same time, it might be held liable for a breach of NAFTA Chapter 11 provisions, and ordered to pay compensation to the investor. This might be seen as problematic, in light of the potential result (double sentencing for the same measure), and also in light of the recourses spent in the multiple proceedings, as the costs involved in international litigation and international arbitration can be high.²⁴⁶

The other typical issue mentioned when discussing concerns relating to overlapping jurisdiction in international dispute settlement, namely the risk of inconsistent ruling, exists also in the investment-trade scenario. In the *Softwood Lumber* dispute, the investment tribunal and WTO judge reached different results as to the nature of the Byrd Amendment. The investment tribunal concluded that it was not a dumping and subsidies measure within the meaning of NAFTA law, while the WTO panel concluded it was, within the meaning of WTO law. The possible negative consequences of these two inconsistent findings were avoided with the signature of the SLA Agreement. But without the conclusion of this agreement, two contradicting decisions would have had to be applied.

Arguably, this type of 'dissonance' might alter both the credibility and legitimacy of the international dispute settlement system as a whole. As we have seen, commentators have not weighed the outcome of the investment facet of the Australian tobacco dispute, in order to ask questions about the way each dispute settlement mechanisms should coordinate, arguing that the mere possibility of having all these parallel disputes launched at the same time was a sign of a defect, and a problem with regard to a State's ability to regulate.²⁴⁷ Although investors might not be concerned about this problem, States certainly will be. If the system looks deficient, they have to spend both time and resources, either arguing that it is not, or accepting that it is and reforming it.

B. INADEQUACIES OF EXISTING PRINCIPLES AND THE NECESSARY REASSESSMENT OF A TRIBUNAL'S ROLE IN REGULATING INTERACTIONS

There are several techniques that international tribunals can use to regulate overlapping jurisdiction and parallel proceedings.²⁴⁸ As we will see over the course of the present section, they do not operate the same way, and have different results. Further, their application and implementation to a given case depends on the type of interactions, as well as on the facts and details of the case.²⁴⁹

²⁴⁶ *Ibid.* See also, C. Romano 'The Price of International Justice' (2005) 4 *L. & Practice Int'l Courts and Trib.* 281.

²⁴⁷ See e.g., A. Ritwik 'Tobacco Packaging Arbitration and the State's Ability to Legislate' (2013) 54 *Harvard J. Int'l L.* 523.

²⁴⁸ Shany (*supra* n.199) 179-180.

²⁴⁹ Allen & Soave (*supra* n.231) 20.

These techniques can be grouped into different categories.²⁵⁰ One might for instance focus on the specific type of interaction the tribunal is dealing with, and distinguish between the techniques that can be deployed to deal with two related on-going proceedings and techniques that can be used in situations of successive proceedings.²⁵¹ Pointing at the fact that coordination techniques usually originate from domestic legal systems, others will differentiate coordination techniques that have been developed in civil law systems, from those developed in common law systems.²⁵² For their part, Pauwelyn and Salles look at the effect of the techniques, as well as their rationale with regard to the courts' power, and distinguish between (i) preclusion doctrines, (ii) doctrines of consolidation and (iii) abstention doctrines.²⁵³ This distinction is useful for the purpose of this section and is adopted in the next developments. Indeed, as we will see below, the techniques belonging to the first two categories cannot be used to address the concerns of parallel proceedings and jurisdictional interactions between the investment tribunals and the trade adjudicator. The techniques belonging to the third category might be more pertinent, but imply a reassessment of the arbitral tribunals' role in regulating potential parallel proceedings and jurisdictional interactions.

1. Inadequacies of Preclusion Doctrines (Res Judicata, Lis Pendens and Estoppel)

As Pauwelyn and Salles explain,

"preclusion doctrines bar either the jurisdiction of a court or the plaintiff's right to have her substantive claim examined. Under preclusions doctrines [...] the second court does not have the any discretion and must decide that it does not have jurisdiction or that the action (or claim) is precluded."²⁵⁴

Within these doctrines we usually find the three following techniques or principles: (i) *lis pendens*, (ii) *res judicata* and (iii) issue or collateral estoppel (also referred to as issue preclusion). Only a brief presentation of each of these three techniques suffices to demonstrate that they are not adequate to deal with this chapter's concerns.

Lis Pendens and Res Judicata

The *lis pendens* doctrine has been developed, in civil law system's, to deal with situations where the same dispute has been brought before two distinct courts or tribunals (because either party *x* initiates an action before tribunal A, and the other party, *y*, initiates an action before tribunal B ; or because *x* initiates two actions against *y*, one before tribunal A and one before tribunal B; or finally because a dispute is initiated in one court but an

²⁵⁰ Pauwelyn & Salles (*supra* n.79) 85-86.

²⁵¹ See e.g., Allen & Soave (*supra* n.231) 20-49. See also, Lowe (*supra* n.204) 192-93.

²⁵² See e.g., Cuniberti (*supra* n.163) 382.

²⁵³ Pauwelyn & Salles (*supra* n.79) 85. Bjorklund adopts a similar distinction as well. See, Bjorklund (*supra* n.236) 304.

²⁵⁴ Pauwelyn & Salles (*supra* n.79) 86.

aspect of the dispute has to be adjudicated by another specific court).²⁵⁵ In such cases, proceedings are on-going before two courts, both of which, in principle, have jurisdiction to hear the case.²⁵⁶ Pursuant to the *lis pendens* doctrine, and in principle, the second court seized should decline jurisdiction and let the first court that was seized decide on the dispute. Often, however, the solution will be less straightforward than one simply based on temporal priority. For instance, it can be that a decision by one court might be an input to take into consideration during proceedings by the latter. In any event, it is usually accepted that for the *lis pendens* doctrine to apply, three conditions are required.²⁵⁷ In theory, there must be (i) identical parties, (ii) an identical object or subject matter, and (iii) an identical (or at least closely connected) legal cause of action.

The same conditions, or 'triple-identity test', also apply to the *res judicata* principle, which relates to subsequent, or sequential –and not parallel– proceedings. Pursuant to this principle, which is also from Roman law origin, a court shall not exercise jurisdiction when another court or tribunal has issued an earlier ruling on the same matter. This principle warrants the finality of proceedings as it ensures that a re-litigation of the same dispute before another court/tribunal is not possible.²⁵⁸

As Reinisch explains, both *lis pendens* and *res judicata* principles serve the same policy rationale of judicial economy (by preventing costly parallel litigation), of legal security (by avoiding conflicting judgments), and of the protection of defendants (by protecting parties from oppressive litigation tactics).²⁵⁹

Although investment tribunals have recognized that both principles may apply in investment arbitration in cases where the three conditions are fulfilled,²⁶⁰ it is quite obvious that their application to parallel proceedings or jurisdictional interactions between trade and investment dispute settlement is impossible.

While, there might be a connection between two disputes pending in each system, and the dispute might indeed involve the same measures or legal norms, this is not sufficient for *res judicata* or *lis pendens* to apply. Investment tribunals have interpreted rather strictly the three criteria in almost all the dispute in which one of the two doctrines have been raised.

²⁵⁵ A. Reinisch 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 *L. & Practice Int'l Courts and Trib.* 37, 43.

²⁵⁶ *Ibid.*

²⁵⁷ Reinisch (*supra* n.255) 50.

²⁵⁸ Cuniberti (*supra* n.163) 383.

²⁵⁹ Reinisch (*supra* n.255) 44.

²⁶⁰ See e.g. for *res judicata*, *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award (7 June 2008) ¶¶126-131 and for *lis pendens*, *Amtó v. Ukraine* (*supra* n.191) ¶71; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction (18 May 2010) ¶131.

It is simply impossible for WTO and investor-State arbitration proceedings to involve the same parties, the same cause of actions and the same relief. Let's imagine a hypothesis such as the one raised before to illustrate this affirmation. Imagine that in our hypothetical case, both the trade judge, and an investment arbitrator, would be asked to rule on the same measure (an import ban) and rule on the case on a similar ground (lack of transparency). The causes of action would still be different, as well as the parties. Even if we assume, for the sake of argument, that the claimant before the investment tribunal asks for a form of restitution and thus the removal of the ban (rather than compensation), and that there is a similarity between the 'reliefs' asked for from the investment tribunal on the one hand and the trade dispute settlement body on the other, the parties, as well as the cause of action, would still be different.

Issue or Collateral Estoppel

The last preclusion technique that can be mentioned is issue or collateral estoppel. The traditional rule of collateral estoppel comes from common law systems and more particularly from US civil procedure.²⁶¹ In short, the rule grants conclusive effect to material issues that have been already litigated and determined, and thus preclude an adjudicator from ruling on these issues again.²⁶² This rule is similar to *res judicata*, but differentiates from the latter in the sense that it focuses (only) on issues in the dispute rather than on all the aspects of the claim (the parties to it, its cause and object).²⁶³ In this sense, the conditions for collateral estoppel to apply appear to be less stringent than the ones for *res judicata*. Unlike *res judicata*, issue estoppel applies even if the causes of action in the two proceedings are different.²⁶⁴ What matters here is whether the same issue has been litigated and decided in a previous case.²⁶⁵ Further, the strict identity of the parties is not required. Rather, the rule will apply if the parties are the same or in privy. In sum, to use Shell's words, "*res judicata* focuses on the general interest in finality and repose of judgments. Collateral estoppel, by contrast, emphasizes finality of specific instances of fact-finding."²⁶⁶

²⁶¹ R.G. Shell 'Res Judicata and Collateral Estoppel Effects of Commercial Arbitration' (1987) 35 *UCLA L. Rev.* 623.

²⁶² H. Smit 'International Res Judicata and Collateral Estoppel in the United States' (1962) 9 *UCLA L. Rev.* 44, 60.

²⁶³ Shell (*supra* n.261) 625. See also, G.A. Bermann "Domesticating' the New York Convention: the Impact of the Federal Arbitration Act' (2011) 2 *J. Int'l Dispute Settlement* 317.

²⁶⁴ The possibility to apply the principle in international dispute settlement has been discussed in the *Nuclear Test* case. See, *Nuclear Tests (Australia v. France)*, Judgment (20 Dec. 1974), ICJ Reports 1974, 253, at 268. WTO Panels and the AB have also discussed the issue. See e.g., *Argentina—Poultry Anti-dumping Measures*, WT/DS241/R, Panel Report (19 May 2003) ¶¶5.37-38 and *European Communities — Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, & WT/DS283/AB/R, Appellate Body Report (28 Apr. 2005). See also, in the context of investment-trade jurisdictional interactions, Allen & Soave (*supra* n.231) 25.

²⁶⁵ Shell (*supra* n.261) 647-48.

²⁶⁶ *Ibid.* 648.

This apparent flexibility seems interesting. In addition, numerous investment tribunals have generally applied the principle of estoppel, and an investment tribunal has once ruled that the specific collateral estoppel rule could be considered as a general principle of international law and therefore applied in investment arbitration.²⁶⁷ One could, therefore, try to argue that once an issue (say for instance the nature of a measure, as was the case for the Byrd Amendment in the Softwood lumber dispute) has been decided by the WTO, the same party may be estopped to request another ruling from an investment tribunal.

This particular question has not been addressed so far. Nonetheless, it seems unlikely that an arbitral tribunal will make use of this doctrine in this situation. The reaction of the tribunal in *Corn Products v. Mexico* points toward this conclusion.²⁶⁸ Recall that in that case, Mexico had argued that the tax measures on non-alcoholic beverages containing a specific type of sugar, were to be considered as a countermeasure taken in response to prior violations of the NAFTA by the US.²⁶⁹ In response, the investor raised an argument based on very same logic of that underlying collateral estoppel, even though the rule was not expressly mentioned. *Corn Products* argued that Mexico had already lost the countermeasures argument in the WTO proceedings and could not, therefore, rely upon it in the present case.²⁷⁰ The tribunal refused that argument. It clearly affirmed that Mexico was not precluded from raising a defense of countermeasure, because of the rulings against it by the WTO Panel and the AB.²⁷¹

2. Inadequacies of Consolidation Doctrines

There is no need to be exhaustive, either, with respect to the consolidation doctrine. Pursuant to this doctrine, when two identical claims are pending before two tribunals, one court can decide to consolidate the claims in one set of proceedings.²⁷² In domestic legal systems where the doctrine is recognized, consolidation occurs based on explicit statutory provisions.²⁷³ Similarly, in international dispute settlement, and more specifically in international investment arbitration, where the doctrine is recognized,

²⁶⁷ Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada [II], ICSID Case No. ARB/10/6, Award (10 Dec. 2010) ¶7.1.2.

²⁶⁸ *Corn Products v. Mexico*, Decision on Responsibility (15 Jan. 2008) ¶57.

²⁶⁹ For a broad study on the investment cases in the US-Mexico sugar dispute, see, A. Antoni & M. Ewing-Chow 'Trade and Investment Convergence and Divergence: Revisiting the North American Sugar War' (2013) 1 *Latin American J. of Int'l Trade L.* 315.

²⁷⁰ *Ibid.* ¶152.

²⁷¹ *Ibid.* ¶154.

²⁷² Pauwelyn & Salles (*supra* n.79) 87.

²⁷³ *Ibid.*

consolidation can only occur if provided for in the treaty upon which the disputes are based,²⁷⁴ or alternatively –but to a minimal extent– if the parties agree to it.²⁷⁵

This doctrine is clearly not pertinent for parallel proceedings between investment and trade dispute settlement. The very first condition for the consolidation of two parallel proceedings rules this possibility out. Indeed, consolidation requires identical dispute settlement mechanisms. In other words, proceedings can be consolidated only if they involve similar tribunals, which both have jurisdiction to do decide upon all of the aspects, including the parties, to the dispute.²⁷⁶ For instance, if two investors have initiated disputes against two NAFTA Chapter 11 tribunals, about the same set of measures taken by the same NAFTA party, then the latter can ask for consolidation, pursuant to NAFTA Article 1126. Further, it presumes that the tribunals have been constituted pursuant to the same rules and act within the same legal system, or on the basis of the same legal instrument.²⁷⁷ Clearly, this is no the case in the situation at hands.

3. Abstention and Deference Doctrines and The Tribunal's Role in Regulating Interactions

Pauwelyn and Salles define abstention doctrines as the doctrines that "lead the courts [...] not to exercise its power to pronounce on claims based on some factor extrinsic to the merits of the claims (for instance the jurisdiction of another court."²⁷⁸ In other words, contrary to the *res judicata* or *lis pendens* principles, which preclude the jurisdiction of the court because a decision has already been issued in the same dispute, or because the same dispute is actually pending before another court, here, the court has jurisdiction but refuses to exercise this jurisdiction over the dispute, or part(s) of the dispute. Within this category, we can mention the *forum non conveniens* and *comity* principles. These two principles are discussed below. As we will see, the application of these principles in international dispute settlement in general, and in investment arbitration more specifically, is limited. Yet, they should not be considered as totally irrelevant in cases of parallel proceedings or jurisdictional interactions between trade dispute settlement and investment arbitration.

Forum Non Conveniens

Pursuant to the *forum non conveniens* doctrine, which originates from common law countries, but for which equivalents can be found in civil law systems,²⁷⁹ a court is

²⁷⁴ G. Kaufmann-Kohler *et al.* 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently? Final Report on the Geneva Colloquium' (2006) 21 *ICSID Rev.* 59.

²⁷⁵ *Ibid.* 87.

²⁷⁶ *Ibid.* 88.

²⁷⁷ *Ibid.* 89.

²⁷⁸ Pauwelyn & Salles (*supra* n.79) 86.

²⁷⁹ For an example of the application of the doctrine in a common law country, *see e.g.*, 28 U.S.C. § 1404(a). For an example of a similar doctrine, *see* the French doctrine of "*exception de connexité*" deriving from

empowered to refuse exercising jurisdiction, or to stay an action, when it considers "that there is some other available forum which is the appropriate forum for the trial of the action, *i.e.* in which the case may be tried more suitably for the interests of all the parties and the ends of justice."²⁸⁰ Unlike the *lis pendens* and *res judicata* rules examined above, *forum non conveniens* does not require the comparison of the disputes pending before two courts and to establish whether these disputes are identical. Similarly, the fact that the other court has already been seized of the dispute (*lis pendens*) or that it has already issued a ruling (*res judicata*) on said dispute are irrelevant factors. What matters here is that the other court, or the potential other court has, or would have, jurisdiction over the dispute and that its handling of the case could be considered as more appropriate. The criteria that need to be taken into consideration vary depending on the system where the doctrine is applicable. Generally, courts will take into consideration practical connecting factors relating to the parties' interests (their place of residence, or the place where they conduct their business, their resources, the availability of witnesses and experts) as well as more objective concerns such as the law applicable to the dispute and the general interests of justice.²⁸¹

Several authors have argued that the *forum non conveniens* doctrine cannot easily be applied in international dispute settlement. Pauwelyn and Salles for instance explain that applying the doctrine as it stands is problematic for the four following reasons. First, the doctrine originates from a common law system and international tribunals might refuse to recognize it as a general principle of international law.²⁸² Second, in international dispute settlement, the condition according to which a court has to have jurisdiction to hear the whole dispute, or part of the dispute, for which the original court declines jurisdiction, is not likely to be met.²⁸³ Third, and finally, because international courts are not likely to show the judicial discretion the application of the principle implies.²⁸⁴ Similarly, Cuniberti argues that the principle is not likely to be applied in international investment arbitration, because courts generally refuse to decline jurisdiction if they

Article 101 of French Code of Civil Procedure, which translates as follows: "if there exists between matters brought before two distinct courts a bond such as there is an interest of good justice to have them examined and determined together, one of the courts may be asked to decline its jurisdiction and to refer the matter as it stands to the other court". *Legifrance Translation* (August 2005), available at <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> (last consulted 1 Aug. 2015).

²⁸⁰ Cuniberti (*supra* n.163) 406, citing Lord Diplock in the judgment of the House of Lords, *Spiliada Maritime Corp. v. Cansulex Ltd.*, 1987 A.C. 460, at 476.

²⁸¹ G. Marceau 'Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35 *J. World Trade* 1081, 1112.

²⁸² Pauwelyn & Salles (*supra* n.79) 110.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.* 112-13.

acquired such due to the existence of an arbitration clause.²⁸⁵ He further notes that, until today, no tribunal has expressly used the doctrine to decline jurisdiction.²⁸⁶

These arguments are certainly not without merit. It is true that the traditional formulation of the doctrine does not seem to warrant tackling all the complexities of multiple proceedings in investment arbitration. Yet, as we will see, a slightly 'reformulated version' of the doctrine, realigned with the problems of the present section could prove useful.²⁸⁷

Comity

Comity is another principle that can be described as an abstention doctrine. In the context of international dispute settlement, the principle of comity relates to the possibility for one court (court A) to take into consideration the fact that another court (court B) may have jurisdiction to deal with a dispute that is similar to the one pending before it, and to take the necessary measures to avoid negative interferences between the outcomes of the two disputes. In Shany's words, the principle of comity is based on the idea that "courts in one jurisdiction should respect and demonstrate a degree of deference to the law of other jurisdictions"²⁸⁸ as well as to "the courts themselves and to their procedures."²⁸⁹ The idea is not that court A will apply the law of court B. This is certainly possible, and sometimes necessary, but is not related to comity. The idea is that court A, while dealing with dispute α , takes into consideration the fact that court B can more appropriately deal with α , and therefore abstains from ruling upon the case. Of course, with this principle, all depends on the will of the abstaining court.

One might also argue that the principle further allows a court, that is facing a situation of parallel proceedings or jurisdictional internationals, to rely on a decision or findings reached by the other court. Or, if the other procedure is still ongoing, to stay its proceedings in order to let the other court decide on the issue, and thus place itself in a position to take that decision into account once it has been decided. In that situation, court A does not abruptly decline jurisdiction to the advantage of court B, it waits and sees.²⁹⁰

Like *forum non conveniens*, it is unsure whether comity qualifies as a general principle of international law.²⁹¹ Nonetheless, it seems that it is largely accepted that the exercise of

²⁸⁵ Cuniberti (*supra* n.163) 407-08.

²⁸⁶ *Ibid.*

²⁸⁷ The expression 'reformulated doctrine' is from Pauwelyn and Salles. They argue that a reformulated version of *forum non conveniens*, adapted to the characteristics of international dispute settlement could be relevant to address jurisdictional interactions between the WTO on one side and regional trade agreements on the other. Pauwelyn & Salles (*supra* n.79) 113-17.

²⁸⁸ Shany (*supra* n.199) 260-61. *See also*, Wehland (*supra* n.164) 208-09.

²⁸⁹ Y. Shany, *Regulating Jurisdictional Relations between National and International Courts* (2007) 166.

²⁹⁰ Wehland (*supra* n.164) 209 ; Shany (*supra* n.199) 260.

²⁹¹ Shany (*supra* n.199) 261-62.

comity is part of the inherent powers of international courts, and that these courts should have the authority to take into account other international proceedings when the latter are related and relevant to the one they deal with, even if that authority is not expressly mentioned in their statutes, or procedural instruments. Similarly, it is usually accepted that international courts have the authority to manage their proceedings in order to act in deference towards another international court.²⁹² In *SPP v. Egypt* for instance, the arbitral tribunal clearly affirmed that "every court has inherent powers to stay proceedings when justice so requires."²⁹³ In this case the tribunal actually accepted to stay the proceedings so that the French *Cour de Cassation* could rule on a matter that was directly related to the dispute. The tribunal expressly used the notion when it affirmed that,

"[w]hen the jurisdiction of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal."²⁹⁴

This case, which represents one of the main illustrations of the application of comity in international dispute settlement,²⁹⁵ is particularly instructive and should be seen as an interesting basis for techniques that are to be used in case of parallel proceedings or jurisdictional interactions between trade and investment dispute settlement mechanisms.

Abstention and Deference Doctrine as a Flexible but Effective Tool to Coordinate Investment-Trade Jurisdictional Interactions?

The principles presented above may not be pertinent for all types of jurisdictional interactions that arise in investment arbitration. Yet, they are certainly of interest and have an important role to play for those interactions studied in the present Chapter. I argue that it is towards these principles that investment tribunals should turn when they face interaction with trade adjudicative bodies or parallel proceedings. And for the following reasons.

Firstly, as we have seen, the doctrines of *forum non conveniens* and comity apply in case of partial interaction. That is when the disputes pending before the two competing forum are not exactly identical. This is likely to be the case in the hypothesis of parallel procedure before an investor-State tribunal and a trade adjudicative body. As we have

²⁹² Wehland (*supra* n.164) 209. Relying on general principles of justice and international law, some authors go one step further and argue that international courts have an obligation to apply comity when facing jurisdictional interactions. See e.g., N. Lavranos, *Jurisdictional Competition : Selected Cases in International and European law* (2009), 87.

²⁹³ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (14 Apr. 1988) ¶87.

²⁹⁴ *Ibid.* ¶84.

²⁹⁵ Shany (*supra* n.199) 263.

seen, while there might be similarities between two parallel disputes brought before investment and trade adjudicators, these proceedings will not be identical.

Secondly, the two doctrines apply, notably, if it is highly likely that the other forum declares itself competent to hear the case. As noted by Cuniberti, "the other forum should not only be more appropriate, but strongly so."²⁹⁶ When investment tribunals are faced with a challenge based on the existence of a dispute before a trade adjudicative body, it is very likely that the trade adjudicator has jurisdiction over the dispute.

Further, in practice, this appropriateness requirement implies that the courts and processes compared be clearly different. If the processes are very similar, it is doubtful that any of them will appear as strongly more appropriate than the other, and thus trigger a stay of proceedings on convenience grounds. In our hypothesis, the two adjudicative bodies undertake different functions. It is therefore possible for the investment tribunal to refer to the trade adjudicative body for the aspects of the disputes which fall within its competence.

In light of the above, the doctrines of *forum non conveniens* and comity seem appropriate to deny jurisdiction over a Scenario 3 claim in cases of parallel proceedings. Arguably, in some disputes already discussed in the present thesis, investor-State tribunals have applied these doctrines implicitly. In *Canfor & all v. US*, for instance, the tribunal did not refer to the doctrine, but did express the idea that the treatment of a dispute relating to custom duties would be appropriate.²⁹⁷

Finally, comity also allows a tribunal to proceed with the case, whilst 'taking into consideration' the proceedings before the other court. This possibility seems particularly interesting for the issues addressed in the present Chapter. A situation of parallel proceedings before trade and investment adjudicative bodies does not necessarily imply a conflict between the jurisdiction of the two bodies, which can only be resolved with one of these bodies declining jurisdiction in favor of the other. Often, the two proceedings will be parallel, but not all the issues to be addressed in the two forums will be competing. It can be the case that only one specific factual element is identical in the two parallel proceedings, but that the dispute before forum A differs from the one addressed in forum B. In this hypothesis, having one of the two forums declining jurisdiction over the whole dispute does not seem appropriate. A more suitable situation would be having either or both forums exercising comity by taking into consideration what the other will do when addressing the specific element that is identical in both disputes. In practical terms, comity may lead an investment tribunal to 'take into consideration' the jurisdiction of a trade tribunal in a parallel dispute and, for instance refer to the findings of the trade tribunal or to the way that tribunal will handle the facts of the disputes, or

²⁹⁶ Cuniberti (*supra* n.163) 407.

²⁹⁷ *Canfor Corporation v. United States; Tembec et al. v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, (Decision on Preliminary Question, 6 Jun. 2006)(hereinafter '*Canfor & al. v. US*') ¶¶348-49.

request information to the parties about the trade proceedings. In a similar situation, comity might also justify a stay of the investment proceedings until the trade tribunal issues a decision, so that the decision can be addressed in the investment case. Allen and Soave endorse this solution, explaining that this should not have a great impact on the unfolding of the investment case, as trade proceedings are usually relatively short.²⁹⁸

Certainly, the use of these principles depends on the willingness of the arbitral tribunal to engage with its trade counterpart. After all, the investment tribunal can always ignore the parallel proceedings and let the parties deal with the problem associated to it if and once they encounter them after the award is issued. Yet, one should note that investment tribunals have to administer the proceedings in accordance with the interests of the disputing parties. It can, therefore, be argued that a measure aiming at regulating a potential interaction with a parallel trade dispute (for instance requesting information about that dispute or staying the proceedings to wait for this outcome) is taken in accordance with the interests of the parties.

In any event, there should be no doubt about the objective capacity of investment tribunals to rely on comity to pronounce this type of measure, as the use of comity fits within the scope of their inherent powers.

At the end of the day, whether investment tribunals will accept to use these principles depends on the perception they have of their own function and their role in relation to other international dispute settlement bodies. In a recent study, Van Harten demonstrates that tribunals have usually declined to observe deference towards other international courts.²⁹⁹ For him, refusing to show restraint and proceeding with the dispute despite the inconvenience it might create, and despite the potential for conflicting decisions and the possibility of having a legitimate forum, is problematic and may further affect the legitimacy of investment arbitration.³⁰⁰ In his view, investment tribunals should re-evaluate their role towards a more system-oriented approach, even if this results in the stay of proceedings until the dispute is resolved in the parallel forum.³⁰¹

There is not enough data to affirm that his conclusion and recommendation also applies for situations of competition or interaction between the jurisdiction of trade adjudicative bodies and investor-State tribunals. It seems, however, difficult to contest that a better integration between trade and investment law would be fostered should investment tribunals observe higher deference towards international trade courts in case of jurisdictional interactions or parallel proceedings. This seems a laudable goal, in light of

²⁹⁸ Allen & Soave (*supra* n.231) 57-58.

²⁹⁹ G. Van Harten 'Judicial Restraint in Investment Treaty Arbitration: Restraint Based on Relative Suitability' (2014) 5 *J. Int'l Dispute Settlement* 5. Based on an empirical research, Van Harten notes that "arbitrators declined to take up opportunities for restraint based on, for example, the relative specialization or legitimacy of another international court." *Ibid.* at 38.

³⁰⁰ *Ibid.* 38-39.

³⁰¹ *Ibid.*

the conclusions reached in the previous Chapter of the present study, and one may thus argue that reference to principles such as *forum non conveniens* or comity in cases of interactions between trade and investment proceedings should therefore be encouraged.

C. THE WAY FORWARD: THE USE OF COORDINATION CLAUSES IN IIAS

Parallel proceedings and jurisdictional interactions between international courts and tribunals may also be regulated directly in the treaties that are used as the basis of their jurisdiction. Pauwelyn and Salles argue that coordinating clauses in international treaties is actually the best method to regulate jurisdictional overlaps.³⁰² Allen and Soave for their part note that treaty-based approaches to parallel proceedings ensure greater predictability and because they remain "grounded in the consent of the counteracting States – as opposed to the inherent authority of tribunals – [...they] may have greater legitimacy."³⁰³

Three types of device need to be examined: (i) Exclusivity clauses, (ii) Forum Selection Clauses, and (iii) Coordination Clauses. Each of these three devices has advantages, as well as limits, in dealing with investment-trade interactions, especially when it concerns addressing Scenario No.2 as well as Scenario No.4 situations.

1. Exclusivity Clauses

Shany defines an exclusivity clause as a jurisdiction clause which "bars litigation before any forum other than the one designated under the jurisdiction-granting instrument".³⁰⁴ Article 344 of the TFEU, which provides that EU Member States cannot submit a dispute concerning the interpretation or application of EU law to any other adjudicative body other than the CJEU, is a good example of this type of exclusivity clause.³⁰⁵ The other example that can be referred to is WTO-DSU Article 23, which we have already encountered. This article endows the WTO-DSB with exclusive jurisdiction over violation of WTO agreements.

Exclusivity clauses appear to be interesting instruments for the managing of parallel proceedings and jurisdictional interactions. In theory, they should prevent a party from relying on two adjudicative bodies (the exclusive one and another) to deal with a dispute over given international norms.

We have seen in Chapter 3 that investment dispute-settlement is non-exclusive, meaning that IIAs do not designate one, exclusive, dispute settlement body for investment

³⁰² Pauwelyn & Salles (*supra* n.79) 117.

³⁰³ Allen & Soave (*supra* n.231) 49-50.

³⁰⁴ Shany (*supra* n.199) 180.

³⁰⁵ The text of Article 344 reads as follows:

"Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein."

disputes. IIAs do not contain exclusivity clauses. Instead, the majority of IIA dispute settlement clauses refer to several alternatives, including investment arbitration.

