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World Trade Organization Rules Before Investment Tribunals: Facilitating Cross-Fertilisation While Appreciating Particularities

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Abstract

The private organisation of production through global value chains has tightened the material connection between international trade and foreign investment while being simultaneously politicised by certain actors. This paper seeks to explore how the rules generated, interpreted, and applied in the World Trade Organization (WTO) have been received by arbitral tribunals deciding investment disputes. Three avenues make this reception possible: first, provisions in investment agreements rendering WTO law directly applicable to investment disputes; second, principles of interpretation allowing recourse to WTO rules as a tool for the interpretation of investment law; third, the authoritative value of WTO case law on points of general international law concerning the settlement of international (investment) disputes. These three avenues allow investment tribunals to build on the law and practice of the WTO with a view to facilitating the cross-fertilisation between the two fields, while appreciating the substantive, procedural and institutional particularities of investment law.

Keywords

applicable law – fair and equitable treatment – general international law – international dispute settlement – investment arbitration – principles of interpretation – procedural law – World Trade Organization

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1 Introduction

International trade law and international investment law are two major pillars of international economic law – the segment of public international law governing economic relations.[1] As such, the two fields have developed in parallel, albeit different, ways;[2] and their intersection can be explored through multiple angles.[3] The present article examines a specific aspect of this relationship, namely the influence of rules generated, interpreted and applied under the auspices of the World Trade Organization (WTO) on investment arbitration, i.e. its cross-fertilization. This broad formulation is intended to cover not only rules and principles of WTO law that are potentially relevant to investment arbitration, but also rules not specific to international trade or the WTO which are used by investment tribunals in the light of the practice within the WTO dispute settlement mechanism. In other words, the avenues this article explores for cross-fertilization include WTO law as applicable law, WTO law as an interpretative tool for similar legal concepts, and the authoritative value of WTO law as 'other relevant rules' of international law. At a moment in which the private organisation of production through global value chains has tightened the material connection between international trade and foreign investment, while these economic transactions are simultaneously being politicised by certain actors, it is time to examine how existing avenues of cross-fertilisation between WTO law and investment arbitration might promote the overall resilience of international economic law, while appreciating the substantive, procedural and institutional particularities of each field.

Investment tribunals are not empowered to decide on alleged violations of obligations under international trade agreements falling outside their jurisdiction,[4] bearing in mind the considerable variation among international investment agreements in terms of the scope of their jurisdictional clauses. In the absence of a jurisdictional clause, some claimants have relied on

1 Matthias Herdegen, *Principles of International Economic Law* (2nd edn, OUP 2016) 3 (the third major pillar being international monetary law).

2 Friedl Weiss, 'Trade and Investment' in Peter T Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 184.

3 See eg Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (CUP 2016); Thomas Brewer and Stephen Young, 'Investment Issues at the WTO: The Architecture of Rules and the Settlement of Disputes' (1998) 1 JIEL 457; Rodney Neufeld, 'Trade and Investment' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009).

4 The issue has been addressed in some length with regard to human rights agreements, see eg Filip Balczerak, *Investor-State Arbitration and Human Rights* (Brill 2017); *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v Argentina*, ICSID Case No ARB/07/26, Award (8 December 2016).

most-favoured-nation treatment under a trade agreement (GATS Article II) as the putative basis of the respondent's consent to investment arbitration.[5] This has generally not been successful. The *Menzies* tribunal, for example, rejected such an argument on the basis that GATS Article II did not refer to international arbitration or dispute settlement and could therefore not be considered current, express and unequivocal consent to arbitration.[6] An illustration can be found in Article 14.D.9 of the Canada–United States–Mexico Agreement (CUSMA) which stipulates that tribunals applying Chapter 14 on Investment would 'decide the issues in dispute in accordance with this Agreement and applicable rules of international law'.[7] This provision is identical to Article 1131(1) of CUSMA's predecessor, the North Atlantic Free Trade Agreement (NAFTA), which has been interpreted as precluding jurisdiction over violations of trade treaties such as the General Agreement on Tariffs and Trade (GATT).[8] At the same time, the most obvious opportunity for convergence between WTO law and investment arbitration is the interpretation of GATT-style general exceptions in investment treaties, which have attracted significant commentary.[9]

However, the case law of the WTO Panels and Appellate Body may come into play in several ways in the context of investment arbitration. First, rights and obligations under trade agreements may be incorporated in investment treaty provisions and thereby become directly applicable in the relations between the investor and the host State.[10] Second, trade law may shed light on

5 *Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v Republic of Senegal*, ICSID Case No ARB/15/21, Award (5 August 2016) paras 129–51.

6 ibid para 132.

7 Canada–United States–Mexico Agreement (signed 30 November 2018, entered into force 1 July 2020) (CUSMA) <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng> accessed 26 October 2022.

8 *Methanex Corporation v USA*, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) Part II, ch B, para 5, responding to the claims in Reply of Claimant Methanex Corporation to US Amended Statement of Defense (19 February 2004) paras 198–202.

9 See eg Amelia Keene, 'The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements' (2017) 18 JWIT 62; Andrew Mitchell, James Munro and Tania Voon, 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths, and Risks' in Lisa Sachs, Lise Johnson and Jesse Coleman (eds), *Yearbook on International Investment Law and Policy 2017* (OUP 2019); Caroline Henckels, 'Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law' (2020) 69 ICLQ 557.

10 Gaetan Verhoosel, 'The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law' (2003) 6 JIEL 493, 496; Charles Kotuby, '"Other International Obligations" as the Applicable Law in Investment Arbitration' (2011) 14 Intl Arb L Rev 162, 162.

the appropriate interpretation of investment treaty provisions. In both these instances, decisions on the meaning of WTO law have an important role to play as a subsidiary means for the determination of other rules of international law – in this case, investment law.[11] Finally, investment tribunals may resort to the case law of the WTO Panels and Appellate Body when interpreting and applying other rules of international law that may become relevant in the course of arbitration, including investment arbitration – for instance, rules under treaties or customary law concerning arbitral procedure or even the rules of treaty interpretation themselves.

The relative resilience of investment arbitration, as compared with the recent politicisation of WTO dispute resolution, may make the former a more attractive forum for the future settlement of economic disputes in the eyes of most States and commercial actors. Rather than presenting a grand theory of how WTO law could be applied in investment arbitration, however, this article seeks to describe some of the lesser-known pathways charted through the pragmatism of past investment tribunals. This article analyses instances in which reference to WTO law was made in investment proceedings, either by the tribunal or the parties, as well as the implications of such references. Additionally, it examines the reasons for any cross-fertilization (or lack thereof) and how subsequent investment tribunals have relied on cross-fertilising precedents. In particular, this article focuses on case law in which trade rules have been relevant not only on substance, but also as interpretative and procedural tools. This contribution could thus have some predictive value for future disputes, assuming counsel and tribunals are more inclined to drive their legal arguments and arbitral reasoning down well-trodden paths. This piece is particularly topical in times of WTO crisis, as the investor-State arbitral mechanism may provide an alternative avenue for the resolution of economic disputes (at least insofar as certain cases are concerned), with the incorporation of acquired knowledge from the WTO. Indeed, the interpretative sensibilities of individual arbitrators may be a key determinant of whether those pathways continue facilitating cross-fertilisation between WTO law and investment arbitration.

As international law continues to evolve together with the contemporary organisation of the world economy, investment arbitrators may be expected to apply and develop the wisdom accumulated within the WTO through its quarter-century of jurisprudence, especially when trade and investment law can find common ground in the substance and procedure of general international law.

11 *Methanex Corporation v USA* (n 8) Part II, ch B, para 6.

2 Possible Drivers of Legal Cross-Fertilisation

2.1 *Economic Convergence, Political Disruption and the Search for Legitimacy*

Not long ago, recourse to WTO rules by investment tribunals was strongly criticized on the ground that these discrete regimes were designed to govern distinct sets of relationships (among States or between an investor and its host State) in pursuit of disparate purposes (free trade versus investment protection).[12] In terms of their regulatory objects, moreover, trade agreements have largely targeted border measures,[13] whereas investment law has been foremost concerned with what happens behind the border, whether one traces its origin to the classical law of State responsibility or the turn toward foreign direct investment as a vehicle of development.[14] On this point, the issue of fragmentation in international law has already been extensively discussed in the literature[15] and does not warrant further analysis on this occasion where the intention is to focus on a concrete discussion of the different ways in which investment tribunals may take into account WTO law. Yet the legal decoupling of international trade and foreign investment belies their close connection from the vantage point of diplomatic history, let alone their intimacy as a matter of economic reality.[16] Trade and investment are arguably intertwined to an even greater degree now that over two-thirds of world trade is conducted through global value chains, whereby production crosses at least one border,

12 See eg Kathleen Claussen, 'The Casualty of Investor Protection in Times of Economic Crisis' (2009) 118 Yale L J 1545.

13 Trade agreements, classically the GATT, also restrict internal regulation that favours domestic products over imports: see Joost Pauwelyn, '*Rien ne Va Plus*? Distinguishing Domestic Regulation from Market Access in GATT and GATS' (2005) 4 WTR 131.

14 See generally Stephan W Schill, Christian J Tams and Rainer Hofmann (eds), *International Investment Law and History* (Edward Elgar 2018).

15 Adrian M Johnston and Michael J Trebilcock, 'Fragmentation in International Trade Law: Insights from the Global Investment Regime' (2013) 12(4) WTR 621; Ernst-Ulrich Petersmann, '"Fragmentation" of International Law as a Strategy for Reforming International Investment Law' (2014) 23(1) The Italian Yearbook of International Law Online 49; August Reinisch, 'Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? – Some Reflections from the Perspective of International Arbitration' in James Crawford and others (eds), *International Law Between Universalism and Fragmentation – Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff 2008) 107.

