BEYOND TRADE LIBERALIZATION AND INVESTMENT PROTECTION: TOWARD MORE INCLUSIVE INTERNATIONAL ECONOMIC JUDICIARIES

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BEYOND TRADE LIBERALIZATION AND INVESTMENT PROTECTION: TOWARD MORE INCLUSIVE AND ORDERLY INTERNATIONAL ECONOMIC JUDICIARIES

ABSTRACT

The implication of trade and investment liberalization on human rights, the environment, public health, and other public interests is a long-debated topic in international legal studies. International economic law and its judiciaries, including the World Trade Organization (WTO) and investment treaty network, are at a critical crossroads. Their once-heralded dispute settlement systems are now buffeted by critique, and their future is in doubt. Recently, the "trade &–" and "investment &–" disputes increasingly occur, turning the WTO dispute settlement mechanism and the investor-state dispute settlement (ISDS) into battlegrounds of competing values of trade/investment liberalization and states' regulatory space. Such potential conflicts between promoting economic prosperity and protecting non-economic interests are manifested in individual cases and states' policymaking. In these disputes, the WTO and the ISDS are condemned for overly sticking to the WTO and investment treaty provisions and inappropriately neglecting external international legal instruments relevant to the dispute raised by the disputing parties, which in turn unduly restraining states' regulatory space to protect their public interests and other social values. Nevertheless, some scholars claim the opposite, arguing that the WTO and ISDS have endeavored to accommodate non-economic factors and other international laws in their adjudicating processes. These extremely contrasting perspectives manifest that the judicial interplays among the WTO, ISDS, and other international legal regimes are worth exploring.

While widespread scholarship exists on the interaction among international legal regimes and judicial engagements from normative aspects, very little addresses the aforementioned debates nor analyzes them with empirical evidence. To fill this gap, I focus on a particular adjudicatory practice among the dispute settlement mechanisms of the WTO and investment treaties, primarily exploring the judicial behavior of introducing external international legal sources in the WTO dispute settlement mechanism and the ISDS. I adopt a mixed-method approach, relying on quantitative

and qualitative content analyses with semi-structured elite interviews to disclose how, when, and why external international legal sources are cited in the WTO dispute settlement mechanism and investment arbitral tribunals. Quantitatively, I conduct a computational legal analysis and statistical tests to comprehensively understand when and how those external international legal sources are analyzed in the WTO and ISDS. Additionally, I conduct both a qualitative content analysis and interviews that will further investigate the potential role(s) of external international legal sources in these two international judicial forums. With the empirical results, I envisage practical legal and policy recommendations that are capable of mitigating the potential negative effects caused by the boundary-crossing between international judicial forums. Through applying interdisciplinary methodological approaches to examine the interactions among international legal regimes – a decades-long debate that still continues in the international law community – I aim to shed light on the discussions of how the WTO and ISDS adjudicators could handle competing interests in dispute reports and awards. Overall, I hope to reshape more inclusive international economic judiciaries and restore the legitimacy of the international economic legal system.

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INTRODUCTION

The impact of trade liberalization and investment protection on human rights, the environment, public health, and other spheres of public interest is a long-debated topic in international legal studies. From a positive perspective, suggesting that trade and investment advance public interests is straightforward, especially from the economic, social, and cultural rights perspectives and for the right to development. For instance, the increases in trade and investment activities can create significant employment opportunities in receiving countries. These economic transactions bring new skills and technology as well as human resources training that may stimulate the overall public welfare of states by empowering people and advancing equal societies if receiving governments responsibly direct trade revenues and investment flows toward their own national development needs. Accordingly, a state has an incentive to shape a business-friendly environment to attract more economic flows by honoring the rule of law, respecting due process, and protecting personal freedom. These efforts may ultimately promote more accountable, democratic, and transparent societies domestically. However, in another extreme of the spectrum, concerns about the "race-to-the-bottom" phenomenon frequently occur where governments are induced to lower their environmental, health, labor protection, and social welfare standards to attract trade and investment flows. Moreover, the nature of trade and investment may also affect the enjoyment of a clean environment, public health, and human rights. For instance, the processes or production methods used in manufacturing certain products are environmentally unfriendly[1] or rely on child labor or forced labor.[2] Likewise, with investment activities, oil drilling conducted by global fossil fuel companies is often accused of oil spills and contaminating water, soil, and air, as well as destroying crops and livelihoods.[3] While states retain the right to implement regulatory measures, such as restricting the imports of those products that are made by forced labor and suspending harmful investment activities, the affected states or investors whose economic interests are negatively influenced are entitled to challenge the legitimacy

[1] *See* Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27(1) YALE J. INT'L L. 59, 70-74 (2002).
[2] *See* Renee Chartres & Bryan Mercurio, *A Call for an Agreement on Trade-Related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards*, 37(3) N.C. J. INT'L L. & COM. REG. 665 (2011).
[3] *See* EMMA AISBETT ET AL., RETHINKING INTERNATIONAL INVESTMENT GOVERNANCE: PRINCIPLES FOR THE 21ST CENTURY 61-71 (2018).

of the states' measures through the WTO dispute settlement mechanism and investor-state dispute settlement system. Increasingly, trade and investment disputes within the WTO or the investor-state dispute settlement (ISDS) are not merely concerned with *inter partes* disputes; in contrast, human rights, environment, and public health conditions might also be impacted by trade and investment cases. These "trade &–" and "investment &–" disputes increasingly occur, turning the WTO or the ISDS mechanism into battlegrounds of competing values of trade/investment liberalization and states' public interests.

The potential value clash between trade liberalization/investment promotion and other non-economic interests manifests not only in individual cases but also in states' policymaking. Much scholarship explores whether states' willingness to adopt measures aiming to advance public interest would be adversely dissuaded by the pro-trade or investment rulings.[4] Hence, as critical architects of the international legal system, the adjudicators of both the WTO dispute settlement mechanism and the ISDS system are expected to be aware of their responsibility to reach an even-handed conclusion. Scholars suggest that both these two international economic judiciaries should recognize the notion of balancing international economic law with other non-economic values.[5] To do so, the adjudicators should determine the interrelationship between external international legal sources, especially those treaties, agreements, and other principles belonging to other equally crucial international legal domains that are relevant to the dispute.

The emergence of international economic law and other international legal regimes reflects the evolutionary nature of international legal systems. Over the past decades, the need to promote synergies between economic and non-economic regulatory regimes has been gradually recognized by interpreting international economic law to conform with other interests, such as environmental protection, public health promotion, and human rights.[6] Since the 1980s, it has been believed that public welfare and economic development should be achieved with tangible

[4] High Commissioner for Human Rights, Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights, at 21, U.N. Doc. E/CN.4/Sub.2/2003/9 (July 2, 2003).
[5] Ernst-Ulrich Petersmann, *The Promise of Linking Trade and Human Rights*, *in* LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES 46 (Daniel Drache & Lesley A. Jacobs eds., 2014).
[6] *Id*.

synergies.[7] Such an ideology is also recognized by international organizations (e.g., the United Nations), which advocate a greater presence of sovereign states' public interests and welfare in international economic law. Currently, the crucial role of international economic law is commonly recognized to realize other policy objectives such as reducing poverty, promoting sustainable development, and combating global climate change.[8] For example, the United Nations Committee on Economic, Social and Cultural Rights has elaborated on states' human rights obligations in the context of international trade and investment. In its General Comment No. 24, the Committee underscores that states "should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist" and "cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude.[9]" The General Comment also notes that "[t]he interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State.[10]" As a result, treaty negotiators should expressly incorporate human rights principles in future trade and investment treaties so that international adjudicators can systematically consider human rights doctrines when interpreting the provisions of trade and investment treaties.[11] Likewise, the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements explores ways to ensure that such economic legal instruments are consistent with states' human rights obligations.[12] While these documents are soft law in nature, they illuminate a path for strengthening the synergies between economic and non-economic interests in the international legal forum.

However, when focusing on the treaty provisions of the covered agreements of the WTO and most international investment treaties, they seem to be traditionally silent on international treaties or legal principles that fall outside trade or investment

[7] DIANE A. DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE AND INVESTMENT 20-24 (2015).
[8] Petersmann, *supra* note 5, at 47.
[9] UN Committee on Economic, Social and Cultural Rights 'General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities: restricting marketing and advertising of certain goods to protect public health' (10 August 2017) UN Doc E/C.12/GC/24 (hereafter CESCR General Comment No 24) [13].
[10] CESCR General Comment No 24.
[11] CESCR General Comment No 24.
[12] United Nations, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (Addendum to the Report of the Special Rapporteur on the Right to Food, Olivier De Schutter) UN Doc A/HRC/19/59/Add.5 (19 December 2011) (hereafter UN Guiding Principles HRIAs).

legal domains – even if those external international legal sources are relevant to given trade and investment disputes. Without a clear mandate from the applicable treaties, both the WTO dispute settlement mechanism and investment arbitral tribunals are allegedly hesitant to embrace external international legal sources even if the disputes do not only involve trade or investment issues. For example, while Members of the WTO created the Trade and Environment Committee in 1994 with the hope of harmonizing the relationship between trade and environmental protection, the Committee hedges its ambitions and declares that its duties and works are based on the following understanding:

> "*The WTO is only competent in dealing with trade. In other words, in environmental issues, its only task is to study questions that arise when environmental policies have a significant impact on trade. The WTO is not an environmental agency. Its members do not want it to intervene in national or international environmental policies or to set environmental standards. Other agencies that specialize in environmental issues are better qualified to undertake those tasks.*[13]"

This conservative perspective held by the WTO attracts criticisms from scholars and NGOs that advocate for a more inclusive multilateral trade system. They argue that "in the event of a conflict between a universally recognized human right and a commitment ensuing from international treaty law such as a trade agreement, the latter must be interpreted to be consistent with the former. When properly interpreted and applied, the trade regime recognizes that human rights are fundamental and prior to free trade itself.[14]"

To realize the object and purpose of trade and investment agreements while at the same time respecting non-trade and investment values, commentators initiate both legislative and interpretative approaches to promote the synergies between different international legal regimes. In terms of the legislative approach, scholars suggest that

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[13] *The Environment: A Specific Concern*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm#:~:text=In%20its%20report%2C%20the%20Appellate,%E2%80%9Callow%E2%80%9D%20them%20this%20right. (last visited Jan. 31, 2024).

[14] *See* Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, *in* HUMAN RIGHTS IN DEVELOPMENT YEARBOOK 1999/2000: THE MILLENNIUM EDITION 51-82 (Hugo Stokke & Anne Tostensen eds., 2001).

future international economic agreements should seriously consider incorporating the "linkage" to introduce non-economic perspectives. As envisaged by international lawyers, the "entry point" of external international legal sources in international economic agreements can be inserted in sections or provisions such as (1) preambles, (2) right to regulation clauses, (3) non-derogating of standards (i.e., the protection of public interests of states); and (4) public policy exceptions.[15] Notably, recent revisions of some regional trade agreements and model international investment treaties, together with more frequent involvement from third parties in the WTO dispute settlement mechanism and the ISDS, facilitate the opportunities to increase references and citations to relevant external international legal sources. The actual number of instruments negotiated that incorporate such provisions is, however, still exceedingly rare. The negotiation powers and other factors relating to the political economy are all factors that could affect the contracting parties' incentives to conclude a more "balanced" international economic agreement/treaty.

In light of this dilemma, other scholars shift their focus to envisage possible interpretative approaches–namely, proposing the guidelines for adjudicators in international trade/investment regimes to consider external international legal sources when necessary. For example, Kingsbury stresses the need to perceive diverse international legal regimes as one multilateral system that aims to address common concerns of the international society.[16] In other words, the purpose of the WTO and the network of investment treaties is not only to promote economic growth or protect investors but also to promote "democratic accountability," "good and orderly state administration," and "rights and other deserving interests.[17]" Scholars with similar ideologies further emphasize that the legitimacy of international law is ensured if the adjudicators of the WTO and the ISDS adequately acknowledge the international legal instruments in other international legal regimes as well as prior jurisprudence rendered by other international courts or tribunals. [18] From this perspective, embracing

[15] Jesse Coleman et al., *Human Rights Law and the Investment Treaty Regime* (CCSI Working Paper 2019).
[16] Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMPORARY PROB. 15, 47-48 (2005).
[17] Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, *in* EL NUEVO DERECHO ADMINISTRATIVO GLOBAL EN AMERICA LATINA 221, 231 (Benedict Kingsbury et al. eds., 2009).
[18] Kingsbury et al., *supra* note 16, at 35. *See* SARAH JOSEPH, BLAME IT ON THE WTO: A HUMAN RIGHTS CRITIQUE 50-53 (2011).

external international legal sources can encompass the non-economic values in trade and investment legal regimes and harmonize the potentially competing interests.

Nevertheless, initiating systemic integration of non-economic interests has not gained unanimous support from the WTO Panels/Appellate Body and investment arbitral tribunals. [19] Some commentators further express their concerns over progressive "boundary crossing"; namely, they oppose treating the reference of external international legal sources as the "default" rule for the WTO Panels and Appellate Body as well as the investment arbitral tribunals. Scholars who hold this view warn that the WTO or investment arbitral tribunals may not be the appropriate forum to adjudicate environmental protection, human rights, and public health matters because such a judicial behavior would be perceived as judicial activism that goes beyond the delegated authority of the Panels, the Appellate Body, and investment tribunals. [20] These scholars indicate that the inappropriate interpretation of international legal sources that are alien to what adjudicators of the WTO or ISDS are used to apply may result in a more severe legitimate crisis in the international legal system.[21]

The emergence of international economic law and other international legal regimes reflects the evolutionary nature of international legal systems. It is expected that the Panels/Appellate Body and investment arbitral tribunals would have to address the interrelationship between their own legal regime and external international legal sources. Nevertheless, as presented, there are currently two opposite perspectives regarding the judicial cross-fertilizations exercised by the disputing parties and adjudicators in the WTO and the ISDS. Which arguments and descriptions better reflect the operation of contemporary international judiciaries and the scenario of contemporary global governance? Is the proliferated international legal system and judiciaries a positive or negative development? Can the coherence of international law be maintained through the efforts of cross-fertilization via disputing parties and international adjudicators? While there is widespread scholarship on the international law proliferation debates, few answer the aforementioned questions and support their analysis with empirical evidence. To fill this gap, I focus on a particular type of

[19] JAMES HARRISON, THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANISATION 201 (2007).
[20] Jose E. Alvarez, *Beware: Boundary Crossings - A Critical Appraisal of Public Law Approaches to International Investment Law*, 17 J. WORLD INVESTMENT & TRADE 171 (2016). *See also* J. Patrick Kelly, *Judicial Activism at the World Trade Organizational: Development Principles of Self-Restraint*, 22 NW. J. INT'L L. & BUS. 353, 358 (2001-2002).
[21] Alvarez, *supra* note 20, at 203.

adjudicatory practice in the dispute settlement mechanism of the WTO and investment treaties, primarily to explore the judicial behavior of citing external international legal sources in the WTO dispute settlement mechanism and investment treaty arbitration. With the empirical results, I move to tailor the legal and policy recommendations that are effective and practical in mitigating the potential negative effects caused by the boundary-crossing conducted by international economic judiciaries. The ultimate goal is to contribute to a debate that has lasted far too long in the international law community.

CHAPTER I RESEARCH AND CONCEPTUAL BACKGROUND

I. The Contemporary Evolution of the International Legal System

Globalization has led to increased uniformity of social life worldwide and has significantly transformed the structure of the international legal system. Traditionally, international law's primary focus is the relationship between sovereign states, including establishing or severing diplomatic relations, declaring wars, or negotiating peace treaties.[22] However, an ever-increasing number of fields require international coordination, such as addressing cross-boundary pollution, preserving exhaustible natural resources, and regulating transnational economic activities.[23] States are gradually realizing that they cannot independently address matters that may involve the interests of other countries. To address novel challenges and enhance the international community's common interests, various international regulatory and cooperative regimes are created. For instance, the World Trade Organization (WTO) aims to "open trade for the benefit of all."[24] The World Health Organization (WHO) is a specialized agency of the United Nations endeavoring to achieve the highest attainable health standards.[25] Global and regional human rights organizations strive for the realization of the universal enjoyment of fundamental human rights by every individual.[26] As a result, the scope and substance of international law gradually expanded and diversified in modern society.

One feature of recent international modernity is what sociologists call "functional differentiation." It is used to depict the emergence of specialized and relatively autonomous spheres of social action and structure.[27] Legal specializations like "international human rights law," "international economic law," or "international

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[22] *See generally* Martti Koskenniemi, *Expanding Histories of International Law*, 56(1) AM. J. LEGAL HIST. 104 (2016).
[23] *See* Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15(3) INT'L J. CONST. L. 671, 674 (2017).
[24] *The WTO*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/thewto_e.htm (Last visited Feb. 2, 2024).
[25] *WHO remains firmly committed to the principles set out in the preamble to the Constitution*, WORLD HEALTH ORGANIZATION, https://www.who.int/about/who-we-are/constitution (Last visited Feb. 12, 2024).
[26] *The Foundation of International Human Rights Law*, UNITED NATIONS, https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html (Last visited Feb. 12, 2024).
[27] Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 11, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

environmental law" diversify the international legal system. This diversification occurs not only in the substance of the laws themselves but also via the variety of judicial forums available for dispute resolution. Many current international dispute settlement mechanisms adjudicate disputes arising from different international legal regimes.[28] Aside from conventional judicial institutions like the International Court of Justice (ICJ), other specialized judicial institutions play more critical roles in adjudicating human rights violation disputes, examining trade and investment treaty compliance, and delimiting maritime boundaries. These institutions are considered more effective and appropriate forums to resolve particular disputes.

Moreover, sovereign states are no longer the sole "actors" in contemporary international law. The players in international law now encompass international organizations, multinational corporations, and even individuals.[29] In some cases, these non-state actors are entitled to directly bring their claims to international tribunals to challenge the legality of states' measures under international law. Prominent examples include emerging investor-state dispute proceedings and human rights treaty mechanisms, where foreign investors and individuals can challenge states by arguing that their measures are inconsistent with their obligations set forth in investment treaties, human rights conventions, or relevant customary international laws. Moreover, a dispute with same factual background may be brought to multiple international judicial forums by individuals, thus resulting in parallel proceedings. Commentators warned that the aforementioned developments might contribute to the "fragmentation" of international law, namely, separate legal norms and of institutions have developed largely independently from one another without considering the disciplines of other international legal regimes.[30] Along with the proliferation of international judicial forums, the international law academia debates whether the proliferation of the international legal system would result in situations in which multiple international norms co-exist in relationships of conflict.[31]

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[28] *See* Antonio A. Cancado Trindade, *A Century of International Justice and Prospects for the Future*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 56, 62 (Mads Andenas & Eirik Bjorge eds., 2015).

[29] *See* ALLEN WEINER ET AL., INTERNATIONAL LAW (2018).

[30] Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 244-45, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

[31] Margaret A. Young, *Fragmentation*, *in* OXFORD HANDBOOK OF INTERNATIONAL LAW, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0113.xml. (last visited Feb. 24, 2024).

II. From Fearing International Law Fragmentation to Acknowledging the Reality of International Regime Complexity

As Anne Peters points out, "the term 'fragmentation of international law' denotes both a process and the result of that process, namely a (relatively) fragmented state of the law. The diagnosis refers to the dynamic growth of new and specialized sub-fields of international law after 1989, to the rise of new actors beside states (international organizations, non-governmental organizations [NGOs], and multinational corporations), and new types of international norms outside the acknowledged source."[32] The understanding of international law fragmentation, resulting from international and judicial proliferation, has evolved through various phases. Initially, scholars and other actors in international law were alarmed by and feared the fragmentation of international law; however, this ideology gradually shifted towards a more neutral or even optimistic perspective. This new outlook recognizes the reality of international regime complexity. The following sections illustrate such transitions, and the details of these evolutions follow.

A. Negative Perspective of International Law Fragmentation in the Early Years

Discussions on the fragmentation of international law can be traced back to the early 1990s, following the end of the Cold War, when new international organizations and judicial forums began to flourish. While many hailed this as a promising advancement towards the legalization and judicialization of the international order in the post-Cold War era, such developments also raised concerns about the potential adverse effects of international law fragmentation. This includes the proliferation of specialized international courts and the concern that "the lack of hierarchical relationships between institutions leads to conflicts between legal rules, lack of clarity, and loss of predictability.[33]" Some scholars also assert that international law fragmentation is hazardous from a political economy perspective. They claim that the fragmented international law would "sabotage the evolution of a more democratic and egalitarian international regulatory system and undermine the reputation of

[32] *See* Peters, *supra* note 23, at 673.
[33] Tamar Megiddo, *Beyond Fragmentation: On International Law's Integrationist Forces*, 44 YALE J. INT'L L. 115, 121 (2019).

international law for integrity.[34]"

The concerns surrounding the fragmentation of international law and judicial proliferation are multifaceted. A primary worry arises when a single case is presented to multiple international judicial forums with overlapping jurisdictions, leading to the possibility of conflicting decisions for the same dispute. This is compounded by the decentralized and unregulated competition among international courts, which increases the likelihood of inconsistent rulings. Another risk is that the same international legal rule could be interpreted differently across various international judiciaries, potentially resulting in its divergent application across different legal regimes. Such discrepancies or even contradictions in rulings could place states in a dilemma of complying with their obligations under different international legal regimes. Scholars warn that the divergent interpretation of identical or similar international legal provisions is fatal since it undermines the authority of the international legal system and fuels the criticism that international law is not "law" in essence.[35]

The abovementioned fears regarding international law fragmentation and judicial proliferation were, unfortunately, realized in the *Duško Tadić* case. Duško Tadić was a former leader of the Serb Democratic Party and was convicted of crimes against humanity, breaches of the Geneva Conventions, and war crimes during the Bosnian War. The case was heard and adjudicated by the International Criminal Tribunal for the former Yugoslavia (ICTY). The dispute with identical case facts and the same legal principles at issue was brought to the ICJ at the state-to-state level. However, the two courts rendered diverging irreconcilable interpretations of the term "control" in Article 8 of the International Law Commission (ILC) Draft Articles on State Responsibility – which is the legal criteria to assess whether the conduct of private individuals or nonstate groups can be attributed to a state. Specifically, while the ICTY recognized that the existence of "overall control" from government agencies could meet the standard, the ICJ asked the claimant to prove the existence of "effective control" by the respondent state to satisfy the meaning of "control" under Article 8 of the ILC Draft Articles on State Responsibility – which is the threshold established in Nicaragua case. This ruling manifestly raises the threshold of

[34] *See generally* Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60(2) STAN. L. REV. 595 (2007).
[35] Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 849-851 (2003).

establishing a respondent state's international liability.

From some scholars' perspective, this case undermines the authority and consistency of international law because the ICTY overturned a long-standing ICJ doctrine on the issue of state responsibility for irregular force activities by creating its own distinctive approach.[36] The fear of international law fragmentation was even fueled by the statement delivered by the Appeals Chamber of the ICTY, which defended its distinct ruling and stated that:

> "*International law, because it lacks a centralised structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralised or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).*[37]"

The concern about international law fragmentation and international judicial proliferation was not limited to legal academia. Instead, government officials, international organizations, and even the international adjudicators themselves highlighted the danger of fragmented development of international law, warning that it might risk incoherence between different international legal regimes and eventually collapse the international legal system at large.[38] In response to the criticisms expressed by legal academia, the United Nations International Law Commission published the report titled "Fragmentation of International Law" in 2006, making it the first official research project that systematically examined discussions of international law fragmentation. This report points out that fragmentation originates from the "decentralized and non-hierarchical nature of international law-making.[39]" This decentralized characteristic may induce conflicts between specialized legal regimes because, unlike the domestic legal system, there is no authoritative central

[36] Chiara Giorgetti & Mark Pollack, *Beyond Fragmentation*, *in* BEYOND FRAGMENTATION: CROSS-FERTILIZATION, COOPERATION, AND COMPETITION AMONG INTERNATIONAL COURTS AND TRIBUNALS 1, 9 (Chiara Giorgetti & Mark Pollack et al. eds., 2022).
[37] Prosecutor v. Tadic, ICTY Appeal Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, ¶ 11,
[38] *See* MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 334 (2011).
[39] *See* Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 246, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

judicial body in international law that can effectively adjudicate the conflicts between different international legal regimes.[40] The report then evaluates several legal techniques that are considered promising to mitigate international law inconsistency, including the rules of applicable law and treaty interpretation under Articles 30 and 31 of the Vienna Convention on the Law of Treaties.[41]

However, even with the proposed legal toolkits to maintain the coherence of international legal order (at least theoretically), scholars assert that the decentralized international legal systems and the judicial proliferation may be manipulated by the actors of international law that have little or even no interest in upholding the coherence of the international legal system. For example, for those global enterprises initiating investment arbitrations against host states, it is imaginable that they will have no interest in invoking procedural practices and substantive laws from other international courts and tribunals if such external references contradict their own specific interests and values.[42] International relations scholars also perceive the proliferation of international legal sources and international courts as an innate feature of international law. Realists contend that the fragmentation of international laws is a natural and inevitable development of the international legal system.[43] States, especially those hegemonies after the end of the Cold War, endeavored to ensure that their national interests and benefits would never be impeded nor challenged. Establishing a multilateral mechanism is a natural and practical approach to legalizing their hegemonic status and core interests.[44] Notably, the creation of certain elemental institutions or international rules is not necessarily the end of pursuing maximizing states' interests. Suppose that the hegemonies realize that there are other rising powers gradually challenging their dominant status. In that case, they will seek to either compete with the rivalry within that regime or deliberately create a new institution and rules to circumvent opposition and reshape their favored policies, even if such a new venue might substantially replace the role and function of the existing one. Commentators used the relationships between the WTO and the emerging regional economic integrations as a vivid example of regime shifting. The critical incentive for the developed countries to negotiate using the WTO in place of the

[40] *See id.*
[41] Vienna Convention on the Law of Treaties, Arts 30 & 31, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).
[42] Thomas Streinz, *Winners and Losers from the Plurality of International Courts and Tribunals: Afterward to Laurence Boisson de Chazournes' Forward*, 28 EUR. J. INT'L L. 1253 (2018).
[43] *See generally* Benvenisti & Downs, *supra* note 34.
[44] *Id.*

GATT in the 1990s was that the US and its Western allies intended to internationalize their domestic trade rules and regulations at the global level. Hence, the establishment of the WTO constructs a friendly regulatory environment for maintaining their powers. In other words, maintaining a consistent international legal system is not the primary concern of sovereign states; rather, like other international law actors, maximizing national interests by creating new international law and judicial proliferation is their principal objective. When viewed from this perspective, scholars who are pessimistic about international law fragmentation assert that the jurisdictional competition and the potential for divergent interpretations by different international judicial bodies will ultimately erode the unity and coherence of the international legal order.[45] These scholars caution that inconsistent rulings, similar to those made in the *Duško Tadić* case, will only become more frequent as the international legal regimes and judicial forums continue to expand.

B. Optimistic Reappraisal on International Law Fragmentation: Regime Complexity

After a decade of concerns arising from international law fragmentation and judicial proliferation, recent studies seem to hold a relatively optimistic reappraisal and perceive fragmentation and proliferation as a positive and healthy evolution of international law. They contend that international law fragmentation and judicial proliferation can, conversely, enhance the accountability of international law by furthering fruitful contestation about legal rules and judicial forums. Inspired by international relation theorists who perceive contemporary international laws and judicial systems as "an array of partially overlapping and nonhierarchical institutions governing a particular issue-area," this school of scholars describes the overlaps of institutions' authorities and international rules as "regime complexity." In their view, such an evolution is actually neutral and can be expected given that the absence of hierarchy among international organizations and international laws is the key feature of the international legal order.[46] Under the concept of regime complexity, international law is naturally differentiated into distinct categories, such as trade,

[45] Giorgetti & Pollack, *supra* note 36, at 10-11.
[46] Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7(1) PERSPECTIVES ON POLITICS 13, 13 (2009).

investment, environmental protection, public health, and human rights. Additionally, each sub-legal regime may be embedded with its own dispute settlement mechanism(s). As previously demonstrated, a dispute may concern several different legal issues. Hence, while the overlap and interaction between different legal regimes and multiple judicial bodies are inevitable, their negative impacts on the legitimacy of international law should not be overestimated.

Unlike scholars who are relatively pessimistic in terms of international law fragmentation and judicial proliferation, these scholars illustrate various benefits of how the regime complexity that emerged from international law fragmentation and judicial proliferation can contribute to better global governance. From the international relationists' perspective, the prosperity of institutions and international rules present opportunities for more actors in the system to participate and formulate a more comprehensive solution for multidimensional global challenges. These scholars criticize the encompassing institutional solution of creating an inclusive institution aimed at rectifying current power disparities, assigning international responsibilities to safeguard individual rights, enhancing democratic participation, and thus more effectively strengthening global governance.[47] Such a Utopian effort, however, is doomed. As Crawford underscored, the nature of proliferation and fragmentation is inherent to international law.[48] The ambiguity and multiplicity resulting from international regime complexity are much more consistent with states' interests because "strategic inconsistency" leaves more flexibility for states to gain better interests among different regimes. Neoliberalists and institutionalists also argue that a decentralized system is more efficient than a formal, centralized system since different international regimes with their own specific focuses, institutional designs, and governing rules provide better "constructed focal points that make particular cooperative outcomes prominent.[49]" The competition among international regimes could potentially enhance the quality of global governance.[50] Specific global issues,

[47] *See*, *e.g.*, David Held, *Cosmopolitanism: Globalisation Tamed?*, 29 REVIEW OF INTERNATIONAL STUDIES 465 (2003). Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103(1) ETHICS 48 (1992).
[48] James Crawford, *Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture*, 1 J. INT'L DISP. SETTLEMENT 3, 23-24 (2010).
[49] Robert O. Keohane & Lisa Martin, *The Promise of Institutionalist Theory*. 20(1) INTERNATIONAL SECURITY 39, 39-51 (1995).
[50] J. C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9(4) THE REVIEW OF INTERNATIONAL ORGANIZATIONS 385, 385-412 (2014). *See also* Benjamin Faude & Michal Parizek, *Contested Multilateralism as Credible Signaling: How Strategic Inconsistency Can Induce Cooperation Among States*, 16 THE REVIEW OF INTERNATIONAL ORGANIZATIONS 843 (2021).

such as trade liberalization, environmental protection, and human rights promotion, can be governed by tailor-made institutional designs and regulatory models that particularly focus on a specific area. Specifically, compared with conventional international judicial bodies such as the ICJ, vibrantly emerging international courts could function more effectively in resolving disputes that require adjudicators with specific background knowledge.[51] Ultimately, the "competition" between different international legal regimes and judicial forums would benefit the international community because of international law's higher content quality.[52] Post-modernists or Constructivists also tend to welcome international law proliferation as an alternative to the formal, top-down institutional design of the international system.[53] From their views, the proliferation of international regulatory regimes is "either an unavoidable minor problem in a rapidly transforming international system or even a rather positive demonstration of the responsiveness of legal imagination to social change.[54]"

Some international legal scholars also hold a similar standpoint and argue that international law fragmentation actually leads to favorable results. They contend that the fragmentation is an essentially harmless side effect of the "institutional expression of political pluralism internationally.[55]" They exemplify the positive results associated with fragmentation, including more compliance with international law, an accommodation of the plurality of states' positions, and the development of international law by arriving at a common denominator either in a piecemeal fashion region or one regime at a time.[56] These scholars even denounce the appropriateness of using the pejorative term "fragmentation"[57] to describe the proliferation of the international legal system and judicial forums. Instead, they propose framing this phenomenon as "pluralism."[58] In their view, fragmentation/proliferation is a necessary

[51] KAREN ALTER ET AL. (EDS.), INTERNATIONAL COURT AUTHORITY (2018). KAREN ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014).
[52] *See* Jonathan I. Charney, *The Implication of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 73-75 (1996).
[53] Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 555 (2002)
[54] *Id*. at 553.
[55] *Id*. at 555.
[56] Hafner, *supra* note 35, at 859-860. JOEL P. TRACHTMAN, THE FUTURE OF INTERNATIONAL LAW 230 (2014)
[57] *See* Anne Peters, *Fragmentation and Constitutionalism*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 1011, 1011 (Anne Orford et al. eds., 2016).
[58] William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 963 (2003).

growing pain accompanying the maturation of the international legal system.[59] In other words, it is the need of the international community today that drives regime specialization and flexibility.[60]

In short, scholars who hold optimistic views regarding current international law developments contend that fragmentation concerns are exaggerated since fragmentation naturally evolves from international law.[61] They dismiss the anxieties about international law fragmentation and judicial proliferation as a "rather theoretical, even esoteric problem.[62]" These commentators further allege that instead of fragmentation, the direction of international law's overall evolution is heading to convergence.[63] An international legal regime (e.g., trade law, investment law, or human rights law) matters not only in its own dispute settlement mechanism but also in other judicial forums because those rules, while alien to a specific legal regime, might offer some guidance and insights for resolving disputes. As a result, such a phenomenon of cross-references actually contributes to a more coherent international legal system. In the same vein, the same scholars stress that while "the rise of [multiple] international courts do increase the possibility of conflicting judgments, it does so within the context of a more, rather than less, important role for international law.[64]" Andenas and Bjorge even proclaim that contemporary international legal scholars can confidently wave farewell to fragmentation and embrace the increasingly coherent international legal system, given that the international community has been conscious and aware of the legal instruments of other regimes and has respected the decisions rendered by external international courts.[65]

C. Halting the Debates in International Law Fragmentation: Pressing Pause

As I have demonstrated thus far, international law fragmentation is a phenomenon characterized by uneven normative and institutional development and

[59] Anthony J. Colangelo, *A Systems Theory of Fragmentation and Harmonization*, 49 N.Y.U. J. INT'L L. & POL. 1, 7 (2016).
[60] Megiddo, *supra* note 33, at 122.
[61] *See* Peters, *supra* note 23, at 680-82.
[62] Koskenniemi & Leino, *supra* note 53, at 574-75.
[63] *See* Burke-White, *supra* note 58, at 967 & 971-73. (stating that the informal agreements or dialogues between states or in international institutions can to some extent avoid treaty conflicts before they occur)
[64] *Id*. at 967.
[65] MADS ANDENAS & EIRIK BJORGE (EDS.), A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW (2015).

progression in inter-state relations.[66] Nevertheless, neither the optimists nor pessimists of international law fragmentation and judicial proliferation would deny that contemporary global governance is built on dispersed legal regimes cooperating with their corresponding judicial forums. Hence, it seems to be meaningless to stick to purely theoretical debates and either exaggerate or overlook concerns that international law fragmentation and judicial proliferation may generate. Instead, the most important task for current scholarship should endeavor to offer a fact-based understanding of international law fragmentation and judicial cross-fertilization. With such an understanding, practical and tailored strategies that are able to mitigate the potential international law or values conflicts can thus be manifested. In order to achieve this goal, engaging with studies on international judicial cross-fertilization – namely, to understand how international courts formally or informally communicate with each other and how the international adjudicators address the international legal sources that are alien to their legal fields – should be the prerequisite for arguing whether international law fragmentation is positive or detrimental. Without more reliable data and empirical evidence illustrating the extent of judicial cross-fertilizations exercised in international courts, the threats posed by international law fragmentation are more perceived than materialized.[67]

While there is debate over whether the contemporary international legal system is moving toward fragmentation or coherence, a strong consensus persists that each international legal regime should avoid becoming a "self-contained" system. As the ICJ judge Christopher Greenwood correctly indicates: "International law is not a series of fragmented specialist and self-contained bodies of law…; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other courts and tribunals…."[68] In line with this voice, a series of concepts is identified to describe cooperative processes or approaches that are available for international judges to minimize inconsistent interpretations triggered by international law fragmentation – including *inter alia*, judicial cross-fertilization, judicial dialogues, and ultimately, "managerial approach" – to promote the coherence

[66] Margaret Young, *Fragmentation, Regime Interaction and Sovereignty*, *in* SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY 71, 71 (Christine Chinkin & Freya Baetens eds., 2015).
[67] Laurence Boisson de Chazournes, *Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach*, 28 EUR. J. INT'L L. 13, 34 (2017).
[68] Declaration of Judge Greemwood, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo), Compensation, Judgment, ICJ Rep 2012.

of the international legal order.[69] Scholars indicate that international adjudicators in different judicial forums have coordinated by referring to procedural and substantive rulings from their fellow judiciaries. Therefore, legal instruments under a specialized international legal regime (e.g., human rights) would possibly be cited and addressed in non-human rights judicial forums such as the WTO[70] or investment arbitral tribunals[71]. Such efforts, as argued by scholars, can be attributed to the intent of international adjudicators to maintain the coherence of the international legal and judicial systems.[72]

With that being said, even if there are fruitful discussions and arguments advocating the desirability of engaging in dialogue across international judiciaries, a series of questions remains unknown and can be better answered empirically. For example, how often does such cross-fertilization happen in international courts? What factors can better explain why international adjudicators would acknowledge external legal sources? What types of cases are more likely to introduce external international legal sources? What are the functions that external international legal sources can play in "local" judicial forums that engage in such judicial cross-fertilization? Addressing the aforementioned questions is essential before assessing the effects of international law fragmentation and judicial proliferation. In other words, empirically assessing the judicial cross-fertilizations exercised in international judiciaries is crucial to intellectually underpinning debates regarding international law fragmentation.

