Procedural and Normative Competition between the WTO's Dispute Settlement and the Investor-State Arbitration: Focusing on the National Treatment Principle*

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Abstract

The history and reality of international dispute settlement required the international community to develop two independent mechanisms for trade and investment. However, in recent years, there is an increasing number of cases in which the same dispute is simultaneously dealt by the WTO and by the investor-state dispute settlement (ISDS), namely, investor-state arbitration under international investment agreements (IIAs). As a result, more and more normative overlaps and practical interactions are observed between the two legal systems.

Against this backdrop, the present paper considers how the international mechanisms of trade and investment legally compete, co-exist and interact each other in the procedure and reality of dispute settlement. First, it examines procedural and technical duplication between the WTO's dispute settlement and ISDS. Then, with a special focus on the national treatment principle, a fundamental rule common to both of the systems, it makes clear how the WTO and ISDS concur for the protection of substantial rights of foreigners in actual dispute settlements.

Keywords: WTO agreements, international investment agreements (IIAs), ISDS clause, investor-state arbitration, national treatment principle, Article 23 of the Dispute Settlement Understanding (DSU)

JEL Classification: F13, F21, F53, F55, K33

I. Introduction

In historical perspective, international laws concerning international trade and investment protection have independently developed their regimes reflecting the reality of international dispute settlement, while recent writings consider them as adjacent disciplines in a larger discipline, *i.e.* international economic law. On the one hand, international trade law (ITL) has been largely constituted multilaterally with Geneva as an institutional nucleus, especially since the formation of the World Trade Organization (WTO) in 1995, which funda-

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mentally sustains classical inter-state mechanisms of dispute settlement. On the other hand, international investment law (IIL) consists of highly diffuse arbitrations triggered by investors, private persons, against the host State of investment based on clauses of investor-state dispute settlement (ISDS) contained in international investment agreements (IIAs) which usually take the form of bilateral or regional investment treaties. In such arbitrations, tribunals not only interpret and apply IIAs giving rise to their jurisdictional basis, but also contribute clarifications or crystallizations of certain basic principles in customary international law (CIL), which are traditionally developed through inter-state practices including arbitrations. In this sense, norm-clarifications in IIL are drastically but gradually promoted by ISDS arbitrations. In other words, IIL depends on trans-national interplays rather than inter-national discourses as they are observed in ITL.

In recent years, many States actively conclude regional trade agreements (RTAs), which are often subcategorized as free trade agreements (FTAs) or economic partnership agreements (EPAs). Most of them have comprehensive provisions of dispute settlement for both of trade and investment between/among the concluding States and their nationals. This trend can be explained by several reasons: a remedy to the paralysis of the WTO, a political option in a strained international relationship[1], and an explanation for the complexity of cross-border business which renders impossible to categorize a certain economic activity into trade or investment[2], and so on. As it is observed in the dispute concerning Australia's "plain package" laws of tabaco products as part of a comprehensive strategy to reduce smoking rates, an increasing number of situations is simultaneously dealt by the WTO and ISDS. Such a case gave rise to concern about duplication of several jurisdictions and adjudications over disputes arising from the same single fact, which may cause an unexpected forum shopping among several international fora by strong actors[3]. Indeed, some authors concern normative and practical duplications between the WTO and ISDS for disputes based on the same single fact though these institutions do not formally but do substantially discuss the same legal issue[4].

Against this backdrop, the present paper considers how international legal regimes of

[1] Kobayashi, Tomohiko, Aya Iino, Satoshi Kodera & Yuka Fukunaga (2016), *Introduction to the WTO/FTA Law*, Horitsu Bunka Sha Publishing, pp. 30-36 [in Japanese]

[2] *Philip Morris Asia Ltd. v. Australia*, UNCITRAL, PCA Case No. 2012-12; Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 Jun. 2018)

[3] Allen, Brooks E. & Tommaso Soave (2014), "Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration," *Arbitration International*, vol. 30, no. 1, pp. 4-8. Another example is domestic climate-related policies introduced by the Province of Ontario in Canada and the EU in the form of price support measures such as feed-in tariffs (FiTs) for renewable energy. Jha, Vyoma (2012), "Trends in Investor Claims Over Feed-in-Tariffs for Renewable Energy," Investment Treaty News, 19 July 2012, available at https://www.iisd.org/itn/2012/07/19/trends-in-investor-claims-over-feed-in-tariffs-for-renewable-energy/ (accessed 15 Apr. 2019); Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-In Tariff Program*, WTO Doc. WT/DS412/R, WT/DS426/R, 19 Dec. 2012 (WTO challenge by the EU and Japan to the Ontario feed-in-tariff (FIT) programme regarding certain wind and solar photovoltaic electricity generation projects); *Mesa Power Group LLC v. Canada*, PCA Case No. 2012–17 (NAFTA Chapter 11 challenge filed 4 Oct. 2011 regarding the Ontario FIT programme); *European Union and certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, WTO Doc. WT/DS452 (complaint filed by China on 18 Dec. 2012)

[4] Allen & Soave, *supra* note 3, pp. 8-9; Shany, Yuval (2003), *The Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press, pp. 53-59

trade and investment legally compete, co-exist and interact each other in procedure and reality of dispute settlement, with a special focus on the national treatment principle, which a core standard assures non-discrimination in almost all IIAs in obliging States to treat foreign investors or investments no less favourably than domestic investors or investments in like circumstances. National treatment is a general principle for substantial protection of foreigners' fundamental rights under CIL and common to the WTO Agreements and most IIAs[5]. It can therefore be a legal basis for duplicate proceedings for the same factual disputes concerning violations of norms with the same name (*i.e.* violations of the national treatment principle can be separately condemned in the WTO and in an IIA) and leads to a delicate question of coordination and priority of these duplicating jurisdictions: does an initiation of arbitrational proceedings against a host State by an investor preclude the investor's national State from exercising at the same time diplomatic protection for him/her or and launching WTO dispute settlement against the host State[6]? Whereas few treaties provide rules for coordination of international jurisdiction, contradicting conclusions can be easily deduced by different jurisdictions as a result of absence of any hierarchical relationship among international tribunals and institutions[7].

As noted above, such phenomenon of fragmentation of international law and proliferation of international dispute settlement leads us to consider delicate questions for coordination and harmonization of jurisdictions: should we accept a normative gap emerged from different international adjudications even if they concern violations of norms with the same name, or should international institutions adopt the same normative conclusion to such disputes with a view to effective solutions of disputes, regardless of a difference of legal regimes. In order to answer these questions, the present paper first examines procedural and technical duplication between the WTO's dispute settlement and ISDS. Then, with a special focus on the national treatment principle, it makes clear how a possible concurrence of adjudications is discussed at the WTO and ISDS, whether the one may adopt the other's interpretations or not. In this way, the paper clarifies the relationship of ITL and IIL in settlement of disputes of national treatment violations arising from the same fact.