16 Jürgen Kurtz, Jorge E Viñuales and Michael Waibel, 'Principles Governing the Global Economy' in Jorge E Viñuales (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (CUP 2020) 331–61.

typically many, through various intra- and inter-firm transactions before final assembly of the end product.[17]

While investment chapters have been commonplace in trade agreements since NAFTA, the private sector's decisions regarding the structure and financing of global production may well drive deliberate cross-fertilisation through treaty negotiations to ensure that the substantive and procedural aspects of trade and investment law keep pace with changing economic arrangements.[18] Tribunals have long recognized the unity of an investment for jurisdictional purposes, giving 'precedence to economic realism over legal formalism … by looking at integrated economic operations rather than individual legal transactions'.[19] Moreover, they have increasingly drawn on trade and environmental law to interpret standards of investment protection in a manner that mirrors the material overlap of such issues in the domestic sphere.[20] Though investment tribunals' references to trade and the environment are not equivalent as environmental laws do not have the same parallel origin with investment that trade does, the incorporation of other regimes in the interpretation of investment provisions is relevant to this analysis. Interestingly, recent trade and investment agreements include explicit references to protection of the environment as an integral part of investor protection, including limitations on incentives to investors which would imply diminishing environmental standards.[21] These hybrid instruments may thus enrich the reasoning of investment tribunals, inviting them to consider a juridical context that better captures the political economy of covered investments: 'trade liberalization, promotion of investment, regulatory space, protection of non-economic interests, and general exceptions'.[22] An ostensible 'trade dispute' between

17 WTO, 'Global Value Chain Development Report 2019' (WTO, 2019) 1. See further The IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4 London Rev Intl L 57.

18 Gregory Shaffer, *Emerging Powers and the World Trading System: The Past and Future of International Economic Law* (CUP 2021) 18–20.

19 Christoph Schreuer, 'The Unity of an Investment' (2021) 19 ICSID Rep 3, 24.

20 See eg *Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award (3 November 2015) paras 387–89.

21 Alessandro Ferrari and others, 'EU Trade Agreements and Non-Trade Policy Objectives' (2021) EUI RSC Working Paper 2021/48; Marco Bronckers and Giovanni Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24(1) JIEL 25; Jacques Pelkmans, 'Linking "Values" to EU Trade Policy – A Good Idea?' (2020) 26(5–6) ELJ 391; Ingo Borchert and others, 'The Pursuit of Non-Trade Policy Objectives in EU Trade Policy' (2020) 20(5) WTR 623; Paola Conconi, 'Linking Trade Policy to Non-Trade Issues: Selected Survey of the Literature' (ECARES, CEPR and CESifo, September 2018).

22 Szilárd Gáspár-Szilágyi and Maxim Usynin, 'Investment Chapters in PTAs and Their Impact on Adjudicative Convergence' in Szilárd Gáspár-Szilágyi, Daniel Behn and

States parties to a trade agreement is bound also to affect the interests of some investors further along the value chain, who may bring a parallel arbitral claim under the investment chapter of that agreement so long as they satisfy the jurisdictional requirements.[23]

At the same time, we have witnessed the exposure of the WTO's centralised institutional architecture to political turbulence, typified by the refusal of the United States to reappoint members of the Appellate Body.[24] The decentralised system of investment arbitration, in contrast, has demonstrated its 'dynamic stability' in the face of opposition due to its perceived failure to accommodate legitimate regulatory interests.[25] Both WTO law and investment arbitration have independently illustrated their ability to take seriously such interests, upholding measures intended to protect public health in the highly publicised disputes over tobacco plain-packaging.[26] Many studies in the past decade have sought to tighten or loosen the legal linkage between WTO law and investment arbitration, based on doctrinal, historical, policy, or empirical analyses.[27]

Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (CUP 2020) 21, 51.

23 See eg *Cargill, Incorporated v Mexico*, ICSID Case No ARB(AF)/05/2, Award (18 September 2009) paras 141–54. Not all trade disputes, however, may be rendered as a 'legal dispute arising directly out of an investment'; purely commercial transactions, such as contracts for the sale of goods, tend not to fall within Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) (ICSID Convention): See eg *Global Trading Resource Corp and Globex International, Inc v Ukraine*, ICSID Case ARB/09/11, Award (1 December 2010) paras 54–57.

24 Vineet Hegde, Jan Wouters and Akhil Raina, 'Is the Rules-Based Multilateral Trade Order in Decline? Current Practices, Trends and Their Impact' (2021) 10 Cambridge International Law Journal 32, 39.

25 Joost 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, 381.

26 See eg *Philip Morris Asia Limited v Australia*, PCA Case No 2012–12, Award on Jurisdiction an Admissibility (17 December 2015); *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016); WTO, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Report of the Appellate Body (29 June 2020) WT/DS435/AB/R, WT/DS 441/AB/R. See further Freya Baetens, 'Protecting Foreign Investment and Public Health: Mutually Exclusive or Complementary by Design?' (2022) 71 ICLQ 139.

27 See eg Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 University of Pennsylvania Journal of International Law 1; Mona Pinchis, 'The Ancestry of "Equitable Treatment" in Trade: Lessons from the League of Nations During the Inter-War Period' (2014) 15 JWIT 13; Federico Ortino and Maria Laura Marceddu, 'Intersections Between Trade and Investment Law and Policy: The Common Causes Underlying the Crisis of Dispute Settlement' in Sachs, Johnson and

Alvarez suggests that most scholars would like to find evidence of 'structural or substance convergence' for the following reasons:[28]

> common interpretative techniques would allow the investment regime to respond to its legitimacy challenges in the (erstwhile) effective ways pursued by the WTO since the protests at Seattle; resort to common precedents would demonstrate both regimes' 'responsiveness' to desires for more coherent, consistent, stable, predictable and hierarchically respectful law; and uniform responses seem desirable at least with respect to parallel disputes filed in both trade and investment regimes.

Indeed, WTO as well as investment law have suffered waves of political and scholarly criticism over the past two decades. Yet the substance of international trade and investment law is supported by almost all States, reflected in the mostly procedural reforms under discussion in United Nations Commission on International Trade Law (UNCITRAL) Working Group III and the concerted effort of many WTO members to create a temporary appellate mechanism.[29] The closest UNCITRAL Working Group III comes to addressing substantive questions of international law is its concern for the consistency of arbitral awards, which is perhaps most troubling when there are contradictory decisions regarding 'more structural secondary rules' rather than inconsistent interpretations of vague and varied primary obligations of sovereign conduct.[30] However, investment tribunals often ground their reasoning in points of general international law elaborated by the Permanent Court of International Justice and the International Court of Justice (ICJ). Not only do investment tribunals 'refer to the jurisprudence of the World Court', observes Pellet, 'but they show a particular deference to it' in their 'search for an enhanced legitimacy'.[31]

Coleman (n 9) 261; José E Alvarez, *The Boundaries of Investment Arbitration – The Use of Trade and European Human Rights Law in Investor State Disputes* (JurisNet 2018) ch 3; Gáspár-Szilágyi, Behn and Langford (n 22).

28 José E Alvarez, 'Epilogue: "Convergence" Is a Many-Splendored Thing' in Gáspár-Szilágyi, Behn and Langford (n 22) 285, 285.

29 See respectively United Nations Commission on International Trade Law (UNCITRAL), 'Working Group III: Investor-State Dispute Settlement Reform' <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 26 October 2022; WTO, 'Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes' (30 April 2020) JOB/DSB/1/Add.12.

30 Julian Arato, Chester Brown and Federico Ortino, 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement' (2020) 21 JWIT 336, 339.

31 Alain Pellet, '2013 Lalive Lecture: The Case Law of the ICJ in Investment Arbitration' (2013) 28 ICSID Rev 223, 230 and 240.

It has also been suggested that tribunals draw on the institutional authority of WTO jurisprudence to shore up the legitimacy of investment arbitration.[32]

As will be developed below, the purpose of this article is not to theoretically determine the drivers of cross-fertilization from WTO law to investment law, but rather to examine how investment law refers to WTO law in practice. The objective is to set out a framework within which investment tribunals can build on the law and practice of the WTO – an evolution which will facilitate increased stability in the investment regime, as opposed to the discussion on fragmentation which has been exhausted elsewhere. Nevertheless, it ought to be recognised that some scholars have cautioned against an increased cross-fertilization of WTO and investment law. Howse and Chalamish, for example, admonish references to WTO law by investment tribunals as they may fail to consider 'the unique characteristics of the investment law regime'.[33] Alvarez similarly warns against attempting to fast-track the incorporation of WTO law in investment law, arguing that such incorporation must consider the specific texts of the treaties at issue as well as their context.[34]

This article submits that existing processes of cross-fertilisation from WTO law to investment arbitration may – and should – be further advanced through the interpretative choices of tribunals to ensure that the segment of public international law concerning economic relations remains materially relevant and normatively legitimate in the eyes of the commercial and governmental actors whom it predominantly regulates.[35] Of course, arbitrators are unlikely to foreground the underlying drivers of cross-fertilisation in their legal reasoning – a fact which as such calls for closer scrutiny of the ways in which the law generated, interpreted, and applied in the WTO has been received by tribunals deciding investment disputes. In examining the cross-fertilisation of WTO and investment law, however, it helps to keep in mind the interpretative sensibilities of individual arbitrators, exemplified by those who have a background in the unique institutional context of the WTO Appellate Body.

32 Michelle Q Zang, 'Engagement Between International Trade and Investment Adjudicators' in Gáspár-Szilágyi, Behn and Langford (n 22) 148, 154–58.

33 Robert Howse and Efraim Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jurgen Kürtz' (2010) 20(4) EJIL 1087, 1088.

34 Alvarez (n 27).

35 On the reflexivity of arbitrators or regimes to external signals regarding their perceived legitimacy, see Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29 EJIL 551; Malcolm Langford, Cosette D Creamer and Daniel Behn, 'Regime Responsiveness in International Economic Disputes' in Gáspár-Szilágyi, Behn and Langford (n 22) 244.

