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Chapter 3: Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration

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It is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. (1)

As the above quotation suggests, the phenomenon of overlapping jurisdiction is by now an established feature of international adjudication. The same facts can give rise to disputes under a host of different treaties. (2)

This, in turn, leads to delicate questions of coordination and priority. Can two disputes proceed in tandem, or must they proceed one at a time? When one tribunal renders its award, what effect should it have on the other, related proceeding? Absent any hierarchy among international tribunals, and with few treaties providing rules for coordination, international tribunals have been forced to muddle through.

Ambiguity in this area can yield disparate approaches. For instance, in the *MOX Plant* litigation, Ireland brought claims against the UK with respect to radioactive discharges from the Mox Plant, before two different fora – arbitral tribunals established under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) (3) and the UN Law of the Sea Convention (UNCLOS). The OSPAR tribunal proceeded to render its award, without regard to other legal sources or dispute settlement mechanisms. By contrast, the UNCLOS tribunal stayed its proceedings, to allow the parties to determine whether the European Court of Justice (ECJ) had exclusive jurisdiction over the dispute. (4) Echoing the confusion in this area, scholarly reaction to these decisions has been mixed, with some commentators praising and others deriding the various approaches taken. (5)

In this chapter, we address one form of jurisdictional overlap that has begun to emerge, and that is poised to be increasingly important in international economic law: parallel or successive disputes before the World Trade Organization (WTO) and investor-State arbitral tribunals.

Little has been written about this particular constellation of disputes. Several authors have considered techniques for addressing overlap between WTO panels and other international tribunals (e.g., regional trade or environmental dispute bodies), but focus entirely on State-to-State dispute settlement mechanisms. (6) Likewise, commentators have analysed overlap between investor-State arbitrations and domestic court proceedings, between investor-State arbitration and international commercial arbitration, and between multiple investor-State proceedings. (7) But little attention has been paid to the interaction between WTO and investor-State proceedings – a distinctive phenomenon that calls for a different approach.

At one level, the relative silence in the literature is not surprising. Examples of such overlap have been few and far between. Until very recently, existing jurisprudence was limited to parallel WTO and investor-State proceedings initiated under Chapter 11 of the North American Free Trade Agreement (NAFTA) – first, the *Softwood Lumber* dispute between the United States and Canada, (8) and second, the dispute over taxes imposed by Mexico on high fructose corn syrup (HFCS). (9)

On another level, however, the omission is striking. WTO dispute settlement and investor-State arbitration under international investment agreements, such as bilateral investment treaties (BITs), have risen to prominence in the past fifteen years. These treaty-based mechanisms have generated disputes touching on sensitive matters of public policy, and have become the subject of intense academic scrutiny and debate. (10)

The WTO and investment treaty regimes also occupy a large swathe of international economic law. The WTO's founding treaty is the WTO Agreement, which contains a large number of individual agreements, on topics from agriculture to intellectual property and the services trade. Likewise, States have signed more than 2,800 BITs and several hundred other investment protection agreements, such as the investment chapters of free trade agreements (FTAs). (11) These investment treaties generally provide extensive protections to investors and allow them to assert claims in arbitration against host governments. Given the overlapping nature of many of the obligations under the WTO Agreement and investment treaties, (12) the number of overlapping (parallel or consecutive) WTO and investor-State disputes is likely to grow over time. Indeed, this type of overlap has recently manifested itself in two high-profile disputes: the challenge to 'plain packaging' regulations imposed by the Government of Australia, and proceedings arising out of 'feed in tariff' programmes. Both disputes have given rise to parallel WTO and investment proceedings. (13)

In this chapter, we attempt to shed light on this relatively unexplored corner of international adjudication. In section 3.01, we examine jurisdictional overlap as a manifestation of the broader phenomenon of ‘fragmentation’ in international law. In this context, we define jurisdictional overlap to mean any situation in which the same or related set of facts gives rise to multiple disputes. This can occur within or across different regimes and legal orders.

Section 3.02 examines the specific context of overlap between WTO and investor-State proceedings in light of the unique attributes of each dispute mechanism. We conclude that these are complementary, and not competing modes of adjudication. Nonetheless, as with any related proceedings, there is a risk of tension and conflict, as well as inefficient duplication of effort. WTO panels and investment tribunals should consider ways of maximizing the benefits of overlapping proceedings while minimizing potential negative externalities.

In section 3.03, we consider the ‘toolkit’ of adjudicative strategies available to WTO panels and investment tribunals when confronted with situations of overlap. We conclude that many of the traditional tools for dealing with these situations, such as *res judicata*, are ill-suited to the task. More refined approaches, grounded in case management and comity, hold greater promise. Unfortunately, institutional rules and existing jurisprudence impose significant constraints on WTO dispute bodies, which have less flexibility than investment tribunals in confronting situations of overlap. Nonetheless, at a minimum, each tribunal may strive to ensure that it is well-informed about the other, related proceeding.

In section 3.04, we consider various treaty-based approaches to situations of overlap. We conclude that the more far-reaching proposals – e.g., authorizing an entity such as the International Court of Justice (ICJ) to regulate jurisdictional overlap – are unrealistic and inappropriate, particularly when applied to overlapping WTO and investment disputes. Although negotiators can eliminate jurisdictional overlap by creating carve-outs and exceptions to treaty coverage, this approach also has serious drawbacks, and can significantly weaken treaty disciplines. Nor do traditional jurisdiction-regulating provisions, such as ‘fork-in-the-road clauses’, have any relevance here.

A more promising path is to explore ‘softer’ treaty strategies, such as clauses that empower – but do not compel – tribunals to stay their own proceedings when faced with related proceedings, subject to defined criteria and limitations. In this respect, the WTO *Dispute Settlement Understanding* (DSU), which sets out the rules for dispute settlement in the WTO system, could be usefully amended. The DSU might be amended to allow panels, in exceptional circumstances, to stay proceedings beyond the strict time limits that they currently face, and to do so at the request of either the complaining or responding party.

We offer two caveats at the outset. First, this chapter only addresses situations of overlap between WTO and investor-State proceedings based on investment treaties. Although overlap is theoretically possible with respect to arbitral proceedings based entirely on contract, this is unlikely to occur, and may present distinct issues.

Second, the issues raised by this form of overlap are legion, and cannot hope to be addressed in a single chapter. We can only begin to sketch out the possibilities in this area, as there is little jurisprudence or treaty practice to guide us. We also cannot resolve many of the related debates which may impact this area, such as the relationship between the substantive provisions of the WTO Agreement and those found in investment treaties.

§3.01 Fragmentation and Jurisdictional Overlap

Overlap between WTO and investor-State proceedings is one manifestation of the broader phenomenon of ‘fragmentation’ in international law. Fragmentation has been described as the ‘emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice’. (14) Hailed by some and lamented by others, the increasingly fragmented, pluralistic nature of the international legal landscape has been the topic of intense scholarly debate.

Fragmentation has several dimensions – normative, institutional, and epistemic. First, international law has witnessed the rise of numerous treaty-based, sectoral normative regimes, such as ‘trade law’, ‘human rights law’, and ‘environmental law’. (15) These constantly-expanding normative regimes were once regulated by ‘general’ international law. As the number and scope of these regimes tends to expand over time, it is increasingly the case that the same conduct by a State or another international legal actor may be regulated by two or more normative regimes.

Second, this proliferation of norms has gone hand in hand with an ‘almost explosive expansion of independent and globally active, yet sectorally limited, courts, quasi-courts and other forms of conflict-resolving bodies’. (16) The normative and institutional dimensions of fragmentation are closely connected, and represent two sides of the same coin. As *Abi-Saab* has observed, ‘[t]o each level of normative density, there corresponds a level of institutional density necessary to sustain the norms’. (17) Most international treaties now provide for judicial or quasi-judicial mechanisms to enforce and clarify their respective norms.

Third, although a relatively unexplored trend, fragmentation also has a ‘professional’ or ‘epistemic’ dimension. Professionals operating in the field of international law may be entrenched in a given adjudicatory structure (a ‘governance node’ that discharges a functional mandate), such as the Dispute Settlement Body (DSB) of the WTO or an investor-State arbitral

tribunal. In addition to creating autonomous rules and policies, these 'nodes' progressively elaborate distinct 'rationalities' – i.e., a unique ethos, and unique legal techniques, professional styles, sensibilities, logics, and technical vocabularies. (18) Every regime 'is programmed' to prioritize particular concerns over others'. (19) While a natural outgrowth of the increasing complexity and specialization of international law, these tendencies may in some cases impede understanding and coordination between different regimes.

Is this more pluralistic landscape a positive or negative development? The scholarly literature is polarized, with both supporters and detractors. On the one side are those who regard the proliferation of international courts as a 'success story'. (20) They view this as evidence of movement towards a more effective system of control, (21) better tailored to the needs of the States engaged in international law-making. This renders States more amenable to settling their differences through adjudication or arbitration, (22) and complying with decisions. (23)

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On the other side are critics of fragmentation, who emphasize the risk to the coherence and harmonious development of public international law. Potential conflicts between substantive obligations are exacerbated by the proliferation of regime-specific courts and tribunals, whose concurrent – and possibly inconsistent – decisions may further erode the unity of the general international legal order. (24)

Regardless of their overall systemic merits, pluralism and specialization are by now established aspects of the international legal order. The creation of these specialized regimes – such as the WTO and the large network of international investment treaties – cannot be undone.

The relevant question is whether the overlapping disputes that emerge from this new legal order are a problem or an opportunity. On the one hand, the existence of different disputes arising out of the same facts could be seen as a way of remedying the potentially broad-ranging effects of a government measure, which may affect a variety of different actors. For instance, where State and non-State actors are empowered to seek relief against the same measure, a multiplicity of proceedings might be viewed as a positive development, and the several proceedings as complementary. (25)

On the other hand, tribunals and commentators have expressed concerns about overlapping proceedings where they involve the same parties and issues, and thus in some sense compete for jurisdiction. (26) Shany observes that 'jurisdictions are deemed to truly compete with one another for business only if the involved parties can hope to achieve comparable results from rival procedures'. (27) Such overlap raises the possibility of forum shopping and risk of conflicting judgments, as well as concerns about the finality of proceedings (e.g., if the same issue can be re-litigated in competing fora). (28) In these situations, traditional jurisdiction-regulating devices, such as *res judicata*, have a role to play.

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In Shany's view, objections to situations of overlap are limited to 'truly competing proceedings', and 'do not encompass merely related proceedings'. (29) As he explains:

If two sets of proceedings involve different parties, different fact patterns, or different legal claims, the arguments against multiplicity lose much of their force. This is because it is widely accepted that every party to a dispute has the right to have his or her day in court and that a claimant may freely decide on the particulars of a claim (e.g. on what grounds to use, whom to name as the respondent, and what remedies to pursue) including which competent court to seize (as long as the claimant exercises his or her rights in a non-abusive manner). Thus, an overly broad multiple litigation bar might place exorbitant limitations on this fundamental expression of party autonomy, which is an important ingredient of the right of access to court. (30)

On this view, the greater the similarity between two disputes, the more acute the policy concerns become. Conversely, situations in which the parties, facts, or legal standards are different raise fewer concerns, and may not warrant application of jurisdiction-regulating devices.

But this is not the whole story. As Shany concedes, even if there is no direct competition among jurisdictions, there can still be 'considerable interaction' between proceedings in different regimes. (31) One can envision 'many scenarios involving related proceedings before different specialized judicial and quasi-judicial bodies'. (32) Marceau observes that the interactions between these bodies can yield normative and procedural 'tensions' between the two systems. (33)

The challenge, then, is to consider the nature of the 'interaction' between a particular set of regimes. Do the fora compete for jurisdiction? If not, what are the benefits and risks associated with overlapping jurisdiction? What, if anything, can be done to maximize the benefits and minimize the risks? In the following sections, we attempt to answer these questions with respect to a specific form of jurisdictional overlap – WTO and investor-State disputes.

§3.02 Overlap between WTO and Investor-State Disputes

To understand the interaction between two overlapping judicial fora, we must first understand the nature and characteristics of each regime. Below, we briefly describe the salient features of WTO dispute settlement and investor-State arbitration. We then consider whether the

regimes are in competition, and the practical and normative implications of overlapping disputes.

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[A] WTO Dispute Settlement

The WTO dispute settlement system is widely regarded as one of the most effective and advanced international judicial mechanisms. (34) As codified in the DSU, any WTO Member may initiate dispute settlement proceedings against any other Member for an alleged violation of the 'covered agreements' (which together comprise the WTO Agreement) before a neutral panel. (35) Claims must arise out of the covered agreements, and not sources of law outside the WTO system. (36)

This is a purely State-to-State mechanism. Private parties and NGOs cannot themselves bring claims, although they may be able to submit amicus curiae briefs. WTO Members face little in the way of standing requirements, and may assert claims even if they have only a potential, future interest that is implicated by a particular measure. (37) In addition, the DSU allows multiple WTO members to unite as co-complainants, and challenge a particular government measure in a single proceeding. (38) WTO Members also may be able to take a significant role in disputes by participating as third parties. (39)

The panel process is governed by the rules and working procedures set out in the DSU. These call for the parties to exchange written submissions, provide written answers to questions posed by the panel, and participate in two oral hearings. (40) At hearings, the parties typically read oral statements, and respond to questions posed by each other, third parties, and the panellists. Although the proceedings are often fact-intensive, there is generally no oral testimony by fact witnesses or cross-examination. Occasionally, experts will appear to make oral statements and answer questions posed by panel members, but this is reserved for more complex cases. Proceedings are confidential, although in some cases hearings have been opened to the public. (41)

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Based on the evidence and arguments presented by the parties, the panel will carry out an 'objective assessment' and render its decision in the form of a written report. (42) All reports are made public, and may attach as appendices copies of the parties' written submissions and/or responses to questions. (43)

The parties may pursue an appeal before a standing Appellate Body (AB). An appeal is limited to issues of law covered in the panel report. After receiving written submissions and responses to questions, and after oral hearings, the AB will issue a written report in which it either upholds, modifies, or reverses aspects of the panel decision. (44) Like panel reports, AB reports are made public.

Under the negative consensus rule, the DSB will approve the AB report (and the panel report, as modified by the AB) unless there is a consensus among WTO Members not to do so. (45) Alternatively, if the parties decide not to appeal a panel's decision, the DSB will adopt the panel's report unless there is a consensus not to do so. (46)

Disputes proceed on an expedited timetable. A WTO panel is generally required to complete its work and circulate its final report within six months from the date it is established, (47) but '[i]n no case should [this period] exceed nine months'. (48) Likewise, the AB must issue its report within 60 (or, in particularly complex disputes, 90) days from the filing of a Notice of Appeal. (49) WTO Members have in some cases informally agreed to extend these deadlines, but this practice remains controversial.

There is no formal theory of *stare decisis* or precedent. But, in practice, the AB and panels tend to adhere to prior decisions and interpretations of the WTO Agreement. The steady accumulation of panel and AB reports has generated a *jurisprudence constante* within the WTO system, which provides important guidance to WTO Members and has had considerable influence on other international tribunals. (50)

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Critically, the WTO dispute settlement process does not provide for retrospective monetary damages. The relief is withdrawal or modification of the WTO-inconsistent government measure with effect from the end of a 'reasonable period of time' (RPT), during which the respondent must bring the measure into conformity with WTO rules. This relief is essentially prospective in nature, and akin to a declaratory judgment issued by courts or arbitral tribunals. (51) The particular modifications to be made to the offending measure are rarely specified. (52) Instead, a WTO panel will render a decision stating that the challenged measure is inconsistent with the WTO Agreement, and recommend that the responding party bring its measures into compliance by the end of the RPT. (53)

The DSU allows the losing party to offer trade compensation to the prevailing parties, but this is voluntary and intended as a temporary measure, pending compliance. (54) The WTO also has an elaborate internal compliance procedure to assess whether compliance with the ruling is sufficient, and if not, to set limits on the amount of retaliatory trade sanctions that may be imposed by prevailing parties. (55)

[B] Investor-State Arbitration

Investor-State arbitration is the product of a large network of international investment treaties, particularly BITs and investment chapters in FTAs. These treaties generally confer extensive protections on foreign investors and investments, such as the right to receive national treatment, most-favoured nation (MFN) treatment, fair and equitable treatment, full protection and security, and protection from expropriation without compensation. (56)

Perhaps the most innovative feature of these treaties is that they generally provide for investor-State dispute settlement. Companies and natural persons can assert claims against the host State when they have been harmed by government action that violates a treaty provision. This is a significant advance from the previous regime ▲▼ of diplomatic protection. Under that regime, only States could assert claims on behalf of their nationals, thereby politicizing the process. (57)

Investor-State dispute settlement has been described as sharing 'hybrid' or sui generis characteristics. As a system that confers dispute settlement rights on non-State entities, investor-State arbitration is a creature of treaty, yet may involve significant issues of private rights and municipal law. Thus, it embodies elements of both public and private international law. (58)

Under most BITs, investors are given a choice of dispute settlement options. The most commonly chosen method is arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), which is part of the World Bank. A significant minority of treaty-based investment disputes are conducted through other arbitral institutions or on an ad hoc basis, under the UNCITRAL Rules of Arbitration. (59) Many investment treaties require the claimant to wait three to six months before initiating arbitration, to allow the parties to attempt a negotiated resolution. (60)

Once initiated, arbitral proceedings follow a relatively defined course. Following appointment of the arbitral tribunal, the parties exchange detailed written submissions, supported by evidence; conduct document disclosure; and participate in a witness hearing. At the hearing, fact and expert witnesses are subject to examination. The parties' counsel also deliver oral statements and answer questions posed by the tribunal. After the hearing, the parties frequently adduce post-hearing submissions.

The parties' submissions throughout the arbitration are generally confidential, and hearings are closed to the public. Unless one of the parties objects, the tribunal may allow third parties to submit amicus briefs or attend hearings, although this rarely occurs in practice. (61) Awards are likewise confidential, but can be made public if the parties agree; otherwise, ICSID may publish excerpts of legal reasoning from awards. (62) In practice, most awards are leaked by one of the parties, and a considerable body of arbitral precedent has developed. (63)

Once the arbitral tribunal issues its award, it may – under the ICSID system – be subject to annulment proceedings. An internal 'annulment committee' will consider a request for annulment on strictly limited grounds, such as excess of authority or failure ▲▼ to state reasons for a decision. (64) This is not an appeal. Once final, an award may be enforced in any jurisdiction that has acceded to the ICSID Convention; that jurisdiction must enforce the pecuniary obligations in an ICSID award in the same way as it would a domestic judgment. (65)

For cases falling outside the ICSID system, arbitral awards may be subject to challenge proceedings before domestic courts, on potentially broader grounds than ICSID annulment proceedings. For its part, the claimant may seek recognition and enforcement of an award under the New York Convention – a process that is generally less advantageous than the procedure called for by the ICSID Convention. (66)

Unlike WTO disputes, investor-State arbitrations are not governed by strict, compressed deadlines set by treaty or rule. Deadlines for submissions and hearings are set by the arbitral tribunal in each case, taking into account the nature of the dispute, as well as the schedules of the parties, arbitrators, and counsel. Although arbitrators are encouraged to proceed and render awards in an expeditious manner, (67) there are no fixed rules. As a result, proceedings can take several years to complete – on average, 3.6 years for ICSID cases, excluding annulment and enforcement proceedings. (68) An arbitration can last for a particularly long time if proceedings are bifurcated into jurisdiction and merits phases, or if awards are subject to annulment or challenge proceedings.

