The Function of Dispute settlement Systems under Bilateral or Regional Agreements to Complement the WTO's Dispute Settlement System and the Reform of the Dispute Settlement System
—Focusing on Disputes Related to Environmental Matters, Including Renewable Energy—

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Abstract

In recent years, there have been arguments hoping for dispute settlement systems under regional agreements to complement the WTO's dispute settlement system. In particular, at a time when there are vacancies on the WTO Appellate Body, which undermines the functions of the organization's dispute settlement system and prevents the WTO Dispute Settlement Body from functioning properly, some people are hoping that dispute settlement processes under bilateral or regional agreements will substitute for the WTO's dispute settlement process.

Indeed, in some previous cases, the same dispute was referred to the WTO Dispute Settlement Body while being in the process of resolution through a dispute settlement process under a regional agreement or a bilateral investment treaty (e.g., the Mexico Soft Drinks case and the Philip Morris v. Australia government case). In many cases where there was an investment agreement between an investing country and an investee country, investors and the host country resolved their dispute through the dispute settlement process under that agreement.

In particular, since the investor-state dispute settlement (ISDS) provision has come to be included in regional agreements, hopes have grown further for international investment arbitration. In Japan as well, when discussions were held on the inclusion of the ISDS provision in the Trans-Pacific Partnership (TPP) agreement and the Japan-Europe economic partnership agreement (EPA), there was a growing mood to prepare for the provision because of the possibility that both the government and companies would become parties to international investment mediation cases. However, the author feels that there is something strange with this course of events and is inclined to think that we should appreciate the fact that the Japanese government and companies have rarely become parties to international investment arbitration cases and should maintain this situation. On this point, even if a dispute arises between investors and the host country, it is of primary importance to resolve it based on the interpretation of the contracts between investors and the host country and through negotiation, rather than using the investment arbitration system. It would be desirable for investors and the host country for the use of the investment arbitration system to be avoided and be

reserved as a last-resort option. This paper considers this point by focusing on cases related to renewable energy.

If a dispute cannot be resolved through the interpretation of changed circumstances or other means under a contract, the process of the WTO Dispute Settlement Body, which uses government-to-government negotiations, is still considered to be more desirable than investment arbitration between investors and the host country in some cases.

Therefore, even though the dispute settlement system under a bilateral or regional agreement may have complemented the WTO's dispute settlement system in some cases, it cannot serve as a substitute. Rather, the WTO's dispute settlement system has a *raison d'etre* of its own, so we should make efforts to maintain it with a view to a future reform. The time may have arrived when parties to disputes should devote more efforts to resolving the disputes through negotiation or compromise before resorting to a dispute settlement system while using the presence of the system as leverage. Furthermore, it is desirable to use an arbitration or dispute settlement process not only as a means to achieve its original purpose, which is to have a third party make the final judgment, but also as a system whereby a third party offers cooperation toward reconciliation. At the same time, the paper examines alternative options, including the use of arbitration under Article 25 of the Dispute Settlement Understanding (DSU) as a means to prevent a freeze on the use of the WTO's dispute settlement system.

Keywords: dispute settlement system, WTO, regional agreement, FTA, WTO, reform of the dispute settlement system, disputes related to renewable energy, dispute related to environmental matters, international investment arbitration, Appellate Body

JEL Classification: F13, F18, F53, Q42, Q56

I. WTO Dispute Resolution Procedures and Dispute Resolution Procedures under Bilateral or Regional Agreements

The Marrakesh Agreement establishing the World Trade Organization (the WTO Agreement) establishes certain dispute resolution procedures. These procedures are set forth in its annex known as the "Understanding on Rules and Procedures Governing the Settlement of Disputes."

Yet despite the existence of multinational agreements such as the WTO Agreement, in recent years WTO member states have increasingly migrated to bilateral and plurilateral free trade agreements separate from the WTO Agreement. The WTO reported the existence of 681 such regional agreements as of January 2019, 467 of which have taken effect, indicating an ever expanding increase in the number of these agreements since the 1990s[1]. Among these, some regional agreements rely solely on the WTO's dispute resolution procedures,

while others establish independent dispute resolution procedures based on international arbitration procedures.

For example, the North American Free Trade Agreement (NAFTA) established its own independent dispute resolution procedures. Further, the establishment of an Investor-State Dispute Resolution Clause (ISDS Clause) allows an investor who suffers damages from violations by a contracting state to engage in negotiations with that state, and to remand the case to international arbitration if a resolution does not appear in sight. On September 30, 2018, the United States-Mexico-Canada Agreement (USMCA) was released as a pact to replace NAFTA, and was signed on November 30, 2018 (it has yet to be ratified as of the end of March 2019).[2] The USMCA establishes independent dispute procedures,[3] and also contains an ISDS Clause.[4]

II. Cases Utilizing both WTO Dispute Resolution Procedures and Dispute Resolution Procedures under Bilateral or Regional Agreements

Under the USMCA, in the event a dispute occurs, a party state is entitled to select the forum in which to settle the dispute, including the WTO Dispute Settlement Body.[5] Allowing a party state to select a forum from all WTO member states and establishing an investor arbitration clause (ISDS Clause), as is done in the USMCA, increases the options for dispute resolution bodies, and thus provides a party state with that many more avenues to choose. While the expansion of options is generally a good thing, the endless continuation of a dispute that may result by a party state's repeated forum shopping is both judicially and economically unreasonable in terms of the interests of the parties. As such, like with NAFTA, the USMCA provisions that once a forum is selected, that forum shall be used to the exclusion of other forums.[6]

Many regional agreements have similar types of exclusive jurisdiction clauses. For example, similar provisions can be found in the economic partnership agreements executed by Japan, and an exclusive jurisdiction provision is provided in Article 28.4, Paragraph 2 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[7]

That being said, despite the existence of exclusive jurisdiction provisions in regional

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[1] World Trade Organization, Trade topics, Regional trade agreements, https://www.wto.org/english/tratop_e/region_e/region_e.htm.

[2] Office of the United States Trade Representative, Free Trade Agreements, United States-Mexico-Canada Agreement, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

[3] Chapter 31 of the United States-Mexico-Canada Agreement, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31_Dispute_Settlement.pdf.

[4] Chapter 13 of the United States-Mexico-Canada Agreement, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/13_Government_Procurement.pdf

[5] Article 31.3 of the United States-Mexico-Canada Agreement, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31_Dispute_Settlement.pdf.

[6] Article 31.3, para. 2 of the United States-Mexico-Canada Agreement, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31_Dispute_Settlement.pdf.

[7] Article 28.4, para. 2 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), http://www.cas.go.jp/jp/tpp/naiyou/pdf/text_yakubun/160308_yakubun_28.pdf,
https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/28.-Dispute-Settlement-Chapter.pdf.

agreements, we find cases that are being disputed in dispute resolution bodies under regional agreements but that are also being brought to the WTO.

II-1 Mexico-Soft Drink case

The Mexico-Tax Measures on Soft Drinks and Other Beverages (Mexico-Soft Drinks (DS308)) involves a case filed with the WTO Dispute Settlement Body by the United States claiming that Mexico's assessment of taxes on soft drinks using non-cane sugar sweeteners was a discriminatory action against importers from foreign states. Because this raised an issue regarding the concerned bodies and the broad handling of these measures as trade related measures under NAFTA,[8] also at issue was whether the exclusive jurisdiction clause under NAFTA would allow for jurisdiction by the WTO, and whether the WTO should make a determination.[9] Both parties in the matter acknowledged that the WTO Panel held jurisdiction,[10] so the issue turned to whether the Panel had the discretion to deny the United States' petition.[11] In response to Mexico's assertion that the WTO should dismiss the petition on the basis of Chapter 20 of NAFTA, the Panel held in the case that the WTO Panel was allowed jurisdiction based on the reasoning that it did not have the discretion to reject a legally filed petition under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and that even if it had this discretion, it could find no facts to support a rejection of the petition.[12]

This conclusion could be criticized in the case of a WTO member state that participates in a regional agreement, where dispute resolution procedures are provided in both the WTO Agreement and the regional agreement, since it would be inappropriate in terms of a speedy resolution of the dispute to force the party states to bear subsequent actions after they have exhausted the dispute resolution procedures under the regional agreement. In the immediate case, such an opinion would be reasonable from Mexico's standpoint. Conceivably, even if the dispute has yet to be deliberated under the dispute resolution procedures of the regional agreement, the resolution of the dispute under multinational dispute resolution procedures, despite the availability of a resolution under more closely tailored dispute resolution procedures in a bilateral or plurilateral agreement, could be criticized as obscuring the signifi-

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[8] Mexico - Tax Measures on Soft Drinks and Other Beverages (US)(DS302), paras. 7.11, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds308/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#.

[9] *Mexico - Tax Measures on Soft Drinks and Other Beverages (US)*(DS302), https://www.wto.org/english/tratop_e/tratop_e.htm.

[10] Mexico - Tax Measures on Soft Drinks and Other Beverages (US)(DS302), paras. 7.4, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds308/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#

[11] Mexico - Tax Measures on Soft Drinks and Other Beverages (US)(DS302), paras. 7.5, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds308/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#

[12] Mexico - Tax Measures on Soft Drinks and Other Beverages (US)(DS302), paras. 7.1-7.18, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds308/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#

cance of providing dispute resolution procedures in bilateral or plurilateral agreements.

On the other hand, a regional agreement sets forth its own relationships of rights and obligations under that regional agreement, and a WTO member state, because it holds rights and obligations as a member state of the WTO, could argue that there is a violation of international law based on the intent of the respective provisions. This would diminish the attraction of participating in regional agreements since being a member state to a regional agreement would inhibit a state from exercising its rights as a WTO member state. Based on this point of view, the determination made by the Panel and the Appellate Body appears to be appropriate. However, there is still room for future debate as to whether we should go so far as to allow jurisdiction in multiple forums, and should allow a forum with jurisdiction to have the discretion to refuse a petition in cases where the measures at issue and the purport of the allegations of violations are completely the same in multiple forums.

II-2 Philip Morris cases

Philip Morris Asia Limited, a Hong Kong corporation, filed a petition against the Commonwealth of Australia in June 2011, seeking international investment arbitration pursuant to the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (Australia-Hong Kong, China SAR BIT (1993)), with regard to Australia's Tobacco Plain Packaging Act 2011. Utilizing the UNICITRAL (1976) Rules, the Permanent Court of Arbitration (PCA) was selected as the arbitral tribunal. In arbitration, the enactment of the Tobacco Plain Packaging Act 2011 was held not to be unforeseeable, and Philip Morris' petition was rejected since the initiation of this arbitration constituted an abuse of rights.[13]

Other disputes with separate parties were also pending with regard to the Tobacco Plain Packaging Act 2011. Between March 2012 and September 2013, Ukraine (DS434), Honduras (DS435), Dominican Republic (DS441), Cuba (DS458) and Indonesia (DS441) requested consultations with Australia in the WTO Dispute Settlement Body for violations of the TRIPS Agreement and the TBT Agreement. The Ukraine procedures were ended on May 30, 2016 due to a suspension of procedures and the lapse of the suspension deadline.[14] In June 2018 panel reports were issued disallowing the claims of Honduras, Dominican Republic, Cuba and Indonesia,[15] and on August 27, 2018, the Dispute Settlement Body (DSB)

[13] Philip Morris Asia Limited v. Common Wealth of Australia (PCA Case No. 2012-12), https://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf.