2.2 *Interpretative Sensibilities of Trade and Investment Adjudicators*

Repeat appointments of individuals have played an important role in the development of investment arbitration, ranging from the initial construction of the subfield through to the cultivation of favoured doctrinal positions.[36] For present purposes, it is worth noting that the juridical influence enjoyed by members of WTO Panels or the Appellate Body need not transpose when they are appointed as investment arbitrators,[37] given their 'distinct vocabulary and hermeneutic sensibility' on questions of treaty interpretation.[38] A useful illustration, in theory and practice, is offered by Georges Abi-Saab, who has adjudicated many trade and investment disputes, including as Chairman of the WTO Appellate Body.[39] Commenting on the textualist approach of the Appellate Body, Abi-Saab observed that 'each judicial organ develops its own judicial policy to adapt the exercise of its judicial activity to its environment'.[40] But a stable policy, whereby adjudicators seek to maintain a reasonable balance of interests among their legal subjects, is difficult to achieve in investment arbitration due to the *ad hoc* character of appointments.[41]

Ironically, this phenomenon is well evidenced by some rather idiosyncratic investment decisions penned by three former Chairmen of the WTO Appellate Body. First, Abi-Saab, in his own words, wrote 'fiery dissenting opinions',[42] such as his fundamental disagreement in *Abaclat* over the scope of covered investments and consent to arbitration under the ICSID Convention with regard

36 See eg Yves Dezalay and Bryan G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996); Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 EJIL 387; Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020).

37 On overlapping appointments of WTO adjudicators and ICSID arbitrators, see Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109 AJIL 761, 769. This article was the focus of a symposium: see 'Symposium on Joost Pauwelyn' (2015) 109 AJIL Unbound 277–318.

38 JHH Weiler, 'The Interpretation of Treaties – A Re-examination' (2010) 21 EJIL 507, 507.

39 For a profile, see Jus Connect, 'Georges Abi-Saab' <https://jusmundi.com/en/p/georges-abi-saab> accessed 26 October 2022.

40 Georges Abi-Saab, 'The Appellate Body and Treaty Interpretation' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill 2010) 106.

41 Georges Abi-Saab, 'Remarks by Georges Abi-Saab' (2017) 111 ASIL Proceedings 211, 219.

42 ibid.

to sovereign bonds issued in a third State.[43] Second, Sacerdoti chaired the *Continental Casualty* tribunal, further discussed below, which drew extensively on WTO case law in its interpretation of 'essential security interests' as the basis for non-precluded measures,[44] including reports of the Appellate Body chaired by himself (*US – Gambling*),[45] Abi-Saab (*Brazil – Retreaded Tyres*)[46] and Florentino Feliciano (*EC – Asbestos*).[47] According to Claussen, the reasoning in *Continental Casualty* 'circumvents legitimate methods of interpretation by importing principles from outside the realm of relevant sources'.[48] Sacerdoti also presided over the Tribunal in *Total*, which drew on GATS provisions to establish the criteria for the application of the standard of fair and equitable treatment, further discussed below. Third, the interpretative maxim of *in dubio mitius* has been expressly endorsed only under the presidency of Feliciano in *SGS v Pakistan*,[49] relying on a report of the Appellate Body that he had chaired.[50] Another investment tribunal – including a former President of the ICJ – promptly derided the decision in *SGS v Pakistan* as invoking an outmoded presumption in favour of sovereign rights that has been displaced by the rise of bilateral investment treaties (BITs).[51]

43 *Abaclat and Others v Argentine Republic*, ICSID Case No ARB/07/5, Dissenting Opinion by Georges Abi-Saab (28 October 2011).

44 *Continental Casualty v Argentina*, ICSID Case No ARB/03/9, Award (5 September 2008). In the annulment proceeding, the Claimant argued that the Tribunal erred in its analysis of WTO law, but the *ad hoc* Committee held that, '[e]ven if it could be established by Continental that the Tribunal reached an erroneous interpretation of Article XI of the BIT based on an erroneous understanding of GATT-WTO law, that would amount only to an error of law, which is not a ground of annulment': *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic (16 September 2011) para 133.

45 WTO, *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body (7 April 2005) WT/DS285/AB/R.

46 WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body (3 December 2007) WT/DS322/AB/R.

47 WTO, *EC – Measures Affecting Asbestos and Asbestos-Contained Products*, Report of the Appellate Body (12 March 2001) WT/DS135/AB/R.

48 Kathleen Claussen, 'The Casualty of Investor Protection in Times of Economic Crisis' (2009) 118 Yale L J 1545, 1553.

49 *SGS Société Générale de Surveillance SA v Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objection to Jurisdiction (6 August 2003) para 171.

50 WTO, *EC – Measures Concerning Meat and Meat Products* (*Hormones*) (*AB-1997-4*), Report of the Appellate Body (16 January 1998) WT/DS26/AB/R–WT/DS48/AB/R, paras 163–65.

51 *Eureko BV v Republic of Poland*, UNCITRAL, Partial Award (19 August 2005) para 258.

The point here is not necessarily to favour any of these positions but rather to underline the likelihood that adjudicators will be more supportive of legal arguments that are familiar to them based on their individual background and prior experience,[52] which might be an important variable in the future cross-fertilisation of investment arbitration by WTO law.[53] There may well be barriers to entry, as it were, for approaches developed in WTO law to be taken up in investment arbitration, given the disposition of arbitrators to 'pay due consideration to earlier decisions of international tribunals' out of an ostensible 'duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law'.[54] The proper touchstone for 'the furtherance of legal certainty and the rule of law', however, is not the 'sheer weight of numbers' of past investment decisions but whether such decisions are 'harmonious with the corpus of public international law'.[55] The uptake of WTO law in investment arbitration may therefore be advanced by foregrounding their common basis in general international law,[56] including the rules of interpretation under the VCLT.

52 Freya Baetens, 'The Rule of Law or the Perception of the Beholder? Why Investment Arbitrators Are Under Fire and Trade Adjudicators Are Not: A Response to Joost Pauwelyn' (2016) 109 AJIL Unbound 302, 306–07.

53 For an overview of the predominant interpretative methodology of investment tribunals, see Christoph Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' in Fitzmaurice, Elias and Merkouris (n 40) 129.

54 *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Award (30 June 2009) para 90.

55 *Muszynianka spółka z ograniczoną odpowiedzialnością v Slovak Republic*, PCA Case No 2017-08, Partial Dissenting Opinion of Professor Robert G Volterra (7 October 2020) para 13.

56 It should be borne in mind that the ICJ has indicated a reluctance to infer principles of general international law from the practice of investment arbitration: see *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia v Chile*) (Judgment) [2018] ICJ Rep 507, para 162 (dismissing Bolivia's argument based on legitimate expectations). The application of WTO law in ICJ litigation, moreover, has been confined to the opinions of individual judges: See eg *Whaling in the Antarctic* (*Australia v Japan: New Zealand intervening*) (Dissenting Opinion of Judge Owada) [2014] ICJ Rep 301, paras 33–37 (finding WTO law to be a useful point of reference in determining the proper standard of review); *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Islamic Republic of Iran v United States of America*) (Declaration of Judge ad hoc Momtaz) [2018] ICJ Rep 684, paras 22–28 (suggesting that unilateral measures taken by the United States would not have satisfied the exception for national security under Article XX(1)(d) of the GATT).

3 World Trade Organization Rules as Applicable Law: The Test Case of Fair and Equitable Treatment

In principle, investment tribunals apply the law agreed upon by the parties;[57] most commonly, the investment agreement between the investor's host and home State.[58] The investment agreement often contains specific provisions on applicable law, which usually mandate the tribunal to decide the disputes in accordance with the agreement 'and applicable rules and principles of international law'.[59] Besides, it is generally accepted that the substantive provisions of the investment agreement constitute the law applicable to the dispute *par excellence*, even if this is not expressly stated in the agreement.[60] The obligations assumed by the parties to the investment agreements, in turn, may render other rules of law, including international law, directly applicable to the dispute.[61] One such obligation may be found in 'umbrella clauses', which, leaving aside their significant variations, in broad terms require the host State to observe its commitments with respect to the foreign investor or the investment, usually those of a contractual character under domestic law.[62]

More to the point, investment agreements may provide that any existing international obligations between the States parties granting more favourable treatment to foreign investments or investors prevail over the investment agreement itself.[63] Whether and which precise obligations are incorporated into the

57 See eg Article 42 ICSID Convention (n 23); more broadly, 'The Proper Law of the Contract in Agreements Between a State and a Foreign Private Person' (1979) 58(II) Annuaire de l'Institut de droit international 192, art 1; Taida Begic, *Applicable Law in International Investment Disputes* (Eleven 2005) 4.

58 Begic (n 57) 25.

59 For several examples, including the Energy Charter Treaty (signed December 1994, entered into force April 1998) and North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (NAFTA), see ibid 26–29; also Andrea Bjorklund, 'Applicable Law in International Investment Disputes' in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill 2014) 269.

60 Christoph H Schreuer and others (eds), *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 578, para 89.

61 This point was well recognised in the very first treaty-based investment arbitration: see *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990) paras 21 and 40.

62 Stanimir A Alexandrov, 'Breaches of Contract and Breaches of Treaty: 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, 565–66.

63 Gaetan Verhoosel, 'The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law' (2003) 6 JIEL 493, 495, with further examples.

investment agreement through reference to international law is a matter of interpretation, to be carried out with respect to the specific provision in question.[64] A provision that is most likely to render WTO law directly applicable in an investment dispute is one commonly found in investment treaties (with slight variations),[65] obligating host States to accord foreign investments fair and equitable treatment 'in accordance with international law'.[66] Academic commentators[67] and litigant States[68] have argued that such international law may incorporate treaty obligations of host States, including rights and obligations arising under WTO law.[69]

In an early effort to integrate WTO and investment law, the Claimant in *Methanex* argued that '[a]ny violation of an international principle intended for the protection of trade or investment is also a violation of the Art. 1105 requirement that state measures be fair, equitable, and in accordance with international law', claiming that the principle in question was the rule drawn from WTO law to the effect that regulatory measures ought to meet certain conditions.[70] The Tribunal considered itself to be bound by the Free Trade Commission's Interpretative Note, which stipulated 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' and that the concept of fair and equitable treatment does 'not require treatment in addition to or beyond' that which is

64 This was illustrated in *Immunities and Criminal Proceedings* (*Equatorial Guinea v France*), *Preliminary Objections* (Judgment) [2018] ICJ Rep paras 91–102. On the mechanism of incorporation in general, see Mathias Forteau, 'Les renvois inter-conventionnels' (2003) 49 Annuaire français de droit international 71.