Yet, exclusivity clauses are still of interest for the investment-trade configuration considered in the present chapter. In an investment dispute where (one of) the investor's claim refers to a trade agreement, or where the subject matter is the same as the subject matter of a dispute about a trade agreement pending before a trade dispute settlement body, the tribunal could examine whether the trade agreement considered by the parties includes an exclusive jurisdiction clause. This textbook hypothesis is not unrealistic. Indeed, although we know, from Chapter 4, that Article 23 of the WTO-DSU has not been applied nor referred to by a tribunal (the reasons for that are explained below), in *Canfor & all v. US* the tribunal did refer to provisions of the dispute settlement mechanisms for anti-dumping and countervailing law under NAFTA (Chapter 19) to decline jurisdiction over several of an investor claim under NAFTA Chapter 11.³⁰⁶ The tribunal noted that Chapter 19 included its own dispute settlement mechanism, that the two proceedings (the one pursuant to Chapter 19 and the one pursuant to Chapter 11) were "concurrent or parallel (with the attendant problems that this creates), even though the applicable law and available remedies differ[ed]".³⁰⁷ Although Chapter 19 does not include an exclusive jurisdiction clause *per se*, that the tribunal could rely upon, it does include a provision providing that none of the other NAFTA chapters shall be construed as imposing obligations with regard to anti-dumping and countervailing law. Referring to this provision - Article 1901(3) - as well as the other provisions in Chapter 19, including Article 1904, which establishes the procedure for review of anti-dumping and countervailing measures, the arbitral tribunal concluded that anti-dumping and countervailing measures could not be subject to adjudication under Chapter 11.³⁰⁸ The tribunal eventually ruled that all but one of the investor's claims related to anti-dumping and countervailing law, and that it therefore could not proceed, declining jurisdiction over these claims.³⁰⁹ *Canfor & al. v. US* thus provides a good example of a tribunal declining jurisdiction over a dispute because the said dispute relates to a subject matter that falls under the authority of an other international adjudicative body, and because that adjudicative body was itself seized, in parallel, by a dispute on that same subject matter.

Exclusivity clauses in outside agreements present an interest, but their effect remains limited for two main reasons. First, they are binding only on the parties to the outside agreement. Hence, the party who invokes the clause might have difficulties convincing the tribunal that the clause shall be applied in the investment dispute. The best example

³⁰⁶ *Canfor & al. v. US* (*supra* n.297).

³⁰⁷ *Ibid.* ¶246.

³⁰⁸ *Ibid.* ¶273.

³⁰⁹ *Ibid.*

is Article 23 of the WTO DSU. As briefly mentioned in the previous Chapter, in a Scenario No.4A situation (WTO law used as a defense on jurisdiction) a defending State could refer to Article 23 of the WTO DSU to challenge the jurisdiction of an arbitral tribunal dealing with a dispute connected to WTO law. In theory, the defending State could attempt to argue that, because of Article 23, the WTO-DSB is the only competent body to apply WTO law. Yet, even if a dispute has been brought before the WTO by another member, this argument would be flawed, as the investor is not bound by this provision.³¹⁰ In this hypothesis, it is in fact the defending State that would be bound by the provision and, in a way, somehow precluded to invoke said provision. Interestingly, in *Philip Morris v. Australia*, the respondent did refer, although implicitly, to the exclusive nature of the WTO dispute settlement body. In its response to the Notice of Arbitration, one of the very few pleading materials published in this case, Australia replied to the investor's attempt to rely on WTO law by explaining that the function of the arbitration clause in the Hong-Kong–Australia BIT was not "to establish a roving jurisdiction that would enable a BIT tribunal to make a broad series of determinations that would potentially conflict with the determinations of the agreed dispute settlement bodies under the nominated multilateral treaties."³¹¹ Australia then added "[t]his is all the more so in circumstances where such bodies enjoy *exclusive jurisdiction*."³¹²

There is no explicit mention of Article 23 of the WTO-DSU, but there is no doubt that the reference to this rule is implied.³¹³ As mentioned in the previous chapter, the investor eventually withdrew the claim based on the WTO law. One might regret this withdrawal, as the tribunal will not have the opportunity to rule on the matter and we will not know if the tribunal would have considered that Article 23 could be referred to by the parties and applied in the case.

The second limit to the application of exclusive jurisdiction clauses found in other treaties follows from the first one. At least one of the parties to the investment dispute is not bound by the exclusivity clause to be found in the other agreement. Similarly, one could argue that the tribunal is not bound either. Some authors have actually used this line of argument to highlight the limit of the exclusive nature of the jurisdiction of the WTO DSB. Marceau and Kwak for instance claim that "[...] Article 23 cannot prohibit tribunals established by other treaties from exercising jurisdiction over the claims

³¹⁰ P. Mavroidis, 'Dispute Settlement in the WTO (Mind Over Matter)' (May 2015) *Robert Schuman Centre for Advanced Studies Research Paper*, available upon subscription at <http://cadmus.eui.eu/bitstream/handle/1814/35980/RSCAS_2015_34.pdf> (last consulted 1 Aug. 2015) 23.

³¹¹ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Australia's Response to the Notice of Arbitration (21 Dec. 2011) ¶35.

³¹² *Ibid.* [emphasis added].

³¹³ As T. Stewart notes in his work on the negotiating history of the Uruguay round, the language and the preparatory work of Article 23 make it crystal clear that this provision was intended to function as an exclusive jurisdiction clause. See T. P. Stewart, *The GATT Uruguay Round: a Negotiating History (1986-1992)* (1993) 2777-79.

arising from their treaty provisions that run parallel to, or overlap with, the WTO provisions."³¹⁴

Arguably, whether or not a tribunal will accept to apply a provision to be found in an outside treaty depends on the discretion of the tribunal and on its approach towards the applicability of non-investment rules in the dispute.³¹⁵ Some tribunals may be willing to show deference to the other court and accept to look at the exclusive jurisdiction clause contained in the other agreement. Others may not.³¹⁶

What seems certain, however, is that the existence of the exclusive jurisdiction clause in the outside treaty alone might not suffice to convince the tribunal. Reference to the abstention doctrines mentioned in the previous development might be used to justify a decision pursuant to which jurisdiction over a claim that is based on an outside agreement is denied.

Finally, it is important to recall that the existence of an exclusive jurisdiction clause in an outside treaty can be seen as a 'legal impediment', that makes a given claim inadmissible.³¹⁷ As mentioned in the previous section, it is argued that the relation between the claim and trade law relates more to the admissibility of the claim rather than the jurisdiction of the tribunal. The existence of an exclusive jurisdiction clause might be an important element that will make an admissibility objection stronger.

2. Forum Selection Clauses

IAs do not include exclusive jurisdiction clauses. They might however contain forum selection clauses, which may be used to regulate parallel proceedings. For instance, 'fork-in-the-road clauses' give the investor the possibility to choose between different dispute settlement mechanisms (usually proceedings before local courts, proceedings before an international tribunal), but only if none of the other options available have already been chosen before.³¹⁸ In other words, these clauses require the investor to make a definitive election of a forum, prior to the initiation of the proceedings.

Similarly, waiver (or 'no U-turn') clauses, provide that an investor may initiate arbitral proceedings only if it waives the right to initiate or continue any proceedings relating to

³¹⁴ K. Kwak & G. Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' in L. Bartels & F. Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (2006) 465, 476. See also, T. Voon, A.D. Mitchell & J. Munro, 'Good Faith in Parallel Trade and Investment Disputes' in T. Voon, A. Mitchell & M. Sornarajah (eds.), *Good Faith and International Economic Law* (2015) 60, 75-76.

³¹⁵ As we will see in the next Chapter, States may reduce this margin of discretion by providing for detailed applicable law in their investment agreements.

³¹⁶ For instance, *Eureko v. Slovakia* the tribunal dismissed the respondent's objection pursuant to which the tribunal should decline jurisdiction because the dispute related to EU law, and that it should therefore be brought before the CJEU.

³¹⁷ See *supra* p.182.

³¹⁸ On this type of provision, see generally, Dolzer & Schreuer (*supra* n.53) 267-68; McLachlan *et al.* (eds.) (*supra* n.163) 103-09 ; Wehland (*supra* n.164) 86-98.

the same measures in a court or tribunal of the host-State, or before any other dispute settlement body.³¹⁹

These two types of provisions are usually considered as efficient tools to prevent investors from initiating multiple proceedings for the same dispute. However, they are only of limited interest in respect to the problem addressed in the present chapter. Indeed, these clauses apply only when there is some form of close-similarity between the disputes presented before the two adjudicative bodies. Therefore, the same limits as those identified for *res judicata* and *lis pendens* apply; the investor is not a party before the trade adjudicator, and the cause of action is necessarily different. So even if it is proven, as is the case in the Australian Tobacco Package dispute, that there is a strong connection between the State party to the WTO proceedings and the investor before the arbitral tribunal, and that the subject matter of the dispute is relatively similar, the arbitrators could not rely on forum selection clauses to preclude the investor from arbitration. Allan and Soave summarize the issue as follows: "there is no 'fork-in-the-road' for [the] investor to take. An investor does not choose a WTO claim over an investment claim [...]."³²⁰

3. Coordination Clauses

I call 'coordination clauses' the provisions in IIAs that warrant and encourage arbitral tribunals to administrate their proceedings, and the way they handle the cases more generally in order to better manage interactions with other proceedings, or with the activity of other adjudicative bodies.

Within this category we usually find what Allen and Soave call "bounded stay provisions",³²¹ which are the clauses "that empower –but not compel– tribunals to stay their proceedings in situations of overlap",³²² or clauses that enjoin tribunals to seek whether findings from the other proceedings might have an impact on the investment dispute, and in the affirmative, to take into consideration these findings.³²³

The current consolidated draft of the CETA includes such a coordination clause. Article X.23 of the Investment Chapter, entitled "Proceedings under different international agreements", reads as follows:

"Where claims are brought both pursuant to this Section and another international agreement and:

- there is a potential for overlapping compensation; or

³¹⁹ See e.g., McLachlan *et al.* (eds.) (*supra* n.163) 107-09 ; C.F. Dugan *et al.*, *Investor-State Arbitration* (2008) 369-70.

³²⁰ Allen & Soave (*supra* n.231) 54.

³²¹ *Ibid.* 55-56.

³²² *Ibid.* 56.

³²³ *Ibid.*

- the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section,

a Tribunal constituted under this Section shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings pursuant to another international agreement are taken into account in its decision, order or award."³²⁴

It is interesting to note that the investment chapter includes other provisions dealing specifically with parallel proceedings before an investment arbitral tribunal and domestic courts, or before two investment arbitral tribunals. Further, the language in this provision is rather broad. The clause does not mention that the claims have to be the 'same', which exclude a "triple-identity test" type of construction based on the *lis pendens* principle. The clause only mentions the 'potential for overlapping compensation' or, even more interestingly, 'a significant impact on the resolution of the claim' which implies connection, but not necessarily competition. Finally, this provision is entitled 'different international agreement' and not 'different *investment* agreement'. One could thus argue that the very goal of this provision is to address the question of parallel proceedings or jurisdictional interaction between investment arbitration on the one side and another international court or tribunal on the other, for instance the WTO-DSB.³²⁵

Applying this type of provision in the hypothesis raised in the beginning of this chapter, it would be possible to claim that the parallel trade dispute might have an impact on the investment arbitration, and that the tribunal should either stay the proceedings to allow

³²⁴ The current draft of the CETA is available on the EU Commission webpage at <<http://ec.europa.eu/trade/policy/in-focus/ceta/>> (last consulted 1 Aug. 2015).

³²⁵ This argument is even stronger if we recall that Canada has been directly involved in parallel trade and investment proceedings (in the Softwood lumber dispute) and is currently subjected to an investment claim based on WTO law (*Eli Lilly*). Further, the regulation of parallel proceedings before investment and trade adjudicative bodies seems to be an important concern for the EU institutions. Already in the Regulation No 912/2014, which establishes the framework for managing the financial consequences of future EU Investment Disputes, the EU legislator has set a rule pursuant to which the Commission shall act as a respondent in investment arbitration when the same of similar treatment as the one examined by the tribunal is also challenged before the WTO-DSU. Recall that this regulation lays down the rules for managing financial responsibility in investor-State arbitration on the basis of international agreements to which the EU is party. The regulation also deals with the question of who shall act as respondent in the proceedings when the measure challenged by the investor originates both from a Member State and EU institutions. To put it simply, pursuant to the Regulation, it is up to the EU Commission to decide who acts as respondent. Yet, the choice is not entirely discretionary. The Commission shall indeed respect the following logic. The EU shall act as respondent if (i) the EU would bear potential financial responsibility as a result of the dispute, or (ii) the dispute concerns treatment afforded by EU institutions, bodies, offices or agencies. In all other situations, the Member State acts as respondent. However, Article 9.3 of the Regulation No.912/2014 adds an interesting exception: the EU may act as respondent (no matter who might be financially responsible at the end, or no matter who acted at the beginning) if (i) a similar treatment is being challenged in a related claim against the Union in the WTO, (ii) a panel has been established and the claim concerns the same specific legal issue and (iii) where it is necessary to ensure a consistent argumentation in the WTO case. Once again, this exception shows that the EU legislator is aware of the potential problems of having proceedings relating to the same issues unfolding before an investment tribunal and the trade adjudicator at the same time.

the trade adjudicator to arrive at a decision, or make sure that it takes the decision of said adjudicator into consideration.

To my knowledge, there are no other existing IIAs that include this type of provision. Most recent investment agreements concluded either by Canada or any EU Member, do not contain such a clause. It is thus difficult to assess how tribunals would interpret the conditions for the provision to apply and more specifically the notions of 'overlapping compensation' or 'significant impact'. One could say that the scope given to investment tribunals to stay the proceeding and/or consider the decision of the other courts or tribunals, is rather wide, and that it will not prevent arbitrators from deciding against engaging with trade adjudicators if they do not want to. On the other hand, one might also argue that "strict rules or mandated references may unduly constrain the decision-making of tribunals."³²⁶ The formulation used in the CETA, therefore, seems interesting, in the sense that it aims to strike a balance between the necessity of settling the proceedings according to the interest of the parties, and the necessity of taking into account other international procedures that are connected, even only indirectly, to the arbitration. This innovation should certainly be seen as positive.

The inclusion of this type of provision in IIAs is recent. It seems clear that the very reason for their inclusion is to tackle problems related with parallel proceedings and jurisdictional interactions between investment arbitration and other fields of international law, such as trade law. Whilst the efficiency of these types of provisions remains to be seen, they may already be qualified as 'promising'.³²⁷ In any event, they appear as clear evidence of the willingness of States to address the issue in their new instruments.

V. CONCLUSIONS

This chapter has demonstrated that, in principle, the connection to trade law of an investment dispute cannot be used to challenge the jurisdiction of the investment tribunal. Further, we have seen that, should the arbitration clause be broadly drafted, it is possible that a tribunal may even accept jurisdiction over a claim in which trade law is directly invoked. This does not mean, however, that the tribunal will have to accept to decide such a claim on the merits, as it can still qualify it as inadmissible.

We have also seen that interactions might occur between the jurisdiction of investment tribunals and the jurisdiction of the trade adjudicative bodies, most notably when proceedings relating to a similar subject matter are launched simultaneously in the investment and trade fora. This situation should not result in a challenge to the jurisdiction of investment tribunals. Nonetheless, when this happens, it is important for the investment tribunals to observe deference towards the trade dispute settlement

³²⁶ Allen & Soave (*supra* n.231) 55.

³²⁷ *Ibid.*

mechanisms. The general principles of *forum non conveniens* or comity, which belong to the toolbox of investment arbitral tribunals, might be seen as interesting techniques enabling them to do so. Even more interesting is the use of coordinating clauses, which compel arbitral tribunals to take into account the results of the trade proceedings, and more generally to look at how the trade dispute settlement body is dealing with its case. These clauses may be seen as the most efficient way of dealing with jurisdictional interactions between investment tribunals and the trade dispute settlement bodies. Inserting this type of clauses in future IIAs, as the EU has started to do, should therefore be encouraged.

CHAPTER 5.

TRADE IN INVESTMENT ARBITRATION: COORDINATING SUBSTANTIVE INTERACTIONS

I. INTRODUCTION

This last chapter addresses the issue of substantive interactions between investment and trade law. The goal is to demonstrate how an investment tribunal should deal with trade norms once these norms have 'entered', and are being discussed, at the merits stage of an investment dispute.

The main argument I will be defending, is that when it is assumed that trade law has a direct bearing on a given investment dispute, the arbitral tribunal may, and should, engage in a better integration of the trade norms bearing upon the dispute at hand. As we will see, tribunals have the capacity, and the discretion, to use trade law, because they enjoy a relative amount of leeway concerning the selection of the laws and norms applicable to investment disputes. Furthermore, tribunals have the tools to address potential conflicts between trade and investment law. In this respect, I argue that several of these tools may be found in existing general principles of international law. However, we will see that tribunals would be better placed if provided with more precise guidelines for how or when to use these tools. These guidelines should take the form of specific clauses in investment agreements, that aim to regulate interactions with trade law.

The present chapter is structured as follows: In Section II, I look at the principles used to identify and determine the applicable laws to an investment dispute, and investigate the discretion investment tribunals have when selecting the laws governing investment disputes. In Section III, I explain why one of the consequences of this discretion, is that investment disputes are then prone to normative interactions between investment norms and non-investment norms. I then identify what these 'non-investment' norms are, and explain how investment tribunals should engage with them. Section IV specifically addresses the interaction between investment and trade norms, and focuses on the techniques that can be used to regulate these interactions in practice. Section V concludes.

II. THE DISCRETION INVESTMENT TRIBUNALS HAVE REGARDING APPLICABLE LAW

This section deals with the applicable law in investment disputes. After two, brief, preliminary remarks (A), I will explain the extent to which investment arbitration can be qualified as specific (compared to other international dispute settlement mechanisms) when it comes to identifying (all) the law that may apply to a given dispute (B). I will then focus on the principles that guide adjudicators towards the identification of these applicable laws (C) and explain how these principles are applied in practice (D).

A. PRELIMINARY REMARKS

Terminology

In this chapter, I will be referring to the notion of 'applicable law' (or 'governing laws', which is identical) and not that of 'sources of law'. These notions are very similar, and are both employed to refer to the bodies of rules in a given legal regime that the adjudicator, of that regime, uses to settle a dispute. For the present paper, however, 'applicable law' seems more pertinent, for at least three reasons. Firstly, and generally, the notion of 'applicable law' is more precise, as it relates to a given situation in an actual dispute. The notion of 'sources of law' is an arguably more general notion, regarding the legal regime as a whole. Hence, one might say that, in a dispute, the adjudicator, in order to identify the law to be used to settle the dispute, may have to look at different sources of law, and when doing so, select the law applicable to the dispute. Ultimately, attention is to be given to these selected laws (applicable law) and not to the broad categories (sources) they come from.¹ Secondly, and more precisely, 'sources of law' is a term that might be more relevant for centralized systems.² Investment arbitration, if we are to consider it a system, is certainly not centralized.³ For example, the laws governing a dispute between a Belgian investor and the state of Hungary, will not necessarily be the same as the laws governing a dispute between a Canadian investor and the United States of America, even though the governing laws of these two distinct disputes may, in theory, derive from the same specific categories of what we may call 'sources of international investment law'. For these reasons, the term 'sources of law' is the more general notion, which

¹ The ICJ recognizes that, in a dispute brought before it, the parties may choose to agree on a smaller pool of laws applicable to their relations, and therefore to their dispute, than the 'sources' referred to in Article 38, without prejudice to that provision. *See e.g.*, the *Serbian Loans* case, where the Court upheld its jurisdiction, but then applied purely domestic law. *Case Concerning the Payment of Various Serbian Loans Issued in France* (France vs. Serbia), PCIJ Rep Series A, No. 20.

² P.C. Mavroidis 'No outsourcing of law? WTO law as practiced by WTO courts' (2008) 102 *Am. J. Int'l L.* 421, 421.

³ This expression, 'decentralized system', is frequently used to highlight the potential for parallel proceedings and conflicts of jurisdiction in the field of investment arbitration. *See e.g.*, A. Reinisch, 'The Issues Raised by Parallel Proceedings and Possible Solutions' in M. Waibel *et al.* (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010) 113, 115.

encompasses the notion of 'applicable law'. The latter is more specific than the first because it is linked to a given dispute, and thus, seems to be more suitable for investment arbitration. Finally, 'applicable law' is the expression employed in most of the case-law emanating from arbitral decisions regarding international investment disputes and relevant BITs.⁴

Applicable Law and Jurisdiction

The second remark regards the axiomatic distinction between jurisdiction and applicable law.⁵ Recall that these two concepts should, in theory, be distinguished. Jurisdiction, is about the power, or authority, of an adjudicator to hear a claim and solve a dispute. The notion of 'applicable law', as explained above, refers to the body of rules that the adjudicator uses to settle a dispute. This distinction is well recognized in international law, and has, to some extent, been recognized by investment tribunals. As we saw earlier, the distinction between the concept of jurisdiction and that of applicable law is not impermeable.⁶ However, it remains fundamental, as it serves as the basis for a better understanding of the rules and techniques available to regulate both interactions and conflicts of jurisdiction, as well as interactions and conflict of laws. The rationale and rules used to apprehend jurisdictional interactions are different from the rationale and rules used to apprehend substantive interactions. We have examined jurisdictional interactions, and how investment tribunals may, and indeed should, deal with them when they relate to investment-trade law, in the previous chapter. Here, we turn our attention to substantive interactions.

B. THE PECULIARITIES OF APPLICABLE LAWS IN INVESTMENT ARBITRATION

Investment arbitration stands as a unique mechanism for international dispute settlement, presenting specificities that are hardly found in other international dispute settlement mechanisms. As demonstrated below, these particularities have an impact on the identification of the law applicable to disputes.

First, let us consider the 'hybrid' nature of investment arbitration.⁷ Investment dispute settlement combines techniques from both public and private international law. The

⁴ Investment tribunals quasi-systematically investigate the rules that need to be used to solve a dispute. When they do so, they usually present the result of their reasoning in a separate section in the dispute, often called 'applicable law'. Rather obviously, other international dispute settlement bodies proceed in a similar fashion. The ICJ, for instance, has been already undertaken such exercise. *See e.g., Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment (3 Feb. 2009), ICJ Reports 2009, 61, at pp. 31-42.

⁵ This discussion is discussed at length in the previous chapter. *See* Chapter 4, pp.146-153.

⁶ Recall for instance, that a tribunal which applies the wrong law to a dispute may be considered as acting in excess of its jurisdiction. *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Peru*, ICSID Case No. ARB/03/4, Decision on Annulment (5 Aug. 2007) ¶85.

⁷ Z. Douglas 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *Brit. YB Int'l L.* 151.

basis of the mechanism is settled in an international treaty, and bears several characteristics of classic public international law dispute settlement,⁸ particularly those of international state liability.⁹ At the same time, several principles applied to the proceedings, the formulation of the award, and to its enforcement, derive from private international litigation, and more specifically, from international commercial arbitration.¹⁰ One of the consequences of this mixed nature, is the combination of different methods used in order to determine the law applicable to investment disputes. On the one hand, the tribunal shall follow indications provided by its constitutional instrument or arbitration rules (e.g. the ICSID Convention), as would any other international tribunal; on the other hand, due to private/ad hoc features of investment arbitration, and the application of principles attached to it, the arbitrators must carefully investigate both the consent of the parties, and their choice as regards all the rules they have chosen to govern a potential dispute between them. This dual approach, specific to investment arbitration, renders the determination of applicable law more complex.

Second, an investment dispute requires arbitral tribunals to investigate "[a] diverse range of legal relationships".¹¹ An investment can hardly be considered to be the result of one single operation, that would require the application of only one set of legal rules. Investments are complex economic operations, and are the result of diverse undertakings (the acquisition of property, the conclusion of a contract, the intervention in public regulatory frameworks, the delivery of concession licenses, the conclusion of financial transactions, etc.) regulated by separate legal provisions (property law, contract law, public law, etc.).¹² In examining an investment claim, arbitrators must take numerous, and not necessarily connected, legal instruments into consideration. Furthermore, whilst not all of these instruments may be considered as 'laws governing the dispute', tribunals

⁸ See e.g., E. De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (2014).

⁹ See, C. Leben 'La responsabilité internationale de l'État sur le fondement des traités de promotion et de protection des investissements' (2004) 50 *AFDI* 683, 694-97.

¹⁰ The commercial nature of investment arbitration has been contested by several authors who argue that, given the principal objective of investor-State arbitration –the judicial examination of the validity of acts passed by government authorities– the proper paradigm to envisage this mechanism should be public law. See e.g., G. Van Harten & M. Loughling 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *Eur. J. Int'l L.* 121. For a general discussion about the different concepts that have been proposed to rationalize investment arbitration, see A. Roberts 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *Am. J. Int'l L.* 45.

¹¹ This expression is used by Douglas to introduce his chapter on 'Applicable Laws' in his work on "The International Law of Investment Claims". Z. Douglas, *The International Law of Investment Claims* (2009) 40. Douglas' approach is further discussed at the end of the present section.

¹² This assertion has been validated by many tribunals, most notably when asserting whether the doctrine of the general unity of investment operation has to be applied. See e.g., *Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013)(hereinafter '*Ambiente Ufficio v. Argentina*') ¶428 ("The doctrine of the 'general unity of an investment operation' is well-established in international investment law [...] Hence, when a tribunal is in presence of a complex operation, it is required to look at the economic substance of the operation in question in a holistic manner").

have to assess the extent of the role these instruments ought to play, if any, in the settlement of the dispute. The assessment operation distinguishes investor-State arbitration from other international dispute settlement mechanisms.

In addition to these two specificities, it can be noted that the rules followed by a tribunal to determine the applicable law to an investment dispute are generally formulated in a rather vague and broad manner. Investment tribunals enjoy considerable latitude regarding the laws they may or may not apply, arguably broader than that enjoyed by other international dispute settlement bodies.

It is, for instance, broader than the latitude enjoyed by the International Criminal Court (ICC) or the International Tribunal for the Law of the Sea (ITLOS). The laws governing the disputes brought before these two dispute settlement bodies are clearly delimited in their respective constitutional instruments, the United Nations Convention on the Law of the Sea ('UNCLOS') for the ITLOS, and the Rome Statute of the International Criminal Court.¹³ Rules applicable to these adjudicators are easily identifiable in advance, and limited to specific texts and normative instruments.¹⁴

Similarly, in WTO dispute settlement, the pool of norms to be applied by the panels or the Appellate Body ('AB') seems to be strictly limited, even though the Dispute Settlement Understanding ('DSU') does not include an applicable law clause *per se*.¹⁵ Pursuant to Article 1.1 of the WTO-DSU, the instruments (covered agreements) to be applied by a panel or the AB are the ones listed in Appendix 1.¹⁶ The list is to be read in light of Articles 3.2 and 23 of the DSU. These provisions do not prevent WTO judges from applying other sources of international law.¹⁷ Yet, they allow for the identification

¹³ The applicable law rules for disputes submitted before the ITLOS are included in Article 23 of the ITLOS Statute, and Articles 288 and 293 of the UNCLOS. The applicable law rules for disputes submitted before the International Criminal Court are included in Article 21 of the Rome Statute.

¹⁴ See M. Forteau, 'The Diversity of Applicable Law before International Tribunals as a Source of Forum Shopping and Fragmentation of International Law: An Assessment' in R. Wolfrum & I. Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?* (2013) 417.

¹⁵ L. Bartels, 'Jurisdiction and Applicable Law in the WTO' (2014), Cambridge Legal Studies Research Working Paper N.59/2014, 16.

¹⁶ The text of this Article reads (emphasis added):

"Article 1 - Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of *the agreements listed in Appendix 1 to this Understanding* (referred to in this Understanding as the "covered agreements")."

The Appendix 1 mentions the Agreement Establishing the World Trade Organization, the Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Understanding on Rules and Procedures Governing the Settlement of Disputes, and four Plurilateral Trade Agreements (Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement, and International Bovine Meat Agreement).

¹⁷ See, Mavroidis (*supra* n.2). See also, L. Bartels 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 *J. World Trade* 419; I. Van Damme, 'Jurisdiction, Applicable Law, and Interpretation' in D. Bethlehem *et al.* (eds.), *Oxford Handbook of International Trade Law* (2009) 298.

of the rules applicable to a dispute brought before a panel and the AB, and for the identification of the rules that, a priori, may not be applied by said organs. Pursuant to these rules, the WTO Dispute Settlement Body (WTO-DSB) does not have the authority to assert whether the comportment of a State is valid under an international agreement which is not mentioned in Appendix 1, or under customary international law. Article 3.2 simply requires the WTO judge to evaluate the conduct of a contracting party to the organization, based on the laws of the organization; laws that must be interpreted in accordance with customary international law. Thus, it might be argued that laws deriving from customary international law, or laws which are considered general principles of international law, are not, strictly speaking, laws applicable to a dispute brought before the WTO-DSB; they are simply interpretative elements. By the same token, domestic law is not mentioned in the above-mentioned provisions. WTO panels, when reviewing a given State measure, might find it necessary (or might be requested by a party) to look at the content of the municipal law of the State in question. It cannot, however, be argued that domestic law belongs to the norms 'governing' a WTO dispute. Domestic law will be referred to as a factual or interpretative element,¹⁸ but not a purely legal one.

The study of the rules that must be used by tribunals to determine laws applicable to a dispute shows that it is slightly different in investment dispute settlement. Investment tribunals enjoy much latitude regarding the law applicable to the dispute they ought to settle.

C. THE RULES FOR THE DETERMINATION OF APPLICABLE LAWS

1. The Principle: The Law(s) Chosen by the Parties

In international arbitration, it is commonly accepted that the parties to a given dispute may choose the law applicable to the dispute.¹⁹ This affirmation derives from the cardinal principle of party autonomy in international arbitration.²⁰ The principle that arbitrators have to apply the law chosen by the parties, a principle which plays a 'fundamental' role in international commercial arbitration, is also well recognized in investment arbitration, despite the difference in nature between these two mechanisms.

ICSID Article 42(1), which reads, "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties", is a direct manifestation of this principle. The other arbitration instruments that may be used for investor-State arbitration also express this general principle. For example, pursuant to Article 35(1) of the UNCITRAL 2010 Arbitration Rules, "[t]he arbitral tribunal shall apply the rules of

¹⁸ Bartels (*supra* n.2) 511, referring to *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, Appellate Body Report (19 Dec. 1997) ¶ 65.

¹⁹ E. Gaillard & J. Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), 787-90.

²⁰ *Ibid.*

law designated by the parties as applicable to the substance of the dispute."²¹ The SCC 2010 Arbitration Rules are slightly more exhaustive, with Article 22(1) providing that "[t]he arbitration tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties."

In light of these different provisions, the first step to be taken when determining what is the applicable law to an investment dispute, is to examine the agreement between the parties. In the event of an investment treaty claim, the fact that there is no direct and formal agreement between the investor and the host-State is of little importance. The consent of both the investor and the State, to the arbitration mechanism as a whole, including the law applicable to it, is deemed to be given when the procedure is initiated.²² The host-State chooses the applicable law to a potential dispute when entering into the investment treaty, and the investor accepts this choice when starting the proceedings. This method has been recognized in *Goetz v. Burundi*,²³ and is today well established.²⁴ The first step that needs to be taken is to look at the international investment agreement (IIA) upon which the claim is introduced.