III. The Emergence of Judicial Cross-Fertilization between International Courts and Tribunals

A. The Evolution of Judicial Dialogue and Cross-Fertilization

With the increasing agreement that international law fragmentation and

[69] Giorgetti & Pollack, *supra* note 36, at 17.
[70] The most recent case regarding the relationship between WTO and human rights protection is the dispute between the US and Venezuela, which concerns the US unilateral trade sanction against Venezuela due to the human rights consideration. Request for consultations by Venezuela, *United States – Measures Relating to Trade in Goods and Services, Request for consultations by Venezuela*, WT/DS574/1 (Aug. 1, 2019).
[71] The investment arbitral tribunals have also been required to take human rights consideration into account when interpreting and applying the international investment treaties. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).
[72] Mads Andenas & Eirik Bjorge, *Introduction: From Fragmentation to Convergence in International Law*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 1, 2-3 (Mads Andenas & Eirik Bjorge, eds., 2015).

proliferation are not necessarily negative, the focus of scholarly discussions turns to explaining the origin and phenomenon of international judicial cross-fertilization. The vast majority of literature on judicial proliferation emphasizes cooperation among international courts as the promising approach to addressing the potential inconsistency of judicial proliferation.

International judicial bodies occasionally communicate with one another, and there are various types of cross-judicial interactions among international courts.[73] Given that the booming of international legal sources and judicial forums is destined for the international legal system, international lawyers want to prevent the development of international legal and judicial proliferation from going wild. Hence, they envisage solution(s) to mitigate the potential adverse effects on the future development of international law. Recognizing the current *status quo* of the international legal system, a group of scholars submitted legal and policy recommendations to prevent potential conflicts caused by international law fragmentation and proliferation. For instance, Martinez submits that international courts should apply the "antiparochial approach." To elaborate, she suggests that international courts should consider relevant decisions rendered by other international judiciaries in order to promote the development of a cohesive and effective international judicial system. Such a goal can be achieved by fostering dialogues among international adjudicators in various legal regimes.[74] In the same vein, Chazournes explores the emerging trend of adopting a managerial approach among international courts. He argues that both international adjudicators and states are actors in an effort to ensure that international law proliferation is developed in a duly manner.[75]

With that being said, promoting the judicial dialogue among different international judicial forums is not without caution. For example, while admitting the fact that cross-fertilizations among different international legal regimes are increasingly frequent, Alvarez warns that interpretative cross-regime citations should not go against the object and purpose of the underlying legal regimes. Otherwise, it might pose the risk of inappropriately interpreting or applying external international

[73] *See generally* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1995).
[74] *See generally* Jenny S. Martinez, *Towards An International Judicial System*, 56 STAN. L. REV. 429 (2003).
[75] de Chazournes, *supra* note 67, at 13.

legal sources that conversely undermine the legitimacy of the international legal system.[76] He concludes his analysis by noting that "prescriptions for boundary crossings, and jurisprudential approaches that presume that these are 'progressive', should be accompanied by a warning: 'Beware: unintended consequences ahead.[77]'" This caveat manifests the notion of carefully exercising the managerial approach amidst the effort of maintaining international law coherence via exercising judicial cross-fertilization.

B. Potential factors influencing cross-fertilizations among international courts

Scholars raise several hypotheses from international relations, international legal disciplines, and sociological perspectives, to explain what motivates the external references conducted in the international adjudication. They propose that there are several possible behavioral explanations for international judicial cross-fertilization.

1. Fill Regulatory Loopholes

The first and probably most intuitive explanation is that international judicial bodies may resort to external international legal sources when applicable legal instruments in their own respective legal regimes are deemed insufficient to adjudicate a dispute.[78] The increasing complexity of legal disputes is the primary contributing factor that creates such interstices of relevant applicable laws. For instance, an investment dispute may not just concern legal issues of investment protection but also involve human rights aspects. Given that most investment treaties fail to address human rights issues, and international adjudicators are discouraged from concluding that "no laws" apply to the dispute, relevant human rights conventions and rulings rendered by human rights courts naturally draw investment arbitrators' attention. In addition, citing external international legal sources, especially the judgments or awards rendered by other international courts, has its practical appeal.[79] It reduces the length of rulings and enhances the authority of judgments by drawing on other prestigious and prominent international courts. As Schill suggests,

[76] Alvarez, *supra* note 20.
[77] *Id*. at 228.
[78] *See* KAREN ALTER & LAURENCE HELFER, INTERNATIONAL LEGAL TRANSPLANTS: THE LAW AND POLITICS OF THE ANDEAN TRIBUNAL OF JUSTICE (2014).
[79] JOSE E. ALVAREZ, THE BOUNDARIES OF INVESTMENT ARBITRATION: THE USE OF TRADE AND EUROPEAN HUMAN RIGHTS LAW IN INVESTOR-STATE DISPUTES 21 (2018).

citing external legal sources and relevant jurisprudence, when necessary, can "shift the burden of argumentation by demanding a reasoned justification for departing from precedent.[80]" In the case of a legal vacuum within a particular legal regime, external international legal sources can be used to introduce a concept alien to the citing international judicial bodies and, therefore, fill the legal gaps.

2. Strengthen the Legitimacy and Authority of Judgements

The second explanation that, to a certain extent, relates to the first hypothesis, is that the reference to external international legal sources may strengthen the legitimacy and the authority of the citing international judicial bodies themselves. As Alvarez argues, the "'spell' of precedents, even when it is only *jurisprudence constante* not subject to *stare decisis*, may be all the more appealing to the extent the respective adjudicators involved share a common mission.[81]" When the citing international courts or tribunals properly introduce the external international legal sources, they can demonstrate that the analysis is all well-formulated by emphasizing the soundness of their reasoning or, at the very least, prevent themselves from an accusation of arbitrariness by indicating that other international judiciaries agreed in the reasoning, or the rule adopted.[82] From the institutional perspective, referring to external international legal sources when there are common grounds between the different international legal regimes (e.g., the WTO and environmental treaties) can manifest that the international court is not self-contained and does not arbitrarily resist any positive insights from broader international legal systems.

3. More Experienced Adjudicators Sit in Multiple International Courts

The third hypothesis is that the growth of international courts also creates the "double-hatted" adjudicator. Nowadays, the international judicial community comprises an increasing number of judges/arbitrators from different legal fields who have extensive experience and diverse knowledge in international adjudication. These experienced adjudicators are frequently appointed in the same international courts and

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[80] Stephan Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, *in* INTERNATIONAL JUDICIAL LAWMAKING 133, 162 (Armin von Bogdandy & Ingo Venzke eds., 2012).
[81] ALVAREZ, *supra* note 79, at 20. *See also* Armin von Bogdandy & Ingo Venzke, *The Spell of Precedents: Lawmaking by International Courts and Tribunals*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 503 (C. P. Romano et al. eds., 2014).
[82] *See* Yonatan Lupu & Eric Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42(3) BRITISH J. POLITICAL SCI. 413, 419 (2012).

are even nominated in other judicial forums where the required legal knowledge is not their expertise. For example, studies reveal that some of the international arbitrators in investment arbitration are in the Indicative List of Governmental and Non-Governmental Panelists of the WTO dispute settlement mechanism or the ICJ judge.[83] Such a trend allegedly assists in the practice of citing or referring to external international legal sources since those "knowledgeable" or well-known adjudicators are more likely to be more confident to resort to external legal sources if necessary.[84] Moreover, from the perspective of judges or arbitrators themselves, it is unsurprising that they would be incentivized to engage in such cross-referencing since citing the jurisprudence of other international courts allows them to bolster their credentials as actors well-trained in international law in a context where adjudicators seek future appointments from disputing parties in the different judicial forums.[85]

4. Maintain the Legitimacy and Consistency of the International Legal Regime

The last hypothesis that explains the occurrence of citing or referring to external international legal sources by international courts is that it can prevent potentially inconsistent interpretations of the same legal provisions and, therefore, contribute to a unified international legal system. In his seminal work, Charney demonstrates that different international judicial forums share a coherent understanding of international law, and cross-fertilization is commonly understood by international adjudicators as a legal tool to achieve international law coherence.[86] Likewise, scholars contend that maintaining and strengthening the legitimacy of international law requires more boundary-crossing between different legal regimes to promote the de-fragmented rule of law in the international aspect. They observe that international judges or arbitrators would intentionally take external legal sources into account when necessary because they believe that such external citations can maintain the legitimacy and effectiveness

[83] *ICJ Judge Peter Tomka appointed to investment arbitration tribunals despite ICJ guidelines against "double-hatting"*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Nov. 24, 2020), https://www.iisd.org/itn/en/2020/11/24/icj-judge-peter-tomka-appointed-to-investment-arbitration-tribunals-despite-icj-guidelines-against-double-hatting/.
[84] *See* Damien Charlotin, *The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis*, 20 J. INT'L ECON. L. 279, 285 (2017).
[85] *See id*. at 296.
[86] *See generally* Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?* 271 COLL. COURSES HAGUE ACAD. INT'L L. 101 (1998).

of that international legal regime.[87] As a result, scholars assert that instead of leading to international law inconsistency, jurisprudential cross-fertilization is the construction of "a *corpus juris* for the international community guided by the rule of law" and "committed to the realization of justice[88]." In order to perform such a joint mission of imparting justice, the international judicial bodies have been incentivized to take external international legal sources into account if needed, which then advance the occasions of citing or referring to those external legal sources.[89]

IV. Research Questions and Methods

A. Research Questions

As will be elaborated in the later section, I employ both quantitative and qualitative approaches to demonstrate the broad interaction between international trade/investment law and other international legal regimes. The research questions for this project include:

A. How frequently are external international legal sources cited/invoked in the WTO Panel/Appellate Body reports and investment arbitral awards?
B. What kinds of external international legal sources are cited/invoked in the Panel/Appellate Body reports and investment arbitral awards?
C. What factors may be positively or negatively associated with the frequency of citing external international legal sources in the WTO Panel/Appellate Body reports and investment arbitral awards?
D. What is the function(s) of external international legal sources when referred to or cited in WTO and investment arbitral proceedings?
E. Do using external international sources contribute to international law coherence?

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[87] Kal Raustiala, *International Proliferation and the International Legal Order*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 293, 294 (Jeffrey L. Dunoff & Mark A Pollack eds., 2013).
[88] Antônio Augusto & Cançado Trindade, *A Century of International Justice and Prospects for the Future*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 56, 77-78 (Mads Andenas & Eirik Bjorge eds., 2015).
[89] MICHELLE Q. ZANG, JUDICIAL ENGAGEMENT OF INTERNATIONAL ECONOMIC COURTS AND TRIBUNALS 12-13 (2020).

B. The WTO Dispute Settlement Body and Investment Arbitration Tribunals as the Research Focus

The research focus of this project is all publicly accessible Panel/AB reports adopted by the WTO Dispute Settlement Body and the investment arbitral awards rendered by ICSID and other *ad hoc* tribunals. While the judicial cross-fertilization among different judicial forums does not exclusively happen in international economic adjudication, the quantity and quality of the jurisprudence of the WTO and investment arbitration render fruitful and sufficient case law that would have more chance in dealing with external legal sources and decisions. Hence, these two judicial forums are much more accessible for exploring the engaging activities between judiciaries through adjudicatory practice.[90] Moreover, exploring the judicial engagement of the WTO and investment arbitral tribunals is particularly valuable. This is because the impact of international economic adjudication is significant, especially considering the potential effects of their rulings on interests that are also regulated by other international legal regimes. Many research projects are dedicated to highlighting the importance of harmonizing the economic interests pursued by the trade/investment legal domain with public welfare protected by other international legal regimes.[91] In addition to theoretical discussions, very few studies offer empirical

[90] *Id*. at 19.

[91] For example, Joseph explains why the WTO is criticized for largely overlooking the role of human rights legal instruments in their decisions. She warns that the WTO rules and jurisprudence result in a chilling effect on states' measures designed to enhance public interests, such as compulsory licensing of pharmaceutical product and renewable energy transformation. To transform the WTO to be a real friend of those non-trade but equally important values, Joseph suggests that the WTO should closely engage with other international organizations such as the WHO, United Nations human rights agencies, and even NGOs. See JOSEPH, *supra* note 18. Another study done by Dupuy and Vinuale observes a series of investment arbitral awards and points out that when host states decide to implement measures or policies aimed at protecting, respecting, or fulfilling their obligations under human rights treaties, there is a risk that investors may initiate investor-state arbitration as a tool to challenge the legitimacy of those human rights measures or policies. *See* Pierre-Marie Dupuy & Jorge E. Vinuales, *Human Rights and Investment Disciplines: Integration in Progress, in* INTERNATIONAL INVESTMENT LAW 1739, 1751-53 (Marc Bungenberg et al. eds., 2015). Pauwelyn suggests that multilateral treaty obligations, such as those under human rights and environmental conventions, may be used as a defense for the respondent state in WTO proceedings against claims of a breach of the WTO so long as the claimant state also bears similar human rights obligations. *See* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER NORMS OF INTERNATIONAL LAW 52ff & 491 (2003). Among works in the field regarding the interplay between international investment law and human rights law, Lo examines the potential "linkages" between international investment agreements and human rights law and claims that human rights provisions "should be incorporated and given a proactive role so as to provide firmer normative and operational guidance of being applied by arbitral tribunals." Chang-fa Lo, *Normative and Operational Linkages Between Human Rights Law and*

inputs and more systematic analyses to understand the incidence and functions of the cross-reference in different international judicial forums. This deficiency is unfortunate as scholarship in international law has undergone an empirical revolution, especially in the field of international economic law.[92] In terms of the external international legal sources cited in the WTO and investment arbitral proceedings, we do witness few studies applying empirical and computational methods to extend the current research scope in legal scholarship. For instance, Kube and Petersmann manually coded investment arbitral awards in which human rights were invoked by the parties in disputes or third-party interveners.[93] Alvarez comprehensively assesses publicly available investment arbitral awards in which the WTO and European Court of Human Rights jurisprudence are cited by the disputing parties or by arbitrators. Charlotin applies computational methods, network analysis, and citation analysis to examine how citations from and to WTO jurisprudence and investment arbitral awards are used.[94]

In brief, many legal scholars have proposed well-grounded approaches to promote the coherence between the regime of international economic law and other legal fields. Nevertheless, the exact phenomenon of citing or referring to external international rules and jurisprudence in the WTO and in ISDS, as well as their impacts on WTO Panels/Appellate Body and investment arbitrators, are still understudied.[95] Benefiting from conventional wisdom, I aim to fill that gap and inquire about evidence to support the arguments and discussions regarding the proliferation of international law and cross-reference. Specifically, I shed light on the judicial practices regarding citing or referencing external international legal sources in WTO and ISDS by disputing parties and adjudicators. In light of contrasting

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BITs – Building A Firmer Status of Human Rights in Investor-State Arbitration, 8(1) CONTEMP. ASIA ARB. J. 1, 23 (2015). Current scholarship also explores the practical function of referencing to human rights provisions in investment arbitration. For example, Alvarez examines how the judgments rendered by the WTO and the European Court of Human Rights are cited by investment arbitral tribunals. He demonstrates that the ISDS litigants are incentivized to resort to the WTO and European Court of Human Rights rulings because these three legal regimes share genuine commonalities, such as similar textual and normative similarities. Therefore, the jurisprudence of the WTO and the European Court of Human Rights can fill the interpretative gaps in international investment treaties. The author names such cross-references "boundary crossing" and predicts that such a phenomenon will continue to appear. *See* ALVAREZ, *supra* note 79, at 21.

[92] *See* Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106(1) AM. J. INT'L L. 1, 1-4 (2012).

[93] Vivian Kube & Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration*, 11(1) ASIAN J. WTO & INT'L HEALTH L. AND POL'Y 65 (2016).

[94] *See* Charlotin, *supra* note 84, at 284-85.

[95] Giorgetti & Pollack, *supra* note 36, at 33.

theoretical perspectives, gathering more empirical evidence to help international legal academia understand the WTO and investment arbitral tribunals' attitudes toward external international legal sources is an important contribution of this dissertation. With empirical data demonstrating the scale, factors, and functions of external legal sources introduced in the WTO decisions and investment awards, I provide a more solid basis for current legal and policy recommendations envisaged by the conventional wisdom to mitigate the concerns of failing to invoke external legal sources when needed; or in contrast, inappropriately engage in judicial cross-fertilizations.

C. Research Population

The research population encompasses the Panel Reports and Appellate Body Reports of the WTO Dispute Settlement Body, as well as the investment arbitral awards rendered by investment arbitral tribunals. In terms of the Panel and Appellate Body Reports of the WTO, I manually download all the available dispute settlement reports as of February 2023 from the WTO website.[96] The total number of the WTO decisions (including Panels and the Appellate Body reports) is 347.[97] Notably, I filter out those WTO cases that are settled or are still in the consultation process because those cases do not render final reports. Regarding the investment arbitral awards, I collect publicly available awards as of February 2023 from the Investment Policy Hub under the United Nations Conference on Trade and Development.[98] For investment arbitral awards, I choose both jurisdictional decisions and merit awards. It is noteworthy that I exclude the cases that are not publicly available since they continue to remain confidential due to the requests of the parties concerned. Besides, because of language restrictions, I also exclude those awards that are not in English. After applying the above filters, there are 560 investment arbitral awards in my dataset.[99]

D. Research Methods

[96] *Chronological List of Disputes Cases*, World Trade Organization, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (Last visited Feb. 29, 2024).
[97] My database includes the WTO disputes until March 2023.
[98] *Investment Dispute Settlement Navigator*, INVESTMENT POLICY HUB https://investmentpolicy.unctad.org/investment-dispute-settlement (Last visited Feb. 29, 2024).
[99] My database includes the investment disputes until March 2023.

I adopt a mixed-method approach, relying on quantitative and qualitative content analysis, together with semi-structured elite interviews, to reveal the frequency of external international legal sources cited by the WTO Panel and Appellate Body, as well as investment arbitral tribunals and how those external international legal sources are analyzed in the "local" judicial forums. In the following sections, I provide a detailed explanation of each method, as well as some methodological limitations.

1. Quantitative Content Analysis

Regarding the research methods, I first conduct quantitative content analysis using computational tools to dive into those collected cases to illustrate the comprehensive picture of the interactions between different international legal domains. This method is often referred to as the "text as data" approach, which bears the strength to capture the contents of potentially large numbers of cases/awards in a fine-grained approach.[100] Specifically, I apply both the "topic modeling" and "most distinct words" analyses to help me build the "dictionary" or "coding protocol" that includes the key terms associated with external international legal sources in the discourse of WTO decisions and investment arbitral awards.[101]

Based on the dictionary, I exercise "Keyword-in-Context" analysis[102] to figure out the aforementioned keywords in context, namely with preceding and following words of my collected documents, of the collected documents. For the WTO Panel/ Appellate Body reports, I resort to "TradeLawGuide," which is a web-based reading and analysis tool for WTO research. [103] This database embeds the comprehensive keyword searching function that can clearly display the specific paragraphs of the WTO decisions that may refer to external international legal sources. As to investment arbitral awards, I rely on the powerful keyword searching function

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[100] *See* Marion Dumas & Jens Frankenreiter, *Text as Observational Data*, *in* LAW AS DATA: COMPUTATION, TEXT, AND THE FUTURE OF LEGAL ANALYSIS 59, 61 (Michael A. Livermore & Daniel N. Rockmore eds., 2019).

[101] The built dictionary includes the following keywords: *"convention", "agreement", "protocol", "charter", "guideline", "guidance", "statute", "declaration", "human rights", "labor", "health", "environment", "energy", "sustainable", "sea", "ILC", "bribery", "corruption"*, to name a few. In addition, jurisprudence rendered by foreign judicial forums is also coded because studying these external judgments can also shed light on the influence of those external judicial forums over the WTO and ISDS. In this regard, the keywords such as *"Court of Justice", "Tribunal", "ICJ", "ECJ", "ECHR", "CJEU", "ITLOS" and "PCA"* are used to filter those external citations.

[102] Nancy L. Leech & Anthony J. Onwuegbuzie, *Beyond Constant Comparison Qualitative Data Analysis: Using NVivo*, 26(1) SCHOOL PSYCHOLOGY QUARTERLY 70 (2011).

[103] TRADELAWGUIDE, https://www-tradelawguide-com.ezproxy.law.stanford.edu/Home/Welcome (last visited Mar. 2, 2024).

established by "Investor-State LawGuide (ISLG)" to go through all the collected awards and identify the aforementioned keywords with their preceding and following sentence. [104] The terms "external international legal source(s)" or "external reference(s)" refer to all non-WTO and investment treaty law sources, including other conventions, treaties, and international legal instruments (including non-binding instruments), general and customary international law concepts and principles, and the jurisprudence of other international judicial forums.[105] For the quantitative analysis, I manually code the collected WTO decisions and the investment arbitral awards as "positive" with respect to having external international legal source without evaluating the importance of such an external reference in my codebook, which is an Excel spreadsheet. In other words, only mentioning an external legal source would be sufficient for the quantitative analysis.

Moreover, I also label critical information about the cases and code them in my codebook, such as the types of cited external international legal sources (e.g., health, environment, human rights, or others), the status of the disputing parties (e.g., developing/developed countries), and the background of adjudicators (e.g., lawyers/non-lawyers).[106] I then apply the ordinary least squares (OLS) linear multiple regression to demonstrate the relations between the identified factors and the frequency of mentioning external references in the WTO decisions and investment awards. Detailed explanations regarding the dependent and independent variables, as well as the model design, are discussed in the *infra* chapters. Overall, the quantitative content analysis approach reveals the developments of cross-fertilization between different international legal regimes and judicial forums with more solid and empirical evidence.

2. Qualitative Content Analysis

In addition to quantitative content analysis that demonstrates the occasions of citing external international legal sources in the WTO/ISDS cases through a "distant

[104] ISLG, https://new-investorstatelawguide-com.ezproxy.law.stanford.edu/ (last visited Mar. 4, 2024).
[105] For the purpose of this research, I exclude "Vienna Convention on the Law of Treaties" from the scope of external international legal sources for the WTO and the ISDS because almost all WTO and ISDS cases refer to this Convention for the purpose of interpreting the treaty terms. In other words, a case would not be coded as having external reference(s) if it only refers to the Vienna Convention on the Law of Treaties.
[106] *See* Philippa Webb, *Factors Influencing Fragmentation and Convergence in International Courts*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 146, 147-168 (Mads Andenas & Eirik Bjorge eds., 2015).

reading" perspective, I also apply qualitative content analysis, which is a "close reading" approach that can advance the roles and place of those cited external international legal sources in international economic jurisprudence. Qualitative content analysis is a method for studying the meaning contained in the body of a message. It is done by classifying and organizing the content of a document systematically into categories that describe its topics, themes and context.[107] While the result of quantitative content analysis can help build the descriptive statistics and demonstrate the scale of how often external international legal sources appear in the jurisprudence of the WTO and investment treaty arbitration through a systematic approach, it falls short in further investigating the possible function(s) of external international legal sources cited in the WTO decisions and investment arbitral awards. Qualitative content analysis can fill this deficiency by systematically categorizing and analyzing the legal status of those cited external international legal sources. Specifically, I plan to dive into the collected case reports and arbitral awards that have been identified as occurrences of citing or referring to external international legal sources and examine how these external international legal sources are used in international economic judicial forums and the functions they play. For the purpose of analysis, I use the term "substantive judicial cross-fertilizations" to indicate those cases that not merely "mention" the external legal sources but substantially analyze the cited external international legal sources and discuss their functions in the context of investment treaty arbitration. I categorize the nature of external international legal sources cited in WTO decisions and investment arbitral awards by adopting the criteria from the ILC Report, which distinguish between "primary" and "secondary" rules in international law.[108] Primary rules are those with general applicability, such as treaty interpretation rules or principles of state liability, among others. On the other hand, secondary rules pertain to the regime-specific legal principles, such as those enshrined in human rights conventions, environmental treaties, and even some customary international law (e.g., the doctrines regarding human rights, environmental protection, or public health that gain the status of customary laws). Drawing from these criteria, I investigate all the WTO decisions and investment

[107] *See* Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 927, 941-42 (Peter Cane & Herbert M. Kritzer eds., 2010).
[108] ILC, Final Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 420, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006)

awards that are identified as positive for having at least one external citation in order to explore the functions, places, and implications of external international legal sources in the WTO and investment treaty regimes, respectively.

3. Evaluations on the Uses of External International Legal Sources

Referencing external international legal sources is not without caveats. Judicial cross-fertilizations may go awry if the WTO adjudicators and investment arbitral tribunals inappropriately use external legal sources to inform the interpretation of the trade and investment provisions because the legal standards applied in other international legal regimes might inappropriately be imported to the trade and investment legal context. Likewise, exercising judicial cross-fertilizations without specifying the legal basis may pose the WTO dispute settlement mechanism and the ISDS the risk of infringing their institutional legitimacy - especially when the external international legal sources are cited to substantially alter the meaning of trade and investment treaty provisions, or fundamentally affect the outcome of the case. To prevent the effort of pursuing international law coherence from inviting a backlash, I build on conventional wisdom's analytical framework to examine if judicial engagement is properly enacted by the WTO and the ISDS. The criteria for evaluating whether external international legal sources are being inappropriately used include: (1) citing external legal sources without considering the context (i.e., transplanting legal principles out of context); (2) overlooking relevant external legal sources when reconciling conflicts of values represented by different legal regimes is needed; and (3) failing to specify legal basis to explain the rationale of citing external legal sources.[109]

4. In-depth Elite Interviews: Exploring the Story Behind the Scenes

Aside from the "law in books" aspect – namely, examining the WTO decisions and investment arbitral awards, I further observe the "law in action" perspective by conducting in-depth and semi-structured elite interviews that aim at deepening the understanding of the story behind citing external international legal sources in international economic law regime. Moreover, the elite interviews can gather their

[109] Please be noted that these criteria are proposed based on the author's own subjective determination. It is totally reasonable and foreseeable that other scholars might disagree with the standards that I adopt, or the evaluations I make.

perspectives on judicial engagement and cross-fertilization. The list of questions for the interviews concentrates on issues such as (i) the possible occasions of citing or referring to external legal sources, (ii) the potential litigation strategies and considerations of citing or referring to the laws from external legal domains, (iii) international judicial bodies attitudes toward those external international legal sources, (iv) the role of those external international legal sources in dispute settlement proceedings, (v) whether the trends (if any) of citing or referring to external international legal sources might lead to the international legal system be more coherence or fragmented, etc. In sum, the in-depth elite interview can discover unrevealed stories and contribute to the comprehensiveness of the data collection.

The ideal interviewees are those "actors" in the international dispute settlement proceedings who are experienced in international dispute resolutions, comprising of judges, arbitrators, and law clerks of international courts/tribunals, lawyers who practice international law, members of NGOs who actively serve as *amicus curiae*, government officials, and scholars. Originally, I had hoped to invite as many stakeholders as I could to enrich my database. Nevertheless, due to the ongoing crisis in the WTO and the intense critique against the ISDS, many stakeholders I had originally hoped to interview were hesitant to participate. As a result, the sample size of my interviewees is limited. My interviewees eventually include two officials of the WTO Secretariat, two members of the Panel, two lawyers practicing international trade law, two lawyers representing the claimant side and host states side respectively, and three arbitrators. Given this constraint, I have decided not to dedicate a full section solely to discussing the interview results. Instead, I will mention these results in subsequent chapters related to the empirical work, but only where they are directly relevant to the findings. It is important to approach these interview results with caution, as they are not representative of a broader perspective.

V. Roadmap of the Dissertation

The structure of this dissertation is described below. This chapter establishes the theoretical background and analytical framework of international law fragmentation and explores the contrasting debates among international relations and international legal perspectives. The philosophical and normative relationship between international economic law and other international legal fields is also ascertained. The

research methods and strategies are also introduced. Chapters II and III focus on WTO decisions and investment arbitral awards, respectively. I present the quantitative empirical results, which incorporate the frequency of those external international legal sources being cited by WTO Panels and Appellate Body and investment arbitral tribunals. I also categorize the aforementioned external international legal sources to elucidate the most frequently interacted legal regimes with the WTO and international investment law. Moreover, the factors that may be associated with the number of external references in the disputes are ascertained. For the qualitative part, I adopt content analysis to closely examine the WTO cases and investment arbitral awards that engage in the judicial practices of cross-citations to examine how the cited external international legal sources are introduced, as well as their roles in the reasoning of the WTO decisions and investment awards. These two chapters further evaluate if the current practices of judicial cross-fertilizations are appropriately exercised by the WTO adjudicators and investment arbitral tribunals. Based on the empirical results and normative arguments, Chapter IV proposes law and policy recommendations to instruct judicial cross-fertilizations and ultimately to promote international law coherence. Chapter V concludes this dissertation.

Overall, I hope to shed light, in particular, on the long-discussed claims of the fragmentation of international law, focusing on the interaction between the international economic law regime and other international legal sources. Most importantly, I aim to build the foundation of future studies on the possible impacts of the proliferation of international judicial forums (e.g., whether the proliferation of international courts produces negative competition among judicial bodies, forum shopping, and inconsistent interpretations, or, conversely, it actually facilitates the cooperation between international courts to mitigate these concerns) by empirically investigating the judicial behavior of cross-reference conducted by the WTO Panels/ Appellate Body and investment arbitral tribunals.

VI. Strengths and Limitations

The multi-pronged methodological approach that I apply has some distinctive advantages. First, the quantitative and qualitative content analysis allows me to obtain a comprehensive, systematic, and deep understanding of the phenomenon of judicial engagement and cross-fertilization between international economic forums and other

legal regimes. Second, the elite interviews with key actors who are experienced in the WTO and investment treaty dispute settlement proceedings provide an additional layer of granularity in understanding what happened behind the scenes. Viewed as a whole, each of the methodological approaches offers me the opportunity to explore the judicial practice of citing external international legal sources in the WTO and investment arbitral proceedings from a broader socio-legal perspective, an aspect that is generally overlooked by international legal scholars.

A significant limitation could be the risk of omitting several investment arbitral awards that are either not accessible or not written in English given these cases might have involved the activities of boundary-crossing In addition, the quantitative and qualitative research results can only demonstrate the picture of judicial engagements between the WTO/investment treaty arbitration and other "foreign" international legal regimes. Also, I only account for the WTO decisions and investment awards that have explicit citations or mentions as positive external legal sources. Unavoidably, such an approach would not be able to capture some WTO decisions and investment awards that might have also been influenced by external authorities without explicit acknowledgment. This is another significant limitation that should be recognized.

There is also a caveat for the OLS linear multiple regression model. While I intend to reveal the association between possible factors that might trigger the WTO Panels/ Appellate Body and investment arbitrators to cite external international legal sources, the arguments made here are more descriptive and qualitative oriented without the attempt to identify or establish causal links between those factors and the occurrence of external international legal sources in given WTO reports and investment arbitral awards. Still, I generate some important insights for international legal and international relations scholars in terms of the debates on international law fragmentation via understanding the evolutions of international judicial proliferation and cross-fertilization.

CHAPTER II EXTERNAL INTERNATIONAL LEGAL SOURCES IN THE WTO DECISIONS

In this chapter, I examine the interactions between WTO laws and external international legal sources. I first introduce the features of the WTO dispute settlement mechanism, the current crisis it is facing, and the legal gateway(s) that may invite external legal sources and accommodate non-economic values in the adjudication process. Quantitatively, I give a broad overview by demonstrating the frequency of the external references in the collected Panel and the Appellate Body reports. The nature of the cited external legal sources and the legal regimes that they belong would also be explored. Moreover, I apply the OLS linear multiple regression to test if the factors such as the disputing parties and the involved agreement may have positive or negative associations with the frequency of external legal sources in the WTO decisions. Qualitatively, I delve into all cases having external references to systematically categorize their functions in the adjudications. I argue that in the context of the WTO decisions, external legal sources are cited to: (1) Serve as the factual background of the disputes. (2) Affirm the existence of customary laws and general principles of law. (3) Fill the legal gaps, especially the procedural rules. (4) Enlighten the interpretation of the WTO treaty provisions. Last but not least, I examine if the judicial cross-fertilizations exercised in the WTO decisions can promote the coherence of international legal system.

I. Introduction

A. The Features of the WTO Dispute Settlement Mechanism

After the end of the Second World War, international economic institutions, such as the International Monetary Fund, the World Bank, and the General Agreement on Tariffs and Trade (GATT), were established to govern global and cross-border economic relations. In terms of international trade governance, countries led by the US originally intended to establish a permanent organization known as the "International Trade Organization (ITO)". Nevertheless, because of the strong domestic opposition within the US, the ITO was never created. Alternatively, the GATT, which is *ad hoc* in nature, evolved into an international instrument with

organs and decision-making authorities.[110] To promote fair trading and settle disputes between contracting parties, GATT Articles XXII and XXIII developed the rule-oriented system which requires that when disputing parties fail to resolve their difference amicably (e.g., via consultation, good office, mediation), such a dispute shall be referred to panels composed of impartial individuals whose findings and recommendations would be passed to the GATT Council to be agreed upon by all contracting parties'. Given that all GATT contracting parties must have consensus on adopting panel's report, the process was perceived as a "power-based system of dispute settlement through diplomatic negotiations[111]" because even the losing parties had the right to block the adoption of panel reports. In other words, in the GATT era, while there was seemingly a judicial-like dispute resolution, it depended heavily on the willingness of disputants to find a mutually agreeable settlement.