As a prerequisite, this paper identifies ITL, among extensive development of international economic agreements after the World War II, as the "WTO Law" based on the present normative system of WTO and its Agreements, which are concluded in the Uruguay Round conducted within the framework of the General Agreement on Tariffs and Trade (GATT)[8]. On the other hand, it is relatively difficult to define the scope of IIL. This is because IIL is

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[5] Kurtz, Jürgen (2016), *The WTO and International Investment Law—Converging Systems*, Cambridge University Press, p. 79

[6] Verhoosel, Gaetan (2003), "The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law," *Journal of International Economic Law*, vol. 6, p. 495

[7] Allen & Soave, *supra* note 3, p. 2

[8] In the present paper, the "WTO Agreements" means a general term of the Agreement establishing the World Trade Organization, Annexes 1, 2 and 4. As Fukunaga suggests, there are few opportunities to use dispute settlement mechanism of RTA instead of that of the WTO, and a competition between these two would be quite rare. Therefore, the paper here does not include RTA for its argument concerning ITL. *See* Fukunaga, Yuka (2013), *Securing Compliance with International Economic Agreements and Dispute Settlement: Achievements and Limits of the WTO Dispute Settlement System and the Investment Arbitration System*, Yuhikaku Publishing, pp. 84-88 [in Japanese]

unformulated at normative level, while ITL has clarified and developed through multilateral negotiations and dispute settlement. As IIL is largely based on individual arbitral adjudications, it lacks an institutional nucleus, and therefore, is fundamentally bilateral. Traditionally, IIL consists of the rules of CIL of "the minimum standard of treatment" of foreign investors, which had been formulated by inter-state arbitrations of diplomatic protection for their nationals abroad from the end of 19th century to the beginning of the 20th century. The rules discussed at the time were, as usual for CIL, so primitive and unclear in their contents and details, therefore, consistent efforts have been done by the scholarship from the beginning of the 20th century for their codification[9]. Such efforts led to a codification of the rules by the International Law Commission (ILC) as the draft articles, which was taken note by the United Nations General Assembly in 2006[10]. It is an important conclusion, however, no more than a mere description of general rules of diplomatic protection. Rather than this, it is investor-state arbitrations after 1990s based on ISDS clauses in IIAs that have largely specified the contents of IIL rules reflecting social and economic activities of the present day. Therefore, the paper mainly deals with ISDS arbitral awards as IIL.

II. Procedural Competition

As mentioned above, ITL and IIL are independent in their procedures of dispute settlement as well as in their historical and normative basis. Nevertheless, dealing with legal disputes arose from the same single fact, it is possible for them to refer each other as "relevant rules of international law applicable in the relations between the parties" in the meaning of Article 31.3 (c) of the Vienna Convention of the Law of Treaties (VCLT). Indeed, such cross-references may result in a *de facto* modification of certain terms of treaties without an explicit reconfirmation of the State Parties' will[11]. On this point, mere problems may arise when the WTO interprets IIAs, because arbitral awards of ISDS are essentially *ad hoc* nature: as each of them are not legally binding upon the others, and it is up to each tribunal whether it accepts the WTO's interpretation or not. On the other hand, a closer look needs to be taken when arbitral tribunals interpret the WTO Agreements. This is because such an interpretation itself is presumably inconsistent with Article 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which strengthens the WTO's multilateral system by requiring the Member States to exclusively abide by the WTO's rules and procedure for dispute settlement concerning the WTO Agreements. Once an ISDS arbitral tribunal issues an interpretation of the WTO Agreements it may affect the status of the

[9] Yamashita, Tomoko (2010), "The Legal Fiction in Diplomatic Protection: A Theory of 'Transformation' from Internal Law to International Law," *Kobe Law Journal*, vol. 60, no. 1, pp. 354-370 [in Japanese]

[10] Draft Articles on Diplomatic Protection (Second reading 2006) with commentaries, UN Doc. A/61/10, Supp.10 in *Yearbook of the International Commission 2006*, Vol. II (Part Two). For more detail, *see* Yamashita, Tomoko (2016), "Exceptions to the Local Remedies Rule-A Study on the ILC Draft Articles on Diplomatic Protection," *International Public Policy Studies*, vol. 21, no. 1, pp. 1-23; Yamashita, (2018), "The Futility Exception to the Local Remedies Rule in Investor-State Arbitration," *The Journal of International Law and Diplomacy*, vol. 117, no. 1, pp. 158-180 [in Japanese]

[11] Sorel, Jean-Marc (2006), «Article 31», dans Olivier Corten et Pierre Klein, *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, Bruylant, p. 1320

other Member States, which are not parties to arbitrations.

In fact, there is an increasing number of ISDS arbitrations in which claimants request tribunals to interpret the WTO Agreements, while the converse is quite rare. This is mainly because of a so-called "umbrella clause," which obliges the host state to observe specific undertakings towards its foreign investors. It has been included in most IIAs under the auspices of developed States anticipating effectiveness of CIL, which affords protection to their nationals concluding concessions with host states[12]. Since an umbrella clause can elevate a contract claim to the level of a treaty claim, it is increasingly requested at ISDS arbitral tribunals that not only references to the WTO jurisprudences as adjacent disciplines but also interpretations of the WTO Agreements.

II-1. Eligibility of Arbitral Tribunals to Interpret the WTO Agreements

One of the main purposes of an ISDS arbitration is an immediate settlement of disputes. This is a very different feature of arbitration from judicial settlement, as in the latter, the courts are required to be consistent in the light of previous jurisprudences. As a corollary of *Kompetenz-kompetenz* allowing each arbitral tribunal to independently decide its jurisdiction and admissibility of claims[13], there appears *prima facie* no obstacle for ISDS to interpret the WTO Agreements. Indeed, in certain arbitrations, investors argue violations by the host state of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

In *Philip Morris v. Uruguay*, it was discussed whether Uruguay's Tobacco Control Policy introducing regulations to cover 80 per cent of their products' packages by health warnings infringes tobacco companies' trademarks. In order to decide whether the regulations expropriated the claimant's foreign investment and breached the Switzerland-Uruguay bilateral investment treaty (BIT), the claimant also asked the tribunal to apply the Montevideo Treaty of 1892, the Paris Convention for the Protection of Intellectual Property of 1979 and the TRIPS Agreement via the umbrella clause included in the BIT[14]. In *Philip Morris Asia v. Australia*, the claimant challenged the Australian Tobacco Plain Packaging Act replacing tobacco companies' brand and logos on cigarette packets with generic drab olive-green coverings and gruesome pictures of diseased body parts. According to the claimant, the Australian Act breaches the umbrella clause of the Australia-Hong Kong BIT by violating the TRIPS Agreement, the Paris Convention as well as the Technical Barriers to Trade (TBT) Agreement[15]. For *Eli Lilly v. Canada*, Canadian patents with respect to several pharmaceutical

[12] Sakata, Masao (2006), "Critical Analysis on Restricted Application of 'Umbrella Clause' in Investment Protection Treaties," *The Doshisya Law Review*, vol 58, no. 2, p. 932 [in Japanese]. For instance, the last sentence of Article 10.1 of the International Energy Charter Treaty stipulates as following: "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."

[13] Iwatsuki, Naoki (2008), "Objections to Jurisdiction and their Settlement in International Investment Arbitration," *RIETI Discussion Paper Series*, no. 08-J-012, pp. 13-14 [in Japanese]

[14] *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 Jul. 2016), paras. 207, 261.