2. The Determination of Applicable Law Following 'Choice of Law' Clauses Contained in IIAs

A first general observation can be drawn from a broad overview of different types of IIAs (including multilateral agreements, such as the ECT) and of several bilateral investment treaty (BIT) models from major capital exporting countries. Not all IIAs designate the laws applicable to a potential investment dispute. In fact, it has been established that

²¹ The wording is the same as that of Article 33(1) of the former version. A virtually identical language is used in the Permanent Court of Arbitration (PCA) 2012 Arbitration rules, and PCA Optional Rules for arbitrating disputes between two parties, of which only one is a State.

²² Without entering into the details of a widely discussed issue, it is usually accepted that the State gives its consent to arbitration by formulating an offer to arbitrate when concluding the IIA (or when passing a law on foreign investment including an arbitration provision), and the investor accepts this offer (and therefore consents as well to arbitration) when issuing its notice of intent or request for arbitration. *See e.g.*, E. Gaillard 'L'arbitrage sur le fondement des traités de protection des investissements' (2003) *Rev. Arb.* 853, 858-59.

²³ *Antoine Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3 (Award, 19 Feb. 1999) ¶94, where the tribunal stated that: "Sans doute la détermination du droit applicable n'est-elle pas, à proprement parler, faite par les parties au présent arbitrage (Burundi et investisseurs requérants), mais par les parties à la Convention d'investissement (Burundi et Belgique). Comme cela a été le cas pour le consentement des parties, le Tribunal estime cependant que la République du Burundi s'est prononcée en faveur du droit applicable tel qu'il est déterminé dans la disposition précitée de la Convention belgo-burundaise d'investissement en devenant partie à cette Convention et que les investisseurs requérants ont effectué un choix similaire en déposant leur requête d'arbitrage sur la base de ladite Convention."

²⁴ Y. Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements, A Guide to the Key Issues* (2010) 191, 195 citing Gaillard (*supra* n.19) 859.

only a minority of IIAs include a choice of law clause.²⁵ A recent study found that, out of 1660 IIAs used as a sample, only 32% explicitly address the question of applicable law.²⁶

A closer look at these IIAs and BIT models allows for a second, and more important, observation. Even when treaties do address the issue of applicable law, the language used is relatively broad, and thus provides the arbitral tribunal with latitude in the determination of applicable law. Indeed, as the following developments demonstrate, choice-of-law provisions do not generally designate specific rules, but rather, refer to 'body of rules' or 'principles'. Further, these designated 'bodies of law' often need to be combined with other 'bodies of law', as most of the clauses on applicable law are not restricted to only one body or sole type of rule. Because detailed guidelines relating to the interactions between these different sources are hardly ever given, arbitral tribunals have the responsibility to combine the different rules or set of rules.

When IIAs do contain choice-of-law provisions, they usually refer to several sources, and tribunals might face the scenario where multiple rules will jointly apply. The most common situation is when the law from a host-State has to be combined with international law.

This is, for instance, the case for the BIT between the Czech Republic and the Netherlands (hereinafter CZ-NL BIT) used in the CME dispute,²⁷ where the arbitrators extensively discussed the question of the interaction between the two bodies of law.²⁸ Article 8(6) of this treaty reads:

"The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

- (1) the law in force of the Contracting Party concerned;
- (2) the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
- (3) the provisions of special agreements relating to the investment;
- (4) the general principles of international law."²⁹

A similar combination lies in the France-Argentina BIT, which gave rise to six ICSID disputes.³⁰ The text of article 8(4) of the that BIT provides as follows:

²⁵ See e.g., C.F. Dugan *et al.*, *Investor-State Arbitration* (2008) 202.

²⁶ J. Pohl, K. Mashigo, A. Nohen "Dispute settlement provisions in international investment agreements: A large sample survey", OECD Working Papers on International Investment, No. 2012/2, 29.

²⁷ *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001).

²⁸ Sacerdoti, who was a party appointed expert in the dispute, uses this article as the basis of a study on applicable law in investment arbitration. See G. Sacerdoti 'Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards' (2004) 19 *ICSID Rev.* 1.

²⁹ The electronic version of this agreement is available on the UNCTAD International Investment Agreements Navigator database at <<http://investmentpolicyhub.unctad.org/IIA>> (last consulted 1 Aug. 2015).

³⁰ Table on file with the author.

"The ruling of the arbitral body shall be based on the provisions of this Agreement, the legislation of the Contracting Party which is a party to the dispute, including rules governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law."

The formulation in these examples show that the wording used to designate the law is not always the same, and may grant tribunals discretion regarding the use of the designated law(s). A tribunal acting upon the CZ-NL BIT will have to render its decision 'on the basis of the law', and it will have to 'take into account' the different sources listed in Article 8.6 of that treaty; whereas a tribunal acting upon the France-Argentina BIT will have its ruling 'based on' the sources listed in Article 8.4 mentioned above. Arguably, the wording of these clauses, for instance 'the tribunal shall apply' or 'the dispute shall be governed by', gives the tribunal less flexibility regarding the use of the norms referred to.³¹

These examples show that governing law clauses may refer to conflict of laws rules. This reference, which is not un-common, widens the scope of applicable laws to a dispute. Indeed, the application of conflict of law rules might result in referring to another system of law, which is not necessarily mentioned in the applicable law clause of the IIA. The example that is usually given is the law of the investor's home State,³² although, at least in theory, even the domestic legal system of a third state, non-party to the dispute, could be somehow elected through this mechanism.³³

Two last remarks can be made on the examples provided above. The CZ-NL treaty, and the France-Argentina treaties, refer to 'principles of international law'. The consequence is, again, a multiplication of the sources potentially applicable by investment tribunals acting upon these types of formulated treaties. Therefore, not only may we find specific international rules included within the toolbox at the disposal of the tribunal (binding for the two States parties to the IIA), but –again, at least in theory– 'principles of international law' regardless of their scope and subject. While the France-Argentina BIT shows that a tribunal can be 'limited' to 'relevant' (whatever that may mean) principles of international law, the CZ-NL BIT shows on the other hand that, 'general principles of international law' can be used by an arbitral tribunal, in addition to 'relevant Agreements between the Parties', the latter source being international treaties concluded between the two parties to the BIT. Second, none of the two clauses give any indication to the tribunal regarding the combination of all the designated and potentially applicable laws, and, as will be demonstrated below, this may be a source of further complication.

³¹ See, Sacerdoti (*supra* n.28) 18-19.

³² M. Audit, 'Le Droit Applicable en Matière d'Arbitrage Fondé sur un Traité de Protection des Investissements' in J.-S. Bergé *et al.* (eds.), *La fragmentation du droit applicable aux relations internationales : Regards croisés d'internationalistes privatistes et publicistes* (2001) 65.

³³ *Ibid.* See also, in the ICSID context, C. Schreuer *et al.*, *The ICSID Convention : A Commentary* (2009) 602.

Certainly, these two examples should not be seen as a representation of the majority of clauses. Some treaties can be more specific, with more precise indications regarding the interaction of different applicable laws,³⁴ or with mechanisms to limit or frame the interpretation of these laws. The US model is pertinent in this respect.³⁵ The governing law clause in that model distinguishes situations between contract and treaty claims, provides for different mechanisms depending on said situations, and gives the parties to the treaty the possibility to submit declarations of interpretation.³⁶ Nonetheless, today such detailed information remains an exception rather than the rule.

In fact, the majority of IIAs do not include choice-of-law provisions. For instance, the BIT models of France (2006), UK (2005) and Germany (2005) are silent on the issue. Applicable law clauses are also absent from the text of the BITs which have been used the most for initiating disputes before an international investment tribunal, namely the US-Argentina BIT,³⁷ or the US-Ecuador BIT, which has been used as the basis for

³⁴ M. Hirsch 'Sources of International Investment Law ' (2011) Paper given in the Conference held by The International Law Association Study Group - International Law Forum of the Hebrew University of Jerusalem on *'The Role of Soft Law Instruments in International Investment Law'* available on the author's SSRN page at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892564>, at 5.

³⁵ The article reads:

"1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its rules on the conflict of laws; and

(ii) such rules of international law as may be applicable."

The US BIT model is available online on the US DoS website at <<http://www.state.gov/e/eb/ifd/bit/>> (last consulted 1 Aug. 2015).

³⁶ The governing law clauses in the US Model reads as follows:

"Article 27 - Governing Law

1. Subject to Paragraphs 2 and 3, when a claim is submitted under Article 20 (Claim by an Investor of a Party), the tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Parties, any relevant rules of international law applicable in the relations between the Parties, and, where applicable, any relevant domestic law of the disputing Party.

2. Interpretation of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to Paragraph 3, if the Parties fail to issue such a decision within 60 days, any interpretation submitted by a Party shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.

3. A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision."

³⁷ See UNCTAD IIA Issue Note, March 2013, p.4, available at <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf> (last consulted 1 Aug. 2015). 'The two IIAs that are most often used, are multilateral agreements: the NAFTA (more than 50 cases) and the ECT (more than 30 cases). The US-Argentina BIT comes next (about 20 cases).

several of the most important recent cases. In these cases, the tribunals had to turn to their constitutional instruments or arbitration rules for guidance. As the next development demonstrates, these instruments provide tribunals with flexibility as well.

3. The Applicable Law in Case of an Absence of Choice

When the IIA does not contain a choice-of-law provision, and the parties have not expressly specified which law shall apply to their dispute, the Tribunal will either try to identify if the parties have implicitly agreed on governing laws,³⁸ or –more likely– try to use the indications given by the instrument upon which the tribunal has been constituted (*e.g.* the ICSID Convention) or by its arbitration rules (*e.g.* UNCITRAL Arbitration Rules, SCC Arbitration Rules).

In this respect, Article 42.1 of the ICSID Convention establishes, in its second sentence, that:

"In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

This formulation is very similar to the ones that may be directly included in IIAs, and leads to the same remarks regarding the relatively broad margin of appreciation left to the tribunal, as well as the necessity to combine the different sources of laws (*i.e.* domestic and international laws). One slight distinction can, however, be made. Indeed, one could argue that contrary to certain BIT provisions mentioned earlier, Article 42(1) actually provides for a limit relating to the application of international law. Nonetheless, recent scholarship tends to argue that the last part of the sentence ("such rules of international as may be applicable") is not to be interpreted as the conditional application of international law, but rather as clarification regarding the type of international law rules that the arbitrators may look at.³⁹ Pursuant to Article 42(1), international law and domestic law are both applicable in investment disputes, and they both have to be coordinated by arbitrators.

UNCITRAL and SCC Arbitration Rules give even more responsibility and flexibility to arbitral tribunals as regards the selection of applicable laws in the absence of choice. In both texts, the only given indication is that the law applied by the tribunal has to be 'appropriate'.⁴⁰

³⁸ In several disputes, tribunals have indeed sought to identify the implicit choice of the parties by looking at the language of the treaty or at the possible agreements concluded between the parties. *See* Schreuer *et al.* (*supra* n.33) 557-58.

³⁹ *Ibid.* 617, citing *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006) ¶88.

⁴⁰ UNCITRAL Arbitration Rules Article 35.1 states that the law applicable to the dispute is the law designated by the parties. Article 35.1 continues as follows "Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines *to be appropriate*". (Emphasis added).

SCC Article 22(1) explains that, in an absence of an agreement regarding the applicable law, "the Arbitral Tribunal shall apply the law or rules which it considers to be the most appropriate".

4. A Variety of Solutions

If it can be argued that all international law dispute settlement mechanisms follow a contractual approach,⁴¹ it can also be argued that this approach is even more evident in investment dispute settlement. The choice made by the parties is primordial, as this choice will lead the arbitral tribunal to the identification of the norms to be applied in the settlement of the dispute. The more detail the choice-of-law clause contains, the less latitude the arbitrators will have in this determination task, and *vice-versa*. However, in practice, the few BITs that do include clauses, do not provide detailed information regarding the rules applicable in case of a dispute. Rather, they designate, in a broad manner, one or several bodies of laws.⁴² In the absence of choice, the tribunal will rely on provisions that are often not precise and give only limited indications.

The direct consequence of this lack of thorough information is that it remains up to the arbitral tribunal to decide upon the laws applicable to disputes. This is a particularly important step in every investment dispute, and it is becoming more and more common for investment decisions and awards to include an entire section on applicable laws to the dispute. In these developments, the tribunals will explain the methodology used to identify all the rules that have to be used to address the questions raised by the parties.

In case several rules apply to the dispute, the tribunals will also have to explain how these rules interact, especially when they derive from distinct sources and legal systems (e.g. international rules, domestic rules, etc.). As we will see in the next section, this has led to numerous solutions in practice.

D. APPLICABLE LAW IN PRACTICE AND REMARKS

From the presentation of applicable law mechanisms, we have seen that the clauses and provisions contained in IIAs, or Arbitration Rules, are limited in scope, and do not provide answers to all the questions regarding applicable laws in investment dispute settlements. Arbitrators are likely to investigate case-law to justify their reasoning in this regard and therefore, an analysis of the practice is necessary. The four following questions, which are of particular interest for our study, have been addressed in practice.

1. The Investment Legal Regime's 'Clinical Non-Isolation'

Firstly, it should be noted that the applicable law debate has been used by investment tribunals to affirm that, in general,⁴³ investment treaties shall not be considered as 'self-

⁴¹ Forteau (*supra* n.14).

⁴² Douglas relies on this observation to argue that these clauses are not choice of law clauses *per se*. Douglas (*supra* n.11) 43.

⁴³ Parties to an IIA could, of course, decide otherwise and indicate in the agreement (and more specifically in the applicable law clause) that disputes arising from that agreement should be settled in accordance with its text only. To my knowledge, no IIA with such a formulation presently exists. Further, in my opinion, it is highly unlikely that this type of 'isolated' agreement will ever see the light of day, as States have a tendency to try and integrate their new IIAs more and more in the field of public international law, notably by using references to other international treaties (for instance, Human Rights treaties or

contained regimes'. The famous passage of the award issued in the first treaty arbitration, *AAPL v. Sri Lanka*, is explicit in this regard:

"[T]he Bilateral Investment Treaty is not a self contained closed legal system limited to provide for substantive materials rules of direct applicability, but it has to be envisaged within a wide juridical context in which rules from other sources are integrated through implied incorporations methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature."⁴⁴

This affirmation, which has been confirmed in several other cases,⁴⁵ highlights the complexity of investment litigation, and the importance of international law. Investment tribunals cannot rely solely on the principal norm upon which they are created, but rather have to look at other legal instruments as well, in order to fulfill their mission. In *AAPL*, the tribunal reckoned that the parties to the disputes reached an agreement to consider the provisions of the Sri Lanka /U.K. BIT as being the primary source of the applicable legal rules. Nonetheless, the tribunal accepted that it should not disregard other international rules of international law.⁴⁶

The *AAPL* discussion on applicable laws is also interesting for how it stresses the impossibility for the tribunal to totally exclude the application of domestic law. Although in that particular case, this was reinforced by the fact that the parties agreed, at least implicitly, to admit to admit supplementary recourse to Sri Lankan domestic law, it shall be clear that investment arbitral tribunals are hardly oblivious to the domestic law.⁴⁷

As mentioned in the introduction of this section, and as further demonstrated in the previous developments, investment law cannot be perceived as isolated from other legal regimes, whether international or domestic. In a typical investment dispute, the tribunal will have to refer to investment norms and other norms (international, domestic, etc.). Table No.1 below identifies all the different 'laws' which can be considered as 'applicable' by investor tribunals depending on the wording of the agreement used in the dispute.

environmental treaties, etc.). For a more exhaustive discussion on the filiation between international investment law and public international law, *see generally* De Brabandere (supra n.8).

⁴⁴ *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990)(hereinafter '*AAPL v. Sri Lanka*')¶21.

⁴⁵ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010)¶121; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award (25 Oct. 2012) ¶113; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 (Award, 31 Oct. 2011)(hereinafter '*El Paso v. Argentina*')¶131.

⁴⁶ This idea was later confirmed by an ICSID *ad hoc* Committee. *See, MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID Case No ARB/01/7, Decision on Annulment (21 Mar. 2007) ¶61 ("the Tribunal had to apply international law as a whole to the claim, and not the provisions of the BIT in isolation").

⁴⁷ The tribunal noted that the "submission of the parties clearly demonstrate[d] that domestic law had a role to play." *See, AAPL v. Sri Lanka* (supra n.44) ¶22.

Table No. 1 – Examples of Different Types of Applicable Law Clauses

	A. No sources mention ed	B. General Formulation	C. Only Internation al law	D. Only Municipa l Law	E. Municipal and ...		
					E.1 Internationa l Law / Principles of Internationa l Law	E2. E1 + specific agreements concluded between the parties to the Treaty	E3. E1+E2+ Others rules
IIA (selected examples)	- Majority of BITs	- Dutch BIT Model	- NAFTA	- UK-Sri Lanka BIT		- Argentina-Spain BIT - CETA	- Belgium-Cyprus BIT
Arbitration Rules (selected examples)		- UNCITRAL Arbitration Rules			- ICSID		

2. Mandatory Rules, Limits to Consent, and the Decisive Role of Arbitral Tribunals in Identifying the Applicable Laws to a Dispute

The third question tribunals have, in the absence of express legal provisions, relates to the limit of the parties' consent. It has been explained that when the parties have chosen a law, "the arbitrators have a duty to apply such law and nothing but such law."⁴⁸ This statement is not entirely correct. Indeed, it is accepted that the parties' consent can be limited at least on one occasion, that is, when the law chosen by the parties is contrary to international public policy.⁴⁹ As Schreuer *et al.* explained,

"The matter is different with regard to certain basic international tenets that may be described as international public policy. These principles would include but not be restricted to peremptory rules of international law. Examples are the prohibition of slavery, piracy, drug trade, terrorism and genocide, the protection of basic principles of human rights, the prohibition to prepare and wage an aggressive war or the use of force contrary to Art. 2(4) of the United Nations Charter. Provisions that would otherwise be applicable, whether contained in an investment agreement or adopted by reference, which violate these basic principles, would have to be disregarded by an ICSID tribunal."⁵⁰

In order to identify these norms, the arbitrators would have to rely on values that are widely recognized by the international community. In this regard, scholars have

⁴⁸ Banifatemi (*supra* n.24) 193.

⁴⁹ See, generally, A.K. Bjorklund 'Mandatory Rules of Law and Investment Arbitration' (2008) 18 *Am. Rev. of Int'l Arb.* 175.

⁵⁰ Schreuer *et al.* (*supra* n.33) 566.

explained that arbitrators should not rely on their conception of 'public policy', nor the one accepted as so in a given legal order.⁵¹ Nevertheless, it would be impossible to identify public principles that have been recognized in all systems of law.⁵² Therefore, arbitrators have to find a challenging equilibrium. Still, international public policy is not fantasy. Investment tribunals and practitioners have, from time to time, referred to it. For instance, in *Inceysa v. El Salvador*, the tribunal, while referring to a condition of legality contained in the BIT,⁵³ reasoned as follows:

"International public policy consists of a series of fundamental principles that constitute the very essence of the State, and its essential function is to preserve the values of the international legal system against actions contrary to it [...]."

This Tribunal considers that assuming competence to resolve the dispute brought before it would mean recognizing for the investor rights established in the BIT for investments made in accordance with the law of the host country. It is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which, as already indicated, is a principle of international public policy."⁵⁴

The tribunal therefore refused to grant the investor's claim. Although the tribunal did not exclude or limit the effect of a rule chosen by the parties and applied *international public policy* instead, this case remains interesting, as it shows that investment treaty tribunals may rely on this conception to modulate the direction given by the parties regarding the applicable law. Cremades, one of the most selected arbitrators in investment disputes, in a dissenting opinion issued in *Fraport v. Philippines*, noted that:

"In cases of gross illegality there may also be other reasons for the inadmissibility of a claim. In some cases, for example, the principles of good faith and public policy may bar a claim. Both good faith and international public policy were important in *Inceysa Vallisoletana S.L. v. Republic of El Salvador*."⁵⁵

Hence, even if it is true that in practice arbitrators are generally reluctant to refer to international public policy, especially because it is difficult to define the notion and identify with precision its content, it may nevertheless have a 'decisive influence' on the tribunal's reasoning regarding the determination of applicable law in a given investment claim.⁵⁶

⁵¹ Gaillard & Savage (eds.) (*supra* n.19) 863.

⁵² *Ibid.*

⁵³ Under this condition, only an investment has to be made "in accordance" with the law host-State can receive the protection of the BIT. For a general discussion on such conditions, see S.W. Schill 'Illegal Investments in Investment Treaty Arbitration' (2012) 11 *L. & Practice Int'l Courts and Trib.* 281.

⁵⁴ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (Award, 2 Aug. 2006)(hereinafter '*Inceysa v. Savador*') ¶¶ 245-48.

⁵⁵ *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Dissenting Opinion of Bernardo M. Cremades (16 Aug. 2007) ¶40.

⁵⁶ Gaillard & Savage (eds.) (*supra* n.19) 860.

The limit of parties' consent highlights the decisive role of investment tribunals in identifying the laws applicable to a dispute. As we will see below, this role is particularly important.

III. INVESTMENTS TRIBUNALS AND NON-INVESTMENT OBLIGATIONS

Mechanisms for the determination of applicable laws in investment arbitration allow tribunals to refer to rules that do not belong to the international investment legal regime. The objective of this section is to shed light on this aspect. The following developments therefore aim to elucidate why, and how, investment tribunals use, apply, or refer to norms that do not belong to the investment legal regime. I aim to remain upwind of the discussion relating to the potential conflicts between investment law and other branches of law, which is discussed in the next section. Here, the objective is to explain which rules are applied. After a brief explanation of what shall be called 'non-investment-law', I will draw up an inventory of non-investment norms that investment tribunals can use and apply following the choice of laws rules identified in the previous section, and analyze how these norms are used in investment arbitration.

A. INVESTMENT LAW AND NON-INVESTMENT LAW

It is interesting to note that, whilst many have discussed conflicts between investment norms and non-investment norms, the concept of 'non-investment norms' has not been properly defined.⁵⁷ In the next two developments, we will attempt to identify what is investment law, and what is non-investment law.

1. Investment Law: the IIAs

The easiest way to define what 'non-investment law' means, is to proceed *a contrario* and to firstly define investment law. Identifying the sources of international obligations, regarding the protection of investments that are binding for the State, might be of some help in this regard.

Hirsch, has undertaken extensive work on this topic.⁵⁸ In his piece entitled "sources of law in international investment law",⁵⁹ he uses as a point of departure Article 38 of the ICJ Statute, and identifies six categories of normative and quasi-normative instruments: (i) investment treaties, (ii) customary international law, (iii) general principles of law, (iv)

⁵⁷ See e.g., A. Reinisch, "'Investment and...' - The Broader Picture of Investment Law' in A. Reinisch & C. Knahr (eds.), *International Investment Law in Context* (2008) 201.

⁵⁸ Hirsch (*supra* n.34). See also, M. Hirsch, 'Interactions Between Investment and Non-Investment Obligations' in P. Muchlinski, F. Ortino & C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) 1008; M. Hirsch, 'Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective' in T. Broude & Y. Shany (eds.), *The Shifting Allocation of Authority in International Law* (2008) 323.

⁵⁹ Hirsch (*supra* n.34).

judicial decisions, (v) scholarly writings, and finally (vi) soft-law. Although it is admitted that all of these 'sources' may "play an important role in numerous important cases",⁶⁰ one must recognize that this is not sufficient to be qualified as investment law.

Even Hirsch agrees that the investment treaty, which is to say, the norm that grounds the cause of action of an investment dispute, is 'the centerpiece' of the investment legal regime.⁶¹

Accordingly, the principal 'source' of international investment law is to be found in the framework of approximately 3000 IIAs. Let alone the situations where a law of the host-State or a specific agreement between the host-State and the investor is used as the basis for arbitration, which are outside the scope of the present study, investment tribunals are created on the basis of the investment treaty. As mentioned earlier, investment arbitration is a specialized dispute-settlement mechanism, focusing on the enforcement of obligations on a State towards the investor of another State. These obligations are found in treaties entered into between the former and the latter.

Investment treaties represent the principal source of investment law. But investment treaties are not self-explanatory, and have to be interpreted. The result of the interpretation of these obligations by investment tribunals, may therefore be associated to this principal source. Although the binding-nature of arbitral precedent is still debated in practice,⁶² and in the literature,⁶³ it seems reasonable to consider investment arbitration case-law as a secondary source of investment law, as it will very often –if not systematically– be used by investment tribunals to determine the applicability of the obligations contained in IIAs, which is to say, investment law obligations.⁶⁴

Investment tribunals have significantly used customary international law. It is difficult to assert that it should not be considered as a direct source of international investment law. Custom is a source of international law in general, and some customary rules relate to the protection of foreign property, which is, in essence, a core principle of investment

⁶⁰ *Ibid.*, 8.

⁶¹ *Ibid.*, 3.

⁶² See e.g., *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 Apr. 2005) ¶23 (references omitted, emphasis added), where the tribunal affirmed, in a very clear way that:

"The provisions of Article 25 of the ICSID Convention together with fundamental principles of public international law dictate, among others, that the Tribunal respects:

[...] the rule according to which each decision or award delivered by an ICSID Tribunal is only binding on the parties to the dispute settled by this decision or award. *There is so far no rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party.* This was in particular illustrated by diverging positions respectively taken by two ICSID tribunals on issues dealing with the interpretation of arguably similar language in two different BITs."

⁶³ See e.g., G. Kaufmann-Kohler 'Arbitral Precedent Dream, Necessity or Excuse?' (2007) 23 *Arb. Int'l* 357.

⁶⁴ Hirsch (*supra* n.34); see also J.P. Commission 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24 *J. Int'l Arb.* 129.

law.⁶⁵ Those specific customary rules may be considered as a secondary source of investment obligations.

These three types of norms –(i) IIAs, (ii) investment jurisprudence and (iii) customary international rules relating to investment protection– represent, in my opinion, what should be called international investment law. These are the three principal sources of investment law.

2. Non-investment Law: The Rest

All of the other legal instruments that may be used in investment arbitration are to be categorized as non-investment norms. But, and this is fundamental, this does not mean that obligations based on rules belonging to this second category cannot be applied by investment tribunals. On the contrary, as explained above, mechanisms of applicable law in investment dispute settlement allow the application of non-investment law in investment disputes. Hence, these mechanisms can be considered as 'gateways' for the use of non-investment law in investment disputes.⁶⁶

B. IDENTIFICATION OF NON-INVESTMENT OBLIGATIONS APPLICABLE IN INVESTMENT DISPUTES

Non-investment laws applied to investment disputes derive from different sources of law. These sources can be divided into two broad categories: municipal law and international law.

1. Municipal Law

A complete explanation of the relevance of municipal law in investment treaty arbitration is beyond the scope of this chapter.⁶⁷ Nevertheless, it is worth briefly explaining which municipal laws may be used by an investment tribunal and why this matters. In that respect, the following observations can be made.

Firstly, one may ask which State's domestic law the arbitrators may apply? As already noted, investment tribunals are likely to apply the domestic law of the host-State,⁶⁸ and

⁶⁵ C. McLachlan, L. Shore & M. Weiniger (eds.), *International Investment Arbitration : Substantive Principles* (2007) 16-17.

⁶⁶ V. Prislán, 'Non-Investment Obligations in Investment Treaty Arbitration - Towards a Greater Role for States' in F. Baetens (ed.), *Investment Law Within International Law: An Integrationist Perspective* (2013) 4-50.

⁶⁷ This question has been deeply analyzed by M. Sasson; see, M. Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International and Municipal Law* (2010).

⁶⁸ For instance, when addressing questions regarding the existence of property rights that are considered as constituting the investment. By way of example, in *EnCana v. Ecuador*, the arbitral tribunal considered that "[f]or there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador." *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Award, 3 February 2006, para. 184.

to some extent the law of the State which the investor is a national of.⁶⁹ In rare instances, investment tribunals can also apply the municipal law of a third-state.⁷⁰

Secondly, even if investment tribunals can apply both international and domestic law, little indication is given regarding the relationship between these two bodies of rules. Certainly, this interaction can be organized in the IIA, but as previously explained, applicable law clauses in IIAs are, usually, broadly drafted, and do not provide for guidelines on how different applicable laws should interact. The ICSID Convention, or the Arbitration Rules that the tribunals could use in absence of an applicable law clause, are not informative in this regard either. Facing this lack of indication, tribunals have developed different approaches to address the problem. In *Goetz v. Burundi*, a 1999 dispute, arbitrators already attempted to summarize what these approaches were.

"In the previous case-law the problem of the links between the various applicable sources of international law is posed in the context of the second sentence of Article 42, first paragraph, of the ICSID Convention, and it has received divergent responses, abundantly commented on in academic writings: hierarchical relationships according to some, domestic law applying first of all but being overborne where it contradicts international law; according to others, relationships based on subsidiarity, with international law being called upon only to fill lacunae or to settle uncertainties in national law; according to others again, complementary relationships, with domestic law and international each having its own sphere of application."⁷¹

Today, commentators seem to agree that different laws, rules, or bodies of rules (domestic or international), can be autonomously, and simultaneously, applied by tribunals, depending on the issues in the dispute.⁷² Tribunals have the authority to determine, or 'characterize', what the issues at stake in a dispute are, and then apply, on a distributive basis, the specific rule applicable to the issue.⁷³ For instance, when analyzing an issue regarding the existence of an investment, the tribunal should refer to domestic law; an issue regarding liability of the host-State should be governed by treaty 'as supplemented by general international law', etc. This approach, based on a method inspired by private international law, has been endorsed by several tribunals and it seems to be the predominant approach in contemporary practice.

⁶⁹ For instance, when there is a need to address a question regarding the nationality of the investment. See e.g., *The Flegenheimer Case, Italian-United States Conciliation Commission*, Decision No. 182 of 20 September 1958, XIV R.I.A.A. 327, ¶24; *Ioan Micula, Viorel Micula S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008)(hereinafter '*Micula v. Romania*')¶86.

⁷⁰ As noted by Schreuer, such reference would be possible in cases involving loan contracts, which might refer to the law of the country that grants the loan or the law of a third country which has an important financial centre. Schreuer *et al.* (*supra* n.33) 559.

⁷¹ *Goetz v. Burundi* (*supra* n.23) ¶97.

⁷² Douglas (*supra* n.11) 44.