To cure such a flaw, much of the impetus for the move from the GATT to the WTO was a response to the rise of unilateralism during the Uruguay Round of negotiation in establishing the WTO. The advent of the WTO curbed unilateralism through two important developments. First, the scope of the WTO discipline was expanded to cover specific issues originating from trade in goods (e.g., technical barriers and sanitary measures), trade in services, and trade-related intellectual property rights. These trade-related issues were unable to be resolved under the multilateral trade system and could only be settled unilaterally. Second, the General Council of the WTO was convened as the Dispute Settlement Body (DSB) to deal with disputes between WTO members. The Dispute Settlement Understanding (DSU) was further implemented and included in the covered agreement that provides rules and procedures and offers a legal-based forum for resolving members' disputes. Unlike its GATT predecessor, the DSU creates the two-instance dispute settlement mechanism, which consists of the *ad hoc* Panels serving as the first instance and the permanent Appellate Body serving as the final instance that can only review whether the Panels have correctly interpreted and applied the WTO covered agreements at issue. Members of the Panel are composed of "well-qualified governmental and/or non-governmental individuals[112]" who are former representatives of the WTO, senior

[110] JOHN MERRILLS & ERIC DE BRABANDERE, MERRILLS' INTERNATIONAL DISPUTE SETTLEMENT 311 (7th ed., 2022).
[111] PETER VAN DEN BOSSCHE & WARNER ZDOUC, LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 296 (4th ed., 2017).
[112] Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter "DSU"],

trade policy officials, trade lawyers, and academic experts. The Appellate Body, on the other hand, is a standing court that consists of seven individuals appointed by the DSB with fixed terms (four years). The appointees are to be persons with demonstrable expertise on trade issues and not affiliated with any government.[113]

According to Articles 16.4 and 17.14 of the DSU, while the reports rendered by Panels or the Appellate Body are required to be adopted by the DSB, especially notable is that those reports will principally be approved by the DSB unless a consensus exists not to adopt them. The same rules also apply when the DSB establishes panels and authorizes retaliation. This "negative-consensus" decision-making procedure significantly improves the effectiveness of dispute resolution proceedings under the WTO by ensuring that the losing party is unable to hamper the adoption of an adverse ruling as in the days of GATT.[114] With these reforms, the dispute settlement mechanism under the WTO is now said to be one of the most effective and crucial international judicial systems of international law. Moreover, these institutional transformations have resulted in initiatives of so-called WTO "constitutionalization."[115] This school of scholars argues that even if the WTO dispute settlement mechanism is built to resolve trade disputes, the rule-oriented legal discourse leaves room for Panels and the Appellate Body to weigh and balance the competing and overlapping interests between trade and other non-economic values in light of constitutional principles, including the rule of law, the principle of proportionality, and sustainable development.[116]

B. Current Crisis of the WTO Dispute Settlement Mechanism

Art. 8.1. ("Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.")

[113] DSU, Art. 17.3. ("The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade, and the subject matter of the covered agreements generally. They shall be unaffiliated with any government.")

[114] DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 405-456 (2004).

[115] *See, e.g.*, Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, *in* THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 31–57 (Grainne De Bu´rca & Joanne Scott eds., 2001); Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17(3) EUR. J. INT'L L. 647 (2006); Joel P. Trachtman, *The Constitutions of the WTO*, 17(3) EUR. J. INT'L L. 623 (2006).

[116] Henrik Andersen, *Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions*, 18 J. INT'L ECON. L. 383-405 (2015).

While the WTO dispute settlement mechanism has gained significant success and is said to be an impressive creation since the end of the Cold War, its development and operation are not without criticism. One of the most prominent arguments is that the constitutional traits of the WTO dispute settlement mechanism caused concerns regarding democratic deficits. To elaborate, the traditional Westphalian system assumes that international laws, including treaties, customary laws, and general principles of laws, can only be interpreted, applied, and enforced by sovereign states. Such a conventional understanding seems to be modified in the WTO judicial forum. Past WTO jurisprudence shows that Panels and the Appellate Body have developed their own legal discourse and argumentation that even extended beyond the arguments of the disputing parties.[117] This "judicial activism" attracts attacks from many WTO members. A survey shows that a significant number of interviewed officials believe the Appellate Body has gone beyond its mandate by unduly imposing or diminishing the WTO members' obligation stipulated by the WTO laws[118], which undo the balance of rights and obligations as struck by the membership.[119] Among the critics, the US has been the strongest proponent of suspending the operation of the Appellate Body. According to the US, the Appellate Body has allegedly strayed far from its role to serve as a judicial organ that WTO members assigned to it, has altered WTO members' rights and obligations through erroneous interpretations of WTO agreements, and has undermined the effectiveness of the WTO dispute settlement mechanism.[120]

On the other hand, some WTO members (especially those in developing

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[117] *See, e.g.*, Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones) (EC – Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 156 (Feb. 13, 1998); Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities (US – Certain EC Products)*, WT/DS165/AB/R, ¶ 123 (Jan. 10, 2001); Appellate Body Report, *Canada – Measures Relating to the Feed-in Tariff Program (Canada – Feed-In Tariff Program)*, WT/DS426/AB/R, ¶¶ 5.214–5.215 (May 24, 2013).

[118] DSU Art. 3.2 "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

[119] Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences*, 54 J. WORLD TRADE 667, 688-690 (2020).

[120] United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (Feb. 2020).

economies) and civil society also expressed their disappointments and grave concerns that the WTO Panels and the Appellate Body failed to pay greater sympathies to their development interests and legitimate policy objectives. They argued that the Appellate Body had interpreted WTO rules in a manner that was overly conservative to environmental and public morals defenses, which, in turn, resulted in WTO rulings being biased in favor of trade liberalizations over regulatory concerns.[121] Past WTO jurisprudence, including *US-Shrimp*, *US-Tuna*, and *EC-Asbestos*, are all cases that triggered widespread criticism from environmental activism and anti-globalization NGOs. Commentators further assert that the WTO dispute settlement system should be more open to embracing those non-trade values and concerns to reinforce the legitimacy of the WTO itself.[122] Since the establishment of the WTO DSB, this system seems to have confronted both internal and external legitimacy crises.

Accumulated disagreements with the operation of the WTO DSB eventually turned out to be the real crisis. The flash point of the Appellate Body collapse happened during the Obama administration when the US decided to block the appointment and re-appointment of the Appellate Body members. In 2019, all members of the Appellate Body were gone, a dismal cast on what had been the "jewel in the crown of the WTO."[123] In response to the collapse of the Appellate Body, a separate appeal system called "the Multiparty Interim Appeal Arbitration Arrangement" (MPIA) was set up by the European Union, China, and many other WTO members in March 2020 to serve as a temporary mechanism to maintain the efficacy of the rules-based trading system and to provide members with access to an independent appeal process for dispute settlement. Built on Article 25 of the DSU, the MPIA embodies the role of WTO appellate review and functions as the interim appeal arbitration procedure as long as the Appellate Body is not able to re-carry out its duties.[124] The MPIA is now open to any WTO members who express their interest in

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[121] Gregory Shaffer et al., *The Extensive (Yet Fragile) Authority of WTO Appellate Body*, 79 L. & CONTEMP. PROBS. 237, 255 (2016).

[122] *See, e.g.*, Henrik Anderson, *Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions*, 18 J. INT'L ECON. L. 383 (2015). *See also* JOSEPH, *supra* note 18. Ernst-Ulrich Petersmann, *Human Rights and the Law of the World Trade Organization*, 37(2) J. WORLD TRADE 241 (2003).

[123] Aditya Rathore & Ashutosh Bajpai, T*he WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?*, JURIST (Apr. 14, 2020), https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/.

[124] Multiparty Interim Appeal Arbitration Arrangement, ¶ 1 ("1. The participating Members indicate their intention to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure (hereafter the "appeal arbitration procedure"), as long as the Appellate Body is not able to

participating in this provisional arrangement.[125]

Even if the US's boycott has paralyzed the Appellate Body, it is undeniable that the WTO has been a successful international judiciary among its peer international dispute settlement mechanisms. As of 2022, over 600 complaints have been filed with the WTO. Over 300 dispute settlement reports had been rendered by Panels and the Appellate Body and had been adopted by the DSB.[126] An empirical study that surveyed government officials from the WTO membership indicates their support for the design of the current WTO dispute settlement system and stresses that the Panel-Appellate Body mechanism "is of critical importance to the functioning of the world trading system.[127]"

C. The Entry Points for WTO Panels and the Appellate Body to Embrace External International Legal Sources

In my view, while the criticisms regarding the democratic deficit caused by the WTO dispute settlement system's judicial activism may be valid to a certain extent, the constitutional traits of the WTO dispute settlement mechanism should be recognized. Panels and the Appellate Body are often used to interpret the WTO treaties and to strike a balance between trade and non-trade values. The mandate of panels and the Appellate Body follows from the WTO Agreement and is clarified in the Dispute Settlement Understanding (DSU). They must preserve the rights and obligations of the WTO members under the various WTO agreements, they must clarify the provisions of those agreements in accordance with customary rules of interpretation of public international law, and they cannot add to or diminish the rights and obligations provided in the WTO covered agreements.[128]

One of the important features of the WTO dispute settlement mechanism is that members of the WTO granted compulsory jurisdiction to this judicial forum *ex ante*.

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hear appeals of panel reports in disputes among them due to an insufficient number of Appellate Body members.")

[125] Multiparty Interim Appeal Arbitration Arrangement, ¶ 12 ("Any WTO Member is welcome to join the MPIA at any time, by notification to the DSB that it endorses this communication. In relation to disputes to which such WTO Member is a party, the date of that Member's notification to the DSB will be deemed to be the date of this communication for the purposes of paragraphs 9 and 10.")

[126] *Chronological List of Disputes Cases*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm. (last visited Feb. 29, 2024)

[127] Fiorini et al., *supra* note 119, at 684.

[128] Andersen, *supra* note 116, at 387-88.

Such a fact is crucial for the Panels and the Appellate Body when confronting non-trade issues in given disputes. Namely, since the WTO rules have an "all-affecting" character, even disputes with a relatively limited trade aspect but with a stronger focus on human rights, health, or environmental protection can still be brought before the WTO as long as such non-trade legal issues are tied to the interpretation and application of the WTO covered agreements. Thanks to the WTO's powerful compliance mechanism, those non-trade interests can be alternatively implemented via the WTO dispute settlement forum. Hence, it is crucial to investigate how the WTO Panels and the Appellate Body address these intertwined interests.

1. Non-WTO International Legal Instruments in the WTO Covered-Agreements: An Overview

Although the WTO adjudicative bodies have jurisdiction only over the claim based on the WTO covered agreements, the DSU does not preclude Panels and the Appellate Body from analyzing those non-WTO international legal instruments when they are raised by the disputing parties. Nor does it preclude the DSU from examining *ex officio* if the adjudicators of the WTO believe that these external legal instruments are relevant to the present case. For example, some WTO rules directly incorporate non-WTO rules into the treaty context, which transforms the external international legal sources into part of the WTO laws. In this scenario, those non-WTO laws can be judicially analyzed by Panels and the Appellate Body. An example of such direct incorporation is the TRIPS Agreement, which assimilates three multilateral conventions in the field of intellectual property – i.e., the Bern, Paris, and Rome Conventions.[129] While not being directly incorporated, external international legal instruments can still be referred to explicitly in WTO agreements so that these non-WTO laws can serve as a benchmark or basis to assess a distinct WTO-specific obligation. For example, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers

[129] For instance, Article 2(1) of the TRIPS Agreement provides that "[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967). Similarly, Article 2(2) of the same agreement states that "[n]othing in Parts Ito IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits." Furthermore, Article 9(1) of the TRIPS Agreement stipulates that "[m]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto."

to Trade (TBT Agreement) both explicitly mention several international legal instruments adopted by international standardized bodies. Annex A of the SPS Agreement provides that the standards, guidelines, and recommendations established by the Codex Alimentarius Commission[130], the World Organization for Animal Health[131], the International Plant Protection Convention[132], and other relevant international organizations identified by the SPS Committee all constitute "international standards, guidelines and recommendations" under the SPS Agreement.[133] Sanitary and phytosanitary measures adopted by the WTO members that conform to these listed international standards are presumably deemed to be necessary to realize the objective of protecting the life and health of humans, animals, and plants, as well as ensuring food safety. Likewise, the TBT Agreement strongly encourages members to base their technical regulations, standards, and conformity assessment procedure on international standards. Instead of identifying the scope of international standards, the TBT Committee sets principles for the development of international standards to help determine which international standards may be relevant for the purpose of the TBT Agreement. These principles include transparency, openness, impartiality and consensus, relevance and effectiveness, coherence, and development dimension.[134] The purpose of referring to those international standards is to balance the objectives of pursuing trade liberalization and reserving WTO members' right to regulate. Hence, it should be expected that external international legal sources are more likely to be referred to and discussed by the disputing parties and the WTO adjudicative bodies in disputes concerning the SPS or TBT measures.

In addition to those external international legal sources that are incorporated in or are referred to by the WTO covered-agreements, other external legal instruments may still be able to be cited in the WTO adjudicating proceeding. These occasions usually happen when the Panels and the Appellate Body are requested to interpret the non-

[130] Codex Alimentarius Commission is an international institution formulating international food standards. *See* CODEX ALIMENTARIUS COMMISSION, https://www.fao.org/fao-who-codexalimentarius/home/en/. (last visited Mar. 4, 2024).
[131] The World Organisation for Animal Health is an intergovernmental organization discussing standards on animal health. *See* THE WORLD ORGANISATION FOR ANIMAL HEALTH, https://www.woah.org/en/home/. (last visited Mar. 4, 2024).
[132] International Plant Protection Convention is a multilateral treaty under the FAO aiming to protect the world's plant resources. *See* INTERNATIONAL PLANT PROTECTION CONVENTION, https://www.ippc.int/en/. (last visited Mar. 4, 2024).
[133] Agreement on the Application of Sanitary and Phytosanitary Measures [hereinafter SPS Agreement], Annex A.3.
[134] Committee on Technical Barriers to Trade, *Decision on Principles for the Development of International Standards, Guides and Recommendations* (November 2000, G/TBT/9).

trade concept in the GATT, the GATS, and the TRIPS Agreement, which include the provisions of general exception and the security exception. To elaborate, Articles XX and XXI of the GATT, Articles XVI and XVI-bis of the GATS, and Article 73 of the TRIPS Agreement encompass a list of exceptions that can justify members' measures that are inconsistent with their WTO obligations but aim to pursue the listed policy objectives. These articles lay down various non-trade concerns as the legitimate grounds to justify WTO-inconsistent measures with the following objectives: maintaining public morals and interests, protecting human and animals' life and health, ensuring the enforcement of domestic laws that are in compliance with the WTO, conserving exhaustible natural resources, and protecting members' own security interests.

Specifically, Article XX(a) of the GATT and Article XIV(a) of the GATS indicate that measures necessary for the protection of public morals can be justified. According to the Appellate Body in *US-Gambling*, the term "public moral" is defined as the "standards of right and wrong conduct maintained by or on behalf of a community or nation including measure[s] for public order preserving fundamental interests of a society, as reflected in public policy and law.[135]" In *EC-Seal*, the Panel emphasized the evolutionary and distinctive nature of public morals among different countries; thus, high deference shall be granted to members to determine their own public morals.[136] The Panel indicated that members are allowed to "define and apply for themselves the concepts of 'public morals' in their respective territories, according to their own systems and scales of values."[137] Due to the exact scope and definition of public morals or public interests being general and broad, commentators suggest that Article XX(a) of the GATT and Article XIV(a) of the GATS could be gateways for relevant non-trade values, such as labor rights, cultural protection, and human rights, together with their corresponding international legal instruments to be brought into the WTO judicial forum.[138]

Second, Article XX(b) of the GATT and Article XIV(b) of the GATS address different but slightly overlapping issues that focus on members' trade-restrictive

[135] Appellate Body Report, *United States – Measure Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R. ¶¶ 286-296 (Apr. 20, 2005).
[136] Paola Conconi & Tania Voon, *EC–Seal Products: The Tension between Public Morals and International Trade Agreements*, 15(2) WORLD TRADE REV. 211, 220 (2016).
[137] Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, ¶ 7.409 (Nov 25, 2013).
[138] David W. Leebron, *Linkage*, 96(1) AM. J. INT'L L. 5, 6-7 (2002).

measures necessary to protect "human, animal or plant life or health." The open-ended concept of "health" also welcomes a broad interpretation that could accommodate many non-trade values. In order to ascertain whether members' trade restrictions can achieve health protection or promotion, Panels, and the Appellate Body may find it useful to resort to or make reference to other international legal instruments (e.g., relevant international conventions implemented under the WHO framework) to strengthen the legitimacy and persuasiveness of their analysis.

Article XX(g) of the GATT and Article XIV(g) of the GATS allow members to breach their legal commitments under the WTO if such trade-restrictive measures are to conserve exhaustible natural resources. The most intuitive understanding of "natural resources" refers to minerals such as coal, gas, or oils. Nevertheless, the WTO jurisprudence has resorted to external international environmental conventions to enrich the concept of natural resources. For example, in *US-Shrimp*, the Appellate Body considered living resources such as sea turtles can fall into the scope of natural resources. [139] Furthermore, invisible objectives such as "clean air" were also recognized as an exhaustible natural resource. [140] Given that the interpretation of "exhaustible natural resources" is generic, it is not static but evolutionary by definition.[141] For the generic terms used in this provision, external international legal sources may be admitted to aid the interpretive process to ascertain whether the alleged materials or objectives are entitled to be "exhaustible natural resources" under Article XX(g) of the GATT and Article XIV(g) of the GATS.[142]

The security exception clauses incorporated in Article XXI of the GATS, Article XIV bis of the GATS, and Article 73 of the TRIPS Agreement are other increasingly notable provisions that will trigger interplay between the WTO and other international legal instruments. These three Articles empower WTO members to take "any action which it considers necessary for the protection of its essential security interests[143]" or

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[139] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 134 (Oct. 12, 1998).
[140] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, pp 9-10 (May 20, 1996).
[141] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 130 (Oct. 12, 1998).
[142] Rachel Harris & Gillian Moon, *GATT Article XX and Human Rights: What Do We Know from the First 20 Years?*, 16(1) MELBOURNE J. INT'L L. 1, 21 (2015).
[143] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT], Art. XXI(a) ("Nothing in this Agreement shall be construed: (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security

implement measures "in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[144]" The security exception clauses further identify three circumstances that constitute members' essential security interests – Fissionable materials, traffic in arms, and the existence of a war or other emergency in international relations. Significant uncertainties surround the security exception clause. In the last two years, there have been a series of WTO disputes concerning how the security exception was interpreted and applied, including the case brought by Ukraine against Russia and the claim made by Qatar against Gulf states.[145] Given that the notion of national security is alien to trade disciplines, the responding members in these cases all notably resorted to other international legal instruments outside the WTO legal regime, such as the Charter of the United Nations and the resolutions rendered by the United Nations Security Council. [146] Therefore, external international legal sources that are relevant to defining the scope of national security are useful for the WTO adjudicative bodies to examine whether members' defense based on the security exception clause can be upheld.

In brief, given that the definitions of "public moral," "health," "natural resource," "security interests," or "emergency in international relations" are all extremely broad and vague, it is expected that Panels and the Appellate Body may need to refer to other sources of international laws to clarify the exact scopes and meanings of those non-trade concepts. [147] Under this circumstance, the WTO adjudicative body is expected to exercise treaty interpretation to introduce external international legal instruments in its reasonings. In the following section, I illustrate the treaty interpretation principles under international law and the DSU. Specifically, I will explore the interpretive approach exercised by WTO adjudicative bodies. This approach could promote the systemic interaction between the WTO and other international legal regimes.

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interests;…")

[144] GATT Art. XXI(b)(iii) ("Nothing in this Agreement shall be construed:…(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests…(iii) taken in time of war or other emergency in international relations;…")

[145] Tania Voon, *Can International Trade Law Recover? The Security Exception in WTO Law: Entering A New Era*, 113 AM. J. INT'L L. 45, 45-46 (2019).

[146] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R (Apr. 26, 2019). Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R (June 16, 2020).

[147] Ernst-Ulrich Petersmann, *Neo-Liberal, State-Capitalist and Ordo-Liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System*, 38 CHINESE (TAIWAN) Y.B. INT'L L. 1, 9-10 (2020).

2. Treaty Interpretive Principles under the WTO Dispute Settlement System

The interpretation of the WTO covered agreements by the Panels, and the Appellate Body is crucially important when resolving members' competing interests in their trade relations and disagreements about the meaning of specific provisions in relevant agreements. The rights and obligations of the WTO agreements are "often drafted in general terms so as to be of a general applicability and to cover a multitude of individual cases, not all of which can be specifically regulated.[148]" As a result, applying the treaty interpretation rule is necessary because there "is no independent ground on which to fix the meaning of the rules" contained in the WTO law.[149]

As a branch of international law, the WTO covered agreements are subject to the same basic rules of interpretation. The interpretive principles are heavily drawn from Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT). Article 3.2 of the DSU states that Panels and the Appellate Body shall "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.[150]" The use of the VCLT interpretive rules is established with the Appellate Body decision in the *US-Gasoline* case, in which the Appellate Body rules that:

> The general rule of interpretation [as set out in Article 31(1) of the Vienna Convention on the Law of Treaties] has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.[151]

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[148] LILIANA E. POPA, PATTERNS OF TREATY INTERPRETATION AS ANTI-FRAGMENTATION TOOLS: A COMPARATIVE ANALYSIS WITH A SPECIAL FOCUS ON THE ECTHR, WTO AND ICJ 292 (2018).
[149] *Id.*
[150] DSU Art. 3.2.
[151] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R*, p.17 (May 20, 1996).

By systematically examining the treaty interpretive practice conducted by Panels and the Appellate Body, scholars explore that the WTO adjudicative bodies use "patterns of reasoning that resemble those of the ICJ when applying the general rules /methods and principles of interpretation to solve treaty interpretation difficulties (e.g., insufficient clarity, ambiguity, obscurity, inconsistency, vagueness or silence in the text).[152]" These customary rules include principles for textual, contextual, and teleological interpretation aimed at mutually coherent interpretations premised on the belief that states will behave lawfully to maintain the systematic character of international law and the mutual coherence of international rules and principles.[153]

Scholars highlight the use of Article 31.3(c) of the VCLT to enable the Panels and the Appellate Body to bring external international legal sources into the WTO judicial forum. The article stipulates that when interpreting the treaty provision with the context, any relevant rules of international law applicable in the relations between the parties shall also be taken into account. When read in the broader context, this sub-paragraph empowers the international adjudicators to integrate interpreted treaty languages into the judicial reasoning, along with any "relevant" and "applicable" international laws in any forms outside the WTO, including treaties, customary laws, or general principles of law that are binding to the disputing parties. As a result, a commentator describes Article 31.3(c) as a "master key to the house of international law[154]" and allows the external international legal instruments to be considered even if they are alien to the treaties under interpretation, thus allowing international adjudicators to take the broader normative environment into account.[155] That said, Article 31.3(c) underlines a legal principle under international law – "systematic integration," which requires international courts to consciously maintain the coherence of the norms and values reflected by various international legal regimes.[156]

In the context of treaty interpretation under the WTO dispute, this treaty interpretive approach, as argued by scholars, can "interpret away" potential conflicts

[152] POPA, *supra* note 148, at 349.
[153] Petersmann, *supra* note 5, at 46 & 54.
[154] ILC, Final Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 420, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006)
[155] Vassilis P. Tzevelekos, *The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?*, 31 MICH. J. INT'L L. 621, 631-32 (2010).
[156] *See* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L. Q. 279, 280 (2005).

of norms between WTO laws and other branches of international law.[157] As highlighted by scholars, Article 31.3(c) of the VCLT may be used as a legal instrument to both ascertain the meaning of the provisions of WTO rules and to address the potential legal and the more broad value conflicts between WTO and non-WTO laws.[158] The WTO adjudicators also acknowledge the notion of mitigating potential legal conflicts between WTO law and other international legal regimes by connecting the interpretive principles of systematic integration. As the Appellate Body in *US-Gasoline* stressed, the WTO Agreements shall not "be read in clinical isolation from public international law.[159]" Accordingly, it seems fair to infer that adjudicators of the WTO be aware of the importance of maintaining harmonious relationships between the WTO law and external international legal instruments, and the interpretive principle of systematic interpretation embedded in Article 31.3(c) is an available legal basis for the WTO adjudicative bodies to exercise this interpretive approach.

D. Summary

Overall, there are occasions that other rules of international law may interact with the WTO laws either because of the treaty language of relevant WTO covered agreements or via the treaty interpretive approach carried out by the Panels and the Appellate Body. Indeed, some of the early WTO disputes (e.g., the Appellate Body reports in *US – Gasoline*, *EC – Hormones*, and *US – Shrimp*, which will be elaborated in the following sections) are well known precisely because of a couple of analyses and statements that each touch upon regarding the relationship between WTO law and other rules of international law.[160] As the development of global trade is increasingly intermingled with other fundamental values, including human rights, health, and even

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[157] Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95(3) AM. J. INT'L L. 535, 550 (2001).
[158] Chien-Huei Wu, *From Fragmentation to Coherence: A Constitutionalist Take on the Trade and Public Health Debates*, *in* FRAGMENTATION VS THE CONSTITUTIONALISATION OF INTERNATIONAL LAW: A PRACTICAL INQUIRY 222, 231 (Andrzej Jakubowski & Karolina Wierczynska eds., 2016).
[159] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, p.20 (May 20, 1996).
[160] *See, e.g.*, Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other Treaties*, 35 J. WORLD TRADE 1081 (2001); Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 J WORLD TRADE 499 (2001); Pauwelyn, *supra* note 157, at 535-578. More recent study, *see generally* Graham Cook, *Flying Under the Radar: Non-WTO International Law Sources in Recent WTO Cases (2015-2020)*, J. INT'L TRADE & ARB. L. 10 (2021).

other matters of high politics, it is predictable that external international legal instruments will be cited or referred to either by disputing parties or by WTO adjudicative bodies *sua sponte*. In the following sections, I will illustrate how the external international legal sources are cited by the WTO adjudicative body via quantitative approaches. Specifically, I apply quantitative and qualitative content analysis, as well as semi-structured in-depth interviews with those "insiders" of the WTO – namely, the WTO adjudicators, practitioners, and staff of the WTO Secretariat, to depict an array of arguments, reasonings, and the roles of those non-WTO international law sources found in WTO disputes.

II. A Distant Reading: Quantitative Observations and Findings

A. General Overview of External International Legal Sources in WTO Jurisprudence

As of February 21, 2023, there were 224 Panel reports and 123 Appellate Body reports circulated and coded as my data.[161] Figure 1 demonstrates that among these reports, 143 of these Panel reports and 68 of these Appellate Body reports introduced external international legal sources at least once. These simple descriptive statistics preliminarily contradict some doctrinal arguments that the WTO dispute settlement mechanism works as a "self-contained" regime. In contrast, the data reveals that external international legal sources occasionally appeared and were addressed by the Panels and Appellate Body.

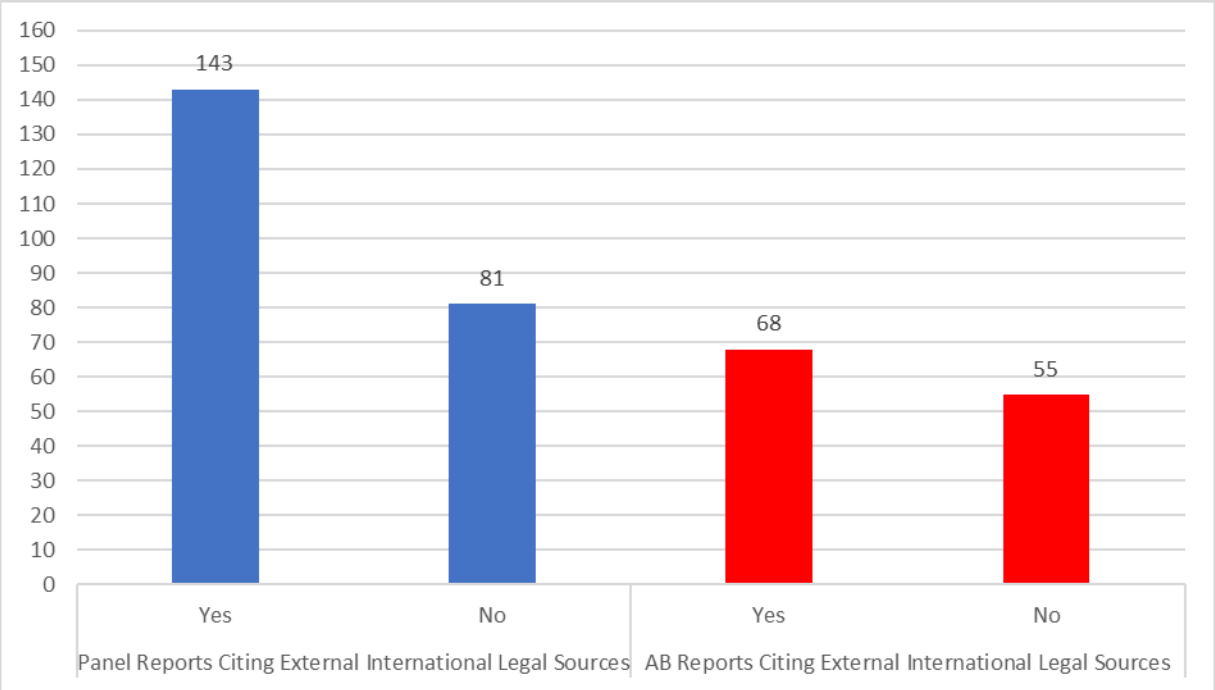

Figure 1 Summary statistics of the data

I further observe the trend of citing external international legal sources in the WTO dispute settlement over time. Figures 2 and 3 illustrate the trend of using

[161] In order to give the most comprehensive picture of the external international legal sources in the WTO decisions, a Panel or Appellate Body report that mentions external legal sources is considered as "positive" with respect to external sources, regardless of their role and importance. The question regarding the role of cited external legal sources will be analyzed in the next section.

external international legal sources over time. The bars refer to the number of reports and the number of decisions mentioning external international legal sources each year. The line shows the percentage of the cited external international legal sources in the total Panel and Appellate Body reports from 1995 to 2022. In general, we can observe fluctuations in the number of external citations in both the Panels' and the Appellate Body's reports. However, the overall trend of such external references has been decreasing over time. This trend aligns with the increasing criticism of the WTO dispute settlement mechanism, as some members have accused the WTO Panels and the Appellate Body of engaging in improper judicial activism.[162]

Additionally, these figures show some discrepancies between Panels and the Appellate Body in terms of the appearance of external international legal sources. Panels seem more open to mentioning external international legal sources in the dispute settlement reports. Almost every year before 2011, over 50% of Panel reports mention external international legal sources. Nevertheless, such citing behavior in the Appellate Body report presents another scenario. For example, the Appellate Body generally mentioned fewer external international legal sources in its decisions in the same period as compared to the Panels. This reluctance was further concretized after 2016 when the US officially denounced the authority of the Appellate Body. This finding can also garner support from other research, which concluded that the US has been the faithful objector to mentioning external international legal sources. [163]

[162] *See, e.g.*, United States Trade Representative, 2019 *Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program* 6, 148 (2019), https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_ 2018_Annual_Report.pdf.
[163] Joost Pauwelyn, *Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution After 20 Years of WTO Jurisprudence*, at 27-28 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731144.

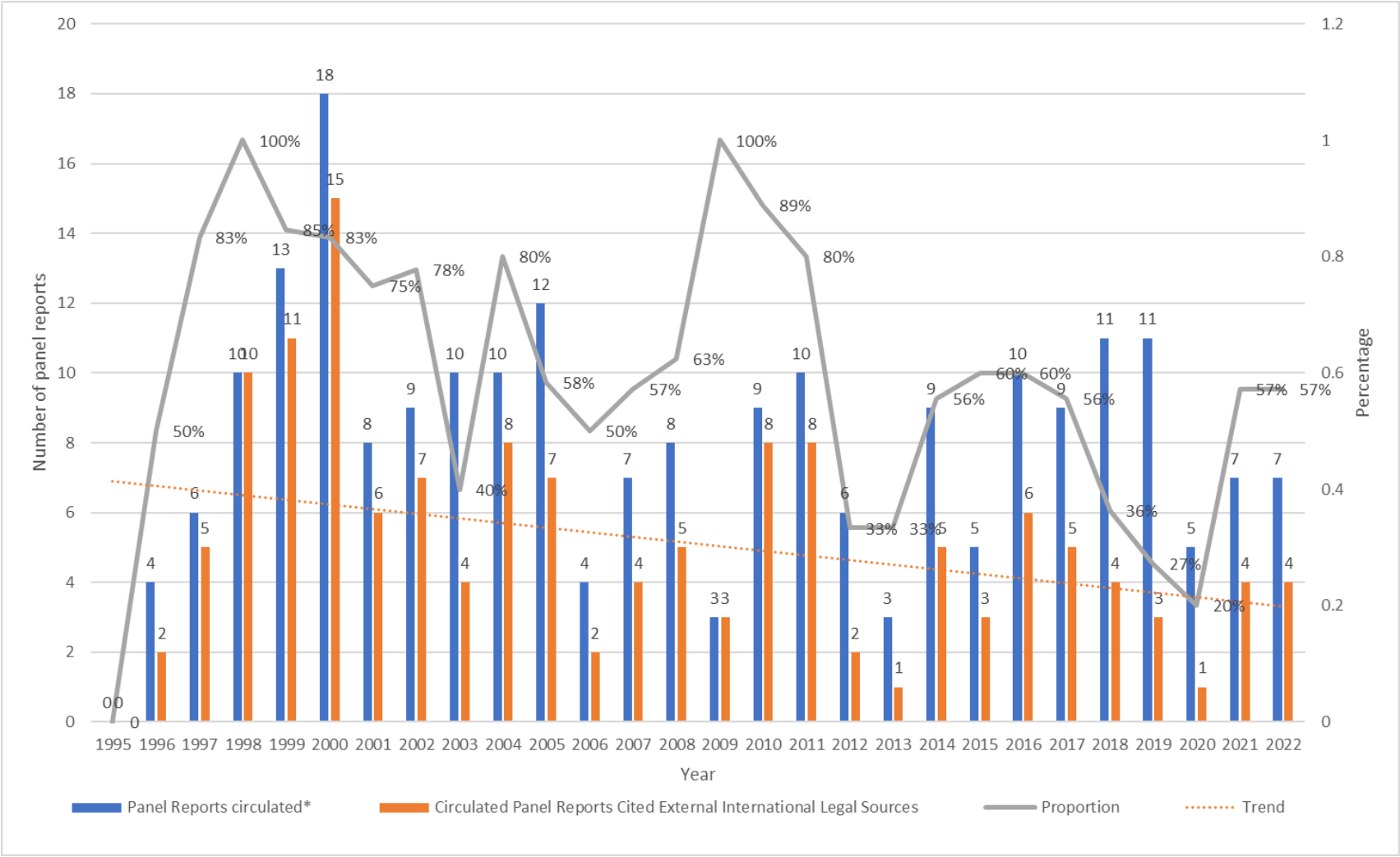

Figure 2 WTO Panel reports citing external international legal sources - By number and percentage.