65 For an illustration of the linguistic variety, see the examples collected in Greg Tereposky and Morgan Maguire, 'Utilizing WTO Law in Investor-State Arbitration' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation* (Martinus Nijhoff 2011) 247, 277–79.

66 See eg Article 1105(1) NAFTA (n 59); for more examples, see Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYBIL 99, 127.

67 Verhoosel (n 63) 497.

68 *Pope & Talbot, Inc v Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) para 107.

69 Similar expressions to 'fair and equitable treatment' were included in trade agreements preceding the formation of the WTO, but this practice has seldom directly informed arbitral interpretations of the standard contained in modern investment treaties: see Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 90–93 and 114; Kenneth J Vandevelde, *The First Bilateral Investment Treaties: US Postwar Friendship, Commerce, and Navigation Treaties* (OUP 2017) ch 8.

70 *Methanex Corporation v USA*, Claimant Methanex Corporation's Draft Amended Claim (12 February 2001) 58.

required by the custom.[71] As a result, the Tribunal held that the claim failed under customary international law because States were in principle permitted to differentiate in their treatment of nationals and aliens, regardless of whether this was allowed under WTO law.[72] Subsequent tribunals have debated the effect of the Interpretative Note on the interpretation of Article 1105 but without referring to WTO or other international trade agreements.[73] In *Unión Fenosa*, a case under the Spain-Egypt BIT, the Claimant argued that the host State's international commitments – including under the WTO covered agreements – gave rise to 'legitimate expectations', which were frustrated through its subsequent conduct.[74] While not discussing the host State's obligations relating to international trade specifically, the Tribunal stressed that its jurisdiction was confined to alleged breaches of the obligations arising under the investment treaty in question.[75]

The umbrella clause provision does not appear to have been used as of yet to incorporate trade obligations under investment law, perhaps due to the fact that many of these clauses refer specifically to commitments entered into 'with regard to the investor' or 'the investment', and not obligations of the State more broadly. Between the techniques of interpretative influence and direct application of WTO law in investment arbitration lie situations, however, in which obligations under international trade agreements are either incorporated into domestic legislation or reflected in customary international law, which are in turn applicable to the dispute. An example of the former situation is *Philip Morris v Uruguay*, in which the applicable Uruguayan legislation was based on a number of intellectual property conventions, including TRIPS.[76] The Tribunal discussed the obligations under these agreements in considerable detail, with a view to determining the host State's undertakings vis-à-vis the investor.[77] An example of the latter situation does not seem to have explicitly occurred in practice, because litigants appear reluctant to argue a direct association between WTO standards and their counterparts in customary international law, even though a similar argument has been put forward in the

71 NAFTA FTC, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001) <www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> accessed 26 October 2022.

72 *Methanex Corporation v USA* (n 8) Part IV, ch C, paras 22 and 25.

73 See eg *Mondev International Ltd v USA*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 121; *Pope & Talbot, Inc v Canada*, UNCITRAL, Award on Damages (31 May 2002) para 47 and 65.

74 *Unión Fenosa Gas, SA v Egypt*, ICSID Case No ARB/14/4, Award (31 August 2018) para 9.20.

75 ibid para 9.55.

76 *Philip Morris v Uruguay* (n 26) para 172.

77 ibid paras 260–65; the Tribunal did not explicitly rely on relevant case law.

doctrine.[78] That said, the Tribunal in *Total* relied on provisions in the GATS to establish the criteria for the application of the fair and equitable treatment standard.

The Tribunal recalled that, under GATS Article VI (to which both parties of the applicable investment treaty were also party), States were obliged to 'ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner' and it held that this requirement 'offer[ed] useful guidance as to the requirements that a domestic regulation must contain in order to be considered fair and equitable'.[79] The Tribunal noted, however, that it 'refer[red] to the requirements found in GATS Article VI just as "guidance" because it ha[d] not been submitted that the GATS [wa]s directly applicable [in the dispute]'.[80] The Tribunal offered no explanation why, from a methodological standpoint, the content of customary law could be ascertained with reference to treaty provisions,[81] even less so provisions appearing in a distinct context and with a different scope of application.[82] This case nevertheless suggests the willingness of certain arbitrators to draw on WTO law in their interpretation and application of the standard of fair and equitable treatment; notably, the Tribunal in *Total* was presided over by Giorgio Sacerdoti, a former Chairman of the WTO Appellate Body.

The direct application of international trade agreements in investment disputes, however, may be explicitly excluded, as was done by the aforementioned Interpretative Note regarding Article 1105(1) of NAFTA – now adopted in Article 14.6 of CUSMA[83] – and in Article 11(3) of the ASEAN Comprehensive Investment Agreement.[84] Also, Article 8.10.6 of the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) provides explicitly that 'a breach of another provision of this Agreement, or of a separate

78 Charles Owen Verrill, Jr, 'Are WTO Violations also Contrary to the Fair and Equitable Treatment Obligations in Investor Protection Agreements?' (2005) 11 ILSA J Intl Comp L 287, 293–94.

79 *Total SA v Argentina*, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010) para 123.

80 ibid para 123.

81 See *Ahmadou Sadio Diallo* (*Republic of Guinea v Democratic Republic of the Congo*), *Preliminary Objections* (Judgment) [2007] ICJ Rep 582, para 90.

82 Jürgen Kurtz, 'WTO Norms as "Relevant" Rules of International Law in Investor-State Arbitration' (2014) 108 ASIL Proceedings 243, 246.

83 CUSMA (n 7) art 14.6.

84 ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 24 February 2012) <http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf> accessed 26 October 2022.

international agreement does not establish a breach of this Article'.[85] Such provisos explicitly confine the standard of fair and equitable treatment to the one accorded by customary international law or to an exhaustive list of specific breaches (such as denial of justice) and stipulate that a breach of a different treaty does not suffice to find a breach of the fair and equitable treatment standard. As more recent treaties specifically contain such an exclusion, it would seem likely that the future role of trade treaties as part of the directly applicable law in investment disputes will be rather limited. Parties to a dispute could arguably invoke WTO rules not as part of the applicable law, but rather as a 'fact' that may form the source of legitimate expectations, rather than an independent source of claim of violation.[86] Recognition that foreign investors operate in a domestic economic and regulatory environment that cannot be materially segregated from the expectations generated by international trade law could also influence the outcome of investment disputes,[87] even if WTO agreements are not technically applied as law.

4 World Trade Organization Rules as a Tool to Interpret Investment Law

Although investment tribunals are frequently prevented from directly applying international trade law in the disputes of which they are seized (depending on the scope of the clauses on jurisdiction or applicable law), they may refer to trade rules in the process of interpreting investment provisions proper. Investment tribunals commonly refrain from explicitly justifying the permissibility of relying on trade law from a methodological perspective and adopt

85 EU–Canada Comprehensive Economic and Trade Agreement (signed 30 October 2016, provisionally entered into force 21 September 2017) (CETA) <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 26 October 2022.

86 The mere presence of WTO law, however, is unlikely to satisfy the typical indicia of legitimate expectations under the standard of fair and equitable treatment, such as the existence of a specific assurance by a State organ on which the investor reasonably relied: see Campbell McLachlan, Laurence Shore and Matthew Weiniger (eds), *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) paras 7.179–7.190.

87 Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 39–40 ('Certainly, domestic legality has not become an outcome-determinative feature in FET analyses, despite some cases appearing to make it so. Nevertheless, it is clear that consideration of domestic law plays an important contributory role for tribunals attempting to give content to the often nebulous FET standard'.).

varying approaches with respect to the desirability of doing so.[88] The subsections below highlight three examples of areas in which investment tribunals have relied on WTO law in the process of interpreting investment provisions. First, investment tribunals have turned to the concept of national treatment under trade law for the interpretation of the similarly worded obligation under investment law. Secondly, investment tribunals have had recourse to trade law with a view to delimiting the scope of legal concepts shared between the two regimes. Lastly, WTO case law has provided guidance in the interpretation and application of interstitial norms indicating a connection or comparison commonly used in dispute settlement.

4.1 *National Treatment and the Concept of 'Likeness'*

The national treatment principle is of pivotal importance in both trade and investment law.[89] Even in past periods of legal uncertainty, the principle was widely accepted as a basic floor of investment protection under general international law.[90] National treatment of products and services is fundamental to the economic theory underpinning WTO law, preventing 'regulatory protectionism' that would be economically wasteful and harmful to foreign producers and domestic consumers.[91] Given the textual similarities of the principle in the two regimes,[92] investment tribunals frequently find themselves discussing the national treatment standard under WTO law to interpret the equivalent

88 Such varying approaches are replicated in the doctrine: compare Qiang Ren, *Public Interests in International Investment Law: Balancing Protection for Investor and Environment* (Cambridge Scholars Publishing 2018) 82–83 and Jürgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents' (2009) 20 EJIL 749, 770.

89 *Corn Products International Inc v Mexico*, ICSID Case No ARB(AF)/04/1, Decision on Responsibility (15 January 2008) paras 109–11, citing GATT, *US – Section 337 of the Tariff Act of 1930*, L/6439 – 36S/345 (16 January 1989) para 5.11; Andrea Bjorklund, 'National Treatment' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 29; Freya Baetens, 'Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 279–316.

90 Ian Brownlie, *Principles of Public International Law* (1st edn, OUP 1966) ch 21.

91 Alan O Sykes, 'Regulatory Protectionism and the Law of International Trade' (1999) 66 University of Chicago Law Review 1.