⁷³ *Ibid.*

Thirdly, one might ask, to what extent may municipal law be applied in investment arbitration? Today, it seems accepted that municipal law might be applied to resolve questions relating both to jurisdiction (existence and legality of the investment), and to the merits of a case (attribution and liability). More specifically, municipal law has been found to be relevant when addressing questions regarding (i) the nationality of the investor, (ii) the existence and the legality of the investment, (iii) the extent to which shareholders may have standing to bring an investment claim, (iv) the interpretation of contractual rights encompassed in the investment claims and (v) the appreciation of a denial of justice allegation.⁷⁴ Looking at these cases, it seems nearly impossible to identify a branch of domestic law that has not been referred to by arbitrators. The law of nationality, investment and establishment law, property law, public law, contract law, competition law, intellectual property law, and procedural law, all belong to the non-exhaustive list of domestic rules that may be applied by investment tribunals.

2. Public International Law

Investment tribunals may be requested to refer to international law in order to solve an investment claim, pursuant to the directions given in the IIA or in their constitutional instrument or arbitration rules. These mechanisms do not, however, specify which 'international law' rules the tribunal may refer to. Practice has shown that a wide range of instruments have been used.

In fact, tribunals have used norms belonging to all of the five traditional categories of international sources of law: (i) treaties, (ii) custom, (iii) general principles, (iv) case-law, and (v) soft-law.

International Treaties

The first category includes international treaties. Of course, investment tribunals rely on investment treaties. But they also rely on non-investment treaties. The list of international treaties and conventions referred to by investment tribunals is extremely long. A broad research on all existing decisions awards issued since the landmark decision in *AAPL*, shows that tribunals have used just over 100 non-IIA international instruments.⁷⁵ At the top of this list we find the Vienna Convention on the Law of Treaties (VCLT), which is used in the majority of investment disputes.⁷⁶ The list also includes many other multilateral agreements, such as the United Nations Charter,⁷⁷ other

⁷⁴ H.E. Kjos, *Applicable law in Investor-State Arbitration - The Interplay Between National and International Law* (2013) 258-68.

⁷⁵ Table on file with the author. The dates correspond to the same one used for the research presented in Chapter 4.

⁷⁶ J.R. Weeramantry, *Treaty Interpretation in Investment Arbitration* (2012) 4-8; M. Waibel, 'International Investment Law and Treaty Interpretation' in R. Hofmann & C.J. Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (2011) 29, 29-30.

⁷⁷ See e.g., *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award (15 Dec. 2014) ¶¶ 559-60, where the tribunal relied on Article 2 of the UN Charter to support its finding that the

trade multilateral agreements,⁷⁸ regional agreements, such as the European Convention of Human Rights or the North American Agreement on Environmental Protection, and bilateral agreements (Treaties of Friendship, Commerce and Navigation, Double Taxation Agreement, etc.).⁷⁹ As these brief examples show, reference to 'other' international norms, that investor-State tribunals may use, is not a term limited to refer to one branch of international law, but rather encompasses various domains.

The reason why arbitral tribunals may refer to these non-investment-related agreements is discussed below. What can be said at this stage, however, is that the examples mentioned above and the list of international agreements referred to by investment tribunals as well as the high number of references to this body of rules show the 'appetite' of the tribunals for international law rules deriving from conventional law.

Customary International Law

The second category is customary international law. As already mentioned, it is possible to identify rules, or principles, of customary international law that actually belong to what one might call international investment law. In addition to these principles, investment tribunals have relied on other general rules of customary international law to fill *lacunas* in IIAs.⁸⁰ For instance, the principles of the State responsibility have been used in a very large number of disputes.⁸¹ In *Enron v. Argentina*, where the tribunal encountered arguments regarding 'necessity', the arbitrators examined the relevant treaty provisions, and stated:

"[A] treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. Had this been the case here the Tribunal would have started out its considerations on the basis of the Treaty provision and would have resorted to the Articles on State Responsibility only as a supplementary means. But the problem is that the Treaty itself did not deal with these elements.

Respondent State had to observe the international human rights obligations it had consented to when concluding international agreements 'in good faith'.

⁷⁸ See Chapter 3 for more detailed information on these references.

⁷⁹ See e.g., *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15 (Award, 31 Oct. 2011) ¶594, where the tribunal relied on the 1956 Nicaragua-United States Treaty of Friendship, Commerce and Navigation (and the ICJ case related to the agreement) to illustrate how other international agreements, similar to BITs, may also contain compromissory clauses.

⁸⁰ Hirsch (*supra* n.34) 8. See also, more generally, T. Gazzini 'The Role of Customary International Law in the Field of Foreign Investment' (2007) 8 *JWIT* 691.

⁸¹ Hirsch (*supra* n.34) 8. See also, J. Crawford 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 *ICSID Rev.* 127 ; J. Kurtz 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25 *ICSID Rev.* 200. Z. Douglas, 'Other Specific Remiges of Responsibility: Investment Treaty Arbitration and ICSID' in J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (2010) 815.

The Treaty thus becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned."⁸²

But these principles relating to State responsibility are not the only customary international rules which have driven the reasoning of investment tribunals. The drafters of the ICSID convention anticipated the importance of customary international law and, at the time the text was designed, attempted to identify the rules that could be applied by investment tribunals. Schreuer *et al*, relying on the history of the drafting of the ICSID convention, and on case-law, have established a list of general rules that have been referred to by ICSID tribunals.⁸³ This list is reproduced below:

- " – the principle of respect for acquired rights
- consequence of a state of necessity
- denial of justice
- the standard of protection in case of an insurrection
- nationalization in breach of stabilization clause
- expropriation requires compensation
- the *Chorzow Factory* standard providing the appropriate measure of compensation for wrongful expropriation;
- a lawful nationalization requires a legislative enactment, taken for a *bona fides* public purpose, non-discrimination and appropriate compensation;
- not only tangible property rights but also contractual rights may be indirectly expropriated;
- jurisdiction is determined by reference to the date on which proceedings are instituted;
- is there a requirement to exhaust local remedies?
- is it permissible to pierce the corporate veil to determine jurisdiction?
- are shareholders protected under general international law?"⁸⁴

Many of these principles have been applied outside the ICSID convention. It is indeed difficult (not to say impossible) to argue that because of the non-application of Article 42(1), a treaty tribunal acting on the basis of the UNCITRAL, or other arbitration rules, would refuse to rely on one of these customary rules, should this was necessary to rule to decide the case.

General Principles of International Law

The third category is that of the general principles of international law. These principles, which have been defined "as general rules on which there is international consensus to consider them as universal standards and rules of conduct that must always be applied

⁸² *Enron Corporation Ponderosa Assets, L.P. v. The Argentine Republic* (also known as *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. The Argentine Republic*), ICSID Case No. ARB/01/3, Award (22 May 2007) ¶334.

⁸³ Schreuer *et al.* (*supra* n.33) 606-07 (references omitted).

⁸⁴ *Ibid.*

and which, in the opinion of important commentators, are rules of law on which the legal systems of the States are based,"⁸⁵ have been applied in numerous instances. The list of these principles is also long.⁸⁶ It includes (i) rules regarding the proceedings, such as *res judicata* or burden of proof, as well as (ii) rules related to the merits and attribution of damages (prohibition of abuse of right,⁸⁷ mitigation of damages⁸⁸). As Schreuer notes, these principles "[a]lthough formally equivalent to treaty and custom, [...] are frequently used to fill gaps left by these two sources."⁸⁹

International Case-Law

The fourth category is international case-law. We have seen in Chapter 4 that tribunals have relied quite often on the case law of WTO panels and AB. In addition, arbitral tribunals have referred to the decisions of other courts and tribunals, including the Permanent Court of International Justice and the ICJ, the ECtHR, the Iran-US Claims Tribunal, and the CJEU.⁹⁰

Soft-law

The last category includes soft law and scholarly instruments. In several cases, investment tribunals have relied on guidelines, or non-legally binding instruments. They can provide guidance to investment tribunals, especially in procedural matters (IBA Guidelines, model laws, etc.). Their importance is nevertheless limited, as it can be argued that, contrary to the other sources, they are not directly referred to by clauses directing the tribunal to apply 'international law' or 'principles of international law'. Hence, Kaufmann-Kohler, who has examined the question in depth,⁹¹ stresses the importance of the codification and applicability of this type of instrument only if they are incorporated in, or associated to, a norm that is mentioned in choice of law clauses.⁹²

3. Remarks

Wide Range of Instruments and Irrelevance of Substantive Discussions

The range of 'non-investment' legal sources that investment tribunals apply is relatively wide. This confirmed an assumption made in the introduction of this dissertation. Investment tribunals refer to trade law. It is a fact. But they refer to other international

⁸⁵ *Inceysa v. Salvador* (*supra* n.54) ¶227.

⁸⁶ Schreuer *et al.* (*supra* n.33) 606-07 (references omitted).

⁸⁷ *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (30 Jun. 2009) ¶¶154-58.

⁸⁸ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (12 Apr. 2002) ¶167.

⁸⁹ Schreuer *et al.* (*supra* n.33) 608.

⁹⁰ See Chapter 3 for data regarding these references.

⁹¹ G. Kaufmann-Kohler 'Soft Law in International Arbitration: Codification and Normativity' (2010) 1 *J. Int'l Dispute Settlement* 283.

⁹² *Ibid.* 288.

norms too. Although it is claimed in the present thesis that trade law is closer to investment law than any other international legal regime,⁹³ it is not repudiated that the tools that need to be used to better clarify the relation between investment and trade law can be used to better clarify the relation between investment and human rights, or investment and international environmental law.

The Use of a Norm whose Application and Interpretation is Reserved for the Exclusive Jurisdiction of another Body

The study of the use of non-investment law confirms another idea which was made in previous developments: Investment tribunals have relied on instruments whose application is –in principle– reserved for the exclusive competence of another body. The various cases where EU law was referred to by tribunals, and in which EU institutions intervened to challenge the jurisdiction of the tribunal on the basis of TFUE Article 344 (exclusive competence of the ECJ), are pertinent examples.⁹⁴ In Chapter 4 we confronted the issue of how the possible jurisdictional interactions that might be created because of this use should be handled for the investment-trade relation. Further research on the regulation of other interactions with regimes, including a dispute settlement mechanism that is exclusively competent for the application of the regime's substantive norms, might be required.

C. OTHER REFERENCES AND USE OF NON-INVESTMENT OBLIGATIONS

In the previous sections of this study, I have explained how investment tribunals may have to apply non-investment laws pursuant to applicable law clauses. In this last development, I focus on the other 'gateways', or 'entry points', that can be used by parties to a dispute, as well as by tribunals, to refer to non-investment laws and other international norms, and how investment tribunals actually use this non-investment law, once it has 'entered' into the dispute.

1. The Entry-Points

Investment tribunals use non-investment law because they can, or sometimes, because they must. When the law says they shall apply domestic or international law, they have an obligation to do it.⁹⁵ As extensively demonstrated in the first part of the present Chapter, the basic entry-point for the application of non-investment obligations is the means for the determination of applicable law (either the choice-of-law clause, or the provision of the arbitration rules regarding governing law). However, this is not the only one. Investment treaties include other provisions that may direct the tribunal to consider non-investment source of law.

⁹³ See Chapter 1, pp.10-25.

⁹⁴ For a discussion on the interaction between EU and Investment Law, *see infra* pp.263.

⁹⁵ It is generally admitted in international arbitration, and in investment arbitration in particular, that a failure to apply the law chosen by the parties may lead to the annulment or the vacatur of the award.

First, IIAs may include what may be called 'legality clauses'. Pursuant to this type of provision, the investor, in order to benefit from the protection of the treaty, must have conducted its operations 'in accordance with the laws of the host-State'.⁹⁶ Examining these clauses, the arbitrators would therefore have to refer to municipal law. Further, a State, as a respondent in arbitration, could also try to use these clauses to request the tribunal to 'apply' international law, by arguing that an international standard, let us say a human right standard, is actually incorporated in its domestic law. In this situation, the investment tribunal, accepting the argument, would have to refer, indirectly, to the international norm.

Second, reference to non-investment law can be made in the definition of a standard protected by the IIA. Thus, for instance, Article 1105(1) of the NAFTA (regarding minimum standard of treatment) provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security". As mentioned in Chapter 3, pursuant to NAFTA Articles 2001 and 1131(2),⁹⁷ the NAFTA Free Trade Commission (the FTC) stated in 2001 that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."⁹⁸ Here, the 'process' that leads a NAFTA Chapter 11 tribunal to apply customary international law is complex (the reference is made in NAFTA Chapter 11 and highlighted by the interpretation of that provision by the State parties to the treaty but particularly interesting. In addition, a body created by the treaty, the FTC, and which is institutionally independent from the tribunal, but entitled to give binding interpretative statements upon the latter, affirmed that the Article 1105(1) standard should be interpreted in accordance with customary international law. Therefore, a NAFTA tribunal willing to assess whether the NAFTA minimum standard of treatment has been respected, would have to apply customary international law. This process was followed in several NAFTA disputes, and notably in *Mondev v. United States*. The award in this dispute discusses the consequences of the FTC's interpretation of Article 1105(1) and concludes that:

"In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly

⁹⁶ See, for a general discussion of such clauses, Schill (*supra* n.53).

⁹⁷ For a detailed analysis of the FTC's activity in this regard, see G. Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' in F. Bachand & E. Gaillard (eds.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (2011) 175.

⁹⁸ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, 31 July 2001, available at <<http://www.state.gov/documents/organization/38790.pdf>> (last consulted 1 Aug. 2015).

provide for "fair and equitable" treatment of, and for "full protection and security" for, the foreign investor and his investments. Correspondingly the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment and to full protection and security."⁹⁹

The tribunal, therefore, held that there was no breach of Article 1105(1).¹⁰⁰

Ultimately, one might argue that this process is of limited value, since the NAFTA choice-of-law provision includes international law, and that therefore the result would have been similar, even if no reference was expressly made to the substantive provision of Article 1105. However, other examples show that reference to international law can be made in the absence of a choice-of-law provision. The France-Qatar BIT is a pertinent example.¹⁰¹ This treaty does not contain any provision regarding applicable law.¹⁰² Nevertheless, Article 3 of the BIT explains that fair and equitable treatment will be assured "in accordance with the principles of International Law". A tribunal requested to apply this standard could use a similar reasoning as the one used by the FTC and the *Mondev* tribunal, and decide to look at customary international law to better interpret the wording of this article.

The result of these different clauses is that investment tribunals would have no option but to refer to non-investment law, even if this law is not mentioned in the choice-of-law clause. This remark highlights the decisive role of the treaty drafters. The lawmakers, which is to say the States, are indeed in the driver's seat regarding the opening of avenues for investment tribunals to refer to non-investment law.¹⁰³

2. The Different Use and Application of Non-Investment Law

Recall that in the previous chapter we established that investor-State tribunals have used trade law for various reasons, and more precisely, in four different scenarios.¹⁰⁴ The goal

⁹⁹ *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) ¶125.

¹⁰⁰ *Ibid.* ¶56.

¹⁰¹ US 2004 BIT Model Article 5.1, which is related to the minimum standard of treatment, contains similar language:

"Each Party shall accord to covered investments treatment *in accordance with customary international law*, including fair and equitable treatment and full protection and security." (Emphasis added).

¹⁰² The arbitration clause, Article 8 of the BIT, offers, in general terms, the possibility to go either before an ICSID tribunal or, in case one of the two States is not member to the ICISD Convention, before an *ad hoc* tribunal, with UNCITRAL arbitration rules being applicable.

¹⁰³ This is consistent with general international law practice. ICJ case law shows that States can always adopt another system of applicable law than the system contemplated in Article 38 of the ICJ Statute. *See e.g.*, *Forteau* (*supra* n.14) 421-23.

¹⁰⁴ *See* Chapter 3. The four scenarios were described as follows:

- Scenario No.1: WTO as a factual or incidental legal element, (used to construe rules or principles that are not substantive investment standards, e.g. general principles of procedures).
- Scenario No.2: WTO as an interpretative element (for substantive investment standards).
- Scenario No.3: WTO norms in the claim.

of the present development is not to proceed with the same exhaustive exercise for all other 'non-investment law' applied by investment tribunals, but to briefly demonstrate that these other 'non-investment' laws have been used for various purposes as well.

Firstly, arbitrators may refer to non-investment law at different stage of the arbitral procedure. Tribunals have indeed referred to non-investment law at the jurisdictional stage, when defining the investment, or the investor, for jurisdictional *rationae materiae* or *rationale personae* purposes.¹⁰⁵ Tribunals have obviously referred to non-investment law at the determination of liability and, for instance, to interpret a treaty standard and assess whether it has been respected. Finally, investment tribunals have applied non-investment law when calculating the amount of damages an investor is entitled to, once the breach has been recognized. The quasi-systematic reference to customary international law, and to the *Chorzow Factory* case, is a good example in this regard.¹⁰⁶

If we now turn to the ways in which investment tribunals actually use non-investment law, we can see that three different ways in which investment tribunal can refer to non-investment law may be distinguished.¹⁰⁷ Firstly, non-investment laws can be treated as 'facts'. This is often the case for domestic law.¹⁰⁸ But other legal sources have been used as 'facts' by international tribunals. For instance, in *AES v. Hungary*,¹⁰⁹ an ECT dispute in which the parties disagreed on whether the host State's behaviour towards the investor was driven by its EU law obligations, the tribunal affirmed that EU law should be considered as fact.¹¹⁰ In that dispute, the tribunal explained that the objective of the arbitration was not to determine whether there is a conflict between EU law and the ECT. Rather, the dispute was about the conformity, or non-conformity, of Hungary's acts and measures with the ECT. Therefore, in the tribunal's words:

- Scenario No.4: WTO norms as a defense.

¹⁰⁵ See Chapter 4, pp.168 *et. seq.*

¹⁰⁶ See Chapter 2, pp.63 *et. seq.* for discussion on damages in international investment arbitration. See also the interesting work of L. Liberti on the possibility of referring to non-investment treaty obligations when assessing damages. L. Liberti, 'The Relevance of Non-Investment Treaty Obligations in Assessing Compensation' in P.-M. Dupuy, E.-U. Petersmann & F. Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 557.

¹⁰⁷ Bartels, in his study on the applicable law before the WTO judges, identifies similar categories for the ways in which the Panels and the AB use non-WTO law when deciding a dispute. Bartels (*supra* n.2), 510.

¹⁰⁸ *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award (29 Mar. 2005) ¶VII.1.B.7 (where the tribunal affirmed that, according to a fundamental principle of international law, "for the purposes of an international law claim, domestic law and governmental measures are essentially matters of fact or evidence"). See also, *Rupert Binder v. Czech Republic*, UNCITRAL, Final Award [Redacted] (15 July 2011) ¶¶390-91 (where the tribunal explained that it derived its competence exclusively from the BIT and was not competent to decide how Czech law is to be interpreted, this being a matter for the Czech courts, but that "in this arbitration Czech law [was] one of the factual elements which the Tribunal must take into account when establishing whether the Czech Republic [had] observed its undertakings in the Czech-German BIT").

¹⁰⁹ *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award (23 Sept. 2010).

¹¹⁰ *Ibid.* ¶7.6.6.

"[I]t is the behaviour of the state (the introduction by Hungary of the Price Decrees) which must be analyzed in light of the ECT, to determine whether the measures, or the manner in which they were introduced, violated the Treaty. The question of whether Hungary was, may have been, or may have felt obliged under EC law to act as it did, is only an element to be considered by this Tribunal when determining the "rationality", "reasonableness" and "transparency" of the re-introduction of administrative pricing and the Price Decrees."¹¹¹

Second, non-investment law can be used as an interpretative element. We saw in Chapter 3 that this has been the case in numerous disputes for international trade law. In this situation, non-investment laws will be integrated in the reasoning of an investment tribunal when construing a provision that needs to be enforced. For instance, investment tribunals have relied on human rights jurisprudence to interpret and determine the contents of various substantive investment obligations.¹¹² Examples include, the definition of expropriation, non-discrimination standards, the rules related to the need to exhaust local remedies, the principle of denial of justice, and the assessment of allocation costs.¹¹³

Finally, non-investment law can be used as a legal element to determine compliance with a provision that is being enforced by the tribunal. In this last scenario, the tribunal will actually 'apply' the non-investment law, verify if it is being respected or not, the conclusion of this verification, in turn, will then be used to verify the application of the IIA provisions. In *Maffezini v. Spain* for instance,¹¹⁴ the tribunal referred and, to some extent, applied Spanish constitutional law, as well as specific Spanish legislation on environmental protection, to rule that Spain could not be held responsible for some of the measures taken towards the investor,¹¹⁵ because these measures were nothing more than the mere consequence of the application of Spanish law applicable to the industry in question.¹¹⁶ In *Chevron v. Ecuador I*,¹¹⁷ one of the claimant's claims was based on a breach of the customary rule prohibiting a denial of justice. The claimant substantiated this claim by referring, *inter alia*, to the jurisprudence from various international and regional

¹¹¹ *Ibid.* ¶ 7.6.09.

¹¹² On the relation between international investment law and human rights in general, see, P.-M. Dupuy, F. Francioni & E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (2009).

¹¹³ J.D. Fry 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke J. Comp. & Int'l L.* 77, 83-96. See also, P.-M. Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in P.-M. Dupuy, E.-U. Petersmann & F. Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 45.

¹¹⁴ *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award (13 Nov. 2000).

¹¹⁵ *Ibid.* ¶¶ 68-69.

¹¹⁶ *Ibid.* ¶ 71.

¹¹⁷ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award (1 Dec. 2008)(hereinafter '*Chevron v. Ecuador*').

human rights bodies.¹¹⁸ In defence, Ecuador argued that, pursuant to the arbitration clause in the treaty, the tribunal did not have jurisdiction to decide upon claims of a breach of customary international law.¹¹⁹ The tribunal rejected this argument and affirmed that the arbitration clause in the treaty did "confer jurisdiction over customary international law claims, as it was in contrast to [...] the wording of large number of other BITs, [...] not limited to causes of action based on the treaty".¹²⁰ Eventually, the tribunal found that the respondent breached a BIT obligation and that it did not need to decide upon the claim based on customary international law.¹²¹ Yet, it seems that for this case the tribunal was ready to apply customary international law, on denial of justice, to the merits of the case.

3. Remarks

This section has shown that the range of legal instruments, not belonging to investment law, that can be used by investment tribunals is relatively broad. Arguably, it allows a better understanding of the numbers given in Chapter 3. In that chapter, I demonstrated that investment tribunals refer frequently to trade norms. Looking more broadly at all the laws that can be used in investor-State arbitration, it is possible to argue that those investment tribunals refer frequently to all type of international norms, including trade norms.

In that sense, we can affirm once more that IIAs cannot be conceived as self-contained regimes, and, more importantly, that they cannot be operated by investment tribunals as if they stood in isolation from other norms that are binding on the States parties to these IIAs. The various above-mentioned 'entry points' to non-investment law incorporated in investment agreements, and the necessity for tribunals to refer to non-investment law when interpreting and applying investment norms, highlight the potential for substantive interactions between investment law and other international norms. Arguably, these interactions need to be regulated. The techniques that can be used to perform this necessary coordination are discussed in the following section.

IV. REGULATING SUBSTANTIVE INTERACTIONS WITH THE TRADE LEGAL REGIME

In the previous section, I demonstrated how investor-State tribunals may have to make use of non-investment law, either because an applicable law clause allows and requests them to do so, or by the operation of other IIA clauses. We have also seen that investor-State tribunals, in fact, do use, and refer frequently to, non-investment law, especially

¹¹⁸ *Ibid.* ¶225.

¹¹⁹ *Ibid.* ¶197.

¹²⁰ *Ibid.* ¶100.

¹²¹ *Chevron v. Ecuador* UNCITRAL, PCA Case No. 34877, Partial Award on the Merits (30 May 2010) ¶275.

trade law. What if this use or reference to non-investment law leads to a conflict between the non-investment norm entering into the dispute and the investment obligations the tribunals have to enforce? In Chapter 3, we have seen for instance that a trade obligation can be referred to by the respondent State to justify (or mitigate) a breach of an investment obligation. Less categorically, we have also seen that investor-State tribunals may be requested to refer to trade norms in order to interpret investment obligations, even if the trade norms are not exactly identical to the investment obligations in question.

This section aims to deal with this question, and in so doing, will address interactions between investment law and the trade legal regime. We will first look at principles to be found in general international law for substantial interaction, and the way investment tribunals apply these principles (A). We will then turn to the way investor-State tribunals have applied these principles when dealing with non-investment law in general. This will allow me to explain how investment tribunals should deal with trade norms in particular (B), and why conflict clauses included in IIAs are important (C).

A. GENERAL PRINCIPLES

The ILC has undertaken important work on the issue of conflicts between international legal rules, which resulted in the publication of a report in 2006, that is considered by many as an important piece of work in the field.¹²² According to this report, there are two major techniques that can be used to deal with an interaction between applicable laws in international dispute settlement: resolving a conflict through the application of one norm over the other norm, and resolving a conflict through the interpretation of one norm in light of the other norm. This affirmation squares with J. Pauwelyn's authoritative work on the issue of conflict of norms in international law.¹²³ In his chapter on conflict in the applicable law, he notes that the conflict avoidance techniques are to be used in case of 'genuine conflicts', which exist where interpretation does not lead to a harmonious reading of the interacting norms.¹²⁴ These two techniques are presented below.

¹²² ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (2006), UN Doc. A/CN.4/L.682 (13 Apr. 2006), as corrected UN Doc. A/CN.4/L.682/Corr.1 (11 Aug. 2006) available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.682> (last consulted 1 Aug. 2015) (hereinafter 'ILC 2006 Report'). See also the conclusions of the ILC on the issue tackled in the Report, which provide a summary of the study, available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.702> (hereinafter "ILC 2006 Conclusions").

¹²³ J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003).

¹²⁴ *Ibid.* 330-31.

1. Application of One Norm Over Another

General international law, contains several provisions that allow an adjudicator facing a conflict of norms (*i.e.* a "situation where a party bound by two international obligations cannot simultaneously comply with its obligations under both treaties"¹²⁵) to determine which of the two conflicting obligations shall have priority over the other. A very simple presentation of these principles is provided in the following developments.

Lex Superior

It is generally accepted that establishing hierarchies amongst international treaties is a difficult endeavor.¹²⁶ Yet, it is also broadly admitted that certain, very limited, categories of international norms prevail over other norms in cases of inconsistency, because these prevailing norms convey values that are considered so fundamental by the international community that they cannot be derogated from.

The concept that most fully encapsulates this higher importance is that of *jus cogens*, codified in VCLT Article 53. Article 53 thus establishes that any inconsistent norm in conflict with a norm of *jus cogens* should be void.

Similar –although not identical– to *jus cogens*, is the concept of 'international public policy' or '*ordre public international*' already discussed in the previous section. This concept conveys the idea that some norms protect particularly important values, and should therefore be applied by arbitral tribunals, irrespective of the will of the parties to the dispute.¹²⁷

Lex Posterior & Lex Specialis

Where rules of *jus cogens* or *public policy* are not involved, other rules of international law regulate interactions between inconsistent international norms.¹²⁸ For instance, the principle of *lex posterior derogate priori*, pursuant to which a later rule prevails over a prior one, which finds application in Articles 30.3 and 59 of the VCLT, provides further guidance for conflicts between two successive treaties on the same subject matter.¹²⁹ VCLT Article 59 provides that when two treaties are in conflict and the parties intended to terminate the earlier treaty (or if this appears from either two treaties), the first treaty (*i.e.* the earlier in time) can be considered as terminated. Article 30, which relates to

¹²⁵ This definition, which is used by Pauwelyn, and other authors, derives from classic studies on conflicts of international treaties. See, C.W. Jenks 'The Conflict of Law-Making Treaties' (1953) 30 *Brit. YB Int'l L.* 401, 426.

¹²⁶ See *e.g.*, P. Weil 'Towards Relative Normativity in International Law' (1983) 77 *Am. J. Int'l L.* 413; D. Shelton 'Normative Hierarchy in International Law' (2006) 100 *Am. J. Int'l L.* 291.

¹²⁷ Gaillard & Savage (eds.) (*supra* n.19) 1322. See also, G. Bermann & L. Mistelis (eds.), *Mandatory Rules in International Arbitration* (2011); C. Kessedjian, "Mandatory Rules of Law in International Arbitration: What are the Mandatory Rules?" (2007) 18 *Am. Rev. Int'l Arb.* 147; P. Mayer, "Mandatory Rules of Law in International Arbitration" (1986) 2 *Arbitration International* 274.

¹²⁸ Hirsch, '*Conflicting Obligations...*' (*supra* n.58) 327.

¹²⁹ G. Marceau 'Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35 *J. World Trade* 1081, 1090.

situations in which the intention of the parties are not obvious. Pursuant to this provision, both treaties continue to exist but one can be considered as temporally suspended.¹³⁰

The other relevant principle in the context of treaty conflicts is *lex specialis derogat generali*. In the words of the ILC, the principle "suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific."¹³¹ For various reasons, and notably because of its difficult application depending on the context in which it is invoked,¹³² the *lex specialis derogat generali* principle has not been codified in the Vienna Convention, and its function in international law might be considered as limited. The main obstacle for the use of that principle is that it is often the case that it is difficult, if not impossible, to establish which norm is *specialis* and which norm is *generali*.¹³³ Yet, the principle has been recognized and applied in a number of cases by the ICJ and seems to be largely recognized in the scholarship.¹³⁴

Importantly, there is a two-tier trigger for the application of the two mentioned principles. First, the adjudicator dealing with the conflict must determine that the rules deriving from the allegedly conflicting treaties are indeed inconsistent. Such determination depends to a significant extent on the interpretation given to the international rules involved. Second, the adjudicator needs to also determine that the rules are dealing with the same subject matter. This involves, again, interpretation. Because of that, as we shall see next, one might suggest that it is preferable to handle normative conflicts through the use of interpretation techniques.

2. Resolving Conflicts Through Harmonious Interpretation

Establishing a hierarchical order between different, potentially applicable, rules to a given problem is problematic. The principles mentioned above have limits, and cannot be used in all norm conflict, or interaction, situations. One might therefore look for a more

¹³⁰ *Ibid.*

¹³¹ ILC 2006 Conclusions, ¶5.

¹³² The ILC notes that the *lex specialis* principle could apply in at least four situations: (i) "between provisions within a single treaty", (ii) "between provisions within two or more treaties", (iii) "between a treaty and a non-treaty standard", and (iv) "between two non-treaty standards". See ILC 2006 Conclusions, ¶5.

¹³³ To give one example, in the WTO legal regime, determining which of the multilateral agreements is *specialis* might be considered as an impossible exercise. See, *EC-Hormones*, WT/DS26/R/USA, Panel Report (18 Aug. 1997) ¶¶8.31-42 (where the panels decided not to address the issue whether the SPS agreement was to be considered as *lex specialis* to the GATT or not). See also, on this specific issue, Pauwelyn (*supra* n.123) 399-404.