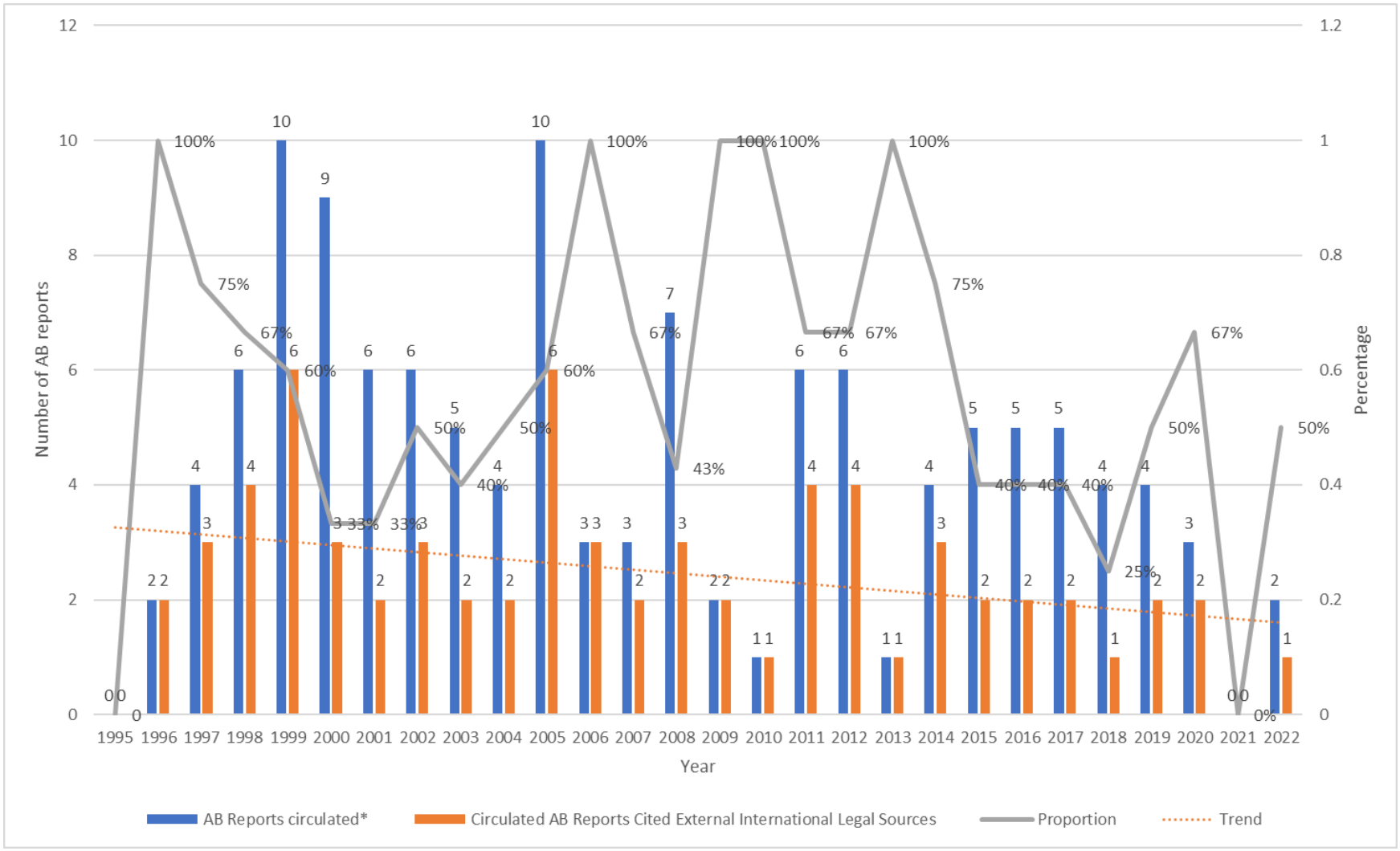

Figure 3 WTO Appellate Body reports citing external international legal sources - By number and percentage.

Understanding the trend of mentioning external international legal sources in the WTO decisions, I then reveal these international legal instruments that have been cited by the Panels and the Appellate Body.[164] Figures 4 and 5 present the number of references for each external international legal source. The most frequently referred legal sources in the Panels' decisions are the legal instruments adopted by the United Nations Food and Agriculture Organization (27 references) and the WHO (23 references). Such results manifest the fact that a significant number of trade disputes concern WTO members' right to regulate human, animal, and plant life and health, including food safety, animal welfare, and plant protection. Additionally, the Southern Common Market (MERCOSUR) and its related international legal sources are frequently mentioned in the Panel reports (23 references). Especially notable are considerable decisions addressing the external legal instruments with subject matters that are distanced from the WTO. For example, the Convention on Biodiversity (10 references), Rio Declaration (10 references), Agenda 21 (6 references), and the United Nations Framework Convention on Climate Change (5 references), which are important legal foundations of global governance regarding environmental protection, climate change, and sustainable development, are referred to by the Panels in several disputes. On a few notable occasions, international human rights instruments were cited by the Panels, such as the European Convention on Human Rights (5 references), Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, United Nations Declaration on the Rights of Indigenous Peoples, and ILO Indigenous and Tribal Peoples Convention (2 references)

[164] Figure 4 and Figure 5 only list those external international legal sources that are mentioned by the Panels or the Appellate Body beyond two times. There are other external legal sources but are only cited in the WTO decisions for once.

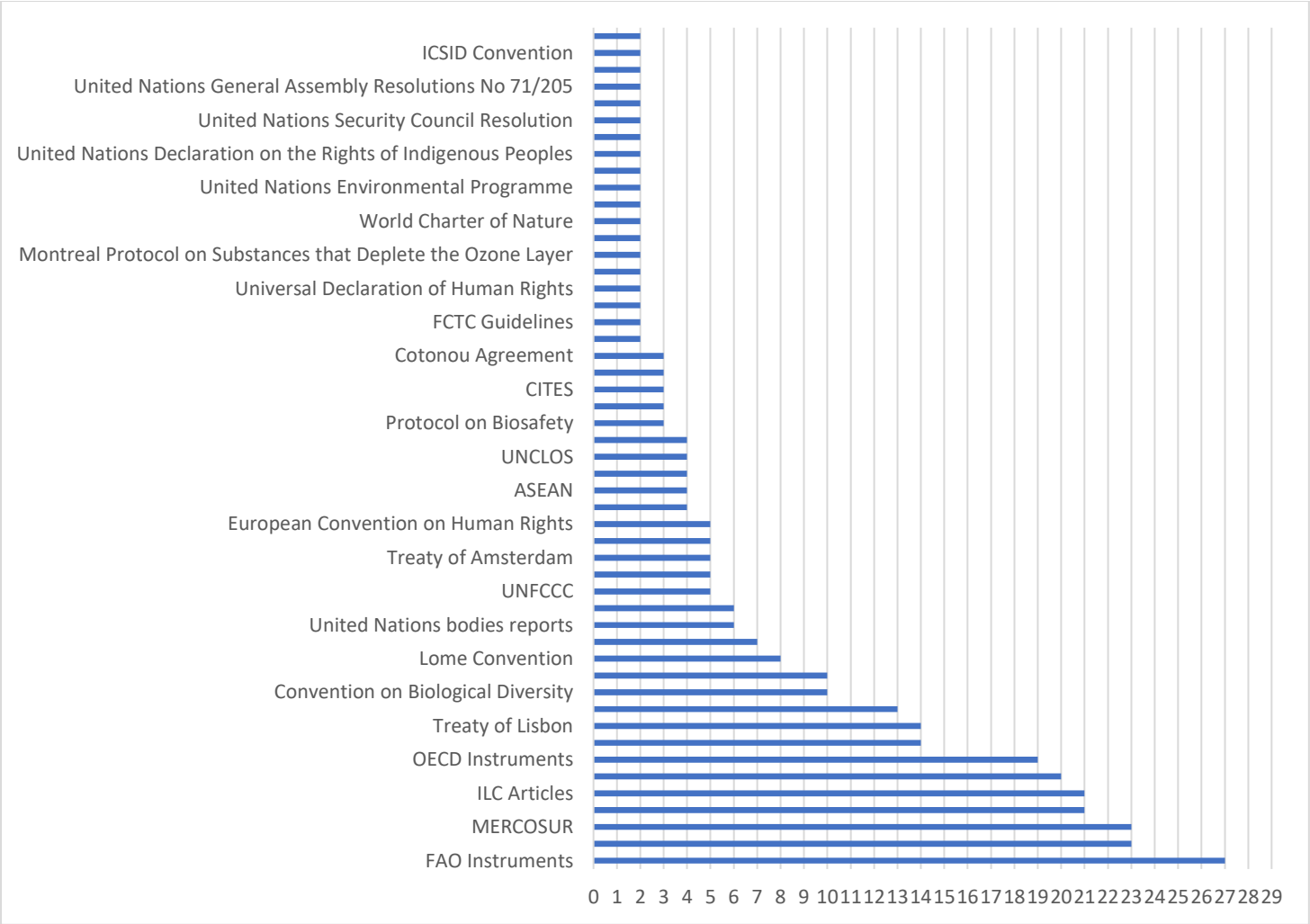

Figure 4 Number of Panel reports that refer to each external international legal source.

The data for the Appellate Body reports demonstrates a different scenario from the Panel reports in terms of the frequency and variety of external international legal sources. The most frequently cited external legal source is the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC Articles, 14 references). The Statute of the International Court of Justice also accounts for certain amounts of references by the Appellate Body (9 references). As for the WHO legal instruments, the data shows that they are also an important source of external international legal sources for the Appellate Body (10 references). Nevertheless, other non-trade international legal instruments, such as environmental and human rights-related treaties and conventions, are rarely or never mentioned in the Appellate Body reports.

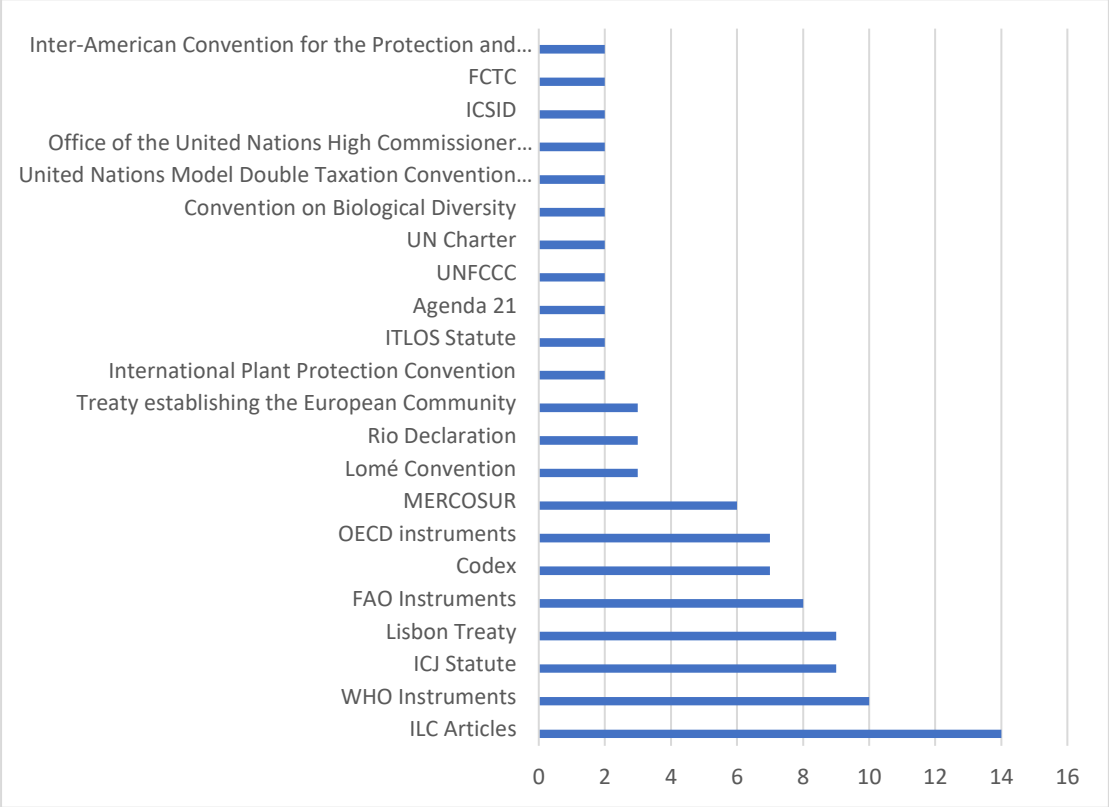

Figure 5 Number of Appellate Body reports that refer to each external international legal source.

The frequency and diversity of the external international legal sources in the WTO Panel and Appellate Body reports can also be observed and categorized by the legal regimes to which those external legal sources belong. Charts 1 and 2 show the percentage of those cited external international legal sources in the Panel and Appellate Body reports categorized by their legal regimes. The outcomes also support

the aforementioned findings. To elaborate, I find more diversity of external international legal sources in the Panel reports, including those international legal instruments concentrating on subject matters of public health promotion (19%), environmental protection (17%), and international courts statutes/customary international law (14%). The Panels were also requested to consider the legal instruments that seem to be distanced from international trade, such as the United Nations legal instruments (8%), human rights/humanitarian issues (6%), or even the law of the sea and fisheries (2%).

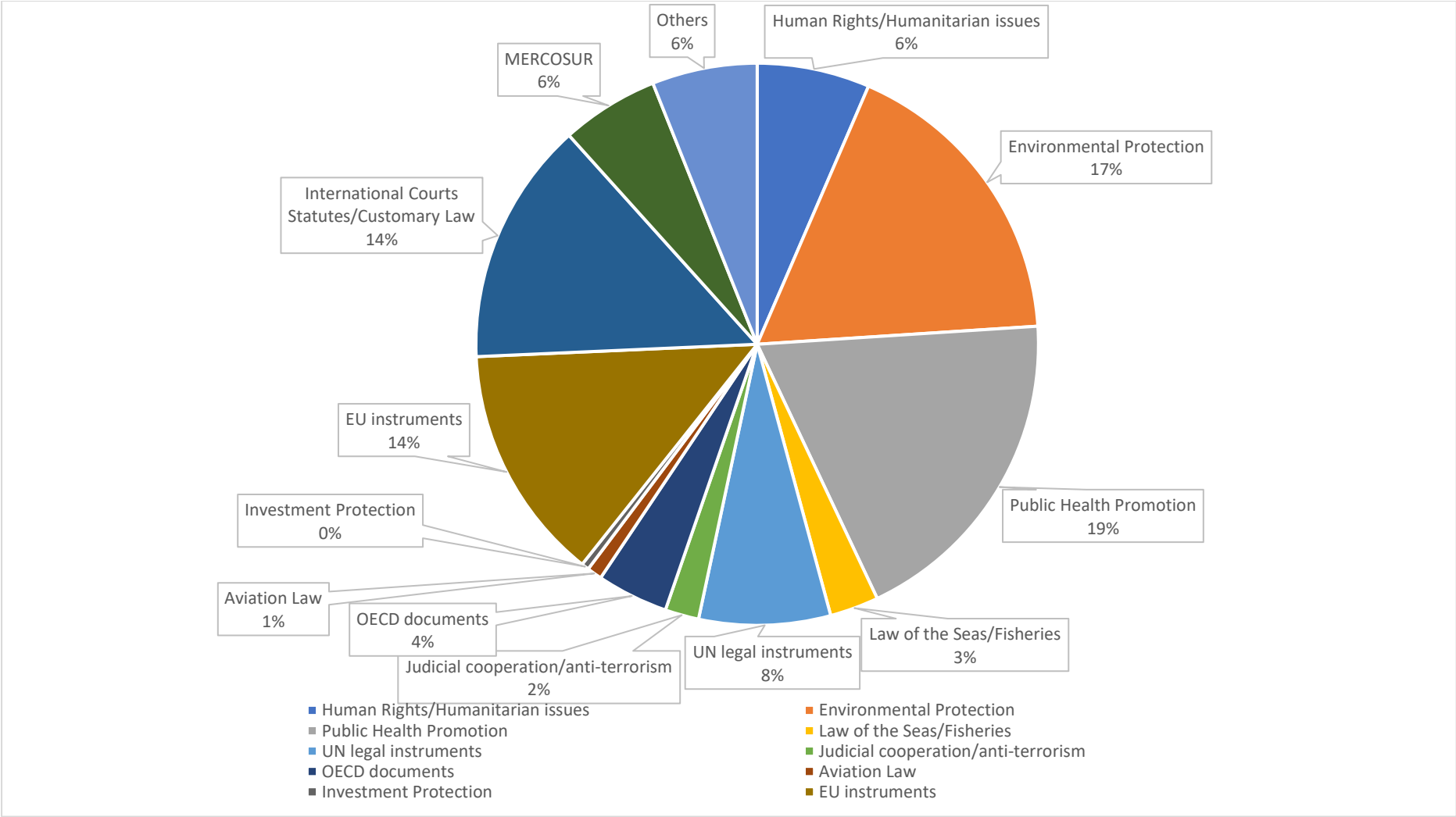

Chart 1 The categories of external international legal sources in the Panel reports

In contrast, in the Appellate Body reports, the majority of the external international legal sources introduced by the Appellate Body are the international court statutes/customary international law and the legal instruments regarding public health promotion. Both legal instruments account for over 50% of such external references (51% in total). The following categories of international legal regimes are the legal instruments of the European Union (15%), the United Nations (8%), and the law of the seas and fisheries (7%). As I will further discuss in the following section, the nature of the Appellate Body, whose authority is limited to issues of law covered in the Panel reports, and legal interpretations developed by the Panels should explain why the Appellate Body is more conservative about introducing the external international legal sources in their reports given that such behavior might go beyond its authority.[165]

[165] DSU Art. 17.6 ("[a]n appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel.")

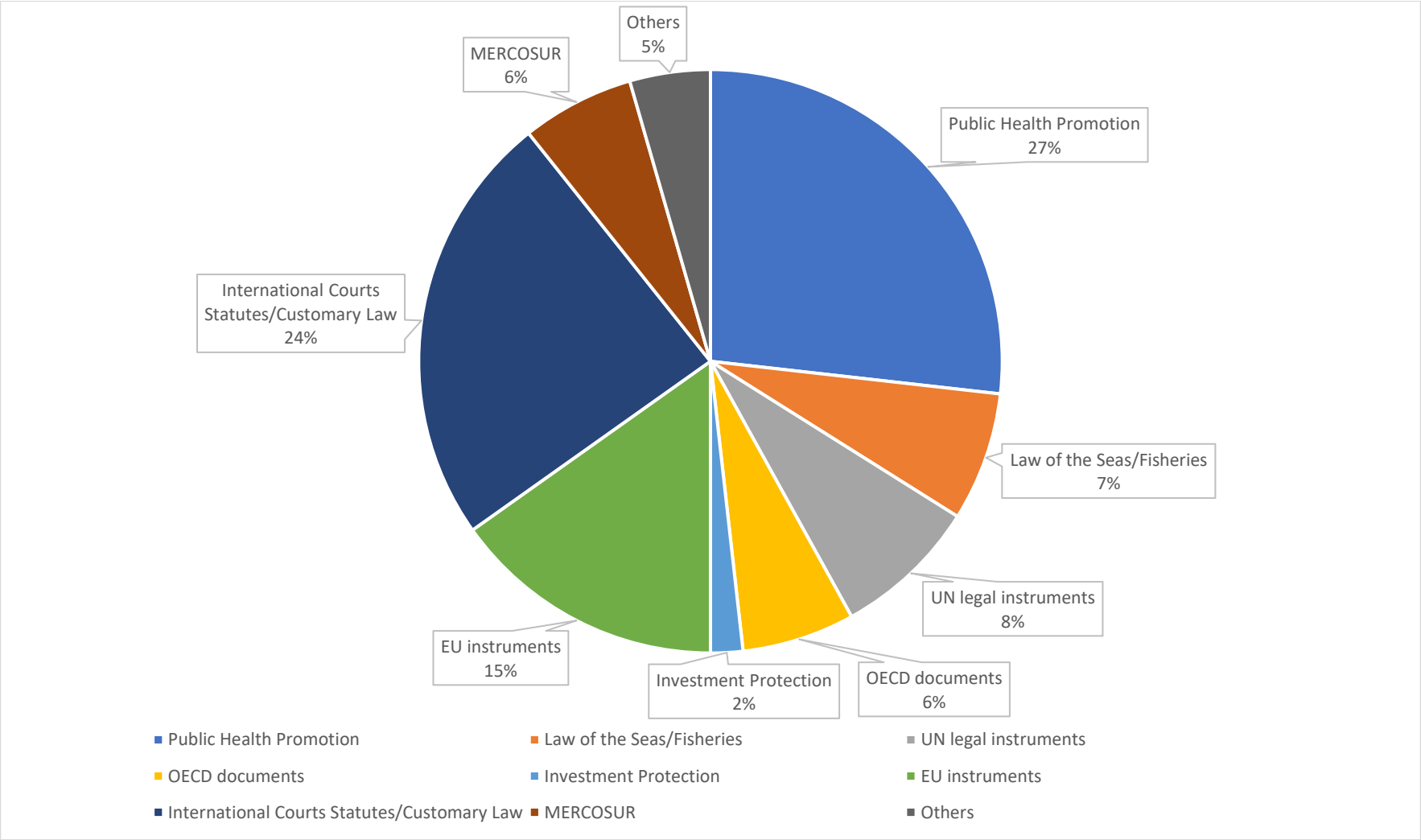

Chart 2 The categories of external international legal sources in the Appellate Body reports

In addition to directly referencing external international legal instruments, introducing the case laws/jurisprudence from other international judicial forums may also indirectly channel non-WTO legal norms in the WTO and promote judicial engagement between the WTO dispute settlement mechanism and other international courts. Indeed, both the Panels and the Appellate body frequently mention external judicial decisions when searching for inspiration and authority outside the WTO jurisprudence.[166] As a result, I also provide descriptive statistics to show the usage frequency of international courts' rulings.

Figure 6 presents the number of references to other international courts' case laws in the Panel, and the Appellate Body reports. We can observe that the jurisprudence of the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), are the most widely mentioned case law outside of the WTO judicial forum. For ICJ cases, there are 70 references in the Panel reports, and 29 references in the Appellate Body reports. Regarding the PCIJ jurisprudence, the Panels made 32 references, and the Appellate Body made ten references. Interestingly, the case law of the European Union, including the European Court of Justice (32 references by the Panels and 8 references by the Appellate Body) and the European Court of Human Rights (7 references by the Panels and 6 references by the Appellate Body) also account for a significant number of references by the WTO adjudicators. Several cross-references are made by resorting to the cases in the International Centre for Settlement of Investment Disputes (ICSID), International Tribunal for the Law of the Sea (ITLOS), Permanent Court of Arbitration (PCA), Iran-US Claims Tribunal, International Criminal Court (ICC), and the Inter-American Court of Human Rights. The rulings that are embedded in the cited international courts' decisions are also demonstrated in Table 1. The result demonstrates that most of these cited jurisprudence from other international courts are the primary rules of international law, including the principle of good faith, treaty interpretation, and the doctrine of attribution. Even when the case laws cited originated from the European Court of Human Rights, ITLOS, or other international courts in specific legal regimes, the rulings mentioned in the WTO Panel and Appellate Body reports are still those primary rules of international law.[167]

[166] ZANG, *supra* note 89, at 38.
[167] Similar findings, *see* Erik Voeten, *Borrowing and Nonborrowing Among International Court*, 39(2) J. LEGAL STUD. 547, 569-571 (2010).

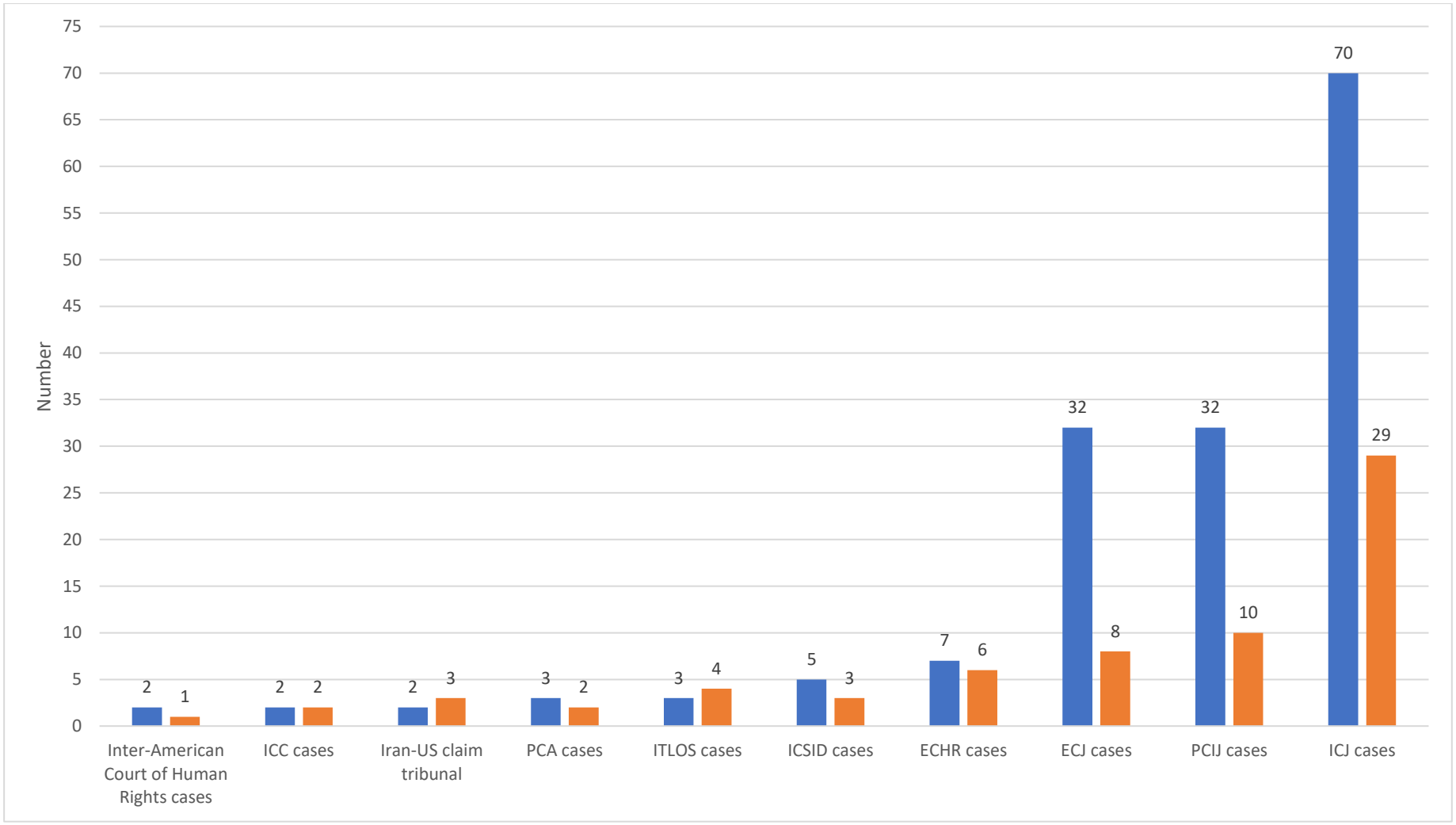

Figure 6 The number of international courts' judgments at the Panels (blue) and Appellate Body reports (orange)

	ICJ/PCIJ case name	Number of WTO decisions making references	The rulings from ICJ/PCIJ introduced to the WTO
1.	Corfu Channel Case	14	The role of expert; adverse inference; good faith; circumstantial evidence; effective interpretation; principle of attribution;
2.	Nuclear Tests Case (Australia v. France)	12	Unilateral public declarations; Principle of Kompetenz-Kompetenz; the existence of dispute; Panel's power to determine the scope of dispute; temporal scope of jurisdiction; the principle of good faith; the interpretative principle of in dubio mitius
3.	Case of Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)	11	The interpretation of security exception (self-judging), good faith, the role of the newspaper, magazine articles, and statements to manifest states' actions (the probative value of indirect evidence), affected third party would not hamper the jurisdiction, the principle of Jura novit curia, the concept of "adverse inferences," countermeasure as customary international law, treaty rule v. customary law
4.	Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)	10	VCLT Art. 48 (error of law is not covered by this article); Estoppel principle
5.	Elettronica Sicula S.p.A. (ELSI)	8	The legal status of domestic law; exhaustion of local remedies does not apply; treaty interpretation re languages
6.	Southwest Africa (Ethiopia v. South Africa)	8	Actio popularis; legal interest to sue; Treaty interpretation (subsequent practice); res judicata
7.	Competence of the General Assembly for the Admission of a State to the United Nations	8	Treaty interpretation (prioritize ordinary meaning);
8.	Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)	8	Treaty interpretation (general rules & effective interpretation; preparatory work); estoppel;

9.	Legal Status of Eastern Greenland (Denmark v. Norway)	7	VCLT Art. 48 (high threshold to establish error); legal effect of unilateral declaration
10.	Case Concerning the Barcelona Traction, Light, and Power Company, Limited	6	Interest to sue; actio popularis; adverse inference; municipal law and court decision; res judicata
11.	Case Concerning the Northern Cameroons, Preliminary Objections (Cameroon v. United Kingdom)	5	Principle of Kompetenz-Kompetenz; Assessing if disputes still exist (legal interests of the case); temporal scope of jurisdiction
12.	Case Concerning the Payment of Various Serbian Loans Issued in France	5	Treaty interpretation (special character v. general term); domestic law and courts' decisions
13.	Border and Transborder Armed Actions	5	Existence of dispute; good faith;
14.	Northern Cameroons (Cameroon v. United Kingdom)	5	Principle of Kompetenz-Kompetenz; the existence of dispute; legal interests to sue
15.	Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)	5	Precautionary principle; significance of environment; estoppel; countermeasure must be commensurate
16.	Case Concerning the Payment in Gold of Brazilian Federal Loans	4	The legal status of domestic law
17.	Frontier Dispute (Burkina Faso/Republic of Mali)	4	legal effect of unilateral declaration; Estoppel principle
18.	Fisheries Case (United Kingdom v. Norway)	4	Newspaper and article as evidence; unilateral declaration; temporal application; good faith
19.	S.S. "Wimbledon" case	4	Principle of state sovereignty; legal interests in bringing the sue;
20.	Factory at Chorzów	4	One party cannot avail himself of the fact that the other has not fulfilled some obligation (Chorzow's principle)
21.	North Sea Continental Shelf Cases	4	Customary law; duty of consultation (meaningful); legitimate expectation; estoppel
22.	Competence of the I.L.O. to Regulate Agricultural Labour	4	Treaty interpretation (holistic interpretation);
23.	Fisheries Jurisdiction (United Kingdom v.	4	jura novit curia

	Iceland)		
24.	Prosecutor v. Zlatko Aleksovski, International Criminal Tribunal for the Former Yugoslavia	3	Cogent reasons principle;
25.	Case concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)	3	Error in the consent (VCLT art. 48(2))
26.	Kasikili/Sedudu Island (Botswana v. Namibia)	3	VCLT Art. 48 (high threshold to establish error)
27.	Lotus	3	Treaty interpretation (preparatory work); concept of enforcement jurisdiction; Treaty obligation and Principle of state sovereignty
28.	Access of Polish War Vessels to the Port of Danzig	3	Treaty interpretation (subsequent practice & holistic interpretation); in dubio mitius
29.	Namibia (Legal Consequences) Advisory Opinion	3	Treaty interpretation (evolutionary interpretation)
30.	Rights of Nationals of the United States in Morocco Case	3	Good faith
31.	Prosecutor v. Tadić, International Criminal Tribunal for the Former Yugoslavia	2	Cogent reasons principle; Political question;
32.	Case Concerning the Guardianship of an Infant	2	The status of the municipal court's decision,
33.	United States Diplomatic and Consular Staff in Tehran (United States v. Iran)	2	Newspaper and article as evidence; the principle of attribution
34.	Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania	2	Stare decisis; treaty interpretation (principle of effectiveness)
35.	Mavrommatis Palestine Concessions Case	2	Treaty interpretation;l Interest to sue; actio popularis
36.	Interhandel (Switzerland v. United States of America)	2	Principle of Kompetenz-Kompetenz; motivo cautelar
37.	Effects of Awards of Compensation Made by	2	Res judicata;

	the United Nations Administrative Tribunal		
38.	Exchange of Greek and Turkish Populations	2	Treaty obligation and Principle of state sovereignty
39.	European Danube Commission between Galatz and Braila	2	Treaty obligation and Principle of state sovereignty
40.	Anglo-Iranian Oil Co. Case	2	Unilateral statement; Principle of Kompetenz-Kompetenz
41.	Free Zones of Upper Savoy and the District of Gex	2	VCLT 27; good faith
42.	The Aegean Sea Continental Shelf Case	2	Treaty interpretation (Evolutionary interpretation);
43.	Nottenbohm case (Liechtenstein v Guatemala)	2	Genuine connection and nationality
44.	Maritime Delimitation and Territorial Questions between Qatar and Bahrain	2	Treaty interpretation (general rules & preparatory work);
45.	Anglo-Norwegian Fisheries	2	Good faith
46.	Case Concerning the Arbitral Award of 31 July 1989 (Guinea - Bissau v. Senegal)	2	Treaty interpretation (object and purpose; holistic interpretation)

Table 1 The most frequently cited ICJ/PCIJ cases by ISDS jurisprudence[168]

B. The Factors Associated with Citing External International Legal Sources

The factors that may be associated with judicial behaviors have attracted numerous discussions. In the context of members of the WTO Panels and the Appellate Body, some scholars insightfully explain their behaviors and decision-making process by referencing theories from other disciplines, such as behavioral economics, international relations, or socio-cultural studies.[169] However, only a few scholars discuss what factors might incentivize the Panels and the Appellate Body to

[168] This table only lists those ICJ/PCIJ cases that are cited by over two WTO decisions.