[15] *Philip Morris Asia Ltd. v. Australia*, UNCITRAL, PCA Case No. 2012-12, Notice of Arbitration (21 Nov. 2011), para. 4.12

compounds which the claimant held were nullified by Canadian courts, and this fact was allegedly against rules protecting intellectual property rights in Article 1709 of NAFTA, which were originally made by using the then draft text of the TRIPS Agreement[16].

None of these cases, however, did the arbitral tribunals mention whether they have jurisdiction or not for interpretation of the WTO Agreements. At most, *Philip Morris v. Uruguay* can be considered as modestly showing a *de facto* interpretation of the TRIPS Agreement: while the tribunal expressed some doubt whether the TRIPS Agreement was applicable to Switzerland, which was not a contracting party, it rejected the claimant's allegation in stating that "nowhere does the TRIPS Agreement, assuming its applicability, provide for a right to use" after considering Article 20 and 16[17]. On this regard, Australia and Uruguay, the respondents of the cases above, insisted that ISDS tribunals were not allowed to interpret the WTO Agreement because it is the WTO that had the exclusive authority for interpretation of its Agreement[18]. Indeed, after the arbitration of *Philip Morris Asia v. Australia*, the WTO proceedings asking the legality of Australian Act were launched by Honduras, the Dominican Republic, Cuba and Indonesia[19].

However, the fact that there is no arbitral award explicitly interpreting and applying the WTO Agreements does not mean that ISDS tribunals do not have jurisdiction over the Agreements. Provided that a large number of investors separately allege in the same way in different arbitrations, it would not be deniable that some tribunals step in expansive interpretations of the WTO Agreements in near future.

II-2. Jurisdictional Competition between the WTO and Arbitral Tribunals

The main reason why disputes arising from the same single fact can be disputed at the WTO and ISDS at the same time is that these two institutions have not perceived each other as they have a potential to be parallel proceedings. For the WTO law, Article 23 of the DSU foresees disputes between the WTO's Member States. This means that it is the proceedings of the RTA, not ISDS, that the WTO recognized as parallel proceedings with it. Similarly, IIAs have presupposed disputes between investors and host States and not between States. Therefore, "the exclusion of any other remedy" mentioned in Article 26 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) means the exclusion of remedies before national courts of host States. Therefore, IIAs usually stipulate legal relationships between ISDS and national remedies of host States[20]. The only exemption is diplomatic protection of CIL, which is regulated by Ar-

[16] *Eli Lilly v. Canada*, UNCITRAL, Case No. UNCT/14/2, Notice of Arbitration (12 Sep. 2013), para. 3, 42

[17] *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, supra* note 14, para. 262

[18] *Philip Morris Asia Ltd. v. Australia*, UNCITRAL, PCA Case No. 2012-12, Australia's Response to the Notice of Arbitration (21 Dec. 2011), paras. 35, 57; *Eli Lilly v. Canada*, UNCITRAL, Case No. UNCT/14/2, Government of Canada Statement of Defense (30 Jun. 2014), paras. 83-84

[19] Panel Report, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, supra* note 2. This case is still pending because Honduras notified the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in this panel report.

ticle 27 of the ICSID Convention in stipulating that "[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention."

Therefore, in order to answer the question of eligibility of ISDS arbitral tribunals to interpret the WTO Agreements, it is necessary to consider whether such an interpretation can be acceptable in the light of the WTO Agreements as well as in general principle of law.

II-2-1. Derogation from Article 23 of the Dispute Settlement Understanding (DSU)

As mentioned above, there seems *prima facie* no obstacle in IIAs for arbitral tribunals to interpret the WTO Agreements. However, if they interpret the Agreements, such an interpretation may infringe the WTO's authority to exclusively interpret the WTO Agreements according to the principle of "strengthening the multilateral system" provided in Article 23 of the DSU. This consideration invites two questions to be answered.

The first question is whether Article 23 of the DSU binds private persons like investors as well as the Member States of the WTO. On this regard, Article 23.1 provides as follows:

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

This provision only mentions "Members," *i.e.* the Member States of the WTO, which are obligated to follow the WTO proceedings when they ask for interpretation of the WTO Agreements. While most host States of investment are the Members at the same time and bound by this clause, private persons such as investors are left out of account[21]. As the Panel indicated in *US – Certain EC Products*, the term "redress" implies "a reaction by a Member against another Member" because of a perceived WTO violation, with a view to remedying the situation[22]. On this account, the WTO procedures of dispute settlement have perceived only inter-state disputes based on its membership, and have never recognized IIAs as a component of "the covered agreements" in the meaning of Article 23 of the DSU nor a part of measures to enforce the WTO Agreement[23].

On the other hand, if each tribunal independently interprets and applies the WTO Agreements, an award rendered in such an arbitration may be against "strengthening the multilat-

[20] Abe, Yoshinori (2007), "Relationships between Investor-State Arbitration and Local Remedy Procedures in Bilateral Investment Treaties/Economic Partnership Agreements," *RIETI Discussion Paper Series*, no. 07-J-040, pp. 6-18 [in Japanese]

[21] Li, Siquing (2018), "Convergence of WTO Dispute Settlement and Investor-State Arbitration: A Closer Look at Umbrella Clauses," *Chicago Journal of International Law,* vol. 19, No. 1, pp. 199-200

[22] Panel Report, United States—Import Measures on Certain Products from the European Communities, WTO Doc. WT/DS165/R (adopted Jul. 17, 2000), para. 6.22

[23] Klopschinski, Simon (2016), "The WTOs DSU Article 23 as Guiding Principle for the Systemic Interpretation of International Investment Agreements in the Light of TRIPs," *Journal of International Economic Law*, Vol. 19, No. 1, p. 229

eral system," since it is legal to be a unilateral application of the Agreements by an individual Member State, that is the respondent State in the arbitration. According to Klopschinski, it is a violation of Article 23 of the DSU to conclude IIAs including a broad ISDS clause which gives arbitral tribunals a potential for interpretation of the WTO Agreements[24]. Indeed, the panel of *US-Sections 301-310 of the Trade Act of 1974* points out as follows: "[t]here is a great deal more State conduct which can violate the general obligation in Article 23.1 to have recourse to, and abide by, the rules and procedures of the DSU than the instances especially singled out in Article 23.2.6.[25]" Taking into account these considerations, it would not be surprising for the WTO to consider such IIAs as unlawful against Article 23 of the DSU, though in reality it keeps silent on this topic.

Even if arbitral tribunals find inappropriate interpretations of the WTO Agreements, it is still possible for the Member State to initiate inter-State proceedings before the WTO on the same fact[26]. Therefore, Article 23 of the DSU does not prohibit investors from asking arbitral tribunals for interpretations of the WTO Agreements nor the tribunals from rendering decisions on the investors' claims. It is therefore not forbidden to conclude that IIAs having ISDS clauses may trigger arbitrations for interpretations of the WTO Agreements, though such arbitrations would be probably condemned by the WTO proceedings thereafter.