[14] Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS434), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm.

[15] Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS435), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm; Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS441), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm; Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS458), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds458_e.htm; Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS467), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm,

adopted the panel reports for Cuba and Indonesia.[16] Honduras and Dominican Republic appealed to the Appellate Body on July 29, 2018 and August 23, 2018 respectively, and these complaints are still pending with the Appellate Body.[17]

What is interesting in the Philip Morris cases is that the responses to the PCA determination of an abuse of rights, provided by the five WTO member states in their complaints against Australia based on the same Tobacco Plain Packaging Act 2011, were divided into three responses. In response to the Philip Morris petitions, major corporations spoke out against national regulatory systems for the management of health, but this was criticized as an infringement of sovereignty, and raised concerns that major corporations would be able to assert their economic power to distort national health and safety policies. In contrast, the states that actually filed complaints with the WTO were states where tobacco is a critical industry, and not the so-called major power states. Following the PCA's finding that the petitions against Philip Morris constituted abuses of rights, Ukraine ultimately withdrew its petition, but the other states sought out panel reports, and Honduras and Dominican Republic appealed a panel report that found violation. The activities of corporations that pursue profits differ from the positions of the states that seek to protect their industries, and specific industries are of particular importance to these states, whereby there may be instances where the regulation of those activities constitutes a matter of life and death for the state's economy, as well as instances which require the pursuit of fair and impartial treatment based on trade rules.

What the arbitration by Philip Morris against Australia and the complaints filed by the foregoing respective states with the WTO Dispute Settlement Body as set forth above have in common is the finding of no violation by Australia. However, they differ in the reasoning and background facts leading to such conclusion, and with the differences in logic between a petition filed by an investor-corporation and a petition filed by a state for the same state action, all reveal a move towards the establishment a more diverse international regime.

III. Need and Tolerance for Parties Other than States

Even under regional agreements, the parties are states, whereby the assumed actors are states and governments. Nevertheless, in recent years, we have seen a number of examples where so-called IDSM Clauses (Investor and State Dispute Clauses) have been inserted into bilateral investment agreements and regional agreements.

Examples of this are the provisions in NAFTA and USMCA, and the ISDS Clause in the

[16] Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS458), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds458_e.htm; Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS467), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm.

[17] Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS435), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm; Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS441), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm.

Australia-Hong Kong Investment Agreement which allowed Philip Morris to petition for arbitration against Australia.

Under the Philip Morris cases, the Philip Morris Asia, Ltd. filed for arbitration prior to the petitions to the WTO Dispute Settlement Body filed by Ukraine, Honduras, Dominican Republic, Cuba and Indonesia. Philip Morris filed its petition for arbitration in June 2011, while these states requested consultations between March 2012 and September 2013, and only requested the establishment of panels after that. The PCA issued its arbitration rulings on December 17, 2015, while the WTO panel reports came out in June 2018. Of course, these states were likely watching the progress of the Philp Morris case, and as is often seen in such cases, the corporation initiates an action prior to the states acting. Ordinarily, if a state files a petition against another state, the states engage in informal negotiations and request consultation with the WTO only if such negotiations are unsuccessful, and only request the establishment of a panel if a resolution cannot be reached through consultation. These procedures may take several years, and thus, having procedures that do not require government intervention may be preferable for both individuals and corporations in the expeditious initiation of cases with dispute resolution bodies.

Additionally, the number of cases in which investors are filing complaints against states is on the increase. The number of petitions filed with International Centre of Settlement of Investment Disputes (ICSID), an investment dispute resolution body established as one forum for international investment disputes, is on the rise. As of the end of 2018, 706 cases have been filed with the ICSID pursuant to the ICSID Additional Facility Rules, with 56 of the cases filed in 2018, the most since 1972 (*see* Fig.1).[18]

These statistics suggest an increasing need for dispute resolutions under the ICSID Convention and ICSID Additional Facility Rules. These numbers overlap with the increasing trend in bilateral investment treaties (BIT). 18 new International Investment Agreements (IIA) were executed in 2017, and a total of 3,322 IIA have been executed as of the end of 2017 (*see* Fig. 2).[19]

Conversely, as of the end of 2017, the number of cases for the establishment of panels filed with the WTO Dispute Settlement Body totaled 308 cases, accounting for roughly half of the initiated cases. Of these, panel reports have been issued in 235 cases (though panel reports are not necessarily issued in every case in which a panel is established due to the possibility of a settlement between the state parties after the establishment of the panels), and appeals have been filed in 156 of these cases, indicating an appeal rate of 60%.[20] The following graph illustrates the number of disputes brought to the WTO, panels established, and notifications of appeal in the period between 1995 and 2017 (*see* Fig. 3).

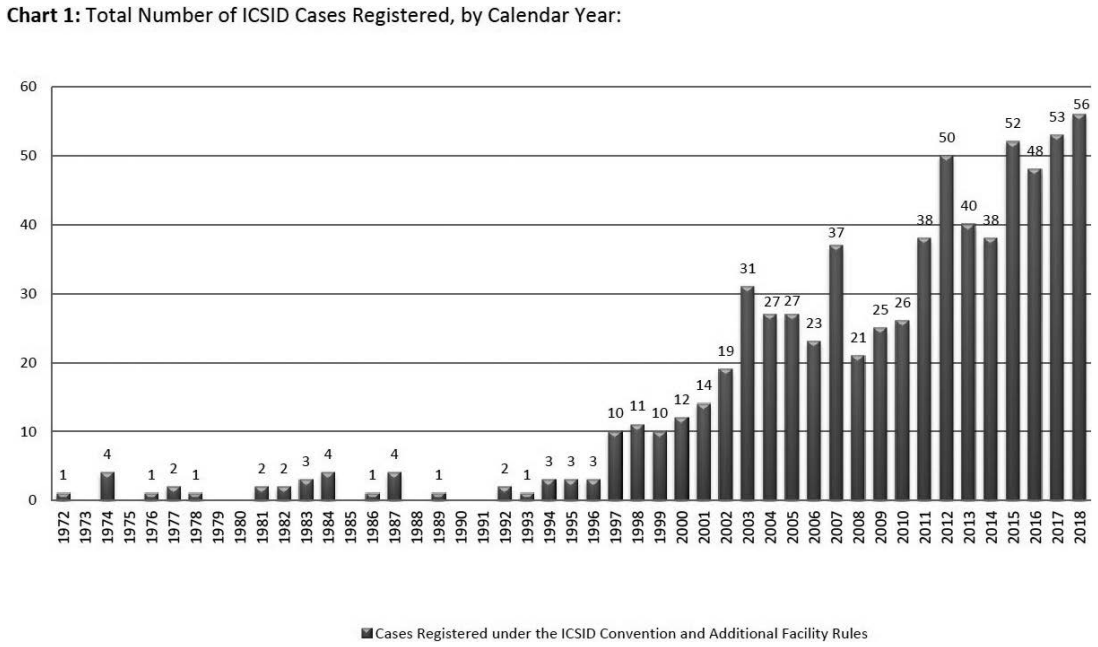
As indicated by this graph, since the establishment of the WTO, expectations in the

[18] ICSID, "THE ICSID CASELOAD —STATISTICS(ISSUE 2019-1)", January, 2019; https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf.

[19] UNCTAD, "World Investment Report 2018 - Investment and New Industrial Policies", United Nations, 2018, p.88; https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf.

[20] World Trade Organization, Dispute Settlement Activity - Some Figures; https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm.

Fig. 1 Trends in Number of Cases Pending with ICSID



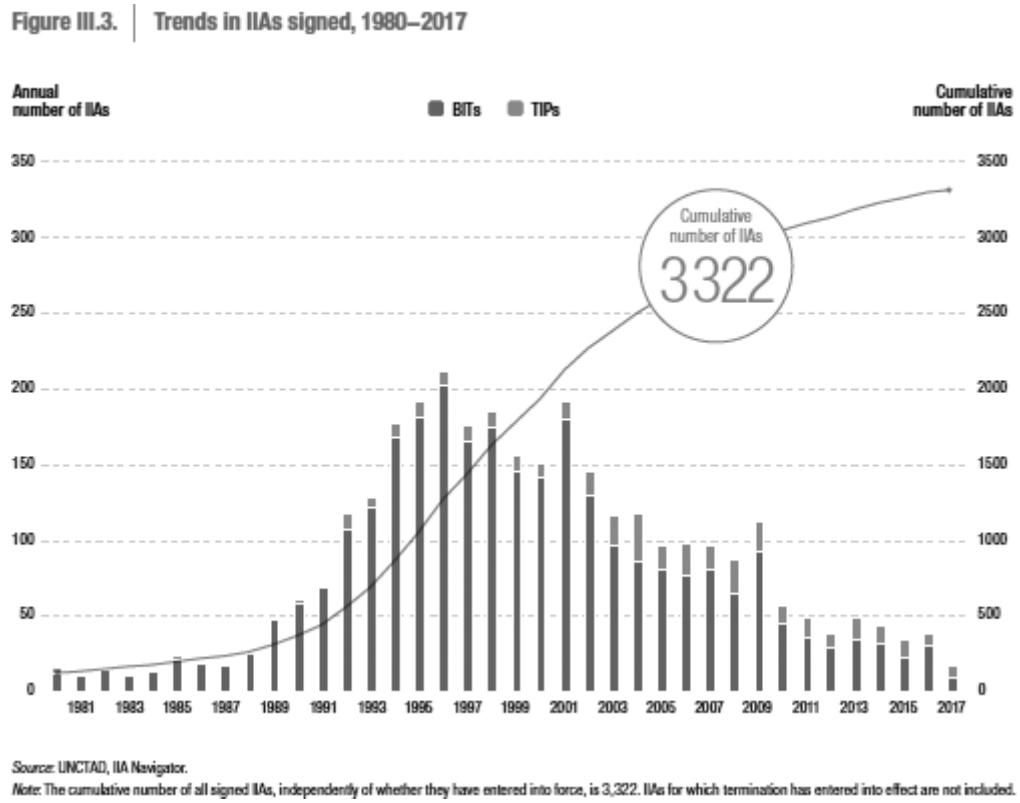
(Source) ICSID, "THE ICSID CASELOAD —STATISTICS (ISSUE 2019-1)", January 2019

WTO Dispute Settlement Body, which has won praise for its performance, have flat lined, while the number of petitions filed with the WTO Dispute Settlement Body was on the decline in the early 2000s when compared to the 1990s.