[169] Tomer Broude, *Behavioral International Law*, 163 U. PA. L. REV. 1099 (2015). Marc L. Busch & Krzysztof J. Pelc, *Ruling Not to Rule: The Use of Judicial Economy by WTO Panel*, *in* THE POLITICS OF INTERNATIONAL ECONOMIC LAW 263, 276 (Tomer Broude et al. eds., 2011). Manfed Elsig & Mark A. Pollack, *Agents, Trustees and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L L. 391, 406-07 (2014). Joost Pauwelyn & Krzysztof Pelc, *Who Guards the "Guardians of the System"? The Role of the Secretariat in WTO Dispute Settlement*, 116(3) Am. J. Int'l L. 534 (2022).

introduce and mention external international legal sources in their decisions – even fewer empirically examine the relationships between the potential factors and the frequency of external international legal sources.[170] Based on the qualitative interview results that I conducted and the conventional wisdom that identifies potential variables that may affect adjudicators' attitudes toward external legal sources, I focus on two primary factors associated with citing external international legal sources: The nature of the dispute and the superpowers' involvements in the disputes, i.e., the US and the EU.

First, the nature of the disputes, according to scholars and practitioners, may affect the frequency of introducing external international legal sources. Generally speaking, in the cases regarding trade remedies, import licensing, and other technical border measures, external international legal sources would be less needed for the WTO adjudicators, given that these disputes are largely about trade and economic matters. Conversely, for those disputes relating to technical barriers (e.g., product liability and safety standard), sanitary measures (e.g., food safety and public health), or other regulatory legislations bearing the realization of other public interests in addition to trade and economic benefits, the external international legal sources could be more relevant and play certain roles in the Panels and Appellate Body's adjudication. This observation is also shared by my interviewees, who used to work for the WTO Appellate Body Secretariat. According to their experience, when assisting the members of the Appellate Body in addressing the dispute concerning the legality of the US's anti-dumping measures imposed on goods imported from other WTO members, the external international legal sources were barely considered because the focus of the anti-dumping disputes is the determination of whether the products are imported below their normal values, or if the US properly calculates the dumping margin. The issues of this kind of case mostly concentrate on the interpretation and application of the WTO Anti-Dumping Agreement itself rather than resorting to external legal sources. Whereas in the dispute concerning Australia's tobacco control measures, India's renewable energy transition policy, or the EU's animal welfare regulations regarding seal products, the external international legal sources from other legal regimes or international judiciaries would be more frequently considered and

[170] Charlotin, *supra* note 84, at 279. *See also* Voeten, *supra* note 167.

mentioned in the legal analysis.[171]

To empirically examine this argument and the perspective shared by the WTO officials, I explore if the subject matter of the disputes has a positive or negative association with invoking external international legal sources. For the purpose of analysis, I categorize the nature of disputes based on the WTO agreement(s) relied on by claimants in that dispute. Table 2 summarizes statistics from the WTO disputes categorized by the cited agreements and the number and percentage of external international legal sources mentioned in each category. The results basically correspond to the aforementioned scholars' assertation that external international legal sources are more likely introduced in disputes that are not only about trade remedies but are also concerning other non-economic regulatory objectives. In the cases where the SPS Agreement and the TBT Agreement are the primary subject matter, external international legal sources appear in almost 90% of these disputes. On the contrary, for those cases relating to the legality of anti-dumping tax and anti-subsidy measures, the external international legal sources seem to be much less prominent. For example, only 37% of the anti-dumping cases make reference to external international legal sources.

[171] Interview with two former staffs of the WTO Appellate Body Secretariat (Jan. 11, 2023, on file with the author).

The WTO Agreements	Number of Disputes involving the WTO Agreement	Number of Disputes Mentioning External Legal Sources	Number of Disputes without Mentioning External Legal Sources	Percentage of Disputes Referencing to External Legal Sources	Min. No. External Legal Sources	Max No. External Legal Sources	Mean No. External Legal Sources
GATT	306	184	122	60.13%	0	27	2.513
Agreement Establishing the World Trade Organization	51	29	22	56.86%	0	10	1.368
Agriculture	17	9	8	52.94%	0	18	3.608
Anti-dumping	102	38	64	37.25%	0	9	0.892
Customs valuation	9	7	2	77.77%	0	11	3.333
Dispute Settlement Understanding (DSU)	15	11	4	73.33%	0	11	4.066
Government Procurement (GPA)	1	1	0	100%	5	5	5
Import Licensing	19	12	7	63.15%	0	8	1.947
Intellectual Property (TRIPS)	17	15	2	88.23%	0	13	4.235
Pre-shipment Inspection	3	3	0	100%	1	2	1.666
Rules of Origin	6	3	3	50%	0	5	2.333
Safeguards	27	12	15	44.44%	0	3	0.142
Sanitary and Phytosanitary Measures (SPS)	27	25	2	92.59%	0	18	4.962
Services (GATS)	13	10	3	76.92%	0	8	2.454
Subsidies and Countervailing Measures (SCM)	91	51	40	56.04%	0	14	1.604

The WTO Agreements	Number of Disputes involving the WTO Agreement	Number of Disputes Mentioning External Legal Sources	Number of Disputes without Mentioning External Legal Sources	Percentage of Disputes Referencing to External Legal Sources	Min. No. External Legal Sources	Max No. External Legal Sources	Mean No. External Legal Sources
Technical Barriers to Trade (TBT)	29	26	3	89.65%	0	18	5.827
Textiles and Clothing	9	8	1	88.88%	0	9	2.777
Trade-Related Investment Measures (TRIMs)	22	16	6	72.72%	0	8	2.681

Table 2 Disputes Citing External International Legal Sources – By Subjects of Disputes

In addition to the subject matter of the dispute, some articles point out that the disputing parties also play a significant role in determining if the external international legal sources would be raised and analyzed by the WTO adjudicators. Specifically, Gregory Shaffer and Joost Pauwelyn indicated that the US and the EU (counting the EU members as one) had been the main parties before the WTO dispute settlement proceedings and largely shaped and influenced the WTO jurisprudence.[172] In terms of the attitude toward citing external international legal sources or case laws of other international judiciaries, Pauwelyn depicted that the US is "one of the staunchest objectors to reference to other international law."[173] By highlighting several WTO disputes that the US was either the complainant or respondent, he concluded that the US has constantly argued against reference to outside rules. In contrast, the EU has "traditionally taken the most open view toward outside international law.[174]" He referred to several EU-involved WTO disputes that mention a handful of external international legal sources to demonstrate how the EU has been an active proponent of referring to outside international legal sources.

Table 3 summarizes statistics of the disputes in which either the US or the EU is a disputing party and the frequency of external international legal sources in the Panel and Appellate Body reports. We can first observe that both the EU and the US are indeed the primary "users" of the WTO dispute settlement mechanism. Over 300 WTO disputes involve the US or the EU. Among the cases that the EU is either the complainant or respondent (126 cases), 74.6 % of such disputes mention other international laws or jurisprudence from other international courts (94 out of 126). For the cases that the US is a disputing party (182 cases), 56% of these decisions cite external international legal sources or other international judiciaries' case laws (102 out of 182). The descriptive statistics are in line with Pauwelyn's observations regarding the US's and EU's attitudes toward introducing external international legal sources.

[172] Gregory Shaffer, *Public–Private Partnerships in WTO Dispute Settlement: The US and EU Experience*, *in* THE WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA 148 (Yasuhei Taniguchi et al. eds., 2007). Pauwelyn, *supra* note 163.
[173] Pauwelyn, *supra* note 163, at 27-28.
[174] *Id*.

	Number of Disputes	Number of Disputes Citing External Legal Sources	Percentage	Min. No. External Legal Sources	Max No. External Legal Sources	Mean No. External Legal Sources
The EU as a disputing party	126	94	74.6%	0	18	3.454
The US as a disputing party	182	102	56%	0	27	2.233

Table 3 The frequency of citing external international legal sources in disputes where either the EU or the US is the disputing party

Are these different proportions statistically significant? The OLS linear multiple regression [175] is applied to compare the proportions of citing external international legal sources among different types of disputes. The total number observed here is 799.[176] The null hypothesis is that the proportions among the groups are equal. The dependent variable is the total number of external international legal sources (including other international judiciaries' jurisprudence) in each coded WTO Panel and Appellate Body report. The independent variables are (1) the WTO-covered agreements that are involved; each WTO agreement is treated as a dummy variable (1: A WTO-covered agreement was involved; 0: A WTO-covered agreement was not involved). Since the establishment of the DSU, 17 WTO covered agreements have been claimed by the complainants. Hence, 17 independent variables will be tested. (2) Whether the disputing party is the US or the EU. This variable is also treated as a dummy variable (1: the US or the EU is the disputing party in the case; 0: the US or the EU is not the disputing party in the case). The US involvement and EU involvement are two different independent variables for my model. In addition, I include the year factor to control for its confounding effects on the relationship between key explanatory variables and the frequency of external references in WTO decisions. The simple regression model and the regression table are presented as

[175] In OLS test, a regression coefficient communicates an expected change in the value of the dependent variable for a one-unit increase in the independent variables.

[176] The number of observations here is 799 instead of 347 as previously presented because each dispute may concern multiple WTO covered agreements. Hence, in order to run the OLS test to evaluate the association between each WTO covered agreement and the frequency of external international legal sources, I split one dispute to several rows which one of the WTO covered agreement involving in that dispute. For example, if a dispute involves GATT, GATS, and SCM Agreement, then it would be split to 3 rows in my Excel codebook.

follows:

$$Y = \alpha + \beta_{1\ldots17} \cdot WTO\ Agreements\ involved + \beta_{18} \cdot EU\ involved + \beta_{19} \cdot US\ involved + \beta_{20} \cdot Year + \varepsilon_i$$

$$N = 799$$

	Dependent variable:		
	Number of external legal sources		
	(1)	(2)	(3)
year_of_case	-0.047***	-0.052***	-0.033**
	(0.015)	(0.015)	(0.015)
num_EU_involve	1.501***		1.467***
	(0.261)		(0.253)
num_US_involve	0.074		0.389
	(0.249)		(0.249)
agreementAgriculture		2.429***	2.272***
		(0.564)	(0.555)
agreementCustoms valuation		2.402**	2.359**
		(1.093)	(1.080)
agreementDSU		2.763***	2.123**
		(0.870)	(0.861)
agreementGATS		2.182**	2.314**
		(0.927)	(0.909)
agreementGATT		1.504***	1.384***
		(0.360)	(0.354)
agreementGPA		3.608	2.913
		(3.163)	(3.105)
agreementImport Licensing		0.850	0.798
		(0.788)	(0.776)
agreementPreshipment Inspection		1.139	1.605
		(1.845)	(1.814)
agreementRules of Origin		1.328	1.026
		(1.321)	(1.300)
agreementSafeguard		-0.283	-0.290
		(0.681)	(0.667)
agreementSCM		0.603	0.381
		(0.453)	(0.447)
agreementSPS		4.028***	4.071***
		(0.681)	(0.667)
agreementTBT		4.764***	4.552***
		(0.663)	(0.652)
agreementTextiles		1.300	1.560
		(1.106)	(1.086)
agreementTRIMS		1.725**	1.434**
		(0.739)	(0.727)
agreementTRIPS		3.197***	2.861***
		(0.825)	(0.810)
agreementWTO Agreement		0.415	0.255
		(0.520)	(0.514)
Constant	96.612***	105.030***	67.578**
	(31.159)	(30.086)	(30.490)
Observations	799	799	799
R^2	0.065	0.140	0.176
Adjusted R^2	0.061	0.120	0.155
Residual Std. Error	3.247 (df = 795)	3.144 (df = 780)	3.082 (df = 778)
F Statistic	18.405*** (df = 3; 795)	7.042*** (df = 18; 780)	8.303*** (df = 20; 778)
Note:			*p<0.1; **p<0.05; ***p<0.01

The above table presents the results of the OLS models. Model 1 examines factors of the US's and the EU's involvement in disputes. Model 2 includes tests of the subject matter of disputes, namely, the WTO covered agreements argued by the disputing parties and addressed by the WTO adjudicators. Model 3 is the most comprehensive, jointly testing the associations between the dependent variable and all independent variables.[177]

The results of Model 1 show that when the US and the EU become the party of the dispute, both present positive associations with having more external international legal sources in the Panel or the Appellate Body reports. However, compared to when the US is a disputing party in a case, the EU's involvement shows a greater regression coefficient (1.501), and only the result of the EU's involvement is statistically significant. This outcome is somewhat consistent with Pauwelyn's argument – namely, when the EU serves as a disputing party in a case, more external international legal sources are mentioned.

Model 2 [178] demonstrates that when a dispute concerns the Agreement on Agriculture, the DSU, GATT, SPS, TBT, and TRIPS Agreements, the more external citations present in the Panels and the Appellate Body reports, compared with the dispute where the Agreement on Anti-Dumping is involved. The results are all statistically significant. Overall, the positive regression coefficients, together with the aforementioned interview results gathered from the officials of the WTO Appellate Body Secretariat, are consistent with the assumption that the nature of the WTO disputes may affect the frequency of external international legal sources in the WTO Panel and Appellate body reports.

Lastly, these results remain unchanged in Model 3. Notably, when the subject matters of the disputes are responding members' technical barriers and sanitary measures, more external international legal sources are mentioned in the dispute settlement reports. The regression coefficients are 4.071 for SPS-related disputes and 4.552 for TBT-related disputes. Both the results are statistically significant ($p < 0.01$). Other disputes where the TRIPS Agreement and Agreement on Agriculture are involved also show notable regression coefficients (2.861 and 2.272, respectively),

[177] In order to detect the multicollinearity issues, I use the Variance Inflation Factor (VIF) to quantify the extent of correlation between one predictor and the other predictors in my model. The general rule of thumb is that VIFs exceeding 4 warrant further investigation. The VIFs result shows that none of the independent variables in this model exceed 4, which mean that the no multicollinearity issues exist in this model.

[178] The Anti-Dumping Agreement is used as the base for Model 2.

which indicates that these cases are positively associated with the frequency of citing external international legal sources ($P < 0.01$). The explanation for such positive correlations is that these WTO covered-agreements have inherently embedded other international legal instruments in their treaty contexts. As mentioned in the previous section, these agreements either directly refer to external international legal sources, adopt open-ended legal terms that could accommodate other non-economic values, or aim to reserve the policy spaces for the WTO members. For instance, the international conventions regulating sanitary and phytosanitary measures, the WHO, and the FAO instruments are annexed in the SPS Agreements and, thus, are repeatedly cited in the disputes involving the SPS Agreement. To some extent, the OLS results evince the assumption that the Panels and the Appellate Body are more comfortable mentioning external international legal sources explicitly specified in the WTO agreements than those not.[179]

Besides, the result of the control variable is worthy of discussion. Models 1-3 show a negative association between the year and the number of external references ($P < 0.05$). The results seem to correspond to the aforementioned descriptive statistics (see figures 2 and 3), which show that the frequency of external citations in WTO decisions is decreasing over time.

The results generated from the OLS test are not without caveats. Note that the regression result does not necessarily mean that the decision mentioning external international legal sources is "because of" the subject matters of the disputes or is because of the EU's involvement. In other words, I do not aim to establish a causal link between the independent variables and the dependent variable because the value of the R-square is just so small. For example, the omitted variable bias may occur given that it is highly likely that other factors may exist and have even stronger connections with the existence of external international legal sources in the Panel and the Appellate Body reports. Nevertheless, as Shaffer insightfully indicated, "all empirical methods are partial and subject to bias.[180]" The result should be perceived as important for ongoing dialogue with other doctrinal and empirical research focusing on similar topics. The OLS results may supplement the doctrinal arguments and the qualitative interview results that I collected.

[179] Pauwelyn, *supra* note 163, at 29-30.
[180] Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT'L L. 189, 209 (2015).

C. Summary

The quantitative content analysis demonstrates the broad picture of the extent to which external international legal sources are mentioned in the Panels and the Appellate Body reports. The trend of citing external international legal sources, the categories of legal instruments introduced in the WTO dispute reports, and the origins of the cited case laws from other international judiciaries are explored. Moreover, the OLS regression results in this section empirically tested the possible factors associated with the frequency of citing external international legal sources in the Panel and the Appellate Body reports. Generally speaking, the results largely correspond to the previous arguments and the interviews that I conducted with the WTO practitioners.

The quantitative approach provides a fundamental understanding of the interactions between the WTO laws and other international legal regimes. Such a distant reading approach, however, falls short of understanding how these external international legal sources are used by WTO adjudicators. As a result, in the next section, I will apply the close reading approach – namely, by conducting qualitative content analysis to examine the representative cases in depth, and several semi-structured elite interviews to explain WTO adjudicators' attitudes toward referencing external international legal sources over time, and to explore the possible roles of external international legal sources in WTO disputes when they are mentioned and cited.

III. A Close Reading: Qualitative Content Analysis of External International Legal Sources in WTO Disputes

A. From open to hesitant to embrace external international legal sources

The descriptive statistics demonstrate that while there are flows in the frequency regarding citing external international legal sources, the data can somewhat respond to the criticisms that the WTO dispute settlement system, or the whole WTO legal system, is a self-contained regime. Occasionally, both the Panels and the Appellate Body have resorted to international legal instruments outside the scope of the WTO and other international judiciaries' jurisprudence in their dispute reports.

However, it is undeniable that the frequency of mentioning external international legal sources or referencing case laws from peer-international courts seems to be decreasing in relative terms. The explanations of such a phenomenon are manifold, but the most essential cause should definitely be attributed to the US boycotting new Appellate Body appointments that substantially paralyze the function of the WTO dispute settlement system and cast a shadow on the "crown Jewel" of the WTO. From the US's perspective, the WTO dispute settlement mechanism has gone beyond its mandate to interpret and apply the WTO provisions by unduly extending the quasi-legislative power, such as overly relying on precedents, addressing unnecessary legal issues, and too aggressively filling legal gaps by resorting to other legal sources.[181] The US's boycott has successfully created a "chilling effect" on both the WTO adjudicators and the legal officers of the WTO Secretariat, whose duties are to assist the panelists and the members of the Appellate Body in analyzing the disputes. According to a former legal officer of the WTO Secretariat that I interviewed, he shared the same impression that since the US brought its critics against the WTO into action, the panelists, members of the Appellate Body, and the staff in the WTO Secretariat began acting more cautiously and conservatively to draw on other international treaties or case laws rendered by other international judiciaries.[182] Similarly, the cramped WTO dispute settlement mechanism also resulted in a decrease in the number and diversity of cases. This circumstance has also been

[181] See United States Trade Representative, Report on the Appellate Body of the World Trade Organization 14 (2020). See also Robert Howse & Joanna Langille, Continuity and Change in the World Trade Organization: Pluralism Past, Present and Future, 117(1) Am. J. Int'l L. 1, 12-14 (2023).
[182] Interview with the staff A of the WTO Secretariat, Jan. 28, 2023 (on file with author).

acknowledged by a legal officer of the WTO Secretariat. He noted that members of the WTO are now less interested in resolving their disputes via the WTO dispute settlement mechanism because the Appellate Body is not functioning; thus, the losing party can simply appeal the case into the void.[183] As a consequence, only the disputes involving trade remedies would still be submitted to the WTO dispute settlement mechanism because these cases are the ones that concern the US the most. This result also explains why external international legal sources are less frequently mentioned in the latest WTO disputes – As I have demonstrated, disputes with the subject matter of trade remedies have a weaker or even negative correlation with the appearance of external international legal sources.[184]

B. The functions of external international legal sources in the WTO case law

In this section, I seek to identify the "objective setting" of any given reference to external international legal sources or case law. Namely, in what way do external international legal sources play a role in WTO jurisprudence? I aim to define the "how," namely, the circumstances in which the WTO adjudicative bodies have utilized external international legal sources. In other words, it describes the particular task or problem that the Panels and the Appellate Body are working to resolve when it draws upon non-WTO laws or jurisprudence for guidance. Examples of this "objective setting" include situations where the Panels or the Appellate Body is faced with a procedural issue and then looks for a solution that other international judiciaries had previously addressed or when the WTO adjudicative body has to conduct a principle of treaty interpretation in its analysis and needs either to establish the content of said principle or to substantiate its relevance to the question at hand. Moreover, there are circumstances where the Panels or the Appellate Body must deal with the complainant's or respondent's arguments that resort to external international legal sources. In short, the classification of "objective setting" sheds light on the type of circumstances where the WTO adjudicative bodies refer to those non-WTO laws and jurisprudence made by other international dispute settlement mechanisms. [185]

[183] Interview with the staff A of the WTO Secretariat, Jan. 28, 2023 (on file with author).
[184] Similar observation, *see* Mariana Clara de Andrade, *Path to Judicial Activism? The Use of "Relevant Rules of International Law" by the WTO Appellate Body*, 15 BRAZ. J. INT'L L. 307 (2018)
[185] It should be noted that the nature of external international legal sources mentioned by WTO adjudicators are not limited to those binding legal instruments. Instead, in many circumstances, soft

1. External international legal sources as the fact findings

The first primary role of external international legal sources is to serve as important information for reinforcing the case background. In this regard, external international legal sources have been mentioned as evidence for concluding that trade-restrictive measures are the only means that responding WTO members have to adopt to protect migratory species of animals, that a particular climate change issue is one encountered by the international community, that certain product restriction could have been foreseen and is without alternative, or that certain practices are the guiding principles for the WTO members to reference in the field of double taxation.

EC – Asbestos is an example that depicts how external international legal sources are used to strengthen the factual background of the dispute. In this case, the measure at stake concerned France's import ban on asbestos and products containing asbestos. Among the arguments asserted by Canada (the complainant of this case), one legal issue was whether the measure at issue resulted in "non-violation nullification or impairment" under Article XXIII:1(b) of the GATT[186], thus allowing Canada to request the Panel denounce France's asbestos ban in the event that the Panel was unable to conclude the WTO-inconsistency of the measure under Article XXIII:1(a) of the GATT.[187] One prerequisite that must be made to establish the non-violation claim is that the measure in question cannot reasonably have been foreseen at the time of the tariff concession negotiation.[188] Canada argued that this element was met because the asbestos ban adopted by France could not reasonably have been foreseen. Nonetheless, the Panel refuted Canada's claim. To support its finding, the Panel agreed with the EU's argument by resorting to a series of WHO international standards on eliminating the use of asbestos adopted since 1977[189] together with the 1986 International Labour Organization Asbestos Convention (No. 162) and concluded that Canada should have reasonably anticipated that the members of the

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laws such as recommendations, guidelines, and other non-binding instruments are introduced by the Panels or the Appellate Body when they are considered relevant to the disputes.

[186] GATT Art. XXIII:1(b) "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of…(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, …"

[187] Panel Report, European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R, ¶¶ 3.510-3.511 (Sept. 18, 2000).

[188] European Economic Community – Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, adopted on 25 January 1990, BISD 37S/86, ¶¶142-154.

[189] IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Man, Asbestos, Vol.14.

WTO might restrict or even prohibit the import of asbestos.[190] Therefore, the Panel in this dispute relied on external international legal sources to manifest the factual background of the international regulatory environment on asbestos and products containing such chemicals.

A similar role of the external international legal sources can also be observed from another case where the EU was, again, the disputing party. In *EC-Seal Products*, the EU's measure of prohibiting the imports of seal products was challenged by Canada and Norway since the regulatory scheme left except seal products hunted by Inuit or indigenous communities, which, from the complainants' perspective, accorded less favorable treatment to seal products imported from Canada and Norway than that accorded to similar EU products. To manifest the regulatory background of its seal regulations, the EU provided a series of European conventions to illustrate its comprehensive ethical rules for the use of animals and its animal welfare policy.[191] These legal instruments presented by the EU illustrated the "standards of right and wrong conduct" maintained on behalf of the EU concerning seal welfare. In light of these external international legal sources as factual background and evidence, the Panel and the Appellate Body concluded that the measure protecting seal welfare and preventing the inhumane killing of seals is a legitimate policy objective under Article 2.2 of the TBT Agreement and was a matter of ethical nature in the EU. Therefore, this policy is constituted as the "public moral" stipulated by Article XX(a) of the GATT[192], which is the general exception clause for members of the WTO to justify their WTO-inconsistent measures.[193]

Another prominent and more recent example of using other international law as factual background is the *India-Solar Cells* case. This dispute arose from a recent

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[190] Panel Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R, ¶¶ 8.295-8.304 (Sept. 18, 2000).

[191] These conventions regarding the protection of animals include: (a) European Convention for the protection of animals during transport, Paris, 13 December 1968, E.T.S. No 65; (b) European Convention for the protection of animals kept for farming purposes, Strasbourg, 10 March, 1976, E.T.S. No 87; (c) European Convention for the protection of animals for slaughter, Strasbourg, 10 May 1979, E.T.S. No 102; (d) European Convention for the protection of vertebrate animals used for experimental and other scientific purposes, Strasbourg, 18 March, 1986, E.T.S. No 123; and (e) European Convention for the protection of pet animals, Strasbourg, 13 November 1986, E.T.S. No 125.

[192] GATT, Art. XX(a) ("Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals;…")

[193] Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R, ¶¶ 7.372-7.411 (Nov. 25, 2013).

background that the development of renewable energy is even more urgent because of increasingly severe climate change concerns. The measure at issue involved India's "National Action Plan on Climate Change," which declared the goal of sustaining "rapid economic growth while dealing with the global threat of climate change.[194]" One of the approaches was to conclude power purchase agreements with private solar power developers. However, such agreements included conditional local content requirements for renewable energy products manufactured by Indian companies (i.e., Domestic content requirement, DCR measure). The DCR measure was condemned by the US for being inconsistent with the WTO provisions, given that it would cause foreign renewable energy products to be less competitive than domestic products. To justify the legality of its measure of local content requirements, India relied on the United Nations Framework Convention on Climate Change (UNFCCC) to manifest the context of its renewable energy policy and the notion of addressing global climate change. According to India, the UNFCCC "recognizes that the range of policy choices available will depend on the specific context of each country.[195]" Articles 4(1)(b) and 4(1)(f) of the UNFCCC provide that Parties of the convention shall formulate and employ their relevant social, economic, and environmental policies and actions to facilitate adequate adaptation to climate change.[196] In addition to the UNFCCC, without identifying specific provisions or paragraphs, India also referred to the Rio Declaration on Environment and Development and the Rio+20 Outcome document "The Future We Want" adopted by the United Nations (UN) General Assembly to emphasize the notion of mainstreaming sustainable development in all its dimensions and to highlight the right of countries to develop their own energy policy based on

[194] Ministry of Environment, Forest and Climate Change (India), *Impact of Climate Change and National Action Plan on Climate Change*, at 3, https://pib.gov.in/newsite/erelcontent.aspx?relid=44098. (2008)

[195] Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R, ¶ 7.271 (Feb. 22, 2016).

[196] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC], Art. 4(1) ("All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: (b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;" . . . (f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;…")

their development aspirations.[197] Meanwhile, in order to justify its DCR measure, India referred to Article XX(d) of the GATT and maintained that the DCR measure was necessary to secure compliance with the WTO-consistent "laws and regulations." According to India, the UNFCCC, Rio Declaration, and a series of international legal instruments regulating global climate change jointly impose legal obligations on India, and DCR measures were implemented to ensure India's compliance with its international obligations.[198] While both the Panel and the Appellate Body eventually rejected India's arguments, they did not completely preclude the possibility that other international laws could be "laws and regulations" under Article XX(d) of the GATT as long as the international obligations laid down by external international legal sources are incorporated into domestic legal systems.[199]

In summary, external international legal sources are repeatedly introduced to highlight the factual background of the challenged measure. Along with the increasingly intertwined relationship between trade and national security in the WTO disputes, more external references from other international legal regimes can be expected. For instance, the prohibition against the use of force stipulated in the Charter of the United Nations and the resolutions adopted by the Security Council or the General Assembly to address the political or even military tensions between countries were mentioned in the WTO disputes such as *Russia-Good in Transit*[200], *Saudi Arabia-IPRs*[201], and *US-Origin Marking (Hong Kong, China)*[202]. In such circumstances, even if those external international legal sources would not be directly

[197] Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R, ¶¶ 7.273-7.274 (Feb. 22, 2016).
[198] Marianna Karttunen & Micheal O. Moore, *India–Solar Cells: Trade Rules, Climate Policy, and Sustainable Development Goal*, 17(2) WORLD TRADE REV. 215, 221 (2018).
[199] Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Module*s, WT/DS456/AB/R, sec. 5.106 (Sept. 16, 2016).
[200] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS/512/R (Apr. 5, 2019). In this case, the UN General Assembly Resolutions 2065 (XX), 3160 (XXVIII) and 31/49 (XXXI), and the UN Security Council Resolution 502 were introduced to examine if the conflict between Russia and Ukraine in 2014 constituted an international emergency. Judgments of other international judiciaries were also mentioned to fuel the discussions.
[201] Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R (June 16, 2020). In this case, Qatar referred to a report published by the Office of the United Nations High Commissioner for Human Rights regarding the Impact of the Gulf Crisis on Human Rights in 2017 to manifest how Saudi Arabia's anti-sympathy measures against Qatar restrained Qarari nationals' property rights.
[202] Panel Report, *United States – Origin Marking Requirement*, WT/DS597/R (Dec. 21, 2022). In this case, the Charter of the United Nations and the General Assembly Resolution 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the United Nations (A/8082) were mentioned to articulate the definition of "emergency in international relations" under GATT Art. XXI.

interpreted or applied by the Panels and the Appellate Body, they reinforce relevant factual background and are indispensable for the WTO adjudicators in order to proceed with their legal analysis under the WTO laws.

2. External international legal sources used to prove the existence of customary international law/general principle of international law

Occasionally, the external international legal sources or judgments of other international judiciaries may be introduced in the Panels or the Appellate Body reports in order to manifest the status of certain doctrines as customary international law. The most well-known example is the Appellate Body in the *EU-Hormone* case. The measure at issue was the legality of the EU prohibiting the importation of meat products treated with growth-promotion hormones. One of the legal arguments was whether the EU's hormone-meat ban could be justified by the "precautionary principle" under customary international law, thus satisfying the legal requirements stipulated in Articles 5.1 and 5.2 of the SPS Agreement, which obliges WTO members to carry out the sanitary measure based on a risk assessment that considers scientific evidence.[203] Canada grounded its complaint against the EU by claiming that maintaining the hormone-meat ban was not based on risk assessment conducted in accordance with Article 5.1 of the SPS Agreement because no adequate scientific evidence has proven that consuming hormone-treated meat poses damage to human health. Instead, the EU's measure was grounded on many unscientific assumptions. [204]

To respond, the EU argued that the health risks and hazards of the hormone meat to humans were still uncertain, and at that time, it was necessary to adopt a precautionary risk-assessment approach to eliminate this kind of danger and protect human life and health. The precautionary principle, which is the doctrine developed in environmental law, was borrowed by the EU to buttress the legality of deviating from international standards of risk assessment. From the EU's perspective, the precautionary principle has become a general rule of customary international law, which empowers sovereign states to define the desired protection level of human health and implement additional precautionary measures in the face of scientific uncertainty. Hence, Articles 5.1 and 5.2 of the SPS Agreement should be interpreted

[203] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones) (EC – Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Feb. 13, 1998).
[204] There are also other legal issues raised by the US in this case. But I only refer to the argument that is relating to the discussion of the roles of external international legal sources in WTO dispute reports.

in conformity with the precautionary principle recognized in international law. To support its argument, the EU referred to many international environmental conventions, such as the Rio Declaration on Environment and Development, WHO legal instruments, and the jurisprudence of the ICJ, to evince the content of the precautionary principle and its eligibility of being part of the customary international law.[205]

The Appellate Body eventually rejected the EU's argument. Notably, the Appellate Body reached its conclusion not on the ground that the precautionary principle is not part of the WTO law; rather, the Appellate Body doubted if the precautionary principle had been recognized as a principle of customary international law outside the field of international environmental law.[206] The Appellate Body even noted that "the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.[207]" Nevertheless, it did not totally exclude the possibility of incorporating certain "spirits" of precautionary principle in the WTO provisions. Instead, the Appellate Body perceived that the precautionary principle could find its reflection in Article 5.7 of the SPS Agreement.[208] Moreover, it emphasized that "there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle.[209]"

In sum, while the Panel and the Appellate Body in this case hesitated to recognize the precautionary principle as part of the customary international law, we can observe how the external international legal sources are used and analyzed by the disputing parties and the WTO adjudicators to examine whether the customary international law exists and can be applied.

3. External international legal sources used as applicable law to fill legal gaps

The third function of external international legal sources for the Panels and

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[205] Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada*, WT/DS48/R/CAN, fn. 151 (Feb. 13, 1998).
[206] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 123 (Jan. 16, 1998).
[207] *Id.*
[208] SPS Agreement Art. 5.7 ("In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.")
[209] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 124 (Jan. 16, 1998).

Appellate Body is that these legal instruments serve as the applicable law and can fill the legal gaps that the WTO provisions fail to cover. Such a role is especially important in terms of filling the procedural gaps left in the DSU.[210]

For instance, in *India-Patens (US)*, the Appellate Body referred to the Permanent Court of International Justice (PCIJ)'s judgment of *Certain German Interests in Polish Upper Silesia* in order to establish the use and the role of municipal laws in the WTO judicial forum. In this case, the Appellate Body ascertained that the municipal law could serve as evidence of facts, state practice, and compliance by quoting the PCIJ's analysis[211] to support its conclusion.[212] Given that neither the WTO Agreement nor the DSU has the provision specifying the legal status of the WTO members' domestic laws in dispute settlement, the Appellate Body recognized the admissibility of the case laws rendered by other international judiciaries to supplement its own procedural rules.

Another typical example of resorting to an external source for gap filling is to reference the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts to ascertain the liability of the respondent members. For instance, in *Saudi Arabia – IPRs*, the Panel agreed with Qatar's argument that while some infringements of intellectual property rights owned by the Qatari nationals were not directly conducted by the government of Saudi Arabia but instead, by the actions of private entities, Such private actions may nonetheless be attributable to Saudi Arabia because of its "anti-sympathy measures" that precluded Qatari intellectual property right holders from obtaining judicial remedies.[213] Notably, in this case, the Panel referred to Article 8 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts[214], which provides that in what circumstances the conduct of a private entities shall be considered an act of a sovereign state under

[210] Pauwelyn, *supra* note 163, at 26.
[211] German Interests in Polish Upper Silesia (Germany v. Poland), Judgment, [1926] PCIJ Series A, No.7, p.19.
[212] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, ¶¶ 65-66 (1997).
[213] Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R, ¶¶ 7.42-7.44 (June 16, 2020).
[214] International Law Commission, Report on the Work of Its Fifty-second Session, UN GAOR, 55th sess., Supp. No. 10, at 124, UN Doc. A/55/10 (2000) [hereinafter "ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts"], Art. 8 ("The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.")

international law, to support its legal analysis.[215] Hence, even the "principle of attribution" is not specifically addressed in the text of the DSU or other WTO covered agreements, through referencing to the ILC Draft Articles, the doctrine has been introduced, been elaborated, and been tailored to the WTO adjudicative process.