¹³⁴ To give only one example of the application of the principle by the world court in a situation of conflict between two distinct international instruments, see, *Mavrommatis Palestine Concessions*, PCIJ Series A, No.2 (1924) at p. 31. See also, for a broad *exposé* of the case law on the principle, ILC 2006 Report, ¶¶68-84. As to scholarship see e.g., Pauwelyn (*supra* n.78) 385-91 and J. Crawford, *Brownlie's Principles of Public International Law* (2012) 708.

moderate approach, which would consist in interpreting the norms in such a way that they can be applied together. This approach, often called harmonious interpretation, is consistent with VCLT Article 31(3)(c).

As the ILC affirmed,¹³⁵ international treaty provisions cannot be interpreted in a vacuum, as they all belong to the same legal order, namely, the international legal order.¹³⁶ This idea constitutes the foundation of Article 31(3)(c), according to which "there shall be taken into account, together with the context [...] any relevant rules of international law applicable in the relation between the parties."¹³⁷

The ICJ and other international courts have provided guidance for the application of this article.¹³⁸ In the *Oil Platform* case of 2003, the ICJ had to interpret Article I of the 1955 Treaty of Friendship and Commerce between US and Iran, pursuant to which "there shall be firm and enduring peace and sincere friendship between the United States of America and Iran."¹³⁹ Referring to its prior case law, the court pointed out that:

"[U]nder the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Art. 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d) of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty."¹⁴⁰

From this affirmation, one might consider that international adjudicators, when facing possible incompatibility between the norm they have to apply in a given dispute, and other legal obligations that are binding on the parties to that dispute, should always attempt to take cognizance of the content of that other legal obligation, as well as the context in which it has been materialized.¹⁴¹

¹³⁵ ILC 2006 Conclusions, ¶13.

¹³⁶ See e.g. P.-M. Dupuy 'L'unité de l'ordre juridique international' (2002) 297 *Hague Recueil* 9.

¹³⁷ P. Sands 'Treaty, Custom and the Cross-fertilization of International Law' (1998) 1 *Yale Human Rights & Dev. J.* 85, 8. Sands affirms that VCLT Article 31(3)(c) "reflects a 'principle of integration.' It emphasizes both the 'unity of international law' and the sense in which rules should not be considered in isolation of general international law".

¹³⁸ See generally, C. McLachlan 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279.

¹³⁹ Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed at Tehran, on 15 August 1955, 284 *UNTS* 93.

¹⁴⁰ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment (6 Nov. 2003), ICJ Reports 2003, 361, at ¶41.

¹⁴¹ P.-M. Dupuy & J.E. Viñuales, 'Human Rights and Investment Disciplines: Integration in Progress' in M. Bungenberg *et al.* (eds.), *International Investment Law - A Handbook* (2015) 1739, 1757.

On the other hand, VCLT Article 31(3)(c) of the Vienna Convention does not suggest that international courts and tribunals, interpreting a treaty provision, have to look at all types of international rules. It is usually accepted that the external rule qualifies for consideration under Article 31(3)(c) if the three following requirements are fulfilled: (i) the rule must be a "rule of international law", (ii) it must be applicable in the relation between the parties, and (iii) it must be relevant.

As to the first one, it is usually widely accepted that 'any rules of international law' means all the sources of international law as listed in Article 38 of the Statute of the ICJ.¹⁴² Both multilateral¹⁴³ and bilateral treaties¹⁴⁴ might be referred to, as well as customary international law¹⁴⁵ and general principles of international law.¹⁴⁶

The second requirement, which relates to the question of whether a rule is applicable in the relations between State parties to a particular treaty, can be separated into three sub-requirements: (i) temporality, (ii) applicability and (iii) relations between the parties. The first one concerns the temporal connection between the rule that is being interpreted and the rule that is being referred to. Because the language of Article 31(3)(c) does not include any temporal limitations, it is considered that all rules applicable between the parties at the date on which the treaty is being interpreted can be referred to, and not just the rules applicable at the date when the treaty was drafted.¹⁴⁷ The second sub-requirement relates to the term 'applicable'. While different views have been discussed in the scholarship,¹⁴⁸ it seems to be accepted that only the rules that are legally 'binding' can be relied upon.¹⁴⁹ Finally the third sub-requirement relating to the phrase 'applicable in the relations between the parties' concerns the relation between the 'parties' to the treaty that is being interpreted. The WTO panel decision in *EC-Biotech Products* casted some doubts as to whether a rule binding upon only a limited number of the parties to

¹⁴² ILC 2006 Report, ¶¶462-70.

¹⁴³ See e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment (20 Apr. 2010), ICJ Reports 2010, 14, at ¶66.

¹⁴⁴ See e.g., *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment (4 Jun. 2008), ICJ Reports 2008, 177, at ¶113.

¹⁴⁵ See e.g., *Oil Platforms (supra n.140)* ¶¶41-42.

¹⁴⁶ See e.g., *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Panel Report (29 Sept. 2006) ¶7.67 and *Golder v. The United Kingdom*, ECtHR, Application No. 4451/70 (Judgment, 21 Feb. 1975) ¶35.

¹⁴⁷ See, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, 21 Jun. 1971, ICJ Reports (1971) 16, at 31. On the issue of intertemporality in the context of Article 31(3)(c), see Pauwelyn (*supra* n.123) 253-68.

¹⁴⁸ On this debate, see, U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Convention on the Law of Treaties* (2007) 178-79.

¹⁴⁹ M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 432. Pauwelyn adopts a broader view and argues that any rule that is "at least implicitly accepted or tolerated" by the parties can be considered under Article 31(3)(c). See, Pauwelyn (*supra* n.123) 261. For a similar view, see also, B. Simma & T. Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C. Binder *et al.* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 678, 698.

the multilateral treaty that is being interpreted, could be referred to pursuant to Article 31(3)(c) or not.¹⁵⁰ Nonetheless, it seems to be accepted that it is sufficient for the States parties to the dispute to be also parties to the treaty relied upon, and thus even if the treaty being interpreted is a multilateral agreement.¹⁵¹ As B. Simma and T. Kill have noted, in the context of investor-State arbitration, the situation is even more complicated, because the parties to the dispute (an investor and a State) will never be parties to another international treaty.¹⁵² As explained below, this has not prevented tribunals from referring to Article 31(3)(c). Indeed, it is accepted that for the purpose of investment arbitration, it seems sufficient that the two parties to the BIT that is being interpreted (the host State party to the dispute and the investor home State) are also parties to the treaty that the arbitrators are referring to in the interpretation process.¹⁵³

Pursuant to the third condition for Article 31(3)(c) to apply, the rule of international law applicable between the parties must be 'relevant'. Like for the other conditions, the meaning and extent of this third requirement has been subject to debate. M. Villiger claims on his side that relevant rules "concern the subject-matter of the treaty term at issue. In the case of customary rules, these may even be identical with, and run parallel to, the treaty rule."¹⁵⁴ Simma and Kill contest this position, arguing that the expression 'same subject matter' is used elsewhere in the VCLT and that the use of another term, *i.e.* 'relevant' suggest a broader scope:

"[i]f the drafters had intended the term 'relevant' to mean 'relating to the same subject-matter' they could have simply repeated the Article 30 formulation in Article 31(3)(c). Instead, the drafters chose to use the term 'relevant', a term whose ordinary meaning is broader than 'addressing the same subject matter'."¹⁵⁵

The debate remains open. Even if one could argue that the ICJ judgment in the *Certain Questions of Mutual Assistance in Criminal Matters* case seems closer to Simma and Kill's reading of relevance, which found that rules from a Friendship and Co-operation Treaty were 'relevant' to interpret rules on mutual criminal assistance in another treaty, it is difficult to affirm that 'relevant' always has to be interpreted.¹⁵⁶ As we will see, the different readings of relevance can have a significant impact on the interpretation of

¹⁵⁰ In that case, the Panel had found that, a treaty which not all the WTO member are parties to, cannot be referred to in application of Article 31(3)(c). See *EC-Biotech Products* (*supra* n.146) ¶¶7.70-75. This position, which greatly diminishes the relevance of Article 31(3)(c), has been criticized by the ILC. See ILC 2006 Report ¶471.

¹⁵¹ ILC 2006 Report, ¶¶471-72.

¹⁵² Simma & Kill (*supra* n.149) 699.

¹⁵³ *Ibid.*

¹⁵⁴ Villiger (*supra* n.149) 433.

¹⁵⁵ Simma & Kill (*supra* n.149) 695.

¹⁵⁶ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment (4 Jun. 2008), ICJ Reports 2008, 177, at ¶113.

investment treaties and, more specifically, on the interpretation of investment treaties by reference to trade law.

B. APPLICATION OF REGULATING TECHNIQUES IN INVESTMENT ARBITRATION

1. In General

Investment tribunals are far from unfamiliar with issues relating to conflicts of law, and the regulation of normative interactions within disputes.¹⁵⁷ In fact, they have had to deal with all of the above-mentioned principles in various cases.¹⁵⁸ Nonetheless, they have used said principles in a relatively cautious manner, favoring a somewhat (case-by-case) conciliatory approach, denying the existence of normative conflicts and resulting in, most of the time, the predominance of investment obligations over non-investment concerns.

Investment Tribunals and Lex Superior

As for *lex superior* and incidences of *jus cogens*, some investment tribunals have, on a few occasions, referred to the concepts, and have made general statements about them and the 'methodology' they implied. In the recurring *Methanex* case,¹⁵⁹ the tribunal, for instance, stated that "as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to parties' choices of law that are inconsistent with such principles."¹⁶⁰ Quoting Pauwelyn, the tribunal in *Phoenix v. Czech Republic* reached a similar statement and affirmed "States in their treaty relations, can contract out of one, more or in theory, all rules of general international law other than those of *jus cogens*."¹⁶¹

In other disputes, tribunals have investigated the content of these concepts even further, by linking them to 'fundamental rights' or basic human rights.¹⁶² For instance, in *EDF v. Argentina*, the arbitrators recognized that it was 'common ground' that investment tribunals had "to be sensitive to international *jus cogens* norms, including basic principles of human rights."¹⁶³ Yet, tribunals have usually avoided stating that a given norm of international law has priority over another one.¹⁶⁴ The only exception seems to be in regard with the concept of public policy. As we have seen in the previous section, arbitrators may call upon the concept of public policy to decide not to apply the law

¹⁵⁷ See generally, A.A. Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration* (2015) 103-46.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (3 Aug. 2005).

¹⁶⁰ *Ibid.* Part IV, Chap. C, ¶24.

¹⁶¹ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) ¶77.

¹⁶² *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 Sept. 2008) 261.

¹⁶³ *EDF v. Argentina*, Award (11 June 2012) ¶909.

¹⁶⁴ Hirsch, 'Conflicting Obligations...' (*supra* n.58) 328-29.

chosen by the parties and subsequently, to rule on a specific question of a given case.¹⁶⁵ Similarly to the cases examined in the previous section, in *World Duty Free v. Kenya*, the tribunal dismissed a contractual claim tainted by bribery. The tribunal ruled that states, in investment treaty arbitration, could escape liability by proving that the aggrieved investor engaged in corrupt activities in connection with the investment under dispute:

"[I]n light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in the matter by courts and international tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all States, or to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."¹⁶⁶

Beside these examples, observers have noted that tribunals are reluctant to establish a hierarchy amongst different international obligations when ruling on a case.¹⁶⁷ They seem to be even more reluctant to favor the application of non-investment laws over investment obligations on the basis of a possible higher 'rank' or importance of the former.¹⁶⁸ The main argument that investment tribunals usually put forward is related to the allegedly limited scope of their jurisdiction, and the impossibility to 'import' non-investment norms within the dispute.¹⁶⁹ In *Siemens v. Argentina* for instance, tribunals considered an argument raised by the Argentine government, according to which its obligations under human rights law required the adoption of the measure challenged by the investor. The tribunal avoided addressing the issue in the following manner:

"The reference made by Argentina to international human rights ranking at the level of the Constitution after the 1994 constitutional reform and implying that property rights claimed in this arbitration, if upheld, would constitute a breach of international human rights law [...] has not been developed by Argentina. The tribunal considers that, without the benefit of further elaboration and substantiation by the parties, it is not an argument that, *prima facie*, bears any relationship to the merits of this case."¹⁷⁰

This type of reasoning has been criticized. Several commentators regret that investment tribunals have been overly cautious, when requested to balance the protection of investor rights with State obligations related to the protection of human rights and fundamental

¹⁶⁵ See *supra* pp.234 *et seq.*

¹⁶⁶ *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 Oct. 2006)157.

¹⁶⁷ Hirsch, 'Conflicting Obligations...' (*supra* n.58) 328-29.

¹⁶⁸ *Ibid.*

¹⁶⁹ This argument, which sends us back to the already discussed distinction between jurisdiction and applicable law, will not be presented once more here. We will simply recall that this distinction is not permeable and that applicable law clauses may be used to inform the scope of the tribunal's jurisdiction.

¹⁷⁰ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 Feb. 2007) ¶79.

liberties.¹⁷¹ They especially stress the limits of the argument on the distinction between jurisdiction and applicable law, whose pertinence fades away when it comes to norms of a particular nature, such as human rights obligations.¹⁷²

Investment Tribunals and other Conflict Regulation Techniques

Investment tribunals have also been cautious in the application of conflict regulation techniques such as *lex specialis* and *lex posterior*, when disputes relate to inconsistencies between IIA obligations and non-investment laws.¹⁷³ In his recently published thesis on the issue of conflicting treaties in investment arbitration, Ghouri notes, for instance, that investor-State tribunals, like other international courts, have had "a tendency to avoid and not resolve treaty conflicts, for which they have developed various techniques, such as reconciling conflicting norms, declaring treaties as parallel instead of conflicting, limited their jurisdiction to only one of the treaty concerned, or simply denying the existence of a treaty conflict."¹⁷⁴

Santa Elena v. Costa Rica is a good example of this reluctance towards traditional conflict regulation techniques.¹⁷⁵ In that case, the respondent requested the tribunal to balance the investor's right to compensation in case of expropriation, with its obligations related to environmental protection, as enclosed in a series of regional and international conventions.¹⁷⁶ The tribunal refused to engage in the discussion on the potential conflict

¹⁷¹ Dupuy & Viñuales (*supra* n.141) 53-54. The authors explain that another reason another reason for why tribunals justify the "debatable stance" taken in *Siemens* and in similar cases "is that investment tribunals have often been reluctant to acknowledge the existence of an outright normative conflict between human rights and investment disciplines because it would place them in a position where a decision as to the relative hierarchy of the two contending norms must be made." *Ibid.* ¶39.

¹⁷² *Ibid.* On the issue of possible conflicts between human rights law and investment law, *see generally*, Dupuy *et al.* (eds.) (*supra* n.112).

¹⁷³ Hirsch, '*Conflicting Obligations...*' (*supra* n.58) 328-29. Note that numerous tribunals have referred to the *lex specialis* principle, but they have done so in other circumstances, most notably when they have to compare the standards of protection offered in BITs and those offered under customary international law. *See e.g. ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 Oct. 2006) ¶481, where the tribunal found that there is general authority for the view that a BIT can be considered as a *lex specialis* whose provisions will prevail over rules of customary international law.

¹⁷⁴ Ghouri (*supra* n.157) 93; 137.

¹⁷⁵ *Compañía Del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 Feb. 2000).

¹⁷⁶ The specific international conventions Costa Rica referred to are not expressly mentioned in the Award. The award only mentions in a footnote that Costa Rica did rely upon "its international legal obligation to preserve the unique ecological site" that was the investor's property. *See. Santa Elena v. Costa Rica* (*supra* n.175) ¶71, n.32. Nonetheless, in an article published after the dispute, Costa Rica's legal counsels listed the instruments referred to. These instruments were (i) the 1971 Ramsar Convention on Wetlands, (ii) the 1972 UNESCO World Heritage Convention, (iii) the 1940 Convention on Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere and (iv) the 1993 Regional Convention for the Management and Conservation of the Natural Forest Ecosystems and the Development of Forest Plantations. *See* C.N. Brower & J. Wong, 'General Valuation Principles: The Case of Santa Elena' in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases From the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005) 747, 764.

between the host-State environmental obligations and the ones owed to the foreign investor. Rather, it disregarded the references made by Costa Rica, explaining that expropriatory environmental measures, no matter how beneficial and laudable to society, had to be compensated, and that "the international source of the obligation to protect environment"¹⁷⁷ made no difference. For the tribunal, the fact that the parties had agreed that, under international law, an expropriation could be made only "against the prompt payment of adequate and effective compensation", meant that it was thus not necessary to take into account the normative sources which led the government to expropriate when (i) deciding about the compensation and (ii) determining the amount of this compensation.¹⁷⁸ This reasoning, which seems logically sound on the surface, has been criticized in doctrine.¹⁷⁹ For instance, Ghouri regrets that the tribunal did not even attempt to envisage whether there was a potential conflict between the host-State's international obligations, and therefore did not look at how this conflict had to be resolved.¹⁸⁰

Beside *Santa Elena*, several other cases have been used to illustrate the (absence of solid) methodology of investment tribunals when facing investment and non-investment norm interactions. In *SPP v. Egypt*,¹⁸¹ Egypt faced an investment claim following its cancellation of agreements with a Hong-Kong's investors, for the development of destination tourism complexes in Egypt near the pyramids. The investor argued that the cancellation of the project amounted to an expropriation of its investment and that they should therefore be compensated. Egypt defended itself arguing, *inter alia*, that the cancellation was required by international law, in accordance with the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.¹⁸² The tribunal, which agreed that international law, and more specifically the UNESCO Convention, was 'relevant' to the dispute,¹⁸³ had to therefore decide whether said Convention, and the registration of the Pyramids Plateau with the World Heritage Committee, forced Egypt to cancel the project. The tribunal carefully examined the

¹⁷⁷ See, *Santa Elena v. Costa Rica* (supra n.175) ¶¶ 71-72.

¹⁷⁸ *Ibid.*

¹⁷⁹ See e.g., J.E. Viñuales, 'Conflits Normatifs en Droit International: Normes Environnementales vs. Protection des Investissements' in S.F.D.I. (ed.), *Colloque d'Aix-en-Provence - Le droit international face aux enjeux environnementaux* (2010) 407; V.S. Vadi 'Cultural Heritage and International Investment Law: A Stormy Relationship' (2008) 15 *Int'l J. Cultural Property* 1; J.R. Marles 'Public purpose, private losses: Regulatory expropriation and environmental regulation in International Investment Law' (2006) 16 *J. Transnat'l L. & Pol'y* 275.

¹⁸⁰ Ghouri (supra n.157) 130-32.

¹⁸¹ *Southern Pacific Properties (Middle East) Limited v. Egypt*, ICSID Case No. ARB/84/3 (Award, 20 May 1992). For a dynamic and fascinating narration of the case, one might refer to Jan Paulsson's lecture at the Paris Arbitration Academy, available online, at <http://www.arbitrationacademy.org/?page_id=3601> (last consulted 1 Aug. 2015).

¹⁸² *Ibid.* ¶ 35.

¹⁸³ *Ibid.* ¶ 78.

scope of application of the Convention, and noted that the contract was cancelled prior to the date that the relevant international obligations, emanating from the Convention, became binding on Egypt.¹⁸⁴ Hence, the tribunal rejected Egypt's arguments regarding the incompatibility between the investment laws and the international Convention. The tribunal investigated the obligations created by the Convention and concluded that the cancellation of the investment project was not externally imposed on Egypt, but rather resulted from Egypt's voluntary actions. Nonetheless, the tribunal accepted that, after the date on which the obligations to protect the site became internationally binding upon its government, Egypt could have been justified in taking such measures. Thus, in the tribunal's words, "a hypothetical continuation of the Claimants' activities interfering with antiquities in the area could be considered as unlawful from the international point of view."¹⁸⁵ Because of this finding, the tribunal declined to award future lost profits. Compensation was ordered only for lost profit until the date when the obligations resulting from the UNESCO Convention became binding on Egypt.¹⁸⁶ According to the tribunal, "from that date forward, the Claimants' activities on the Pyramids Plateau would have been in conflict with the Convention and therefore in violation of international law, and any profits that might have resulted from such activities are consequently non-compensable."¹⁸⁷

Two main conclusions can be drawn from the tribunal's reasoning in *SPP*. It indicates that where a non-investment obligation is externally imposed on a party to an investment agreement, this factor is likely to be taken into account by an arbitral tribunal. However, the reasoning shows that tribunals will not necessarily refer to the traditional normative interactions techniques referred to earlier. Instead, tribunals might adopt their own methodology, based on the factual circumstances of the case, in order to balance obligations related to investment protection and non-investment obligations.

The approach adopted by the tribunal in *Parkerings v. Lithuania*,¹⁸⁸ provides another interesting example of such an absence of general methodology when it comes to substantive interactions. In that case, the investor brought a claim following the termination of a project for the development of a large-scale parking system in the Old Town area of Vilnius, a site included in the UNESCO World Heritage List. One of the reasons given by the Lithuanian authority, for the cancellation, was that the construction of the project would be detrimental to the cultural character of the Old Town, and could destroy a large part of the archaeological heritage of the city. The investor initiated arbitral proceedings on the basis of the Norway-Lithuania BIT, claiming, *inter alia*, that the cancellation led to a breach of the FET and MFN standards of protection. As for the

¹⁸⁴ *Ibid.* ¶ 154.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.* ¶ 191.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 Sept. 2007).

justification given by the Lithuanian authorities with regard to the possible harm that may come to Vilnius' cultural heritage, Parkering claimed that such justifications were ill-founded, due the project having been subsequently handed over to another foreign investor, a Dutch company, which was *de facto* treated more favorably.¹⁸⁹ In response, Lithuania contented that the project agreement with the Dutch company was entirely different, especially because it had been subject to the approval of the authorities in charge of the conservation of the cultural heritage of Lithuania. The tribunal addressed this issue by comparing the two projects, and by establishing whether Parkering and the Dutch company were in 'like circumstances'. The tribunal noted that, in contrast to the project presented by the Dutch company, Parkering's project extended significantly into the UNESCO site of Vilnius Old Town. Notably, the tribunal took into consideration the concerns expressed by the local authorities in charge over cultural heritage, environmental protection, and urban development, and ruled that:

"Despite similarities in objective and venue [...] the differences of size of Pinus Proprius [the Dutch Company] and [Parkering]'s projects, as well as the significant extension of the latter into the Old Town near the Cathedral area, are important enough to determine that the two investors were not in like circumstances. Furthermore, the Municipality of Vilnius was faced with numerous and solid oppositions from various bodies that relied on archaeological and environmental concerns. In the record, nothing convincing would show that such concerns were not determinant or were built up to reject [Parkering]'s project. Thus the City of Vilnius did have legitimate grounds to distinguish between the two projects."¹⁹⁰

The tribunal further noted that the refusal of authorization to proceed with the project "was justified by various concerns, especially in terms of historical and archaeological preservation and environmental protection"¹⁹¹ and concluded that the investor was not treated in a less favorable manner than the Dutch investor.¹⁹² *Parkering v. Lithuania* represents another interesting case in which the tribunal took into consideration non-investment obligations, yet did not draw upon the traditional principles of international law relating to normative interactions.¹⁹³

Finally, in *SD Myers v. Canada*,¹⁹⁴ Canada argued that it should not be held liable for a breach of its NAFTA investment obligations because the measures at stake were taken pursuant to international environmental obligations, *inter alia* those included in the Basel

¹⁸⁹ *Ibid.* ¶¶ 202-03, 281, 363.

¹⁹⁰ *Ibid.* ¶ 396.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.* ¶ 430.

¹⁹³ Ghouri shares the same concern. In his view, the tribunal could have used the VCLT, and more particularly Article 31(3)(c), to interpret the BIT obligation in light of the UNESCO Convention, rather than "engaging in contortions with the like circumstances test." Ghouri (*supra* n.157) 123-24.

¹⁹⁴ *S.D. Myers v. Government of Canada*, UNCITRAL, Partial Award (13 Nov. 2000).

Convention (a UN international agreement dealing with international traffic in chemical compounds and hazardous wastes).¹⁹⁵ The tribunal examined the relationship between the NAFTA and the other international agreement, and noted that both the NAFTA and the Basel Convention included provisions regulating the relations between the two treaties, and that no fundamental contradictions existed between them.¹⁹⁶ Looking in greater depth into the content of the Basel Convention, the tribunal decided that Canada could not refer to it in order to excuse an alleged NAFTA violation. Especially if amongst the variety of equally effective means that Canada could adopt to comply with environmental obligations, one is available that is not inconsistent with its international investment obligations:

"[...] where a State can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade. This corollary also is consistent with the language and the case law arising out of the WTO family of agreements."¹⁹⁷

The tribunal did not attempt to create a hierarchy between NAFTA obligations and non-investment obligations, but rather looked for a solution that ensured that the investment obligations and non-investment obligations could be considered as mutually consistent.¹⁹⁸

Interestingly, in a commentary published several years after the award, M. Hunter –who served as president of the *SD Myers* tribunal– and G. Gonde e Silva, explained that the tribunal could have, in fact, unconsciously applied the transnational public policy principles when it referred to Canada's other international treaty obligations, and could have engaged in balancing them against its NAFTA obligations.¹⁹⁹ While they admitted the difficulties in defining the exact nature, content, and scope of the transnational public policy, Hunter and Gonde e Silva went on to suggest that the notion was a 'flexible and dynamic concept' which could act as a 'corrective mechanism' in the interpretation and application of IIAs.²⁰⁰ Nevertheless, *SD Myers* shows once again that investment tribunals usually avoid direct conflict between investment and non-investment obligations, and regulate the interactions between these obligations using techniques and principles which are not the traditional ones international law offers when it comes to addressing interactions between treaties.

¹⁹⁵ *Ibid.* ¶211.

¹⁹⁶ *Ibid.* ¶¶214-15.

¹⁹⁷ *Ibid.* ¶221.

¹⁹⁸ *Ibid.*

¹⁹⁹ M. Hunter & G.C.E. Silva 'Transnational Public Policy and its Application in Investment Arbitrations' (2003) 4 *JWIT* 367, 371-72.

²⁰⁰ *Ibid.* 374.

Investment Tribunals and the Particularities of the EU-Investment Interaction

The frictions between EU Law and Investment Law which have given, in practice, fruitful discussions on the applicability of conflict regulating techniques.²⁰¹ In several intra-EU BIT cases (*i.e.* where the two parties to the BIT are both EU member states) respondent states have argued that intra-EU BITs should be considered invalid because of their accession to the EU.²⁰² These defenses were based on VCLT Article 30 and 59 and thus gave investment tribunals the opportunity to reason on the principles of *lex posterior* and *lex specialis*.²⁰³

Tribunals have engaged in the application of these principles, but have rejected the arguments by demonstrating that (i) EU law and provisions in the applicable IIAs were not incompatible, and that (ii) EU Treaties and IIAs do not have the same subject matter, despite partial overlap between the guarantees contained in EU law and investment protection standards.²⁰⁴

²⁰¹ A very large number of studies have been published on this issue. Amongst the most recent ones, see *e.g.* A. Reinisch 'The EU on the Investment Path, Quo Vadis Europe-The Future of EU BITs and Other Investment Agreements' (2013) 12 *Santa Clara J. Int'l L.* 111; M. Bungenberg & S. Hobe, 'The Relationship of International Investment Law and European Union Law' in M. Bungenberg *et al.* (eds.), *International Investment Law - A Handbook* (2015) 1602. *See also*, for a broad review of the various issues and doctrinal discussions on this theme, the 2013 special issue of Transnational Dispute Management on 'EU, Investment Treaties, and Investment Treaty Arbitration - Current Developments and Challenges', available upon subscription at <<http://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=47>> (last consulted 1 Aug. 2015). *See also*, M. Burgstaller 'European Law and Investment Treaties' (2009) 26 *J. Int'l Arb.* 181 and C. Söderlund 'Intra-EU BIT Investment Protection and the EC Treaty' (2007) 24 *J. Int'l Arb.* 455, which are cited frequently and appear to be landmark studies.

²⁰² *See e.g.*, *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004, Partial Award (27 Mar. 2007)(hereinafter '*Eastern Sugar B.V. v. Czech Republic*') and *Eureko B.V. v. Slovak Republic (also known as 'Achmea B.V. v. Slovak Republic [I]')*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 Oct. 2010)(hereinafter '*Eureko B.V. v. Slovak Republic*').

²⁰³ For a detailed analysis of this case-law, *see e.g.*, A. Reinisch 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations' (2012) 39 *Legal Issues Eco. Integration* 157.

²⁰⁴ *Eastern Sugar v. Czech Republic (supra n.202)* ¶¶169-73 ; *Eureko B.V. v. Slovak Republic (supra n.202)* ¶¶262-63. *See also*, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction (30 April 2010) ¶¶72-109, in which the exact same objections were made, and rejected, for the exact same reasons. *See further*, Investment Arbitration Reporter case-note about the *European American Investment Bank A.G. (EURAM) v. The Slovak Republic*, UNCITRAL (unpublished) available upon subscription at http://www.iareporter.com/articles/20130117_1 (last consulted 1 Aug. 2015) and *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case no. 2009-11, Partial Award (23 May 2011)(*HICEE v. Slovak Republic*) where the Slovak Republic did not make any objection on the basis of the alleged invalidity of the BITs, even though the facts of these two cases were similar to the ones in previous cases.

Several EU law and international law scholars have criticized the approach of the tribunals in these cases.²⁰⁵ Recently, C. Teijte and C. Wackernagel have argued, for instance, that traditional regulating techniques are difficult to apply because they necessarily result in a 'forceful demonstration of superiority' from one legal order over the other.²⁰⁶ Relying on the jurisprudence related to the interrelationship between the EU legal order and the ECHR, they plead for a 'collaborative attitude' that would consist in a coordination of these competing legal orders.²⁰⁷ For them, "each legal order can prevail to the extent that it is factually and legally possible"²⁰⁸ and only a 'gross violation' of the rules contained in the legal system created by one treaty (for instance the EU Treaties), when applying the other (for instance the IIA), would justify giving priority to the former (EU Treaties) over the later (the IIA).²⁰⁹

Perhaps more interestingly, G. Bermann refers to the notion of 'accommodation strategies' in order to address the attitude investor-State tribunals should show when facing interactions between EU law and international investment law.²¹⁰ According to Bermann, these accommodation strategies are techniques that lead an adjudicator "to interpret one or both of two potentially conflicting norms in such a way as to dispel an apparent contradiction between them."²¹¹ This will usually require the adjudicator to compromise the values and interests of the legal system she or he belongs to, and therefore to "weigh the costs and benefits of compromise in the long as well as the short term."²¹² As Bermann explains, "an important component of that exercise is the decision-maker's assessment of both its vulnerabilities and those of the legal order to which it primarily belongs." Bermann suggests that the vulnerabilities which the international arbitration legal order and the EU legal orders have towards each-other might "operate as an incentive to pursuing accommodation strategies of various sorts."²¹³

Finally, Ghouri suggests that a better way of addressing potential conflicts between investment treaties and EU law would be through systematic interpretation. Relying on the recent case in *Electrabel v. Hungary* where the tribunal expressly referred to Article

²⁰⁵ See e.g., S. Hindelang 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39 *Legal Issues of Eco. Integration* 179.