In contrast with WTO panels, investor-State tribunals are not limited to providing prospective relief. Arbitral remedies are typically retrospective, and damages are the dominant form. Non-monetary forms of relief, such as restitution of property or specific performance, are theoretically possible in some cases, but rarely sought or awarded. (69)


[C] Interaction between the Two Regimes

[1] Jurisdictional Competition?

As the preceding suggests, WTO dispute bodies and investor-State tribunals do not compete for jurisdiction. According to Shany, overlap is only objectionable where there is meaningful jurisdictional competition – i.e., where the parties and issues are ▲▼ essentially the same. (70) These categories are traditionally construed rather narrowly by international tribunals, (71) and do not appear to apply to overlapping WTO and investor-State disputes.

First, WTO and investor-State disputes appear to involve different parties. At a formal level, the matter is at least arguable. Scholars and tribunals continue to debate whether investors exercise 'direct' or 'derivative' rights when asserting claims under investment treaties. Under a derivative rights theory, investors step into the shoes of their home State, and exercise rights that are essentially those of the State. (72) It is essentially the home State that is asserting the investment claim – conceivably the same State that is pursuing a parallel WTO claim. Under a direct rights theory, the investor is not a proxy for the State, and has direct dispute settlement rights. (73)

But on a practical level, the differences are clear. The complaining parties in both proceedings are different – States in WTO proceedings and corporations or individuals in investor-State arbitration. A foreign investor may lobby its home State to bring a WTO claim against the host State government, and may provide financial and legal support. (74) But it is the home State that ultimately decides whether to bring the claim, based on an array of considerations that may span several industries and sectors. (75) Moreover, WTO claims may be brought by several different States, not merely the investor's home State. Each of these States has its own criteria for deciding whether to bring a claim, including offensive and defensive considerations within the WTO system, and in the context of its broader relations with other countries. These States also have authority to decide how to litigate a case, whether to settle, and whether (and how) to pursue retaliation if the losing party does not comply. Only WTO Members are entitled to pursue retaliation against the losing party – not affected private parties, such as investors.

The same is true for investor-State claims. Only the affected investor may decide to bring a claim. This decision need not be supported by their home State – which may, indeed, oppose that decision. Investors and their home State may also differ on their interpretation of the relevant investment treaty provisions. (76) Moreover, investors  decide how to pursue the case, and are entitled to any damages that result. Damages do not flow to the home State. (77)

Second, the issues at stake in WTO and investor-State proceedings are not necessarily the same. The facts may be essentially identical; for instance, the two proceedings may challenge the same government measure. But the legal grounds for the claims will differ, as they are grounded in different treaties with provisions that often differ in scope and formulation. (78) And as discussed above, the relief requested will probably differ. An investor will likely receive damages in its investment claim, whereas a prevailing WTO Member will secure a panel's recommendation that the responding Member bring its measures into compliance with the WTO Agreement.

[2] Interaction between Related Proceedings

Based on the preceding, there does not appear to be any meaningful risk of jurisdictional competition between WTO and investment tribunals. The presence of jurisdictional overlap between the two regimes arguably raises fewer concerns than, for instance, parallel proceedings under the State-to-State dispute mechanisms of the WTO and FTAs, where the same parties are involved. (79) Indeed, as discussed above, WTO and investment proceedings are essentially complementary. Nonetheless, as discussed below, these related proceedings may give rise to certain tensions and inefficiencies.

[a] Conflicting Factual Determinations

First, the two tribunals may render conflicting factual determinations. For instance, they may adopt different views on the interpretation and effect of a government measure. These differences may reflect a range of factors, including different rules and procedures for presenting evidence and different litigating strategies by the parties. Other factors, such as differing evidentiary presumptions and burdens of proof, also may play a role. Differences may arise where WTO panels and investor-State panels adjudicate the same dispute concurrently, without communicating and without the benefit of each other's reasoning. (80) While certain differences are natural, and may reflect healthy disagreement between the two tribunals, commentators have argued that conflicting decisions threaten the legitimacy of international adjudicatory regimes. (81)

[b] Conflicting Interpretation and Application of Similar Legal Provisions

WTO and investment tribunals also may render legal interpretations and apply law to fact in conflicting ways. This is not necessarily a problem where the relevant legal standards and provisions are fundamentally different. But in the case of the WTO Agreement and investment treaties, the standards converge at several points.

Several provisions in the WTO Agreement and investment treaties qualify as 'Multi-Sourced Equivalent Norms' (MSENS). (82) Broude and Shany define these as norms which are (1) binding upon the same international legal subjects; with (2) similar or identical normative content; and (3) are established through different international legal instruments or legislative procedures, or are applicable in different substantive areas of law. (83) As the International Law Commission (ILC) opined in its 2006 report on fragmentation in international law, such norms 'point in the same direction'. (84) They prescribe similar conduct (e.g., non-discrimination, protection of intellectual property) on the part of the same subjects of international law (i.e., States that host foreign investment, which are also parties to the WTO Agreement).

MSENS 'are never fully equal', (85) however, as the language of the relevant provisions may

differ slightly from treaty to treaty. These differences may be outcome-determinative when applied to specific facts. Moreover, the specific legal frameworks in which MSENs are codified may contain different background principles, which inform their interpretation. (86) These often subtle discrepancies may require WTO panels and investor-State tribunals to conduct distinct legal analyses.

National treatment principles constitute a clear example of MSENs. They are codified in, *inter alia*, Article III of the GATT 1994, and appear in BITs. Under the GATT 1994, Members may not provide less favourable treatment to imported goods than to domestic goods that are 'like products'. (87) BITs likewise bar less favourable treatment, but do so with respect to 'investments' or 'investors'. (88) Moreover, the BIT obligation is generally framed in terms of foreign investments or investors that are in 'like circumstances' with their domestic counterparts – not 'like products'. (89)

According to prevailing WTO jurisprudence, a 'likeness' analysis chiefly focuses on the existence of a sufficiently close competitive relationship between two or more products. (90) Whether products receive 'less favourable treatment' does not hinge on the subjective discriminatory intent of the regulator or the actual impact upon imports (the so-called 'aims-and-effects' test (91)), but rather on the modification of the competitive conditions between imported and domestic products to the detriment of the latter, discernible from the 'design, architecture, and structure of the measure'. (92)

Several investor-State arbitral tribunals have taken a different approach. They have interpreted the concept of 'like circumstances' in BITs as not being grounded in the competitive relationship between foreign and domestic investments. (93) In some cases, they essentially have taken the position that the foreign and domestic investments to be compared are those that raise similar public policy concerns. (94) Moreover, to be discriminatory, the measure at issue generally must have an *actual* impact on, or harm to, a specific investor or investment. In other words, a mere modification of the competitive conditions to the detriment of foreign investors is not sufficient to show discrimination. (95)

These diverging legal interpretations of similar treaty language arguably stem from the different policy objectives that inform the WTO Agreement and international investment treaties. The WTO Agreement is more concerned with trade 'liberalization and market access for imports in the interest of overall welfare, not to guarantee rights or trade flows to individual exporters'. (96) By contrast, investment treaties consider national treatment as a means of providing, among other things, 'security and fairness to individual business operations by curtailing discriminatory abuse by local governments'. (97)

Other examples of possible MSENs include MFN obligations contained in the General Agreement on Trade in Services (GATS), with respect to 'mode 3' supply of services (i.e., commercial presence of a service supplier in another country), and corresponding MFN protections found in BITs with respect to investors and investments; (98) WTO and BIT prohibitions against the imposition of local content requirements or other requirements contingent upon exports or foreign exchange inflows; (99) and the protections found in the WTO TRIPS Agreement and IP protections available through BITs. (100)

How should WTO and investor-State tribunals handle situations of jurisdictional overlap, where MSENs are involved? On the one hand, a tribunal in one regime may benefit from the interpretation and application of similar provisions by a tribunal in another regime. A finding by a WTO panel that there are 'like products' is arguably relevant to an investor-State tribunal's determination that the same measure violates national treatment provisions in a BIT. (101) This may tend to promote cross-fertilization between the two regimes.

But, as with any MSEN, tribunals will need to be attuned to differences in the underlying legal provisions and context. (102) To the extent that the tribunals ultimately pursue different approaches in interpreting and applying similar legal provisions, they can carefully consider the decision rendered by the other tribunal (if available) or jurisprudence from the other regime. Differences in textual provisions and context, as well as areas of disagreement, can be clearly identified and explained. We discuss in further detail below additional approaches and mechanisms that may be considered in this context.

[c] Inconsistent Remedies

In principle, the remedies afforded through the WTO and investor-State systems should be complementary. Whereas the dominant remedy in investment arbitration is damages, the WTO dispute system calls for withdrawal or modification of a government measure.

From the investor's perspective, overlapping WTO and investment proceedings may provide an ideal solution, allowing it to enjoy both retrospective and prospective relief. If it prevails in the arbitration, an investor can secure damages for the impairment of the value of its investment. If the complaining parties in a WTO claim also prevail, the investor will be a beneficiary of the result (assuming there is compliance) – i.e., the withdrawal or modification of the challenged measure.

But inconsistencies are at least theoretically possible where non-monetary relief is sought in arbitral proceedings. If an arbitral tribunal ordered the respondent State to modify a measure that violated a BIT, and the State complied, (103) there could be implications for parallel WTO proceedings. One can imagine a situation in which a WTO compliance panel found that the very act ordered by the arbitral tribunal and implemented by the State did not comply with a DSB

recommendation that the State bring its original measure into compliance with the WTO Agreement. Although this scenario remains unlikely, it does point to the potential benefits of mutual awareness by tribunals of remedies ordered in related cases, and of the obligations imposed by other systems.

[d] Judicial Economy and Finality

Jurisdictional overlap usually involves some duplication of resources and effort. Much of the same evidence may have to be adduced and adjudicated on several occasions, in different fora. Multiple legal teams may need to be engaged, and political and financial resources devoted to both disputes. There also may be some tension with the principle of finality. A measure may be subject to challenge in repeated, successive proceedings before different fora, prolonging uncertainty about its legal status.

But these are in some sense the inevitable consequences of having multiple international legal regimes with dispute settlement mechanisms. A government measure can, and often does, implicate rules in multiple regimes. Affected actors cannot be blamed for pursuing their rights under different regimes, at least where the parties are different.

That being said, parties and tribunals – each of whom may have an interest in controlling time and cost – may consider certain techniques to promote efficiency and coordination between different proceedings. We discuss some of these techniques below.

§3.03 Adjudicative Approaches to Overlap

When faced with a situation of overlap, how should a WTO panel or investment tribunal respond? This will depend on the facts of a given case; there is no ‘one-size-fits-all’ approach. As the proceedings do not directly compete, there is no pressing need to employ jurisdiction-regulating strategies. Adjudicators in WTO and investment disputes may nonetheless consider ways to promote coordination and efficiency between the two proceedings.

Below, we consider the various tools in the ‘toolkit’ of jurisdictional strategies available to adjudicators, as applied to both successive (i.e., one dispute concludes before the other) and parallel (i.e., concurrent) proceedings. We observe that many of the traditional techniques, such as *res judicata* principles, are ill-suited to overlapping WTO and investment disputes. Adjudicators may have greater room to apply principles of comity and case management, either in taking account of previous rulings or in staying proceedings to allow the other forum to proceed. They may also consider requests for evidence, pleadings, and orders from the other proceedings, as a way of promoting consistency and efficiency. In addition, the parties in the two proceedings may in some cases find it advantageous to agree on ways to sequence the disputes.

[A] Successive Proceedings

[1] *Res Judicata*

Successive proceedings are typically viewed through the doctrinal lens of *res judicata*. Under this doctrine, an earlier, final adjudication is conclusive in subsequent proceedings, and may preclude further adjudication of what was previously decided. (104) Concepts of *res judicata* affirm the importance of finality, and feature in virtually all legal systems. Indeed, *res judicata* has been recognized as a general principle of international law. (105)

In domestic law, the precise contours of the *res judicata* doctrine may vary significantly from jurisdiction to jurisdiction. Reflecting these differences, the ILA Committee on International Commercial Arbitration, in its seminal 2006 report on *res judicata*, chose to abandon the term, and referred instead to the ‘conclusive and preclusive effects of arbitral awards’. (106)

Under international law, there are generally four requirements for applying *res judicata* in international proceedings. Specifically, the proceedings:

- (i) are conducted before courts or tribunals in the international legal order;
- (ii) involve the same relief;
- (iii) involve the same grounds; and
- (iv) are between the same parties. (107)

Application of this doctrine to successive WTO and investor-State proceedings is problematic. First, it is debatable whether WTO and investor-State arbitration proceedings partake of the same international legal order. According to the International Law Association (ILA), ‘[i]ncluded in the same legal order are tribunals established under treaties and mixed arbitration tribunals (between private investors and host States)’. (108) On the other hand, treaty-based investor-State arbitration proceedings have a ‘hybrid’ or *sui generis* character, as investment treaties empower individual, non-State actors (investors) – whose investments arise under municipal law – to pursue claims directly against States, yielding awards that are deemed ‘commercial’ for enforcement purposes. (109) In any event, given the erosion of distinctions between ‘public’ and ‘private’ international legal orders, the continuing significance of the ‘same legal order’ requirement is in doubt. (110)

Second, WTO and investor-State arbitration proceedings ordinarily do not involve 'the same relief'. In the classic formulation of the doctrine, the 'object' or *petitum* of two claims must be the same. (111) As discussed above, investors typically receive ▲▼ damages, whereas prevailing WTO Members obtain a panel recommendation that the responding Member bring its measures into compliance.

Moreover, the 'cause' or 'grounds' of claims are probably not the same, as they are founded on legal obligations contained in different treaties (i.e., the WTO Agreement and investment treaties). Authorities are divided over whether it is permissible to look beyond the formal legal basis of a claim, and to assess whether the underlying nature of the dispute is the same in both fora. (112)

Third, as discussed above, WTO and investor-State proceedings also do not appear to involve the 'same parties'. (113) As discussed above, the home State and investor are not fungible for all purposes. (114) While some arbitral tribunals have applied an 'economic approach' between related parties for jurisdictional purposes, (115) there is not necessarily an identity of economic interest between the home State and investor. Although the investor may support its home State in WTO proceedings, the State has broader systemic interests at stake and can act independently – and contrary to – the wishes of an investor. (116)

Finally, the practice of WTO dispute bodies and investor-State tribunals renders it particularly unlikely that either system would confer *res judicata* status on a previous decision of the other. In successive proceedings within the WTO (e.g., panel proceedings following a decision by another panel or the AB), dispute bodies – without using the term '*res judicata*' – have given conclusive and preclusive effect to decisions in prior proceedings between the same parties. (117) But no WTO panel or the AB has applied the *res judicata* doctrine with respect to proceedings conducted outside the ▲▼ WTO. (118) While such an outcome is possible in theory, it remains unlikely in practice, given the interpretation by WTO adjudicatory bodies of Article 11 of the DSU, requiring that WTO panels conduct their own 'objective assessment' of the facts and law (as opposed to relying on the effect of a ruling by a non-WTO body). (119)

The decision in *India – Autos* suggests that a WTO panel is likely to adopt a relatively strict approach to *res judicata*. In that case, India argued that a decision by a previous WTO panel (i.e., the panel in *India – Quantitative Restrictions*) had already adjudicated the measures at issue, and was binding as a matter of *res judicata*. (120) The panel refrained from deciding whether the principle of *res judicata* had a place within the WTO system, but noted that if it did:

[T]here should, at the very least, be in essence identity between the matter previously ruled on and that submitted to the subsequent panel. This requires identity between both the measures and the claims pertaining to them. There is also, for the purposes of *res judicata*, a requirement of identity of the parties (121)

The panel ultimately rejected India's *res judicata* defence, finding that, even if the doctrine applied in WTO proceedings, its requirements were not met. The specific measures challenged in the second proceeding were distinct from those in the first; indeed, the challenged measures were adopted after the first panel had been established, and fell outside its terms of reference. (122) The relevant claims in both proceedings invoked the same legal provision (GATT Article XI:1); however, the panel found that it had to 'go beyond the mere identification of the provision claimed to have been violated', and 'must at the very least accurately identify the precise legal basis for the claimed violation in relation to the measure at issue'. (123) In the first proceeding, the issue was whether India's discretionary licensing system was inconsistent with Article XI; in the second, the issue was whether trade balancing and indigenization conditions ▲▼ subsequently introduced were inconsistent with Article XI. (124) The latter were not 'inherent' elements of the former, and the issues were distinct. Under these circumstances, *res judicata* could not apply. (125)

Investor-State tribunals have taken an equally strict approach to *res judicata*. They have adhered to the traditional requirements of *res judicata* – i.e., the 'triple identity test' (generally formulated as requiring identity of parties, relief, and grounds). Applying this test, investment tribunals have in many cases refused to give *res judicata* effect to decisions of domestic courts or previous arbitral tribunals. (126)

The award in *Helnan International Hotels v. Egypt* illustrates this approach. In that case, the respondent argued that claims brought under the Denmark-Egypt BIT were barred by *res judicata*. Egypt pointed to a previous award issued by a tribunal established under the auspices of the Cairo Regional Centre for International Commercial Arbitration ('the Cairo Award'). The ICSID tribunal rejected this defence, observing that:

The *res judicata* effect of the Cairo Award is limited to the Egyptian legal order and cannot be opposed to the admissibility of Helnan's claims grounded on the alleged breach of the Treaty. (127)

The ICSID tribunal found that the Cairo Award did not meet the 'triple identity test'. (128) First, there was no identity of parties. The parties in the Cairo arbitration (i.e., the Egyptian Organization for Tourism and Hotels – EGOH – as claimant, and Helnan as respondent and counterclaimant) differed from those in the BIT arbitration (i.e., Helnan as claimant and Egypt as respondent). (129) Second, even though the subject matter of both disputes was the same, the ICSID tribunal noted that 'the relief sought was not identical, although it [was] globally aiming at the same result' – i.e., allowing Helnan to remain in charge of managing the hotel,

requiring the hotel's owner to renovate it, and obtaining compensation in damages (albeit in differing amounts). (130) Finally, the tribunal observed that the claims were 'not based on the same legal grounds or the same causes of action[]', as the Cairo arbitration addressed purely contractual claims, whereas the BIT arbitration was grounded in Egypt's alleged treaty violations. (131)

In sum, jurisprudence from WTO panels and investment tribunals suggests that *res judicata* arguments face an uphill battle. It will be exceedingly difficult to persuade adjudicators from either system to give *res judicata* effect to decisions rendered by the other. As evident in the *Helnan* award, there may be lingering concerns over whether WTO decisions form part of the same 'legal order' as investment arbitration, and vice versa. Nor would the elements of the triple identity test – in its traditional formulation – be met: the parties are, for practical purposes, different (States versus investors); the claims are grounded in different treaties with differing standards; and the relief (retrospective damages versus prospective recommendations to comply with treaty obligations) is also distinct. Unless a tribunal were willing to adopt a more flexible approach to the doctrine's requirements, an argument founded in *res judicata* would be difficult to sustain.