Besides, the second question to be addressed is whether individual IIAs can exclude application of Article 23 of the DSU. While the DSU itself composes an essential part of the WTO Agreements as a lump-sum deal, it is still possible to invalidate the DSU between certain Member States based on general rules of international law for modifications of treaties. On this regard, Article 41 of the VCLT clarifies conditions to modify multilateral treaties as following:

> Agreements to modify multilateral treaties between certain of the parties only
> 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
> (a) the possibility of such a modification is provided for by the treaty; or
> (b) the modification in question is not prohibited by the treaty and:
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
> 2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

[24] *Ibid*., pp. 228-229
[25] WTO Panel Report, *United States – Sections 301-310 of the Trade Act of 1974* (US – Sections 301-310), WT/DS152/R, adopted 22 Dec. 1999, para. 7.45
[26] Li, *supra* note 21, p. 204

In the light of Article 41.1 of the VCLT, some of the WTO Agreements can be understood as explicitly excluding application of the DSU and make it possible to resort to proceedings outside of the WTO. For example, while Article 64.1 of the TRIPS Agreement provides that disputes arising from the TRIPS are going to be dealt by the DSU, its Article 1.1 confirms that "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement." Article 1.1 can be read as not prohibiting the Members from concluding IIAs, which include ISDS clauses, as far as such IIAs afford "more extensive protection" than that of the TRIPS Agreement. In practice, the Appellate Body Report of *EC – Bananas III (Article 21.5 – Ecuador II)* noted that the parties could be precluded from initiating the WTO dispute settlement proceedings by means of prior consent, either explicitly or by necessary implication, to waive their right to have recourse to the DSU[27]. On the contrary, the GATT, for instance, does not have any provision enabling a derogation from the WTO proceedings. In *Peru - Additional Duty on Imports*, the Panel required an explicit waiver of the right to bring a case before the WTO in order to derogate from the DSU[28], and concluded that such a waiver was not observed in this case[29]. The Report of the Appellate Body upheld this decision and confirmed a general derogation from Article 23 of the DSU inadmissible in stating in its footnote that "[w]hile Article 3.7 of the DSU acknowledges that parties may enter into a mutually agreed solution, we do not consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes[30]."

In relation to this point, a DSU provision could be derogated from, even if third parties held different views, as it is confirmed by the Appellate Body in *US-Hormones Dispute* in stating that Article 17.10 of the DSU was "more properly understood as operating in a relational manner" and that the confidentiality requirement was not "absolute[31]." Likewise, Salles argues that Article 23.1 of the DSU operates in a relational manner, as a promise of each WTO member to each other WTO member, and it could be said to implicate a less than absolute commitment that is subject to a derogation by two disputing parties jointly[32]. In the light of Article 41.1 of the VCLT and the WTO precedents, however, this hypothesis should be applicable only to the cases where an explicit will of the Member States for a derogation is observed in IIAs. In addition, as it is provided in Article 41.2 of the VCLT, States should notify the other WTO Members of their intention to conclude an IIA which modify certain provisions of the WTO Agreements, especially Article 23 of the DSU, even when the con-

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[27] Appellate Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Second Recourse to Article 21.5 of the DSU by Ecuador, WTO Doc. WT/DS27/AB/RW2/ECU (26 Nov. 2008), para. 217.

[28] Panel Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, WTO Doc. WT/DS457/R (27 Nov. 2014), para. 7.84

[29] *Ibid.*, para. 7.96

[30] Appellate Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, WTO Doc. WT/DS457/AB/R (20 Jul. 2015), para. 5.26 n. 106, para. 5.28

[31] Appellate Report, *United States—Continued Suspension of Obligations in the E.C.—Hormones Dispute*, WTO Doc. WT/DS320/AB/R (16 Oct. 2008), Annex IV, para. 6

[32] Salles, Luiz E. (2015), "A Deal is a Deal: Party Autonomy, the Multiplication of PTAs, and WTO Dispute Settlement," *Questions of International Law*, Zoom-in 23, p. 28

cerned Agreement has a provision allowing a derogation from its obligation to take the DSU proceedings under as observed in the TRIPS. Indeed, there is no such notification at present, any IIAs are considered not to include States' will of derogation from the WTO Agreements. Without such States' will, even if investors ask for interpretations of the WTO Agreements as aforementioned cases, any arbitral tribunal cannot interpret the Agreements as it lacks jurisdiction over the disputes.

II-2-2. General Principles of Law of Jurisdictions

When several dispute settlement bodies are accessible for a claimant, it is a legal tradition to regulate multiple proceedings in order to circumvent potential contradictions which would be drawn by them. On this regard, three general principles of law need to be elucidated: *res judicata*, also known as the doctrine of finality, provides that the final judgment of a competent judicial forum is binding upon the parties*; lis (alibi) pendens* governing relations between parallel proceedings; and *electa una via* provides that once a party has selected a certain procedure for dispute resolution, the party is precluded from seizing any other dispute settlement body[33]. For these principles, the International Commercial Arbitration Committee in the International Law Association (ILA) issued its final reports in 2006[34]. While quasi-judicial institutions such as the Panels and the Appellate Body of the WTO were out of the scope of the reports, the reports indicated important elements upon which all three rules commonly depend on their application, *i.e.* elements to find whether the regulated sets of proceedings compete with each other: the parties or the cause of action[35]. Provided that these two elements are identical in the WTO and in ISDS, general principles can regulate these proceedings.

The first element to be considered is the parties. In ISDS, do investors directly claim their own rights based on IIAs concluded between their national State and the host State of investment? Or, are investors exercising derivative rights of their national State instead of their own rights, as they are a mere object, not subject, in international law in the light of Article 27 of the ICSID Convention, which reserves the possibility of diplomatic protection as a final option of intervention by their national State to investor-state dispute? For this question, no consensual answer has been attained neither in doctrine nor in practice[36]. Allen and Soave notes that even though it is logically possible to consider investors exercising es-

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[33] Shany, *supra* note 4, pp. 23-25

[34] de Ly, Filip & Audley Sheppard (2009), "The International Law Association (ILA) International Commercial Arbitration Committee Reports on Lis Pendens and Res Judicata," *Arbitration International*, No. 25, No. 1, pp. 1-86

[35] *Ibid.*, "Final Report on Lis Pendens," p. 30, para. 4.51. For the doctrine of *res judicata*, the ILA points out that there are four preconditions to apply in international law, namely proceedings must: (i) have been conducted before courts or tribunals in the international legal order; (ii) involve the same relief; (iii) involve the same grounds; and (iv) be between the same parties. *Ibid.*, "ILA Interim Report on Res Judicata and Arbitration," pp. 56-59

[36] Allen & Soave, *supra* note 3, p. 14; *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican State*s, ICSID Case No. ARB(AF)/04/5, Award, 21 Nov. 2007, paras 163, 168–179; *Corn Products International, Inc. v. United Mexican States,* ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, 15 Jan. 2008, paras 165-179; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 Sep. 2009, paras 403–430; Douglas, Zachary (2003), "The Hybrid Foundations of Investment Treaty Arbitration," *British Yearbook of International Law*, vol. 74, pp. 167-184

sential rights of their States, it is more relevant on a practical level to perceive investors claiming their own rights in view of complaining parties in proceedings: States in WTO proceedings and investors as private persons such as corporations or individuals in ISDS arbitration[37]. On the other hand, Li points out that even in practices a home state may also subsidize, or in other ways incentivize, private investors to challenge the WTO violations in tribunals, which likely constitutes State action[38]. As obvious from these arguments, a real claimant cannot be easily identified in an international investment dispute.