²⁰⁶ C. Tietje & C. Wackernagel 'Enforcement of Intra-EU ICSID Awards' (2015) 16 *JWIT* 205.

²⁰⁷ *Ibid.* 241-42.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ G.A. Bermann 'Navigating EU Law and the Law of International Arbitration' (2012) 28 *Arb. Int'l* 397, 425-31.

²¹¹ *Ibid.* 428.

²¹² *Ibid.*

²¹³ *Ibid.* 431.

31(3)(c) VCLT,²¹⁴ he notes that "proactive systemic integration where non-investment treaties have a bearing on disputes arising out of investment treaties"²¹⁵ shall be seen as positive.

Investment Tribunals and the Systemic Integration Principle

The last technique mentioned to address interactions between two international norms lies with the principle of systemic integration. As we have seen in the previous development, this principle has been codified in Article 31(3)(c) of the VCLT. Investment tribunals have relied quite frequently on this Article. In fact, to date, it is possible to identify more than a dozen decisions and awards in which tribunals have expressly referred to this Article, and therefore taken into account other relevant rules of international law applicable in the relations between the parties of a dispute, when required to interpret provisions contained in IIAs.²¹⁶ The cause, and impact, of the use of this principle varies from case to case. Reference to Article 31(3)(c) can be accessory, like in the *Azurix v. Argentina* annulment proceedings, where the *ad hoc* Committee briefly mentioned the article but explained that the parties to the dispute had not referred to "any agreement or rules of international law of the kind referred to in [Article 31(3)(c)], other than the BIT and the ICSID Convention, and general principles of customary international law."²¹⁷ For the Committee the use of the principle was therefore moot.²¹⁸ In other cases, reference to Article 31(3)(c) is of considerable importance. In *Al-Warraq v.*

²¹⁴ *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable and Liability (30 Nov. 2012)(hereinafter '*Electrabel v. Hungary*') ¶3.42.

²¹⁵ Ghouri (*supra* n.157) 174-76.

²¹⁶ *Emmis International Holding, B.V. and Emmis Radio Operating, B.V. and Mem Magyar Electronic Media Kereskedelmi És Szolgáltató KFT. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Objection under ICSID Arbitration Rule 41(5) (11 Mar. 2013)(hereinafter '*Emmis v. Hungary*') ¶¶78-81; *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, Award (31 Mar. 2010) ¶84; *Ambiente Ufficio v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013) ¶¶600-07; *Electrabel v. Hungary* (*supra* n.214) ¶3.42; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Award on Respondent Preliminary Objections to Jurisdiction and Admissibility of the Claims (21 June 2012) ¶72.3; *El Paso v. Argentina*, Award (31 Oct. 2011) ¶¶616-24; *HICEE B.V. v. Slovak Republic*, Partial Award on Jurisdiction, ¶134; *European Media Ventures SA v. The Czech Republic*, UNCITRAL, (Partial Award on Liability, 8 July 2009) ¶47; *Micula, v. Romania*, Decision on Jurisdiction & Admissibility (24 Sept. 2008) ¶87 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction & Admissibility (18 Apr. 2008) ¶105; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Abr. V079/2005, Award on Jurisdiction (5 Oct. 2007) ¶119; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) ¶¶207-15; *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, Case No. 080/2004, Award (21 Apr. 2006) ¶¶95-97; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) ¶254; and *AAPL v. Sri Lanka* (*supra* n.44) ¶40.

²¹⁷ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (1 Sept. 2009) ¶85.

²¹⁸ *Ibid.* ¶85.

Indonesia for instance, the tribunal used Article 31(3)(c) to interpret a relatively vague arbitration clause contained in the Organization of Islamic Cooperation Investment Agreement by reference to BIT practice, and accepted jurisdiction over the case.²¹⁹ To this date, *Al-Warrag v. Indonesia* remains the first, and only, investment arbitration case brought before a tribunal through this instrument.

The use of the principle is certainly not without limits. In at least two cases, *Grand River v. US* and *Emmis v. Hungary*, the tribunals noted that the need to take into account other rules of international law does not 'provide a license to import' legal elements found in other treaties, or customary international law, into the arbitration.²²⁰ In other words, Article 31(3)(c) cannot be used to expand the jurisdiction of an arbitral tribunal.

Looking at the case-law on this provision, and at the nature of investment arbitration more generally, one may argue that the systemic integration principle is particularly suitable for addressing normative interactions as envisaged by investment tribunals.²²¹ The technique does not compel tribunals to blindly apply other norms that have no relation whatsoever with the treaty being interpreted. The use of Article 31(3)(c) implies that tribunals enquire as to whether the treaty they are interpreting, and the external norms they may refer to, may be harmonized, and how this can be done. As mentioned previously, the external rule must have a substantial legal relationship with the provision interpreted. Further, the bearing and scope of the external obligation has to be carefully assessed in order to determine the extent to which it should be taken into account in the interpretation of the investment treaty. This exercise necessitates a pragmatic, case-by-case, approach. It also requires a contextual approach. That means looking at the context in which the investment treaty that is being interpreted has been concluded, as well as the context in which the other rule, that is being referred to, has been concluded. These exercises seem in line with both the flexibility required in investment arbitration, and with actual practice.²²²

2. With Trade Norms

Direct Conflict between Trade and Investment Law: Inadequacy of Lex Posterior and Lex Specialis Principles and the VCLT Rules on Conflicts between Treaties?

Turning to the specific interactions between trade and investment treaties, one needs to recall from the previous chapter that direct confrontations between a norm contained in

²¹⁹ *Al-Warrag v. Indonesia* (*supra* n.216) ¶72.3.

²²⁰ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) ¶¶66-67; *Emmis v. Hungary*, Decision on Objection under ICSID Arbitration Rule 41(5) (11 Mar. 2013) ¶¶78-81.

²²¹ C. McLachlan 'Investment Treaties and General International Law' (2008) 57 *ICLQ* 361.

²²² D. Kalderimis 'Systemic Integration and International Investment Law—Some Practical Reflections' (2012) 3rd Biennial Global Conference Working Paper, *Society of International Economic Law (SIEL)*, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101772> (last consulted 1 Aug. 2015).

an IIA, and one contained in a trade agreement, have been rare in practice.²²³ To use Pauwelyn's language,²²⁴ investor-State tribunals have seldom faced arguments based on a 'conflict situation' where compliance or invocation of trade law has led, or would lead, to a breach of an IIA.²²⁵

It is therefore difficult to affirm with certitude what an investment tribunal should do, when faced with an argument, pursuant to which WTO law should trump investment law, or *vice-versa*.

Should this hypothesis occur, and in light of the previous developments, it seems difficult to imagine that investor-State tribunals would rely on the traditional conflicting regulation techniques above-mentioned, such as *lex posterior* and *lex specialis*. Similarly, the VCLT rules on conflicts between treaties (Articles 30, and to some extent Article 59), do not seem to be adequate tools for addressing the issue at hand in the present section. Looking at (i) the conditions for these principles and rules to apply, and especially the 'same subject matter' requirement, and (ii) the existing case-law on these issues, it is unlikely that tribunals will accept to engage in the application of these principles in order to address a possible conflict between investment and trade law.

WTO Law as International Public Policy?

One option to address an argument pursuant to which a given WTO rule trumps investment law, would be to demonstrate that the former belongs to public policy. This should be seen as an innovative proposition, as such a demonstration has never been attempted in practice.

However, one could argue that grounds exist to develop this demonstration. As explained earlier, public policy is concept that is well known by international arbitral tribunals and, more specifically, the international arbitration community.²²⁶ If the exact content of public policy is uncertain, it usually accepted that international public policy is supposed to reflect the fundamental values, basic ethical and economic standards, and the enduring moral consensus of the international business community.²²⁷ One could use the

²²³ See Chapter 3, pp.136 *et. seq.* Recall that this could happen under Scenario No.4, where WTO law is invoked as a defense to justify an alleged breach of investment law.

²²⁴ Pauwelyn (*supra* n.123) 179.

²²⁵ According to the research presented in Chapter 3, this has been the case in only one case. In *Eastern Sugar v. Czech Republic*, the respondent to a dispute claimed that the measure allegedly in breach of the IIAs had been taken pursuant to WTO obligations. The tribunal did not address the argument. See, *Eastern Sugar v. Czech Republic* (*supra* n.202) ¶262.

²²⁶ See *supra* pp.234 *et seq.*

²²⁷ Gaillard & Savage (*supra* n.19), ¶1521; G. Born, *International Commercial Arbitration* (2014) pp.2715-17. Examples include, human rights (such as opposition to racial, sexual and religious discrimination and slavery), *bonos moros* (prohibition against agreements to perform criminal acts, supplying arms to terrorist groups, piracy and comparable acts), fair hearing and due process, as well as rules against bribery and corruption. See, P. Lalive, "Transnational (or Truly International) Public Policy and International Arbitration" in P. Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 257, at pp. 285-286.

malleability of the scope of the notion to argue that WTO law may, in certain circumstances, pertain to international public policy. For instance, the proximity between the rationale of some rules of WTO law and competition law, which to some extent may qualify as public policy, could be used in this respect.

Yet, this demonstration suffers from a number of shortcomings. First and foremost, it is based on the assumption that a form of hierarchy can be observed in international law between different international rules. As we have already seen, this is difficult, if not impossible to establish.²²⁸ For instance, it is not the case that, because WTO agreements are multilateral, they should prevail over IIAs, which, most of the time, are bilateral. Further, as we have also seen in previous developments, in practice, investment tribunals have shown some reluctance towards establishing a hierarchy amongst different international obligations.

It is, therefore, unlikely that an argument, pursuant to which WTO law pertains to public policy, and should therefore prevail over a conflicting investment obligation, would succeed before an investor-State arbitral tribunal.

Harmonious Interpretation between Trade and Investment Obligations

The 'systemic integration' principle seems more suitable for dealing with substantive interactions between international trade and investment law. It is particularly pertinent to address questions related to the previously mentioned Scenarios No.1 and Scenarios No.2. As we have seen in Chapter 4's conclusions, in these situations, investor-State tribunals have an interest in ensuring harmonious interpretation between interacting investment and trade norms. VCLT Article 31(3)(c) is an interesting tool in that regard, for the two following reasons.

Firstly, the conditions for the application of that Article in case of an interaction between a trade and an investment norm, should not be difficult to satisfy. Recall that these conditions are (i) the normative nature of the rule referred to (it has to be a 'rule of international law'), (ii) the binding character of the rule referred to, for the parties to the IIA that is to be interpreted (the rule has to be 'applicable' in the relation between the parties) and finally (iii) the relevance of the rule referred to.

The first and second conditions are not difficult to satisfy. WTO agreements certainly qualify as rules of international law for the purpose of Article 31(3)(c). Further, as mentioned elsewhere in this work, the WTO presently consists of 160 members. The odds that it will be binding upon the parties to a given investment agreement are, therefore, relatively high.

As for the relevance condition, as we have seen, it depends on the interpretation given to the term. One could argue that if one party refers to a trade agreement, it arguably becomes relevant. In addition, as we have seen in the introduction of this work, there are

²²⁸ See e.g., Weil (*supra* n.126) and Shelton (*supra* n.126).

some similarities between the investment and trade disciplines. This similarity necessarily emphasizes the relevance of the reference. If it is difficult to argue that any of the WTO agreements could be considered as having the "same subject matter" as a given IIA, it is, however, possible for a tribunal to be convinced that a WTO agreement is relevant for the interpretation of a notion that is used both in that agreement and in the IIA it has to apply.

Secondly, one should recall that Article 31(3)(c) does not enjoin the investor-State tribunal to apply or enforce the given trade norm that is at play in the investment dispute. For research that have already been explored, enforcement would be problematic. Rather, Article 31(3)(c) enjoins the tribunal to 'take into account' the trade norm, that is, to take cognizance of the norm, and to look at the context in which it has been concluded, and whether this context might inform the context in which the investment norm has been concluded. As mentioned several times in this work, this exercise is supported by the seminal *obiter* from *AAPL v. Sri Lanka*, where the tribunal affirmed that investment law could not be considered a self-contained regime.²²⁹

Finally, as we have seen, this solution seems to be supported in case law, as well as in the scholarship. For instance, Sacerdoti has claimed that Article 31(3)(c) could be used as a tool to connect the investment and trade disciplines back together.²³⁰ On several occasions, E.U. Petersmann has emphasized the role of Article 31(3)(c) in what he calls the "harmonization of substantive international economic law standards"²³¹. Although not addressing the trade-investment relationship specifically, Ghouri has also called for the wider use of Article 31(3)(c), in order to address conflicts between investment obligations and non-investment law.²³²

C. REFERENCE CLAUSES: THE WAY FORWARD?

In *Electrabel v. Hungary*, the Tribunal affirmed in a quite straightforward manner that there was no general principle under international law compelling the harmonious interpretation of all existing legal rules.²³³ This affirmation is not without merits. Article 31(3)(c) of the VCLT gives a possibility international courts to refer to other

²²⁹ *AAPL v. Sri Lanka* (*supra* n.44) ¶21.

²³⁰ See e.g., G. Sacerdoti, 'The Application of BITs in Time of Economic Crisis: Limits to their Coverage, Necessity and the Relevance of WTO Law' in G. Sacerdoti *et al.* (eds.), *General Interests of Host States in International Investment Law* (2014) 3, 10; G. Sacerdoti & M. Recanati, 'From Annulment to Appeal in Investor-State Arbitration: Is the WTO Appeal Mechanism a Model?' in J.A. Huerta-Goldman, A. Romanetti & F.X. Stirnimann (eds.), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (2013) 327.

²³¹ E.-U. Petersmann 'Competing "Principles of Justice" in Multilevel Commercial, Trade and Investment Adjudication: Need for More "Judicial Dialogues" and Legal "Cross-Fertilization"' (2013) 1 *Glob. Community YB Int'l L. & Juris.* 163, 197; E.-U. Petersmann 'The Judicial Task of Administering Justice in Trade and Investment Law and Adjudication' (2013) 4 *J. Int'l Dispute Settlement* 5, 9-10.

²³² Ghouri (*supra* n.157) 146-48.

²³³ *Electrabel v. Hungary* (*supra* n.214) ¶4.173.

international rules, it does enjoin them to do so. For this reason, State sometime choose to include specific provisions in their international instruments to give proper guidelines and instructions on how conflict and interactions between different international treaty shall be deal with by international judges. Often labeled as 'conflict clauses' or 'reference clauses', these provisions either create rules of priory between international instruments in case of conflict or invite judges to refer to a given other international treaty when interpreting the one containing the clause.²³⁴

Trade and investment agreements may include this type of clauses, and in some instances specifically to address trade-investment interactions.²³⁵ NAFTA Article 103 is often mentioned as an example of such clause. This provision, which is included in the first Chapter of the NAFTA, provides that, in case of inconsistency between the rights and obligations created in virtue of the NAFTA and those existing pursuant to GATT, the NAFTA is supposed to prevail.²³⁶

The draft of the CETA agreement includes more interesting examples. For instance, in the First Chapter on Initial Provisions and General Definitions, current Article X.04 entitled 'Relation to other agreements' reads as follows:

"The Parties affirm their rights and obligations with respect to each other under the WTO Agreement and other agreements to which the Parties are party."

In the Investment Chapter (currently, Chapter 1), Article Article X.5 entitled 'Performance Requirements' includes, in its last paragraph, the following provision:

"This article is without prejudice to the WTO commitment of a Party".

Still in Chapter 11, Article X.14 on 'Reservation and Exceptions' reads, in its relevant parts:

In respect of intellectual property rights, a Party may derogate from Article X.6 (National Treatment), Article X.7 (Most-Favoured-Nation Treatment) and subparagraph 1(f) of Article X.8 (Performance Requirements) where permitted by the TRIPS Agreement, including any amendments to the TRIPS Agreement in force for both Parties, and waivers to the TRIPS Agreement adopted pursuant to Article IX of the WTO Agreement.

²³⁴ Pauwelyn (*supra* n.123) 328.

²³⁵ A.R. Ziegler, 'Investment Law in Conflict with WTO Law' in M. Bungenberg *et al.* (eds.), *International Investment Law - A Handbook* (2015) 1784.

²³⁶ The text of Article 103 reads as follows:

"1. The Parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade and other agreements to which such Parties are party.
2. In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement."

The text on the NAFTA is available online at the following address <<http://www.sice.oas.org/trade/nafta/chap-01.asp>> (last consulted 1 Aug. 2015).

These provisions expressly enjoin tribunals to take into consideration WTO law. To some extent, they even establish a form of hierarchy between WTO law and investment norms.

There is no case-law on these provisions.²³⁷ It is impossible elaborate on their application. Yet, these clauses may be seen as interesting instruments to address substantive interactions between trade and investment law. Their inclusion should therefore be encouraged.

V. CONCLUSIONS

This chapter has allowed for the demonstration of the following general argument: investment arbitral tribunals have the legal capacity to apply trade law.

Investment arbitral tribunals enjoy latitude when it comes to identifying and selecting the rules that need to be applied to deal with a case. Of course, States have the possibility to narrow down this latitude by including choice-of-law clauses in their IIAs, and by drafting these clauses so that the options for the rules to be selected remain limited. However, this does not seem to be a trend. The clauses included in 'new generation' IIAs are still relatively broad and usually provide for the application of the IIA itself, and 'other international legal instruments' in force between the parties. As explain in this chapter, reference to these 'other' legal instruments can be seen as a 'gateway' through which international trade law enters an investment dispute.

This gateway, and more generally the rules related to applicable law identified in the present chapter, should be used to address situations identified in Scenarios No.1 and No.2. Investment tribunals have used, and should use, the possibility to refer to, and when necessary apply, trade law when dealing with disputes.

We have further seen that, in cases of interference between the substance of an investment norm and a trade norm that has to be applied, arbitral tribunals have the necessary tools, to avoid direct conflict between the two norms, in their arsenal. Amongst these tools, the use of rules of treaty interpretation, and more specifically Article 31(3)(c) are the ones that should be favored by investment tribunals. In addition, conflict and coordination clauses, whose inclusion in IIAs seems to be becoming standard practice, are interesting instruments to address trade-investment substantive interactions, and notably Scenario No.4 situations.

²³⁷ In *Pope & Talbot v. Canada*, the tribunal did refer to NAFTA Article 103, but did so simply to interpret the language of NAFTA Article 1105. The relation between trade law and investment law was not addressed specifically. See, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 Apr. 2001)¶115.

CHAPTER 6.

GENERAL CONCLUSIONS

"Everything should be made as simple as possible, but not simpler."

A. Einstein

International dispute settlement is certainly as exciting and complex as astrophysics, one of Einstein's numerous fields of expertise. The international judicial universe is still expanding, a myriad of objects dot this universe and the behavior of these objects is often as mysterious as dark matter.¹ In this conclusion, I will summarize the main findings of the present thesis 'as simply as possible', in an attempt to apply the maxim of the great German-born theoretical physicist, by focusing on the framework I attempted to draw in the previous chapters, to which investor-State tribunals should refer when they engage with international trade law. I will then identify the lines of research this work has opened up, the potential study of which will hopefully allow for a better understanding of the international investment legal regime.

I. SUMMARY OF FINDINGS

This thesis aimed to address the following research question: How should investor-State tribunals refer to international trade law, and why? This question was answered through the demonstration of the following points.

International Trade Law and International Investment Law Are Interconnected, and Arguably, Converging Towards Each Other

We saw in the introduction that the international investment and trade legal disciplines are closely interconnected. Investment and trade law share the same 'history', the rules for the regulation of foreign investment and trade once having been blended in single instruments. Although today these rules belong to different institutional structures, several connecting factors between the two disciplines continue to exist. Trade and investment share the same conceptual narrative: While the same pro-market, anti-protectionist bias influenced the development of both trade and investment law after World War II, the two regimes have, since then, been subject to a 'rebalancing', in order to better safeguard the public interest of States through a process of 'maturation'. In

¹ For an insightful and accessible –even for lawyers– presentation on the notion of dark matter in astrophysics, see P. Burchat, 'Shedding Light on Dark Matter' (2008) *Ted Talk*, available at <https://www.ted.com/talks/patricia_burchat_leads_a_search_for_dark_energy> last consulted (1 Aug. 2015).

addition, trade and investment law are based on the same general economic rationale, as both regimes ultimately aim to offer and protect the competitive opportunities of international economic actors. More pragmatically, foreign trade and foreign investment are interdependent and sometimes complementary economic activities. Investment activities may trigger trade flows and *vice-versa*. This interdependence may give occasion for one singular government measure to spawn parallel trade and investment proceedings. Finally, the interdependence between international trade and investment activities has lead governments to conclude agreements that combine regulation of trade and regulation of investment. The number of preferential trade agreements that include a whole set of investment protection provisions is growing and this demonstrates how the regulation of one international economic activity (for instance trade) necessarily implies the taking into account of the regulation of another international economic activity (for instance investment).

In the introduction, we also noted how several authors have looked at these interconnections between international trade and investment law, and have argued that their growing importance indicates convergence between the two disciplines. As we have explained, this argument is not totally misguided, as the line between trade and investment law continues to fade. It is, however, difficult to talk about proper consolidation, as the two regimes remain institutionally different.

Investor-State Tribunals and Trade Adjudicative Bodies Serve Different Functions and the Consolidation of the Two Regimes is Unwarranted

In Chapter 2, we looked at the way investment arbitration operates, especially in comparison to international trade dispute settlement. We have seen that these two adjudicative mechanisms are fundamentally different; especially because they serve different functions, despite the substantive principles applied in both *fora* being relatively similar. Investment arbitration is geared towards individuals and the reparation of the harm their investments might have suffered due to State actions. Trade dispute settlement, on the other hand, focuses on maintaining a state of equilibrium between the trade concessions negotiated by sovereign States. Whereas in investment arbitration the principal form of remedy is presented in the form of monetary damages to be paid to the investor, in trade dispute settlement the remedy usually takes the form of an order to the losing State to withdraw the unlawful measure. From this observation, we concluded, in Chapter 2, that coherence and convergence between trade and investment law could only be achieved through the development of soft integration techniques (rules that allow an adjudicator from one discipline to take into account what an adjudicator from another discipline is saying).

International Trade is Frequently Used by Investor-State Tribunals

In an attempt to better understand how these techniques should be used in investment arbitration, we looked, in Chapter 3, at all the different situations in which investor-State tribunals have used trade law. The main finding of the research, in that respect, was that

references to trade norms in investment arbitration are made more often than one might think. More importantly, we have also seen that these references can be categorized into four different situations: Trade norms are used to illustrate a factual or incidental legal element of the investment dispute (Scenario No.1), to interpret a substantive investment norm (Scenario No.2), as a basis of a claim relating to a breach of an investment obligation (Scenario No.3), and finally, to counter a claim relating to such a breach (Scenario No.4). The examination of these four scenarios led us to conclude that if trade norms are to be used by investment tribunals, they should be used in the most appropriate way, and that this would be facilitated by two types of legal techniques: Techniques that allow for better coordination between the jurisdiction of investment tribunals and trade adjudicative bodies, and techniques that allow for better coordination between substantive investment norms and substantive trade norms. These two sets of techniques were examined in Chapter 4 and Chapter 5.

Techniques Exist to Avoid (Jurisdictional and Substantive) Conflicts When Arbitral Tribunals Apply Trade Law

In Chapter 4, we focused on the concept of jurisdiction and explained why (i) the use of trade norms in a given investment dispute does not necessarily affect the jurisdiction of the investment tribunal dealing with that dispute, and that (ii) investment tribunals may even have jurisdiction over claims that refer directly to trade law. We have also seen that techniques exist to address potential conflicts of jurisdiction between trade and investment adjudicators in cases of parallel or subsequent proceedings. In Chapter 5, we addressed the issue of substantive interactions between investment and trade law and studied how an investment tribunal should deal with trade norms once these norms have 'entered', and are being discussed at, the merits stage of an investment dispute. The main result of this last examination was that when it is assumed that trade law has a direct bearing on a given investment dispute, the arbitral tribunal may, and should, engage in a better integration of the trade norms bearing upon the dispute at hand.

The two sets of techniques identified in Chapters 4 and 5 constitute the analytical framework which investor-State arbitral tribunals can refer to in cases where international trade law is invoked. This framework is schematized and further explained below.

II. THE FRAMEWORK

Scenario	Description	Jurisdiction / Applicable Law	Integration Technique(s) and Principle(s) to be used by Arbitral Tribunals
Scenario No.1	WTO law is mentioned as part of the factual matrix of the case. Also included in this first scenario are what I call accessory legal references to WTO law, which are isolated references to WTO law, used to underpin a legal argument that is not directly linked to investment standards.	<ul style="list-style-type: none"> • No concerns regarding the jurisdiction of the tribunal • No concerns regarding applicable law principles 	<ul style="list-style-type: none"> • Distinction between Jurisdiction and Applicable Law • General Rules Governing the Jurisdiction of Investment Tribunals <hr/> <ul style="list-style-type: none"> • Article 31.3(c) of the VCLT
Scenario No.2	WTO law is taken into account in the interpretation of a given, substantive, investment standard.	<ul style="list-style-type: none"> • No concerns regarding the jurisdiction of the tribunal • No concerns regarding applicable law principles 	<ul style="list-style-type: none"> • Distinction between Jurisdiction and Applicable Law • Article 31.3(c) of the VCLT <hr/> <ul style="list-style-type: none"> • Specific Provisions in IIAs • Choice of Law Clauses • Reference Clauses
Scenario No.3	WTO law is being 'imported' into the investment arbitration by the investor, who argues that the breach of a WTO obligation results in the breach of an investment obligation.	<ul style="list-style-type: none"> • Potential concerns relating to the jurisdiction of the tribunal 	<ul style="list-style-type: none"> • Scope of the Arbitration Clause <hr/> <ul style="list-style-type: none"> • Admissibility
Scenario No.4	WTO law is used as a defense. It is raised by the respondent State either to challenge the jurisdiction of the arbitral tribunal, or as a counter argument on the merits of the case, to say that the measure being challenged before the investment tribunal had to be taken in order to comply with a WTO obligation.	<ul style="list-style-type: none"> • Potential concerns relating to the jurisdiction of the tribunal • Potential normative conflict between trade and investment obligations 	<ul style="list-style-type: none"> • General Principles • Conflict Clauses <hr/> <ul style="list-style-type: none"> • Limited use of General Principles • Conflict Clauses and Reference Clauses <hr/> <ul style="list-style-type: none"> • Article 31.3(c) of the VCLT and 'Accommodation Techniques'

The Table presented on the previous page aims to summarize the main findings of Chapters 3, 4 and 5. It represents the legal framework to which investor-State arbitral tribunals can refer in cases where international trade law is invoked.

In the first two columns, I list the four scenarios identified in Chapter 4 and recall what each scenario is about. The third column (entitled 'Jurisdiction / Applicable Law') identifies whether the situation referred to in the relevant scenario raises concerns about the jurisdiction of the arbitral tribunal and/or about the law to be applied by the arbitral tribunal. The last column (entitled 'Integration Technique(s) and Principle(s)') identifies the legal techniques and principles which should be referred to and applied by investor-State tribunals to ensure the appropriate use of trade law.

Scenario No.1 situations do not raise jurisdictional concerns. As we have seen in Chapter 4, pursuant to the distinction between jurisdiction and applicable law, as well as to the general rules governing jurisdiction in investment arbitration, the simple connection of an investment dispute to trade law cannot be used to challenge the jurisdiction of an investment tribunal. The jurisdiction of a tribunal cannot be challenged simply because the tribunal is requested to apply trade law as a fact, or to refer to it as an 'incidental legal element'. We have also seen that Scenario No.1 references might be encouraged, as they are typical examples of cross-references between international courts. VCLT Article 31.3.(c), the function of which has been described in Chapter 5, can be seen as a pertinent vector to foster these types of references.

Scenario No.2 situations do not raise jurisdictional concerns either. Again, in light of the same reasons given in the explanation for Scenario No.1, an investor-State arbitral tribunal that refers to trade law in order to interpret a given investment obligation cannot be considered to be acting beyond its jurisdiction. Like in Scenario No.1 situations, tribunals will benefit from the use of Article 31.3(c) in Scenario No.2 situations. In addition, they can also refer to specific provisions in IIAs, such as broad 'choice of law clauses' and 'reference clauses', both examined in Chapter 5.

In contrast, Scenario No.3 situations do raise jurisdictional concerns. Depending on the language of the arbitral agreement and the limits it may include, it can easily be argued that tribunals do not have jurisdiction over claims that are based, indirectly, on a breach of a trade obligation. However, when the clauses are broadly drafted (for instance, when they provide for jurisdiction over 'all disputes relating to an investment' as defined in the IIA), it seems possible to argue that tribunals may entertain jurisdiction over trade-related claims. As explained in Chapter 4, the concept of admissibility might also be used by an investor-State tribunal to decide whether a trade-related claim can proceed to the merits.

Finally, Scenario No.4 situations can be divided into two subcategories. The first subcategory relates to situations where trade law is used to challenge the jurisdiction of an investor-State tribunal. These situations usually occur when parallel proceedings are running before a trade adjudicative body. This situation raises potential concerns for the

jurisdiction of the arbitral tribunal. As we have seen in the last section of Chapter 4, these concerns might be addressed by either applying general principles of international law (such as comity), or any conflict clauses that might be included in the IIAs, which aim to regulate jurisdictional interactions between international trade and investment proceedings.

The second subcategory relates to the use of trade law as a counter argument on the merits of the case. In such an instance, the State argues that trade law should trump investment law. In this situation, the tribunal might, therefore, face a conflict between the content of the investment obligation and the content of the trade obligation. As we have seen in Chapter 5, the existing general principles of international law relating to conflicts of international treaties (*lex specialis* and *lex posterior*), are only of limited interest, as the conditions for the application of these principles seem difficult to satisfy in cases of a conflict between trade and investment legal instruments. Tribunals shall therefore rely on the conflict clauses or reference clauses that might be included in IIAs or use interpretative or accommodation techniques to address the conflict.