In comparison to the foregoing trend in the number of petitions of investment arbitration, it seems that there is a greater need for international investment arbitration, which serves as a means for the resolution of disputes between investors and host states, than for the WTO Dispute Settlement Body, which serves as a body for the resolution of disputes between states.

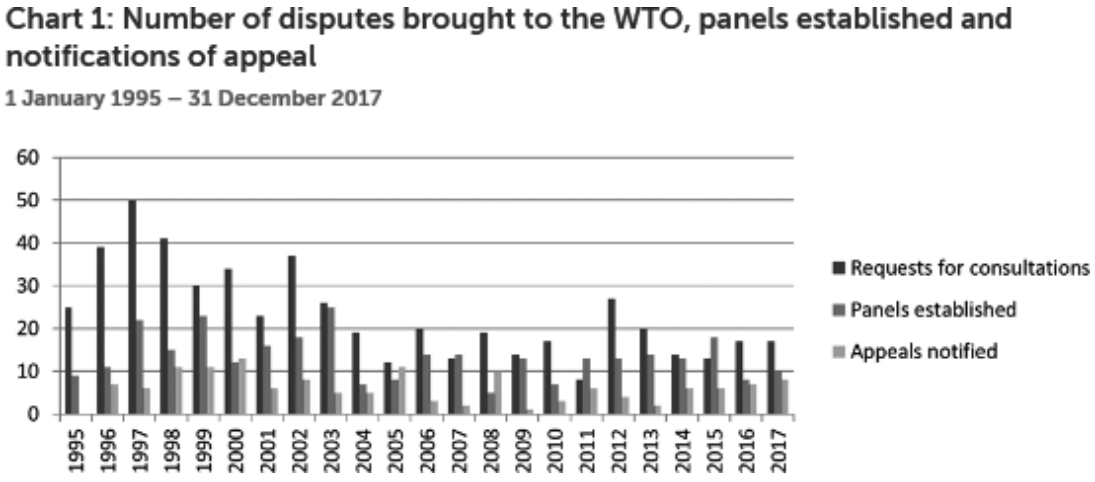
Based thereon, it could be argued that the respective dispute resolution procedures under international investment agreements or regional agreements are capable of complementing and/or replacing the WTO's dispute resolution procedures. This argument is more realistic at present, as doubts are being cast on the WTO Dispute Settlement Agreement which lacks appellate body members.

Fig. 2 Trends in Execution of International Investment Agreements



(Source) UNCTAD, "World Investment Report 2018-Investment and New Industrial Policies", United Nations, 2018, p. 89

Fig. 3 Trends in Number of WTO Disputes, Requests for Consultation, Panels Established, Appeals



(Source) World Trade Organization, Dispute settlement activity-some figures

IV. Issues Confronting the WTO Dispute Settlement Body

The WTO's Multilateral Trade Negotiations (Doha Round) have stagnated and ossified, turning into a long-standing issue, and the wide use and utilization of the WTO Dispute Settlement Body is thought to serve as a factor amid this.

However, this dispute resolution function is at imminent risk. Specifically, four of the seven members of the Appellate Body have resigned, and their vacancies have yet to be filled, leaving only three members. These three members are from the United States, India and China. Of these, two will have their tenure lapse by December 10, 2019, and one will have their tenure lapse by November 30, 2020. This situation has led to increasingly longer trial periods for appeals. Under the DSU Rules, the maximum period from the date a party to the dispute notifies its decision to appeal to the date the Appellate Body circulates its report is 90 days (DSU Article 17, Paragraph 5). However, in recent years the Appellate Body has often reported difficulty in circulating a report in 90 days, and to date, the average number of trial days at the Appellate Body has been approximately 118 days, compared to the approximately 180 days required since 2011.[21]

The appointment of Appellate Body members is stagnating because the United States has refused to grant consensus. Members of the Appellate Body are appointed by the WTO Dispute Settlement Body (DSU Article 17, Paragraph 2), and in principle, decisions on the Dispute Settlement Body (DSB) are made by consensus (DSU Article 2, Paragraph 4). Due to the opposition of the United States, members are not being appointed and the Appellate Body continues to have fewer than the established number of seven members. If three persons were appointed to the Appellate Body, three of the seven members of the Appellate Body would serve on one case (DSU Article 17, Paragraph 1), and if these three were to work at full capacity, they would be able to discharge the function of the Appellate Body. The problem is that once the term of the remaining three members is up, dispute resolution at WTO will be on the brink of ceasing to function.

In withholding consensus, among other things, the United States first argues that the members of the Appellate Body are appointed for four-year terms (DSU Article 17, Paragraph 2), and that allowing a member whose term has lapsed to participate until their cases come to a conclusion constitutes a violation of the DSU. The United States further goes on to assert that a judicial dispute resolution body "goes too far" by serving a legislative function through the issuance of aggressive opinions by Appellate Body members. While the vacancies caused by the United States do not necessarily benefit WTO member states, the United States' opinion is not without reason. In the course of the execution of the WTO Agreement, the United States attached importance to the legislative intent, it held out that the agreement among the WTO member states extended only to the specific language of the

[21] Tsuyoshi Kawase, Junji Nakagawa, Hugo Perezcano Diaz, Keith William Cameron Wilson, Manjiao Chi, Carlos Coelho, Peter Draper, Christopher Findlay, Reforming the WTO AB: Short-term and Mid-term Options for DSU Reform, and Alternative Approaches in a Worst Case Scenario, p. 3, T 20 Japan 2019, March 15, 2019, https://t20japan.org/wp-content/uploads/2019/03/t20-japan-tf8-3-reforming-the-wto-ab.pdf.

agreement, and it was critical of the expansion of the content and language of the agreement beyond the original intent through interpretation. With multilateral agreements like the WTO that involve the participation of multiple states with varying motives, it is reasonable to argue that discretion and reserve should be exercised against the expansion of the provisions of the agreement since the language serves as a common denominator for the member states. On this point, a multinational agreement will fail if a portion of the member states act recklessly.

Such criticism may need to be heeded in the maintenance of the WTO's dispute resolution function.

V. Role of WTO Agreement, Bilateral Agreements and Reginal Agreements in Dispute Resolution Procedures

V-1. State v. State (Mexico-Soft Drink)

We can see that dispute resolution procedures under bilateral or regional agreements are replacing the WTO's dispute resolution procedures in cases where the parties are states, and this may contribute to judicial economy.

In the Mexico-Soft Drink case, certainly the NAFTA provisions did not fully complement the WTO provisions, and it is fully reasonable that individual problems would arise, and individual dispute resolution procedures would exist in line with the intent of these respective agreements.[22] On this point, the WTO panel decision in the Mexico-Soft Drink case upheld not only that the conclusion was consistent with the WTO agreements, but also that this conclusion was reasonable.[23]

Nevertheless, the issues at dispute at the WTO Dispute Settlement Body may also be the issues under NAFTA, and it can be said that the intent of the United States in asserting an unreasonable restraint on trade would serve the same intent for the disputes under either of these dispute resolution procedures. In addition, in the case of this dispute, it was possible that the party nations would be the United States and Mexico in each of these dispute resolution procedures.

In light of these circumstances, in the case of a dispute between states, as long as a similar provision to the provision of the WTO Agreement is included under the regional agreement, it would not be unreasonable to argue that the dispute resolution procedures under the regional agreement should supplement the WTO's dispute resolution procedures which are currently at a standstill.

However, the WTO's dispute resolution procedures are still viewed as significant in cases between investors and states. First, the WTO's dispute resolution procedures remain nec-

[22] NAFTA, Articles 2003-2019, https://www.cbp.gov/trade/nafta

[23] Mexico - Tax Measures on Soft Drinks and Other Beverages (US)(DS302), paras. 7.1-7.18, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds308/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#.

essary in cases where the regional agreement does not fall under the range of covered agreements under the WTO Agreement. Second, in the case of the WTO's dispute resolution procedures, member states are allowed to participate as third parties in consultations and trials for the resolution of disputes. Allowing WTO member states opportunities to broadly voice their opinions serves to reflect a diverse variety of opinions. From the viewpoint of maintaining the order of global trade, this is considered favorable since it serves as a democratizing procedure. Third, the rulings differ in effect. In the case of a bilateral agreement, a ruling is only binding on the two states, and even if the ruling is referred to as precedent in other forums, it is difficult to imagine that it would be cited as reasoning for interpretations in other forums. Conversely, though WTO rulings are only binding upon the two states, they are adopted by the Dispute Settlement Board (DSU Article 16, Paragraph 4, DSU Article 17, Paragraph 14), and accepted by the party states, and if concessions are not put in place based on the recommendations, a party state is able to seek enforcement by requesting authorization from the Dispute Settlement Body (DSB) concerning the concessions (DSU Article 22, Paragraph 2). These procedures are circulated to all member states via the DSB, and the ruling serves as precedent in similar disputes in the future. This sharing of the dispute between party states among all member states leads to it having an effect on, and the results thereof being utilized by, all WTO member states. Fourth, these dispute resolution procedures have their merits. For example, the establishment of procedural rules and limits on the duration of cases heightens foreseeability for party states. Furthermore, the adoption of a two-tier system allows a party state to request an appeal if it is unhappy with the panel ruling. As such, the WTO's dispute resolution procedures are more attractive to party states that have misgivings when only arbitration proceedings are available.

Based on the foregoing, the WTO's dispute resolution procedures still play an independent function and role even if the dispute resolution procedures under regional agreements are found to function to supplement the WTO's dispute resolution procedures.

V-2. Corporation v. State (Philip Morris)

Conversely, the picture differs in cases placing corporations against states. In cases where corporations challenge states, a corporation cannot become a party to the WTO's dispute resolution procedures, and it must work with the government of the petitioning state to utilize these procedures. State governments do not merely represent the interests of a single corporation, and work broadly with industries to decide whether or not to proceed with WTO dispute resolution procedures based on the extent of the effect and damages in a variety of spheres. While a broader, more measured response is preferred, there are instances where these procedures may be impractical for corporations. Under an ISDS Clause, a corporation is able to seek a speedier resolution if this clause allows an investor to file a petition for dispute resolution procedures against the host state.

Nevertheless, this also poses issues: First, only corporations with financial resources are able to petition for arbitration or the like in host states. A major corporation such as Philip

Morris would have been able to sue Australia. Would it have been possible for tobacco companies in Ukraine, Honduras, Dominican Republic, Cuba or Indonesia to file petitions for investment arbitration? These countries instead filed a petition for WTO dispute resolution procedures. Second, major corporations are capable of exerting influence on the sovereignty of host states. In cases such as the Philip Morris case where the issue is a law or regulation related to a policy for the health and safety of citizens, if a corporation that profits from business activities that run contrary to the policy were to petition for arbitration on the basis of a violation of an investment agreement, questions would arise as to whether there exists a level playing field. Third, a host state's measures and regulations may inherently conflict with investment agreements and investors are put at a disadvantage, so the essential issue becomes an issue of form: namely, is allowing corporations, individuals or other investors to bring disputes with states the best method for resolving disputes?