In *China-Rare Earths* case, where China argued that the Panel in the present dispute should not be bound by its previous findings adopted by another Panel and the Appellate Body facing the same legal questions, the Panel referred to the judgment of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Aleksovski*[216], the *Saipem S.p.A. v. Bangladesh* arbitral award adjudicated by the ICSID[217], and the *Cossey Case* rendered by the European Court of Human Rights[218], to define the concept of "cogent reasons." The Panel recognized the concept of "cogent reasons" to be a procedural doctrine under international law and ruled that only when it was persuaded that there were compelling grounds demonstrating that the previous decision had been decided on the basis of a wrong legal principle then the present Panel shall deviate from the prior established findings.[219] Together with many other past WTO jurisprudence referring to the ICJ and other international judiciaries' judgments to affirm that the doctrine of *stare decisis* does not apply in the WTO dispute settlement, introducing the concept of "cogent reason" alternatively contributes to maintaining the consistency and predictability of WTO dispute settlement mechanism.[220]

In terms of the jurisdictional and admissibility arguments, the Panels and the Appellate Body have also drawn upon fruitful discussions from other international judiciaries. For example, in *Russia-Transit in traffic* case, Russia challenged that the Panel lacked jurisdiction to review Russia's invocation of security exception under GATT Article XXI(b) given that the nature of the dispute was a "political question"

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[215] Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R, ¶¶ 7.51-7.73 (June 16, 2020).
[216] Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14/1-A, Prosecutor v. Aleksovski, Judgement of 24 March 2000, ¶ 108.
[217] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 67 (Mar. 21, 2007).
[218] Case of Cossey v. United Kingdom, 184 Eur. Ct. H.R (ser. A) at 35 (1990).
[219] Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R; WT/DS432/R; WT/DS433/R, ¶ 761 & Fn 127 (Mar. 26, 2014).
[220] *See, e.g.*, Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, ¶ 64 (Feb. 19, 2009). In this case, the Panel cited several international judiciaries jurisprudence (e.g., ICJ, ECHR and ITLOS) to highlight the notion of previous decisions, while maintaining that the doctrine of stare decisis does not apply in WTO dispute settlement.

and hence, was non-justiciable.[221] In order to reinforce the rationale to refute Russia's argument, the Panel resorted to the Advisory Opinion rendered by the ICJ and the decision on jurisdiction issued by the International Criminal Tribunal for the Former Yugoslavia to reject the "political question" argument. The Panel concluded that in so far as the dispute before the Panel turns on a legal question capable of a legal answer, the WTO adjudicators are bound to exercise jurisdiction over that case, regardless of the political background or the other political sensitiveness of the dispute.[222] In this case, while the DSU fails to determine if the "political question" could serve as a ground to preclude the Panel and Appellate Body from exercising their jurisdiction, case laws from other international judiciaries are introduced by the Panel to fill this legal vacuum. This is another example of how external international legal sources are cited when the DSU is silent on the issue.

4. External international legal sources as the reference for interpreting the WTO provisions

Another important role of external international legal sources is to help the Panels and the Appellate Body clarify the meaning of the WTO provisions. This approach has been seen in many notable "trade &-" disputes that involve the legal consistency of states' regulatory measures (e.g., maritime conservation, human health protection, and other public interests) under the WTO law. For example, in *US-Shrimp* case, multiple international legal instruments were referred by the Panel and the Appellate Body in order to examine the legality of the US's domestic legislation to protect certain marine animals. The US Endangered Species Act of 1973 listed endangered or threatened five species of sea and prohibited any harassment, hunting, capture, or killing of the listed sea turtles that occur in the US waters and the high seas.[223] To prevent the potential harm to sea turtles, the US Endangered Species Act of 1973 required that US shrimp trawlers use "turtle excluder devices" (TEDs) in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles. To ensure the implementation of the Act, the US further enacted Section 609 of US Public Law 101–102, which required that shrimp harvested with technology

[221] Advisory Opinion, Certain Expenses of the United Nations, (United Nations) (1962) I.C.J. Reports, p. 155; International Criminal Tribunal for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić (1995), Case No. IT-94-1-A, ¶¶ 23-25).
[222] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, ¶¶ 7.102-7.103 & fn 183 (May 4, 2019).
[223] Endangered Species Act of 1973 (U.S.)

that may adversely affect certain sea turtles may not be imported into the US.[224] Such restrictions imposed on shrimp imports adversely affected the trade interests of other countries that perceived the US as an important market for their shrimp exports. Hence, On 8 October 1996, India, Malaysia, Pakistan, and Thailand requested consultations with the United States. In this case, the protection of sea turtles was at the heart of the ban. The complainants argued that the import ban violated Articles I, XI, and XIII of the General Agreement on Tariffs and Trade, as well as nullification and impairment of benefits were alleged.

In response, the US contended that the import ban at issue, even if found to be inconsistent with the aforementioned GATT provisions, can still be justified by Article XX(g) of the GATT because such measure is necessary to conserve exhaustible natural resources, namely the sea turtle. In order to strengthen its argument, the US listed numerous external international legal instruments, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on Biodiversity, Inter-American Convention for the Protection and Conservation of Sea Turtles, and UN Agreement for Straddling Fish Stock and Highly Migratory Species, to manifest the endangerment of sea turtles and to argue that sea turtles fall within the scope of "exhaustible natural resources" stipulated in Article XX(g) of the GATT. Furthermore, the US introduced environmental law principles through citing certain international environmental agreements to strengthen the legitimacy of the import ban. After scrutinizing the arguments made by the US, the Appellate Body reached the conclusion that sea turtles are entitled to "exhaustible natural resources" under GATT Article XX(g). Notably, the Appellate Body recognized the notion of "evolutionary interpretation" as a treaty interpretation approach. It held that the WTO provisions shall be interpreted in the light of contemporary concerns of the international community, such as the protection of the conservation of the environment. Referring to relevant external international legal sources, from the Appellate Body's view, is an important source for the WTO adjudicators to ascertain the WTO provisions (i.e., "exhaustible natural resource") that are generic in nature. Such a perspective is to ensure that the WTO is a "living legal instrument" that can better synergize social, cultural, and technological movement and the continuing obligations of the WTO members entered into for an

[224] Section 609 of US Public Law 101–102

indefinite period of time.[225]

Another prominent example in which the WTO adjudicators used external international legal sources as references to interpret WTO provisions is the *Australia-Plain Packaging* case.[226] The measure at issue in this case is the legality of a series of more stringent tobacco control measures introduced by Australia, including the tobacco plain packaging legislation that prohibits tobacco companies from displaying their logos, brand imagery, trademarks, and related images on their tobacco products. In addition, the legislation requires all tobacco product packaging to be printed in a standard drab dark-brown color with the product name. Graphic health warnings are also required on over 75% of the front and back of tobacco packaging.[227] Concerning the negative impacts on tobacco businesses posed by the stringent regulations, Honduras, the Dominican Republic, Cuba, and Indonesia initiated claims under the WTO. These countries argued that Australia's plain packaging regulations breached Article 2.2 of the TBT Agreement[228] since the legislation was "more trade restrictive than necessary" to protect public health.[229] Moreover, the complainants alleged that the tobacco control measure at stake violated Articles 16.1 and 20 of the TRIPS Agreement[230] because Australia failed to prevent tobacco companies' trademarks from being used without authorization and the tobacco control measure also unjustifiably encumbered the use of tobacco companies' trademarks.[231] In response, Australia defended its stringent tobacco control measure by drawing on the WHO FCTC, especially Articles 11 and 13 of the Convention, which oblige contracting parties to implement effective measures to ensure that tobacco packaging and labeling would not constitute a type of tobacco advertisement that causes misleading or deceptive effects.[232] Adopting plain packaging for tobacco, as recommended by the

[225] Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, ¶ 396 (2009).
[226] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (June 28, 2018). Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R (June 9, 2020).
[227] Tobacco Plain Packaging Act 2011 (Australia)
[228] TBT Agreement, Art. 2.2.
[229] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, ¶¶ 7.17-7.20 (June 28, 2018).
[230] Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS Agreement], Arts. 16.1. & 20.
[231] *Id.*
[232] Framework Convention on Tobacco Control, *opened for signature* June 16, 2003, 2302 U.N.T.S.

Guidelines for implementing the aforementioned Articles, is one of the most effective means to increase the noticeability of health warnings and eliminate the effects of tobacco packaging as a form of advertising and promotion.[233]

Australia's plain packaging legislation is largely based on the WHO FCTC. Hence, in this case, the FCTC provision played significant roles and was repeatedly mentioned by both the Panel and the Appellate Body. First, when examining whether the measure at issue is inconsistent with Article 2.2 of the TBT Agreement – namely, to determine (1) if the measure purses a legitimate objective of protecting human life, (2) the measure's trade restrictiveness, (3) the degree of contribution made by the measure to the pursued objective, and (4) the risks that non-fulfillment would create[234], the WHO FCTC provisions are highly relied on by the Panel and the Appellate Body. For example, Article 11, Article 13 of the FCTC, and relevant scientific reports adopted by the FCTC Conference of Parties were referred to strengthen the connection between the plain packaging measure and its policy objective of better protecting public health by reducing tobacco consumption and exposure.[235] The Guidelines for Implementation of Article 11 and Article 13 are introduced to manifest the seriousness of the global tobacco epidemic, and the health risk of failing to adopt plain packaging measures is particularly grave.[236] The effectiveness of the tobacco plain packaging in reducing tobacco consumption rate is also supported by citing the Guidelines for Implementation of Article 11 and Article 13, and hence, the contribution between the measure and the policy objective is established.[237] Moreover, by acknowledging that tobacco plain packaging, together with other tobacco control measures, are complementary elements of a comprehensive tobacco control regulatory framework, the Panel and Appellate Body rejected the alternative measure proposed by the complainants that were allegedly to be less trade

166 [hereafter FCTC], Arts. 11 & 13.

[233] Guidelines for Implementation Article 11 of the FCTC; Guidelines for Implementation Article 13 of the FCTC.

[234] The analytical framework of Article 2.2 of the TBT can be found in Appellate Body Report, Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R, ¶ 6.3 (June 9, 2020). *See also* Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, p. 332 (May 16, 2012).

[235] Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R, ¶ 7.243 (June 9, 2020).

[236] *Id*. at ¶¶ 7.250, 7.2596, 7.310 & 7.2592.

[237] *Id*. at ¶ 7.2595.

restrictive but could achieve the same level of protection as the plain packaging measure.[238] Second, in determining if Australia's tobacco legislation is an "unjustifiable" encumbrance under TRIPS Article 20, the Panel and Appellate Body again drew on FCTC Articles 11 and 13 and their implementing Guidelines to interpret the term "unjustifiable." Both the Panel and Appellate Body agreed that tobacco plain packaging is an important part of eliminating the attractiveness of the tobacco packaging and the effects of tobacco product promotion. Therefore, the reason for applying the plain packaging measure is to provide sufficient support for the resulting encumbrance, and such infringement on the tobacco industry is not unjustifiable.[239] Finally, the WTO adjudicators maintained the legality of Australia's tobacco legislation under the TBT Agreement and TRIPS Agreement. They concluded their analysis by eliciting that demonstrate that the WHO FCTC provisions and its Guidelines reflect Australia's regulatory power to "pursue its relevant domestic public health objective in line with the emerging multilateral public health policies in the area of tobacco control.[240]" From my perspective, this statement recognizes the importance of relevant external international legal sources in the WTO adjudicating process.

In brief, these cases demonstrates that how the WTO Appellate Body is required to adjudicate the defense articulated by the responding parties on the basis of the "non-WTO" international agreements. The Appellate Body in this case affirmed that Panels might take non-WTO treaties into account in interpreting WTO agreements.

C. WTO Panels and the Appellate Body Unduly Restrict the Use of Article 31.3(c) of the VCLT

External international legal sources may likely be introduced through treaty interpretative practices performed by the Panels and the Appellate Body, especially resorting to Article 31.3(c) of the VCLT, which, from the commentators' perspective, is an expression of systemic integration that empowers WTO adjudicators to avoid potential treaty conflicts between the WTO laws and other international legal regimes.[241]

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[238] *Id*. at ¶¶ 7.1728-7.1730
[239] *Id*. at ¶ 7.2595.
[240] *Id*. at ¶ 7.2604.
[241] GRAHAM COOK, A DIGEST OF WTO JURISPRUDENCE ON PUBLIC INTERNATIONAL LAW CONCEPTS

With that being said, there seems to be no clear guidance from the WTO jurisprudence regarding how the systematic interpretive approach embodied by Article 31.3(c) of the VCLT shall be exercised. The Panels and the Appellate Body have taken other international legal sources into account either on the basis that they did so qualify under Article 31.3(c) of the VCLT or without mentioning the legal basis. The data shows that among the 211 disputes (143 Panel reports and 68 Appellate Body reports) in the dissertation universe that mention external international legal sources, only 31 of those cases explicitly make such references on the basis of Article 31.3(c) of the VCLT. Such a small number infers that most of the time, the Panels and the Appellate Body introduced external international legal sources without specifying the legal grounds to justify their cross-references.[242]

In the very first report that numerous external legal sources were introduced, the Panel and the Appellate Body in *US-Shrimp* consulted a number of international conventions and declarations without explicitly invoking Article 31.3(c) of the VCLT. Rather, they vaguely stated that such external references were the exercise of evolutionary interpretation under Article 31 of the VCLT.[243] Notably, when referring to those external international legal sources, the Appellate Body acknowledged that neither all international legal instruments mentioned are ratified by all WTO members nor are they all "hard law" with legally-binding effects. Instead, the Appellate Body ruled that those cited external international legal instruments represent the "recent acknowledgment by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources" and thus could be introduced to inform the meaning of "exhaustible natural resources" in Article XX(g) of the GATT.[244]

However, such a relatively progressive approach was not upheld in the *EC-Biotech product*. The Panel in *EC – Biotech Products* displayed a comprehensive analysis of each element of Article 31.3(c) of the VCLT. In the course of its analysis, the Panel held a narrow understanding regarding the phrase "applicable in the relations between the parties." In this case, the EU cited the Cartagena Protocol on

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AND PRINCIPLES 80 (2015).

[242] Similar observation, *see* POPA, *supra* note 148, at 311-12 (2017).

[243] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 130 (Oct. 12, 1998). The Appellate Body further referred to the ICJ case (Namibia (Legal Consequences) Advisory Opinion (1971) I.C.J. Rep., p. 31.) to support such approach.

[244] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶¶ 130-31 (Oct. 12, 1998).

Diversity and Convention on Biological Diversity to support that the purpose of the challenged measure is for handling and regulating the use of living-modified organisms resulting from modern biotechnology that may have adverse and potential effects on human health. The EU contended that the abovementioned international agreements concerning the matters of biological diversity and food safety shall be taken into account by referring to Article 31.3(c) of the VCLT. Nevertheless, the Panel stressed that other international laws could be considered only if that international legal instruments are applicable to "all" WTO members, not just the parties to a dispute. Given that not all WTO members are parties to the Cartagena Protocol on Diversity and Convention on Biological Diversity, the Panel concluded that these non-trade rules were not qualified as "relevant rules of international law applicable between the relations between the parties" under Article 31.3(c) of the VCLT.[245]

Notably, this narrower application of Article 31.3(c) of the VCLT seems to be slightly modified by the Appellate Body in the *EU-Large Civil Aircraft* case. In this case, the Appellate Body started by reiterating that "one must exercise caution in drawing from an international agreement to which not all WTO Members are party" because "the purpose of treaty interpretation is to establish the *common intention* of the parties to the treaty [i.e., WTO agreement].[246]" Interestingly, immediately after the above statement, the Appellate Body explicitly recognized the notion of the principle of systemic integration expressed by Article 31.3(c) of the VCLT, which "seeks to ensure that 'international obligations are interpreted by reference to their normative environment' in a manner that gives 'coherence and meaningfulness' to the process of legal interpretation.[247]" As a result, the WTO adjudicators must delicately balance the account of an individual WTO member's international obligations and the importance of maintaining a consistent approach to the interpretation of WTO law among all WTO members. The Appellate Body, in this case, seems to not exclude the possibility

[245] Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R; WT/DS293/R, ¶ 7.68 (Sept. 29, 2006).
[246] Appellate Body Report, *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, ¶¶ 844-45 (May 18, 2011) (citing ILC Report on Fragmentation, ¶¶ 410–80, in particular ¶¶ 413, 419, and footnote 569; Panel Report, EC – Approval and Marketing of Biotech Products, ¶¶ 7.65–7.89; Panel Report, US – Shrimp (Article 21.5 – Malaysia), ¶ 5.57; Appellate Body Report, EC – Computer Equipment, ¶ 93). *See also* McLachlan, *supra* note 156, at 279.
[247] Appellate Body Report, *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, ¶ 845 (May 18, 2011)

that relevant external international legal sources may be considered under Article 31.3(c) of the VCLT in the context of the principle of systemic integration – even if not all WTO members are the parties of that international treaty.

The inconsistent understanding of Article 31.3(c) of the VCLT, in my view, is to some extent responsible for WTO adjudicators' reluctance to specify a legal basis when engaging in cross-reference. Additionally, as explored by the dissertation, in many circumstances, external international legal sources are treated as evidence of factual background. Hence, invoking Article 31.3(c) of the VCLT is unnecessary – even if the parties of the dispute argued that they intended to resort to specific international instruments outside the WTO to understand the WTO provisions based on Article 31.3(c) of the VCLT.[248] Such perspective is shared by the Panel in *EC-Biotech* Products, where it suggested that the past WTO jurisprudence "did not suggest that it was looking to other rules of international law *because it was required to do so pursuant to the provisions of Article 31(3)(c)* of the Vienna Convention (emphasis added).[249]" Rather, while rejecting the EU's argument that the Cartagena Protocol on Diversity and Convention on Biological Diversity shall be taken into account on the basis of Article 31.3(c) of the VCLT, the Panel did not preclude the possibility of having reference to other rules of international law for the purpose of determining the 'ordinary meaning' of a term under Article 31(1) and considered that this would permit consideration of international conventions that may not qualify as 'relevant rules of international law applicable between the relations between the parties' under Article 31(3)(c).[250] From my perspective, this statement further discourages future WTO adjudicators from resorting to Article 31.3(c) of the VCLT to justify their cross-reference activities, given that applying Article 31.1 of the VCLT can both achieve the same objective and create fewer controversies. Even if the Panels and the Appellate Body intend to cite external international legal sources to inform the non-economic concerns to specific WTO provisions, the WTO jurisprudence has significantly narrowed its application, which constitutes a major hurdle in conducting

[248] *See, e.g.*, Panel Report, *European Communities – Measures Affecting Importation of Certain Poultry Products*, WT/DS69/R, ¶ 31 (Mar. 12, 1998).
[249] Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R; WT/DS293/R, fn 271 (Sept. 29, 2006).
[250] *Id.* at ¶¶ 7.92-7.94. ("We think that, in addition to dictionaries, other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used. Such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do. They would be considered for their informative character.")

such an interpretative exercise.[251]

D. A Critical Appraisal on Judicial Engagements Exercised in the WTO Dispute Settlement Mechanism

1. Strategic references of using external international legal sources

In the context of WTO disputes, empirical evidence shows that disputing parties, especially responding members, predominantly cite external international legal sources. The Panels or the Appellate Body make external citations on only a few occasions. Responding members cite external legal sources for two main purposes: firstly, to lay out the factual background with external references, and secondly, to refer to other international laws as convincing legal instruments that support the legality and necessity of the challenged measures. For these types of external references, it is impractical and unrealistic to expect disputing parties to make external references with the aim of promoting coherence in international law. As Shaffer insightfully observed, disputing parties "are interested in such other international law in light of its implications for advancing their priorities both in national and transnational debates.[252]" In other words, whether other international laws are recognized as the applicable legal sources for Panels or the Appellate body does not matter. External references are of interest to countries implicated by the WTO disputes only when it affects the legitimacy of their position and argument in dispute settlement proceedings.

WTO adjudicators mostly cite external international legal sources to clarify procedural matters, including jurisdiction, admissibility, state conduct attribution, burden of proof, due process, judicial economy, and countermeasures.[253] Many of these external references draw upon customary international law or general legal principles. Consequently, case law from the ICJ and other international judiciaries, as well as procedural rules from various international courts, serve as the foundational sources for the external references WTO adjudicators employ to address procedural

[251] These observations are also shared by the officials of the WTO Secretariat whom I interview. They recalled that when resorting to external international legal sources is needed while drafting the judgments, they preferred to conduct such cross-references directly without mentioning the legal basis (e.g., Article 31.3(c) of the VCLT), regardless of whether the cited external international legal sources are for clarifying the meaning of the WTO provisions.
[252] Shaffer, *supra* note 180, at 207-08.
[253] COOK, *supra* note 241.

voids within the DSU.[254] In contrast, substantive judicial engagements by the WTO Panels and the Appellate Body that delve into the deeper interactions between trade law and other legal domains, such as human rights, environmental protection, and public health, are scarcely observed. Notably, when requested to address arguments from disputing parties that are based on external international legal sources, WTO adjudicators appear to prefer integrating non-trade concerns, highlighted by these external references, within the scope of WTO rules (for example, the general exceptions clause under GATT Article XX), rather than directly depending on other international legal instruments.

After reviewing WTO Panels/Appellate Body reports that incorporate external legal sources, I question whether the strategic use of external references currently practiced may foster meaningful integration and consistency between international trade law and other legal domains.[255] Furthermore, the inconsistent application of treaty interpretation rules outlined in Article 31 of the VCLT contributes to the failure to guide WTO adjudicators on properly addressing external international legal sources. The subsequent sections will demonstrate the varied interpretive approaches adopted by the Panels and the Appellate Body, as well as the instances where they improperly overlook external international legal sources in their adjudications.

2. WTO Adjudicators Are Conservative to Engage in Substantial Judicial Cross-fertilizations

In cases that could benefit from more substantive judicial engagement, the Panels and the Appellate Body have been cautious in responding to external references that could be crucial for incorporating special non-trade considerations into WTO treaty provisions between disputing parties. As detailed, various WTO Panels and the Appellate Body have demonstrated differing attitudes toward including external international legal instruments due to their varied interpretations of the interpretive methods outlined in Article 31.3(c) of the VCLT. The most restrictive interpretation of Article 31.3(c) of the VCLT, which sets prerequisites for considering external international legal sources, risks overlooking the non-trade concerns represented by other international treaties. I highlight specific cases to show how WTO adjudicators

[254] Pauwelyn, *supra* note 163, at 26.
[255] Similar perspective, *see* Alvarez, *supra* note 20. *See also* Silvia Steininger, *What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration*, 31 LEIDEN J. INT'L L. 33 (2018).

may inadvertently overlook relevant external legal sources that are critical to the disputes.

In *EC-Biotech*, as elaborated, the EU cited multilateral environmental agreements to strengthen the legitimacy of the measure being challenged, which pertained to the management and regulation of living-modified organisms resulting from modern biotechnology that could have adverse effects on human health. When considering the relationship between these multilateral environmental agreements and WTO laws, the Panel declined to recognize the environmental agreements as 'relevant rules of international law' under Article 31.3(c) of the VCLT on the grounds that not all WTO members are parties to those environmental conventions. The Panel further warned that introducing external international legal sources shall not result in a consequence that "the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.[256]" This concern is problematic for two reasons. First, considering external international legal instruments through Article 31.3(c) of the VCLT does not necessarily impose additional legal obligations from other international laws on a WTO member. Instead, as discussed in the following section, the role of external international legal instruments under Article 31.3(c) of the VCLT is confined to treaty interpretation. In other words, external references are used by treaty interpreters to achieve an interpretation that, on the one hand, avoids potential conflicts between WTO laws and relevant external international legal instruments and, on the other hand, fosters synergies between trade and other international legal regimes. Second, WTO laws actually demonstrate a preference for relying on international standards and even integrate some multilateral conventions into their substantive provisions. For instance, the SPS and TBT Agreements advocate the use of international standards to promote harmonization and prevent unnecessary trade barriers while simultaneously aiming to harmonize values across trade, the environment, and the protection of human, animal, or plant life.[257] In practice, no members question the significance of these international standards within the context of WTO law, despite not all WTO Members having agreed to or participated in the formulation of such standards. Thus,

[256] Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, ¶¶ 7.71 (Sept. 29, 2006).
[257] Nathalie Bernasconi-Osterwalder, *Interpreting WTO Law and the Relevance of Multilateral Environmental Agreements in EC-Biotech*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (2007), https://www.ciel.org/wp-content/uploads/2015/03/BIICL_ECBiotech_7Jun07.pdf.

considering external references through interpretation would neither add to nor diminish the rights or obligations of WTO members. The Panel's concern about imposing unexpected legal obligations on WTO members who are not parties to certain external international legal instruments is exaggerated due to a misunderstanding of the role of treaty interpretation.

In *US-Tuna II (Art. 21.5 - II)*, Mexico argued that the principle of sustainable development should be considered by the Panel in its analysis of Article 2.1 of the TBT Agreement, referencing Article 31.3(c) of the VCLT. To support its claim, Mexico asserted that the principle of sustainable development has attained the status of a general principle of international law. It further indicated that language pertaining to sustainable development is also presented in the preamble of the WTO Agreement. Nevertheless, the Panel rejected Mexico's claim of interpreting Article 2.1 of the TBT in light of the principle of sustainable development because it was inappropriate to "elevate the language of the preamble to the level of a norm, and accord it more weight than the language used by the Members in framing the obligations contained in the covered agreements.[258]" On appeal, Mexico emphasized that obligations related to sustainable development in a dispute should be interpreted in light of the objectives and purposes of the WTO Agreement, which includes promoting sustainable development. However, like the Panel, the Appellate Body dismissed Mexico's argument for considering the principle of sustainable development in interpreting Article 2.1 of the TBT Agreement. This implies that while WTO members have the authority to adopt technical regulations pertaining to sustainable development, the scope and obligations outlined in Article 2.1 of the TBT Agreement remain unaffected. In my opinion, both the Panel and the Appellate Body, in this case, overly emphasized the ordinary meaning of the treaty text, thereby undermining the objectives and purposes articulated in the preamble of the WTO Agreement. Importantly, the interpretive rules under Article 31 of the VCLT do not prioritize a textual approach over others. Rather, a teleological approach, which considers the objectives and purposes of the WTO agreements as equally significant as the ordinary meaning, should also be applied. Given that Article 3.2 of the DSU refers to the customary rules of treaty interpretation that WTO adjudicators must follow, the Panel

[258] Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to article 21.5 of the DSU by the United States*, WT/DS381/RW/USA; WT/DS381/RW2, ¶ 7.130 (Oct. 26, 2017).

and the Appellate Body, in this case, should have interpreted the obligations under Article 2.1 of the TBT Agreement in consideration of both its ordinary meaning and its objectives and purposes. Therefore, the acknowledgment in the preamble of the WTO Agreement of the notion of creating synergies between economic prosperity and sustainable development, as highlighted by Mexico, should not have been disregarded.

the Panel and the Appellate Body were asked to determine whether Colombia had violated its obligations under Article II of the GATT by imposing a compound tariff on the importation of textile products. To justify its measure, Colombia argued that the scope of Article II of the GATT should not extend to 'illicit trade.' In support of its claim, Colombia referred to several international conventions, including the FCTC, CITES, and the UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, to demonstrate that illicit trade is a concern recognized by the international community. In response to the assertion that Article II of the GATT does not explicitly limit its scope to exclude illicit trade, Colombia further relied on investment arbitral jurisprudence that refused to exercise jurisdiction over the illegal investment even if the respective investment treaty "does not include a specific clause requiring that the investment be made in accordance with the laws of the receiving country.[259]" However, neither the Panel nor the Appellate Body upheld Colombia's arguments. The Panel deemed it unnecessary to consider the argument concerning illicit trade. On appeal, the Appellate Body, instead of directly addressing the external legal sources cited by Colombia, ruled that the scope of Article II of the GATT encompasses all types of transactions, even those classified as 'illicit trade' under members' domestic laws. In addressing concerns related to illicit trade, the Appellate Body appeared to implicitly dispose of Colombia's references to external legal sources by pointing to the general exceptions contained in Article XX of the GATT.[260] There is little doubt that concerns regarding illicit trade and the relevant international legal frameworks regulating such trade could be addressed in discussions about whether a measure can be justified under Article XX of the GATT. Nonetheless, the question of whether Article II:1 of the GATT extends its protection to imported goods whose production or distribution is considered illegal remains contentious. Specifically, if

[259] Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R, ¶ 7.63 (Nov. 27, 2015).
[260] Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R, ¶¶ 5.40, 5.45, & 5.47 (June 7, 2016).

the production or distribution of an imported product is recognized as an illicit trade by international conventions, it should not be covered by WTO members' tariff commitments in their schedules. This is because it would be illogical for Article II:1 to require a WTO member to provide favorable treatment to imported products that would likely violate the legal formalities and requirements of the destination country, as well as relevant international legal instruments. Even if the notion of addressing illicit trade can be considered under Article XX of the GATT, as suggested by the Appellate Body, this approach disadvantages the responding member because it shifts the burden of proof to the responding member.[261]

Another type of inappropriate use, namely, the Panels and the Appellate Body's failure to consider external legal sources when needed, occurred in the *US-Origin Marking Requirement*. This case raised the question of whether Hong Kong's situation constituted an 'emergency in international relations' that would allow the US to invoke Article XXI(b)(iii) to justify its trade-restrictive measures against Hong Kong. The US, along with other third parties such as Canada, argued that the term "emergency in international relations" should not only encompass international tensions such as armed conflicts or the use of force but should also include political or economic tensions occurring between WTO members. Therefore, the deterioration of human rights conditions should be included, given that such a decline may also negatively impact bilateral relations between WTO members.[262] Nonetheless, the Panel defines the term "emergency" by relying on a rigid literal approach, stating that emergency refers to "a state of affairs that occurs in relations between states or participants in international relations that is of the utmost gravity, in effect, a situation representing a breakdown or near-breakdown in those relations.[263] " Based on this literal interpretation, constituting an 'emergency' in international relations requires the gravity and magnitude of tension to be comparable to that of war or other armed conflicts, and it necessitates evidence of a breakdown in relations. I posit that the Panel's approach is overly formalistic and unbalanced, leaving no room for WTO members to invoke the security exception to adequately respond to the emergency

[261] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, at 15-16 (May 23, 1997).
[262] Panel Report, *United States – Origin Marking Requirement*, WT/DS597/R/Add.1, at 68-69 (Dec. 21, 2022).
[263] Panel Report, *United States – Origin Marking Requirement*, WT/DS597/R, ¶ 7.290 (Dec. 21, 2022).

beyond war or armed conflicts.[264] Especially when alleged human rights abuses involve violations of internationally recognized human rights, multilateral human rights conventions such as the United Nations Declaration on Human Rights, the ICCPR, and the ICESCR serve as valuable references for WTO adjudicators to determine if the bilateral relationship between disputing parties has deteriorated or is near breakdown due to significant disagreements over human rights conditions. Regrettably, the Panel failed to consult external international legal instruments to thoroughly examine whether a WTO member can invoke Article XXI(b)(iii) to justify its trade-restrictive measures against another member believed to be involved in human rights abuses. Instead, it prematurely concluded that the political tensions and differences between the US and Hong Kong (with China's involvement) do not constitute an emergency in international relations equivalent to war or a situation of utmost gravity. Overall, the Panel in the *US-Origin Marking Requirement* case missed an opportunity to elucidate how WTO laws should interact with international human rights laws to harmonize the values pursued by both legal regimes.[265]

3. Summary

Disputing parties, as well as the WTO Panels and the Appellate Body, generally do not transplant legal principles out of context or misinterpret external international legal sources and, thus, would not alter the rights and obligations of members under the WTO covered agreements. Specifically, inappropriate uses of external legal sources are less likely when these sources are referenced merely to supplement the factual background or to clarify procedural matters in dispute settlement proceedings. However, the circumstances in which the WTO adjudicators should have addressed arguments based on external legal sources but failed to do so have occasionally occurred in cases where disputing parties sought to use external international legal

[264] Relevant arguments, *see* Mao-wei Lo & Chien-Huei Wu, *From US-HKPA, HKHRDA TO HKAA: The Turnings of the US' China Policy and the End of Hong Kong's Full Autonomy*, 21(2) UCLA J. INT'L L. & FOREIGN AFF. 93, 141-44 (2021).

[265] The argument for introducing more external legal sources when needed in the context of the WTO is, however, not without objection. For instance, the US attacked the Panels and the Appellate Body for the tendency of being judicial activism by asserting that both of them deviated from the WTO rules and took into account other rules of international law from time to time. Such a judicial behavior, from the US's perspective, goes against Article 3.2 of the DSU. *See* UNITED STATES TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 74-79 (2020). Different perspectives, *see* Yuka Fukunaga, *Interpretative Authority of the Appellate Body: Replies to the Criticism by the United States*, *in* THE APPELLATE BODY OF THE WTO AND ITS REFORM 167 (Chang-fa Lo et al. eds., 2021).

sources to encourage WTO adjudicators to engage in substantive judicial cross-fertilization. I present four cases to illustrate how the WTO Panels or the Appellate Body avoided addressing the role of external legal sources raised by the disputing parties. The accumulation of such reluctance may foster further distrust in the WTO dispute settlement mechanism.

IV. Chapter Conclusion

On numerous occasions, directly referring to external international legal sources or indirectly citing case laws from other international judiciaries have assumed certain roles in the WTO Panels and the Appellate Body. Nevertheless, these references and introductions are like a "muted dialogue" – namely, most of the time, the WTO adjudicators have neither manifested the legal basis under the WTO provisions authorizing them to make the cross-reference nor explicitly defined the legal status of those external international legal instruments and judgments. Nevertheless, by exercising quantitively and qualitatively content analysis, I scrutinize the possible roles of those external international legal sources mentioned in the WTO dispute settlement and empirically evinces that the legal grounds for the WTO adjudicators to look into the external international legal sources and jurisprudence of other international judiciaries remain unclear. In my view, without the guidelines for inter-legal regimes, cross-references pose a risk to the legitimacy of the WTO dispute settlement mechanism because it remains unclear when and how external international legal sources could be introduced. Without making causal inferences, I apply quantitative statistical analysis to demonstrate the associations between the nature of the cases and the frequency of citing external international legal sources. Specifically, the OLS regression is applied to probe the possible factors that might be associated with the occurrence of external international legal sources in the Panels and the Appellate Body reports. The regression results correspond to the observation that disputing parties' attitudes matter – namely, the EU is more open to introducing external international legal sources than the US. Furthermore, the subject matter of the disputes also correlates to the occurrence of external international legal sources. When the disputes involve certain WTO covered-agreements, such as the SPS Agreement, TBT Agreement, or GATS regulating beyond trade remedies, the OLS regression results entail that positive associations between the subject matter of disputes and the

frequency of citing external international legal sources, and the difference of outcome between different groups are statistically significant.