92 *United Parcel Service of America Inc v Canada*, ICSID Case No UNCT/02/1, Award on the Merits, Separate Statement of Dean Ronald A Cass (24 May 2007) para 57. For an overview of the principle in the two regimes, see Raúl Emilio Vinuesa, 'National Treatment, Principle' in *Max Planck Encyclopedia of Public International Law* (last updated April 2011) (online).

investment provision, either as a source from which analogies may be drawn or as a concept for which distinctions ought to be made.

The determination of 'likeness' is key in the application of the obligation to accord national treatment, under both trade and investment law. WTO Members are required to accord foreign products and services treatment no less favourable than the one accorded to 'like' domestic products or services.[93] Under investment treaties, host States commonly undertake an ostensibly similar obligation to accord foreign investors and investments treatment at least as favourable as the one accorded to domestic investors and investments 'in like circumstances'.[94] Nevertheless, DiMascio and Pauwelyn noted that the diverging goals of these regimes, offering investors a remedy for injury in the case of investment treaties and protecting competitiveness opportunities under trade law, may complicate the possibility of transposing the interpretation of one regime to another.[95] In spite thereof, when interpreting the term 'in like circumstances' with a view to determining the common ground of comparison between the product or service in question and its domestic counterparts, investment tribunals have often sought recourse to WTO case law. For example, the Tribunal in *SD Myers* relied on *Japan – Alcoholic Beverages*[96] to affirm that the assessment of 'likeness' must be made on a case-by-case basis in light of all circumstances.[97] The Tribunal explained that 'likeness' under the GATT is not dispositive of the case because different treatment of 'like' situations might be justified under the exceptions listed in GATT Article XX.[98]

By contrast, the *Methanex* tribunal stressed the distinction between 'like products' under WTO law and 'like circumstances' under NAFTA, holding that trade criteria were deliberately excluded from the NAFTA Chapter 11 on Investment.[99] This approach was also adopted in the *Cargill* case,[100] and echoed in the *Occidental Exploration* award, in which the Tribunal elaborated

93 Article III(4) GATT; Article XVII(1) GATS; Article 2.1 TBT Agreement; see also Article 3.1 TRIPS Agreement and Article 2.3 SPS Agreement.

94 See eg Article 1102(1) NAFTA (n 59); for an overview of provisions, see Tereposky and Maguire (n 65) 262–63.

95 Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 AJIL 70–80.

96 WTO, *Japan – Taxes on Alcoholic Beverages* (AB-1996-2), Report of the Appellate Body (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, paras 8.5–8.6.

97 *SD Myers, Inc v Canada*, Partial Award (12 November 2000) para 244; ibid, Separate Opinion by Dr Bryan Schwartz, para 126.

98 *SD Myers, Inc v Canada*, Partial Award (n 97) para 246; ibid, Separate Opinion by Dr Bryan Schwartz, para 128.

99 *Methanex Corporation v USA* (n 8) Part IV, ch B, paras 29–35.

100 *Cargill v Mexico* (n 23) paras 193–94.

on the distinct purposes served by the principle of national treatment in the trade and investment regimes.[101] In a similar vein, the *Merrill & Ring* tribunal cautioned against treating the two similar expressions interchangeably in disregard of the distinct contexts in which they appear.[102] It observed that the strict context of a trade treaty might justify the need to ensure equality of treatment in respect of competitive opportunities (or other trade objectives), while the context of investment might warrant a broader understanding of the concept of 'likeness' to include relevant elements beyond trade objectives.[103] The same approach was followed in *Clayton/Bilcon*.[104] The Tribunal in *Paushok* was faced with the opposite problem: the obligation to accord national treatment under the investment treaty was not confined to investments 'in like circumstances' but instead was ostensibly unqualified.[105] Although mindful of the differences between the applicable investment treaty and the WTO agreements, the Tribunal adopted the comparator of 'competitive and substitutable products', often used in the WTO case law, because it appeared 'a reasonable one to apply when considering allegations of discrimination'.[106]

The *Corn Products* tribunal adopted a somewhat different approach, owing in part to the fact that it was faced with WTO decisions concerning the very same factual circumstances (i.e. the same taxes and import requirements imposed by the same State).[107] The Tribunal stressed that the principle of non-discrimination was of fundamental importance both in international trade law and in international investment law, relying on GATT/WTO case law on the matter.[108] The Tribunal approved the earlier case law of investment tribunals, which cautioned against equating 'like products' under GATT with 'like circumstances' under the applicable investment treaty (NAFTA) as a matter of principle, and accepted that a domestic and a foreign investor producing like products may not necessarily be in like circumstances for the purposes of

101 *Occidental Exploration and Production Company v Ecuador*, LCIA Case No UN3467, Final Award (1 July 2004) paras 174–76.

102 *Merrill & Ring Forestry LP v Canada*, ICSID Case UNCT/07/1, Award (31 March 2010) para 86.

103 ibid para 87.

104 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc v Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) paras 691–92.

105 *Sergei Paushok and CJSC Golden East Company and CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) para 313.

106 ibid para 315.

107 See also infra Section 4.3, text accompanying infra n 123.

108 *Corn Products International Inc v Mexico* (n 89) paras 109–11, citing GATT, *US – Section 337 of the Tariff Act of 1930*, L/6439 – 36S/345 (16 January 1989) para 5.11.

the application of the national treatment principle under investment law.[109] Nonetheless, the Tribunal held in the same breath that:

> where the measure said to constitute the violation of [the national treatment principle] 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 [the national treatment principle].[110]

Accordingly, the Tribunal concluded that the measures, which had already been held to breach the principle of national treatment toward like products under the WTO, also breached the principle of national treatment toward investors in like circumstances under NAFTA.[111] The *Cargill* tribunal, which was called to decide on effectively the same measures taken by Mexico, adopted a more cautious approach, stating that:

> the fact that a WTO panel in *Mexico – Tax on Soft Drinks* concluded that cane sugar and [high fructose corn syrup] are 'directly competitive or substitutable' products is relevant but not determinative of whether the producers of these products are in 'like circumstances' for the purposes of Article 1102 [of NAFTA, providing the obligation to accord national treatment].[112]

Despite this caveat, the *Cargill* tribunal arrived at the same result as the Tribunal in *Corn Products*, affirming a violation of the national treatment principle.[113]

WTO law may also shed light on the interpretation of other concepts in the context of the national treatment principle in investment arbitration. The case of *Pope & Talbot* concerned a measure that did not explicitly single out foreign investors or investments but, according to the Claimant, in effect accorded treatment 'less favourable' than the one reserved for domestic investors.[114] The Respondent invited the Tribunal to rule that a 'disproportionate disadvantage

109 ibid paras 121–22.
110 ibid para 122.
111 ibid para 143; see also *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, ICSID Case No ARB(AF)/04/5, Final Award (21 November 2007) paras 212–13.
112 *Cargill v Mexico* (n 23) para 194.
113 ibid para 221.
114 *Pope & Talbot, Inc v Canada* (n 68) para 30.

test' should be applied in such cases, relying on GATT and WTO case law.[115] After engaging in an extensive discussion of the case law,[116] the Tribunal observed that the Respondent had partly misread the WTO findings, which did not articulate the disproportionate disadvantage test.[117] The Tribunal discussed how a correct reading of the WTO case law would in fact reject the approach argued by the Respondent.[118] Besides, the Tribunal pointed out that the adoption of the 'disproportionate disadvantage test' would be inapposite in the context of investment, where the analysis of challenged measures occurs on an individualized basis, rather than the sector-based approach applicable in the context of trade.[119] Accordingly, the host State's argument failed.[120]

While these cases illustrate several inroads made by WTO law in the interpretation of the national treatment standard under investment treaties, by no means do they exhaust the methodological bases for further cross-fertilisation. In *Belenergia*, for instance, the Respondent argued that the 'likeness standard' under WTO case law should be used as an 'interpretative tool in the light of Article 31(3)(c) VCLT [Vienna Convention on the Law of Treaties]' for the interpretation of the national treatment principle under the applicable investment treaty, although the relevance of WTO law was challenged by the Claimant and ultimately remained unaddressed in the Tribunal's dismissal of the alleged breach.[121] Similarly, in the *Cross-Border Trucking Services* case, the Panel relied on the fact that NAFTA Article 2102:2 'closely tracks' the GATT Article XX language to decide that in order for the moratorium 'on processing of Mexican applications for operating authority to be NAFTA-legal, any moratorium must secure compliance with some other law or regulation that does not discriminate; be necessary to secure compliance; and must not be arbitrary

115 ibid para 45.

116 ibid paras 46–63, discussing WTO, *EC – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Panel (22 May 1997) WT/DS27/R/USA, WTO, *EC – Measures Concerning Asbestos and Asbestos Containing Products*, Report of the Panel (18 September 2000) WT/DS135/R, and WTO, *US – Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel (16 March 1992) DS23/R – 39S/206.

117 *Pope & Talbot, Inc v Canada* (n 68) paras 68–69, discussing *US – Section 337 of the Tariff Act of 1930* (n 108) paras 5.13–5.14, WTO, *Canada – Term of Patent Protection*, Report of the Panel (5 May 2000) WT/DS170/R, paras 6.99–6.100, and *US – Measures Affecting Alcoholic and Malt Beverages* (n 116) para 5.6.

118 *Pope & Talbot, Inc v Canada* (n 68) paras 53–55, 60.

119 ibid paras 56–57.

120 ibid para 67.

121 *Belenergia SA v Italy*, ICSID Case No ARB/15/40, Award (6 August 2019) paras 461 and 546.

or unjustifiable discrimination or a disguised restriction on trade'.[122] For the sake of legal certainty, a rigorous application of the principle of systemic integration might provide a firmer basis for the cross-fertilisation of WTO law and investment arbitration in the arena of national treatment.[123]

4.2 *Delimitation of the Scope of Legal Concepts*

International trade law may be relevant for the interpretation of other legal concepts shared by investment and trade law, including 'procurement', 'services', 'taxation', 'public bodies', 'measures', 'performance requirements' and 'legitimate expectations'. However, the following cases illustrate how investment tribunals usually choose to emphasize the differences between the two regimes, leading them to reject the WTO interpretation (delimitation through distinguishing).