With regard to the third and final point, should not more importance be placed on the possibility of corporations and states to reach a resolution under contract doctrines related to investment (i.e. the doctrine of changing circumstances, etc.) than pitting the parties against each other in arbitration or the like under dispute resolution procedures? Additionally, if a host state's policies go too far, this is not just an issue between corporations and the state, and we should consider the need for an interstate resolution.

I will delve further into this point by looking at the available means for resolution of disputes regarding the Feed-In Tariff (FIT) programs for solar power projects which have recently emerged as issues in a number of states.

VI. Renewable Energy and Dispute Resolution

A number of states are actively seeking to exploit renewable energy. These efforts include shifts in energy policies and require labor and money for the installation of systems that differ from past systems, so states have pushed forward policies for the exploitation of renewable energy to aid in these efforts.

A variety of issues have arisen in the course of these efforts. For example, states have worked to involved local industries in the development of their own renewable energy industries by mandating that a set percentage of procurement for the renewable energy facilities be directed to manufacturers within the state. In response thereto, cases have been brought before the WTO on the issue of whether requiring so conflicts with national treatment, and these include, for example, Canada-Certain Measures Affecting the Renewable Energy Generation Sector (DS412)[24] and Canada-Measures Relating to the Feed-in Tariff Program (DS426).[25]

Specifically, the feed-in tariffs under FIT programs for renewable energy are not estab-

[24] Canada — Certain Measures Affecting the Renewable Energy Generation Sector (DS412), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm.

[25] Canada — Measures Relating to the Feed-in Tariff Program (DS426), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds426_e.htm.

lished in perpetuity and may change for ensuing circumstances, and these circumstances differ according to the extent of the explanations provided by the states. Additionally, investors who have determined events to be unforeseeable have sought investment arbitration.

Japan has also adopted a FIT program and will likewise experience fluctuations in its feed-in tariffs.

VI-1. FIT Overview

A Fit Program for Renewable Energy is a program under which a state commits to the purchase of renewable electricity by power companies at a set price and for a set term. A portion of the power companies' purchase costs are collected from consumers of the electricity in the form of tariffs, which support the introduction of renewable energy that remains expensive at present. According to the explanation of the Agency for Natural Resources and Energy at the Ministry of Economy, Trade and Industry, this program has been enacted for the following purpose:

> This program makes it easier to predict the recovery of high constructions costs for power generating facilities, and advances and heightens the propagation of renewable energy. The propagation of renewable electricity will be effective in improving the rate of Japan's energy self-sufficiency. The increase in energy self-sufficiency will lead to a reduced dependency on fossil fuel, will subdue fluctuations in electricity prices accompanying volatility in fuel prices, and this program is being enacted to the benefit of all electricity users.

Using any of the five types of renewable energy subject to FIT: solar power, wind power, hydropower, geothermal power or biomass power, an entity formulates a business plan that satisfies the requirements stipulated by the state and produces new power pursuant to this plan. While all generated power is purchased, solar power of 10kW or less that is mounted on residential rooves is consumed by the household, and the surplus energy is purchased. The expenses required in the purchase of renewable energy under the FIT program are covered by the renewable energy tariffs widely collected from the users of the electricity. These renewable energy tariffs have the following features:

> They are paid by all users of electricity;
>
> They are part of the electricity rates;
>
> The amount paid is proportionate to the amount of electricity usage;
>
> The unit price of the renewable energy tariff is adjusted so that it is uniform nationwide;
>
> The collected renewable energy tariffs are appropriated to costs of the purchase of electricity by power companies under the purchase program, and ultimately go to the entities that are producing the renewable energy;
>
> The unit price for the renewable energy tariff estimates how much renewable energy will be produced in the year based on the purchase price and the like, and is set each year by the Minister of Economy, Trade and Industry. The difference between

the estimated price and the actual price is adjusted for in the unit price for the renewable energy tariff in ensuing years; and,

The renewable energy purchased under the program is supplied as a portion of the electricity going to consumers, and the renewable energy tariff is paid as a part of their electricity rates. The fuel costs and the like saved by consumers through the purchase of renewable electricity are deducted from the costs required in the purchase of renewable electricity in the calculation of the renewable energy tariff.[26]

Such a FIT program will undergo inevitable modifications from the initial program due to subsequent changes in circumstances. If these modifications were included in the program from the beginning, they would be foreseeable and the stakeholders would not suffer unforeseen damages, but issues arise when they exceed the foreseeability threshold, inviting disputes between investors and states.

VI-2. Modification of FIT Purchase Price

On March 22, 2019, the Ministry of Economy, Trade and Industry determined new pricing for 2019 and onward under the renewable energy FIT program. In 2019, the price for solar power (commercial use) was set at JPY 14/kW, much lower than the prior JPY18/kW as of March 2019. The output subject to the "auction system" where purchases are made sequentially from producers who generate power at lower costs was expanded from the prior 2,000kW or more to include output of 500kW or more, a clear focus on costs.[27]

Table 1 Notice of Determination of Purchase Price for FIT Program

(2) Commercial Solar Power (10kW or more to 500kW or less)
We have determined the purchase price for 2019.

Power Source	Scale	(Reference) 2018 Price	2019 Price
Commercial Solar Power	10kw or more to 500kw or less	JPY18 + Tax	JPY14 + Tax

(3) Commercial Solar Power (500kW or more)
The 2019 purchase price will be determined by auction.

(Source) Ministry of Economy, Trade and Industry, Agency for Natural Resources and Energy, "Determination of Purchase Price / Tariff Unit Price, etc. for 2019 Onward under FIT Program," March 22, 2019

[26] Ministry of Economy, Trade and Industry, Agency for Natural Resources and Energy, Feed-in-Tariff Program, Overview of Program, https://www.enecho.meti.go.jp/category/saving_and_new/saiene/kaitori/surcharge.html.

[27] Ministry of Economy, Trade and Industry, Agency for Natural Resources and Energy, Determination of Purchase Price / Tariff Unit Price, etc. for 2019 Onward under FIT Program, March 22, 2019, https://www.meti.go.jp/press/2018/03/20190322007/20190322007.html.

VI-3. New Correspondence under FIT Program to Non-Operational Commercial Solar Power Generation Projects

In 2018, prior to the price modification, considerable opposition was voiced in public comments to the "Proposed Ministerial Order Partially Revising the Regulation for Enforcement of the FIT Act" regarding the response to non-operational commercial solar power generation projects, which in some instances could have entered investment arbitration. The proposal was revised based on these comments in deciding the response to non-operational projects.

Since the initiation of the FIT program in July 2012, the approval and introduction of commercial solar power projects has rapidly expanded, and lower capital costs and the like have driven down procurement prices to less than one half (falling from JPY 40/kWh in 2012 to JPY 18/kWh in 2018). This rate of decline was much larger than that for other power sources, and is considered to have been significantly distorted by the large number of non-operational projects during the determination of procurement pricing at the time of certification. Specifically, the accumulation of a large number of projects that have yet to commence operations while holding rights to higher prices is thought to have led to (1) a subsequent increase in the national burden, (2) stagnation in new development and cost reductions from remaining non-operational projects, and (3) the suppression of new development from sequestering of grid capacity by the non-operational projects.[28]

In response thereto, the foregoing "Proposed Ministerial Order Partially Revising the Regulation for Enforcement of the FIT Act" established that, "the 2017 procurement price (JPY 21/kWh) shall apply to those non-operating solar power generation facilities of 10kW or greater that obtained the former certification prior to March 31, 2016 and entered into grid connection agreements prior to July 31, 2016, when the receipt date for their application for the commencement of grid connection construction falls between April 1, 2019 and March 31, 2020 (excluding instances where certification of modification of Article 10, Paragraph 1 of the Act is received in or after 2018, and the procurement price for 2018 onward is applied)."[29] It goes on to state that, "the deadline for the submission of an application for the commencement of construction for grid connections with an electricity transmission utility for the receipt of the application for the commencement of grid connection construction prior to the date of enforcement is assumed to be scheduled aiming for around late January 2019."[30]

In other words, a deadline which had never been anticipated under the FIT Act to that time was suddenly established in October 2018, reducing the purchase price to JPY 21/kWh

[28] Agency for Natural Resources and Energy, Response to Mitigation of National Burden for Certified Projects (Non-Operational Commercial Solar Power Generation Projects), December 5, 2018, https://www.meti.go.jp/press/2018/12/20181205004/1812005004-1.pdf.

[29] Ministry of Economy, Trade and Industry, Agency for Natural Resources and Energy, Overview of Laws and Regulations Partially Revising the Regulation for Enforcement of the Act on Special Measures Concerning Procurement of Electricity from Renewable Energy Sources by Electricity Utilities, October 2018, http://search.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000179826.

for permits issued prior to January 31, 2019, if the "application commencement of grid connection construction" has not been commenced.

1617 opinions were submitted in response thereto, the majority of which opposed the proposal due to the unforeseen damages to the industry and the negative effects on investors caused by an insufficient notification period and the retroactive implementation of detrimental changes.[31] Additionally, industry groups and investors also engaged in individual negotiations.

Based thereon, the Agency for Natural Resources and Energy made additional needed revisions while maintaining the general principle. Namely, in principle the proposed revisions would apply to all solar power generation projects of 10kWh or more that acquired FIT program certification between 2012 and 2014 and entered into a grid connection agreement with an electricity transmission utility prior to July 31, 2016, but that do not have a deadline for the commencement of operations and have yet to commencement operations. However, since some of these projects had commenced full-scale development and construction and were expected to be operating in the near term, the current measures (the modification of the applicable purchase price and the establishment of a deadline for the commencement of operations) would not be applied as long as it confirmed through public procedures that full-scale development and construction had actually commenced. Specifically, the standard was set as the receipt of notification of the construction plan under the Electricity Act which is required for the construction of facilities for solar power generation projects of 2MW or more.[32]

You could say that the foregoing "New Response under FIT Program to Non-Operational Commercial Solar Power Generation Projects" is an example that illustrates the rapid responses from investors in public comments, and the government's establishment of a set landing point by revisions addressing these responses. In other words, it is likely a good example of how investors and states should anticipate disputes, and engage in negotiations to resolve the issues at an early stage. First, I want to emphasize that disputes could be prevented in advance through negotiations between investors and states.

At the same time, however, it could be argued with regard to the proposal of sudden modification measures such as in this proposed ministerial order, that investors could first deter the government from the modifications based on a suffering of unforeseen damages, but then the issue would shift to the remedies available if the modifications are put in place.