The second element is whether the causes of action are undifferentiated in the WTO and in ISDS when concerned facts are essentially identical. In principle, legal grounds for claims will differ, since the WTO proceedings and ISDS are grounded on different treaties with different provisions which often differ in scope and formulation. With respect to available remedies, the WTO proceedings call for future-oriented measures such as a withdrawal or a modification of government measures while the dominant remedy in ISDS is past-oriented, that is compensation[39]. In the WTO, any panels and the Appellate Body have never applied *res judicata* principle with respect to proceedings outside the WTO[40]. Similarly, in ISDS, some tribunals limited the *res judicata* effect only to proceedings fulfilling certain conditions. In *Helnan International Hotels A/S v. Egypt*, for example, Egypt insisted that the claim could be set aside by *res judicata* because of the award rendered by the Cairo Regional Centre for International Commercial Arbitration for the identical fact. However, the ICSID tribunal dismissed this argument based on the "triple identity test" for the parties to the arbitrations, the cause of action and the legal grounds[41].

With respect to the second element, even the causes of action are not necessarily identical in the WTO and ISDS, these parallel proceedings would affect each other especially in the cases where the cause of action is a breach of a principle for substantive protection, *e.g.* national treatment, which exists both the WTO Agreements and IIAs, or where non-pecuniary remedies such as modification of governmental measures of the host state are called for in ISDS[42].

III. Normative Competition

The national treatment principle requires States to provide foreign goods, services, investors and investments treatment no less favourable than that accorded to their own national equivalents. Unlike the so-called absolute treatment standards such as fair and equitable treatment, national treatment is a comparative or relative standard which accords treatment

[37] Allen & Soave, *supra* note 3, p. 15
[38] Li, *supra* note 21, p. 201
[39] Allen & Soave, *supra* note 3, pp. 15, 19; Kurtz, *supra* note 5, p. 94
[40] Allen, *supra* note 4, pp. 22-23
[41] *Helnan International Hotels A/S v. Egypt*, ICSID Case No. 05/19, Award, 3 Jul. 2008, paras. 130-131
[42] Allen& Soave, *supra* note 3, p.19. For more details of non-pecuniary remedies in ISDS, *see* Nisugi, Kento (2018), "The Legal Basis and Nature of the Investor's Right to Invoke State Responsibility in Investment Treaty Arbitration: With Particular Emphasis on Non-Pecuniary Remedies," *The Journal of International Law and Diplomacy*, vol. 117, no. 2, pp. 77-104 [in Japanese]

depending upon the level of treatment given to national or other foreign investors[43]. In Kurtz's words, national treatment is like its close cousin, most-favoured-nation treatment, "a substantive legal protection directly shared across both the WTO and investment treaties[44]." According to Broude and Shany, such equivalent rules co-existing in the different international legal spheres are multi-sourced equivalent norms, which are defined as follows: two or more norms which are (1) binding upon the same international legal subjects; (2) similar or identical in their normative content; and (3) have been established through different international instruments or "legislative" procedures or are applicable in different substantive areas of the law[45].

The national treatment principle qualifies the first and third criteria, as it is an obvious parallel norm equivalently existing across ITL and IIL, and always binds upon the "host State" of foreign products and investments. A closer look is, however, required for the second criterion, in order to find whether the national treatment principle is similar or identical in normative contents of ITL and IIL. This is because the standards of protection would be different even for a similar norm; on the other hand, if it is an identical norm, the levels of protection also need to be the same. Provided that the WTO and ISDS arbitration offered different levels of national treatment protections for the disputes arising from the same unique fact, it needs to be asked whether it is required to reconcile these two adjudications in answering the following questions: is there any difference between the cases where a derogation from Article 23 of the DSU is accepted or not as considered in Section 2?; would such a difference decide which forum has priority over the other, and set a unique standard of protection?; or, may each forum have each standards side by side?; in addition, is it possible to perceive a treaty providing both trade and investment like an RTA as being expected to afford the same standards of protection, but differentiated standards are accepted when trade and investment are regulated by different treaties?

In order to answer these questions, this section scrutinizes mutual effects between ITL and IIL by confirming normative contents of the national treatment principle throughout the WTO proceedings of dispute settlement and ISDS arbitrations.

III-1. National Treatment Principle under the WTO Agreements

The principle of national treatment in the context of the WTO means that imported products and locally produced products should be treated equally, except for tariffs imposed onto foreign products at the entrance of the domestic market. This principle is found across the WTO agreements, for instance, Article 3 of the GATT, Article 17 of the General Agreement on Trade in Services (GATS), Articles 2.1 and 3 of the TRIPS Agreement, Article 2.1 of the Agreement on Technical Barriers to Trade (TBT), Article 3.2 (a) of the Agreement on Gov-

[43] Reinisch, August (2015), "National Treatment," in Marc Bundenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds.), *International Investment Law*, C.H. Beck-Hart-Nomos, p. 847
[44] Kurtz, *supra* note 5, p. 79
[45] Broude, Tomer & Yuval Shany (2011), *Multi-Sourced Equivalent Norms in International Law*, Hart Publishing, p. 5

ernment Procurement (GPA)[46]. Among these, Article 3 of the GATT is the most basic and general provision prohibiting governmental measures to protect local products, which constitutes a useful basis for interpretation of the principle in the other WTO Agreements[47]. Especially, the first sentence of Article 3.4 is similar with the national treatment principle prescribed in IIAs, as it provides as following[48]:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

The WTO jurisprudence on Article 3.4 of the GATT consistently emphasises that foreign and domestic products to be "like" that are in a competitive relationship, and treatment of imports less favourable than the treatment accorded to domestic products in such a situation cannot be allowed[49]. What is difficult here is to decide whether governmental regulations including domestic taxes are appropriate indications to impermissible protectionist purpose. There is no clear standard on this regard since the dense jurisprudence on Article 3.4 of the GATT has traversed, with different emphases at distinct stages, questions of adverse competitive effect[50].

According to Kurtz, part of the reason for the complexity of the WTO jurisprudence is the different textual inter-relation between the macro articulation of the goal of the norm in Article 3.1 of the GATT, and the specific but separate obligations to accord national treatment on internal tax measures through the first and second sentences of Article 3.2 and regulations in Article 3.4[51]. On this point, *EC – Asbestos* is the first occasion where the Appellate Body defined the scope of the term "like products" in Article 3.4 of the GATT and found that the term is not inter-related with other paragraphs of Article 3. In this case, Canada claimed that a French law banning the sale of construction material containing asbestos was a discriminatory measure against foreign products because Canadian asbestos construction materials had been banned, while certain French "like products" asbestos-free construction materials could continue to be sold in the French marketplace. The Appellate Body ruled that the term "like" in Article 3.4 could not have coverage wider than the combined coverage of the terms "like" and "directly competitive or substitutable" in Article 3.2[52]. Although the complicated textual set-up of Article 3 of the GATT has been criticized[53], the

[46] The revised version of GPA of 2012 has enlarged its scope of protection more comprehensively by introducing the principle of "non-discrimination" in Article 4.1 and 4.2.
[47] Appellate Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WTO Doc. WT/DS176/AB/R (2 Jan. 2002), paras. 233-242
[48] Kurtz, *supra* note 5, p. 80; Reinisch, *supra* note 43, p. 849
[49] Appellate Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (12 Mar. 2001), para. 99
[50] Kurtz, *supra* note 5, pp. 81-82
[51] *Ibid*., p. 82

structure as proven central in setting the tenor of jurisprudence and strategic emphasis accorded to text in the hermeneutics of the WTO, especially the Appellate Body adjudication[54]. In short, national treatment in Article 3 of the GATT is the provision (1) concerning like products, (2) prohibiting discriminatory protectionist measures against foreign products, and (3) to grant equal opportunities of fair competition; therefore, a derogation from Article 3 shall be strictly subject to conditions provided in Article 20 as general exceptions based on social political reasons or otherwise Article 21 as security exceptions.