Provisions protecting investments tend to be inapplicable to 'procurement',[124] a term which investment tribunals have occasionally been called to interpret. Having adopted a broad definition of 'procurement', the *Mesa* tribunal noted that this approach was consistent with WTO case law on the matter.[125] At the same time, the Tribunal noted the different context in which the term appears in GATT Article III(8)(a), where it is confined to procurement of products intended for governmental use and not for commercial resale. As a result, the Tribunal refused to read such qualifications into the equivalent NAFTA provision or impose additional requirements for its application.[126] Similarly, the *Occidental* tribunal considered that WTO law (as invoked by the Claimant) was not helpful in defining 'matters of taxation', which fell beyond the jurisdiction of the Tribunal.[127]

When interpreting the term 'services' in a BIT concluded in 1984, the *Mitchell* Tribunal held that the term was a notion proper to the BIT, which should therefore not be interpreted in light of agreements concluded within the context of the GATT or the WTO, even if such agreements contained the same concept of services, because it was used for purposes different from those

122 *In the matter of Cross-Border Trucking Services*, NAFTA Arbitral Panel Established Pursuant to Chapter 20, Report of the Panel (6 February 2001) paras 260–69.

123 See eg Prabhash Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of *Philip Morris v Uruguay*' (2019) 9 Asian JIL 98.

124 See eg Article 1108(7) NAFTA (n 59).

125 *Mesa Power Group, LLC v Canada*, PCA Case No 2012–17, Award (24 March 2016) paras 411–14; see also ibid paras 436, 449 and 456.

126 ibid paras 431–33; see also ibid para 459.

127 *Occidental Exploration v Ecuador* (n 101) para 69.

prevalent at the time of the conclusion of the BIT.[128] Reasoning along similar lines, the investment Tribunals in *UPS* and *Mesa* attached no relevance to the findings by WTO Panels and the Appellate Body that certain entities (whose conduct was the subject of the dispute) were 'public bodies' for the purposes of the WTO agreements because, unlike those agreements, NAFTA distinguished between organs of the State and other forms of State enterprises.[129] Sometimes, tribunals do not pronounce directly on invitations by the litigant parties to take account of WTO law on the interpretation of specific concepts. In *Bureau Veritas*, for example, the Respondent relied on WTO case law to deny the character of its conduct as 'measures' that might trigger the jurisdiction of the investment tribunal – an argument which was largely ignored by the Tribunal.[130]

While the *International Thunderbird* tribunal affirmed the operation of 'legitimate expectations' in investment law without the aid of international trade law, an arbitrator writing separately acknowledged the importance of the principle in the context of WTO law.[131] Seeking a broad interpretation of the prohibition on performance requirements under Article 1106(1) NAFTA, the Claimant in *Merrill & Ring* invited the Tribunal to rely on WTO case law rather than on investment awards only.[132] While not explicitly distinguishing WTO law, the Tribunal rejected the claim.[133]

4.3 *Interstitial Norms Indicating a Connection or Comparison*

As international law expands and diversifies, it increasingly relies on concepts which, while not conferring rights and obligations themselves, serve to qualify or modify the normative effect of other rules. Such concepts, which have

128 *Patrick H Mitchell v DRC*, ICSID Case No ARB/99/7, Award (9 February 2004) para 53; the *ad hoc* Committee held that the Tribunal's reasoning on the question whether the investment constituted a protected 'service' was inadequate, yet it did not make any reference to WTO law: *Patrick H Mitchell v DRC*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006) paras 37–41.

129 *United Parcel Service of America Inc v Canada*, ICSID Case No UNCT/02/1, Award on the Merits (24 May 2007) para 61; *Mesa Power Group, LLC v Canada* (n 125) paras 346–347.

130 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Paraguay*, ICSID Case No ARB/07/9, Further Decision on Objections to Jurisdiction (9 December 2012) para 191, citing WTO, *Japan – Measures Affecting Consumer Photographic Film & Paper*, Report of the Panel (31 March 1998) para 10.122 (the Tribunal did not address this point directly).

131 *International Thunderbird Gaming Corporation v Mexico*, Chapter XI NAFTA and UNCITRAL, Arbitral Award (26 January 2006) para 147 and ibid, Separate Opinion of Professor Thomas Wälde, para 29.

132 *Merrill & Ring Forestry LP v Canada* (n 102) para 102.

133 ibid para 120.

been dubbed 'interstitial norms' by virtue of their operation at the interstices between other rules, can be found in various fields of law.[134] Interstitial norms used in international trade indicating a connection or comparison may also be considered relevant for the purposes of investment adjudication. These include interpretations of 'in relation to', 'consistent with', necessity, proportionality, 'alternative to', the 'self-judging' character of security exceptions, and allocation of international responsibility. It may be of no surprise, then, that investment adjudication turns to trade law when interpreting these concepts.

For instance, the protection under investment treaties is commonly granted against measures adopted by the host State that 'relate to' foreign investors or investments.[135] The Claimant in *Methanex* relied on an interpretation of the term 'relate to' as put forward by its host State (the United States) in the context of WTO proceedings.[136] While pointing out that this interpretation was 'of only marginal assistance' in substantive terms, the Tribunal highlighted the methodological importance of interpreting terms against the backdrop of their context and of the relevant instrument's object and purpose.[137] The *Pope & Talbot* tribunal did not directly address the Respondent's invocation of WTO case law to support the argument that 'measures relating to' (the investor or investment) must amount to measures 'primarily aimed at' (the investor or investment), although it rejected such a narrow reading of the term.[138]

In *SD Myers*, the Tribunal articulated the principle that a legitimate objective – in that case, environmental protection – ought to be achieved by the host State through the means that are most in line with open trade, affirming (without references) that this was 'consistent with the language and the case law arising out of the WTO family of agreements'.[139] When ascertaining whether a specific measure ran contrary to the prohibition against performance requirements under Article 1106 NAFTA, the same Tribunal considered WTO law to support the proposition that the substance of the measure in

134 Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2001) 213–15.

135 See eg Article 1101(1) NAFTA (n 59).

136 WTO, *US – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (20 May 1996) WT/DS2/AB/R.

137 *Methanex Corporation v USA*, Partial Award (7 August 2002) paras 144–45; contrast *SD Myers, Inc v Canada* (n 97), Separate Opinion by Dr Bryan Schwartz, paras 51–52, relying on the interpretation of the same term in the WTO case law.

138 *Pope & Talbot, Inc v Canada*, Award in Relation to Preliminary Motion by Canada (26 January 2000) paras 28, 30, and 33.

139 *SD Myers, Inc v Canada* (n 97) para 221.

question ought to be assessed, rather than merely its form.[140] The Tribunal also held that the obligations under NAFTA are cumulative in principle, much like the obligations under the WTO system, as affirmed in WTO case law.[141]

In *Sempra*, Argentina argued that a provision of the applicable investment treaty allowing the host State to take 'measures necessary for … the protection of its essential security interests' was self-judging, in the sense that it was not subject to the Tribunal's review.[142] Relying in part on WTO law, the Tribunal observed that a similar provision in GATT (Article XXI) is not considered to be entirely self-judging, and it rejected the Respondent's argument.[143] The *Continental Casualty* case turned on the interpretation of the same provision: according to Argentina, the provision had to be interpreted in the light of the GATT-WTO case law, under which 'necessary' was not synonymous to 'indispensable'.[144] The Tribunal agreed with the Respondent that it was

> 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.[145]

The *Continental Casualty* tribunal also relied on WTO case law for support of its finding that consultations and negotiations could not be considered as alternative 'measures' that could have been adopted in lieu of the impugned measures,[146] as well as for the benchmark to assess the suitability of the measures in question.[147] When discussing the principle of proportionality, the Tribunal in the *Occidental Exploration* case remarked that the WTO is among

140 ibid paras 273–75.

141 ibid paras 291–94, citing WTO, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel (21 June 1999) WT/DS96/R, para 7.38.

142 *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Award (28 September 2007) para 366.

143 ibid para 384.

144 *Continental Casualty v Argentina*, ICSID Case No ARB/03/9, Award (5 September 2008) para 85.

145 ibid para 192; the Tribunal then extensively discussed the case law in paras 193–95.

146 ibid para 204, fn 308, citing WTO, *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body (7 April 2005) WT/DS285/AB/R, para 317.

147 *Continental Casualty v Argentina* (n 144) para 232, fn 349, WTO, *EC – Measures Affecting Asbestos and Asbestos-Contained Products*, Report of the Appellate Body (12 March 2001) WT/DS135/AB/R, para 168.

the international law settings in which such principle is applied, although it did not cite any authority for this proposition.[148] In the *Greentech and Novenergia* case, on the other hand, the Tribunal refrained from any engagement with the part of the European Commission's *amicus* brief wherein the Commission relied on WTO Panel reports (among other authorities) for support of its proposed principles for allocation of responsibility between an international organization and its member States.[149]

5 World Trade Organization Case Law as Subsidiary Means for Determining 'Other Relevant Rules' of International Law

Beyond questions of WTO law, the decisions of the WTO dispute settlement system pronounce on matters that pertain to international law or international adjudication more broadly and therefore constitute important authorities for other international adjudicators, including investment tribunals. In other words, the WTO is used as an interpretative tool not because of the similarities in the relevant legal texts, but rather as applicable international law. Below three such situations are elaborated upon: questions of methodology of interpretation, questions of (arbitral) procedure, and questions relating to consecutive investment proceedings concerning identical facts.

5.1 *Questions of Methodology of Treaty Interpretation*

Investment tribunals have relied on WTO case law to support specific methodological approaches to interpretation. Examples include interpretation on the basis of the ordinary meaning of the text,[150] in light of the context which may

148 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012) para 402; an *ad hoc* Committee held that the Tribunal's overall reasoning on the question of proportionality was convincing: *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, ICSID Case No ARB/06/11, Decision on Annulment of the Award (2 November 2015) para 350.