Built on the quantitative evidence, the qualitative content analysis is carried out to investigate the role(s) of the external international legal sources when they are cited in the Panels and the Appellate Body reports. To some scholars' disappointment, external international legal sources have never been invoked as a self-standing defense against allegations of WTO law inconsistency. Rather, I reveal that when the external international legal sources are introduced, they have been referred to: (1) as evidence of one or more factual conclusions; (2) for the purpose of interpreting the specific WTO provisions; (3) to manifest the existence of customary international law; and (4) to fill the legal gaps. Predominately, the external legal sources cited in the Panel and the Appellate Body reports belong to primary rules of international law, such as procedural rules, customary law, and general principles of law that are not regime-specific. However, I observe certain substantive judicial cross-fertilizations exercised in the WTO decisions. For example, the precautionary principle from international environmental law, the legal principles enshrined in the FCTC, or the legal obligations of combatting illicit trade and corruption stipulated in other international conventions are introduced and deliberated in the Panel and Appellate Body reports. Notably, in a majority of disputes involving other international laws, the Panels or the Appellate Body preferred to introduce external international legal sources directly without stating the legal basis for such cross-reference activities. The relative reluctance to engage in substantive judicial cross-fertilizations (i.e., responding to non-trade international conventions introduced by disputing parties) deprives the chances of assessing the important roles of external international legal sources in the WTO disputes that involve potential conflicts between trade and other public interests. Regrettably, the Panels and the Appellate Body eventually lost the opportunity to demonstrate how the values conflicts could be reconciled under the WTO judicial forum.

The findings reported here apply to the WTO dispute settlement mechanism. An important question for scholars and policymakers in the international legal regime is whether the same observations apply to another equally important international economic judiciary, namely the ISDS system. The next chapter turns to this question.

CHAPTER III EXTERNAL INTERNATIONAL LEGAL SOURCES IN INVESTMENT ARBITRAL AWARDS

This chapter assesses judicial cross-fertilizations conducted in the context of the ISDS mechanism. Similar to the previous chapter, I first depict the procedural structure of the ISDS, the criticisms they have suffered, and the potential legal gateways in investment treaties that may channel external legal sources into investment arbitral proceedings. The quantitative empirical findings display the extent to which external legal sources are present in the collected investment arbitral awards. Both the frequency and diversity of the cited external legal sources are higher than those in the WTO decisions. The OLS linear multiple regression is applied again. It reveals that factors including the composition of arbitral tribunals, the dynamic of disputing parties, the participation of amici, and the economic sector of the investment activities involved entail positive or negative associations with the number of external legal sources in investment awards. The results are also statistically significant. Built on the quantitative results, I conduct qualitative content analysis and several in-depth interviews to ascertain the functions of the external legal sources from four main legal regimes: Human rights, trade, environment, and anti-corruption. I argue that substantive judicial cross-fertilizations – namely, the introduction of secondary rules of international law, happen more frequently in the context of the ISDS compared with the WTO. Finally, I contend that although external international legal sources play a more significant role in investment awards, it is still too early to assert whether they truly contribute to the coherence of international law. This uncertainty arises because investment tribunals might inappropriately use these sources, potentially causing greater disorder across international legal regimes.

I. Introduction

A. The Features of the Investor-State Dispute Settlement Mechanism

International investment treaties and their prominent judiciary, the investor-state dispute settlement (ISDS) mechanism, only recently gained practical importance and attracted academic debates. Empowering individuals with the standing to challenge sovereign states is a significant revision under international law. In the past, when the

host countries negatively impeded foreign individuals' properties and investment interests, individual investors could only resort to remedies by requesting their home countries exercise diplomatic protection at the state-to-state level. Nevertheless, under this traditional public international law approach, launching diplomatic protection to act on behalf of the injured nationals against the host states is subject to the home countries' discretion. In other words, a sovereign state is in no way obliged to take up its people's case and to raise concern against the host state if the home state considers this action to not be in its national interests.[266] Even if the home country exercises diplomatic protection, the impeded individuals still have no right to request what remedies shall be made and what wrongful acts shall be redressed by host states. For example, the monetary compensation rendered by the liable state would not necessarily go to the injured individuals. Instead, the home countries, at least as a matter of international law, retain the power to decide how to distribute the compensation. Diplomatic protection is widely recognized as customary international law by international judiciaries and scholars. Under customary international law, activating diplomatic protection requires two prerequisites to be met. First, the injured individuals shall have exhausted all available national remedies of the host state but still have failed to correct wrongful actions by the host state. Second, individuals whose interests have been impaired must maintain their nationality with a genuine link between the espousing state from the moment the injury happens until at least the time the claim has been presented through diplomatic espousal.[267] The diplomatic protection rules constituted a basic legal foundation for foreign investment protection in the early years.

However, sovereign states and individuals soon realized that a more progressive legal instrument was needed to respond to the evolving and prosperous cross-border business transactions after the Second World War. International investment activities substantially expanded. Investors from developed countries actively established wholly or majority-owned business units in developing countries where many of these newly independent states failed to provide a stable legal and political environment that would ensure foreign investors' property rights and other interests. Combining

[266] Permanent Court of International Justice (30 August 1924). The Mavrommatis Palestine Concessions. Publications of the Permanent Court of International Justice. Series A No. 2. p. 12

[267] Diplomatic Protection – Title and texts of the draft articles on Diplomatic Protection adopted by the Drafting Committee on second reading, International Law Commission 58th session, A/CN.4/L/684 (2006), Article 14.

the ideology of decolonization and the development strategy of import-substitution, foreign investors from the Global North were subject to stringent regulatory environments, including screening mechanisms, performance requirements, and high levels of taxation.[268] A number of expropriations of foreign capital with either little or no monetary compensation also occurred. As a result, developed countries were incentivized to negotiate more powerful legal instruments with the developing countries to strengthen the legal protection for their investors. On the other hand, developing countries do not intend to keep foreign investors out altogether. Rather, foreign direct investment flows are necessary for these post-colonial countries to promote economic growth and contribute to national development. Especially after the Cold War, attracting foreign direct investment became the primary economic policy for those countries dissolving from the Soviet Union that were endeavoring to launch economic reform. Hence, these developing countries were also willing to take requests from developed countries for additional protection to foreign investment in exchange for more sources of capital, technology advantages, management practices, and other positive spillovers to the rest of the economy. This trade-off resulted in international investment treaties. With these international legal instruments independent of host states' domestic legal systems and judicial remedies, property rights and economic interests owned by foreign investors from the Global North could be better ensured, making developing countries more attractive investment destinations.[269]

The rise of international investment treaties and the creation of the ISDS as a default dispute resolution for tackling disputes between host state governments and foreign investors are remarkable achievements in international law. Unlike the international trade law regime, where the multilateral convention and institution (i.e., the WTO and the WTO agreements) were created in 1995 to govern global trade, the efforts to build a multilateral mechanism to regulate international investment activities failed in 1998.[270] Alternatively, the bilateral and plurilateral investment agreements concluded between states with similar structures were woven into the investment legal framework and constituted the foundation of contemporary international investment

[268] JONATHAN BONNITCHA ET AL., THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 8 (2016).
[269] *Id*. at 11.
[270] *The Multilateral Agreement on Investment Draft Consolidated Text*, ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (Apr. 22, 1998), https://www.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf.

law. Since the first bilateral investment agreement was signed by Germany and Pakistan in 1959, the number of international investment agreements has been booming. According to the United Nations Conference of Trade and Development, over 3,200 international investment agreements (including bilateral investment treaties or investment chapters in regional trade agreements) have been concluded. With investment agreements, arbitral institutions, rules governing investment disputes, and jurisprudence that elaborate on the doctrines and principles of international investment law, the international investment legal regime is perceived as one of the most prosperous international legal fields.[271]

International investment agreements consist of principles relating to treatments and protections for foreign investors and their investments. Among the international investment agreements network, the vast majority of agreements include provisions against uncompensated expropriation and discrimination (including most favor nation and national treatments standards) against foreign investors and their investments. Other conventional protections embodied in the international investment agreements also empower foreign investors to claim the benefits of a minimum standard of treatment (i.e., fair and equitable treatment), full protection and security, the legal and contractual commitments made by host states (commonly known as "umbrella clause"), performance requirements, and rights to transfer capital.

Equally important are the definitions of "investments" and "investors" since they determine the scope of investment protection standards enshrined in international investment agreements. For the protected investments, contemporary treaty practices generally extend their coverage to both tangible (e.g., land ownership, factories, and equipment) and intangible assets (e.g., shares, loans, and intellectual property rights). In practice, most of the international investment treaties define protected investments by referring to "every kind of asset having required characteristics" owned or controlled by foreign investors with an open-ended list exemplifying the eligible types of investments[272] or to a closed but extremely comprehensive list that incorporates

[271] BONNITCHA ET AL., *supra* note 268, at 3.

[272] *See, e.g.*, Agreement on Investment Among The Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations, Art. 1(e) ("investment means every kind of asset that an investor owns or controls, and that has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gains or profits or the assumption of risk, including but not limited to: (i) movable and immovable property and other property rights such as mortgages, liens or pledges; (ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights derived therefrom; (iii) intellectual property rights which are recognised pursuant to the laws and

practically all types of assets.[273] In addition to definitions of "investment" stipulated in investment agreements, Article 25 of the ICSID Convention further specifies the scope of "investment." Under this article, an economic activity is entitled to be an "investment" if its operation involves an expectation of economic return, a certain duration, sharing of the management risks, and bringing a contribution to the host states' developments.[274] Some arbitral tribunals contend that the claim can only be brought under the ICSID Convention if the purported "investment" possesses these four elements.[275] In terms of "investors," almost all investment agreements cover individuals who hold nationality and juridical entities constituted in the parties of investment agreements. Among the concluded disputes, most of the investment treaty claims are brought by legal entities, with a few prominent cases initiated by natural persons.[276]

The ISDS mechanism offers an easily accessible international judicial remedy to

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regulations of a host Party; (iv) claims to money or to any contractual performance having financial value; (v) business concessions required for conducting economic activities and having financial value conferred by law or under a contract, including any concession to search for, cultivate, extract or exploit natural resources…")

[273] *See, e.g.*, Agreement Between the Government of the United Mexican States and the Government of the People´s Republic of China on the Promotion and Reciprocal Protection of Investments, Art. 1 (""investment" means the assets owned or controlled by investors of a Contracting Party and acquired in accordance with the laws and regulations of the other Contracting Party, listed below: (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a Contracting Party or of a State enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a Contracting Party or to a State enterprise; (e) an interest in an enterprise that entitles the owner to share an income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d) above; (g) real estate or other property, tangible or intangible, acquired or used for business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the other Contracting Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean, (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of the other Contracting Party, or (iii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d) above, or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h) above…")

[274] International Center for the Settlement of Investment Disputes Convention, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159, Art. 25. [hereinafter ICSID Convention]

[275] Salini et al v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001). Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Decision on Jurisdiction, ¶ 116 (Mar. 5, 2008). Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgyz Republic, ICSID Case No. ARB(AF)/06/1, Decision on Jurisdiction, ¶ 94 (Sept. 13, 2007).

[276] GUS VAN HARTEN, THE TROUBLE WITH FOREIGN INVESTOR PROTECTION (2020).

injured foreign investors. This international judicial mechanism operates beyond the host state's legal system, which subjects host states' measures or actions to the scrutiny of international arbitral tribunals and is backed by international enforcement. Modeled on international commercial arbitration, where the authority of arbitral tribunals is granted by parties, the legitimacy of investment treaty arbitration is bestowed on consents made by states and investors. In the context of investment disputes, host states offer their consent to use arbitration as a dispute resolution under international investment treaties when the treaties are signed. The "consent to arbitration" would be perfected at the time the foreign investors file the request for arbitration.[277] Under the ISDS mechanism, investors normally are not required to exhaust local remedies before initiating investment claims. Such institutional design results in the "asymmetric nature" of the ISDS proceeding. Whereas foreign investors retain the option of initiating the claim against host states at any time without the need to acquire host states' consent, the opposite is generally not the case.[278] By allowing individuals (both natural persons and entities) to have standing against sovereign states based on international treaty commitments, the international investment law regime and its dispute resolution are revolutionized creatures under the realm of public international law. This fact also explains the upsurge in investment treaty arbitrations. Since the first investment treaty-based arbitration that was brought by AAPL against Sri Lanka in 1987, foreign investors have initiated over 1,200 investor-state arbitration cases. Similar to international commercial arbitration, investment disputes can either be administered by arbitration institutions or be conducted by *ad hoc* tribunals. As revealed by the most recent data established by the UNCTAD, 63.4% of the known investment arbitration disputes were submitted to the ICSID (including the ICSID Additional Facility). The remaining cases were governed by the UNCITRAL Rules (26.2%), the rules of the Stockholm Chamber of Commerce, and the International Chamber of Commerce.[279] The main remedy that may be rendered by the investment arbitral tribunals is monetary compensation if host states' measures are considered to breach their investment treaty obligations. Backed by the ICSID Convention and the New York Convention, the award issued by investment arbitral

[277] Tsai-yu Lin et al., *Problems Using the Latest Institutional Arbitration Rules for Investment Treaty Disputes* (2023) (on file with the author).
[278] *See* Mees Brenninkmeijer & Fabien Gélinas, *Counterclaims in Investment Arbitration: Towards an Integrated Approach*, 38(3) ICSID REV. 567, 568 (2023).
[279] UNCTAD INVESTMENT TREATY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement. (last visited Mar. 16, 2024).

tribunals would be recognized and enforced if the arbitral proceedings and the award itself do not fall within the grounds for annulment.[280] Unlike the national court system, where judicial decisions can be appealed based on the matter of substantive law, the only possibilities for setting aside investment awards stipulated in the international conventions are limited to procedural deficiencies. The empirical results demonstrate that the losing host states voluntarily comply with arbitral awards for the most part.[281] If host states fail to implement obligations stipulated in arbitral awards, then foreign investors may resort to the domestic courts where the assets of host states are located in order to obtain recognition and enforce the awards. With both international and national judicial mechanisms, the ISDS is one of the most frequently used and effective international judiciaries in resolving investment disputes and restoring the legal order of the international investment law regime.[282]

In addition to the substantial provisions of international investment agreements, the accumulative legal interpretations from the past jurisprudence are another critical source that furnishes the substance of international investment law. Like other international judiciaries, a tribunal is not bound by prior decisions rendered by other

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[280] ICSID Convention, Art. 52.1 (Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: a. that the Tribunal was not properly constituted; b. that the Tribunal has manifestly exceeded its powers; c. that there was corruption on the part of a member of the Tribunal; d. that there has been a serious departure from a fundamental rule of procedure; or e. that the award has failed to state the reasons on which it is based.) New York Convention, Art. V (1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.).

[281] Emmanuel Gaillard & Ilija Mitrev Penushliski, *State Compliance with Investment Awards*, 35(3) ICSID REV. 540 (2020).

[282] O Thomas Johnson Jr & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011 at 692 (Karl P Sauvant ed., 2012).

arbitral tribunals. Under Article 38(1)(b) of the Statute of the International Court of Justice (ICJ Statute), judicial decisions issued by international courts are just the "subsidiary means for the determination of rules of law.[283]" Thus, citing precedents in no way constitutes a principle of *stare decisis* in public international law. Such an understanding is reiterated by the ICSID Convention, in which Article 53.1 provides that the investment award shall "only" be binding on the disputing parties.[284] Hence, there is currently no formal system of *stare decisis* in investment treaty arbitration. Nevertheless, despite lacking a legally binding effect, the reality is that the past jurisprudence is significantly influential in the contemporary practice of investment treaty arbitration. Certain ISDS case laws are repeatedly cited by parties in their arguments and tribunals in their awards. The notion of investment arbitral precedents is emphasized in *Burlington Resources Inc v. Ecuador*, where the arbitral tribunal notes that while the arbitral tribunal is not bound by prior arbitral awards, it must carefully account for relevant decisions of international courts and tribunals that examined similar facts or legal issues.[285] This tribunal further acknowledges its duty to establish a consistent legal analysis for the specific treaty clauses to contribute to the harmonious development of the international investment law regime.[286] Several other tribunals justify their reference to previous arbitral precedents as an informal source for tribunals that is instructive, persuasive, and capable of casting light on legal issues.[287] Undeniably, the ultimate authority to interpret treaty clauses remains with

[283] Statute of the International Court of Justic, Art. 38(1)(d).
[284] ICSID Convention, Art. 53.1.
[285] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 221 (Dec. 14, 2012).
[286] *Id*. at ¶ 187 ("As stated in the Decision on Jurisdiction, the Tribunal considers that it is not bound by previous decisions. Nevertheless, the majority considers that it must pay due regard to earlier decisions of international courts and tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law.")
[287] Azurix Corp v Argentine Republic, ICSID Case No ARB/01/12, Award, ¶ 391 (July 14, 2006). ("[F]indings of other tribunals ... should be helpful to the Tribunal' in identifying 'ordinary meaning' of BIT terms"). Gas Natural SDG, SA v Argentine Republic, ICSID Case No ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, ¶ 36 (June 17, 2005) (comparison to earlier rulings 'useful'). Liberian Eastern Timber Corporation v Republic of Liberia, ICSID Case No ARB/83/2, Award, ¶ 16.11 (Mar. 31, 1986) ("[T]hough the Tribunal is not bound by the precedents established by other ICSID Tribunals, it is nonetheless instructive to consider their interpretations.") Rosinvest UK Ltd v The Russian Federation, UNCITRAL, SCC (079/2005), Award, ¶ 285 (Sept. 12, 2010). Metalclad Corporation v United Mexican States, ICSID Case No ARB(AF)/97/1, Award, ¶ 108 (Aug. 30, 2000); Biloune and Marine Drive Complex Ltd v Ghana Investment Centre and the Government of Ghana, UNCITRAL, Award (June 30, 1990).

the contracting parties of investment treaties.[288] However, it is undeniable that investment arbitral tribunals play a significant autonomous role in developing international investment law in a decentralized, quasi-judicial system of international dispute resolution. Investment arbitral tribunals elucidate the indeterminate standards provided in international investment agreements, such as the generic term "fair and equitable" used in standards and the boundary between the permissible exercise of a state's regulatory authority and compensatory expropriation. Since similar or even identical treaty languages regarding investor/investment protection standards are set out in contemporary investment treaties, and because the analogous factual backgrounds are shared in multiple investment disputes, an arbitral tribunal's discourse of particular standards and rules are naturally attractive for later arbitral tribunals to refer to when requested to elaborate on the same, or similar, treaty clauses in the context of similar case facts.[289] As the number of arbitral tribunals endorsing particular rulings or interpretations of treaty provisions increases, the cited discourse may eventually obtain a collective normative effect on the evolution of the interpreted rules.[290] Regardless of the non-legally binding effect, the precedents in the context of investment treaty arbitration may result in their own legitimacy and constitute an indispensable pillar for the evolution of the international investment legal regime.

Over the decades, the international investment treaty system and its powerful ISDS mechanism have created unique legal and economic advantages for foreign investors. However, recently the ISDS mechanism has been utilized by multinational enterprises to not only target developing and emerging countries with unstable political and legal systems but also challenge the Global North that assumptively honors the rule of law and maintains independent national judiciaries. With the rocketing number of claims brought by foreign investors and the criticism of potential abuses of the ISDS mechanism that hinder the regulatory measures adopted by host states, the legitimacy of the international investment legal regimes has gradually been questioned. The ISDS mechanism even became a deal-breaker during the negotiations of some new regional economic agreements. The legitimacy crisis of the ISDS mechanism will be elaborated on in the next section.

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[288] Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 185-87 (2010)

[289] Patrick M Norton, *The Role of Precedent in the Development of International Investment Law*, 33(1) ICSID REV. 280 (2018).

[290] Stephan Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L. J. 1083 (2011).

B. Current Crisis of the Investor-State Dispute Settlement Mechanism

Contemporary international investment treaties commonly entail contracting parties offering foreign investors substantial and procedural privileges by legally committing to the treatments that foreign investors are entitled to enjoy and granting foreign investors the right to sue host states for monetary compensation via international arbitration directly. However, as an increasingly powerful judicial mechanism of global governance, the legitimacy of the ISDS system and even the whole international investment legal regime has been attacked.

As Diez et al. define, the legitimacy crisis of an international legal regime happens if there exists "the incongruence between the purpose, procedure and performance" with generalized standards of appropriateness for an institution and its judiciary.[291] Applying these criteria to international investment law and the ISDS mechanisms, critics indicate the deficiencies of the current ISDS that led to the legitimacy crisis of this legal system. They attack the ISDS mechanism for (1) lacking independence and impartiality, (2) going beyond the mandate from investment treaty parties, (3) rendering inconsistent results, and (4) being systematically biased toward foreign investors.

In terms of the lack of independence and impartiality, scholars assert that the neutrality of investment arbitrators is jeopardized because of their appointment process and their professional background. According to Puig, the pool of investment arbitrators is an extremely closed universe in which those arbitrators usually come from large international law firms with profound knowledge of private law and economic law.[292] Such professional background also results in these arbitrators overlooking the distinct nature of investment arbitration (i.e., sovereign states are one side of disputing parties) and handling the investment cases from a purely private law perspective. Moreover, some arbitrators with distinct pro-investor ideologies and inclinations are repeatedly appointed by claimants and even named presiding arbitrators. These subjective factors, plus these arbitrators' recurrent appointments, naturally lead the ISDS system to systematically side with foreign investors and fail to

[291] Thomas Dietz et. al., *The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System*, 26(4) REV. INT'L POLITICAL ECONOMY 749, 756 (2019).
[292] Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387 (2014).

sufficiently take into account the potential concern of public interests pursued by host states in their decisions. Additionally, the structure of the ISDS mechanism further creates economic incentives for investment arbitral tribunals to favor foreign investors. On almost all occasions, only foreign investors are entitled to bring the claim, and host states are mostly the responding party in the ISDS system. Hence, gains for investment arbitrators primarily depend on the willingness of foreign investors to initiate the claim. Unlike judges in national courts whose compensations, social status, and privileges are ensured by domestic laws, investment arbitrators tend to exercise their legal analyses in a way that favors the claimant side due to the reputational and economic considerations in order to be re-appointed in the future. As a result, commentators conclude that it is difficult to expect the ISDS mechanism to operate in line with the principles of judicial independence and to maintain impartiality.

The second concern critics express is that investment arbitrators enjoy too wide discretion under the ISDS system. Theoretically, international adjudicators, including investment arbitrators, have a wide margin of discretion in adjudicating. In the context of international dispute resolutions, the Principal-agent theory suggests that the relationship between states and international courts, or tribunals, is like that of principals and agents.[293] Since the international judiciary's authority to resolve disputes arising from the treaties is bestowed by sovereign states that consent to be bound by those international legal instruments, international courts or tribunals shall not exceed the scope of a delegation since the agents' legitimacy is based solely on the principals' consent. Therefore, as an international tribunal, investment arbitration tribunals should act consistent with the mandates granted by investment treaty parties to prevent "agent slippage."[294] Nonetheless, the intermediate terms used in international investment agreements leave investment arbitrators with an overly broad margin of discretion. With the aforementioned pro-investor bias, the investment tribunals' legal interpretation and analysis are accused of regularly contradicting the expectations of host states - which are the "owners" of the investment treaty at issue and retain the most authoritative power to interpret the treaty language. Especially among those investment disputes concerning the legality of host states' legislations or regulatory measures adopted for ensuring public welfare, arbitrators often extend the

[293] Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 641-44. (2005).
[294] Roberts, *supra* note 288, at 186.

scope of protection by broadly interpreting and applying treaty clauses, such as the FET standard, full protection and security, and indirect expropriation.[295] The traditionally unlimited margins of discretion exercised by investment arbitral tribunals eventually both run against the intention of investment treaty parties and erode the legitimacy of the ISDS mechanism.[296]

Third, investment arbitral proceedings are criticized for operating in a vacuum, suggesting their integrity and accountability are impossible to supervise. Unlike commercial arbitration, where the subject matter presented in front of tribunals mostly covers contractual issues, measures in the context of investment arbitration often concern host states' legislations or regulatory measures. As Franck[297] precisely illustrates, the ISDS is a dispute settlement mechanism that "privatizes" public issues through three private lawyers who usually lack knowledge of responding to states' political, social, and cultural contexts. Even worse, unlike the WTO dispute settlement mechanism where the Appellate Body is created to serve as the authoritative institution to ensure consistent legal interpretations of the WTO laws, no single body has the capacity to resolve the conflicting interpretations rendered by tribunals. Because different arbitral tribunals are organized under different investment treaties, they may result in different conclusions about disputes involving the same facts, identical host states, and similar investment treaty clauses. In this sense, the contradicting or even opposite legal interpretations would significantly erode the legitimacy of the ISDS mechanism because they may create uncertainty and damage the reasonable expectations of foreign investors and sovereign states that anticipate a predictable and reliable judicial system.[298]

Fourth, investment arbitral tribunals are criticized for overlooking sovereign states' regulatory authority. Investment disputes involving public welfare components, such as environmental protection, human rights, and public health promotion, continuously invite fierce legitimacy debates on the ISDS. Investment treaty arbitration is accused of favoring foreign investors' property rights over host states' need to duly exercise

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[295] Gas Van Harten, *Arbitrator behavior in asymmetrical adjudication: An empirical study of Investment treaty arbitration*, 50(1) OSGOODE HALL L. J. 211-268 (2012).
[296] Wolfgang Alschner, *Ensuring Correctness or Promoting Consistency? Tracking Policy Priorities in Investment Arbitration through Large-Scale Citation Analysis*, *in* THE LEGITIMACY OF INVESTMENT ARBITRATION EMPIRICAL PERSPECTIVES 230, 232 (Daniel Behn et al eds., 2022).
[297] Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1558 (2005).
[298] *Id*. at 1558 & 1584.

their right to regulate and legislate in the public interest. Partially relevant to the previous criticism concerning inconsistent arbitral awards, the divergent attitude toward host states' public interests involved in given disputes eventually results in the chilling effect upon important laws and regulatory measures and eventually restrains states' sovereignty. Particularly, there have been concerns that the legality of domestic legislation and executive orders would be "second-guessed" by arbitrators, thus "depriving domestic governments of the right to govern in the way that they see fit.[299]" The professional background of investment arbitrators is also attributed to such systemic bias against responding states in investment disputes. The composition of investment arbitral tribunals also casts doubt on whether these arbitrators, who usually have profound expertise in commercial transactions but lack background in public international law, can appropriately strike a balance between foreign investors' economic benefits and sovereign states' public interests. Empirical evidence further reveals that reputation costs and the desire to be re-appointed in future disputes may lead investment arbitrators to favor investors' position and, in turn, neglect host states' legitimate policy concerns.[300] Overall, the ISDS mechanism is alleged to be a pro-investor and anti-global south's regulatory efforts that rigidly stick to its network and preclude itself from the broader international law family.

These challenges raised by scholars, NGOs, and states manifest that the ISDS system fails to meet the prerequisites to be a legitimate international judicial forum. As a decentralized dispute settlement mechanism, an investment dispute is heard by party-appointed arbitrators who are requested to weigh and balance the economic interests of a foreign investor from the global North and the public interests of a state in the global South. The dominance of the global North in this legal system inevitably raises concerns about the legitimacy of the ISDS mechanism, prompting questioning and criticism of virtually every aspect of the system.[301] In response to the criticisms, many legal and policy recommendations have been initiated to cure deficiencies of this judicial system. Among these, exercising boundary crossings could guide investment law in a "more mature" direction and render that regime "more legitimate

[299] *Id*. at 1586 n.328.
[300] Ren Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 282-83 (2001).
[301] Daniel Behn et al., *Introduction: The Legitimacy Crisis and the Empirical Turn*, *in* THE LEGITIMACY OF INVESTMENT ARBITRATION EMPIRICAL PERSPECTIVES 1, 4-7 (Daniel Behn et al. eds., 2022).

and acceptable to states, investors, and civil society alike.[302]" Resorting to external international legal sources has the benefit of "adherence" to established international and institutional norms and enhances the legitimacy of investment arbitration accordingly.[303] Moreover, external citations could allegedly help concretize the indeterminate legal concepts in investment treaties (e.g., the concept of "fair" and "equitable" treatment) by referencing other relevant international conventions or courts' rulings that draw the boundary of states' regulatory space. Eventually, the judicial cross-fertilizations may balance investment protection and non-investment concerns and ensure consistency among international legal regimes.[304] To offer more fact-based arguments, I empirically investigate the picture of judicial cross-fertilizations exercised by investment arbitral tribunals in the following sections. Moreover, I explore whether external references could guide the decision-making process of investment arbitral tribunals, in particular by enhancing the understanding of substantive provisions of the investment treaties.

C. The Entry Points for Investment Arbitral Tribunals to Embrace External International Legal sources

The investment treaty itself is the legal gateway that allows investment arbitral tribunals to exercise judicial engagements and to introduce external international legal sources.[305] The generic language used in investment treaties, while allegedly being liable for the legitimacy crisis in investment treaty arbitration, empowers investment arbitral tribunals with ample discretion to resort to external international legal sources as part of their legal reasoning.[306]

1. Preambular languages that incorporate public interests concerns

The preamble of investment treaties is the first entry point permitting disputing parties and investment arbitral tribunals to resort to external international legal sources. Traditionally, preambles of most investment treaties predominantly stress the

[302] Stephan W Schill, *International Investment Law and Comparative Public Law: An Introduction*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3, 36 (Stephan W Schill ed., 2011).
[303] THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 26 (1998).
[304] Steininger, *supra* note 255, at 51.
[305] ALVAREZ, *supra* note 79, at 6.
[306] Valentina Vadi, *Critical Comparisons: The Use of Comparative Law in Investment Treaty Arbitration*, 39(1) DENV. J. INT'L L. & POL'Y 67, 69 (2010).

need to provide a stable investment environment for nationals from treaty parties or flag countries' desire to boost their economic prosperity by attracting foreign direct investment flow. Nevertheless, the new generation investment treaties increasingly insert some non-economic elements into their preambles, such as referencing countries' right to regulate, highlighting the notion of sustainable development, and emphasizing the social investment aspects. For example, Chapter 12 (Investment) of the Taiwan-New Zealand Economic Cooperation Agreement stipulates that treaty parties' rights to regulate and their duty to protect public health, safety, and the environment shall be recognized while it encourages the promotion of investment activities between the parties.[307] The Canadian and the EU investment treaty models also adopt this progressive preambular language that refers to respecting states' regulatory autonomy and their efforts to protect the environment and public health.[308] When an investment treaty's preamble underlines those public interests, it leaves considerable room for litigants and arbitral tribunals to import external international legal sources that apply in those domains and that thus clarify the meaning and scope of investment treaty provisions that refer to them, especially when exercising the treaty interpretation under Article 31 of the VCLT in light of the object and purpose of the investment treaty.

2. The Legality Clause of Investments Linking to International Public Policy

The requirement that foreign investments be made in compliance with the laws

[307] Taiwan-New Zealand Economic Cooperation Agreement, Ch. 12, Art. 1. ("The objectives of this Chapter are to encourage and promote the flow of investment between the Parties on a mutually advantageous basis […] while recognising the rights of Parties to regulate and the responsibility of governments to protect public health, safety and the environment.")

[308] *See, e.g.*, Canadian Model Foreign Investment Promotion and Protection Agreement, Preamble ("Reaffirming the importance of encouraging investment promotion activities and to make these activities more accessible to underrepresented groups, including by encouraging investments by women, Indigenous peoples, and micro, small, or medium-sized enterprises…Reaffirming the importance of promoting responsible business conduct, cultural identity and diversity, environmental protection and conservation, gender equality, the rights of Indigenous peoples, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving the Party's right to regulate in the public interest.") European Union-China Comprehensive Agreement on Investment, Preamble (RECOGNIZING the right of the Parties to adopt and enforce measures to achieve legitimate public policy objectives;... REAFFIRMING their commitment to the Charter of the United Nations, signed in San Francisco on 26 June 1945, and having regard to the principles articulated in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948;...DETERMINED to strengthen their economic, trade and investment relations in accordance with the objective of sustainable development, and to promote investment in a manner supporting high levels of environmental and labour rights' protection, including fighting against climate change and forced labour, taking into account the relevant international standards and agreements;...COMMITTED to encourage enterprises to respect corporate social responsibility or responsible business conduct;")

and regulations of the host State is an increasingly common requirement for the new generation of investment treaties. Many investment protection treaties contain "in accordance with the law" clauses. As was resonated by the investment tribunal in *Salini v. Morocco*, the purpose of the legality clause is "to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.[309]" Failing to comply with the legality clause would result in either dismissal of the claim in the jurisdictional stage or rejection of the substantive arguments at the merit stage.[310]

Investment arbitral jurisprudence has identified several grounds for foreign investors' misconduct that may cause the investment to be denied the protection of the investment treaties. Among these misconducts, bribery and corruption are considered violations of "international public policy." In *World Duty Free v. Kenya*, the arbitral tribunal resorted to several international legal instruments relating to anti-bribery and corruption to determine if the exclusive concession granted to the claimant to run duty-free operations in an international airport in Kenya was the result of bribery. The tribunal resonated that "in light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy….[311]" Accordingly, the tribunal dismissed the claimant's submission on the grounds that the corruption was against international public policy. Another scenario that may constitute a breach of international public policy and, therefore, cause the claim to be dismissed is when the investment is obtained by deceitful conduct. For instance, the tribunal in *Plama v. Bulgaria* ruled that since the investment at issue was established with a series of fraudulent misrepresentations, the investor shall not be entitled to enjoy any legal protections enshrined in the investment treaty in accordance with both the principle of *nemo auditur pro priam turpitudinem allegans* ("nobody can benefit from his own wrong") and the principle of good faith – both of which are the fundamental components of international public policy.[312] The tribunal referred to the ICJ case to support its analysis.[313] Hence, past

[309] Salini et al v. Morocco, Decision on Jurisdiction, ICSID Case No. Arb/00/4, ¶ 46 (July 23, 2001).
[310] Ursula Kriebaum, *Investment Arbitration - Illegal Investment, in* Austrian Arbitration Yearbook 307, 318 (Christian Klausegger & Peter Klein eds., 2010).
[311] World Duty Free Company v Republic of Kenya, Final Award, ICSID Case No. Arb/00/7, ¶ 157 (Oct. 4, 2006).
[312] Plama Consortium Limited v. Bulgaria, Final Award, ICSID Case No. ARB/03/24, ¶ 143 (Aug. 27, 2008).

jurisprudence reveals that the concept of "international public policy" in determining if foreign investment is legitimately established may also be a legal gateway that licenses investment arbitral tribunals to import external international legal sources. While currently, most of the disputes invoking international public policy are related to corruption, bribery, or criminal matters, it is possible that the scope of international public policy may be extended to other categories of investors' misconduct.[314] For example, when the investment is attacked for being established in a manner that breaches human rights conventions, those international legal instruments in human rights regimes may be relevant for arbitral tribunals to clarify whether such misconduct is contrary to international public policy.

3. Standard of Treatments Connecting to Broader International Law

The third legal gateway for importing external international legal sources into the arguments or reasoning of investment treaty arbitration is the fair and equitable treatment (FET) standard. Among the investment claims, fair and equitable treatment guarantee violations are the most frequent legal grounds argued and defended by disputing parties in investment treaty arbitration.[315] Scholars observe that in FET claims, there is a substantive factual and legal connection between investment and other international legal regimes.[316] The generic terms "fair" and "equitable" and their relationship with international minimum standards of protection under customary law provide litigants and investment arbitrators with ample room to inject external elements that enlighten the meaning and scope of the FET standard. Previous case laws evince that investment arbitral tribunals might resort to the concepts from the international human rights regime and equate a breach of the FET standard to a "violation of due process," "denial of justice," "manifest arbitrariness," "abusive treatment," or "target discrimination on manifestly wrongful grounds" (e.g., gender,

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[313] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14

[314] *See generally* Jean-Michel Marcoux, *Transnational Public Policy as a Vehicle to Impose Human Rights Obligations in International Investment Arbitration*, 21(6) J. WORLD INV. & TRADE 809 (2020). Relevant investment arbitral jurisprudence, *see* Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, Award, SCC Case No. V 116/2010, ¶¶ 170-72 (Dec. 19, 2013); OAO Gazprom v. The Republic of Lithuania (I), Final Award, SCC Case No. V125/2011, ¶ 28 (July 31, 2012).