While the issue seems to have calmed down for the time being, in light of the aforemen-

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[30] Ministry of Economy, Trade and Industry, Agency for Natural Resources and Energy, Overview of Laws and Regulations Partially Revising the Regulation for Enforcement of the Act on Special Measures Concerning Procurement of Electricity from Renewable Energy Sources by Electricity Utilities, October 2018, http://search.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000179826.

[31] Ministry of Economy, Trade and Industry, Agency for Natural Resources and Energy, Results of Public Comment on Overview or Proposed Ministerial Order, etc. Partially Revising the Regulation for Enforcement of the Act on Special Measures Concerning Procurement of Electricity from Renewable Energy Sources by Electricity Utilities, December 21, 2018, http://search.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000181268.

[32] Agency for Natural Resources and Energy, New Response under FIT Program to Non-Operational Commercial Solar Power Generation Projects (Revisions), December 5, 2018, https://www.meti.go.jp/press/2018/12/20181205004/1812005004-2.pdf.

tioned price change and future modifications to the program, I believe it would be meaningful to look at the supplementary function of dispute resolution procedures, the theme of this treatise, based on overseas precedent, with regard to such renewable energy related disputes.

VI-4. Overseas Precedent Involving FIT

Petitions for the investment arbitration under FIT have already been filed overseas. I wish to now explore whether these cases can also serve as guidelines for the future resolution of issues in Japan.

The FIT program is an interim step for increasing the propagation of renewable energy (not a permanent program), which will inevitably be abolished in the long-term. As such, structurally, this program harbors the risk of provoking investment disputes.[33]

VI-4-1. Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain, ICSID Case No. ARB/14/1

In this case, Masdar Solar & Wind Cooperatief U.A. based in the Netherlands (Masdar) filed a petition for arbitration against the government of Spain with the International Centre for Settlement of Investment Disputes (ICSID), upholding damages by Spain.[34]

In a case filed by Masdar, a corporation established in the Netherlands, on May 16, 2018, the ICSID arbitral tribunal affirmed that Spain had breached its obligation to afford the fair and equitable treatment (FET) prescribed in Article 10(1)[35] of the Energy Charter Treaty (ECT).

(Factual Background)

Royal Decree No. 661/2007 (RD661/2007) is one iteration of investment stimulation policy for Spain's renewable energy sector, under which renewable energy generators are entitled to enjoy premium pricing over and above the wholesale market pricing. The stable adoption of a FIT mechanism throughout the facility installation period serves as the basis for subsidiaries to generators. Article 44.3 of RD661/2007 prohibits subsequent revisions of the FIT mechanism that affect facilities registered prior to January 1, 2012.

According to Masdar's claims, Spain abolished the RD661/2007 legal system and introduced a less preferential legal system through the series of measures at issue in this case implemented between 2012 and 2014, and applied this system to facilities installed under the

[33] Dai Tamada, Legal Issues in Renewable Energy Feed-in-Tariff Program -Points of Dispute in Investment Agreement Arbitration-, p. 3, Research Institute of Economy, Trade and Industry, October 2017.

[34] Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain, ICSID Case No. ARB/14/1; https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf

[35] Energy Charter Treaty (ECT) Article 10.1: Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations (footnote omitted). Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party (footnote omitted).

RD661/2007 legal system.

Masdar had invested in three concentrated solar power (CSP) plants in accordance with RD611/2007. It alleged that its investment was affected by these measures, and Masdar filed a petition for arbitration based on Spain's breach of its obligation to afford the FET of Article 10(1) of the ECT. Masdar also sought compensation of all damages suffered up through restitution, and the compensation of the full amount of damages for investment in the form of full restitution by re-establishing the situation which existed prior to Spain's breach of the ECT.

(Dismissal of Spain's Jurisdictional Objections)

In objecting to the arbitral tribunal's personal jurisdiction (*ratione personae*), Spain alleged that Masdar's action must be attributed to the UAE, which is not a party to the ECT. As well, Spain alleged that because the dispute at issue is a bilateral dispute, neither the requirements of Article 26[36] of the ECT, nor those of Article 25[37] of the Convention on the Settlement of Investment Disputes Between States and Nationals and Other States (ICSID Convention) had been met. The arbitral tribunal rejected Spain's objections because Spain failed to submit evidence supporting government control, and because it had already been held that Masdar did not have governmental authority.

With its objection to subject matter jurisdiction (*ratione materiae*), Spain contented that Masdar has no "investment" in Spain for the purposes of Article 1(6)[38] of the ECT and Article 25 of the ICSID Convention. The arbitral tribunal held that a substantial number of recent awards (*Abaclat v. Argentina*,[39] *GEA Group Aktiengesellshaft v. Ukraine*,[40]*and Others*) have considered that the term "investment" has an inherent meaning, which an alleged investment must meet in addition to falling into one of the categories of assets generally mentioned in BITs. Essentially, the arbitral tribunal determined that Masdar had met "investment" within the scope of the meaning in the foregoing precedent, on the thinking that the clarification of the meaning of the term "investment" under Article 1(6) of the ECT formed a part of the interpretation of this provision.

Relying on the Spanish language version and Italian language version of the ECT, Spain

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[36] ETC Article 26: (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

[37] ICSID Agreement: Article 25

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

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

alleged that Article 17[41] of the ECT stipulated that an investor must maintain substantial business activities in the host state. Spain objected to jurisdiction (consent, *ratione voluntatis*) and alleged that Masdar had not met the criteria since it existed in the Netherlands. The arbitral tribunal rejected the objection for lack of evidence.

With regard to objections concerning a "tax on the value of the production of electricity of a direct and real nature," Spain alleged that the levy is a true tax, and alleged that exemption of tax under Article 21(1)[42] should be applied. The arbitral tribunal agreed, and conclude that it did not have jurisdiction over petitions arising from the imposition of taxes.
(The *Achmea* case does not apply to multilateral international treaties to which the EU is party.)

Finally, Spain objected that Article 26 of the ECT does not apply to an intra-EU dispute. Namely, that Masdar is a Dutch corporation and, as such, EU law prevails over the ECT. The arbitral tribunal concluded that none of the provisions of the ECT exclude intra-EU disputes from its range, and that EU law is not incompatible with the investor-State arbitration provisions stipulated in the ECT. The two legal orders can be applied together with regard to the arbitration at issue. This is because only the ECT deals with investor-State arbitration, and nothing in EU law can be interpreted as precluding investor-State arbitration under the ECT and the ICSID Convention.

With the judgement rendered on 6 March 2018 by the Court of Justice of the European Union in *Slovak Republic v. Achmea BV* case (Achmea Judgement),[43] Spain then requested the arbitral tribunal reopen arbitration. Spain alleged that the Achmea Judgement allowed

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[38] ETC Article 1(6): "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
(d) Intellectual Property;
(e) Returns;
(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.
A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.
"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

[39] https://www.italaw.com/cases/35

[40] https://www.italaw.com/cases/478

[41] ECT Article 17: Each Contracting Party reserves the right to deny the advantages of this Part to:
(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised.

[42] ETC Article 21(1): Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.

[43] https://www.iisd.org/itn/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit/.

objections regarding intra-EU disputes and requested that this judgment be included in the record. Nevertheless, the arbitral tribunal thereupon found that the Achmea Judgment applied to bilateral investment agreements but not to multilateral treaties to which the EU was party.[44]

(Fair and Equitable Treatment under Article 10(1)[45] of the ECT)

The breach of the obligation to afford fair and equitable treatment became the core dispute in this arbitration case. According to the allegations of Masdar, the legal system at issued in the case was introduced to the framework of the legal system under RD611/2007 and removed the promised stability which served as the basis for Masdar's investment. Relying on *Charanne v. Spain* (*Charanne*),[46] Spain alleged that the stabilization provisions offered in general legislation, or political announcements, like press releases and others, cannot create legitimate expectations.

The arbitral tribunal confirmed that under this analysis a state holds the undisputed freedom to amend its legislation. The arbitral tribunal then held that absent explicit undertakings directly extended to investors, fair and equitable treatment does not include economic and judicial stability, and foreign investors legally have no expectation thereof.[47] Nevertheless, the arbitral tribunal cautioned that such right was not subject to restrictions.

In examining whether or not Spain had violated investors' legitimate expectations, the arbitral tribunal looked at the two schools of thought deployed under *Charanne*. The majority opinion under this case adopted the school of thought that only a specific commitment forms a legitimate expectation. Meanwhile, the dissent found that if investors rely on general legislation as the basis for their legitimate expectations, they must demonstrate that they exercised appropriate due diligence to familiarized themselves with the legal system. Namely, such school of thought considers that general legislation may serve as the basis for legitimate expectations if due diligence has been exercised, even if there is no specific commitment.

The arbitral tribunal in *Masdar* affirmed that the investor had exercised the due diligence required to understand the legal system and had filed a petition for a legitimate expectation based on general legislation. The arbitral court held that the majority opinion in *Charanne* was not binding and that there was no need to examine the existence of a specific commit-

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[44] Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain, ICSID Case No. ARB/14/1, para. 679, https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf.

[45] ETC Article 10(1): Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe 39 Final Act of the European Energy Charter Conference, Declaration 4.55 Energy Charter Treaty any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

[46] *Charanne v. Spain*; https://www.italaw.com/cases/2082.

[47] Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain, ICSID Case No. ARB/14/1, para. 485, https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf.

ment, but went on to affirm that a specific commitment existed in the form of a decision specifically issued by Spain to each and every company doing business.[48]

Affirming that there are general commitments and specific commitments, and that both form legitimated expectations, the arbitral tribunal refused to select either of the schools of thought, and affirmed that Spain had violated the fair and equitable treatment prescribed in Article 10(1) of the ECT.

(Ruling and Costs)

The arbitral tribunal ruled that Spain had violated the criteria for fair and equitable treatment pursuant to Article 10(1) of the ECT, and that *Masdar* was entitled to the award of full compensation. Upon acknowledging that the revival of the RD611/2007 legal system would have a significant impact upon Spain's legal authorities, the arbitral tribunal ordered Spain to pay damages and pre-decision delay damages of EUR 64.5 million.

VI-4-2. Issues with Japan's FIT Program in View of Masdar

If we examine the modifications to Japan's FIT program in line with the Masdar case, where the home state of an investor has executed an international investment agreement with Japan and that agreement contains an ISDS Clause or the like, a general commitment as well as a specific commitment with a renewable energy investor likely exists between the Japanese government and the investor, if there is a violation of the general commitment as well as the specific commitment, most likely it would be possible to assert a violation of fair and equitable treatment both under the majority opinion and dissenting opinion of Masdar.

If you look at this specifically, under Japan's program, the unit price for the renewable energy feed-in tariff (FIT) estimates how much renewable energy will be produced in the year based on the purchase price and the like, is set each year by the Minister of Economy, Trade and Industry, and the difference between the estimated price and the actual price is adjusted for via the unit price for the renewable energy tariff in ensuing years. As such, there is no general commitment or specific commitment between the Japanese government and investors that the pricing in each year will be maintained at the purchase price in preceding years. Accordingly, it is difficult to imagine that a violation of fair and equitable treatment could be upheld or alleged based solely on the fact that the 2019 purchase price is less than the 2018 purchase price.