[2] Issue Estoppel

Alternatively, a WTO panel or tribunal may consider applying the doctrine of issue estoppel. Originally developed in common law jurisdictions, the doctrine 'prevents a party in subsequent proceedings from contradicting an issue of fact or law that has already been distinctly raised and finally decided in earlier proceedings between the same parties (or their privies)'. (132) This doctrine 'has more kinship with *res judicata* than with estoppel', (133) and is grounded in concerns of finality, not the avoidance of inconsistency. (134) As one commentator observed:

Its advantage is that it prevents unnecessary litigation whilst at the same time conceding to a claimant his right to have any new cause of action adjudicated; as such it is a notion which international tribunals might usefully adopt. (135)

Issue estoppel is narrower than *res judicata*, and its requirements are less stringent. The doctrine applies where the previous decision is final; the issue raised in both proceedings is the same; the parties in the two proceedings are the same or privies; and the issue of fact or law is an 'essential element' in the previous cause of action or defence and/or in the previous decision. (136) In contrast with *res judicata*, issue estoppel applies even if the causes of action in the two proceedings are different. (137)

The doctrine of issue estoppel has gained increasing acceptance in international adjudication. Indeed, the ILA endorsed issue estoppel as a recommended transnational principle for arbitration in its 2006 report. (138) However, civil law jurisdictions do not recognize the concept. (139)

It is unclear whether issue estoppel qualifies as a general principle of international law. One ICSID tribunal, *RSM v. Grenada*, answered this question in the affirmative. (140) The tribunal ruled that the claimants – a company, RSM, and its controlling shareholders – were bound by the findings rendered by a prior ICSID tribunal with respect to certain rights, questions and facts (the previous award was adverse to RSM). (141) Although the shareholders were not parties to the previous arbitration, the second tribunal found that they were bound as 'privies' of RSM – they had asserted damages indirectly, based on harm suffered by the company itself. (142)

On the other hand, general principles that are adapted from domestic legal systems for use in international adjudication typically reflect widespread use across a range of legal systems. (143) As civil law jurisdictions do not recognize the doctrine of issue estoppel, this raises questions as to whether it qualifies as a general principle. (144) The matter is further complicated by different understandings of what constitutes 'general principles', and the requirements for establishing them. (145)

So what can we conclude? In cases of successive proceedings, can WTO and investor-State tribunals make use of issue estoppel?

Turning first to the WTO, no panel has expressly applied principles of issue estoppel. (146) This may reflect the fact that issue estoppel is not mentioned in the DSU, and uncertainty over the doctrine's status in international law. A WTO panel might apply issue estoppel as an exercise of its implied or inherent authority. (147) But this would raise complex questions regarding the appropriate limits and sources of such implied or inherent authority, and about whether applying issue estoppel to the findings of a non-WTO tribunal is consistent with the DSU. (148)

In any event, it may be difficult to establish a core requirement of issue estoppel – i.e., that there be identity of parties. Certain common law jurisdictions have adopted a flexible approach to this requirement (e.g., extending the doctrine to parties that are in privity, or – in the case of the United States – to third parties (149)). But it is unclear whether a WTO (150) or investment tribunal (151) would be willing to employ such a flexible approach with respect to a previous decision or finding in the other regime. This is uncharted territory, and awaits development in future cases.


[3] Systemic Interpretation

When faced with a previous, related decision, tribunals may also draw on the principle of 'systemic interpretation' articulated in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). Under this provision, a treaty interpreter should, when interpreting a treaty, take into account 'any relevant rules of international law applicable in the relations between the parties'. This provision is often viewed as a means of avoiding conflicts between international legal commitments, and promoting a 'systemic' interpretation of obligations. (152)

Article 31(3)(c) is not, in and of itself, a jurisdiction-regulating principle. It is an interpretative principle that calls for consideration of other rules of international law when reading a given text.

But Article 31(3)(c) could, in theory, lead one tribunal to invoke a prior decision of another tribunal as an authoritative expression of a rule of applicable international law. Such an approach would allow tribunal A to interpret its constitutive treaty ('Treaty A') in light of tribunal B's interpretation of its own constitutive treaty ('Treaty B') – as long as the norms of Treaty B are considered to be 'relevant rules of international law applicable in the relations between the parties'. For instance, an award rendered by an investment tribunal interpreting a BIT could, in theory, be cited as context by a WTO tribunal interpreting a similar provision of the WTO Agreement. (153)



Application of Article 31(3)(c) in this manner remains controversial, however, and a proper discussion of the issues would exceed the scope of this chapter. It remains unclear whether the term 'the parties' employed in Article 31(3)(c) refers to *all* of the parties to the treaty being interpreted, or is limited to a *sub-set* of those parties (e.g., only the parties to the dispute). (154)

WTO jurisprudence has yet to resolve this debate, but appears to have narrowed considerably the availability of systemic interpretation. In *EC – Large Civil Aircraft*, the AB did not take a clear position on the issue, and observed only that 'a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members'. (155)  By contrast, the unappealed WTO panel decision in *EC – Biotech Products* ruled that the obligation to take into account exogenous rules of international law when interpreting WTO law applied only to those rules that are binding on *all* WTO members. (156) Subject to further guidance from the AB, a WTO panel may be reluctant to conclude that an investment tribunal's interpretation of the provisions of a BIT (applicable between only two Members) constitute 'relevant rules of international law applicable in the relations between the parties'.

Investment tribunals may have greater flexibility in employing systemic interpretation with respect to decisions by WTO panels or the AB. Given the extraordinary breadth of WTO membership, (157) the parties to a BIT generally will also be parties to the WTO Agreement. But even here, systemic interpretation would have limited application. It would apply only to interpretation of the legal provisions in the BIT, which could be read in light of similar WTO provisions, as interpreted by a previous WTO panel.

[4] Prior Decisions as Evidence

A less controversial approach is to treat previous decisions by other tribunals in related matters as part of the factual evidence in the case. This falls within a WTO panel's authority under DSU Article 11 to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case'. Arbitral tribunals have similar authority. (158) Under this approach, the subsequent tribunal is at least aware of the preceding tribunal's decision, and will take it into account. This may tend to ensure greater consistency of results and focus or simplify the issues. (159)

The more difficult question is how much weight to accord prior decisions. Should a tribunal defer to the previous tribunal's findings on factual or legal matters, or even rebuttably presume that the other forum's findings are correct? (160) How should the  findings of another forum – derived under different legal standards and procedural rules – be taken into account? 

The answers to these questions are difficult, and to a large extent context-dependent. Below, we consider factors – such as provisions of the DSU, similarity of applicable legal standards, and considerations of comity – that may bear on a decision-maker's approach. We also consider applicable jurisprudence from WTO and investment tribunals.

[a] DSU Provisions

From the WTO perspective, one factor is the DSU itself. Under DSU Article 3.2, the WTO dispute settlement system serves only to 'preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements'. Likewise, Article 3.3 specifies that decisions of WTO dispute settlement bodies 'cannot add to or diminish the rights and obligations provided in the covered agreements'. Based on these provisions, one could argue that taking into account or applying non-WTO decisions in related cases would be tantamount to imposing obligations from another legal regime, or deciding rights and obligations found outside the WTO covered agreements. (161)

Article 7 of the DSU may also limit the ability of panels to rely on decisions rendered by non-WTO tribunals. Under Article 7.1 of the DSU, panels are given the following terms of reference:

To examine, in light of the relevant provisions in (name of covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

Likewise, under Article 7.2, '[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute' (emphasis added). Article 11 has similarly imperative language with respect to a panel's duty to carry out an 'objective assessment'. (162) Thus, panels may be concerned that, in relying on the findings of another tribunal, they would be seen as having abdicated their decision-making and fact-finding role.

WTO jurisprudence applying these provisions may further constrain a panel's ability to rely on non-WTO decisions. In *Mexico – Taxes on Soft Drinks*, the AB cited DSU Article 3.2 in support of its finding that the WTO dispute settlement system could not be used to 'determine the rights and obligations outside the covered agreements' – in that case, rights and obligations under the NAFTA. (163) The AB also found that Articles 7 and 11 of the DSU barred a panel from declining to exercise jurisdiction over a dispute under the covered agreements. (164) A panel could not fulfil its obligation to render an 'objective assessment' if it abstained from making any findings on the matter before it. (165)

Critically, the AB was not faced with a decision rendered by a non-WTO tribunal. It did not address the extent to which it was permissible to take into account such foreign decisions. Indeed, simply taking into account a non-WTO decision is not necessarily inconsistent with the requirement to undertake an 'objective assessment'. The panel arguably has discretion to accord the weight it deems appropriate to a given fact – including the 'fact' of a non-WTO decision, and the reasoning adopted in that decision. (166)

But the matter remains unsettled. The text of the DSU, coupled with the AB's reasoning in *Mexico – Taxes on Soft Drinks*, will undoubtedly prompt caution among WTO adjudicatory bodies faced with decisions rendered by foreign tribunals.

By contrast, investor-State tribunals are not subject to provisions akin to those in the DSU. In principle, there is no reason why these tribunals could not take into account or apply the findings of a WTO panel. And, as discussed below, investment tribunals in some cases appear to have applied a degree of deference to WTO decisions.

[b] Comparison of Legal Standards

In determining how much weight to give a previous WTO or investor-State decision, a tribunal may consider the relationship between the legal standards applied in both disputes. If the standards in each regime are sufficiently different, the findings of one tribunal may be less relevant to the other.

Tribunals will be sensitive to differences in the text, context, and underlying objectives of the legal provisions at issue in each regime. For instance, as discussed below, investment tribunals have in some cases drawn on WTO jurisprudence regarding national treatment, while noting the textual and other differences between the national treatment provisions found in the WTO Agreement and investment treaties.

In other cases, a WTO violation may be a predicate to an investor-State claim. For instance, an investor may argue that a violation of the WTO Agreement gives rise to a violation of the 'umbrella clause' found in a BIT, or supports a finding that the 'fair and equitable treatment' standard has been violated. In these cases, the findings of a WTO dispute body may be more directly relevant to a BIT claim. (167)


[c] Comity

Another factor that may come into play is the principle of comity. According to Shany, the exercise of comity requires that 'courts in one jurisdiction [] show respect and demonstrate a degree of deference to the laws of other jurisdictions, including the decisions of judicial bodies operating in these jurisdictions'. (168) The doctrine is grounded in a range of concerns, such as courtesy, reciprocity, and the need to coordinate multiple proceedings, all of which apply to situations of jurisdictional overlap between international tribunals. (169) Comity is a flexible principle, and subject to multiple interpretations. Indeed, one observer has described comity as 'a concept with almost as many meanings as sovereignty'. (170)

Although comity is frequently invoked, it does not appear to be either a principle of customary international law or a general principle of international law. (171) Instead, comity is often said to be grounded in the inherent authority of tribunals. (172) This raises questions as to the proper scope of comity and the legitimacy of its use by tribunals. (173)

In theory, comity should play an important role in the relations between WTO and investment tribunals. All international tribunals should approach one another with an attitude of mutual respect. (174) Investment tribunals may be particularly inclined to treat WTO decisions with respect, given the WTO's stature and influence as a supra-national court. Conversely, although investment tribunals are ad hoc bodies, they form part of a large network of treaty-based tribunals, whose decisions often garner wide attention and yield an evolving, influential

jurisprudence. (175) A WTO panel may even view an investor-State tribunal as having a slight comparative advantage when it comes to a particular factual issue. Unlike WTO proceedings, investment arbitration features rigorous oral hearing procedures, including cross-examination of fact witnesses.

WTO and investment tribunals may have additional reasons for not second-guessing each other's decisions. They may have jurisdictional concerns – i.e., tribunals may not want to appear as if they were adjudicating claims under another treaty regime. They also may be unfamiliar with the other regime's treaty provisions, rules,  and jurisprudence. In addition, the tribunal from one regime may not be privy to all of the evidence and argument that was presented to the other tribunal.

Thus, there are good reasons for a WTO panel or investment tribunal to extend comity to the findings of the other. The precise weight to be accorded those findings may vary from case to case. This will likely reflect, among other factors, the degree of similarity between the legal standards in both regimes, and in exceptional cases, whether there is any indication of irregularities that would give rise to concerns about the integrity and fairness of the 'foreign' proceedings.

In practice, however, there are no reported cases in which WTO or investment tribunals have expressly applied comity in situations of mutual overlap. More generally, WTO panels and the AB have shown little inclination to extend comity to decisions of non-WTO tribunals. By contrast, as discussed below, considerations of comity appear to have implicitly informed some investment awards rendered in situations of overlap with WTO proceedings.


[d] Existing Jurisprudence

[i] The WTO: Splendid Isolation?

WTO panels and the AB have so far had little occasion to consider decisions by other international courts or tribunals in situations of jurisdictional overlap. No WTO decision has applied or interpreted rulings by investment tribunals arising out of the same government measure.

In a few instances, however, WTO panels have faced situations of jurisdictional overlap with tribunals constituted under regional trade mechanisms – i.e., in State-to-State proceedings. These examples do not suggest a willingness by WTO dispute bodies to apply comity or rely on the findings of another tribunal. Indeed, no WTO decision even has mentioned the principle of comity. If anything, the approach taken by WTO dispute bodies suggests a degree of indifference to the decisions of other international tribunals, or – to borrow a phrase from one commentator – 'jurisdictional isolationism'. (176)

The Softwood Lumber Dispute

Perhaps the clearest case of jurisdictional overlap between WTO and regional dispute settlement proceedings is the long-running *Softwood Lumber* dispute. This dispute between the United States and Canada, which centered on alleged Canadian subsidies to softwood lumber producers, spawned some 25 proceedings before various international tribunals. In the final tally, the dispute yielded 4 WTO disputes, 15 NAFTA Chapter 19 cases, and 6 disputes under NAFTA Chapter 11. These proceedings culminated in a settlement agreement, signed in 2006. But even this did not end matters, as Canada and the United States later pursued arbitration before the London  Court of International Arbitration (LCIA), concerning alleged violations of the settlement agreement. (177)

Remarkably, WTO bodies did not address the many related disputes that arose during the *Softwood Lumber* controversy. Of the 12 decisions rendered by WTO bodies, none discusses the merits of related NAFTA decisions or possible mechanisms of coordination. This may be partly attributable to the litigation strategies of the parties and differences in applicable law.

Brazil: Retreaded Tyres

In *Brazil – Retreaded Tyres*, WTO dispute bodies were faced with a decision rendered by a State-to-State dispute body under the MERCOSUR trade regime. Before the WTO, the European Communities (EC) challenged Brazil's ban on the import of retreaded tyres, which Brazil justified under GATT Article XX(b) as a measure 'necessary to protect human, animal or plant life or health'. The EC complained, in particular, about the exemption that Brazil carved out from this ban for members of the MERCOSUR customs union – which Brazil undertook in compliance with the ruling of a MERCOSUR tribunal. As the EC was unable to take advantage of this exemption, it asserted that Brazil's actions constituted a form of arbitrary or unjustifiable discrimination, and a disguised restriction on international trade. (178)

The panel disagreed. It observed, first, that Brazil only applied this exemption after the MERCOSUR arbitral tribunal had ordered it to do so, on the grounds that the ban conflicted with MERCOSUR trade rules. As the panel observed, 'MERCOSUR rulings are *res judicata* for the parties involved'. (179) The ruling in question had 'binding legal effects for Brazil' and Brazil 'had an obligation, under MERCOSUR, to implement the ruling'. (180)

The panel noted that, in the MERCOSUR proceedings, Brazil had not attempted to argue that the ban was justified on the grounds of human health, animal or plant life, under Article 50(d) of the Montevideo Treaty. (181) But the panel stated that it was not in a position to second-guess Brazil's litigation choice, and that it would be inappropriate for it to do so. Moreover, it

was 'not clear that a different strategy would necessarily have led to a different outcome'. (182)

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Thus, the panel accepted the MERCOSUR ruling as binding within the MERCOSUR legal order, and did not second-guess the merits of the decision. The panel ▲▼ cautioned that, although it 'give[s] due consideration to the existence of Brazil's commitments under MERCOSUR', this does not imply that the exemption is necessarily justified under WTO law. (183) The panel went on to consider how the import ban was applied. It concluded that the exemption was a reasonable approach under the circumstances and did not constitute arbitrary or unjustified discrimination. (184)

The AB reversed the panel's decision with respect to the MERCOSUR exemption, largely based on a different interpretation of the *chapeau* to GATT Article XX. According to the AB, '[t]he assessment of whether discrimination is arbitrary or unjustifiable [under the chapeau to GATT Article XX] should be made in light of the objective of the measure'. (185) Here, 'the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree'. (186) The MERCOSUR tribunal's ruling was not viewed as relating to or supporting the GATT Article XX(b) objective; its logic was foreign to the WTO system, and incapable of justifying deviation from GATT principles of non-discrimination.

The AB emphasized that Brazil had failed to argue before the MERCOSUR tribunal that the import ban was justified on grounds of human, animal and plant health or safety, under Article 50(d) of the Treaty of Montevideo, which 'serves a function similar to that of Article XX(b) of the GATT 1994'. (187) Like the panel, the AB stated that it would not be appropriate to second-guess Brazil's litigation strategy. (188) But the AB's decision suggested that Brazil's obligation to implement the MERCOSUR ruling – and discriminate against non-MERCOSUR countries – was simply a reflection of its litigation strategy, and a problem of Brazil's own devising. Thus, the AB appeared to cast doubt on the validity and relevance of the MERCOSUR ruling.

Argentina: Poultry Anti-Dumping Duties

In *Argentina – Poultry Anti-Dumping Duties*, a WTO panel was faced with another MERCOSUR ruling, this time with respect to anti-dumping duties imposed by Argentina on poultry products. Argentina argued that Brazil was estopped from bringing a WTO claim, because Brazil had been unsuccessful in a previous challenge of these duties before a MERCOSUR tribunal. Alternatively, Argentina argued that the previous MERCOSUR decision had binding effect, and should dispose of Brazil's WTO claim. (189)

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The panel rejected both arguments. First, there was no estoppel, as Brazil had not expressly or implicitly waived its WTO rights by asserting a MERCOSUR claim, or made a statement that Argentina relied on to its detriment. The panel noted that Brazil had signed the Protocol of Olivos, which provides that once a party decides to bring a claim to either MERCOSUR or the WTO, the choice is exclusive; it may not thereafter attempt ▲▼ to bring a case in the other forum. But this Protocol had not yet entered into force, and was thus irrelevant. Indeed, according to the panel, the fact that the MERCOSUR parties felt the need to sign this Protocol implied their recognition that – absent the Protocol – parties were free to assert WTO claims after pursuing MERCOSUR procedures. (190)

Equally, the panel concluded that it was not 'bound' by the ruling of the MERCOSUR tribunal. The panel observed:

[T]here is no basis in Article 3.2 of the DSU, or any other provision, to suggest that we are bound to rule in a particular way, or apply the relevant WTO provisions in a particular way. We note that we are not bound to follow rulings contained in adopted WTO panel reports, so we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies. (191)

Argentina also failed to establish that the earlier MERCOSUR ruling was part of the normative framework to be applied as a result of Article 31.3(c) of the VCLT, or explain how it would affect the panel's task of interpreting the WTO Agreements. The panel expressed doubt as to whether 'a rule applicable between only several WTO Members would constitute a relevant rule of international law applicable between the "parties"'. (192) But in any event, Argentina 'ha[d] not relied on any statement or finding in the MERCOSUR Tribunal ruling to suggest that we should interpret specific WTO agreements in a particular way'. (193)

The decision in *Argentina – Poultry Anti-Dumping Duties* is instructive in several respects. The decision suggests the panel's view that, as a general matter, a WTO Member cannot be estopped from bringing a WTO claim after it loses a related claim before a regional body. On this view, estoppel would not apply where an investor files a BIT claim and loses, and its home State then initiates a WTO claim. It is difficult to see how the investor's loss, without more, would bar its home State from asserting a subsequent State-to-State claim in the WTO.

It is also significant that the panel in *Argentina – Poultry Anti-Dumping Duties* did not address the substance of the MERCOSUR ruling or accord deference to any of its findings. This appears to reflect, in part, Argentina's litigation strategy before the panel, and its failure specifically to explain how the MERCOSUR tribunal's findings were relevant to the merits of its WTO claims. But it may also suggest a reluctance to rely on the findings of a foreign tribunal. And the decision renders it extremely unlikely that a WTO panel would view itself as 'bound' in any way by the decision of a foreign tribunal.