149 *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA*, SCC Arbitration V (2015/095), Final Award (23 December 2018) para 288 (the Tribunal did not directly engage with WTO law on the point).

150 *Pope & Talbot, Inc v Canada*, Interim Award (26 June 2000) para 69, fn 33 and *Pope & Talbot, Inc v Canada*, Award on the Merits of Phase 2 (n 68) para 75, both citing *Japan – Taxes on Alcoholic Beverages* (n 96) 12.

include circumstantial elements relating to the conclusion of the treaty,[151] on the basis of the principle of effectiveness (*ut res magis valeat quam pereat*)[152] and of the principle *in dubio mitius*.[153] Investment tribunals have also invoked WTO case law for support of the general principle of good faith[154] and the doctrine of abuse of rights as a specific manifestation of this general principle,[155] as well as for the propositions that interpretation according to the VCLT is a holistic exercise,[156] that exceptions ought to be interpreted narrowly,[157] and that the instrument under interpretation should not be read 'in clinical isolation from public international law'.[158] The Tribunal in *Telefonica* for example

151 *ADF Group Inc v USA*, ICSID Case No ARB(AF)/00/01, Award (9 January 2003) para 147, citing WTO, *US – Import Prohibition of Certain Shrimp and Shrimp Products* (AB-1998-4), Report of the Appellate Body (12 October 1998) WT/DS58/AB/R, para 114 and *EC – Measures Concerning Meat* (n 50) paras 181 and 165; *Continental Casualty v Argentina* (n 144) para 187, fn 281, citing WTO, *EC – Customs Classification of Frozen Boneless Chicken Cuts* (AB-2005-5), Report of the Appellate Body (12 September 2005) WT/DS269/AB/R, para 289.

152 *Poštová banka, AS and Istrokapital SE v Greece*, ICSID Case No ARB/13/8, Award (9 April 2015) para 293, citing WTO, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (AB-1999-8), Report of the Appellate Body (14 December 1999) WT/DS98/AB/R, paras 80–81; *Orascom TMT Investments Sàrl v Algeria*, ICSID Case No ARB/12/35, Award (31 May 2017) para 288, fn 305, citing *Japan – Taxes on Alcoholic Beverages* (n 96) 12.

153 *SGS Société Générale de Surveillance SA v Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objection to Jurisdiction (6 August 2003) para 171, citing *EC – Measures Concerning Meat* (n 50) paras 163–65.

154 *Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petróleos, Inc v Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) para 170, citing *Japan – Taxes on Alcoholic Beverages* (n 96) and WTO, *US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (AB-2001-2), Report of the Appellate Body (24 July 2001) WT/DS184/AB/R, para 166.

155 *Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petróleos, Inc v Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) para 175, citing *US – Import Prohibition of Certain Shrimp and Shrimp Products* (n 151) para 158.

156 *Almasryia for Operating & Maintaining Touristic Construction Co, LLC v Kuwait*, ICSID Case No ARB/18/2, Award on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules (1 November 2019) para 28, fn 7, citing WTO, *China – Publications and Audiovisual Products* (AB-2009-3), Report of the Appellate Body (21 December 2009) WT/DS363/AB/R, para 348.

157 *Canfor Corporation v USA and Terminal Forest Products Ltd v USA*, Decision on Preliminary Question (6 June 2006) para 187, citing GATT, *Canada – Import Restrictions on Ice Cream and Yoghurt*, L/6568 – 36S/68 (27 September 1989) para 59.

158 *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 77, citing *US – Gasoline* (n 136) 18.

relied on WTO case law to determine the applicable legal standard to accept instances of practice as 'subsequent practice' relevant for interpretative purposes under Article 31(3)(b) VCLT,[159] while the arbitral tribunal in *Watkins* found support in WTO case law when affirming the presumption against conflict between two treaties operating in parallel.[160] In *Euram*, the Tribunal adopted a narrow definition of conflict between treaty provisions (whereby conflict only exists when one treaty requires what the other prohibits), whilst acknowledging that a WTO Panel had held that a conflict exists when one treaty explicitly permits what the other prohibits.[161]

For their part, parties in investment arbitration disputes have invoked WTO case law (with varying levels of success) with respect to the criteria for considering whether instances of practice may qualify as 'subsequent practice' for interpretative purposes under Article 31(3)(b) VCLT,[162] for the legal standard of estoppel,[163] for the importance of interpreting a provision in accordance with its ordinary meaning,[164] and for the proposition that treaty language must

159 *Telefónica SA v Argentina*, ICSID Case No ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006) para 114, citing *Japan – Taxes on Alcoholic Beverages* (n 96) 13.

160 *Watkins Holdings Sàrl, Watkins (Ned) BV, Watkins Spain SL, Redpier SL, Northsea Spain SL, Parque Eólico Marmellar SL, and Parque Eólico La Boga SL v Spain*, ICSID Case No ARB/15/44, Award (21 January 2020) para 224, citing WTO, *Indonesia – Certain Measures Affecting the Automobile Industry*, Report of the Panel (2 July 1998) WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para 14.28.

161 *European American Investment Bank AG (Austria) v Slovakia*, PCA Case No 2010-17, Award on Jurisdiction (22 October 2012) para 216, fn 231, discussing WTO, *EC – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Panel (22 May 1997) WT/DS27/R/USA, para 7.159.

162 *Charanne BV and Construction Investments SARL v Spain*, SCC Case No 062/2012, Final Award (21 January 2016) para 258, citing *Japan – Taxes on Alcoholic Beverages* (n 96) (the Tribunal did not address the argument directly).

163 *Hulley Enterprises Limited (Cyprus) v Russia*, PCA Case No AA 226, Final Award (18 July 2014) para 1322, *Yukos Universal Limited (Isle of Man) v Russia*, PCA Case No AA 227, Final Award (18 July 2014) para 1322, and *Veteran Petroleum Limited (Cyprus) v Russia*, PCA Case No AA 228, Final Award (18 July 2014) para 1322, all three citing WTO, *Guatemala – Definitive Anti-Dumping Measures On Grey Portland Cement From Mexico*, Report of the Panel (24 October 2000) WT/DS156/R, paras 8.23–8.24 and WTO, *Argentina – Definitive Anti-Dumping Duties On Poultry From Brazil*, Report of the Panel (22 April 2003) WT/DS241/R, para, 7.39.

164 *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Spain*, ICSID Case No ARB/13/30, Decision on Jurisdiction (6 June 2016) para 64, citing WTO, *EC – Customs Classification of Certain Computer Equipment* (AB-1998-2), Report of the Appellate Body (5 June 1998) WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para 84.

be interpreted in its context,[165] according to the principles of effectiveness,[166] *in dubio mitius*,[167] and transparency.[168] The Respondent in *Philip Morris Asia Limited v Australia* relied on WTO case law to support its articulation of the doctrine of abuse of rights.[169] Although the Tribunal did not explicitly discuss the case law of the WTO, it accepted the argument of abuse of rights both on the law and on the facts.[170] However, since the *Philip Morris v Australia* decision, the existence of the doctrine of abuse of rights has been cast in doubt.[171]

5.2 *Questions of (Arbitral) Procedure*

WTO case law may influence questions of procedure in investment arbitration. As explained by Ruiz-Fabri and Paine, cross-fertilization on procedural issues is fairly common in international law, due to several factors, including the adjudicators' experience as well as that of disputing parties, counsel, administering institutions and secretariats.[172] It can be particularly relevant where issues of due process are considered. When addressing a claim for breach of the obligation to accord national treatment, the *Feldman* tribunal for example

165 *Metal-Tech Ltd v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013) paras 168 and 183, citing WTO, *US – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) (EC)*, Report of the Panel (32 October 2005) WT/DS294/R, para 7.169 (the Tribunal did not expressly address the argument).

166 *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc v Canada*, PCA Case No 2009-04, Award on Damages (10 January 2019) para 330, fn 443, citing *US – Gasoline* (n 136) 23.

167 *Mobil Investments Canada Inc & Murphy Oil Corporation v Canada*, ICSID Case No ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) paras 187 and 252 (the Tribunal did not address the point directly but instead proceeded with interpreting the provisions in question in the context of the specific dispute: paras 214 and 254–55); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Paraguay*, ICSID Case No ARB/07/9, Further Decision on Objections to Jurisdiction (9 December 2012) para 183, citing *EC – Measures Concerning Meat* (n 50) para 165, fn 154 (the Tribunal did not address the point directly).

168 *Champion Trading Company and Ameritrade International, Inc v Egypt*, ICSID Case No ARB/02/9, Award (27 October 2006) para 161, citing WTO, *US – Restrictions on Imports of Cotton and Man-Made Fibre Underwear* (AB-1996-3), Report of the Appellate Body (10 February 1997) WT/DS24/AB/R, 21.

169 *Philip Morris Asia Limited v Australia* (n 26) para 401.

170 ibid paras 554 and 585.

171 Jan Paulsson, *The Unruly Notion of Abuse of Rights* (CUP 2020). It has been remarked, moreover, that 'Paulsson and the ICJ are mostly of one mind on abuse of rights': Martins Paparinskis, 'Book Review: The Unruly Notion of Abuse of Rights, by Paulsson Jan. Published by Cambridge University Press (2020, pp xiii, 144)' (2021) 37 Arb Intl 387, 394.