III-2. National Treatment Principle under International Investment Agreements

The dense WTO jurisprudence concerning national treatment is indeed frequently referred in ISDS arbitrations. However, certain tribunals, such as *Pope & Talbot v. Canada*[55], *Methanex v. United States*[56], *Occidental Exploration and Production v. Ecuador*[57], are negative for directly transplanting it into ISDS in view of differentia of purposes of ITL and IIL.

In ISDS, national treatment has played a relatively minor role compared to other substantive standards of protection, while it is one of the basic principles contained in most IIAs no matter which purposes they have, investment protection or liberalization, and usual stipulations do not differ in significant ways[58]. Normally, the national treatment clause addresses post-entry or post-establishment investors and investment in an internal market of the host State. However, certain IIAs concluded by Unites States and Canada expressly extend their scope of treatment to pre-entry / pre-establishment investors and investment. For instance, Article 1102 of the North American Free Trade Agreement (NAFTA) provides as follows:

> Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

While this provision appears at first glance similar with Article 3.4 of the GATT, this simple, pared-down structure omits any guide as to the ultimate purpose of non-discrimination in this treaty setting[59]. In order to embody the article, the term "treatment no less fa-

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[52] Appellate Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, supra* note 49, paras. 98-100

[53] Hudec, Robert (1998), "GATT/WTO Constrains on National Requiem for an 'Aims and Effects' Test," *The International Lawyer*, Vol. 32, No. 3, p. 633

[54] Kurtz, *supra* note 5, p. 83

[55] *Pope & Talbot Inc. v. Canada*, UNCITRAL (NAFTA), Award on the Merits of Phase 2, 10 Apr. 2001, paras. 43, 46-49, 70

[56] *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3 Aug. 2005, Part II, Ch. B, para. 6, and Part IV, Ch. B, para. 35

[57] *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN3467, Final Award 1 July 2004, paras. 175-176

[58] Reinisch, *supra* note 43, p. 850

[59] Kurtz, *supra* note 5, p. 84

vourable" is disused whether there were discriminatory measures against foreign investors, and they were "in like situation" or "in like circumstances" conferred to domestic investors[60]. Although national treatment provisions often appear as stand-alone obligations, they can be frequently found in combination with obligations of most-favoured-nation (MFN) treatment like Article 10.7 of the International Energy Charter of 1995. Some other treaties permit choosing between MFN or national treatment[61].

Each IIA provides exceptional situations in which the national treatment principle does not apply. These exceptions are usually categorized into general exceptions for measures to protect public interest (e.g. public hygiene, environmental protection) or specific exceptions of certain economic area (e.g. aviation transport) and of international development aid whose beneficiaries are exclusively limited to domestic investors. In practice, arbitrators are asked for ruling on governmental measures which are not clearly mentioned as exceptions in IIAs; whether they are against the national treatment principle or justified as an example of general exceptions for the purpose of public interest.

For NAFTA, as it does not have any general clauses for exceptional justifications, the first generation of NAFTA jurisprudence, notably *S.D. Myers v. Canada*, has formulated such exceptions, which are equivalent to general exceptions in Article 20 of the GATT, by appreciating the term "in like circumstances" of Article 1102 of NAFTA[62]. The tribunal required an inquiry not only into the same business sector which was crucial to demonstrate the importance of the competitive relationship between the foreign and domestic investors, but also into circumstances that would justify governmental regulations treating them differently in order to protect the public interest in fear of potential environmental destruction[63]. This award laid a cornerstone in interpretation of NAFTA without any explicit clause to admit a very wide range of exceptions based on the term "in like circumstances," and it is frequently cited in NAFTA jurisprudence thereafter. Based on this formulation focusing on the like circumstances question, the tribunal of *Pope & Talbot v. Canada* addressed that differences in treatment between foreign and national investors would presumptively violate Article 1102.2, unless they have a reasonable nexus to rational government policies: whether it has a reasonable nexus to rational government policies that do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and do not otherwise unduly undermine the investment liberalizing objectives of NAFTA[64]. In this way, these awards have established a three-step analysis inducing a justifiable derogation from Article 1102: (1) whether foreign and national investors are "in like circumstances"; (2) whether any portion of the domestic industry received better treatment than the foreign investor and its invest-

[60] UNCTAD, *National Treatment: UNCTAD Series on Issues in International Investment Agreements* (United Nations, 1999), pp. 33-34

[61] *E.g.* Art. 2.2.a of the Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investment of 11 March 1986; Art. 2.2 of the Agreement between the Islamic Republic of Pakistan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments of 16 March 1995; Art. 3.3 of the Austrian Model BIT (2008)

[62] Reinisch, *supra* note 43, p. 853

[63] *S. D. Myers v. Canada*, UNCITRAL (NAFTA), Partial Award, 13 Nov. 2000, paras. 247, 250-251

[64] *Pope & Talbot Inc. v. Canada, supra* note 55, paras. 78-79

ments did; and (3) whether there is any reason and objective to justify the disparate treatment accorded to them[65].

Indeed, these three elements are very similar to those justifying a derogation from Article 3 of the GATT as mentioned above. Provided that the reason and objective of national treatment in IIAs are granting equal opportunities for fair competition in the market of the host State, they can be normatively considered as almost identical rather than merely similar with the WTO Agreements in substance. Therefore, the following parts of the present paper examine these elements in order to understand possible normative competition between the WTO law and IIAs concerning the national treatment principle.

III-2-1. Treatments "in Like Circumstances"

Whereas *S.D. Myers v. Canada* and *Pope & Talbot v. Canada* put importance on the term "in like circumstances" of Article 1102 of NAFTA with the three-step analysis, following tribunals considers a lack of "like circumstances" as a crucial criterion for investors to be treated in an indiscriminate way in the context of national treatment. In *GAMI Investments v. Mexico*, the claimant argued to have been discriminated because the claimant's sugar mills were all expropriated but some domestic ones with very similar characteristics were not. The tribunal, however, denied this assertion holding that the claimant was not in like circumstances with the others because their sugar mills were insolvent, and thus expropriated, and the measures set them apart from others that were not insolvent[66]. In *United Parcel Service of America v. Canada*, it is alleged that Canada accorded more favourable treatment to Canada Post than to the claimants in the non-monopoly postal services market. The tribunal rejected this claim because it found that the claimants had failed to establish that they were in like circumstances with Canada Post, because their service, the importation of goods by courier, was sufficiently distinguishable from the importation of goods as mail, and it, thus, concluded that the different characteristics of each service permitted different customs treatment[67].