[ii] Investor-State Jurisprudence

By contrast, investor-State tribunals have on occasion directly addressed situations of jurisdictional overlap with WTO proceedings. Although no investor-State tribunal has expressly invoked principles of comity with respect to WTO decisions, they have engaged to varying degrees with the substance of, and even relied upon the decisions of WTO dispute bodies.

The 'Sweeteners' Dispute

The principal example of jurisdictional overlap is the so-called 'Sweeteners' dispute, arising out of Mexico's tax on high fructose corn syrup (HFCS). The tax spawned a WTO challenge and a trio of investment cases filed under Chapter 11 of NAFTA.

The WTO and NAFTA cases addressed the same core measures – i.e., Mexico's imposition of a 20% excise tax on soft drinks and syrups, and on services used to transfer and distribute soft drinks and syrups. The tax applied to soft drinks and syrups that used any sweetener other than cane sugar, such as HFCS. Soft drinks and syrups made with cane sugar were exempt. Whereas cane sugar producers and distributors were Mexican-owned, US investors manufactured and distributed HFCS in Mexico. (194)

The burden of the tax thus fell on US investors. Mexico argued that this reflected the fact that the tax was a countermeasure. Mexico suggested that this tax was a response to the United States' violation of NAFTA – specifically, its denial of access to the US market for most of Mexico's surplus sugar produce, and its failure to cooperate in establishing a NAFTA Chapter 20 panel to address Mexico's grievances. (195) Evidence adduced in the WTO and NAFTA proceedings also suggested a protectionist intent. (196)

The United States successfully challenged the tax before the WTO. In its ruling of 7 October 2005, the WTO panel concluded that the tax was discriminatory, and violated GATT Article III. (197) HFCS and cane sugar were 'like products', yet HFCS received less favourable tax treatment than (domestic) cane sugar. (198) The panel concluded that this dissimilar tax treatment was applied 'so as to afford protection to domestic production', citing, among other things, evidence from Mexican government sources suggesting a legislative intent to protect domestic production of cane sugar. (199) The panel held that this discrimination was not justified under GATT Article XX(d), and refused to consider Mexico's countermeasures defence. (200) The AB subsequently upheld the panel's decision. (201) Prompted by these rulings, Mexico repealed the tax in 2006, following agreement between the United States and Mexico concerning access for Mexican sugar to US markets. (202)



Investment claims continued, however. US investors brought claims against Mexico under Chapter 11 of the NAFTA, citing several grounds, such as national treatment and expropriation. In each case, the tribunals grappled with the problem of how to interpret and apply findings from the WTO proceedings, which concluded before the investment tribunals rendered their awards.

In *Corn Products International v. Mexico*, the NAFTA tribunal observed that GATT Article III contained language which was 'analogous' to NAFTA's national treatment provisions (especially Article 1102). (203) The tests for discrimination were nonetheless 'separate and distinct' under each regime, as NAFTA queries whether investors or investments are in 'like circumstances', whereas the GATT inquiry is tied to whether there are 'like products'. (204)

But the NAFTA tribunal found that the WTO 'like products' finding was nonetheless 'highly relevant' to its inquiry:

[T]he Tribunal does not accept the fact that HFCS and sugar are like products for the purposes of the GATT is irrelevant to the application of the Article 1102 test. On the contrary, *it considers that this fact is highly relevant to the application of that test*. While the Tribunal would not suggest that the fact that a foreign investor and a domestic investor are producing like products will necessarily mean that they are to be considered as being in like circumstances for the purposes of Article 1102, or that differential treatment will necessarily entail a violation of that provision, where the measure said to constitute the violation of Article 1102 is directly concerned with the products and designed to discriminate in favour of one and against the other, then *that is a very strong indication that there has been a breach of Article 1102*. (205)

The *Corn Products* tribunal concluded that where, as here, the products were interchangeable and indistinguishable from the perspective of the end user, the products, and thus the respective investments, were in 'like circumstances' under the NAFTA. (206) Accordingly, the tribunal found that the tax violated Article 1102. (207)

The *Corn Products* tribunal's reliance on WTO findings only went so far, however. The tribunal found that Mexico was not barred from asserting its countermeasures defence in the NAFTA proceedings, simply because the WTO AB had rejected Mexico's countermeasures defence. (208) The AB had rejected this defence based on the language of GATT Article XX(d) – a decision that was 'conclusive' with respect to whether the tax violated GATT Article III, (209) but not dispositive of whether Mexico had a valid countermeasures defence under general international law or in the context of the NAFTA. (210) NAFTA and the GATT contained distinct international obligations. (211)

Likewise, in *Archer Daniels Midland Co. and Tate & Lyle v. Mexico*, the NAFTA tribunal cited the WTO panel's findings in support of its conclusion that the tax violated NAFTA Article 1102. Although the tribunal conducted its own review of the evidence, it cited and agreed with the WTO panel's finding that the intent of the measure was to protect the domestic cane sugar industry. (212) Drawing on language from GATT Article III, the tribunal agreed with the WTO panel that there was 'dissimilar taxation on directly competitive products', and that the tax was 'applied in a way that afforded protection to the domestic cane sugar industry, targeting the HFCS industry, which is largely owned by foreign US investors'. (213) Based on these findings, the tribunal concluded that the tax violated NAFTA Article 1102. (214)

By contrast, the NAFTA tribunal in *Cargill, Inc. v. Mexico* adopted a more cautious approach to WTO findings. The tribunal remarked that 'like circumstances' in Article 1102 of NAFTA must be interpreted 'on its own terms', and there is no 'automatic transfer of GATT law relating to 'like products' to the Article 1102 term 'like circumstances''. (215) A 'like products' finding can be an 'important component' of the 'like circumstances' inquiry; however, such a finding is 'relevant but not determinative' for purposes of Article 1102. (216)

The *Cargill* tribunal concluded that the Mexican tax violated Article 1102, but did not rely on the WTO panel's findings. Unlike the *AdM/Tate & Lyle* and *Corn Products* tribunals, it did not rely on the WTO panel's findings regarding the protectionist intent behind the tax. Instead, the tribunal found that the measure was designed to put pressure on the United States government to change its policy on sugar imports from Mexico. (217) The tribunal held that the tax violated Article 1102, given Mexico's intentional targeting of investors based on their US nationality. (218)

Nor did the *Cargill* tribunal look to WTO findings in connection with Mexico's countermeasures defence. Instead, the tribunal sought and obtained copies of the awards rendered by its sister NAFTA tribunals, in *AdM/Tate & Lyle* and *Corn Products*. The tribunal reasoned that: ▲▼

The holdings in these other proceedings are not binding *per se* on this Tribunal. However, both the significance of the question presented and the close relationship of the parallel proceedings indicate that this Tribunal should, if at all possible, consider the reasoning of the panels in these proceedings as it may bear upon the issue as it is presented in this case. (219)

The *Cargill* tribunal ultimately rejected Mexico's countermeasures defence, as had the other two tribunals. In its ruling, the *Cargill* tribunal cited the *Corn Products* decision in support, while criticizing aspects of the reasoning in the *AdM/Tate & Lyle* decision. (220) Thus, the tribunal actively sought out previous related decisions by other tribunals, but did not uncritically accept their analysis.

Canfor Corp. v. United States

In yet another chapter in the *Softwood Lumber* saga, the NAFTA Chapter 11 tribunal in *Canfor Corp. v. United States* issued a 'Decision on Preliminary Question' in which it relied on the findings of a related WTO panel, as well as the litigation conduct of the United States in WTO proceedings. (221)

The claimants were Canadian producers of softwood lumber, who challenged various countervailing duty and anti-dumping measures imposed by the United States. They also challenged the 'Byrd Amendment', whereby countervailing and anti-dumping duties were distributed to affected US producers. (222) Thus, claimants sought damages in an investment claim for what were ostensibly trade-related measures.

In its Decision, the tribunal found that NAFTA Article 1901(3) barred the submission of claims under Chapter 11 with respect to US anti-dumping and countervailing duty law. (223) But the tribunal allowed claimants to pursue their challenge of the Byrd Amendment, on the grounds that this did not constitute anti-dumping or countervailing duty law, within the meaning of the NAFTA. (224)

In allowing the Byrd Amendment claims to proceed, the tribunal relied in part on the findings of a WTO panel. To qualify as an anti-dumping and countervailing duty law for purposes of the NAFTA, a statutory amendment cannot be inconsistent with the WTO Antidumping Agreement or the WTO Agreement on Subsidies and Countervailing Measures. (225) In *US – Offset Act (Byrd Amendment)*, a WTO panel found that the Byrd Amendment was, in large part, inconsistent with each of these agreements. (226) As a result, the *Canfor* tribunal observed, '[t]hat WTO position, in turn, calls into question whether the United States complied with' the NAFTA requirements for establishing an ▲▼ anti-dumping and countervailing duty law. (227) The tribunal went on to find that the Byrd Amendment was not anti-dumping and countervailing duty law, and could be subject to challenge under NAFTA Chapter 11. (228)

The *Canfor* tribunal buttressed its findings by pointing to arguments made by the United States before the WTO. In the WTO proceedings, the United States took the position that the Byrd Amendment 'had nothing to do with the administration of the anti-dumping and countervailing duty laws'. (229) The WTO panel rejected this argument for purposes of the WTO Agreement. (230) But the *Canfor* investment tribunal found that the US position 'support[s] Claimants' proposition that, for NAFTA purposes, the United States did not consider the Byrd Amendment to be part of its anti-dumping or countervailing duty law at the time of its enactment'. (231) The tribunal viewed this as 'relevant factual evidence', and even an 'admission against interest':

While the conduct of the United States before the WTO and the findings of the WTO Panels and its Appellate Body have no binding effect upon this Tribunal, they constitute relevant factual evidence which the Tribunal can and should appropriately take into account, especially in the case of positions advocated by the United States before the WTO that amount to admissions against interest for purposes of this NAFTA case. (232)

[iii] Lessons from the Jurisprudence

The paucity of jurisprudence makes it difficult to draw firm conclusions about how WTO and investment tribunals would approach situations of overlap. Nonetheless, the available jurisprudence provides tentative indications.

WTO panels and the AB have thus far not shown an inclination to consider and rely upon decisions rendered by non-WTO tribunals in situations of overlap. Although this jurisprudence reflects the unique facts of each case, WTO dispute bodies have repeatedly emphasized the distinctions between WTO and non-WTO regimes and the limited relevance of foreign decisions.

By contrast, investment tribunals have in several cases relied on the findings of WTO panels – both factual findings and the application of law to fact – while remaining sensitive to differences in the underlying legal standards. They have not shown blanket deference to WTO findings, or rebuttably presumed that those findings are correct. But they have implicitly applied comity, and a degree of deference to those findings in some cases.

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[B] Parallel Proceedings

Parallel proceedings implicate a different set of concerns – namely, whether and how to coordinate between two ongoing proceedings. Should the later-filed dispute be dismissed or stayed in favour of the first-filed case? How should both tribunals proceed? We consider different strategies below.

[1] Reframing the Dispute

One possible approach is to reframe the two overlapping disputes for jurisdictional purposes. Pauwelyn has suggested that in exceptional circumstances, the subject matter and rules implicated in two parallel proceedings may be so similar that they should be deemed, in effect, one and the same dispute. (233) This gives rise to a conflict between two jurisdictional provisions – i.e., the DSU, which asserts WTO jurisdiction over the dispute, and the dispute resolution clause found in the non-WTO treaty. (234) To resolve this conflict, Pauwelyn advocates using ‘normal conflict rules’ such as *lex posterior* and *lex specialis*. (235) If application of these conflict rules favours the non-WTO forum, the WTO panel would decline jurisdiction. (236) Alternatively, a WTO panel might dismiss where the dispute does not genuinely concern WTO claims, but is inextricably related to non-WTO claims for which the panel lacks jurisdiction. (237)

Regardless of its merits as a general proposition, Pauwelyn's approach appears to be rooted exclusively in the State-to-State context, and has no bearing on situations of overlap with investor-State claims. Even if WTO and investment claims challenge the same measure, the investor is arguably a different party than its home State, and asserts claims under a different legal standard. For this reason, it is difficult to see how the dispute settlement clauses in a BIT and the DSU would conflict.

Moreover, if applied to situations of overlap between WTO and investment claims, Pauwelyn's proposal would leave claimants without a remedy. If a WTO panel declined jurisdiction on the grounds that a claim was inextricably bound up with an investment claim, the Member whose claim was dismissed could not then pursue an investor-State claim. (238) The same is true for an investor whose BIT claim is dismissed; the investor cannot pursue WTO dispute settlement, which is only open to States. ▲▼ Apart from truly exceptional circumstances, it is unlikely that a tribunal would deprive claimants of access to justice in this manner. (239)

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Pauwelyn's approach also appears to have been foreclosed by *Mexico – Taxes on Soft Drinks*. In that case, Mexico asked the WTO panel to decline jurisdiction, on the grounds that the dispute was inextricably linked to a NAFTA dispute between Mexico and the United States. Mexico argued that the panel had inherent authority to decline jurisdiction ‘where the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as NAFTA provisions’. (240) As discussed above, the WTO panel rejected this argument, and concluded that it lacked the discretion to choose whether to exercise jurisdiction, given its mandate as set out in the DSU. (241) This ruling was upheld by the AB. (242)

[2] Lis Pendens

International tribunals may also consider drawing upon principles developed for addressing situations of *lis pendens*. In these circumstances, courts and tribunals are faced with ‘parallel proceedings, involving the same parties and the same cause of action, [which] are continuing in two different sites at the same time’. (243) In other words, situations of *lis pendens* typically involve the same parties and same cause of action, and are not merely related in some factual way. (244)

In domestic legal systems, doctrines have emerged to confront situations of *lis pendens*. Civil law jurisdictions generally adhere to the first-filed rule – i.e., a court seized with a case that has been filed later in time must decline jurisdiction or suspend proceedings in favour of the first-filed forum. In common law countries, *lis pendens* is only one factor to consider in determining the appropriate forum, as part of a broader *forum non conveniens* analysis. (245)

The role of *lis pendens* doctrines in international adjudication is less clear. (246) No WTO case has addressed these doctrines. At a minimum, the limited available jurisprudence and commentary suggests that an identity of parties and cause of action or issues must be present. (247)

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The judgment rendered by the Permanent Court of Justice (PCIJ) in *Certain German Interests in Polish Upper Silesia* is instructive. (248) In that case, the Court refrained from deciding whether *lis pendens* principles applied in international law, but noted that the requirements of the doctrine were, in any event, not fulfilled in the case before it, which involved different parties and different legal issues. It is significant that, like WTO proceedings, the PCIJ dispute was State-to-State, whereas the parallel case involved claims asserted by individuals against a State (Germany) in a mixed tribunal. (249) This suggests that *lis pendens* principles would not apply to parallel WTO and BIT claims, where there would not appear to be identical parties and issues – a requirement that has been strictly construed by investor-State tribunals. (250)

Likewise, the ILA Study Group observed in its 2006 report on *lis pendens* and arbitration that overlap between a supra-national judicial proceedings (such as WTO disputes) and international commercial arbitration is ‘unlikely to give rise to a true *lis pendens*, because the parties or the cause of action will most probably be different’. (251) The pendency of such related actions may, instead, call for the application of case management principles. (252)

[3] Case Management and Comity

In situations of parallel proceedings, where the issues and parties are not identical, an international tribunal may nonetheless stay its own proceedings. A tribunal may do so as a function of its inherent case management authority and as an expression of comity.

The source and extent of a tribunal's power to impose a stay is unclear, however, and may be context-specific. It is generally accepted that international tribunals have inherent authority to manage their proceedings in a way that promotes justice, and to stay their proceedings. (253) But the scope of that authority may be constrained by the treaty provisions and rules governing a particular tribunal. (254) Likewise, although comity as a principle is desirable, it is probably not a general principle of international law, (255) and usually is not mentioned in treaties establishing international tribunals. Instead, the exercise of comity arguably flows from a tribunal's inherent authority. (256) The proper scope of an international tribunal's exercise of its inherent authority, and its ability to exercise comity, remain unclear. (257)

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Can a WTO panel stay its proceedings to allow an investment claim to proceed? If the *complaining party* requests a stay, Article 12.12 of the DSU provides that a panel ‘may’ grant a stay, for a period not to exceed 12 months. (258) The time limits that otherwise apply to panel proceedings, including the overall nine-month time limit, would be postponed accordingly. (259)

But the DSU is silent with respect to stays imposed at the request of the *responding party* or the *panel itself*. Under an *e contrario* reading of Article 12.12, this silence would suggest that panels have no power to issue a stay in those circumstances, absent consent by the complaining party. We note that this reading of Article 12.12 implies a significant curtailment of the inherent authority traditionally vested in international tribunals. (260)

Regardless of which party requests the stay, however, a panel may be reluctant to grant it. Article 3.3 of the DSU affirms that the ‘prompt settlement of situations’ in which a Member believes its benefits under the WTO Agreement have been infringed ‘is essential to the effective functioning of the WTO’. (261) Stays of WTO proceedings could run counter to this objective. A panel may be particularly reluctant if the reason for the stay is to allow another, non-WTO tribunal to render a decision. This would subordinate the timing of a WTO case to that of a ‘foreign’ tribunal.

More importantly, a stay might not be effective. Investment claims can last several years, and generally have a much longer timeline than WTO disputes. Even if a panel granted the maximum 12-month stay sought by a complaining party, this might not allow enough time for an investment tribunal to render its award within the overall ▲ time limit required by the DSU. (262) If annulment or challenge proceedings are factored in, the likelihood becomes even more remote. (263)

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By contrast, investment tribunals have greater flexibility in granting a stay. They are not constrained by fixed time limits, and – within reason – may be willing to stay their proceedings pending resolution of a related case. For instance, in *SPP v. Egypt*, the ICSID tribunal granted a request that it stay proceedings pending a ruling in a related matter before the French *Cour de Cassation*. The tribunal observed that:

When the jurisdictions of two unrelated and independent tribunals extend to the same

dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, *in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.* (264)

The SPP tribunal reasoned that 'every court has inherent powers to stay proceeding when justice so requires', and that its own discretion to do so was further grounded in Article 44 of the ICSID Convention. (265)

Likewise, the ICSID tribunal in *SGS v. Philippines* stayed its proceedings pending quantification of contractual damages – either by agreement of the parties or ruling by the contractually-agreed forum (i.e., the courts of the Philippines). Citing the UNCLOS decision in *MOX Plant*, the ICSID tribunal observed that 'international tribunals have a certain flexibility in dealing with questions of competing forums'. (266) Noting its additional power under Article 19 of the ICSID Arbitration Rules and Article 44 of the ICSID Convention, the tribunal reasoned that 'justice would be best served if the Tribunal were to stay the present proceedings pending determination of the amount payable' under the contract. (267) This approach has proven controversial. (268)

But investment tribunals have refused to grant a stay where the parallel proceedings are not sufficiently linked. In *Eureko B.V. v. Slovak Republic*, the UNCITRAL tribunal refused to stay the claimant's BIT challenge pending resolution of a previously-filed infringement proceeding conducted by the EU Commission against the Slovak Republic. The tribunal endorsed the principle of comity, but refrained from ordering a stay given insufficient linkages between the two proceedings: ▲▼

While the Tribunal wishes to organise its proceedings with full regard for considerations of mutual respect and comity as regards other courts and institutions, it does not consider that the questions in issue in the infringement case are so far coextensive with the claims in the present case that it is appropriate to suspend its proceedings now. Should it become evident at a later stage that the relationship between the two sets of proceedings is so close as to be a cause of procedural unfairness or serious inefficiency, the Tribunal will reconsider the question of suspension. (269)

Thus, it is conceivable that, in certain cases, an investment tribunal would stay its proceedings in favour of a parallel WTO dispute. Investment tribunals have more flexibility in this respect than their WTO counterparts. In deciding whether to issue a stay, investment tribunals would consider, among other things, the similarity of the factual and legal issues presented in both cases, and any prejudice to the parties that may result from a stay. Like the tribunal in *SGS v. Philippines*, a tribunal imposing a stay would, at a minimum, require the parties to report regularly on the status of the WTO proceedings, and consider lifting the stay if delay proved excessive. (270)

But in perhaps the majority of cases, there will be no need for investment tribunals to grant a stay. WTO panel proceedings are supposed to conclude within nine months, and AB proceedings within three months. (271) Investor-State arbitration, on the other hand, can last several years. Depending on when the respective claims are filed, WTO proceedings often will conclude before the investment claims, rendering a stay unnecessary.