172 Hélène Ruiz Fabri and Joshua Paine, 'The Procedural Cross-Fertilization Pull' (2019) MPILux Research Paper 2019(6).

adopted a principle for the allocation of the burden of proof articulated in WTO case law, stating that once the Claimant had adduced evidence to raise a presumption that it has been treated in a manner less favourable than its domestic counterparts, the burden for rebutting this presumption shifted to the other party.[173] The Tribunal in *Canfor* further discussed WTO case law on questions relating to the burden of proof[174] and the doctrine of judicial economy,[175] although it clarified that such rules were of limited relevance for the question at hand, namely the issuance of an procedural order on the consolidation of multiple claims pursuant to Article 1126(2) NAFTA, which was primarily concerned with the application of procedural economy (in the sense of an effective administration of justice).[176] Perhaps even more remotely, the Tribunal in *Chevron* relied on academic doctrine for the allocation of the burden of proof originally elaborated for the purpose of WTO proceedings.[177]

WTO case law may also provide a point of comparison with respect to questions on the conduct of proceedings. For example, the *Pope & Talbot* tribunal applied the rule articulated by the WTO Panel in *Canada – Measures Affecting the Export of Civilian Aircraft* to the effect that a State wishing to withhold information is expected to clearly explain the basis for the need to protect that information.[178] When affirming its power to accept *amicus* briefs by third parties, moreover, the arbitral Tribunals in *Methanex*[179] and *UPS*[180] relied on

173 *Marvin Feldman v Mexico*, Case No ARB(AF)/99/1, Award (16 December 2002) para 177, citing WTO, *US – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (AB-1997-1), Report of the Appellate Body (25 April 1997) WT/DS33/AB/R, 14; see also *International Thunderbird Gaming Corporation v Mexico* (n 131) para 95, fn 2.

174 *Canfor Corporation v United States of America and Tembec et al v United States of America and Terminal Forest Products Ltd v United States of America*, Order of the Consolidation Tribunal (7 September 2005) para 93.

175 ibid para 182.

176 ibid paras 93 and 183.

177 *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, PCA Case No 2007-02, Interim Award (1 December 2008) para 140, citing Henrik Horn and Joseph HH Weiler, 'European Communities – Trade Description of Sardines: Textualism and Its Discontent' in Henrik Horn and Petros C Mavroidis (eds), *The WTO Case Law of 2002* (CUP 2005) 248, 265–68.

178 *Pope & Talbot Inc v Canada*, UNCITRAL, Decision [on Official Secrecy and Professional Privilege] (6 September 2000) para 1.6.

179 *Methanex Corporation v USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae* (15 January 2001) para 33.

180 *United Parcel Service of America Inc v Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 October 2001) para 64.

the WTO practice of receiving *amicus* briefs from third parties – not without criticism.[181]

5.3 *Questions Relating to Consecutive Proceedings Concerning Identical Facts*

Investment tribunals may be seized to assess the lawfulness of measures which are challenged concurrently, or have been challenged in the past, in WTO proceedings. This was the situation in *ADM*, where an investment Tribunal was invited by the Claimants to adopt the earlier findings of a WTO Panel with respect to the intended objective of a tax measure which adversely affected US investors.[182] While not attaching authority to the WTO Panel pronouncements as a matter of principle, the Tribunal concurred that the measure was not intended by Mexico to induce compliance by the United States with its international obligations but rather aimed at protecting the domestic production of sugar.[183] Relying on the findings of the WTO Panel and Appellate Body that the measures in question were inconsistent with the obligation to accord national treatment in respect of taxation under GATT Article III(2) because they imposed dissimilar taxation on directly competitive or substitutable imports, the Tribunal concluded that the same measures ran contrary to the national treatment principle under the applicable investment treaty (Article 1102 NAFTA).[184]

As discussed above, the Claimant in *Corn Products* argued that its products were in like circumstances, for the purposes of the application of the national treatment standard, with the products of a domestic investor: these products

181 See eg Gary Born and Stephanie Forrest, '*Amicus Curiae* Participation in Investment Arbitration' (2019) 34 ICSID Rev 626, 637 ('The *UPS* decision rested on the express consent of both parties to *amicus* participation, while *Methanex*, which the Tribunal expressly said should have no precedential effect, relied principally on earlier decisions of the Iran–US Claims Tribunal and WTO Appellate Body, both of which were subject to procedural rules that provided expressly for *amicus* or similar non-party participation. Neither decision supports more general authority to allow *amicus* participation in investment arbitration (or elsewhere)').

182 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc v Mexico*, ICSID Case No ARB(AF)/04/5, Award (21 November 2007) para 141.

183 ibid paras 149–51. This inquiry was undertaken in the course of a plea of countermeasures precluding wrongfulness under customary international law: See further Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYIL 264, 335–52; Jorge E Viñuales, 'Defence Arguments in Investment Arbitration' (2020) 18 ICSID Rep 9, paras 122–26.

184 *Archer Daniels v Mexico* (n 182) paras 212–13; see also *Corn Products International Inc v Mexico* (n 89) paras 109–24.

had already been found to be 'like products' within the meaning of the GATT.[185] For the Tribunal, the fact that the products in question had been considered as like products was 'highly relevant' for the determination whether the products were 'in like circumstances' for the purposes of the applicable standard of national treatment under NAFTA.[186] Indeed, the Tribunal concluded that the investors in the case, which had been found to produce 'like products' under WTO law, were also 'in like circumstances' under NAFTA.[187] Faced with a similar situation, the Tribunal in *Cargill* explained that the determination by a WTO panel that two products were 'directly competitive or substitutable' was 'relevant but not determinative of whether the producers of these products [we]re in "like circumstances" for the purposes of the NAFTA provision on national treatment'.[188] Having conducted its own analysis, the Tribunal concluded that the producers in question were indeed in like circumstances within the meaning of NAFTA.[189] The Tribunals in *Corn Products* and *Cargill* were faced with similar enquiries, as discussed above. As a final example, in *Canfor*, the characterization of the same measures by the host State in the context of WTO proceedings was considered as 'relevant factual evidence which the Tribunal can and should appropriately take into account, especially in the case of positions advocated by [the host State] before the WTO that amount to admissions against interest for purposes of this NAFTA case'.[190]

6 Conclusion

The material connection between international trade and foreign investment (exemplified by the rise of global value chains) and, accordingly, the parallel development of WTO law and investment arbitration have led many scholars to argue that the two legal fields are converging, or at least that they ought to converge.[191] In recent years, the debate has been rekindled by

185 *Corn Products International Inc v Mexico* (n 89) para 99.
186 ibid para 122.
187 ibid para 143.
188 *Cargill v Mexico* (n 23) para 194.
189 ibid para 214.
190 *Canfor Corporation v USA* (n 157) para 327.
191 See respectively Sergio Puig, 'The Merging of International Trade and Investment Law' (2015) 33 Berkeley J Intl L 1; Giorgio Sacerdoti, 'Trade and Investment Law: Institutional Differences and Substantive Similarities' (2014) 9 Jerusalem Rev Leg Stud 1. See further supra Section 2.

initiatives aiming comprehensively to regulate trade and investment relations between their parties, like the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP),[192] the Transatlantic Trade and Investment Partnership (TTIP),[193] or CETA. This paper has flagged possible drivers of legal cross-fertilisation, including global economic developments and the responsiveness of international tribunals to their perceived legitimacy, but did not intend to extensively discuss the merits of such convergence. Equally, the paper was not meant to address in-depth why WTO law is making its way into investment law or why investment tribunals are willing to consider WTO law, though it is well-known that WTO law is more readily referred to by arbitral benches on which former WTO Appellate Body Members serve. Rather, this paper's aim has been more modest: it has sought to explore the ways in which the law generated, interpreted, and applied in the WTO has been received by arbitral tribunals deciding investment disputes. It appears that three avenues make this reception possible. First, provisions in the investment agreements may render WTO law directly applicable to investment disputes, though the extent of this is limited. Second, principles of interpretation may allow for recourse to WTO rules as a tool for the interpretation of investment law, where tribunals appear to have been more comfortable referring to WTO law either to determine or distinguish the meaning of similar terms. Third, the authoritative value of WTO case law may influence points of general international law applicable to the settlement of investment disputes, where tribunals frequently refer to WTO methodology and procedure as a guide to resolve issues relating to methodology of interpretation, (arbitral) procedure, and consecutive investment proceedings concerning identical facts.

In much the same way as investment tribunals rely significantly on case law from the Iran–US Claims Tribunal, the ICJ and the Permanent Court of International Justice, it is unsurprising that they also refer to the extensive body of WTO case law. Given tribunals' reluctance to incorporate WTO law as applicable law in investment law, it seems that the best method for cross-fertilization is either through the use of WTO rules as a tool to interpret investment law or as a subsidiary means for determining 'other relevant rules' of international law more broadly. Where tribunals refer to analysis carried out at the WTO, either to distinguish or support their own interpretation of a provision, and

192 Comprehensive and Progressive Agreement on Trans-Pacific Partnership (adopted 8 March 2018, entered into force 30 December 2018) [2018] ATS 23.

193 See European Commission, 'EU Negotiating Texts in TTIP' <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1230&title=EU-negotiating-texts-in-TTIP> accessed 26 October 2022.

do so contemplating the differences in objectives and texts of the two regimes, they make investment law more stable and predictable because they augment the relevant case law.

As the paper has demonstrated, three avenues allow investment tribunals to build on the law and practice of the WTO with a view to facilitating cross-fertilisation between the two fields, while appreciating the substantive, procedural and institutional particularities of investment law. The interpretative sensibilities of investment arbitrators may be a key determinant of whether the identified avenues continue to facilitate cross-fertilisation, as illustrated above by the heterodox investment decisions of three former Chairmen of the WTO Appellate Body. But the professional orientation of generalist adjudicators toward an international economic dispute should reflect not only their prior experience but also the specific regime in which that dispute has been submitted for settlement, though, as Koskenniemi explains, this may prove difficult given their internal bias.[194] Writing about reform in trade and investment law a few years ago, Pauwelyn argued that the investment regime was comparable to water – 'flexible enough to adapt, yet stable enough to be capable of organization' – unlike the WTO system, which he considered to be 'in a state of ice'.[195] Given the dependence of global finance, production, and distribution on the resilience of international economic law in times of sporadic politicisation, treaty drafters as well as arbitral tribunals may find it useful to maintain and reaffirm the adaptability of the investment regime and its receptiveness to the law and practice of the WTO system, lest the latter return to a state of deep freeze.

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194 Martti Koskenniemi, 'Hegemonic Regimes' in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 315–17.

195 Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform' (2014) 108 ASIL Proceedings 255, 257.

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