As it is observed in precedents, national treatment will not be granted unless foreign and domestic investors are exactly operating in the very same business sector, otherwise they are not "in like circumstances." On this point, the tribunal of *Archer Daniels Midland v. Mexico* addressed that treatment should have been compared with those operating in the same sector, *i.e.* in the same "economic sector" and "business sector[68]." However, a closer look needs to be taken at "like circumstances" as it was indicated in *Champion Trading v. Egypt*. In this case, Egypt had made certain payments to cotton producers who had sold cotton at the na-

[65] This three-step analysis is summarized in the claimants' argumentation in *Methanex v. USA, supra* note 56, Part IV, Ch. B, para. 13

[66] *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL (NAFTA), Final Award, 15 Nov. 2004, para. 114

[67] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007, para. 99

[68] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, 21 Nov. 2007, para. 198

tional collection centres at fixed prices, which were not paid to cotton producers selling on the free market. Thus, even when foreign and domestic investors can operate in the same economic and business sector, there would be a significant difference in substance and in such a situation, they could not be in "like circumstances"[69].

Although most arbitral tribunals including *S.D. Myers v. Canada* stresses the importance of "like circumstances" as the existence of a competitive relationship between foreign and domestic investors and investments of the host State, this consideration is not accepted by all tribunals. In *Occidental Exploration and Production v. Ecuador*, the tribunal left the criterion of operation in the same economic and business sector and extended the scope of protection. In this case, Ecuador refused to the claimant the option to claim a VAT refund on its oil exports, while it permitted several other exporters, among them exporters of flowers, mining, and seafood producers, to claim such a refund. Ecuador argued that the VAT refund was not available to any oil exporters, including the State-owned oil company, thus, it did not act in contravention to its national treatment obligation. The tribunal explicitly renounced the need of a competitive relationship or operations in the same business sector to establish that a foreign investor was in "like circumstances" as others[70]. Another example is *Methanex v. United States*, in which the tribunal adopted a narrower scope than the one of *S.D. Myers v. Canada*. The case arose from California's ban on methyl tertiary-butyl ether (MTBE), a gasoline additive containing methanol, while continuing to permit ethanol, another oxygenates with similar effects: both oxygenates when added to gasoline contribute to a cleaner combustion. The claimant, Canadian methanol producer, argued that the US ban on MTBE was discriminatory and intended to protect the US ethanol industry who received more favourable treatment than the claimant in like circumstances with US ethanol producers. The tribunal rejected this view because it found that there were in fact identical comparators, producers of MEBE and methanol not ethanol, who were in like circumstances with Methanex[71].

It should be also noted that arbitral tribunals tend to use the concept of "like circumstances" even when no such expression is found in IIAs unlike Article 1102 of NAFTA. A good example is *Consortium RFCC v. Morocco* in which the tribunal examined whether foreign and domestic investors had been in "the same situation" though such a phrase was not included in Articles 3.1 and 3.2 of the Italy-Morocco BIT, the provisions concerning national treatment[72].

III-2-2. Discriminations against Foreign Investors

For a measure to be discriminatory, it does not need to violate domestic law, but it shall be the one that fails to provide foreign investors and investments with treatment at least as

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[69] *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9 (formerly Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt), Award, 27 Oct. 2006, paras. 154-155

[70] *Occidental Exploration and Production Company v. Ecuador*, *supra* note 57, paras. 174, 177

[71] *Methanex v. USA*, *supra* note 56, Part IV, Ch. B, para. 17

[72] *Consortium RFCC c. Royaume du Maroc*, CIRDI Aff. No. ARB/00/6, Sentence arbitrale, 22 déc. 2003, para. 53

favourable as the treatment of domestic comparators[73]. On this point, the tribunal of *Methanex v United States* stressed that there had been no violation of the national treatment principle since the California ban did not differentiate between foreign investors or investments and various MTBE producers in California or, if it was relevant, methanol feedstock producers in the United States: "[t]he treatment is uniform, for the ban applies to all MTBE manufacturers[74]." Hence, in the tribunal's opinion, there was no violation of national treatment in NAFTA as well as in general international law even if Methanex had been legally and factually affected by the governmental measures. There are several other cases, like *ADF Group v. United States*, *AES Summit Generation v. Hungary*, etc. where the tribunals dismissed investors' claims because of non-existence of discriminatory measures.

There is a broad agreement what is decisive to establish a violation of national treatment is the fact that measures objectively have discriminatory effects, while a subjective element, an intent of the host State to discriminate foreign investors, is not required[75]. This is because, as noted in *Feldman v. Mexico*[76], *Bayindir v. Pakistan*[77], it would be virtually impossible for any claimant to meet the burden of demonstrating a government's motivation for discrimination since it is a subjective element. There are indeed some arbitral awards, like *LG & E Energy v. Argentina*[78], *Alex Genin, Eastern Credit v. Estonia*[79], and *Methanex v. United States*[80], require an intention of discrimination. However, a "protectionist intent is not necessarily decisive on its own" as noted in *S.D. Myers v. Canada*, since "[t]he word "treatment" suggests that practical impact is required to produce a breach[81]."

The national treatment obligation is an application of general prohibition of discriminative measures based on nationality, including both *de jure* and *de facto* discrimination. This view is clearly endorsed by the NAFTA cases of *Archer Daniels Midland v. Mexico*[82], *Pope & Talbot v. Canada*[83], as well as by non-NAFTA tribunals, *International Thunderbird Gaming v. Mexico*[84], etc. A clear example where a factual discrimination led to the finding of a breach of the national treatment principle is *Feldman v. Mexico* where tax rebates were

[73] *Ronald S. Lauder v. The Czech Republic*, Final Award, 3 Sep. 2001, para. 220
[74] *Methanex v. USA, supra* note 56, Part IV, Ch. B, para. 21
[75] *F Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 Dec. 2002, para. 181; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 Sep. 2007, para. 368; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007, para. 321; *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, 15 Jan. 2008, para. 138; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, Award on Jurisdiction and Liability, 17 Mar. 2015, para. 791
[76] *F Marvin Roy Feldman Karpa v. United Mexican States, ibid*., para. 183
[77] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 Aug. 2009, para. 390
[78] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006, para. 146
[79] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 Jun. 2001, para. 368
[80] *Methanex v. USA, supra* note 56, Part IV, Ch. B, p. 6, para. 12
[81] *S. D. Myers v. Canada, supra* note 63, para. 254
[82] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico, supra* note 68, para. 193.
[83] *Pope & Talbot Inc. v. Canada, supra* note 55, para. 43
[84] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 Jan. 2006, para. 426

withheld from the claimant while they were given to its Mexican competitors[85]. On the contrary, the absence of *de facto* discrimination proved fatal to the claim in *International Thunderbird Gaming v. Mexico*. In this case, the tribunal did not uphold the claimant' argument that Mexican anti-gambling measures deemed certain "skill machines" operated at the claimant's facilities illegally while domestic ones under essentially identical circumstances remained open and operating, because Mexican measures were directed at both Mexican and non-Mexican gambling operations and they were overall consistent[86].