On the other hand, the new correspondence to non-operating commercial solar power projects under the FIT program is a somewhat different matter. As stated above, Proposed Ministerial Order Partially Revising the Regulation for Enforcement of the FIT Act" established that, "the 2017 procurement price (JPY 21/kWh) shall apply to those non-operating solar power generation facilities of 10kW or greater that obtained the former certification prior to March 31, 2016 and entered into grid connection agreements prior to July 31, 2016, when the receipt date for their application for the commencement of grid connection con-

[48] Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain, ICSID Case No. ARB/14/1, para. 520, https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf.

struction falls between April 1, 2019 and March 31, 2020 (excluding instances where certification of modification of Article 10, Paragraph 1 of the Act is received in or after 2018, and the procurement price for 2018 onward is applied)."[49] It goes on to state that, "the deadline for the submission of an application for the commencement of construction for grid connections with an electricity transmission utility for the receipt of the application for the commencement of grid connection construction prior to the date of enforcement is assumed to be scheduled aiming for around late January 2019."[50]

In other words, a deadline which had never been anticipated under the FIT Act to that time was suddenly established under the FIT Act, and assuming that there is a "general commitment" to not establish a specific deadline if the period up to that deadline is too short, in theory there could be violations of this general commitment. Furthermore, if this is disclosed in some form or another to an investor who has already commenced full-scale development and construction, assuming that there is a "specific commitment" with the investor not to reduce the purchase price if a shorter deadline is suddenly established and the investor cannot meet that deadline, it is not entirely unreasonable to consider this to also to be a violation of a specific commitment. However, absent special circumstances such as notification of the decision in line with the foregoing situation, a theoretical construct would be required to demonstrate the "specific commitment."

Based on the foregoing examination, it is difficult to imagine that the mere reduction of the purchase price would constitute a violation of fair and equitable treatment, however it is still possible that the reduction of the purchase price when a shortened deadline is established for the timing of "an application for the commencement of grid connection construction" and this deadline not being met, could be disputed by arbitration based on a violation of fair and equitable treatment. Perhaps the revisions proposed by the Japanese government were also significant in the avoidance of such circumstances.

VI-4-3. Charanne and Construction Investments v. Spain, SCC Case No. V062/2012

I will now provide an overview of the Charanne case[51] which is cited in the Masdar arbitration decision and relied on by Spain in the Masdar arbitration.

The petitioners in this case are Charanne B.V., a Dutch corporation, and Construction Investments S.A.R.L., a Luxembourg corporation. These two companies respectively held a 18.6583% interest and 2.8876% interest in Grupo T-Solar S.A. (T-Solar) registered in Spain. T-Solar owned 34 solar power generation facilities. On May 7, 2012, the petitioners filed for arbitration against Spain seeking USD 10 million in compensation for losses incurred due to

[49] Ministry of Economy, Trade and Industry, Agency for Natural Resources and Energy, Overview of Laws and Regulations Partially Revising the Regulation for Enforcement of the Act on Special Measures Concerning Procurement of Electricity from Renewable Energy Sources by Electricity Utilities, October 2018, http://search.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000179826.

[50] Ministry of Economy, Trade and Industry, Agency for Natural Resources and Energy, Overview of Laws and Regulations Partially Revising the Regulation for Enforcement of the Act on Special Measures Concerning Procurement of Electricity from Renewable Energy Sources by Electricity Utilities, October 2018, http://search.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000179826.

[51] *Charanne and Construction Investments v. Spain*, SCC Case No.V 062/2012, https://www.italaw.com/cases/2082.

decreed measures adopted by Spain under the 1994 Energy Charter Treaty (ECT). In 2007 and 2008 Royal Decrees 661/2007 and 1578/2008 established a general feed-in tariff system (FIT system) under to pay solar power generation facilities that supplied electricity to the general grid to reduce the need for traditional energy production. The general FIT system was modified in 2010, and Spain adopted two decrees negatively impacting the circumstances at the petitioners. Royal Decree 1565/2010 eliminated the power producer's 26-year (later extended to 30 years) price guarantee and sought the introduction of a maintenance system for the general grid so that power producers would not suffer reduced voltage. Legislative Decree 14/2010 limited the maximum hours for transmitting electricity on the general grid and assessed charges for access to the distribution grid. The petitioning companies alleged that these two decrees constituted an indirect expropriation of their investments in T-Solar and violated the obligation to afford fair and equitable treatment, and that Legislative Decree 14/2010 infringed on an effective right of recourse.

The arbitral tribunal held that the foregoing measures at issue caused a certain extent of damages to the petitioners, but threw out the expropriation claim since there was insufficient evidence demonstrating that these measures were tantamount to expropriation.[52] Additionally, with regard to the violation of fair and equitable treatment, the arbitral tribunal held first that the petitioners are required to have a legitimate expectation that the legal framework as of the time of investment would not be revised or modified by subsequent rules, and that absent a specific commitment, there is a legitimate expectation that Royal Decree 661/2007 and Royal Decree 1578/2008 would be frozen in place without modification.[53] It went on to hold that even in such instances, there may be a legitimate expectation that the revision is not be unreasonable, arbitrary, contrary to public interest or disproportionate, but then affirmed that the revisions at issue did not violate such a legitimate expectation.[54]

VI-4-4. Issues with Japan's FIT Program in View of Charanne

If the modifications to Japan's FIT program are examined in line with the Charanne case, like with Charanne, it is unlikely that the modifications to the FIT program are tantamount to expropriation.

As to the issue of a violation of fair and equitable treatment, first, regarding the question of whether there is a legitimate expectation that the legal framework as of the time of investment would not be revised or modified by subsequent rules, from its initiation the program stipulated that there would be price modifications. Additionally, regarding the new response under the FIT program to non-operating commercial solar power projects, it is unlikely that there were expectations of a perpetual deadline for operations, and in any event, it is unlikely that there was a legitimate expectation that there would be no revisions or modifications.

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[52] Charanne and Construction Investments v. Spain, SCC Case No.V 062/2012, para. 467, https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf.

[53] *Charanne and Construction Investments v. Spain*, SCC Case No.V 062/2012, paras. 476-511, https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf.

[54] *Charanne and Construction Investments v. Spain*, SCC Case No.V 062/2012, para. 511-542, https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf.

Next, we will examine the question of whether the modifications are unreasonable, arbitrary, contrary to public interest or disproportionate. With regard to price modifications, the renewable energy FIT unit price estimates, in advance, how much renewable energy will be introduced in the year based on the purchase price and the like, and is set each year by the Minister of Economy, Trade and Industry. The difference between the estimated price and the actual price is adjusted for in the unit price for the renewable energy tariff in ensuing years. Accordingly, it is difficult to label a modification of pricing in line with these rules as unreasonable, arbitrary, contrary to public interest or disproportionate. Conversely, in light of the language of the aforementioned "New Correspondence under FIT Program to Non-Operational Commercial Solar Power Generation Projects," the new correspondence to non-operating commercial solar power projects under the FIT program suddenly established a deadline for "applications for the commencement of grid connection construction" only a few months prior to that deadline, and could be found to be unreasonable, arbitrary, contrary to public interest or disproportionate. In consideration of this point, and as mitigation measure to reduce the likeliness of disputes, the government likely added the measure stating that the current measures (the modification of the applicable purchase price and the establishment of a deadline for the commencement of operations) would not be applied as long as it confirmed through public procedures that full-scale development and construction had actually commenced.

VI-5. Issues in the Resolution of Disputes in Renewable Energy Cases

As examined above, how standards are establish and how judgements are rendered may differ from arbitral tribunal to arbitral tribunal in similar FIT cases, and the conclusions can fall on either side. This is truly a case-by-case situation. Even with the correspondence to non-operating projects under the Japanese FIT program, the extent of the construction commenced by individual investors and the degree of evidence determines whether or not a revision of laws or regulations is applied.

We should not disavow the value of case-by-case decisions. However, this gives rise to situations where those investors who have the time and money required to resolve a dispute are able to bring disputes, while those without these means are forced to cry themselves to sleep. Additionally, it invites the disproportionate application of laws that should be applied equitably when the dispute resolution function is involved. As concluded in the Masdar case, individual investors experience considerably different consequences when a dispute is resolved through the payment of damages rather than the abolishment or reinstatement of laws or regulations.

As such, it is important to rely on state vs. state dispute resolution procedures in such cases. Namely, it will always be important to engage in negotiations between an investor's home state and its host state that take into consideration not just a specific investor but all investors.

Also, whether between an investor and a state or between a state and a state, dispute res-

olution procedures should not be limited to the filing of petitions or actions with arbitral tribunals, the WTO or other dispute resolution bodies, but rather negotiations, settlements and other procedures prior or parallel thereto can be thought to grow in increasing importance. As addressed above, the strong performing dispute resolution function at the WTO was put at risk by vacancies at its Appellate Body, and in the midst of this, resolutions by negotiation and resolutions by settlement have greatly increased in importance.

The illustration of the revised establishment of a set landing point through the public comments in the new correspondence to non-operating projects in Japan's FIT program should serve as a reference. Talks between party states based on the provisions or intent of laws or regulations, the provisions or intent of treaties, or the provisions or intent of agreements will only grow in importance in the future as the most basic and efficient manner for resolving disputes.

Namely, by leveraging international investment arbitration or the WTO's dispute resolution function as the last bastion, the parties should increase their efforts to seek out the ideal terminus through negotiations, and the interpretation of agreements and treaties to reach an early resolution that benefits both parties. This is because no matter what the third-party experts say, real interests are involved, and party who has suffered damages earnestly desires an early resolution.

It goes without saying that the intent of negotiations and settlements is simply that we do not regress to having dispute resolutions by diplomatic power politics as existed prior to the conclusion of the WTO Agreement. In this sense as well, dispute resolution procedures remain important for just, reasonable and equitable resolutions and for settlements between the parties. During the era of WTO's predecessor GATT, a consensus of all member states was required to adopt a panel report, and there exists an opinion that this may have served as an incentive to settlements.[55] Unquestionably, the settlement incentive has waned under the WTO, which in effect engaged in the automatic adoption of panel reports, but with the WTO's dispute resolution function at risk, it is time to reconfirm the necessity of settlements.

VII. Significance of Dispute Resolution Procedures in Plurilateral Regional Trade Agreements (CPTPP, etc.) - Differences with Bilateral Investment Agreements

Disputes among states and disputes between investors and states cannot fully be resolved solely by international investment arbitration, and the dispute resolution function of the WTO Dispute Settlement Body and other bodies pursuant to multinational treaties is still considered to be significant.