[4] Request for Information and Documents

One means of promoting efficiency and avoiding conflicts is to request information and documents from another proceeding. Under Article 13 of the DSU, WTO panels may 'seek information from any relevant source'. Investment tribunals have similar authority. (272) A WTO panel may seek information and documents adduced in a parallel ▲▼ investment arbitration, and vice versa. Such an approach tends to ensure that the same evidence is before both dispute resolution bodies.

Parties and tribunals may request such information for a variety of reasons. WTO panels tend not to pursue the rigorous oral hearing procedures and more extensive document disclosure process that occur in investment arbitration. A panel may thus be keenly interested in documents and transcripts from a parallel investment arbitration, as well as pleadings and rulings. (273) Given the overlapping factual issues in both proceedings, this evidence may be relevant at several levels – for instance, where the cross-examination testimony of a government official in an investment arbitration contradicts the respondent State's position at the WTO. Conversely, as the *Canfor* award illustrates, the submissions and arguments of the respondent State in a WTO proceeding may be relevant to an investment claim. (274)

There is precedent for such requests. In *Fraport v. Philippines*, the ICSID tribunal ordered the respondent to produce all of its submissions and documents filed in a parallel ICC arbitration 'on an on-going basis'. (275) The ICC arbitration involved different parties (an investment vehicle, PIATCO, and the Philippines), but appeared to address related allegations of fraud and corruption. The Tribunal accepted the claimant's argument that the underlying issues overlapped in both arbitrations:

While the present ICSID arbitration and the ICC arbitration are not, strictly speaking, parallel arbitrations, the Tribunal accepts Claimant's representations that the underlying issues in both arbitrations [sic] are, in substantial part, overlapping.

In the circumstances, there exists a real possibility that the two arbitral tribunals, presented

with and asked to consider similar facts, could render conflicting or inconsistent decisions regarding those facts. This is not a desirable outcome. (276)

One potential barrier to such requests is confidentiality. In WTO proceedings, most dispute-related documents are not automatically made public, and written submissions are confidential. (277) A party is nonetheless free to disclose its own submissions to the public, (278) and several WTO Members, including the United States and the European Union, disclose their submissions as a matter of policy. At the request of another Member, a party to a dispute must provide a 'non-confidential summary' of the information contained in its submission, which could be disclosed to the public. (279)

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Thus, an investment tribunal could order the respondent State to produce its own submissions in a WTO dispute. If those submissions contained confidential information, the investment tribunal could apply confidentiality protections (e.g., redaction) through a protective order. A tribunal might also order the respondent to produce other parties' submissions from the WTO dispute, subject to confidentiality protections, or obtain 'non-confidential summaries' of those submissions.

Likewise, a WTO panel would confront confidentiality issues when seeking information and documents from an investment arbitration. In some cases, even the existence of an arbitration is not public, and may be unknown to a WTO panel. Submissions and other documents from an investment arbitration are generally deemed confidential. Nonetheless, it is conceivable that an investment tribunal would permit the production of such documents at the request of a WTO panel, subject to redaction or other measures to protect sensitive information. A panel would have less difficulty in obtaining arbitral awards, which in most cases find their way into the public domain. (280)

Apart from confidentiality concerns, another question mark is the weight that a panel or tribunal would give to evidence adduced in another proceeding. A WTO panel, in particular, may be hesitant in relying on testimony or findings adduced in another proceeding, which involves different parties and procedures. The panel may feel compelled under Article 11 of the DSU to carry out its own 'objective assessment' of the facts and law. (281)

[5] Agreed Sequencing

In some cases, the parties may agree to sequence the disputes. For instance, the parties may agree that the WTO challenge will proceed first, followed by investment arbitration, or vice versa. Such an agreement would be reminiscent of the 'mutually agreed solution' by which WTO Members settle disputes and/or agree not to appeal panel rulings. (282) Indeed, a WTO panel or investment tribunal might encourage such an agreed approach.

One ambiguity is how a tribunal would respond to alleged violations of such an agreement. Could the respondent ask a WTO panel to dismiss or stay a WTO claim brought in violation of such an agreement, citing abuse of rights or estoppel? Likewise, could the respondent ask an investment tribunal to dismiss or stay a claim brought before the conclusion of the WTO case? Or would any disputes about compliance with a sequencing agreement be resolved solely in accordance with the dispute settlement provisions contained in that agreement? Here, again, there are no straightforward answers, and much awaits elaboration in future cases.

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§3.04 Treaty-Based Approaches

Alternatively, States may regulate overlapping WTO and investor-State arbitration proceedings by treaty. Such an approach ensures greater predictability, as less is left to the discretion of individual adjudicators. A treaty-based approach also remains grounded in the consent of the contracting States – as opposed to the inherent authority of tribunals – and may have greater legitimacy. (283)

But a treaty-based approach involves trade-offs and risks. (284) Depending on its design, a treaty rule can be heavy-handed, sacrificing the interests of individual litigants in favour of clarity and predictability. In some cases, a degree of flexibility may be preferable. Adjudicators are more nimble in responding to individual configurations of overlap, and can assess the various interests at stake.

Moreover, treaty negotiators may have little incentive to address overlap between WTO and investment proceedings in the first place. There have been very few examples of such overlap thus far, and negotiators may be reluctant to use their diplomatic capital to push for treaty provisions that address the phenomenon. They might not view it as worth the effort.

From the WTO side, the prospects of amending the DSU are bleak. The current 'Doha Round' of negotiations is at a virtual standstill. Unless the environment improves, changes to the DSU are unlikely, at least in the near term.

It is also unlikely that States would agree to re-open negotiations on the more than 2,800 BITs currently in effect. To the extent that they are willing to address overlap at all, whether in existing or new investment treaties, States would do so with respect to a broad range of possible overlapping proceedings, under multiple treaty regimes – and not merely WTO-investment overlap.

With these caveats in mind, we consider below an array of treaty-based approaches, ranging

from broad-ranging institutional proposals and jurisdictional rules, to more limited, horizontal approaches to overlap. We conclude that the more far-reaching treaty approaches are either impractical or undesirable. A more promising path is to explore 'softer' treaty strategies, such as clauses that empower – but do not compel – tribunals to stay their own proceedings when faced with related proceedings, subject to defined criteria and limitations. Such provisions would be particularly useful additions to the DSU, giving WTO dispute bodies more flexibility in responding to situations of overlap with non-WTO tribunals.

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[A] Role for the International Court of Justice

One far-reaching proposal is to empower the ICJ to coordinate or sequence overlapping proceedings, or resolve any conflicts between decisions that might emerge. Such an approach might find favour among those who seek to strengthen the ICJ's role as the 'world's supreme court' amid an increasingly fragmented landscape for international law. (285)

Needless to say, this approach has little prospect of being adopted. Amid the many practical difficulties it would face, this approach would require a fundamental overhaul of thousands of investment treaties, the DSU, and the ICJ Statute. (286) It is unlikely that parties to investment treaties or the WTO Members would countenance such a 'vertical' approach and cede authority in such matters to the ICJ. (287) They may also lack confidence in the ICJ's ability to resolve issues relating to the specialized areas of investment and trade law.

[B] Institutional Coordination

Various forms of institutional coordination are also conceivable. For instance, a consultative body might be established to address issues of overlap. Adjudicators from the WTO and other fora (including, but not limited to, arbitral panels established under investment treaties) could consult on the best way forward in cases of parallel jurisdiction, or where conflicting decisions have been rendered.

This kind of direct dialogue between adjudicators deciding cases in different fora would be virtually unprecedented in the international sphere, and would raise serious questions of due process and jurisdiction. Moreover, the presence of a consultative body does not itself resolve the issues of overlap; it merely provides a forum in which the issues can be discussed. On what basis should overlap be dealt with? What principles should govern decision-making in this context? More fundamentally, would a consultative body yield a better, more informed resolution than submissions from the parties to their respective tribunals? It is unclear whether the added value of such a mechanism would justify the complexities associated with its creation. Negotiators are unlikely to expend diplomatic capital to create such a novel mechanism without a compelling reason, and the prospects of them doing so are remote.

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[C] Conflict and Coordination Clauses

Of greater interest are clauses that would foreclose or manage instances of jurisdictional overlap. We consider potential clauses below.

[1] Subject Matter Exclusion

One strategy is to avoid situations of jurisdictional overlap entirely, by excluding potentially overlapping subject areas from a treaty's scope. Instead of accommodating overlapping disputes, this approach would eliminate the source of overlap itself, by narrowing a treaty's scope. As such, this is a relatively blunt instrument, and generally inadvisable as a means of avoiding overlap between WTO and investment claims.

At one extreme, it is possible to imagine a clause that would exclude from the scope of investment treaties any measure that falls within the WTO Agreement. (288) But given the breadth of the WTO Agreement and the significant potential for overlap with investment disciplines, this could remove a substantial amount of foreign investment from the coverage of investment treaties.

Perhaps for this reason, no State appears to have attempted to include such a broad carve-out in investment treaties, and this approach remains unlikely for the foreseeable future. (289) It is even more far-fetched to contemplate any effort to exclude 'investment' issues from the WTO Agreement, which would reverse years of hard-fought negotiations to include such issues within the WTO framework. (290)

In practice, subject matter carve-outs are more targeted, and only infrequently apply to situations of overlap with WTO disciplines. For instance, the national treatment and MFN provisions in the investment chapter of the New Zealand – Singapore Closer Economic Partnership Agreement (EPA) do not apply to measures affecting investments that fall within the treaty's services chapter, to the extent that they relate to supply of services through 'commercial presence' in the territory of the other party. (291) This would, by extension, exclude many situations of overlap with WTO services disciplines. (292) But this exclusion comes at a cost, as investors in the services trade are effectively denied national treatment and MFN protection. (293)

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A more common subject matter exclusion relates to situations of WTO overlap with respect to

intellectual property. For instance, the expropriation provision in the US Model BIT (which has been applied in several BITs (294)) excludes compulsory licenses granted in relation to intellectual property rights, or licenses that revoke, limit, or create intellectual property rights – as long as the licenses comply with the WTO TRIPS Agreement. (295) In effect, where a compulsory license is TRIPS-compliant, it cannot give rise to an expropriation claim. The Model BIT also excludes from national treatment and MFN obligations any measure that falls under a derogation or exception to certain provisions of the TRIPS Agreement. (296)

These provisions create a kind of ‘safe harbour’ for certain government measures that relate to intellectual property. If a State can establish that such a measure is TRIPS-consistent or falls under TRIPS exceptions, it is immune from claims under certain core investment treaty protections, such as expropriation, national treatment, and MFN. This allows governments more policy flexibility – a legitimate policy choice, but one that potentially limits investor protections. Moreover, these provisions require a BIT tribunal to determine whether a measure is consistent with or falls within provisions of another treaty – the TRIPS Agreement. (297) If a WTO case has been filed against the same measures, there is at least the potential for conflicting interpretations of the WTO Agreement.

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In sum, treaty negotiators may agree on carve-outs for a variety of legitimate reasons – for instance, to preserve greater policy flexibility and avoid exposure to investor claims in sensitive areas. But it makes little sense to restrict the scope of investment treaty protections, solely to avoid overlap with WTO proceedings. Such overlap is rare to begin with, and may be addressed by other, less-restrictive techniques. As discussed above, certain carve-outs may even exacerbate problems of overlap, giving rise to conflicting interpretations by different tribunals. Because such carve-outs potentially deprive investors of treaty protection and dispute settlement rights, negotiators must carefully consider the implications before including them.

[2] Fork-in-the-Road Clauses

Alternatively, negotiators might consider employing a kind of ‘fork-in-the-road’ clause with respect to WTO and investment claims. Investment treaties commonly include such clauses, which give the claimant the right to pursue two or more dispute settlement options; however, once chosen, that option becomes exclusive of all others. (298) These clauses typically require claimants to choose between proceedings in international arbitration and domestic court. (299)

Currently, investment treaties and the DSU do not contain fork-in-the-road clauses that govern WTO and investment claims arising out of the same measure. The reason for this is straightforward – there is no ‘fork-in-the-road’ for either the home State or its investor to take. An investor cannot choose a WTO claim over an investment claim, or vice versa. The investor has no control over whether a State or group of States pursues a WTO claim with respect to the same measure. Nor does the home State have control over the investor's decision to assert an investment claim.

Likewise, although the ICSID Convention contains a fork-in-the-road clause, it does not apply to overlapping investment and WTO claims. Article 26 of the Convention provides that ‘[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy’. Article 26 applies only to the ‘parties’ to an ‘arbitration’ under ICSID, and does not purport to bar WTO Members from asserting WTO claims once an investor has filed an ICSID claim with respect to the same measure. (300)

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[3] Claim Preclusion and Sequencing Provisions

Relatedly, States may consider imposing a strict claim preclusion rule. An investment treaty might bar an investor from filing a claim once its home State has initiated a WTO claim with respect to the same measure. Conversely, the DSU might be amended to bar WTO proceedings if an investment claim has been launched. These are not fork-in-the-road clauses – the investor is not asked to ‘choose’ between two possible claims – but are variations on the first-filed rule. Such an approach enhances legal certainty and finality – i.e., by ensuring that a measure is only subjected to legal challenge in one of the two regimes. But it arguably makes little sense as a policy matter, as it deprives either the investor or its home State of access to dispute settlement, due merely to the happenstance of which claim was filed first.

Instead of a claim preclusion rule, States might employ clauses that provide for the sequencing of overlapping disputes. A treaty might require the stay of an investment claim if a WTO claim challenging the same measure was filed first, and vice versa. Although less drastic than a claim preclusion provision, such a clause is arguably mechanistic, and may unduly prejudice investors if their claims are automatically subordinated to WTO claims in cases where urgent resolution is needed.

[4] Bounded Stay Provisions

A more promising avenue is to include clauses that empower – but do not compel – tribunals to stay their proceedings in situations of overlap, and provide criteria to guide decision-

making. In theory, investment tribunals already have this power, as a function of their inherent authority. (301) But their exercise of this power may acquire greater legitimacy if codified in treaty language. (302) Such a clause would also constrain and guide the exercise of this authority, by providing factors for the tribunal to take into account and guidelines on the amount of time a stay would remain in place. (303)

WTO panels would benefit from similar changes to the DSU. Although WTO panels exercise inherent authority, (304) they are constrained by provisions of the DSU which, as interpreted by the AB, leave little room for panels to stay their proceedings in favour of non-WTO tribunals. The parties occasionally agree to modify the strict time limits in the DSU, but this practice is arguably *contra legem*, and remains controversial.

WTO panels would benefit from having the express power to stay proceedings in exceptional cases, where there are related proceedings before another tribunal, at the request of either the complaining or responding party. In such circumstances, the time limits would be lifted, injecting a degree of needed flexibility to the system. But this would remain a truly exceptional deviation from the DSU's time limits, relevant to the small number of cases where there is overlap. Properly formulated, such a change would not undermine the overall efficiency of WTO dispute settlement.

[5] Clauses Regulating the Use of Findings from Other Proceedings

Negotiators might also consider including clauses that regulate how a tribunal applies the findings of a 'foreign' tribunal. A provision that expressly empowers WTO panels and investment tribunals to consider and rely on the findings of tribunals from other regimes would put to rest any lingering uncertainties in this area. But strict rules or mandated deference may unduly constrain the decision-making of panels and tribunals. Adjudicators arguably should be given room to consider such evidence on a case-by-case basis, in the context of a particular claim.

Thus, while such treaty provisions might yield a degree of clarity, they may harm decision-making if framed in mandatory terms. Given potentially wide variations in the factual and legal issues presented in overlapping disputes, negotiators should avoid imposing an interpretative straight-jacket on panels and tribunals.

§3.05 Conclusion

Fragmentation of the international legal order is here to stay. The proliferation of international norms and judicial bodies cannot be undone. States and adjudicators must adapt to this new reality, and find ways to harness its potential benefits, while minimizing risks.

This is equally true of jurisdictional overlap between the dispute settlement bodies of different regimes, such as WTO and investor-State tribunals. This particular form of overlap is poised to become an increasingly important feature of international adjudication.

WTO and investment tribunals do not compete for jurisdiction, and in this sense present fewer concerns than overlapping State-to-State disputes. They are, in effect, complementary proceedings, involving what are arguably different parties, legal standards, and remedies. Nonetheless, parties and tribunals should remain cognizant of potential negative externalities associated with this overlap – such as conflicting factual determinations, legal interpretations, and remedies, as well as inefficient duplication of resources.


In confronting situations of overlap, WTO and investment tribunals have certain strategies at their disposal. Where there are successive proceedings (i.e., a tribunal is faced with a final decision rendered by another regime), it may be difficult to apply traditional jurisdiction-regulating tools, such as *res judicata*. Even common interpretative strategies – such as systemic interpretation under VCLT Article 31(3)(c) – have limited use.

A more promising path is for tribunals to evaluate previous decisions rendered by other regimes as part of the factual evidence in the case. This will tend to promote cross-fertilization between regimes, and minimize inconsistencies – e.g., inconsistent factual determinations or remedies. The weight accorded such decisions will depend on the circumstances, and in particular the relationship between the legal standards at issue in both proceedings. A tribunal may also extend a degree of deference to the 'foreign' tribunal's decision, as a matter of comity. Existing jurisprudence suggests that, thus far, WTO panels and the AB are more constrained in their ability to rely upon the findings of non-WTO bodies or to extend comity than investment tribunals.

Likewise, investment tribunals have greater flexibility in managing parallel proceedings than WTO panels or the AB. Investment tribunals are not constrained by the time limits imposed by the DSU, and in appropriate cases may more readily exercise comity to stay the investment arbitration pending resolution of a parallel WTO dispute.

When faced with parallel proceedings, WTO and investment tribunals may promote efficiency and avoid conflicts by seeking information and documents from the other tribunal. Other strategies – such as attempts to 'reframe' a dispute to give one jurisdiction priority, or application of *lis pendens* criteria – appear to have no bearing on overlapping WTO and investment proceedings. Alternatively, the parties may agree to sequence the two overlapping proceedings.

In addition to adjudicative strategies, treaty-based approaches to overlap warrant careful consideration. Treaty solutions may have greater legitimacy, and reduce uncertainty. But most such approaches are politically unrealistic or unhelpful. Conflict and coordination clauses – such as subject matter carve-outs, fork-in-the-road clauses, and claim preclusion and sequencing provisions – either do not apply to overlapping WTO and investment claims, or are otherwise problematic from a policy perspective. By contrast, clauses that give decision-makers more authority and guidance with respect to the stay of proceedings, or regulate the use of findings from other proceedings, may be usefully integrated into treaties – particularly the DSU – assuming there is political will to do so.