This analytical framework is, certainly, perfectible and its use in practice will depend on the specific considerations of each case where trade law is invoked. Yet, I argue that references to this framework might serve increase the quality of decisions and awards and allow for interpretative consistency in the work of investor-State tribunals whenever they engage with international trade law.

III. INTERNATIONAL INVESTMENT LAW AND ITS OTHERS

In the introduction of this work, I noted that international investment law was evolving and moving in new directions. In the thesis, I focused on one of these directions, that is international trade law.

Nevertheless, one has to admit that international investment law is, to some extent, also connected to other branches of public international law. To mention only a few examples, the relations between international investment law and human rights, environmental law or cultural heritage, have been the object of various studies and commentaries.

It is certain that these other connections have different causes and consequences than the ones studied in the present work. However, looking at the surface of the studies devoted to these other connections, and bearing in mind the results of the present thesis, it is possible to make the following general remark: International investment law cannot be viewed as an isolated regime within the international legal system. Its content and the way it operates is necessarily connected to other disciplines of public international law.

Drafting similar analytical frameworks for each of these other connections might lead to a better understanding of how principles and rules developed in the context of other sub-fields of international law should inform the content of investment law. This understanding will, in turn, allow for a better understanding and more accurate presentation of the intricacies of international investment law.

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BIBLIOGRAPHY

BOOKS

- J. E. Alvarez, et al.**, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press, 2011) lii-254 p.
- C. F. Amerasinghe**, *Jurisdiction of International Tribunals* (Martinus Nijhoff Publishers, 2003) lxi-881 p.
- , *Local remedies in international law* (Cambridge University Press, 2004) xxxii-445 p.
- B. Audit**, *Droit international privé* (Economica, 2010) ix-1013 p.
- F. Baetens (ed.)**, *Investment Law Within International Law: An Integrationist Perspective* (Cambridge University Press, 2013) lii-514 p.
- P. H. F. Bekker, et al.**, *Making Transnational Law Work in the Global Economy : Essays in Honour of Detlev Vagts* (Cambridge University Press, 2010) xxxiii-684 p.
- R. D. Bishop, J. Crawford & W. M. Reisman**, *Foreign investment disputes: cases, materials, and commentary* (Kluwer Law International, 2005) lv-1653 p.
- A. Broches**, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff Publishers, 1995) xvii- 545 p.
- T. Broude & Y. Shany**, *Multi-sourced equivalent norms in international law* (Hart, 2011) xviii-333 p.
- C. Brown**, *A Common Law of International Adjudication* (Oxford University Press, 2007) liii-303 p.
- M. Bungenberg, A. Reinisch & C. Tietje**, *EU and Investment Agreements: Open Questions and Remaining Challenges* (Nomos, 2013) 200 p.
- B. Cheng**, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, Reprinted, 2006) 544 p.
- W. L. Craig, W. W. Park & J. Paulsson**, *International Chamber of Commerce arbitration* (Oceana Publications, 2000) xvi-952 p.
- J. Crawford**, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012) lxxx- 803 p.
- E. De Brabandere**, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press, 2014) 264 p.
- O. Delas (ed.)**, *Juridictions internationales : complémentarité ou concurrence?* (Bruylant, 2005) xviii-184 p.
- N. F. Diebold**, *Non-Discrimination in International Trade in Services: 'Likeness' in WTO/GATS* (Cambridge University Press, 2010) xlii-390 p.
- M. Dimsey**, *The resolution of international investment disputes : challenges and solutions* (Eleven International Publishing, 2008) xlvi-251 p.

Bibliography

- R. Dolzer & C. Schreuer**, *Principles of international investment law* (Oxford University Press, 2012) xxxix-433 p.
- Z. Douglas**, *The International Law of Investment Claims* (Cambridge University Press, 2009) lxvii-616 p.
- C. F. Dugan, et al.**, *Investor-State Arbitration* (Oxford University Press, 2008) xxv-791 p.
- P. Dumberry**, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International, 2013) 392 p.
- P.-M. Dupuy, F. Francioni & E.-U. Petersmann (eds.)**, *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) xlvi-597 p.
- G. Fitzmaurice**, *The Law and Procedure of the International Court of Justice* (Grotius Publications, 1986) 2 volumes, xli-860 p.
- F. Fontanelli, G. Martinico & P. Carrozza (eds.)**, *Shaping Rule of Law Through Dialogue, International and Supranational Experiences* (Europa Law Publishing, 2009) 433 p.
- J. Fouret & D. Khayat**, *Recueil des commentaires des décisions du CIRDI [2002-2007]* (Bruylant, 2009) xxiv-710 p.
- E. Gaillard & J. Savage (eds.)**, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) xxxiii-1280 p.
- E. Gaillard & J. Younan (eds.)**, *State Entities in International Arbitration* (Juris Publishing, 2008) iii-615 p.
- A. Geouffre de Lapradelle & N. Politis**, *Recueil des arbitrages internationaux – Vol. 2* (A. Pedone, 1905), 1106 p.
- A. A. Ghouri**, *Interaction and Conflict of Treaties in Investment Arbitration* (Kluwer Law International, 2015) xvii-192 p.
- A. T. Guzman**, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2007) xii-260 p.
- M. Herdegen**, *Principles of International Economic Law* (Oxford University Press, 2013) xl-493 p.
- R. Hofmann, C. J. Tams & S. W. Schill**, *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (Nomos, 2013) 359 p.
- R. Hofmann & C. J. Tams (eds.)**, *International investment law and general international law : from clinical isolation to systemic integration?* (Nomos, 2011) 275 p.
- R. Hofmann & C. J. Tams (eds.)**, *International Investment Law and Its Others* (Nomos, 2012) 236 p.
- J. E. Kalicki & A. Joubin-Bret**, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill, 2015) 1043 p.
- Y. Kerbrat (ed.)**, *Forum shopping et concurrence des procédures contentieuses internationales* (Bruylant, 2011) 310 p.
- H. E. Kjos**, *Applicable law in Investor-State Arbitration - The Interplay Between National and International Law* (Oxford University Press, 2013) 344 p.

Bibliography

- R. Lapidoth, T. Broude & Y. Shany**, *The shifting allocation of authority in international law : considering sovereignty, supremacy and subsidiarity ; essays in honour of Professor Ruth Lapidoth* (Hart, 2008) viii-437 p.
- H. Lauterpacht**, *The Development of International Law by the International Court* (Cambridge University Press, 1982) xix-408 p.
- , *International Law: Being the Collected Papers of Hersch Lauterpacht Systematically Arranged and Edited by Elihu Lauterpacht - Vol. 5* (Cambridge University Press, 2009) 821 p.
- N. Lavranos**, *Jurisdictional Competition : Selected Cases in International and European law* (Europa Law Publishers, 2009) xi-109 p.
- C. Leben & C. Kessedjian (eds.)**, *Le droit européen et l'investissement* (Éditions Panthéon-Assas, 2009) 176 p.
- R. Mackenzie, et al.**, *Manual on international courts and tribunals* (Oxford University Press, 2010) xxvi-547 p.
- P. C. Mavroidis & M. Wu**, *The Law of the World Trade Organization* (West, 2013) lxxxvi-1072 p.
- P. Mayer & V. Heuzé**, *Droit international privé* (Montchrestien, 2010) 798 p.
- C. McLachlan**, *Lis pendens in international litigation* (Martinus Nijhoff Publishers, 2009) 485 p.
- C. McLachlan, L. Shore & M. Weiniger (eds.)**, *International Investment Arbitration : Substantive Principles* (Oxford University Press, 2007) 1-474 p.
- P. Muchlinski, F. Ortino & C. Schreuer (eds.)**, *The Oxford handbook of international investment law* (Oxford University Press, 2008) lxxv-1282 p.
- A. Newcombe & L. Paradell**, *Law and Practice of Investment Treaties : Standards of Treatment* (Kluwer Law International 2009) xxx-614 p.
- D. Palmeter & P. C. Mavroidis**, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge University Press, 2004) xviii-330 p.
- J. Paulsson**, *Denial of justice in international law* (Cambridge University Press, 2005) xxvi-279 p.
- J. Pauwelyn**, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of international Law* (Cambridge University Press, 2003) xxviii-522 p.
- M. Raux**, *La Responsabilité de l'Etat sur le Fondement des Traités de Promotion et de Protection des Investissement*, Thèse pour l'obtention du grade de docteur en droit public de l'Université Paris 2 – Panthéon-Assas (2010) 539 p.
- A. Redfern & M. Hunter**, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2004) lviii-613 p.
- L. Reed, J. Paulsson & N. Blackaby**, *Guide to ICSID arbitration* (Kluwer Law International, 2011) xvii-468 p.
- S. Ripinsky & K. Williams**, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008) xxxviii-561 p.
- T. Roe & M. Happold**, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press, 2011) xxii-249 p.

Bibliography

- B. Şabāhī**, *Compensation and Restitution in Investor-State Arbitration : Principles and Practice* (Oxford University Press, 2011) xxiii-256 p.
- J. W. Salacuse**, *The Law of Investment Treaties* (Oxford University Press, 2010) xxxvi-517 p.
- P. Sands, R. Mackenzie & Y. Shany**, *Manual on international courts and tribunals* (Butterworths, 1999) xxxviii-346 p.
- C. Santulli**, *Droit du contentieux international* (Montchrestien, 2005) xi-584 p.
- M. Sasson**, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International and Municipal Law* (Kluwer Law International, 2010) xxxii-264 p.
- K. P. Sauvart & M. Chiswick-Patterson**, *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) xxiii-447 p.
- C. Schreuer, et al.**, *The ICSID Convention : A Commentary* (Cambridge University Press, 2009) lxvii- 1,524 p.
- G. C. Shaffer**, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press, 2003) xiv-227 p.
- Y. Shany**, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003) lxix-348 p.
- , *Regulating Jurisdictional Relations between National and International Courts* (Oxford University Press, 2007) xxxvi-216 p.
- , *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014) 322 p.
- M. Shapiro**, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981) x-245 p.
- I. M. Sinclair**, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984) x- 270p.
- M. J. Trebilcock, R. Howse & A. Eliason**, *The Regulation of International Trade* (Routledge, 4th ed., 2013) x-948 p.
- P. Van Den Bossche & W. Zdouc**, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2013) lvi-1045 p.
- K. J. Vandevelde**, *Bilateral investment treaties : History, Policy, and Interpretation* (Oxford University Press, 2010) xii-562 p.
- M. E. Villiger**, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009) xxxxiv-1057 p.
- M. Waibel**, *Sovereign defaults before International courts and tribunals* (Cambridge University Press, 2011) lvi-366 p.
- M. Waibel, et al.**, *The Backlash against Investment Arbitration : Perceptions and Reality* (Wolters Kluwer, 2010) liv-614 p.
- J. R. Weeramantry**, *Treaty Interpretation in Investment Arbitration* (Oxford University Press, 2012), xlix- 262 p.
- H. Wehland**, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (Oxford University Press, 2013) xxxix-261 p.

Bibliography

CHAPTERS IN BOOKS

- S. A. Alexandrov & I. Laird**, 'Compliance and Enforcement' in Peter Muchlinski, Federico Ortino, & Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 1171-87
- J. E. Alvarez**, 'What are the International Judges for? The Main Functions of International Adjudication' in Cesare Romano, Karen J. Alter, & Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014) 158-78
- J. E. Alvarez**, 'Beware: Boundary Crossings' in Tsvi Kahana & Anat Scolnicov (eds.), *Boundaries of Rights, Boundaries of State*, (forthcoming) 14-51
- J. E. Alvarez & T. Brink**, 'Revisiting the Necessity Defense ' in Karl Sauvant (ed.), *Yearbook of International Investment Law & Policy 2010/2011* (Oxford University Press, 2011) 315-58
- M. Audit**, 'Le Droit Applicable en Matière d'Arbitrage Fondé sur un Traité de Protection des Investissements' in Jean-Sylvestre Bergé, et al. (eds.), *La fragmentation du droit applicable aux relations internationales : Regards croisés d'internationalistes privatistes et publicistes* (Pedone, 2001) 65-82
- L. Azoulay & W. Ben Hamida**, 'La protection des investissements par le droit primaire - droit conventionnel des investissements et droit primaire communautaire: Étude comparée des régimes et des approches' in Charles Leben & Catherine Kessedjian (eds.), *Le droit européen et l'investissement* (Éditions Panthéon-Assas, 2009) 69-88
- F. Baetens**, 'Preferential Trade and Investment Agreements and the Trade/Investment Divide: Is the Whole More than the Sum of Its Parts?' in Rainer Hofmann, Christian J. Tams, & Stephan W. Schill (eds.), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (Nomos, 2013) 91-128
- Y. Banifatemi**, 'The Law Applicable in Investment Treaty Arbitration' in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements, A Guide to the Key Issues* (Oxford University Press, 2010) 191-210
- L. Bartels**, 'Jurisdiction and Applicable Law Clauses: Where does a Tribunal find the Principal Norms Applicable to the Case before it?' in Tomer Broude & Yuval Shany (eds.), *Multi-sourced equivalent norms in international law* (Hart, 2011) 115-41
- J. A. Bishoff & R. Happ**, 'The Notion of Investment' in Marc Bungenberg, et al. (eds.), *International Investment Law - A Handbook* (Nomos, 2015) 495-544
- T. R. Braun**, 'Investment Chapters in Future European Preferential Trade and Investment Agreements: Two Universes or an Integrated Model' in Rainer Hofmann, Christian J. Tams, & Stephan W. Schill (eds.), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (Nomos, 2013) 129-56
- T. Broude**, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law?' in Roberto Echandi & Pierre Sauvé (eds.), *Prospects in International Investment Law and Policy* (Cambridge University Press, 2013) 139-55

Bibliography

- C. N. Brower & J. Wong**, 'General Valuation Principles: The Case of Santa Elena' in Todd Weiler (ed.), *International Investment Law and Arbitration: Leading Cases From the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005) 747-76
- C. Brown**, 'Inherent Powers in International Adjudication' in Cesare Romano, Karen J. Alter, & Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014) 828-47
- M. Bungenberg & S. Hobe**, 'The Relationship of International Investment Law and European Union Law' in Marc Bungenberg, et al. (eds.), *International Investment Law - A Handbook* (Nomos, 2015) 1602-43
- M. Burgstaller**, 'European Law Challenges to Investment Arbitration' in Michael Waibel, et al. (eds.), *The Backlash against Investment Arbitration: Perception and Reality* (Kluwer Law International, 2010) 455-82
- D. Caron**, 'The Iran – U.S. Claims Tribunal and Investment Arbitration: Understanding the Claims Settlement Declaration as a Retrospective BIT' in Christopher S Gibson & Christopher R Drahozal (eds.), *The Iran-United States Claims Tribunal at 25: The Cases Everyone Needs to Know for International and Investor-State Arbitration* (Oxford University Press, 2007) 375-83
- G. Cordero Moss**, 'Tribunal's Powers versus Party Autonomy' in Peter Muchlinski, Federico Ortino, & Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2009) 1207-44
- C. Crépet Daigremont**, 'Les interactions normatives dans le domaine des investissements: La remise en cause du droit international par le droit de l'Union européenne ' in Laurence Bugorgue-Larsen, et al. (eds.), *Les interactions normatives: Droit de l'Union européenne et droit international* (Pedone, 2012) 167-81
- E. Denters**, 'Preferential Trade and Investment Treaties' in Tarcisio Gazzini & E. De Brabandere (eds.), *International Investment Law. Sources of Rights and Obligations*, (Martinus Nijhoff Publishers, 2012) 49-67
- Z. Douglas**, 'Other Specific Remiges of Responsibility: Investment Treaty Arbitration and ICSID' in James Crawford, Alain Pellet, & Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010) 815-42
- J. L. Dunoff**, 'A new approach to regime interaction' in Margaret Young (ed.), *Regime Interactions in International Law* (Cambridge University Press, 2012) 136-74
- P.-M. Dupuy**, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 45-61
- P.-M. Dupuy & J. E. Viñuales**, 'Human Rights and Investment Disciplines: Integration in Progress' in Marc Bungenberg, et al. (eds.), *International Investment Law - A Handbook*, (Nomos, 2015) 1739-67
- A. A. Escobar**, 'Argentina's Multiplication of Investor-State Arbitration Proceedings' in Charles Leben (ed.), *Le contentieux arbitral transnational relatif à l'investissement: Nouveaux développements* (L.G.D.J., 2006) 219-35

Bibliography

- I. Fadlallah**, 'La distinction treaty claims - contracts claims et la compétence de l'arbitre CIRDI : faisons-nous fausse route?' in Charles Leben (ed.), *Le contentieux transnational relatif à l'investissement: Nouveaux développements* (L.G.D.J., 2006) 205-18
- M. Footer**, 'On the Laws of Attraction: Examining the Relationship Between Foreign Investment and International Trade' in Roberto Echandi & Pierre Sauvé (eds.), *Prospects in International Investment Law and Policy* (Cambridge University Press, 2013) 105-38
- M. Forteau**, 'Forum shopping et fragmentation du droit international applicable aux relations internationales, Le regard de l'internationaliste publiciste' in Mathias Forteau (ed.), *La fragmentation du droit applicable aux relations internationales, Regards croisés d'internationalistes privatistes et publicistes* (Pedone, 2011) 143-63
- , 'The Diversity of Applicable Law before International Tribunals as a Source of Forum Shopping and Fragmentation of International Law: An Assessment' in Rüdiger Wolfrum & Ina Gätschmann (eds.), *International Dispute Settlement: Room for Innovations?* (Springer, 2013) 417-41
- F. Francioni**, 'Access to Justice, Denial of Justice, and International Investment Law' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 63-81
- M. Friedman**, 'Treaties as Agreements to Arbitrate - Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration' in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (Kluwer Law International ; with the assistance of the Permanent Court of Arbitration, 2007) 545-68
- H. Fujita**, 'Chevauchements juridictionnels et tribunaux internationaux' in Nisuke ; McWhinney Ando, Edward ; Wolfrum, Rüdiger (ed.), *Liber amicorum Judge Shigeru Oda* (Kluwer Law International, 2002) 575-87
- T. Gazzini & Y. Radi**, 'Foreign investment with a human face, with special reference to indigenous peoples' rights' in Rainer Hofmann & Christian J. Tams (eds.), *International Investment Law and Its Others* (Nomos, forthcoming)
- C. Greenwood**, 'State Responsibility for the Decisions of National Courts ' in Malgosia Fitzmaurice & Dan Sarooshi (eds.), *Issues of state responsibility before international judicial institutions* (Hart Publishing, 2004) 55-73
- J. Griebel**, 'The New EU Investment Policy Approach' in Marc Bungenberg, et al. (eds.), *International Investment Law - A Handbook*, (Nomos, 2015) 304-25
- M. C. Gritón Salias**, 'Do Umbrella Clauses Apply to Unilateral Undertakings?' in Christina Binder, et al. (eds.), *International Investment Law for the 21st Century: Essays in Honor of C. Schreuer* (Oxford University Press, 2009) 490-96
- L. Helfner**, 'The Effectiveness of International Adjudicators' in Cesare Romano, Karen J. Alter, & Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014) 464-82
- M. Hirsch**, 'Interactions Between Investment and Non-Investment Obligations' in Peter Muchlinski, Federico Ortino, & Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 1008-48

Bibliography

- , 'Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective' in Tomer Broude & Yuval Shany (eds.), *The Shifting Allocation of Authority in International Law* (Hart Publishing 2008) 323-43
- K. Hobér**, 'Denial of Justice in Local Courts' in Federico Ortino, Audley Sheppard, & Hugo Warner (eds.), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Law, (British Institute of International and Comparative Law, 2006) 187-97
- H. Horn & P. C. Mavroidis**, 'International Trade: dispute settlement' in Andrew T Guzman & Alan O Sykes (eds.), *Research Handbook in International Economic Law* (Edward Elgar Publishing, 2008) 177-210
- J. A. Huerta-Goldman**, 'Trade Remedies Disputes — Reciprocal Relationship between WTO and NAFTA Tribunals' in Filippo Fontanelli, Giuseppe Martinico, & Paolo Carrozza (eds.), *Shaping Rule of Law Through Dialogue : International and Supranational Experiences* (Europa Law Publishing, 2010) 319-44
- J. A. Huerta-Goldman, A. Romanetti & F. X. Stirnimann**, 'Cross-Fertilization and Reciprocal Opportunities: An Overview' in Jorge A. Huerta-Goldman, Antoine Romanetti, & Franz X. Stirnimann (eds.), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International, 2013) 1-14
- A. Joubin-Bret**, 'The Growing Diversity and Inconsistency in the IIA System' in Karl Sauvant & Michael Chiswick-Patterson (eds.), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 137-39
- J. Kammerhofer**, 'The Theory of Norm Conflict Solutions in International Investment Law' in M.C.C. Segger, Markus W. Gehring, & A.P. Newcombe (eds.), *Sustainable Development in World Investment Law* (Kluwer Law International, 2011) 83-99
- G. Kaufmann-Kohler**, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' in Frédéric Bachand & Emmanuel Gaillard (eds.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (Juris Publishing, 2011) 175-94
- C. Knahr**, 'International Investment Law and State Responsibility: Conditions of Responsibility' in Christian J. Tams & Rainer Hofmann (eds.), *International Investment Law and General International Law: from Clinical Isolation to Systemic Integration?* (Nomos, 2011) 95-110
- R. H. Kreindler**, 'Parallel Proceedings: A Practitioner's Perspective' in Michael Waibel, et al. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) 127-48
- U. Kriebaum**, 'Restitution in International Investment Law' in Rainer Hofmann & Christian J. Tams (eds.), *International Investment Law and General International Law : From Clinical Isolation to Systemic Integration?* (Nomos, 2011) 201-2010
- J. Kurtz**, 'On the evolution and slow convergence of international trade and investment law' in Giorgio Sacerdoti, et al. (eds.), *General Interests of Host States in International Investment Law* (Cambridge University Press, 2014) 104-29
- , 'Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law' in Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales (eds.), *The Foundations of International Investment Law: Bridging Theory Into Practice* (Oxford University Press, 2014) 257-396
- K. Kwak & G. Marceau**, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' in Lorand Bartels & Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 465-524
- I. Laird**, 'A Difference without a Distinction? An Examination of the Concepts of Admissibility and Jurisdiction in *Salini v. Jordan* and *Methanex v. USA*' in Todd Weiler (ed.),

Bibliography

- International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, (Cameron May, 2005) 201-22
- C. Leben**, 'L'évolution du droit international des investissements: un rapide survol' in Charles Leben (ed.), *Le contentieux arbitral transnational relatif à l'investissement: Nouveaux développements* (L.G.D.J. , 2006) 9-22
- B. Legum**, 'Options to Establish an Appellate Mechanism for Investment Disputes' in Michael Chiswick-Patterson & Karl Sauvant (eds.), *Appeals Mechanism in International Investment Disputes*, (Oxford University Press, 2008) 231-40
- B. Legum & I. Petculescu**, 'GATT Article XX and international investment law' in Roberto Echandi & Pierre Sauvé (eds.), *Prospects in International Investment Law and Policy* (Cambridge University Press, 2013) 340-62
- C. Lévesque**, 'The inclusion of GATT Article XX exceptions in IIAs: a potential risky policy' in Roberto Echandi & Pierre Sauvé (eds.), *Prospects in International Investment Law and Policy* (Cambridge University Press, 2013) 363-70
- L. Liberti**, 'The Relevance of Non-Investment Treaty Obligations in Assessing Compensation' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 557-64
- P. C. Mavroidis**, 'Amicus Curiae Briefs Before the WTO: Much Ado About Nothing' in Armin von Bogdandy, Petros C Mavroidis, & Yves Mény (eds.), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer law international, 2002) 317-29
- C. McLachlan**, 'Investment Treaty Arbitration: The Legal Framework' in Albert Jan van den Berg & with the assistance of the Permanent Court of Arbitration (eds.), *50 Years of the New York Convention - ICCA International Arbitration Conference* (Kluwer Law International, 2008) 95-145
- R. Michaels & J. Pauwelyn**, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law' in Tomer Broude & Yuval Shany (eds.), *Multi-sourced equivalent norms in international law* (Hart, 2011) 19-44
- S. Miroudot**, 'Investment' in Jean-Pierre Chauffour & Jean-Christophe Maur (eds.), *Preferential Trade Agreement - Policies for Development* (The World Bank, 2011) 307-26
- S. Miroudot**, 'Investment' in Jean-Pierre Chauffour & Jean-Christophe Maur (eds.), *Preferential Trade Agreement - Policies for Development* (The World Bank, 2011) 307-26
- A. Newcombe**, 'General Exceptions in International Investment Agreements' in M.C.C. Segger, Markus W. Gehring, & Andrew Newcombe (eds.), *Sustainable Development in World Investment Law*, (Kluwer Law International, 2011) 351-70
- G. Petrochilos**, 'Attribution' in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements - A Guide to the Key Issues*, (Oxford University Press, 2010) 287-322
- D. M. Price**, 'Some Observations on the Role of State in Investor-State Dispute Settlement' in Bernardo Cremades & Julian D.M. Lew (eds.), *Parallel State and Arbitral Procedures in International Arbitration*, (ICC Pub., 2005) 73-77
- V. Prislán**, 'Non-Investment Obligation in Investment Treaty Arbitration - Towards a Greater Role for States' in Freya Baetens (ed.), *Investment Law Within International Law: An Integrationist Perspective* (Cambridge University Press, 2013) 450-81
- S. Puig**, 'The role of procedure in the development of investment law: The case of Section B of Chapter 11 of NAFTA' in Chester Brown & Kate Milles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 339-69

Bibliography

- A. Reinisch**, "'Investment and...' - The Broader Picture of Investment Law' in August Reinisch & Christina Knahr (eds.), *International Investment Law in Context* (Eleven International Publishing, 2008) 201-07
- , 'The Issues Raised by Parallel Proceedings and Possible Solutions' in Michael Waibel, et al. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) 113-26
- , 'Enforcement of Investment Awards' in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements : A Guide to the Key Issues* (Oxford University Press, 2010) 671-98
- B. Rémy**, 'La concurrence des procédures États-investisseurs' in Yann Kerbrat (ed.), *Forum shopping et concurrence des procédures contentieuses internationales* (Bruylant, 2011) 15-76
- G. Sacerdoti**, 'The Application of BITs in Time of Economic Crisis: Limits to their Coverage, Necessity and the Relevance of WTO Law' in Georgio Sacerdoti, et al. (eds.), *General Interests of Host States in International Investment Law* (Cambridge University Press, 2014) 3-25
- G. Sacerdoti & M. Recanati**, 'From Annulment to Appeal in Investor-State Arbitration: Is the WTO Appeal Mechanism a Model?' in Jorge A. Huerta-Goldman, Antoine Romanetti, & Franz X. Stirnimann (eds.), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International, 2013) 327-56
- C. Santulli**, 'Clause electa una via et clause de règlement judiciaire national préalable dans l'arbitrage relatif à l'investissement international' in Charles Leben (ed.), *La procédure arbitrale relative aux investissements internationaux : aspects récents* (L.G.D.J., 2010) 115-23
- E. C. Schlemmer**, 'Investment, Investor, Nationality, and Shareholders' in Peter Muchlinski, Federico Ortino, & Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 49-88
- C. Schreuer**, 'Shareholder Protection in International Investment Law ' in Pierre-Marie Dupuy, et al. (eds.), *Völkerrecht als Wertordnung: Common values in international law* (Engel, 2006) 601-19
- , 'What is a Legal Dispute' in Isabelle Buffard, et al. (eds.), *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner*, (Martinus Nijhoff Publishers, 2008) 959-79
- , 'Interaction of International Tribunals and Domestic Courts in Investment Law' in Arthur W. Rovine (ed.), *Contemporary issues in international arbitration and mediation : The Fordham Papers* (Martinus Nijhoff Publishers, 2010) 71-94
- S. M. Schwebel**, 'The Law Applicable in International Arbitration: Application of Public International Law' in Stephen M. Schwebel (ed.), *Justice in International Law* (Cambridge University Press, 2011) 173-81
- T. Sebastian & A. Sinclair**, 'Remedies in WTO Dispute Settlement and Investor-State Arbitration: Contrast and Lessons' in Jorge A. Huerta-Goldman, Antoine Romanetti, & Franz X. Stirnimann (eds.), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International, 2013) 273-91
- B. Simma & T. Kill**, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in Christina Binder, et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 678-707
- O. Spiermann**, 'Applicable Law' in Peter Muchlinski, Federico Ortino, & Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 89-118

Bibliography

- P. Sturma**, 'International Investment Law and State Responsibility' in Christian J. Tams & Rainer Hofmann (eds.), *International Investment Law and General International Law: from Clinical Isolation to Systemic Integration?* (Nomos, 2011) 111-20
- T. Sugihara**, 'The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues' in A. S. Muller (ed.), *The International Court of Justice*, (Kluwer Law International, 1997) 117-38
- G. Tereposky & M. Maguire**, 'Utilizing WTO Law in Investor State Dispute Settlement' in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010* (Martinus Nijhoff Publishers, 2011) 247-83
- C. Tomuschat**, 'The European Court of Human Rights and Investment Protection' in Christina Binder, et al. (eds.), *International Investment Law for the 21st Century: Essays in Honor of C. Schreuer* (Oxford University Press, 2009) 636-57
- F.-X. Train**, 'Forum shopping et fragmentation du droit applicable aux relations internationales, le regard de l'internationaliste privatiste' in Mathias Forteau (ed.), *La fragmentation du droit applicable aux relations internationales, Regards croisés d'internationalistes privatistes et publicistes* (Pedone, 2011) 131-41
- I. Van Damme**, 'Jurisdiction, Applicable Law, and Interpretation' in Daniel Bethlehem, et al. (eds.), *Oxford Handbook of International Trade Law* (Oxford University Press, 2009) 298-343
- J. J. van Haersolte-van Hof & A. K. Hoffmann**, 'The Relationship between International Tribunals and Domestic Courts' in Peter Muchlinski, Federico Ortino, & Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)
- J. E. Viñuales**, 'Conflits Normatifs en Droit International: Normes Environnementales vs. Protection des Investissements' in S.F.D.I. (ed.), *Colloque d'Aix-en-Provence - Le droit international face aux enjeux environnementaux* (Pedone, 2010) 407-27
- T. Voon, A. D. Mitchell & J. Munro**, 'Good Faith in Parallel Trade and Investment Disputes' in Tania Voon, Andrew Mitchell, & Muthucumaraswamy Sornarajah (eds.), *Good Faith and International Economic Law* (Oxford University Press, 2015) 60-87
- T. Voon, A. D. Mitchell & J. Munro**, 'Good Faith in Parallel Trade and Investment Disputes' in Tania Voon, Andrew Mitchell, & Muthucumaraswamy Sornarajah (eds.), *Good Faith and International Economic Law* (Oxford University Press, 2015) 60-87
- M. Waibel**, 'International Investment Law and Treaty Interpretation' in Rainer Hofmann & Christian J. Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos, 2011) 29-52
- , 'Coordinating Adjudication Processes' in Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 499-530
- , 'Investment Arbitration: Jurisdiction and Admissibility' in Marc Bungenberg, et al. (eds.), *International Investment Law - A Handbook* (Nomos, 2015) 1212-87
- T. W. Wälde**, 'The Specific Nature of Investment Arbitration' in Thomas W. Wälde & Philippe Khan (eds.), *New Aspects of International Investment Law* (Martinus Nijhoff Publishers, 2007) 43-117
- F. Weiss**, 'Trade and Investment' in Peter Muchlinski, Federico Ortino, & Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 183-221
- L. T. Wells**, 'Backlash to Investment Arbitration: Three Clauses' in Michael Waibel, et al. (eds.), *The Backlash against Investment Arbitration: Perception and Reality* (Kluwer Law International, 2010) 341-52