[55] "[T]he need for consensus to adopt panel reports gave disputing parties the incentive to pursue mutually agreed solutions." Robert McDougall, Impasse in the WTO Dispute Settlement Body: Consequences and Responses, European Centre for International Political Economy, No. 11/2018, p. 3, https://ecipe.org/wp-content/uploads/2018/12/ECI_18_PolicyBrief_WTO_11-2018_LY06.pdf.

That being said, what is the significance of dispute resolution procedures under the CPTPP, the EU and other plurilateral regional trade agreements, and more specifically, what is the significance of establishing a dispute resolution body under plurilateral regional trade agreements separate from those under multinational agreements such as the WTO Agreement, which has approximately 200 members, and bilateral investment agreements?

This is conspicuous in a situation such as we have at present were negotiations regarding the WTO' rules have reached an impasse. Namely, since the execution of the WTO Agreement, negotiations on the revision of the rules have failed to advance, and under these circumstances, the states have entered into regional trade agreements with individual states or a plurality of states. At present, a total of 312 regional trade agreements have taken effect under the WTO[56] (*see* Fig. 4).

The following five regional trade agreements are the most recent agreements notified to the WTO (*see* Table 2), and Japan is a party to two of these agreements (Japan-EU EPA and CPTPP).

Under these regional trade agreements, we can imagine cases where the agreements promote more freedom than the WTO Agreement, and cases where a violation of these agreements may constitute a violation of an individual regional trade agreement even if it is not directly a violation of the WTO Agreement. Additionally, as for the means of dispute resolution, there are cases where the WTO's dispute resolution procedures are slated as one option, but many of the regional trade agreements stipulate other options. These include NAFTA (currently USMCA), CPTPP and the Japan-EU EPA, where we can find the significance of having dispute resolution procedures separate from the dispute resolution procedures under bilateral investment agreements or the WTO's dispute resolution procedures.

Some regional trade agreements also include ISDS Clauses. For example, the Free Trade Agreement between the United States of America and the Republic of Korea (KORUS FTA)[57] contains an ISDS Clause,[58] but this has been criticized as a poison pill clause, and became a point of contention in the negotiation of the TTP Agreement. Some regional trade agreements with ISDS Clauses also contain separate procedures for disputes between states to address disputes other than investment disputes, and often the WTO's dispute resolution procedures are included as an option. Under the KORUS FTA, the dispute resolution procedures under the KORUS FTA and the WTO's dispute resolution procedures are both allowed as options for disputes between the parties, and it is stipulated that once a selection is made, the forum selected shall be used to the exclusion of the other fora.[59]. In addition, the aforementioned NAFTA allowed for the selection of either GATT's or NAFTA's independent dispute resolution procedures.[60]

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[56] WTO, List of All RTAs, https://rtais.wto.org/UI/PublicAllRTAList.aspx.

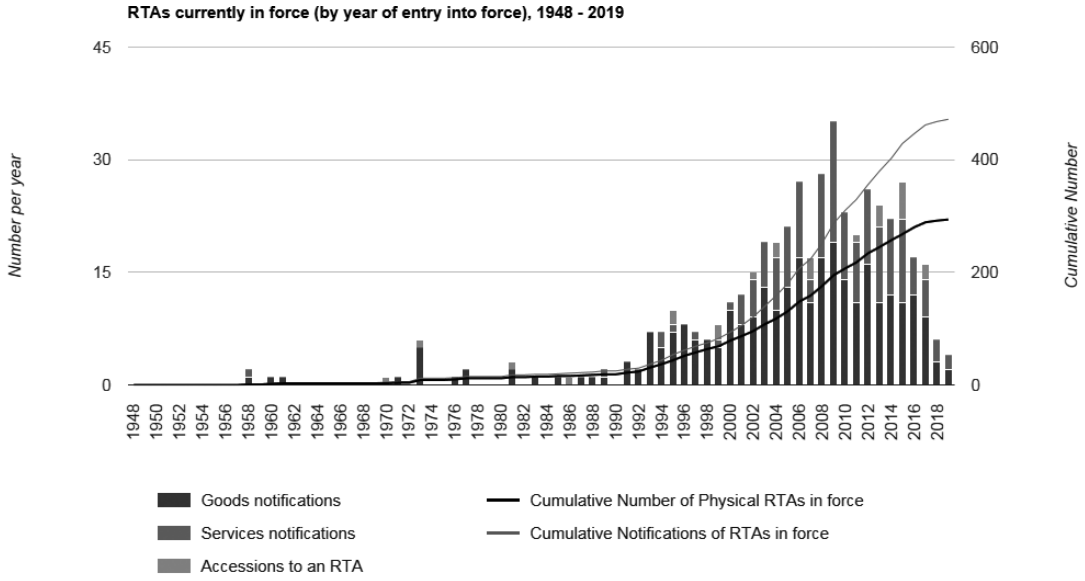
[57] KORUS FTA, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.

[58] KORUS FTA, Chapter 13, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/Chapter_Eleven_Investment.pdf

[59] KORUS FTA, Article 22.6, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file973_12721.pdf.

[60] NAFTA Article 2005, https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-AmericanFree-Trade-Agreement?mvid=1&secid=ed3bd8c9-2d73-45fb-9241-d66364f8037a#A2005. http://www.sice.oas.org/Trade/NAFTA/CHAP-201.ASP

Fig. 4 Trends in Number of Regional Trade Agreements (RTA) in Force



Note: Notifications of RTAs: goods, services & accessions to an RTA are counted separately. Physical RTAs: goods, services & accessions to an RTA are counted together. The cumulative lines show the number of notifications/physical RTAs currently in force.

Source: WTO Secretariat - April 30, 2019

(Source) WTO[61]

Table 2 Regional Trade Agreements (RTA) Recently Notified to WTO

Recent Notifications			
RTA Name	**Coverage**	**Date of notification**	**Date of entry into force**
Southern Common Market (MERCOSUR) - Israel	Goods	Mar 29 2019	Dec 23 2009
Hong Kong, China - Georgia	Goods & Services	Feb 12 2019	Feb 13 2019
EU - Japan	Goods & Services	Jan 14 2019	Feb 1 2019
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	Goods & Services	Dec 20 2018	Dec 30 2018
EFTA - Philippines	Goods & Services	Oct 26 2018	Jun 1 2018

(Source) WTO[62]

[61] WTO, Welcome to the Regional Trade Agreements Information System (RTA-IS), https://rtais.wto.org/UI/charts.aspx.
[62] WTO, Welcome to the Regional Trade Agreements Information System (RTA-IS); https://rtais.wto.org/UI/charts.aspx

The proliferation of these various dispute resolution procedures risks a "spaghetti bowl" type state of affairs, but there is commonality in the forums selected by the various agreements, and it also produces an environment where the accumulation of arguments in the many forums available as options, including the WTO Dispute Settlement Body, ISCID, UNCITRAL, etc., are mutually instrumental[63,64]. Namely, precedent is mutually cited and referred to through the Statute of International Court of Justice[65] Article 38, Paragraph 1[66] and ICSID Agreement Article 42. We also see harmony being achieved in how international

[63] "It is well known that, just as the ICJ, ICSID tribunals are not bound by the rule of *stare decisis*. From a bird's eye view, ICSID tribunals use case law, as does any other international court or tribunal. Like the ICJ,(16) the International Tribunal for the Law of the Sea,(17) the panels and the Dispute Settlement Body (DSB) of the WTO,(18) the regional courts of human rights,(19) criminal courts or tribunals,(20) ICSID tribunals and investment tribunals in general refer to 'judicial decisions' as 'subsidiary means for the determination of rules of law' according to the famous formula of Article 38(1)(d) of the Statute of the International Court of Justice to which Article 42(1) of the ICSID Convention(21) implicitly refers.(22)" Alain Pellet, The Case Law of the ICJ in Investment Arbitration, ICSID Review - Foreign Investment Law Journal, Volume 28, Issue 2, Fall 2013, Pages 223–240, September 4, 2013, https://doi.org/10.1093/icsidreview/sit022.

(16) Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (Judgment) General List No 75 [1992] ICJ Rep 589–601, paras 386–404. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 131–4, paras 214–223 and 209, para 403; and Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), (Merits: Judgment) [2010] ICJ Rep 663–4, paras 64–8.

(17) Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) (Judgment, 14 March 2012) ITLOS Case No 16, para 184.

(18) US—Stainless Steel (Mexico), Appellate Body Report 30 April 2008 (adopted on 20 May 2008) WT/DS344/AB/R, 65–8, paras 154–62.

(19) Cossey v The United Kingdom, ECtHR App No 10843/84 (1990) Series A, Vol 184, para 35.

(20) Prosecutor v Kupreškic, ICTY, Case No IT-95-16-T, Judgment (14 January 2000) para 540. See also Prosecutor v Zlatko Aleksovski, ICTY, Case No IT-95-14/1-A, Appeal Chamber, Judgment (24 March 2000) paras 89–114 (see also paras 122–36 and 137–46).

(21) See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) para 40. 'The term "international law" as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.'

(22) In an Award of 22 June 2010, an ICSID Tribunal noted that: 'While Article 38.1.d. of the Statute of the International Court of Justice expressly mandates the Court to also take into account "judicial decisions," there is no such express rule either in the ECT, the ICSID Convention or other applicable part of international law as to whether, and if so to what extent, arbitral awards are of relevance to the Tribunal's task'. See Liman Caspian Oil (n 5) para 172.

[64] "The decisions of investment treaty arbitral tribunals are proving to be essential in establishing the modern international law of investment. Given the paucity of detail in the international investment treaties to which states have adhered, it is inevitable that the meaning and contours of the legal standards in those treaties will be defined and clarified in arbitral decisions. The actual compilation of a generally accepted set of standards will be an accretive process developed little by little as tribunals make decisions in individual cases, and as those decisions are tested by other tribunals, by publicists and international organizations, and by the states themselves. Gradually one may expect the institution of a jurisprudence constante, and the emergence of key decisions that are judged to be the influential starting points from which further analysis should flow." Bjorklund, Andrea, Investment Treaty Arbitral Decisions as Jurisprudence Constante (December 23, 2008). UC Davis Legal Studies Research Paper No. 158. Available at SSRN: https://ssrn.com/abstract=1319834 or https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319834

[65] Article 42 (1) of the ICSID Convention:

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

[66] Article 38 (1) of the Statute of International Court of Justice:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

law is interpreted, as arbitral tribunals, the courts and other tribunals mutually refer to the interpretations of the clauses of the Vienna Convention on the Law of Treaties which governs the interpretation of treaties.

VIII. Desirable Future Aims and New Proposals

Under the foregoing examination, I have argued that even though international investment arbitration and dispute resolution procedures under plurilateral regional agreements are useful tools for the parties to the treaties and agreements serving as the basis therefor, they cannot simply replace the WTO's dispute resolution procedures, but are useful as a supplementation thereof, and as such, efforts should be made to preserve the WTO's dispute resolution function.