In the end, there is no substitute for an informed adjudicator. Expanding the epistemic horizon of the *individuals* who are interpreting, applying and enforcing the relevant rules and principles is fundamental. Enhanced coordination and efficiency  between WTO and investment proceedings are more likely where adjudicators have a working understanding of the rules applicable in the other regime, of events occurring in that regime, and of how they might impact their work in a given case. Adjudicators will be able to exercise ‘responsible discretion’ – for instance, with respect to the amount of deference to be accorded to decisions of another tribunal.

Greater mutual awareness can be achieved in a number of ways – for instance, by fostering informal dialogue between international adjudicators through joint conferences and meetings, [\(305\)](#) and by improving dialogue between academia and international tribunals. The rise of overlapping disputes and legal norms may in some cases prompt parties and institutions to favour adjudicators with backgrounds in different international legal regimes. This, in turn, will promote cross-fertilization and better equip adjudicators to manage situations of overlap.



References

- *) The views expressed in this chapter are personal to the authors, and do not necessarily express those of Sidley Austin LLP or its clients. The authors would like to thank Rudolph Adlung, Todd Friedbacher and Claus Zimmermann for their comments.
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- 2) See *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 Aug. 2003 (hereinafter ‘*SGS v. Pakistan*’), para. 147 (‘As a matter of general principle, the same set of facts can give rise to different claims grounded in differing legal orders’).
- 3) The term ‘OSPAR’ is a hybrid of the words ‘Oslo’ and ‘Paris’, as the OSPAR Convention replaced the 1972 Oslo Convention (which dealt with dumping from ships and aircraft) and the 1974 Paris Convention (covering land-based pollution, including offshore installations).
- 4) For a discussion of the *MOX Plant* litigation, see N. Lavranos, *Regulating Competing Jurisdictions among International Courts and Tribunals*, 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 578–583 (2008).
- 5) See, e.g., Lavranos, *Regulating Competing Jurisdictions*, 583, 616–617; N. Lavranos, *The Epilogue in the Mox Plant Dispute: An End Without Findings*, 18 *European Energy and Environmental Law Review* 180 et seq. (2009); M.D. Varela & V.E.T. de Oliveira, *Da Unidade à Fragmentação do Direito Internacional: O Caso Mox Plant*, 54 *Revista da Faculdade de Direito da UFMG* 119 et seq. (2009); B. Kwiatkowska, *The Ireland v. United Kingdom (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism*, 18(1) *International Journal of Marine and Coastal Law* 46–58 (2003).
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- 9) See Panel Reports, *Mexico – Corn Syrup*, WT/DS132/R; *Mexico – Corn Syrup (Article 21.5 – US)*, WT/DS132/RW; *Mexico – Taxes on Soft Drinks*, WT/DS308/R; Appellate Body Reports, *Mexico – Corn Syrup (Article 21.5 – US)*, WT/DS132/AB/RW; *Mexico – Taxes on Soft Drinks*, WT/DS308/AB/R; *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 Sep. 2009 (hereinafter ‘Cargill’); *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/1, Award, 15 Jan. 2008 (hereinafter ‘Corn Products International’); *AdM and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/5, Award, 21 Nov. 2007 (‘AdM/Tate & Lyle’).
- 10) See, e.g., C. Brown & K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011); G.A. Alvarez & W.W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 *Yale Journal of International Law* 366 et seq. (2003); G. Van Harten & M. Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17(1) *European Journal of International Law* 121 et seq. (2006); L.E. Peterson, *Bilateral Investment Treaties and Development Policy-Making* (International Institute for Sustainable Development 2004); C. Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 *Journal of World Investment and Trade* 231 et seq. (2004).
- 11) According to statistics of the United Nations Conference on Trade and Development (UNCTAD), by the end of 2011, States had signed 3,164 international investment agreements (IIAs) – comprised of 2,833 BITS and 331 ‘other IIAs’. UNCTAD, *World Investment Report 2012*, UN Doc. No. UNCTAD/WIR/2012, 84 (2012).
- 12) See, e.g., R. Adlung & M. Molinuevo, *Bilateralism in Services Trade: Is There Fire Behind the (Bit-) Smoke?*, 11 *Journal of International Economic Law* 365 et seq. (2008); G. Verhoosel, *The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 *Journal of International Economic Law* 493 et seq. (2003).
- 13) See, e.g., *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434, WT/DS435, WT/DS441 (complaints initiated by the Dominican Republic, Honduras, and Ukraine on 18 Jul. 2012, 4 Apr. 2012, and 13 Mar. 2012, respectively); Notice of Arbitration, *Philip Morris Asia Limited v. Australia*, PCA Case No. 2012-12 (UNCITRAL) (challenge to Australia plain packaging measures under Hong Kong-Australia BIT); Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-In Tariff Program*, WT/DS412/R, WT/DS426/R, 19 Dec. 2012 (WTO challenge by the EU and Japan to the Ontario feed-in-tariff (FIT) programme regarding certain wind and solar photovoltaic electricity generation projects); *Mesa Power Group LLC v. Canada*, PCA Case No. 2012-17 (NAFTA Chapter 11 challenge filed 4 Oct. 2011 regarding the Ontario FIT programme). In addition, China has launched a WTO complaint against the EU concerning aspects of Member State FIT programmes, while investors have initiated arbitration under investment treaties against Spain, Italy, and the Czech Republic over their FIT programmes. *European Union and certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452 (complaint filed by China on 18 Dec. 2012); Vyomha Jha, ‘Trends in Investor Claims Over Feed-in-Tariffs for Renewable Energy,’ *Investment Treaty News*, 19 Jul. 2012, available at <http://www.iisd.org/itn/2012/07/19/trends-in-investor-claims-over-feed-in-tariffs-for-renewable-energy> (last visited 5 Feb. 2013).
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- 24) See, e.g. Buergethal, 272; J. Calamita, *Countermeasures and Jurisdiction: Between Effectiveness and Fragmentation*, 42 Georgetown Journal of International Law 237–239 (2011). In 2000, Gilbert Guillaume, the then-President of the ICJ, addressed the United Nations General Assembly with these words:
- [T]he proliferation of international courts gives rise to a serious risk of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases. This is a particularly acute risk, as we are dealing with specialized courts that are inclined to favour their own disciplines. ... A dialogue among judicial bodies is crucial.
- Statement of the President of the ICJ to United Nations General Assembly of 26 October 2000, available at <http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1> (last accessed 8 Aug. 2012). See also Statement of the President of the ICJ, Judge Schwebel, to United Nations General Assembly of 26 Oct. 1999, available at <http://www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1> (last accessed 8 Aug. 2012).
- 25) Whether the parties to such disputes are States, corporations, or individuals, their autonomy rights must be respected, and access to justice ensured. Shany, *The Competing Jurisdictions*, 23–24.
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- 36) Arts. 3.2 and 11 of the DSU; cf. Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras 44–56.
- 37) The Appellate Body noted in *EC – Bananas III* that the DSU does not contain any explicit requirement (or implicit understanding) that a WTO Member have a 'legal interest' in order to request the establishment of a panel. Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, para. 132. Accordingly, a WTO Member 'has broad discretion in deciding whether to bring a case against another Member under the DSU'. *Ibid.*, para. 135. See also J.P. Gaffney, *Due Process in the World Trade Organization: The Need For Procedural Justice in the Dispute Settlement System*, 14(4) American University International Law Review 1209 (1999).
- 38) Art. 9 of the DSU.
- 39) Art. 10 of the DSU.
- 40) Arts 12–14, Annex 3 of the DSU.
- 41) Art. 18.2 of the DSU states, in relevant part, that 'written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public'. Arts 14 and 17.10 establish the confidentiality of panel and Appellate Body deliberations, respectively. Finally, panel and Appellate Body hearings are, in principle, not public, unless all the participants expressly request the adjudicatory body involved to open the hearings (or parts thereof) to public observation. See, e.g., Panel Reports, *Canada – Continued Suspension*, WT/DS321/AB/R, and *US – Continued Suspension*, WT/DS320/AB/R, paras 7.40 and 7.45; Appellate Body Report, *US – COOL*, WT/DS384/AB/R, WT/DS386/AB/R, Annex IV, para. 6.
- 42) Arts. 11, 12, and 16 of the DSU.
- 43) See, e.g., annexes to Panel Report, *EC – Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1.
- 44) See generally Art. 17 of the DSU.
- 45) Art. 17.14 of the DSU.
- 46) Art. 16.4 of the DSU.
- 47) Art. 12.8 of the DSU.
- 48) Art. 12.9 of the DSU. At the request of the complaining party, a panel may stay its proceedings for a period not to exceed twelve months. If this occurs, the normal time limits (including the nine-month cap on the duration of proceedings), will be extended accordingly. Art. 12.12 of the DSU.

- 49) Art. 17.5 of the DSU. Applying the negative consensus rule, the DSB will adopt the panel report within sixty days after the date it is circulated to the members, if there is no appeal. Art. 16.4 of the DSU. If there is an appeal, and assuming there is no consensus against adoption, the DSB will adopt the AB report within thirty days of its circulation to Members. Art. 17.14 of the DSU.
- 50) See, e.g., Appellate Body Report, *US – Stainless Steel (Mexico)*, WT/DS344/AB/R, paras 158–162. As discussed in footnotes 194 et seq. below, arbitral tribunals have cited to WTO jurisprudence in several investor-state cases. The influence of the WTO covered agreements and jurisprudence is similarly apparent in the work of bodies constituted under other international legal regimes. See, e.g., *Portuguese Republic v. Council*, ECJ, Judgment, Case C-149/96, 1999 E.C.R. I-8395; *Biret International SA v. Council*, ECJ, Judgment, Case C-93/02 P, 2003 E.C.R. I-10497; *Herrmann v. Germany*, European Court of Human Rights (ECrHR) (Grand Chamber), Judgment, 9300/07, 26 Jun. 2012, footnote 14 and accompanying text; *Anheuser-Busch Inc. v. Portugal*, ECrHR (Second Section), Judgment, 73049/01, 11 Oct. 2005; United Nations Sub-commission on Human Rights, *Intellectual property rights and human rights*, Res. No. 2000/7, paras 2, 8-13 (commenting on the impact of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) on the human right to health). For further discussion, see C.R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and its Influence on Other Actors and Regimes*, 24 *Berkeley Journal of International Law* 81-92 (2006); M. Bronckers, *The Effect of the WTO in European Court Litigation*, 40 *Texas International Law Journal* 443-448 (2005).
- 51) Allen, 288–289, 296. See also P. Grané, *Remedies under WTO Law*, 4 *Journal of International Economic Law* 757–763 (2001).
- 52) Art 19.1 of the DSU provides that '[i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations'. In practice, panels and the Appellate Body rarely offer such suggestions.
- 53) Art. 19 of the DSU.
- 54) Art. 22.2 of the DSU; Allen, 285, 289.
- 55) Arts 21 and 22 of the DSU; Allen, 284–286.
- 56) See R. Dolzer & M. Stevens, *Bilateral Investment Treaties* 58–118 (Martinus Nijhoff 1995).
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- 58) See generally Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 *British Yearbook of International Law* 152 et seq. (2003).
- 59) See UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, IIA Issues Note No. 1, p. 4 (March 2013) (finding that 61% of all known treaty-based investment arbitrations have been brought under the ICSID Convention and ICSID Additional Facility Rules, while 26% were conducted under the UNCITRAL Rules).
- 60) Schreuer, *Travelling the BIT Route*, 232.
- 61) ICSID Arbitration Rule 32(2).
- 62) ICSID Arbitration Rule 48(4). See also UNCITRAL Arbitration Rules (2010), Article 34(5) (parties are barred from unilaterally publishing awards, except in circumstances where 'the disclosure is required of a party by legal duty, or to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority').
- 63) See UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA Monitor No. 1 (2009): *International Investment Agreements*, UNCTAD/WEB/DIAE/IA/2009/6/Rev1: 2–4.
- 64) ICSID Arbitration Rules 50–52.
- 65) Art. 54(1) of the ICSID Convention.
- 66) See L. Reed, J. Paulsson & N. Blackaby, *Guide to ICSID Arbitration* 179–180 (Kluwer Law International 2004); A. Boralessa, *The Limitations of Party Autonomy in ICSID Arbitration*, 15 *American Review of International Arbitration* 268 (2004).
- 67) See, e.g., UNCITRAL Arbitration Rules, Article 17(1) (in conducting the arbitration, the tribunal shall, *inter alia*, 'conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute'); IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 2(1) ('The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.').
- 68) See A. Sinclair et al., *ICSID Arbitration: How Long Does It Take?*, 4(5) *Global Arbitration Review* (2009).
- 69) Allen, 294–295.
- 70) Shany, *The Competing Jurisdictions*, 24.
- 71) Shany, *The Competing Jurisdictions*, 24–28.
- 72) See, e.g., *AdM/Tate & Lyle*, paras 163, 168–179.
- 73) See, e.g., *Corn Products International*, paras 165–179; *Cargill*, paras 403–430; Douglas, 167–184.

- 74) See J. Bohanes & F. Garza, *Going beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement*, 4 Trade, Law and Development 47, 79–85 (2012) (discussing the role of ‘public-private networks’ in WTO dispute settlement); C. Gibson, *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation*, 25 American University International Law Review 408 (2010) (‘[o]ften the private parties “stand side by side” with the government in the pursuit of the WTO claim and will have access to the specific information and legal analysis needed by the government officials’).
- 75) Cf. Gibson, 407 (‘[t]he private investor will thus need considerable political sway to induce its government to initiate the state-to-state dispute’).
- 76) For instance, the NAFTA governments may file submissions in an investor-State arbitration ‘on a question of interpretation of the NAFTA. Art. 1128 of the NAFTA. The investor’s home State may disagree with its interpretation of the NAFTA. See, e.g., *GAMI Investments, Inc. v. Mexico*, UNCITRAL, ICSID Reports 13, Submission of the United States of America, 30 Jun. 2003 (agreeing in part and disagreeing in part with US investors’ interpretation of NAFTA Chapter 11).
- 77) Cf. *AdM/Tate & Lyle*, Separate Opinion of A. Rovine, para. 27.
- 78) See Shany, 26 (‘[i]t looks as if multiple litigation arising under different legal systems cannot be deemed to involve the “same issues”’).
- 79) See generally Shany, 49–50, 53–59; Henckels, 572–579.
- 80) See generally Hafner, 858.
- 81) For instance, in the parallel *Lauder* and *CME* arbitrations, the tribunals rendered awards that were fundamentally inconsistent with respect to the same fact pattern, albeit involving different BITs and different (yet related) claimants. See *Lauder v. The Czech Republic*, UNCITRAL, ICSID Reports 9: 66, Final Award, 3 Sep. 2001 (hereinafter ‘*Lauder v. Czech Republic*’); *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, ICSID Reports 9: 121, Partial Award, 13 Sep. 2001 (hereinafter ‘*CME v. Czech Republic*’). This inconsistency invited withering criticism and questions about the legitimacy of investment arbitration. See, e.g., S. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham Law Review 1568 (2005) (contradictory results in the *CME* and *Lauder* awards ‘undermine[] the legitimacy of investment arbitration’); A. Reinisch, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation v. The Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration*, in *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* 116 (I. Buffard et al. eds., Martinus Nijhoff 2008) (inconsistency between *CME* and *Lauder* awards was ‘the ultimate fiasco in investment arbitration’).
- 82) T. Broude & Y. Shany, *The International Law and Policy of Multi-Sourced Equivalent Norms*, in *Multi-Sourced Equivalent Norms in International Law* (T. Broude & Y. Shany eds., Hart 2011).
- 83) Broude & Shany, 5.
- 84) ILC Report, para. 93.
- 85) Broude & Shany, 5.
- 86) Broude & Shany, 7–9.
- 87) Art. III:4 of the GATT.
- 88) See, e.g., Art. 1102 of the NAFTA; Art. 3 of the 2012 US Model BIT.
- 89) See, e.g., Art. 1102 of the NAFTA; Art. 3 of the 2012 US Model BIT.
- 90) See, e.g., Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, para. 99; Panel Report, *China – Electronic Payment Services*, WT/DS413/R, paras 7.701–7.705. The assessment of whether such a competitive relationship exists is typically conducted according to the three criteria identified in the Report of the Working Party, *Border Tax Adjustments*, L/3464, adopted 2 Dec. 1970, BISD 18S/97. A tribunal would consider the products’ physical characteristics, their end-uses, and consumers’ tastes and habits with respect to those products. In addition, tariff classification, if sufficiently detailed, may provide indications with respect to ‘likeness’. Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:I, 21 and 22.
- 91) See R.E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an ‘Aim and Effects’ Test*, 32 International Lawyer 619 et seq. (1998).
- 92) See, e.g., Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 137; Appellate Body Report, *Chile – Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, para. 71.
- 93) See, e.g. *Methanex Corp. v. United States*, NAFTA Chapter 11 Arbitral Tribunal, Jurisdiction and Merits, 3 Aug. 2005, paras 34–37, *supra* in N. DiMascio & J. Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 American Journal of International Law 71 (2008).
- 94) DiMascio & Pauwelyn, 72. See, e.g. *Pope & Talbot v. Canada*, NAFTA Chapter 11 Arbitral Tribunal, Award on Merits Phase 2, 10 Apr. 2001, paras 87 and 88, *ibid.*, 73. The approach adopted by the NAFTA Chapter 11 Arbitral Tribunal somewhat recalls that adopted by the WTO panel report in *US – Clove Cigarettes* and reversed by the AB. See Panel Report, *US – Clove Cigarettes*, WT/DS406/R, paras 7.80–7.120.
- 95) DiMascio & Pauwelyn, 70 and 71.
- 96) DiMascio & Pauwelyn, 61.