Bibliography

- M. Wu**, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime' in Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales (eds.), *The Foundations of International Investment Law* (Oxford University Press, 2014) 169-209
- K. Yannaca-Small**, 'Parallel Proceedings' in Peter Muchlinski, Federico Ortino, & Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 1008-48
- M. Young**, 'Introduction: the productive friction between the regimes' in Margaret Young (ed.), *Regime Interaction in International Law* (Cambridge University Press, 2012) 1-19
- A. R. Ziegler**, 'Investment Law in Conflict with WTO Law' in Marc Bungenberg, et al. (eds.), *International Investment Law - A Handbook*, (Nomos, 2015) 1784-801

PEER REVIEW ARTICLES & WORKING PAPERS

- S. A. Aaronson & M. R. Abouharb** 'Does the WTO help member states improve governance?' (2013) 13 *World Trade Review* 547
- L. Achouk-Spivak** 'Arbitrage en matière d'investissement et crise argentine : un bilan d'étape' (2007) *Les cahiers de l'arbitrage* 55
- R. Adlung & M. Molinuevo** 'Bilateralism in Services Trade: Is There Fire behind the (BIT-)Smoke?' (2008) 11 *Journal of International Economic Law* 365
- S. A. Alexandrov** 'The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*' (2004) 5 *Journal of World Investment & Trade* 555
- R. P. Alford** 'The Convergence of International Trade and Investment Arbitration' (2013) 12 *Santa Clara Journal of International Law* 35
- B. E. Allen & T. Soave** 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration' (2014) 30 *Arbitration International* 1
- W. Alschner** 'Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System' (2013) 13 *World Trade Review* 65
- 'Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law' (2013) 5 *Goettingen Journal of International Law* 455
- K. J. Alter** 'Agents or Trustees? International Courts in their Political Context' (2008) 14 *European Journal of International Relations* 33
- J. E. Alvarez** 'Why are We "Re-Calibrating" Our Investment Treaties?' (2010) 4 *World Arbitration and Mediation Review* 143
- A. Antoni & M. Ewing-Chow** 'Trade and Investment Convergence and Divergence: Revisiting the North American Sugar War' (2013) 1 *Latin American Journal of International Trade Law* 315
- J. Arato** 'The Margin of Appreciation in International Investment Law' (2014) 54 *Virginia Journal of International Law* 545

Bibliography

- M. Audit & M. Forteau** 'Investment Arbitration without BIT: Toward a Foreign Investment Customary Based Arbitration?' (2012) 29 *Journal of International Arbitration* 581
- K. Bagwell, P. C. Mavroidis & R. W. Staiger** 'The Case for Auctioning Countermeasures in the WTO' (2003) *NBER Working Paper No. 9920*
- Y. Banifatemi & E. Gaillard** 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18 *ICSID Review* 375
- L. Bartels** 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 *Journal of World Trade* 419
- 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 *The American Journal of International Law* 95
- W. Ben Hamida** 'L'arbitrage Etat-investisseur face à un désordre procédural : la concurrence des procédures et les conflits de juridictions' (2005) 51 *Annuaire français de droit international* 564
- G. A. Bermann** 'Domesticating' the New York Convention: the Impact of the Federal Arbitration Act' (2011) 2 *Journal of International Dispute Settlement* 317
- 'Navigating EU Law and the Law of International Arbitration' (2012) 28 *Arbitration International* 397
- A. K. Bjorklund** 'Private Rights and Public International Law: Why Competition among International Economic Law Tribunals is not Working' (2007) 59 *Hastings Law Journal* 241
- 'The Emerging Civilization of Investment Arbitration' (2008) 113 *Penn State Law Review* 1269
- 'Mandatory Rules of Law and Investment Arbitration' (2008) 18 *American Review of International Arbitration* 175
- 'Convergence or Complementarity' (2013) 12 *Santa Clara Journal of International Law* 65
- L. Boisson de Chazournes & S. Heathcote** 'The Role of the International Adjudicator' (2001) 05 *American Society of International Law Proceedings* 129
- G. Born** 'A New Generation of International Adjudication' (2012) 61 *Duke Law Journal* 775
- R. Briese & S. W. Schill** 'Djibouti v. France - Self-Judging Clauses before the International Court of Justice' (2009) 10 *Melbourne Journal of International Law* 308-328
- T. Broude** 'Toward an Economic Approach to the Consolidation of International Trade Regulation and International Investment Law' (2013) 9 *Jerusalem Review of Legal Studies* 24
- C. N. Brower & J. K. Sharpe** 'Multiple and Conflicting International Arbitral Awards' (2003) 4 *Journal of World Investment & Trade* 211
- C. Brown** 'The Inherent Powers of International Courts and Tribunals' (2005) 76 *British Yearbook of International Law* 195
- G. Burdeau** 'Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant les États' (1995) *Revue de l'arbitrage* 3

Bibliography

- M. Burgstaller** 'European Law and Investment Treaties' (2009) 26 *Journal of International Arbitration* 181
- W. Burke-White & A. Von Staden** 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2007) 48 *Virginia Journal of International Law* 307
- D. Burriez** 'Le treaty shopping procédural d'incorporation dans le contentieux arbitral transnational' (2010) 25 *ICSID Review* 394
- M. L. Busch** 'Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade' (2007) 61 *International Organization* 735
- D. Caron** 'Towards a Political Theory of International Courts and Tribunals' (2006) 24 *Berkeley Journal of International Law* 401
- A. Cassese** 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649
- J. Chaisse** 'Promises and Pitfalls of the European Union Policy on Foreign Investment—How will the New EU Competence on FDI Affect The Emerging Global Regime?' (2012) *Journal of International Economic Law* 1
- J. Chalker** 'Case Note: Eastern Sugar B.V. v. The Czech Republic' (2009) 6 *Transnational Dispute Management*, available online at <www.transnational-dispute-management.com>
- S. Charnovitz** 'What is International Economic Law?' (2011) 14 *Journal of International Economic Law* 3
- S. Cho & J. Kurtz** 'Converging Divergences: A Common Law of International Trade and Investment' (2014) *Chicago-Kent College of Law Research Paper*
- J. K. Cogan** 'Competition and Control in International Adjudication' (2007) 48 *Virginia Journal of International Law* 411
- D. Collins** 'A New Role for the WTO in International Investment Law: Public Interest in the Post-Neo Liberal Period' (2010) 25 *Connecticut Journal of International Law* 1
- J. Combacau** 'Le droit international: bric-à-brac ou système?' (1986) 31 *Archives de philosophie du droit* 85
- J. P. Commission** 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24 *Journal of International Arbitration* 129
- A. Cosbey & P. C. Mavroidis** 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy - The Case for Redrafting the Subsidies Agreement of the WTO' (2014) 17 *Journal of International Economic Law* 11
- T. Cottier** 'The Common Law of International Trade and the Future of the World Trade Organization' (2015) 18 *Journal of International Economic Law* 3
- R. M. Cover** 'The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation' (1980) 22 *William and Mary Law Review* 639
- J. F. Coyle** 'Treaty of Friendship, Commerce and Navigation in the Modern Era' (2012) 51 *Columbia Journal of Transnational Law* 302

Bibliography

- J. Crawford** 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 *ICSID Review* 127
- B. Cremades & D. Cairns** 'The Brave New World of Global Arbitration' (2002) 3 *Journal of World Investment & Trade* 173
- B. Cremades & I. Madalena** 'Parallel Proceedings in International Arbitration' (2008) 24 *Arbitration International* 507
- G. Cuniberti** 'Parallel Litigation and Foreign Investment Dispute Settlement' (2006) 21 *ICSID Review* 381
- W. J. Davey & A. Sapir** 'The soft drinks case: the WTO and regional agreements' (2009) 8 *World Trade Review* 5
- A. Davies** 'Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does A Measure Relate to Investment?' (2012) 15 *Journal of International Economic Law* 793
- E. De Brabandere** 'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims' (2012) 3 *Journal of International Dispute Settlement* 609
- A. De Mestral** 'Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship' (2013) 16 *Journal of International Economic Law* 777
- M. Dekastros** 'Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention' (2013) 14 *Journal of World Investment & Trade* 286
- P. Di Rosa** 'The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues' (2004) 36 *The University of Miami Inter-American Law Review* 41
- N. F. Diebold** 'Standards of Non-Discrimination in International Economic Law' (2011) 60 *International and Comparative Law Quarterly* 831
- N. DiMascio & J. Pauwelyn** 'Nondiscrimination in Trade and Investment Treaties: World Apart or Two Sides of the Same Coin?' (2008) 102 *American Journal of International Law* 48
- Z. Douglas** 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *British Yearbook of International Law* 151
- S. Douglas-Scott** 'A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis' (2006) 43 *Common Market Law Review* 629
- P. Dumberry & G. Dumas-Aubin** 'When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration' (2012) 13 *The Journal of World Investment & Trade* 349
- P.-M. Dupuy** 'L'unité de l'ordre juridique international' (2002) 297 *Recueil des Cours de l'Académie de Droit International de La Haye* 9
- 'Unité d'Application du Droit International à l'Echelle Globale et Responsabilité des Juges' (2009) 1 *European Journal of Legal Studies*
- O. K. Fauchald** 'The Legal Reasoning of ICSID Tribunals - An Empirical Analysis' (2008) 19 *European Journal of International Law* 301

Bibliography

- G. K. Foster** 'Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration' (2011) 49 *Columbia Journal of Transnational Law* 201
- F. Francioni** 'Compensation for Nationalisation of Foreign Property: The Borderland between Law and Equity' (1975) 24 *International and Comparative Law Quarterly* 255
- S. R. Franck** 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521
- J. D. Fry** 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative and International Law* 77
- E. Gaillard** 'L'arbitrage sur le fondement des traités de protection des investissements' (2003) *Revue de l'arbitrage* 853
- 'Chronique des sentences arbitrales' (2010) 137 *Journal du droit international* 499
- A. Gattini** 'Un regard procédural sur la fragmentation du droit international' (2006) 110 *Revue Générale de Droit International Public* 303
- T. Gazzini** 'The Role of Customary International Law in the Field of Foreign Investment' (2007) 8 *Journal of World Investment & Trade* 691
- A. A. Ghouri** 'Investment treaty arbitration and the development of International Investment Law as a 'Collective Value System': A synopsis of a new synthesis' (2009) 10 *Journal of World Investment & Trade* 921
- 'Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options' (2010) 16 *European Law Journal* 806
- C. S. Gibson & C. R. Drahozal** 'Iran-United States Claims Tribunal Precedent in Investor-State Arbitration' (2006) 23 *Journal of International Arbitration* 521
- T. Ginsburg** 'Bounded Discretion in International Judicial Lawmaking' (2005) 45 *Virginia Journal of International Law* 631
- J. D. González Campos** 'Les liens entre la compétence judiciaire et la compétence législative en droit international privé' (1977) 156 *Recueil des Cours de l'Académie de Droit International de La Haye* 227
- A. Gourgourinis** 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 *Journal of International Dispute Settlement* 31
- L. Guglya** 'The Interplay of International Dispute Resolution Mechanisms: the Softwood Lumber Controversy' (2011) 2 *Journal of International Dispute Settlement* 175
- G. Guillaume** 'The Future of Judicial Institutions' (1995) 44 *International and Comparative Law Quarterly* 848
- 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 *Journal of International Dispute Settlement* 5
- A. Guzman** 'International Tribunals: A Rational Choice Analysis' (2008) 157 *University of Pennsylvania Law Review* 171
- H. Haeri** 'A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law' (2011) 27 *Arbitration International* 27

Bibliography

- R. H. Hansen** 'Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties' (2010) 73 *The Modern Law Review* 523
- V. Heiskanen** 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' (2014) 29 *ICSID Review* 231
- C. Henckels** 'Overcoming Jurisdictional Isolationism at the WTO–FTA Nexus: A Potential Approach for the WTO' (2008) 19 *European Journal of International Law* 571
- P. F. Henin** 'The Jurisdiction of Investment Treaty Tribunals over Investors' Human Rights Claims: The Case Against *Roussalis v. Romania*' (2013) 51 *Columbia Journal of Transnational Law* 224
- S. Hindelang** 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39 *Legal Issues of Economic Integration* 179
- M. Hirsch** 'Sources of International Investment Law ' (2011) Paper given in the Conference held by The International Law Association Study Group - International Law Forum of the Hebrew University of Jerusalem on available on the author's SSRN page at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892564>
- H. Horn & P. C. Mavroidis** 'Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination' (2004) 15 *European Journal of International Law* 39
- H. Horn & P. C. Mavroidis** 'United States-Continued Dumping and Subsidy Offset Act of 2000' (2005) 4 *World Trade Review* 525
- H. Horn, G. Maggi & R. W. Staiger** 'Trade Agreements as Endogenously Incomplete Contracts' (2010) 100 *American Economic Review* 394
- R. Howse & E. Chalamish** 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz' (2009) 20 *European Journal of International Law* 1087
- M. Hunter & G. C. E. Silva** 'Transnational Public Policy and its Application in Investment Arbitrations' (2003) 4 *Journal of World Investment & Trade* 367
- C. W. Jenks** 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401
- L. Johns** 'Courts as Coordinators: Endogenous Enforcement and Jurisdiction in International Adjudication' (2011) 56 *Journal of Conflict Resolution* 257
- A. M. Johnston & M. J. Trebilcock** 'Fragmentation in International Trade Law: Insights from the Global Investment Regime' (2013) 12 *World Trade Review* 621
- D. L. Jones** 'The Iran-United States Claims Tribunal: Private Rights and State Responsibility' (1984) 24 *Virginia Journal of International Law* 259
- D. Kalderimis** 'Systemic Integration and International Investment Law—Some Practical Reflections' (2012) 3rd Biennial Global Conference Working Paper, *Society of International Economic Law (SIEL)*
- G. Kaufmann-Kohler** 'Arbitral Precedent Dream, Necessity or Excuse?' (2007) 23 *Arbitration International* 357

Bibliography

- 'Soft Law in International Arbitration: Codification and Normativity' (2010) 1 *Journal of International Dispute Settlement* 283
- G. Kaufmann-Kohler, et al.** 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently? Final Report on the Geneva Colloquium' (2006) 21 *ICSID Review* 59
- M. Kawano** 'L'affaire du thon à nageoire bleue et les chevauchements de juridictions internationales' (2003) *Annuaire français de droit international* 516
- J. B. Kim** 'Entrenchment of regionalism: WTO legality of MFN clauses in preferential trade agreements for goods and services' (2013) 13 *World Trade Review* 443
- B. Kingsbury & S. W. Schill** 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) *NYU School of Law, Public Law Research Paper*
- R. H. Kreindler** 'Arbitral Forum Shopping : Observations on Recent Developments in International Commercial and Investment Arbitration' (2006) 16 *American Review of International Arbitration* 17
- J. Kurtz** 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents' (2009) 20 *European Journal of International Law* 749
- 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25 *ICSID Review* 200
- 'Charting the Future of the Twin Pillars of International Economic Law' (2013) 9 *Jerusalem Review of Legal Studies* 36
- A. Lang** 'The Role of the International Court of Justice in a Context of Fragmentation' (2013) 62 *International & Comparative Law Quarterly* 777
- P. A. Lanyi & A. Steinbach** 'Limiting Jurisdictional Fragmentation in International Trade Disputes' (2014) 5 *Journal of International Dispute Settlement* 372
- N. Lavranos** 'The Epilogue in the MOX Plant Dispute: An End Without Findings' (2009) 18 *European Energy and Environmental Law Review* 180
- 'New Developments in the Interaction between International Investment Law and EU Law' (2010) 9 *The Law & Practice of International Courts and Tribunals* 409
- C. Leben** 'La responsabilité internationale de l'État sur le fondement des traités de promotion et de protection des investissements' (2004) 50 *Annuaire Français de Droit International* 683
- B. Legum** 'The Innovation of Investor-State Arbitration Under NAFTA' (2002) 43 *Harvard International Law Journal* 531
- 'Defining Investment and Investor: Who is Entitled to Claim?' (2006) 22 *Arbitration International* 521
- T.-Y. Lin** 'Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?' (2012) 5 *Contemporary Asia Arbitration Journal* 1
- V. Lowe** 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian Yearbook of International Law* 191

Bibliography

- G. Maggi & R. W. Staiger** 'The Role and Design of Dispute Settlement Procedures in International Trade Agreements' (2011) 126 *Quarterly Journal of Economics* 475
- G. Marceau** 'Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35 *Journal of World Trade* 1081
- J. R. Mariles** 'Public purpose, private losses: Regulatory expropriation and environmental regulation in International Investment Law' (2006) 16 *Journal of Transnational Law & Policy* 275
- E. Martinez** 'Understanding the Debate over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Gas Cases' (2012) 23 *Duke Journal of Comparative & International Law* 149
- J. A. Maupin** 'MFN-based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?' (2011) 14 *Journal of International Economic Law* 157
- P. C. Mavroidis** 'Remedies in the WTO legal system: between a rock and a hard place' (2000) 11 *European Journal of International Law* 763
- 'No outsourcing of law? WTO law as practiced by WTO courts' (2008) 102 *American Journal of International Law* 421
- C. McLachlan** 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279
- 'Investment Treaties and General International Law' (2008) 57 *International and Comparative Law Quarterly* 361
- D. McRae** 'The World Trade Organization and International Investment Law: Converging Systems—Can the Case for Convergence be Made?' (2013) 9 *Jerusalem Review of Legal Studies* 13
- R. Michaels** 'The New European Choice-of-Law Revolution' (2008) 82 *Tulane Law Review* 1607
- C. A. Miles** 'Corruption, Jurisdiction and Admissibility in International Investment Claims' (2012) 3 *Journal of International Dispute Settlement* 329
- A. D. Mitchell & D. Heaton** 'Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function, The' (2009) 31 *Michigan Journal of International Law* 559
- A. D. Mitchell & C. Henckels** 'Variations on a Theme: Comparing the Concept of Necessity in International Investment Law and WTO Law' (2013) 14 *Chicago Journal of International Law* 93
- K. Oellers-Frahm** 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions' (2001) 5 *Max Planck Yearbook of United Nations Law* 67
- F. Orrego-Vicuña** 'Individuals and Non-State Entities before International Courts and Tribunals' (2001) 5 *Max Planck United Nation Year Book* 53
- 'Foreign investment law: how customary is custom' (2005) 99 *American Society of International Law Proceedings* 101

Bibliography

- F. Ortino** 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 *Journal of International Dispute Settlement* 31
- A. i. Padideh** 'From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance?' (2008) 11 *Journal of International Economic Law* 779
- M. Papadaki** 'Compromissory Clauses as the Gatekeepers of the Law to be 'used' in the ICJ and the PCIJ' (2014) 5 *Journal of International Dispute Settlement* 1-45
- M. Parish** 'International Courts and the European Legal Order' (2012) 23 *European Journal of International Law* 141
- J. Paulsson** 'Arbitration Without Privity' (1995) 10 *ICSID Review - Foreign Investment Law Journal* 232
- J. Pauwelyn** 'The Role of Public International Law in the WTO: How far can we go?' (2001) 95 *American Journal of International Law* 535
- 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (2003) 37 *Journal of World Trade* 997
- 'Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking' (2006) 9 *Journal of International Economic Law* 197
- 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' (2014) 29 *ICSID Review* 372
- J. Pauwelyn & L. E. Salles** 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions' (2009) 42 *Cornell International Law Journal* 77
- A. Pellet** 'The Case Law of the ICJ in Investment Arbitration' (2013) 28 *ICSID Review* 223
- P. Peters** 'Dispute Settlement Arrangements in Investment Treaties' (1991) 22 *Netherlands Yearbook of International Law* 91
- 'Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties' (1997) 44 *Netherlands International Law Review* 233
- E.-U. Petersmann** 'Constitutionalism and International Organizations' (1997) 17 *Northwestern Journal of International Law and Business* 398
- 'Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade' (2006) 27 *University of Pennsylvania Journal of International Economic Law* 273
- 'The Judicial Task of Administering Justice in Trade and Investment Law and Adjudication' (2013) 4 *Journal of International Dispute Settlement* 5
- 'Competing "Principles of Justice" in Multilevel Commercial, Trade and Investment Adjudication: Need for More "Judicial Dialogues" and Legal "Cross-Fertilization"' (2013) 1 *The Global Community Yearbook of International Law & Jurisprudence* 163
- E. A. Posner & J. C. Yoo** 'Judicial Independence in International Tribunals' (2005) 93 *California Law Review* 1
- B. Poulain & M. Raux** 'Actualité du droit européen des investissements internationaux' (2011) 115 *Revue Générale de Droit International Public* 113

Bibliography

- L. S. Poulsen** 'Bilateral Investment Treaties and Preferential Trade: Is a BIT Really Better than a Lot?' (2010) 1 *Investment Treaty News* 16
- S. Puig** 'International Regime Complexity and Economic Law Enforcement' (2014) 17 *Journal of International Economic Law* 491
- D. Pulkowski** 'Book Review of Pauwelyn's Conflict of Norms in Public International Law' (2005) 16 *Eur. Journal of International Law* 153
- A. Reinisch** 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 *The Law and Practice of International Courts and Tribunals* 37
- 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureka Investment Arbitrations' (2012) 39 *Legal Issues of Economic Integration* 157
- 'The EU on the Investment Path, Quo Vadis Europe-The Future of EU BITs and Other Investment Agreements' (2013) 12 *Santa Clara Journal of International Law* 111
- W. M. Reisman** 'Case Specific Mandates' versus 'Systemic Implications': How Should Investment Tribunals Decide?' (2013) 29 *Arbitration International* 131
- A. Ritwik** 'Tobacco Packaging Arbitration and the State's Ability to Legislate' (2013) 54 *Harvard International Law Journal* 523
- A. Roberts** 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 *American Journal of International Law* 179
- 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *The American Journal of International Law* 45
- C. A. Rogers** 'The Politics of International Investment Arbitrators' (2013) 12 *Santa Clara Journal of International Law* 223
- C. Romano** 'The Price of International Justice' (2005) 4 *The Law & Practice of International Courts and Tribunals* 281
- C. B. Rosenberg** 'The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards' (2012) 44 *Georgetown Journal of International Law* 503
- C. Rousseau** 'De la Compatibilité des Normes Juridiques Contradictoires dans l'Ordre International' (1932) 39 *Revue Générale de Droit International Public* 133
- N. Rubins** 'Opening the Investment Arbitration Process: At What Cost, for What Benefit?' (2009) 2009 *Austrian Arbitration Yearbook* 483
- G. Sacerdoti** 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 *Recueil des Cours de l'Académie de Droit International de La Haye* 251
- 'Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards' (2004) 19 *ICSID Review* 1
- 'Trade and Investment Law: Institutional Differences and Substantive Similarities' (2013) 9 *Jerusalem Review of Legal Studies* 1

Bibliography

- G. H. Sampliner** 'Arbitration of Expropriation Cases Under U.S. Investment Treaties—A Threat to Democracy or the Dog That Didn't Bark?' (2003) 18 *ICSID Review* 1
- P. Sands** 'Treaty, Custom and the Cross-fertilization of International Law' (1998) 1 *Yale Human Rights and Development Journal* 85
- M. Sattorova** 'Denial of Justice Disguised?: Investment Arbitration and the Protection of Investors from Judicial Misconduct' (2012) 61 *International & Comparative Law Quarterly* 223
- E. Savarese** 'BIT Clauses Bearing on the Ratione Temporis Jurisdiction of ICSID Tribunals; A Survey on the Constituent Elements of Investor-State Legal Disputes under BITs' (2009) 10 *Journal World Investment & Trade* 601
- O. Schachter** 'New Directions in International Law' (1972) 49 *Chicago-Kent Law Review* 13
- L. Schicho** 'Attribution and State Entities: Diverging Approaches in Investment Arbitration' (2011) 12 *Journal World Investment & Trade* 283
- S. W. Schill** 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2010) 23 *Leiden Journal of International Law* 401
- 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 *European Journal of International Law* 875
- 'Illegal Investments in Investment Treaty Arbitration' (2012) 11 *The Law & Practice of International Courts and Tribunals* 281
- 'Luxembourg Limits: Conditions For Investor-State Dispute Settlement Under Future EU Investment Agreements' (2013) 10 *Transnational Dispute Management*, available online at <www.transnational-dispute-management.com>
- S. W. Schill & R. Briese** "'If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) 13 *Max Planck Yearbook of United Nations Law* 61
- A. K. Schneider** 'Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations' (1999) 20 *Michigan Journal of International Law* 697
- C. Schreuer** 'International and Domestic Law in Investment Disputes: The Case of ICSID' (1996) 1 *Austrian Review of International and European Law* 89
- 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 *Law & Practice of International Courts and Tribunals* 1
- 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1 *McGill Journal of Dispute Resolution* 1
- T. Schultz & C. Dupont** 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2014) 25 *European Journal of International Law* 1147
- W. F. Schwartz & A. O. Sykes** 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization' (2002) 31 *The Journal of Legal Studies* 179
- S. M. Schwebel & J. G. Wetter** 'Arbitration and the Exhaustion of Local Remedies' (1966) 60 *American Journal of International Law* 484

Bibliography

- G. C. Shaffer, M. Elsig & S. Puig** 'The Extensive (but Fragile) Authority of the WTO Appellate Body' (2014) University of California - Irvine School of Law *Legal Studies Research Paper Series No. 2014-54*
- Y. Shany** 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *American Journal of International Law* 225
- R. G. Shell** 'Res Judicata and Collateral Estoppel Effects of Commercial Arbitration' (1987) 35 *UCLA Law Review* 623
- D. Shelton** 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291
- 'Form, Function, and the Powers of International Courts' (2008) 9 *Chicago Journal of International Law* 571
- J. Shookman** 'Too Many Forums for Investment Disputes? ICSID Illustrations of Parallel Proceedings and Analysis' (2010) 27 *Journal of International Arbitration* 361
- B. Simma & D. Pulkowski** 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483
- A.-M. Slaughter** 'Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191
- H. Smit** 'International Res Judicata and Collateral Estoppel in the United States' (1962) 9 *UCLA Law Review* 44
- C. Söderlund** 'Intra-EU BIT Investment Protection and the EC Treaty' (2007) 24 *Journal of International Arbitration* 455
- S. A. Spears** 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 *Journal of International Economic Law* 1037
- A. M. Steingruber** 'Some remarks on Veijo Heiskanen's Note: 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' (2014) 29 *ICSID Review* 675
- A. Stone Sweet** 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4 *Law & Ethics of Human Rights* 47
- A. Stone Sweet & G. della Cananea** 'Proportionality, General Principles of Law and Investor-State Arbitration' (2014) *SSRN Paper* available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435307>
- A. Stone-Sweet & J. Mathews** 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72
- A. O. Sykes** 'The Safeguards Mess: A Critique of WTO Jurisprudence' (2003) 2 *World Trade Review* 261
- 'The Least Restrictive Means' (2003) 70 *The University of Chicago Law Review* 403
- 'Public versus Private Enforcement of International Economic Law: Standing and Remedy' (2005) 34 *The Journal of Legal Studies* 631
- R. Teitel & R. Howse** 'Cross-judging: tribunalization in a fragmented but interconnected global order' (2008) 41 *NYU Journal of International Law and Politics* 959

Bibliography

- V. J. Tejera Pérez** 'Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards' (2012) 3 *Journal of International Dispute Settlement* 1
- C. Tietje & C. Wackernagel** 'Enforcement of Intra-EU ICSID Awards' (2015) 16 *Journal of World Investment & Trade* 205
- J. L. Tobin & M. L. Busch** 'A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements' (2010) 62 *World Politics* 1-42
- J. P. Trachtman** 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333
- C. J. Trevino** 'State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration Under the Same Treaty' (2014) 5 *Journal of International Dispute Settlement* 199
- V. Vadi** 'When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law' (2010) 42 *Columbia Human Rights Law Review* 797
- 'Cultural Heritage and International Investment Law: A Stormy Relationship' (2008) 15 *International Journal of Cultural Property* 1
- 'Investing in Culture: Underwater Cultural Heritage and International Law' (2009) 42 *Vanderbilt Journal of Transnational Law* 853
- A. van Aaken** 'Fragmentation of International Law: The Case of International Investment Law' (2006) 17 *Finch Yearbook of International Law* 91
- 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 *Journal of International Economic Law* 507
- I. Van Damme** 'Inherent Powers of and for the WTO Appellate Body' (2008), Graduate Institute of International and Development Studies (Geneva), available at <graduateinstitute.ch/ctei/page2142.html>
- 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 *European Journal of International Law* 605
- G. Van Harten** 'Judicial Restraint in Investment Treaty Arbitration: Restraint Based on Relative Suitability' (2014) 5 *Journal of International Dispute Settlement* 5
- G. Van Harten & M. Loughling** 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121
- K. J. Vandeveld** 'A brief history of international investment agreements' (2005) 12 *U.-C. Davis Journal of International Law & Policy* 157
- G. Verhoosel** 'The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law' (2003) 6 *Journal of International Economic Law* 493
- C. O. J. Verill** 'Are WTO Violations Also Contrary to the Fair and Equitable Treatment Obligations In Investment Protection Agreement?' (2005) 11 *ILSA Journal of International and Comparative Law* 287
- J. E. Viñuales** 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship' (2010) 80 *British Yearbook of International Law* 244

Bibliography

- A. Von Bogdandy & I. Venzke** 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 *Leiden Journal of International Law* 49
- T. Voon & A. Mitchell** 'Time to Quit? Assessing International Investment Claims against Plain Tobacco Packaging in Australia' (2011) 14 *Journal of International Economic Law* 515
- P. Weil** 'Towards Relative Normativity in International Law' (1983) 77 *American Journal of International Law* 413
- J. H. H. Weiler** 'The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 *Journal of World Trade* 191
- M. Wu & J. Salzman** 'Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy, The' (2013) 108 *Northwestern University Law Review* 401-474