Additionally, in terms of time and money, I have also proposed that the function of these dispute resolution procedures should be heightened in their serving as last bastion leverage, so that the parties seek a resolution through negotiations or settlements at stages prior thereto.

This may serve as a breakthrough policy that leads to future improvements in light of the current circumstances where the WTO's dispute resolution function is under threat.

That being said, what are the solutions available as alternative plans if the WTO's dispute resolution function falls into complete disarray due to Appellate Body vacancies or the like?

VIII-1. Proposal on Replacement with Arbitration of DSU Article 25

Last year, member states of the WTO proposed arbitration under DSU Article 25[67] as a substitute if the WTO's dispute resolution procedures become dysfunctional.[68,69]

The arbitration of DSU Article 25 is allowed as "an alternative means of dispute resolution" under Paragraph 1, and as such it is considered appropriate as an alternative if dispute resolution becomes dysfunctional.

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[67] DSU Article 25 Arbitration
1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual amendment of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceedings shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

[68] William Alan Reinsch, Jack Caporal, Article 25: An Effective Way to Avert the WTO Crisis?, the Center for Strategic and International Studies, January 24, 2019, https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis.

[69] Bashar H. Malkawi, Can Article 25 Arbitration Serve as a Temporary Alternative to WTO Dispute Settlement Process?, January 5, 2019, http://arbitrationblog.kluwerarbitration.com/2019/01/05/can-article-25-arbitration-serve-as-a-temporary-alternative-to-wto-dispute-settlement-process/.

In a comparison of the DSU dispute resolution procedures, arbitration under DSU Article 25 requires an agreement among the parties (DSU Article 25, Paragraph 2), and the dysfunction of the dispute resolution procedures will not be resolved if the parties cannot come to an agreement. However, the dysfunction of the WTO could be prevented by reaching an agreement among all member states prior the WTO's dispute resolution procedures falling into dysfunction. Additionally, if such an advance agreement is formed among all the member states, they might best also take steps to prevent the dysfunction of the dispute resolution procedures in individual cases by combining an agreement or constructive agreement that provide that the agreement of the parties is not required for individual disputes.

Such a proposal is similar in its direction to the conclusion of this treatise that efforts should be made to reach a resolution through negotiations or settlements prior to delving into the existing dispute resolution procedures, and would not impair the intent and import thereof from extending to the examined renewable energy disputes as well.

The question is whether or not an agreement can be reached among all the WTO member states. At present, this is hard to imagine since the United States is spearheading discontent with the WTO's dispute resolution procedures. However, if delays in the cases pending in the WTO Dispute Settlement Body cause global trade to come to a standstill, the WTO member states will have to reach an agreement. If the arbitration of DSU Article 25 becomes a similar system to the current WTO Dispute Settlement Body, in particular the Appellate Body, it will likely be difficult to gain the consensus of the United States which opposes it. Accordingly, it will be necessary to incorporate the issues being raised as problems with the current WTO Dispute Settlement Body in reaching a resolution.

In its history, the WTO has only used DSU Article 25 arbitration on one occasion[70] in case (DS160)[71] taking issue with Section 110(5) of the United States Copyright Act, which deliberated limited specific issues such as whether it was reasonable for the EU to calculate losses for all potentially realizable income. The arbitral tribunal held that the losses should be limited to realized income and that profits that are merely expected should not be included in losses, and determined that the level of EC benefits which were being nullified or impaired as a result of the operation of Section 110(5)(B) amounted to EUR 1,219,900 per year[72,73].

With regard to the proposed substitution of DSU Article 25 arbitration, based on the ex-

[70] Bashar H. Malkawi, Can Article 25 Arbitration Serve as a Temporary Alternative to WTO Dispute Settlement Process?, January 5, 2019, http://arbitrationblog.kluwerarbitration.com/2019/01/05/can-article-25-arbitration-serve-as-a-temporary-alternative-to-wto-dispute-settlement-process/.

[71] U.S-Section 110(5) of the U.S. Copyright Act- Recourse to Arbitration under Article 25 of the DSU, WT/DS160/ARB25/1, Nov. 9, 2001, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm.

[72] U.S-Section 110(5) of the U.S. Copyright Act- Recourse to Arbitration under Article 25 of the DSU, WT/DS160/ARB25/1, Nov. 9, 2001; https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm, http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114291.pdf

[73] U.S-Section 110(5) of the U.S. Copyright Act- Recourse to Arbitration under Article 25 of the DSU, WT/DS160/ARB25/1, Nov. 9, 2001, paras. 3.2-3.58, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=65434&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True,
http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114291.pdf.

perience and knowledge accumulated by the WTO Dispute Settlement Body to date, the view is that replacing this with DSU Article 25 arbitration will be tenuous due to the lack of predictable procedures such as those prescribed in the WTO's dispute resolution procedures, and the lack procedures for appeals to an appellate body,[74] Nevertheless, the dispute resolution mechanism is a system under the WTO Agreement which includes DSU Article 25 arbitration as an allowed alternative means, and it is reasonable to think that the full utilization of this mechanism would serve as a desperate measure for the WTO to protect its regime.[75]

VIII-2. Proposal to Replace only the Appellate Body with DSU Article 25 Arbitration

With this proposal for replacement with DSU Article 25 arbitration, there is a proposal to combine an agreement not to engage in the following stated appeals with an agreement for "appeal-arbitration" to replace the Appellate Body with DSU Article 25 arbitration.[76] The concerns with this proposal include such questions as to how the procedures up to the panel stage will be combined with DSU Article 25 arbitration, whether the current dispute resolution procedures will be complicated if both the procedures are combined, and whether there will be any resolution if the current issues raised with the Appellate Body are merely boxed off and go unresolved. With regard to the last point, there is a school of thought that imagines a multinational system that excludes the United States, but there is doubt that a system that excludes such an important actor will "maintain the WTO dispute resolution system."

That being said, a proposal that replaces only the Appellate Body with DSU Article 25 arbitration would have the advantage of completing the procedures without having to start over, through the provisional processing of the cases currently pending at the Appellate Body and the cased pending at panels. However, when viewed in the long-term, the foregoing question of how the existing procedures will be combined with the arbitration procedures lingers as a persistent issue.

Taking this point into consideration, the EU is proposing to replace of only the Appellate Body with DSU Article 25 arbitration. The proposal appears to be well-conceived since it suspends panel procedures for the duration of DSU Article 25 arbitration, and then returns the results of DSU Article 25 arbitration to panels, but we will have to see what results from

[74] "While theoretically article 25 arbitration seems to be a viable alternative past practice and wealth of experience and knowledge developed under WTO ordinary dispute settlement mechanism would prevent utilization of such an alternative.", Bashar H. Malkawi, Can Article 25 Arbitration Serve as a Temporary Alternative to WTO Dispute Settlement Process?, January 5, 2019, http://arbitrationblog.kluwerarbitration.com/2019/01/05/can-article-25-arbitration-serve-as-a-temporary-alternative-to-wto-dispute-settlement-process/.

[75] "WTO members should not shy away from utilizing article 25 arbitration. The dispute settlement mechanism as a whole – including article 25 arbitration – is not only about disputes; it is an evolving body of international trade law principles.", Bashar H. Malkawi, Can Article 25 Arbitration Serve as a Temporary Alternative to WTO Dispute Settlement Process?, January 5, 2019, http://arbitrationblog.kluwerarbitration.com/2019/01/05/can-article-25-arbitration-serve-as-a-temporary-alternative-to-wto-dispute-settlement-process/.

[76] Robert McDougall, Impasse in the WTO Dispute Settlement Body: Consequences and Responses, European Centre for International Political Economy, No. 11/2018, pp.4-5, https://ecipe.org/wp-content/uploads/2018/12/ECI_18_PolicyBrief_WTO_11-2018_LY06.pdf.

the examinations by the member states.

VIII-3. Proposal of an Agreement not to Appeal

Furthermore, in light of the stalled function of the Appellate Body and the risk of its cessation, there is also a proposal among member states for the maintenance of the function of the WTO's dispute resolution procedures through an advance agreement not to bring appeals[77]. The question with this opinion is whether the means provided under the WTO Agreement can be abandoned if an unsatisfactory panel report is issued, and the loss of a uniform organization and function among panel reports.[78] While this involves the partial abandonment of the current system so that reaching an agreement will not be an easy task, it is worth consideration since it effectively utilizes a portion or the existing system.

In light of the Appellate Body's current situation, we have witnessed actual cases were states have reached agreements not to appeal. In case (DS496) brought to the WTO by Vietnam with regard to Indonesia's safeguarding of certain iron and steel products, the parties reached an agreement not to appeal if the number of members on the Appellate Body fell below three members.[79] The efforts of member states to work together and overcome dysfunction serves as a ray of hope.

VIII-4. Summary

The WTO's dispute resolution procedures have functioned successfully since the conclusion of the WTO Agreement, but have become increasingly cumbersome and burdensome with the passage of time. The number of pages of written opinions have increased, the volume of reports has ballooned, and the limited terms for procedures are regularly extended.

The time has come to advance international arbitration procedures and dispute resolution procedures under regional agreements in a direction that simplifies and increases their efficiency as litigation procedures, and not in directions that make them cumbersome, burdensome or stringent.

Cumbersome and burden dispute resolution procedures are no longer suited to our present circumstances where comparisons of precedent have become increasingly easy through the use of AI, and we are all aware that they will not stand up to the test of time.

Dispute resolution procedures under regional agreements and international investment arbitration procedures under bilateral investment agreements may supplement the dispute

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[77] Robert McDougall, Impasse in the WTO Dispute Settlement Body: Consequences and Responses, European Centre for International Political Economy, No. 11/2018, pp.3-4, https://ecipe.org/wp-content/uploads/2018/12/ECI_18_PolicyBrief_WTO_11-2018_LY06.pdf.

[78] Robert McDougall, Impasse in the WTO Dispute Settlement Body: Consequences and Responses, European Centre for International Political Economy, No. 11/2018, p.4, https://ecipe.org/wp-content/uploads/2018/12/ECI_18_PolicyBrief_WTO_11-2018_LY06.pdf.

[79] Indonesia-Safeguard on Certain Iron and Steel Products, (WT/496/14), March 27, 2019.

resolution procedures under the multilateral WTO Agreement, but they will never fully replace these measures, whereby the dispute resolution procedures under the WTO Agreement will continue to be significant. However, these procedures are on the edge of death or survival, not simply due to chance brought on by the timing of world affairs, but rather, as made inevitable through the need for reform. This reform will demand simplification and increased efficiency, and ultimately a new realization that parties should pour more energy into resolutions reached through negotiations and settlements. Shifting from a situation where third-party arbitral tribunals and dispute settlement bodies render judgments from on high, to the utilization of flexible arbitration or dispute resolution procedures as systems where third states cooperate to reach early settlements, will lead to early dispute resolution, and will likely be beneficial not only to the party states but also the international regime.

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