- 97) DiMascio & Pauwelyn, 61, 69; see also Allen, 293. For a critical appraisal of the merits and limits of applying WTO law in investor-State arbitration, see J. Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents*, 20(3) *European Journal of International Law* 755–759 (2009).
- 98) Compare, e.g., Art. II:1 of the GATS with Art. 4 of the US-Rwanda BIT. See generally Adlung & Molinuevo.
- 99) Compare, e.g., Art. 2 and the Annex of the WTO Agreement on Trade-Related Investment Measures (TRIMs Agreement) and Art. 8 of the US-Uruguay BIT. Although the former provisions apply only to goods and the latter also covers services, the obligations imposed on responding States under the two regimes overlap in several respects.
- 100) See P.K. Yu, *The Global Intellectual Property Order and its Undetermined Future*, 1 *World Intellectual Property Organization Journal* (2009). For discussion of overlap between disciplines in the WTO Agreement and international investment treaties, see, e.g., F. Weiss, *Trade and Investment*, in *The Oxford Handbook of International Investment Law* 182 et seq. (P. Muchlinski et al. eds., Oxford University Press 2008); T.L. Brewer & S. Young, *Investment Issues and the WTO: The Architecture of Rules and the Settlement of Disputes*, 1 *Journal of International Economic Law* 459–464 (1998). See also DiMascio & Pauwelyn, 48 et seq.
- 101) See, e.g., *Corn Products International*, paras 123 et seq.; Panel Report, *Cross-Border Trucking Services (Mexico v. US)*, NAFTA Chapter 20 Panel, Secretariat File No. USA-MEX-98-2008-01, 6 Feb. 2001, paras 260–294.
- 102) While several BIT tribunals have invoked GATT national treatment principles and jurisprudence in interpreting and applying BIT national treatment obligations, they have in many cases viewed as significant the differences in text and background principles. See generally Kurtz, 749–752. The extent to which GATT principles in this area have relevance to corresponding BIT provisions remains contested. See, e.g., DiMascio & Pauwelyn, 58–59.
- 103) In some cases, a State may prefer to implement a change in law, in lieu of having to pay a multi-million dollar damages award. Indeed, in some cases a State would welcome an adverse ruling that requires it to change its laws or practices. Such a ruling may give it political cover vis-à-vis domestic constituencies, and minimize political costs associated with otherwise unpopular legislative choices and reforms. See Allen, 305; J. Tumlrir, *Protectionism: Trade Policy in Democratic Societies* (American Enterprise Institute 1985); K. Bagwell & R.W. Staiger, *The Economics of the World Trading System* 32–34 (MIT Press 2002).
- 104) International Law Association, Committee on International Commercial Arbitration, ‘Final Report on *Res Judicata* and Arbitration’ (Toronto, 2006) (hereinafter ‘Final ILA Report on *Res Judicata*’), para. 15; International Law Association, Committee on International Commercial Arbitration, ‘Interim Report on *Res Judicata* and Arbitration’ (Berlin, 2004) (hereinafter ‘Interim ILA Report on *Res Judicata*’), 2–3.
- 105) Interim ILA Report on *Res Judicata*, 2; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 336 (Stevens 1953).
- 106) Final ILA Report on *Res Judicata*, para. 15.
- 107) See Interim ILA Report on *Res Judicata*, 19; Yannaca-Small, *Parallel Proceedings*, 1017.
- 108) Interim ILA Report on *Res Judicata*, 19; see also A. Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools To Avoid Conflicting Dispute Settlement Outcomes*, 3 *The Law and Practice of International Courts and Tribunals* 37, 52 (2004) (‘The same legal order comprises international law and within it an international court is bound by a decision of an international arbitral tribunal and vice versa’).
- 109) Douglas, 152.
- 110) See, e.g., Final ILA Report on *Res Judicata*, para. 40 (refraining from including the ‘same legal order requirement’ in ILA recommendations, given, *inter alia*, the Committee’s impression that ‘a process of permeation and interaction between different legal orders is only beginning and may result in the legal community no longer viewing private law and public law as operating in separate legal orders’); see also Douglas, 152–160, 185; cf. G. Marceau, *WTO Dispute Settlement and Human Rights*, 13(4) *European Journal of International Law* 812 (2002) (‘Principles of international commercial law such as *forum non conveniens*, *res judicata*, *lis pendens*, abuse of process, and procedural rights, etc. cannot find application in the overlap of jurisdictions between public international law tribunals’).
- 111) Interim ILA Report on *Res Judicata*, 20; Cheng, 340, 344; see also Final ILA Report on *Res Judicata*, para. 42.
- 112) Interim ILA Report on *Res Judicata*, 20–21; Yannaca-Small, 1018; Reinisch, ‘The Use and Limits,’ 64–70.
- 113) See Yannaca-Small, 1019. (‘The condition “same parties” has been rather narrowly construed by international courts and tribunals. The dominant test that has emerged in practice has been that of “virtual identity” or essentially the same parties. Some international legal scholars advocate deviating from a strict requirement of “identical” parties.’).

- 114) There is a divergence of views as to whether investors have 'direct' or 'derivative' rights under investment treaties. Compare, e.g., *AdM/Tate & Lyle*, paras 168–179 (endorsing a derivative rights approach), with *Corn Products International*, paras 165–179 (adopting a direct rights approach); and Douglas, 167–184 (same). Even if investor rights were, for certain purposes, 'derivative' of the rights of the home State – such that the investor was a mere beneficiary of those rights – this does not mean that investor and home State are identical parties for purposes of res judicata.
- 115) Interim ILA Report on Res Judicata, 21; Reinisch, *The Use and Limits*, 55–61 (advocating adoption of a 'realistic' approach to the identity of parties requirement, wherein related parent and subsidiary companies can be regarded as the 'same party').
- 116) See, e.g., Final ILA Report on Res Judicata, para. 49 (rejecting US doctrine by which persons who are not parties to a prior action, but who control or substantially participate in the control of the presentation on behalf of a party, are bound by the determination of issues decided in the prior proceeding as if they were parties).
- 117) For instance, the Appellate Body has affirmed that its reports have the equivalent of res judicata effect with respect to subsequent panel proceedings. See, e.g., Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, WT/DS58/AB/RW, paras 92–96; Pauwelyn, *How to Win*, 1017. Moreover, unappealed findings included in a panel report that are adopted by the DSB 'must be treated as a final resolution to a dispute between the parties in respect of the particular claim and the specific component of a measure that is the subject of a claim'. Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, WT/DS141/AB/RW, para. 93.
- 118) In *Mexico – Taxes on Soft Drinks*, the AB rejected Mexico's request that it refrain from exercising jurisdiction, on grounds that echo some of the elements traditionally found in the res judicata doctrine. Mexico had argued that the panel should decline jurisdiction, asserting that the United States's WTO claim was 'inextricably linked to a broader dispute' under the NAFTA, and that only a NAFTA panel could resolve the dispute as a whole. Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 54. But, as the AB observed, Mexico did not dispute the panel's finding that 'neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA ... and the dispute before us'. *Id.* Nor had a NAFTA panel decided the 'broader dispute' that Mexico described. *Id.* In *Argentina – Poultry Anti-Dumping Duties*, a third party (Paraguay) expressly invoked the doctrine of res judicata with respect to related proceedings conducted in the MERCOSUR system. However, the respondent, Argentina, expressly refrained from relying on the doctrine, and the panel refused to consider it on the grounds that a third party could not define the parameters of the proceedings. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, WT/DS241/R, paras 7.28 and 7.33 and n. 53 thereto.
- 119) Cf. Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51; Art. 11 of the DSU.
- 120) Panel Report, *India – Autos*, WT/DS146/R, WT/DS175/R, paras 7.42–7.48. India initially appealed from the panel's decision; however, the appeal was withdrawn before the Appellate Body could rule. Appellate Body Report, *India – Autos*, WT/DS/146/AB/R, WT/DS175/AB/R, paras 17–18.
- 121) Panel Report, *India – Autos*, para. 7.66.
- 122) Panel Report, *India – Autos*, paras 7.83–7.86.
- 123) Panel Report, *India – Autos*, para. 7.89.
- 124) Panel Report, *India – Autos*, paras 7.87–7.90.
- 125) Panel Report, *India – Autos*, paras 7.91–7.103.
- 126) See, e.g., *CME v. Czech Republic*, paras 432–436 (denying res judicata effect of final award in related investment dispute between claimant's controlling shareholder and the Czech Republic, on the grounds that the triple identity test had not been met); Y. Shany, *Contract Claims vs. Treaty Claims*, 845. ('[I]n the eyes of all ICSID tribunals parallel contract and treaty claims do not meet the "same issues" standard of similarity between competing claims that would mandate the introduction of strict jurisdictional rules regulating competition, such as *lis alibi pendens* and *res judicata*.')
- 127) *Helnan International Hotels A/S v. Egypt*, ICSID Case No. 05/19, Award, 3 Jul. 2008 (hereinafter '*Helnan*'), para. 131. An ICSID ad hoc committee later annulled an unrelated portion of the tribunal's reasoning, but otherwise upheld the award. See *Helnan*, Decision of the Ad Hoc Committee, 14 Jun. 2010.
- 128) *Helnan*, Award, para. 126.
- 129) *Helnan*, Award, para. 127. The Tribunal accorded this factor less significance, given *Helnan*'s argument that EGOH's acts were attributable to the Egyptian state. *Ibid.*
- 130) *Helnan*, Award, paras 128–130.
- 131) *Helnan*, Award, para. 130.
- 132) Interim ILA Report on Res Judicata, 7.
- 133) D.W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, 33 British Yearbook of International Law 176, 179 (1957).
- 134) Bowett, 179.
- 135) Bowett, 179.
- 136) See, e.g., *Halsbury's Laws of England* paras 1179–1180 (LexisNexis, vol. 12, 5th ed. 2009); Interim ILA Report on Res Judicata, 7; *Mills v. Cooper* [1967] 2 QB 49, 468–470. See also *San Remo Hotel v. San Francisco*, 545 US 323 (2005), 11, n. 16; *Allen v. McCurry*, 449 US 90 (1980), 94.

- 137) See, e.g., *Halsbury's Laws of England* paras 1179–1180 (LexisNexis, vol. 12, 5th ed., 2009); *San Remo Hotel v. San Francisco*, 545 US 323 (2005), 11, n. 16; *Allen v. McCurry*, 449 US 90 (1980), 94; see also Final ILA Report on Res Judicata, 36.
- 138) Final ILA Report on Res Judicata, 36, Recommendation 4.2.
- 139) Final ILA Report on Res Judicata, 36; Interim ILA Report on Res Judicata, 14.
- 140) *Grynberg et al. v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 Dec. 2010, paras 7.1.1–7.1.3 (hereinafter 'RSM'). Significantly, the parties did not dispute that collateral estoppel was a 'general principle of law applicable in the international courts and tribunals such as this one'. *Ibid.*, para. 7.1.2.
- 141) RSM, paras 7.1.1–7.2.1.
- 142) RSM, paras 7.1.4–7.1.7. The tribunal observed that, while shareholders can assert rights belonging to the corporation, they 'cannot use such opportunities as both sword and shield. If they wish to claim standing on the basis of their indirect interest in corporate assets, they must be subject to defences that would be available against the corporation – including collateral estoppel.' *Ibid.*, para. 7.1.7.
- 143) H. Mosler, *General Principles of Law*, in *Encyclopedia of Public International Law* 517, vol. 2 (E-I) (R. Bernhardt ed., Elsevier Science B.V. 1995) ('[t]here must be evidence that [a principle] is applied by a representative majority which includes "the main forms of civilization and of the principal legal systems of the world"').
- 144) Even if issue estoppel is not a general principle, res judicata is. In theory, an international tribunal could justify the use of issue estoppel on the grounds that it is an adaptation of res judicata to the circumstances of a particular international dispute. Cf. Mosler, 513 ('[g]eneral principles of law originating in the intercourse of individuals are applicable, as *jus inter gentes*, only *mutatis mutandis*, i.e. they must be adapted to the special character of international relations'); *ibid.*, 519.
- 145) Mosler, 511–527; *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 Oct. 2011, paras 621–624.
- 146) In *India – Patents (EC)*, India unsuccessfully asserted a defence akin to issue estoppel, albeit grounded in waiver concepts and Art. 9.1 of the DSU. On 5 Sep. 1997, a panel found that certain measures relating to intellectual property in force in India were inconsistent with the TRIPS Agreement. Panel Report, *India – Patents (US)*, WT/DS50/AB/R. The EU was a third party in that dispute. Ten days later, the EU requested the establishment of a second panel and challenged the same measures. India asked the panel to dismiss the EU's complaint under Art. 9.1 of the DSU, because the matter had already been adjudicated, and the EU should have joined the US in the first complaint. In support of its arguments, India argued, *inter alia*:
- [S]ince the principle of res judicata [does] not apply if the parties to the dispute were different and the principle of stare decisis [does] not apply in the WTO to the interpretations of a panel or the Appellate Body, if successive multiple complaints by different Members on the same matter were to be admitted and examined as separate new cases, it would engender the danger of contradictory decisions and the waste of resources would be tremendous.
- Panel Report, *India – Patents (EC)*, WT/DS79/R, para. 4.2. The panel rejected India's argument, and observed that the DSU does not limit the freedom of WTO Members to 'determine whether and when to pursue a complaint'. At the time of the United States' request for the establishment of the first panel, the EU chose not to file an analogous request, preserving its right to initiate a new WTO dispute on the same matter at a later stage. *Ibid.*, paras 7.15–7.16.
- 147) For a discussion of the inherent and implied powers exercised by international tribunals, and in particular the WTO, see A.D. Mitchell & D. Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, 31 Michigan Journal of International Law 561 (2010).
- 148) See, e.g., Appellate Body Report, *Mexico – Taxes on Soft Drinks*, WT/DS308/AB/R, para. 46 (finding that, although WTO panels exercise inherent authority, this does not necessarily mean that WTO panels have the authority to 'decline to rule on the entirety of the claims that are before them in the dispute'); see also *ibid.*, para. 49 (concluding, based on Art. 7.2 of the DSU, that 'panels are required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute'), para. 51 ('It is difficult to see how a panel would fulfill [its] obligation [under DSU Art. 11] if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it').
- 149) Interim ILA Report on Res Judicata, 7, 11.
- 150) A WTO panel may be more willing to consider applying issue estoppel with respect to previous findings of non-WTO tribunals in *State-to-State* proceedings, where there is a clear identity of parties. Cf. Pauwelyn, *How to Win*, 1018–1019 (suggesting that WTO panels might apply issue estoppel with respect to findings of non-WTO tribunals in *State-to-State* proceedings).
- 151) As the RSM decision illustrates, an investor-State tribunal may be more willing than a WTO panel to apply issue estoppel. An investment tribunal may be more likely to adopt a flexible approach with respect to the 'identity of the parties' requirement where the *lex arbitri* and/or law of the host State suggest or permit such flexibility.
- 152) See generally C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54(2) International and Comparative Law Quarterly 279 et seq. (2005).

- 153) In practice, WTO adjudicatory bodies seldom rely on investor-State arbitral awards. On one occasion, the AB referred to the ICSID arbitral award in *Saipem S.p.A. v. Bangladesh*, Case No. ARB/05/07, to buttress its statement that ‘absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case’. Appellate Body Report, *US – Stainless Steel (Mexico)*, WT/DS344/AB/R, para. 160. See also R. Alford, *Does the WTO Rely on Investment Arbitration Awards as Persuasive Authority?*, Kluwer Arbitration Blog, 27 Sep. 2012, available at <http://kluwerarbitrationblog.com/blog/2012/09/27/does-the-wto-rely-on-investment-arbitration-awards-as-persuasive-authority-2/> (last accessed 7 Dec. 2012).
- 154) See, e.g., Henckels, 579–581; Marceau, *WTO Dispute Settlement and Human Rights*, 753 et seq.; U. Linderfalk, *Who Are ‘The Parties’? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the ‘Principle of Systemic Integration’ Revisited*, 55 *Netherlands International Law Review* 343–364 (2008).
- 155) Appellate Body Report, *EC – Large Civil Aircraft*, WT/DS316/AB/R, para. 845.
- 156) Panel Report, *EC – Approval and Marketing of Biotech Products*, paras 7.68 and 7.70; see also Panel Report, *Argentina – Poultry Anti-Dumping Duties*, n. 64 to para. 7.41; Henckels, 580–581. In *EC – Chicken Cuts*, the AB assessed whether the Harmonized Commodity Description and Coding System (HS) constituted relevant context for the purpose of interpreting the WTO covered agreements. The AB observed that ‘should the criteria in Article 31(3)(c) be fulfilled, the [HS] may qualify as a “relevant rule[] of international law applicable in the relations between the parties”’. Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, para. 195. The AB further noted that ‘the membership of the [HS] is “extremely broad” and includes the “vast majority of WTO Members”’. But, in the end, the AB found it unnecessary to rule on the question of whether the HS constitutes a relevant rule of international law applicable in the relations between the parties. *Id.*, para. 196, n. 384 to para. 199.
- 157) As of the publication of this chapter, the WTO has 159 members, three of which are separate customs territories. See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.
- 158) See, e.g., UNCITRAL Arbitration Rules 27(3) and 27(4); ICSID Arbitration Rules 43 and 44.
- 159) From the perspective of a WTO panel, this approach requires that the panel have access to the previous investor-State tribunal’s award. Most (but not all) such awards are made public.
- 160) See, e.g., Douglas, 273–274 (‘[T]here should be a rebuttable presumption to the effect that a treaty decision of a competent court or tribunal on questions of municipal law relating to the existence, nature or extent of the investor’s interests in the investment will be followed by a treaty tribunal’); see also Teubner & Fischer-Lescano, 1044.
- 161) Cf. Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 56.
- 162) Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras 50–53.
- 163) Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 56.
- 164) Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras 48–51.
- 165) Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51.
- 166) Pauwelyn goes further, and argues that non-WTO rules may, in some circumstances, constitute part of the applicable law of the dispute. See Pauwelyn, *How To Win*, 1000–1005.
- 167) Conversely, in theory, a WTO Member might assert a claim under the DSU, alleging that another Member’s BIT – or implementation of that BIT – violates the MFN obligation under the GATS. See, e.g., Adlung & Molinuevo. But if such a claim were brought, it is unclear whether this could give rise to successive or parallel investor-State claims, requiring the use of jurisdiction-regulating devices.
- 168) Shany, *The Competing Jurisdictions*, 260.
- 169) Shany, *The Competing Jurisdictions*, 261.
- 170) Henckels, 584.
- 171) Shany, *The Competing Jurisdictions*, 262–263.
- 172) See, e.g., *Southern Pacific Properties v. Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 27 Nov. 1985 (hereinafter ‘*SPP v. Egypt*’), paras 84–87; Henckels, 585–589, 592–597.
- 173) See Henckels, 583–585; Calamita, 254–266; W.T. Worster, *Competition and Comity in the Fragmentation of International Law*, 34 *Brooklyn Journal of International Law* 119–149 (2008).
- 174) A.-M. Slaughter, *A Global Community of Courts*, 44(1) *Harvard International Law Journal* 196 (2003). See also A.-M. Slaughter, *A Typology of Transjudicial Communication*, 29 *University of Richmond Law Review* 125–129 (1994–1995).
- 175) See, e.g., B. Kingsbury & S. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, New York University School of Law, Public Law and Legal Theory Research Paper No. 09-46: 1 (‘decisions made *ex post* by [arbitral] tribunals ... may influence what later tribunals will do, and may influence *ex ante* the behavior of States and investors’).
- 176) See, e.g., Henckels, 571 et seq.