III-2-3. Purpose of the National Treatment Principle

Even when two elements under the three-step analysis are fulfilled and there were discriminatory measures against foreign investors and investments, a finding of a breach of the national treatment principle will be avoided when the host State can provide an appropriate justification for the different treatment. For instance, the tribunal of *S.D. Myers v. Canada* stated that "the interpretation of the phrase 'like circumstances' in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns[87]." Similar statements can be found in cases such as *Pope & Talbot v. Canada*[88], non-NAFTA case of *Parkerings-Compagniet AS v. Lithuania*[89]. This is a remarkable element genuinely emerged from ISDS jurisprudence—though each arbitral award does not have the *res judicata* effect to the other—because, unlike Article 20 of the GATT, national treatment clauses in most IIAs usually do not expressly provide for such a justification possibility.

The scope of exceptions to the national treatment principle appears to be identical to that of Article 20 of the GATT, as suggested by the tribunal of *S.D. Myers v. Canada*[90] in its analysis of "like" situations. Although the reason why the tribunals rely on the term "like circumstances" is a lack of express stipulations of justification possibility, such an unwritten exception should be restrictively accepted in view of the purpose of the national treatment principle.

In order to consider this problem, the real purpose of the principle needs to be identified. In this regard, a statement in *S.D. Myers v. Canada* can be a clue: "protectionist intent is not necessarily decisive on its own[91]." In other words, it is required for the host State to have a certain extent of protectionist intent while such an intent itself is not decisive to establish a breach of the national treatment principle. For *S.D. Myers v. Canada*, Kurtz analyses an important contextual difference between the two regimes, notably the absence of Article 20 of the GATT in Chapter 11 of NAFTA: "this seems to be the controlling factor shaping its

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[85] *F Marvin Roy Feldman Karpa v. United Mexican States*, *supra* note 75, para. 181
[86] *International Thunderbird Gaming Corporation v. Mexico*, *supra* note 84, paras. 171, 182
[87] *S. D. Myers v. Canada*, *supra* note 63, para. 250
[88] *Pope & Talbot Inc. v. Canada*, *supra* note 55, para. 78
[89] *Parkerings-Compagniet AS v. Republic of Lithuania*, *supra* note 75, para. 368
[90] *S.D. Myers v. Canada*, *supra* note 63, para. 246
[91] *Ibid.*, paras. 252-254

choice to position national treatment as a discipline on purposeful protectionism[92].” In a similar way, the tribunal of *Pope & Talbot v. Canada* mentioned that the “like circumstances” question would require addressing “any difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments.[93]” It can be, therefore, concluded that the national treatment principle in IIL, as it is the same with ITL, prohibits the host State to take protectionist measures in order to guarantee a fair competition between foreigners and nationals in the same market.

In conclusion, the national treatment principle in the WTO Agreements and IIAs is considered to be a multi-sourced equivalent norm proposed by Broude and Shany in fulfilling three criteria: the principle (1) binds upon the same international legal subjects, *i.e.,* the host State; (2) is identical or at least similar in their normative content, *i.e.,* prohibition of protectionist discrimination against foreigners; and (3) has been established through different international instruments in different substantive areas.

IV. Conclusion

With a special focus on the national treatment principle, this paper studied how ITL and IIL legally compete, co-exist and interact with each other in the procedure and reality of dispute settlements for possible parallel procedures before the WTO and ISDS arising from the same factual basis. A conclusion is summarized as following.

The first part examined procedural problems. As a result of the fact that there is no procedural restriction for ISDS tribunals in *prima facie* exercising their jurisdiction, a number of investors ask for interpretation and application of the WTO Agreements before ISDS arbitral tribunals. Although there would be no obstacle in most IIAs, such arbitrations can be problematic from the WTO side, as Article 23 of the DSU confers an exclusive authority for the WTO to interpret its Agreements. On this point, it is possible to conclude that investors’ claim based on ISDS clauses themselves are not prohibited in the light of the WTO Agreements, because Article 23 of the DSU imposes the obligation to use the WTO procedures onto its Members, that is States not investors. In addition, a procedure at the WTO can be launched after investment arbitrations even if the concerned disputes arose from the same fact. This conclusion is supported by general principles of law, as the parties and the cause of action are not formally identical in the WTO and ISDS. Nevertheless, the arbitral tribunals shall not exercise their jurisdiction over interpretation of the WTO Agreement unless a concerned IIA stipulates explicit States’ will of derogation from Article 23 of the DSU. Some of the WTO Agreements can be interpreted as accepting a derogation from Article 23 of the DSU: for instance, the TRIPS Agreement permits the implementation in law of Member States offering “more extensive protection” than is required by the TRIPS, therefore, a

[92] Kurtz, *supra* note 5, p. 124
[93] *Pope & Talbot Inc. v. Canada*, *supra* note 55, paras. 78-79

conclusion of IIA including an ISDS clause is not illegal as far as it is considered to offer such a protection. Moreover, there is a *prima facie* possibility for an arbitral tribunal to interpret the TRIPS Agreement through such an IIA. For the other Agreements in which there is no provisional possibility deducing a derogation from the WTO procedure, it is almost impossible to discharge the obligation of Article 23 of the DSU. Nevertheless, even when the concerned WTO Agreements have a provision for possible derogation from the WTO procedures, States cannot modify the Agreement by conclusion of IIAs as far as they do not notify the other WTO Members of their intention, as it is required in Article 41.2 of the VCLT. In sum, an ISDS tribunal cannot interpret the TRIPS Agreement and the others when there is no such notification to the WTO by the concluding States of IIAs. With the proviso, however, that the problem of jurisdiction does not matter in substance to normative interactions between ITL and IIL for the same rule.

The second part considered a possibility of normative interaction between ITL and IIL with a special focus on the national treatment principle, which is the most fundamental rule in both legal regimes. In the WTO law, Article 3 of the GATT stipulates, among the others, the most basic and general rule of national treatment, which is the provision (1) concerning like products, (2) prohibiting discriminatory protectionist measures against foreign products, and (3) to grant equal opportunities of fair competition; therefore, a derogation from Article 3 shall be strictly subject to conditions provided in Article 20 as general exceptions based on social political reasons or otherwise Article 21 as security exceptions. On the contrary, the provisions of national treatment in IIAs are so simple that they do not mention any exceptions to the principle. Therefore, arbitral tribunals often refer to the WTO jurisprudence in order to find relevant justifications for violations. In order to consider general exceptions to the national treatment principle in IIAs, a three-step analysis was established by the NAFTA tribunals of *S.D. Myers v. Canada* and *Pope & Talbot v. Canada*: (1) whether foreign and national investors are "in like circumstances"; (2) whether any portion of the domestic industry received better treatment than the foreign investor and its investments did; and (3) whether there is any reason and objective to justify the disparate treatment accorded to them. These criteria are indeed very similar with those of the GATT when a violation of Article 3 occurs. Among them, the third element is a point of intersection of ITL and IIL because arbitral tribunals rely on Article 20 of the GATT when there is no provision concerning general exceptions in IIAs like in NAFTA. This fact suggests that the national treatment principle in the context of IIAs is also the rule granting equal opportunities of fair competition. As a result, the principle can be considered as identical or at least similar in its substance on the spheres of ITL and IIL.

In conclusion, the national treatment principle in ITL and IIL can have mutual normative effect regardless of the problem concerning jurisdictions of dispute settlement bodies. Further clarifications of specific normative contents are awaiting increasing interactions between the two legal regimes.

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