- 177) See J.R. Crook, *United States and Canada Arbitrate a Softwood Lumber Dispute in the London Court of International Arbitration*, 102 *American Journal of International Law*: 192–194 (2008); USTR website, *Hearing Notice: The United States of America v. Canada (LCIA Arbitration No. 7941)*, available at <http://www.ustr.gov/about-us/press-office/press-releases/archives/2007/december/hearing-notice-united-states-america-v-c> (last checked 18 Oct. 2012). For a detailed procedural history of the *Softwood Lumber* dispute, see Dunoff, 319–356.
- 178) Panel Report, *Brazil – Retreaded Tyres*, WT/DS332/R, paras 7.252–7.268.
- 179) Panel Report, *Brazil – Retreaded Tyres*, paras 7.271–7.272.
- 180) Panel Report, *Brazil – Retreaded Tyres*, paras 7.271–7.272.
- 181) Panel Report, *Brazil – Retreaded Tyres*, paras 7.275.
- 182) Panel Report, *Brazil – Retreaded Tyres*, paras 7.276. The panel noted that in a similar case between Uruguay and Argentina, the MERCOSUR tribunal also reached the conclusion that the restriction was unjustified, despite the invocation of the health exception available under the Montevideo Treaty. *Ibid.*, n. 1451 to para. 7.276.
- 183) Panel Report, *Brazil – Retreaded Tyres*, para. 7.285.
- 184) Panel Report, *Brazil – Retreaded Tyres*, paras 7.285–7.289.
- 185) Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.
- 186) Appellate Body Report, *Brazil – Retreaded Tyres*, para. 228.
- 187) Appellate Body Report, *Brazil – Retreaded Tyres*, para. 234.
- 188) Appellate Body Report, *Brazil – Retreaded Tyres*, para. 234.
- 189) Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.18.
- 190) Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.38.
- 191) Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.41.
- 192) Panel Report, *Argentina – Poultry Anti-Dumping Duties*, n. 64 to para. 7.41.
- 193) Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.41.
- 194) *Corn Products International*, para. 132.
- 195) See, e.g., *Corn Products International*, para. 150.
- 196) *Corn Products International*, paras 42, 101; Panel Report, *Mexico – Soft Drinks*, paras 8.8, 8.61, 8.84, 8.86–8.94, 8.158, 8.189.
- 197) Panel Report, *Mexico – Taxes on Soft Drinks*, para. 9.2.
- 198) Panel Report, *Mexico – Taxes on Soft Drinks*, paras 8.36, 8.58.
- 199) Panel Report, *Mexico – Taxes on Soft Drinks*, paras 8.86–8.96.
- 200) Panel Report, *Mexico – Taxes on Soft Drinks*, paras 8.198, 8.202.
- 201) Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 85.
- 202) See *Corn Products International*, para. 48.
- 203) *Corn Products International*, para. 114.
- 204) *Corn Products International*, para. 121.
- 205) *Corn Products International*, para. 123 (italics added).
- 206) *Corn Products International*, para. 126.
- 207) *Corn Products International*, paras 143, 193.
- 208) *Corn Products International*, paras 154–160.
- 209) *Corn Products International*, para. 156.
- 210) *Corn Products International*, para. 157.
- 211) *Corn Products International*, para. 158.
- 212) *AdM/Tate & Lyle*, paras 136–151, 190.
- 213) *AdM/Tate & Lyle*, para. 212.
- 214) *AdM/Tate & Lyle*, para. 213. The tribunal also found inapposite the WTO panel's findings with respect to Mexico's countermeasures defence, given the specificities of the language in GATT Art. XX(d). *Ibid.*, para. 130.
- 215) *Cargill*, para. 193.
- 216) *Cargill*, para. 194.
- 217) *Cargill*, paras 208–209, 299.
- 218) *Cargill*, paras 215–223. *Cargill* also asked the tribunal to calculate damages based on the illegality under WTO rules of antidumping duties imposed by Mexico on HFCS, before the tax was imposed. *Cargill* did not seek damages based on losses incurred because of the antidumping duties, but wanted to be restored to the position that it would have occupied but for all illegal acts (including the antidumping duties). The tribunal recognized that a WTO panel found these duties to be illegal, but rejected the relevance of those findings for purposes of quantum. The tribunal observed *inter alia* that 'the WTO and NAFTA have their own specific consequences for the illegal imposition of antidumping duties and it is not for a NAFTA Chapter 11 tribunal to amend those regimes by the addition of further consequences'. *Ibid.*, para. 455.
- 219) *Cargill*, para. 380; see also *ibid.*, paras 45–51.
- 220) *Cargill*, paras 379–430 and n. 102. The tribunal received a redacted version of the *Corn Products* decision shortly before finalizing its award. *Ibid.*, n. 102.
- 221) *Canfor Corp. v. United States*, UNCITRAL, Decision on Preliminary Question, IIC 42, 287 (2006), 6 Jun. 2006 (hereinafter '*Canfor*').
- 222) *Canfor*, paras 4–5.
- 223) *Canfor*, paras 273, 352.
- 224) *Canfor*, paras 274–350.
- 225) Art. 1902(2) of the NAFTA; see *Canfor*, paras 295, 333.
- 226) *Canfor*, para. 333; Panel Report, *US – Offset Act (Byrd Amendment)*, WT/DS217/R, WT/DS234/R, paras 4.501–4.502.

- 227) *Canfor*, para. 333.
- 228) *Canfor*, paras 333–334.
- 229) *Canfor*, para. 325; Panel Report, *US – Offset Act (Byrd Amendment)*, paras 4.501–4.502.
- 230) *Canfor*, para. 326; Panel Report, *US – Offset Act (Byrd Amendment)*, paras 7.141–7.145.
- 231) *Canfor*, paras 325–326.
- 232) Panel Report, *US – Offset Act (Byrd Amendment)*, para. 327. Although the *Canfor* tribunal did not invoke concepts of estoppel or abuse of process, these concepts might also be asserted by a claimant in an investor-State case with respect to allegedly contradictory positions taken by a respondent State before WTO and BIT tribunals.
- 233) Pauwelyn, *How to Win*, 1015.
- 234) Pauwelyn, *How to Win*, 1015; see also Art. 23 of the DSU.
- 235) Pauwelyn, *How to Win*, 1015.
- 236) Pauwelyn, *How to Win*, 1015.
- 237) Pauwelyn, *How to Win*, 1015–1017; see also Henckels, 597.
- 238) A State may pursue State-to-State dispute settlement under a BIT. For instance, the US-Argentina BIT allows either party to the BIT to pursue international arbitration with respect to State-to-State disputes concerning ‘the interpretation or application of the Treaty’. US-Argentina BIT, Art. VIII. But this would not eliminate the parallel proceedings, as the investor-State claim would continue in tandem with any State-to-State claim under the BIT. Moreover, even if they involved the same State parties, WTO and State-to-State BIT proceedings would implicate different legal standards, procedures, and remedies; they are not in any meaningful sense interchangeable.
- 239) See Shany, *The Competing Jurisdictions*, 155; Henckels, 579.
- 240) Panel Report, *Mexico – Taxes on Soft Drinks*, para. 4.103.
- 241) Panel Report, *Mexico – Taxes on Soft Drinks*, para. 7.8.
- 242) Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.
- 243) International Law Association, *Final Report on Lis Pendens and Arbitration* (Toronto 2006) (hereinafter ‘Final ILA Report on *Lis Pendens*’), para. 1.2 (quoting J. Fawcett, *Declining Jurisdiction in Private International Law*, Report to the XIVth Congress of the International Academy of Comparative Law 27 (Athens 1995)).
- 244) Final ILA Report on *Lis Pendens*, paras 2.1–2.46.
- 245) Final ILA Report on *Lis Pendens*, para. 1.5.
- 246) Shany, *The Competing Jurisdictions*, 162.
- 247) Shany, *The Competing Jurisdictions*, 24; Final ILA Report on *Lis Pendens*, para. 1.2.
- 248) *German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment, 1925 PCIJ (ser. A) No. 6 (25 Aug. 1925) (hereinafter ‘*German Interests in Polish Upper Silesia*’).
- 249) *German Interests in Polish Upper Silesia*, paras 49–57.
- 250) Shany, *The Competing Jurisdictions*, 24–28; Final ILA Report on *Lis Pendens*, paras 3.1–3.20.
- 251) Final ILA Report on *Lis Pendens*, para. 4.51.
- 252) Final ILA Report on *Lis Pendens*, paras 1.12, 4.52.
- 253) See generally Mitchell & Heaton, 561 et seq.
- 254) Mitchell & Heaton, 574–579.
- 255) Shany, *The Competing Jurisdictions*, 262–263.
- 256) Mitchell & Heaton, 599–600; McLachlan, 359.
- 257) Shany, *The Competing Jurisdictions*, 260–269. The Final ILA Report on *Lis Pendens* formulates recommendations for ‘sound case management’ on the part of arbitral tribunals. It observes that, ‘on the one hand, the tribunal should seek to avoid inconsistent decisions, but on the other hand a tribunal is mandated to decide the dispute referred to it without unnecessary delay and a claimant has a right to have its claims determined’. Final ILA Report on *Lis Pendens*, para. 4.25. Accordingly, a tribunal requested by a party to stay its proceedings should use its inherent powers to grant such a request ‘on such conditions as it sees fit, until the ... partial or interim outcome[] of any other pending proceedings’. This possibility, dictated by the need ‘to avoid conflicting decisions, to prevent costly duplication of proceedings or to protect a party from oppressive tactics’, is subject to the requirements that the tribunal is: (i) ‘not precluded from [staying its proceedings] under the applicable law’; (ii) ‘satisfied that the outcome of the other pending proceedings or settlement process is material to the outcome of [its own arbitration]’; and (iii) ‘satisfied that there will be no material prejudice to the party opposing the stay’. *Ibid.*, para. 5.13.6.
- 258) Art. 12.12 of the DSU.
- 259) *Ibid.*
- 260) Even if a panel had the authority to grant a stay at the request of the respondent or on its own initiative, it is doubtful that the overall nine-month deadline for completing panel proceedings would be postponed. Art. 12.12 grants such a postponement only where the complaining party requests the stay.
- 261) Art. 3.3 of the DSU (emphasis added); see also Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 52; Mitchell & Heaton, 603.
- 262) If, at the outset of the dispute, a WTO panel granted a twelve-month stay at the complaining party’s request, the panel would have nine months to complete its work after the stay was lifted. Art. 12.12 of the DSU. In theory, that would leave the investment tribunal with 21 months in which to render its award. As noted above, one study found that the average ICSID case takes far longer to resolve – i.e., 3.6 years, excluding annulment proceedings. See Sinclair et al.

- 263) See, e.g., Mitchell & Heaton, 601 ('Declining jurisdiction in favour of another dispute settlement forum ... would more than likely cause these time limits [in the DSU] to be exceeded'); Shany, *The Competing Jurisdictions*, 279–280.
- 264) *SPP v. Egypt*, para. 84 (emphasis added).
- 265) *SPP v. Egypt*, para. 87.
- 266) *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/06, Decision on Jurisdiction, 29 Jan. 2004 (hereinafter '*SGS v. Philippines*'), para. 171.
- 267) *SGS v. Philippines*, paras 173–176.
- 268) See, e.g., C. Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 *The Law and Practice of International Courts and Tribunals* 10–11 (2005); Shany, *Contract Claims vs. Treaty Claims*, 841–842.
- 269) *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 Oct. 2010 (UNCITRAL), para. 292; see also *SGS v. Pakistan*, paras 185–189 (rejecting request to stay ICSID arbitration under the Swiss-Pakistan BIT in favour of contractual arbitration, on the grounds that completion of the contractual arbitration was not a 'necessary precondition' to resolution of the BIT claims).
- 270) *SGS v. Philippines*, Decision on Jurisdiction, paras 175–176; *SGS v. Philippines*, Order of the Tribunal on Further Proceedings, 17 Dec. 2007 (lifting stay of proceedings after nearly four years, based on the tribunal's provisional conclusion that there did not appear to be any remaining dispute as to core quantum issues or barrier to the admissibility of SGS's claim).
- 271) These figures do not include the time for implementation and retaliation proceedings under Arts 21.5 and 22.6 of the DSU. These proceedings would not involve a reconsideration of the merits of the panel and Appellate Body decisions, however. They only address the adequacy of compliance with rulings and the extent of authorized retaliation, if any.
- 272) See, e.g., ICSID Arbitration Rules (2006), Rule 34(2); UNCITRAL Arbitration Rules (2010), Art. 27(3); IBA Rules on the Taking of Evidence in International Arbitration (2010) (hereinafter '*IBA Rules*'), Arts 3(10), 7. See also P. Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence*, 28 *Arbitration International* 173 et seq. (2012) (observing that arbitrators generally have wide powers to take initiatives to obtain factual and legal evidence, but that they should generally refrain from doing so absent specific justificatory factors).
- 273) Kwak & Marceau, 482.
- 274) *Canfor*, para. 327.
- 275) *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award, 16 Aug. 2007 (hereinafter '*Fraport v. Philippines*'), paras 18–19.
- 276) *Fraport v. Philippines*, para. 19 (quoting Tribunal Procedural Order of 18 Oct. 2004); cf. Schreuer et al., *The ICSID Convention: A Commentary* 383 (2d ed., Cambridge University Press 2009).
- 277) Art. 18.2 of the DSU; G. Marceau & M. Hurley, *Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms*, 4 *Trade, Law, and Development* 25 (2012).
- 278) Art. 18.2 of the DSU.
- 279) Art. 18.2 of the DSU.
- 280) The ICSID Secretariat cannot publish awards without both parties' consent, apart from excerpts containing a tribunal's legal reasoning. ICSID Arbitration Rule 48(4). But the parties are generally free to publish their awards, and most make their way into the public domain. The UNCITRAL arbitration rules prohibit the litigants from unilaterally publishing awards, but allow it where 'the disclosure is required of a party by legal duty, or to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority'. UNCITRAL Arbitration Rules (2010), Art. 34(5); see Marceau & Hurley, 26–27.
- 281) Kwak & Marceau, 482.
- 282) Art. 3.6 of the DSU; Pauwelyn, *How to Win*, 1007–1008.
- 283) See, e.g., Henckels, 596–598; Shany, *Contract Claims vs. Treaty Claims*, 849.
- 284) See, e.g., Shany, *Contract Claims vs. Treaty Claims*, 849.
- 285) See, e.g., G. Guillaume, *La mondialisation de la Cour internationale de justice*, 2 *International Law Forum du Droit International* 242 (2000); Marceau, *Conflicts of Norms and Conflicts of Jurisdictions*, 1114–1115; C. Leathley, *An Institutional Hierarchy To Combat Fragmentation of International Law? Has the ILC Missed an Opportunity?*, 40 *NYU Journal of International Law and Politics* 259 et seq. (2007).
- 286) See Dupuy, 800 (observing that institutional proposals for strengthening the primacy of the ICJ are 'theoretically interesting', but 'very few seem realistic because most of them would require a formal revision of the Statute of the ICJ').
- 287) Marceau, *Conflicts of Norms and Conflicts of Jurisdictions*, 1114 ('It is doubtful, as [Guillaume] points out, that States are ready to empower the ICJ [with reference jurisdiction]; it is also doubtful that international tribunals would be willing to surrender their judicial power. It is also difficult to imagine that States or tribunals could agree on the type of questions that could be referred to the ICJ'); Kwak & Marceau, 479.
- 288) Cf. Kwak & Marceau, 483 (concluding that DSU Art. 23 does not bar WTO Members from entering into regional trade agreements 'or other treaties with dispute settlement provisions where rights and obligations are parallel to those of the WTO').

- 289) Exceptionally, the newly-implemented ASEAN Comprehensive Investment Agreement (ACIA or 'the Agreement') comes close to such a broad carve-out, effected through a series of subject matter exclusions. The ACIA does not apply to subsidies or grants provided by an ASEAN Member State, government procurement, or services supplied by a government authority. Art. 3.4 of the ACIA. The ACIA also does not apply certain investment protections, such as national treatment and MFN, to measures affecting trade in services that fall within the ASEAN Framework Agreement on Services. Art. 3.4 and 3.5 of the ACIA. Moreover, the Agreement excludes from the scope of certain investment protections intellectual property measures that constitute exceptions to TRIPS, or that are consistent with TRIPS provisions regarding compulsory licensing. Arts 9.5 and 14.5 of the ACIA.
- 290) A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 54–56 (Kluwer Law International 2009). Indeed, such a carve-out would exclude the supply of services under mode 3 (i.e., commercial presence), which constitute 55–60% of all trade covered by the GATS. See A. Maurer & J. Magdeleine, *Measuring Trade in Services in Mode 4*, in *Service Sector Reforms, Asia-Pacific Perspectives* 171 (P. Sauvé et al. eds., Asian Development Bank Institute and ARTNet, 2011).
- 291) Art. 26.2 of the Agreement between New Zealand and Singapore on a Closer Economic Partnership ('Articles 28, 29 and 30 [national treatment and MFN investment protections] shall not apply to any measures affecting investments adopted or maintained pursuant to Part 5 [services chapter] to the extent that they relate to the supply of any specific service through commercial presence as defined in Article 16(n), whether or not they have been covered in Annex 2'.); see also M. Ewing-Chow, *Thesis, Antithesis and Synthesis: Investor Protection in BITs, WTO and FTAs*, 30 *University of New South Wales Law Journal* 553–554 (2007).
- 292) See Art. I.2(c) of the GATS (defining trade in services as including the supply of services through commercial presence in the territory of another Member).
- 293) See also Art. 38 of the EFTA-Singapore FTA (national treatment and MFN provisions of investment chapter do not apply to service sector); *Canfor*, paras 188–273 (interpreting Art. 1901(3) of the NAFTA as excluding anti-dumping and countervailing duty law from investor-State dispute settlement). Relatedly, Art. 2005(3)–(4) of the NAFTA give the respondent in a State-to-State dispute the right to have any claims brought against it to proceed solely within the NAFTA system, and not the WTO, where they implicate sanitary and phytosanitary measures and standards, or relate to environmental and conservation agreements. This type of clause cannot be readily adapted to cases of jurisdictional overlap between WTO and investor-State proceedings, however, as the two are not alternative fora; for instance, the respondent State cannot choose to defend against an investor's claim before the WTO.
- 294) See, e.g., Art. 11.6 of the US-Korea FTA; Art. 15.6 of the US-Singapore FTA; see also Arts 9 and 14.5 of the ACIA.
- 295) Art. 6.5 of the 2012 US Model BIT. The same provision appears in the 2004 US Model BIT.
- 296) Art. 14.4 of the 2012 US Model BIT; see also *ibid.*, Art. 21 (excluding taxation measures from the scope of most investment protections).
- 297) Cf. Gibson, 397–398 (Art. 6(5) of the US-Uruguay BIT, which is based on Art. 6.5 of the US Model BIT, 'has the effect of importing WTO standards as applicable law, into the context of the investment dispute concerning a compulsory license').
- 298) For example, Art. 8(2) of the Argentina-France BIT provides that '[o]nce an investor has submitted the dispute either to the jurisdiction of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final'. See Schreuer, *Travelling the BIT Route*, 240; UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, UNCTAD Series on International Investment Policies for Development 20 and 21 (New York and Geneva, 2005). Cf. NAFTA, Art. 2005(6) (providing that once a party initiates State-to-State dispute settlement proceedings under either NAFTA Chapter 20 or the GATT, 'the forum selected shall be used to the exclusion of the other . . .').
- 299) Schreuer, *Travelling the BIT Route*, 239–240.
- 300) Nor does Art. 27(1) of the ICSID Convention appear to foreclose parallel or successive WTO and investment claims with respect to the same measure. Art. 27(1) provides that '[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute'. It is doubtful that a WTO claim asserted by the investor's home State would be viewed as a form of diplomatic protection or an 'international claim ... in respect of a dispute' filed by the investor. As discussed above, a WTO Member asserts a claim based on a range of systemic trading interests, not necessarily limited to those of the investor in question. The parties, legal claims, and remedies are arguably different in WTO and investment proceedings. Cf. Verhoosel, n. 9 ('It is doubtful that WTO proceedings challenging the same measure would be considered to fall within the category of a diplomatic claim "in respect of [the same] dispute"'); Gibson, 405–406. Moreover, the drafting history of the ICSID Convention indicates that the concern that prompted negotiators to include Art. 27 was the possibility that states would initiate arbitration on behalf of investors for violation of the investment treaty – not that they would initiate dispute settlement proceedings under other international agreements. See Schreuer et al., *The ICSID Convention*, 420–421.

- 301)** *SPP v. Egypt*, para. 87; see also *Nuclear Tests (Australia v. France)*, 1974 ICJ 253, 259–260 (20 Dec. 1974).
- 302)** Cf. Henckels, 596–598; *ibid.*, 596 ('Legitimacy of international tribunals is especially crucial where judges exercise inherent powers without explicit textual authority') (citing C.P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication*, 39 *NYU Journal of International Law and Politics* 869 (2007)).
- 303)** See, e.g., Calamita, 262–263, 270 (suggesting factors for consideration by international adjudicators when granting a stay on comity grounds).
- 304)** See, e.g., Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.
- 305)** See, for example, the annual meetings between the presiding members of the major international courts organized by the Brandeis Institute for International Judges, <http://www.brandeis.edu/ethics/internationaljustice/biij/index.html> (last accessed 9 May 2013).

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