[315] *Breaches of IIA provisions alleged and found*, UNCTAD INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement. *See also* JOSE E. ÁLVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 177 (2011).

[316] ALVAREZ, *supra* note 79, at 9.

race or religious belief).[317] Through referring to international human rights law and relevant jurisprudence made by international and regional human rights courts, actors of investment treaty arbitration attempt to enumerate with greater precision of the FET standard. In those new-generation investment treaties, treaty parties further strengthen the connection between investment law and other international rules by adding the phrase "in accordance with international law" or "in accordance with customary international law" as the qualifier for the FET standard. For instance, Article 7 of the Morocco-Nigeria Reciprocal Investment Promotion and Protection Agreement specifies states' duties under the FET standard by referring to "international law principles" and listing the exhaustive grounds that would be perceived as FET violations.[318] Such a design of the FET provision permits disputing parties and tribunals to resort to external legal sources, including those stipulated in Article 38 of the ICJ Statute (i.e., customary international law, general principles of law, other international treaties, and judicial decisions rendered by other international courts), to explain the scope and extent of the FET standards.

The expropriation clause is another standard of treatment embedded in most if not all, investment treaties that may be a legal gateway to import external international legal sources. Contemporary investment treaties regulate not only direct expropriation, which prohibits host states from depriving the ownership of foreign investors' investment property but also "indirect expropriation", which refers to those governmental measures that deter foreign investors from fully utilizing their investment assets and are tantamount to transfer of ownership of the investment or its direct seizure.[319] Extending the scope of expropriation enhances the level of protection for foreign investors. However, the boundary between indirect expropriation and regulatory taking becomes increasingly blurred. Numerous investment arbitral tribunals have been requested to determine the legality of host

[317] *See, e.g.*, Comprehensive Economic and Trade Agreement Between Canada, of the One Part, and the European Union [and its Member States], of the Other Part, Canada-EU, Art. 8.10(2), Oct. 30, 2016, 2017 O.J. (L 11) 23.

[318] Morocco-Nigeria Reciprocal Investment Promotion and Protection Agreement, Art. 7.2 (For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment": Includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of a Party.)

[319] Pope & Talbot v. Canada, Interim Award, UNCITRAL Arbitration Rules 1976, ¶¶ 87-93 (Mar. 25, 1999).

states' measures for pursuing public welfare but instead severely infringing on the economic use of the investment. In order to better distinguish between compensatory expropriation and sovereign states' right to regulate, the latest investment treaties endeavor to specify the scope of indirect expropriation by carving out certain regulatory measures from being perceived as expropriations. This regulatory model can be found in the ASEAN-India Investment Agreement. Article 8.9 of the Agreement provides that non-discriminatory regulatory measures shall not constitute expropriation if they are designed by states in pursuit of public policy to achieve legitimate public interest, such as the protection of public health, safety, and the environment.[320] In addition, many investment treaties specifically carve out the issuance of compulsory licenses granted to intellectual property rights, as long as such compulsory licenses are consistent with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).[321] This regulatory approach, from Alvarez's perspective, invites litigants and investment tribunals to engage in external reference, such as resorting to environmental treaties to examine whether responding states' measures are for implementing their environmental treaty obligations or referring to the TRIPS Agreement to ascertain if the issuance of compulsory licenses is WTO-consistent.[322] Here, external international legal sources may play significant roles for both disputing parties and investment tribunals to exercise the case-by-case inquiry.

4. Exception and Right to Regulate Clauses Preserving States' Policy Spaces

Since the 21st century, states have gradually witnessed how foreign investors use the ISDS mechanism to deter host states from enacting legislation or regulatory measures they disfavor. In contrast, earlier investment treaties are usually silent on host states' regulatory autonomy and foreign investors' legal obligations. To redress investment treaties' asymmetric nature, states started reforming projects to modernize treaty content. Among the second-generation investment treaties, two of the

[320] Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India, Art. 8.9.
[321] *See, e.g.*, Investment Promotion and Protection Agreement Between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore, Art. 5.5 (This Article does not apply to the issuance of compulsory licenses granted ill relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the Agreement on Trade Related Aspects of Intellectual Property Rights in Annex IC to the WTO Agreement.)
[322] ALVAREZ, *supra* note 79, at 13-14.

distinguishing features are the proliferation of the General Agreement on Tariffs and Trade (GATT) Articles XX- and XXI-type general exception and security exception clause or the not lowering standards/non-derogation clauses. Empirical evidence demonstrates that in 2016, over 40% of the newly concluded investment treaties contained these types of provisions.[323] These new treaty clauses are embedded to fine-tune the balance between investment protection and other policy concerns. For instance, Article 13.5 of the Agreement for the Promotion and Protection of Investments between Colombia and India borrows almost the entire model regarding the general and security exception clauses from Articles XX and XXI of the GATT. These articles provide that the investment agreement shall not be construed to prevent both contracting parties from enforcing necessary measures to maintain public order, protect human and animal life and health, and fulfill their obligations under the UN Charter for the maintenance of international peace and security.[324] In terms of not lowering standards/non-derogation clauses, Article 8.9.1 of the Canada-EU Comprehensive Economic and Trade Agreement explicitly recognizes Canada and EU's right to regulate matters such as "the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.[325]" Article 8.9.4 of the Agreement further maintains treaty parties' right to suspend the subsidy and other kinds of economic benefits granted to foreign investors if such discontinuation is necessary to comply with states' legal obligations under other international treaties.[326]

The effectiveness of these new generation treaty provisions to uphold host states' measures has not been fully examined by investment arbitral tribunals, where Alschner and Hui called "general public policy exceptions missing in action," the interpretive issues raised by these exception clauses remain unresolved, and their usefulness for responding states remains unknown.[327] Nevertheless, the function of external international legal sources in applying these clauses is worthy of further

[323] Wolfgang Alschner & Kun Hui, *Missing in Action: General Public Policy Exceptions in Investment Treaties*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY (Lisa Sachs et al. eds., 2018).
[324] Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India, Art. 13.5.
[325] Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union [and Its Member States] of the Other Part, Art. 8.9.1.
[326] Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union [and Its Member States] of the Other Part, Art. 8.9.4.
[327] Alschner & Hui, *supra* note 323.

exploration – especially to examine how external references may assist investment arbitral tribunals in interpreting these novel elements. External international legal sources under this context should be especially referenceable because these new provisions are modeled on the existing legal instruments (e.g., general and security exceptions of the WTO GATT) and have been thoroughly interpreted and analyzed by other international adjudicative bodies. For instance, the WTO jurisprudence has developed a comprehensive analytical framework to determine if the measure is "necessary"; thus, states can justify their legal inconsistencies via Article XX of the GATT. The "necessity test" built under the WTO is naturally desirable for investment arbitral tribunals to explain the scope and standard of review when they are requested to examine if host states can successfully justify their measures by exception clause.

5. The Applicable Laws to the Merits Referring to Public International Law

The merits phase of investment disputes is characterized by the interplay of multiple legal sources, including public international law and the domestic law of the contracting parties. Both investment treaties and investment arbitration rules contain applicable law clauses. For instance, Article 26(6) of the Energy Charter Treaty states that the applicable law to the dispute is the Energy Charter Treaty itself and the "applicable rules and principles of international law.[328]" Regarding the rules governing investment arbitral proceedings, Article 42(1) of the ICSID Convention provides guidance for investment arbitral tribunals to identify the scope of laws that may be applicable to given disputes. In principle, where the parties' consent is present, the ICSID tribunals shall apply the laws agreed upon by the disputing parties. However, if parties fail to agree on applicable laws during the proceedings, the ICSID tribunals "shall apply the law of the Contracting State Party to the Dispute and such rules of international law as may be applicable.[329]" From Reisman's perspective, Article 42(1) of the ICSID Convention offers considerable room for other international laws in addition to the investment treaty to be directly applied by the ICSID tribunals.[330] This perspective is also shared by investment arbitral jurisprudence. As in *Antoine Goetz et al. v Republic of Burundi*, the ICSID tribunal noted that "[C]hoice of law clauses in investment protection treaties frequently refer

[328] Energy Charter Treaty, Art. 26.6.
[329] ICSID Convention, Art. 42(1).
[330] W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15 ICSID REV. 362 (2000).

to the provisions of the treaty itself, and more broadly, to international law principles and rules. This leads to a remarkable comeback of international law, after a decline in practice and jurisprudence, in the legal relations between host States and foreign investors [. . .].[331]" The tribunal in *Tecmed S.A. v. Mexico* further defined the term "international law" as the "sources described in Article 38 of the Statute of the International Court of Justice considered [...] not as frozen in time, but in their evolution.[332]" For investment treaty arbitrations, the most relevant international rules that are applicable to investment disputes are the investment treaties between responding states and foreign investors' home countries. Beyond that, the aforementioned investment arbitral jurisprudence also resonates with the admissibility of external international legal sources to be applicable in investment disputes when the nature of the given dispute, as objectively assessed by the tribunal, involves interwinding interests.

6. Amicus Curiae Progressively Making External References

Civil society participating through amicus curiae submission in the context of the ISDS proceeding is an increasingly notable trend. Legally speaking, neither the ICSID Convention nor UNCITRAL Arbitration Rules explicitly stress the admissibility of an amicus curiae brief in an arbitral proceeding. Most investment arbitral jurisprudence adopted a tolerative perspective toward intervention from amicus curiae, given that neither investment treaties nor arbitration rules explicitly prohibit amicus curiae submissions.[333] In the wake of advocacy for transparency in the ISDS mechanism, commentators believe that embracing amicus curiae participation can transparentize investment arbitral proceedings, thus restoring the legitimacy of the ISDS system.[334] As a result, in a 2006 revision, the ICSID Arbitration Rules explicitly recognized the legality of non-party participation. Rule 37(2) of the ICSID Arbitration Rules (now Rule 67 of the 2022 ICSID Arbitration Rules) stipulated that certain conditions shall

[331] Antoine Goetz et al. v Republic of Burundi, Award, ICSID Case No. ARB/95/3 (Feb. 10, 1999). *See also* HEGE E. KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 222-23 (2013).
[332] Tecnicas Medioambientales Tecmed S.A. v The United Mexican States, Award, ICSID Case No. Arb (AF)/00/2, ¶ 116 (May 29, 2003).
[333] *See also* Eric de Brabandere, *NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12(1) CHI. J. INT'L L. 85, 99-100 (2011).
[334] *Id*. at 102. *See also* Philippe J. Sands & Ruth Mackenzie, *International Courts and Tribunals, Amicus Curiae*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶¶ 29-31 (Rudiger Wolfrum ed., 2011).

be satisfied in determining if non-disputing parties' submissions could be accepted. These conditions include (1) whether the amicus curiae submission can assist the tribunal in clarifying a factual or legal issue; (2) whether the submission addresses matter within the scope of the dispute; and (3) whether the amicus curiae maintains a significant interest with the disputes. Many investment arbitral tribunals also highlighted the need for greater transparency in disputes where greater public interests involve an implicit precondition.[335] In addition to investment treaty arbitration resolved under the ICSID system, the UNCITRAL Working Group III adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in 2014, which also created the mechanism for regulating non-disputing parties' interventions.[336] Several new general investment treaties also allow NGOs and members of civil societies to submit amicus briefs. For instance, Article 9.16.3 of the Australia-China Free Trade Agreement models the language from the ICSID Arbitration Rules.[337] By codified as legal obligations in treaties, the legitimacy of third-party participation is further strengthened and institutionalized. Investment arbitral tribunals also bear the duty of responding to the submissions from non-disputing parties - they determine that the submission shall be either granted or

[335] *See, e.g.*, Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervenes "Amici Curiae", UNCITRAL Arbitration Rule (1976), ¶ 49 (Jan. 15, 2001). United Parcel Service of America Inc. v. Government of Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ICSID Case No. UNCT/02/1, ¶ 70 (Oct. 17, 2001).

[336] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art. 5 ("1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty. 2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection. 3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2. 4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party. 5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.")

[337] Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Art. 9.16.3 ("With the written agreement of the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written amicus curiae submission with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:
(a) the amicus curiae submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties; (b) the amicus curiae submission would address a matter within the scope of the dispute; and (c) the amicus curiae has a significant interest in the proceeding.")

rejected.[338]

Admitting amicus curiae arguably lends legitimacy to the ISDS system. Civil society participating in international dispute settlements has been noticeable mostly in disputes involving public interests, namely in cases relating to the right to water, the right to health, the right to indigenous people, and labor rights and their connection with trade and foreign investment. In defending public welfare and specific minority interests that are usually sacrificed in the wake of economic globalization, amicus curiae tend to frame its arguments related to internationally recognized social rights by considering legal instruments in other international legal regimes, such as human rights, public health, and climate change. Therefore, NGOs who participated in investment disputes as amicus curiae are progressive actors engaging in cross-referencing in the ISDS proceeding.

D. Summary

Similar to the academic discussions in the context of the WTO jurisprudence, conventional wisdom argues that there are occasions when other branches of international norms may interact with the international investment legal regime, either because of the treaty clauses contained in investment treaties or via the treaty interpretive approach carried out by investment arbitral tribunals. What makes examining the ISDS system particularly worthwhile is the nature of the subject matter of investment disputes and the structure of investment treaties. To elaborate, investment disputes are primarily concerned with how host states' regulatory measures affect cross-border investment activities, which intuitively interact more with the local economy and social welfare. For instance, global mining companies in host states might be accused of negatively affecting local populations' health and clean environment. The disputes between host states and foreign investors usually are not the disagreement between the two sides *per se*; instead, the decisions rendered by investment arbitral tribunals are inherently "public" in nature because they may significantly impact responding states' public policy and local residents' welfare. Hence, the ISDS mechanism is described as an international judiciary that privatizes

[338] *See, e.g.*, ICSID Arbitration Rules, Rule 67(5) "The Tribunal shall issue a reasoned decision on whether to permit a non-disputing party submission within 30 days after the last written submission on the application." *See also* Gary Born & Stephanie Forrest, *Amicus Curiae Participation in Investment Arbitration*, 34(3) ICSID REV. 626 (2019).

the dispute settlement proceeding for disputes of a public nature.[339] The drawbacks of traditional consent-based arbitration to solve investment disputes have been underlined for several years, including untransparent procedures, inconsistent decisions, and systemically favoring foreign investors. To bring repercussions on the overall legitimacy of the ISDS system, having more external references exercised by both litigants and arbitrators in the ISDS mechanism implies that those non-economic values can be heard in arbitral proceedings. The interactions between different legal regimes and judicial forums affect the system of investment treaty arbitration. For instance, more judicial engagements indicate that the whole ISDS system is becoming more public welfare friendly. In particular, as more ISDS case laws embrace external international legal sources, such judicial behavior would naturally be internalized to constitute a new legal culture of investment treaty arbitration and to abide by future investment arbitral tribunals when adjudicating investment disputes that involve intertwined values.[340]

Moreover, compared with the WTO covered-agreements, investment treaties seem to have more legal gateways - namely, preambles, the definition of protected investments, substantive treatments, and procedural rules (i.e., amicus curiae submission) - to license both litigants and tribunals to resort to external international legal sources to reinforce the persuasiveness of their arguments and analyses. Hence, it seems to be expected that external international legal instruments will be cited or referred to more frequently, either by disputing parties or by investment arbitral tribunals *sua sponte*. In the following sections, I illustrate how investment arbitral tribunals cite external international legal sources via quantitative approaches. Meanwhile, I apply quantitative and qualitative content analyses as well as semi-structured in-depth interviews with those "insiders" of ISDS proceedings – namely, the investment arbitrators, practitioners, and staff members of the ICSID and other arbitration institutions, to depict an array of arguments, reasonings, and roles of those external international legal sources found in investment disputes.

[339] Franck, *supra* note 297, at 1521.
[340] Stephan W. Schill, *Sources of International Investment Law: Multilaterization, Arbitral Precedent, Comparativism, Soft Law*, at 10 (Amsterdam Law School Legal Studies, Working Paper No. 2017-19, 2017).

II. A Distant Reading: Quantitative Observations and Findings

A. General Overview of External International Legal Sources in Investment Arbitral Jurisprudence

1. Overview of the Dataset

After removing the cases that are neither not public nor written in English, 560 investment arbitral awards were published and coded as my data. Among these awards, external international legal sources were mentioned at least once in 449 cases, as shown in Figure 7. Comparing these results with the descriptive statistics regarding the WTO reports demonstrated in the previous chapter, we preliminarily observe that the investment arbitral jurisprudence significantly immerses itself in the family of international law with active interactions with other international legal regimes.

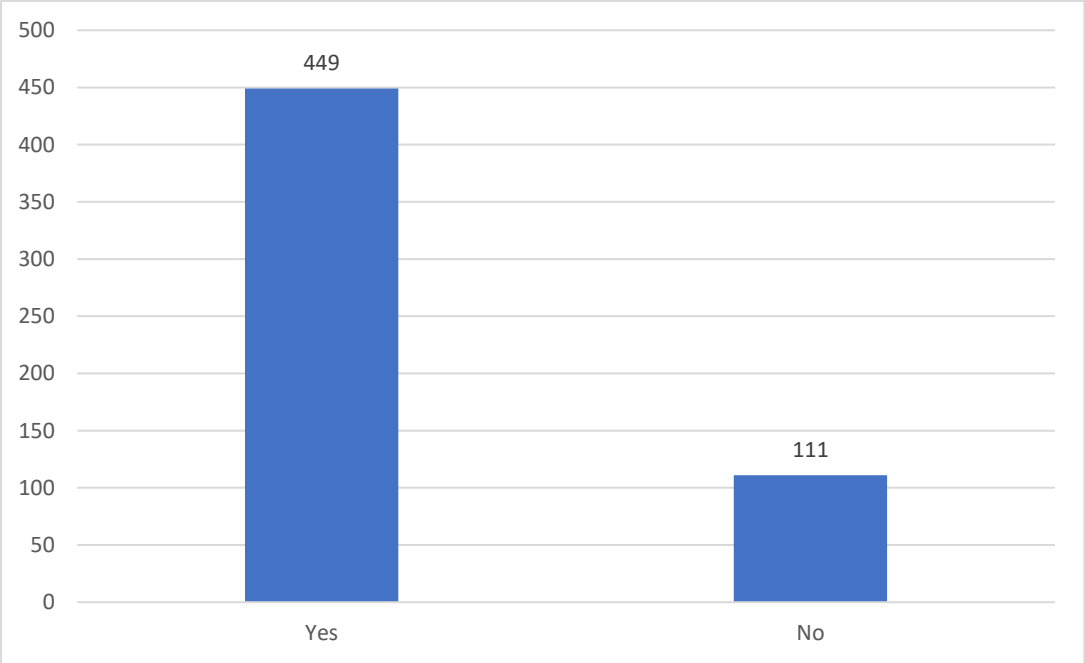

Figure 7 Summary statistics of the data

2. Exploring the Trends of Introducing External International Legal Sources

To demonstrate the frequencies of external international legal sources being cited or referred to in investment arbitral awards, Figure 8 showcases the distribution of awards and how many included external international legal sources in order to observe the trend of citing external international legal sources in investment arbitral jurisprudence over time. The blue bars refer to the total number of awards rendered in

the five-year period, and the orange bars represent the number of awards mentioning external international legal sources during each period. The line shows the percentage of external international legal sources in the total investment arbitral awards from the 1980s to 2022. The trend suggests that external international legal sources have appeared quite frequently in all time periods. A steady descent, however, is observed after the number reaches the peak during the 2001-2005 period. A possible explanation would be that investment arbitral tribunals have been repeatedly requested to adjudicate claims and submissions from disputing parties or third-party interveners (i.e., amicus curiae) rooted on broader international legal instruments; thus, they have developed a relatively profound case law addressing non-investment law narratives. As a result, the latest investment arbitral tribunals may directly refer to the investment arbitral jurisprudence that examined similar subject matter related to the roles of specific external international legal sources. For example, when discussing the applicability of the International Covenant on Civil and Political Rights (ICCPR) - especially introducing the right to present at trial and the presumption of innocence under Article 14 of the ICCPR, *Al-Warrq v. Indonesia* has become frequently cited by later arbitral tribunals facing the same issues. 13 cases cite relevant paragraphs discussing Article 14 of the ICCPR in the *Al-Warrq v. Indonesia*.[341] Citing the investment arbitral jurisprudence that has "digested" and has internalized external international legal sources into the analyses of investment treaty provisions seems to be intuitive for arbitral tribunals. It could explain why appearances of external

[341] These cases are: Antonio Del Valle Ruiz and others v. Kingdom of Spain, PCA Case No. 2019-17, Final Award (Mar. 13, 2023). Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain, PCA Case No. 2017-25, Final Award (Nov. 9, 2021). Yukos Capital Limited (formerly Yukos Capital S.A R.L.) v. Russia, PCA Case No. 2013-31, Final Award (July 23, 2021). Yukos Universal Limited (Isle of Man) v. Russia, PCA Case No. 2005-04/AA227, Opinion of Advocate General Paul Vlas (Apr. 23, 2021) [Unofficial English]. Veteran Petroleum Limited (Cyprus) v. Russia, PCA Case No. 2005-05/AA228, Opinion of Advocate General Paul Vlas, 23 April 2021. Hulley Enterprises Limited (Cyprus) v. Russia, PCA Case No. 2005-03/AA226, Opinion of Advocate General Paul Vlas, 23 April 2021. Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colombia, ICSID Case No. UNCT/18/1, Award, 12 March 2021. Guris Construction and Engineering Inc. and others v. Arab Republic of Syria, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020. Peter de Sutter and Kristof De Sutter v. Republic of Madagascar II, ICSID Case No. ARB/17/18, Award, 17 April 2020. South American Silver Limited v. Plurinational State of Bolivia, PCA Case No. 2013-15, Award, 22 November 2018. Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016. Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-2, Award, 15 March 2016. Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015

international legal sources are decreasing. [342]

[342] The detailed examination regarding how the external international legal sources is internalized by investment arbitral tribunals will be discussed in the next section.

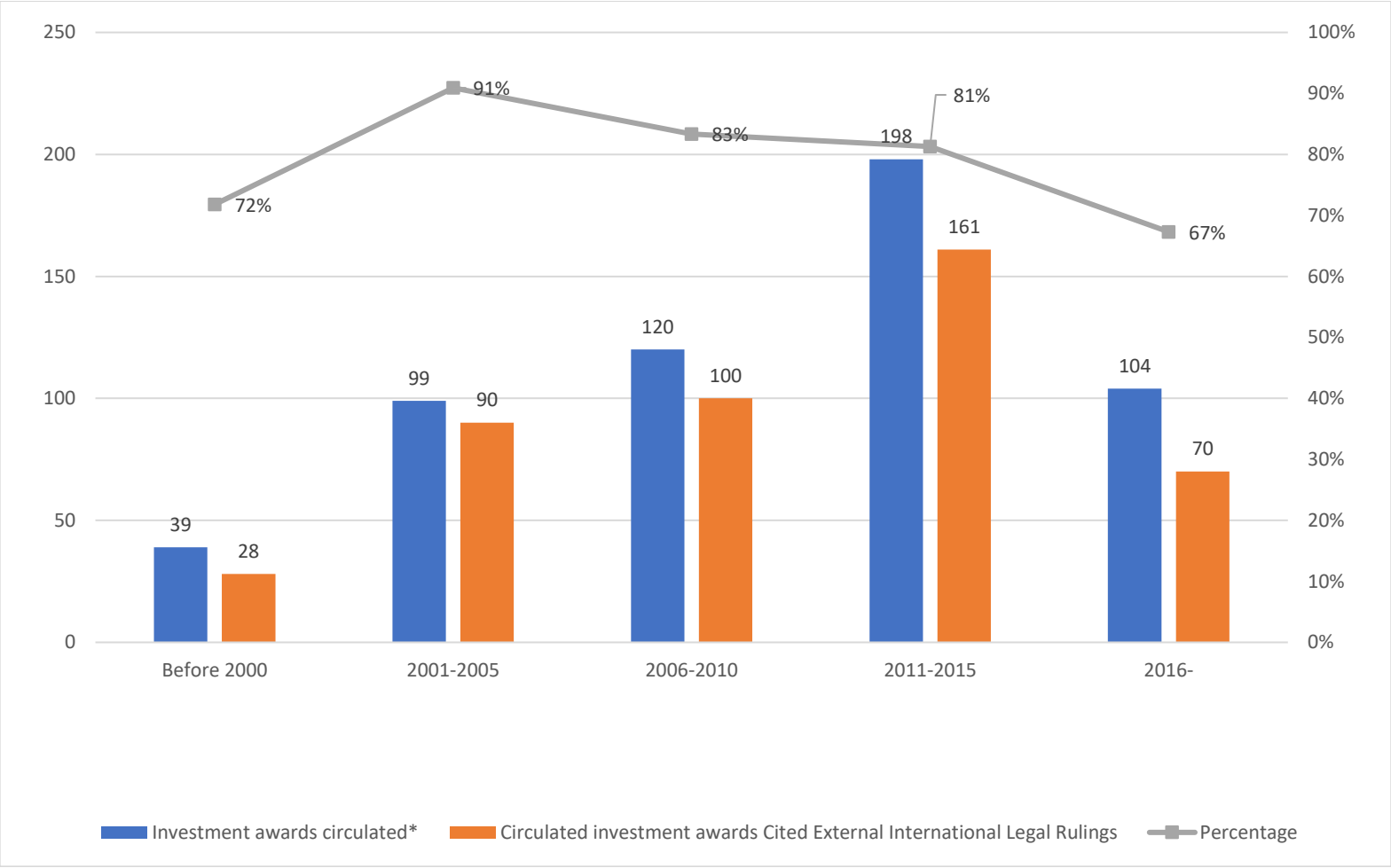

Figure 8 Investment awards citing external international legal sources - By number and percentage

3. What external international legal sources are introduced?

After depicting the trend of mentioning external international legal sources in the investment arbitral awards, I categorize the international legal instruments introduced and discussed by disputing parties and arbitral tribunals.[343] Figure 9 presents the number of references for the top 20 most cited external international legal sources. The most frequently referred to legal sources in investment awards are the ILC Draft Articles on States Responsibility (313 references). This result may not be surprising given that the substance of the ILC Draft Articles on State Responsibility has been recognized as customary international law and offers valuable guidance for investment arbitrators to determine legal issues such as states' liabilities and the rules regarding reparation. The ICJ Statute is mentioned in 80 cases, which is also expected as Article 38 of the ICJ Statute lists the sources of international law that apply to all international judiciaries, which should be the very first step for arbitral tribunals to identify the laws that they apply.

The noticeable external references are those international legal instruments belonging to the international human rights regimes, such as the European Convention on Human Rights (ECHR), which is introduced in 69 investment disputes; UN human rights instruments (including the Genocide Convention[344] (49 cases), the Convention on the Elimination of All forms of Racial Discrimination (14 cases), the Universal Declaration of Human Rights (9 cases), and the ICCPR (14 cases)); the American Convention on Human Rights (12 cases); and broadly referencing international human rights law/treaties (27 cases).[345] Other subject matters include international trade (GATT: 37 cases), environmental protection/climate change (European Energy Charter: 41 references; Kyoto Protocol: 27 cases; and United Nations Framework Convention on Climate Change (UNFCCC): 26 cases), and global anti-corruption/bribery instruments (OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (12 cases) and UN Convention against Corruption (10 cases)). Overall, compared with those external international

[343] Figure 4 only list those top-20 frequently mentioned external international legal sources in investment arbitral awards. There are other external international legal sources cited in the investment arbitral awards that are with great importance. The role and significance of the cited external international legal sources will be analyzed in the following section.

[344] Nevertheless, when we read closely, we may find that most of this category is in fact referencing to the ICJ case "Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide". Thus, this category is not the "substantive judicial cross-fertilizations" that will be analyzed in the *infra* section.

[345] For this category, the investment dispute is coded as positive if it explicitly mentions "international human rights law(s)".

legal sources introduced in the WTO decisions, investment arbitral jurisprudence exhibits more regime interactions with other international legal fields both in terms of frequency and diversity.

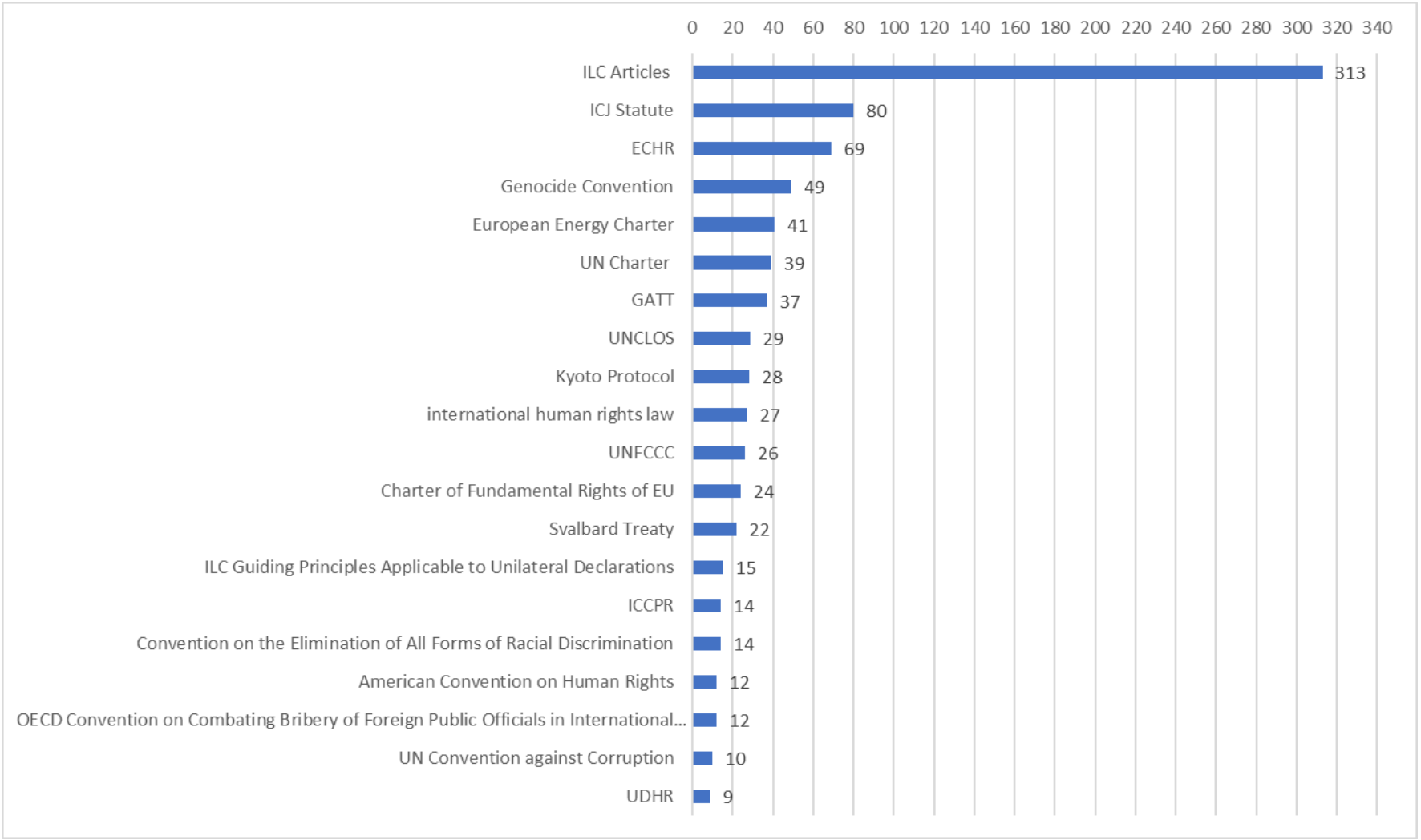

Figure 9 Number of investment arbitral awards that refer to each external international legal source

The frequency and diversity of judicial engagements between the ISDS mechanism and other international legal regimes can also be demonstrated by categorizing those cited external international legal sources. Chart 3 presents the percentage of those cited external international legal sources in the investment arbitral awards categorized by their legal regimes. To elaborate, customary international law or general principles of international law account for over 40% of external legal sources mentioned in investment disputes. This result is consistent with the argument that customary international law and general principles of law are critical components of international investment law because many substantive treaty provisions are simply reflections of customary law. Alternatively, the accumulation of similar treaty languages in investment treaties also codifies and enriches the content of customary international law. Therefore, disputing parties frequently rely on customary international law or general principles of law as a secondary source of law under investment treaties.[346] The most relevant legal doctrines introduced in investment disputes are the rules protecting aliens abroad and the rules prescribing standards of compensation – both of which are codified by the United Nations International Law Commission as the Articles on Responsibility of States for Internationally Wrongful Acts.[347] Thus, both customary international law and general principles of law play a significant role in investment disputes.

Another closely relevant legal regime repeatedly mentioned in past investment arbitral jurisprudence is international human rights law. Unlike the WTO jurisprudence, which seems to be more distant from human rights, 25% of the coded investment disputes cite at least one legal instrument belonging to the international human rights regime. Notably, international human rights legal instruments are not only referred to by host states to justify their violations under investment treaties but are also introduced by foreign investors to reinforce the soundness of their claims.[348] The following are the international environmental treaties with a focus on climate change governance, transboundary pollutants prevention, and natural resources

[346] *See, e.g.*, ANDREA GATTINI ET. AL. (EDS), GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION (2018). Patrick Dumberry, *Are BITs Representing the "New" Customary International Law in International Investment Law?*, 28(4) PENN STATE INT'L L. REV. 675, 693-97 (2010).

[347] Jean d'Aspremont, *International Customary Investment Law: Story of a Paradox*, *in* INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS 6, 10-15 (Tarcisio Gazzini & Eric De Brabandere eds., 2012)

[348] The usage of international human rights law by investors and host states will be discussed in the following section.

preservation. These external references happen in 15% of the investment disputes – most of which concern the legitimacy of host states' renewable energy transition policies or programs under investment treaties.[349] Equally notable external references are those international legal instruments in the fields of international trade (5%) and anti-corruption (3%). The former is cited for enlightening the interpretations of certain investment treaty clauses that share treaty languages and legal doctrines similar to those embodied in the WTO agreements.[350] The latter usually occurs when the disputing parties request investment arbitrators to determine if foreign investors' investments are legitimate and can enjoy the protections offered by the investment treaties accordingly. The roles of these external international legal sources in investment arbitral awards will be qualitatively examined in the following section.

[349] The roles of international environmental treaties in the ISDS proceedings will be discussed in the *infra* section.
[350] The roles of the trade law and its jurisprudence in the ISDS proceedings will be discussed in the *infra* section.

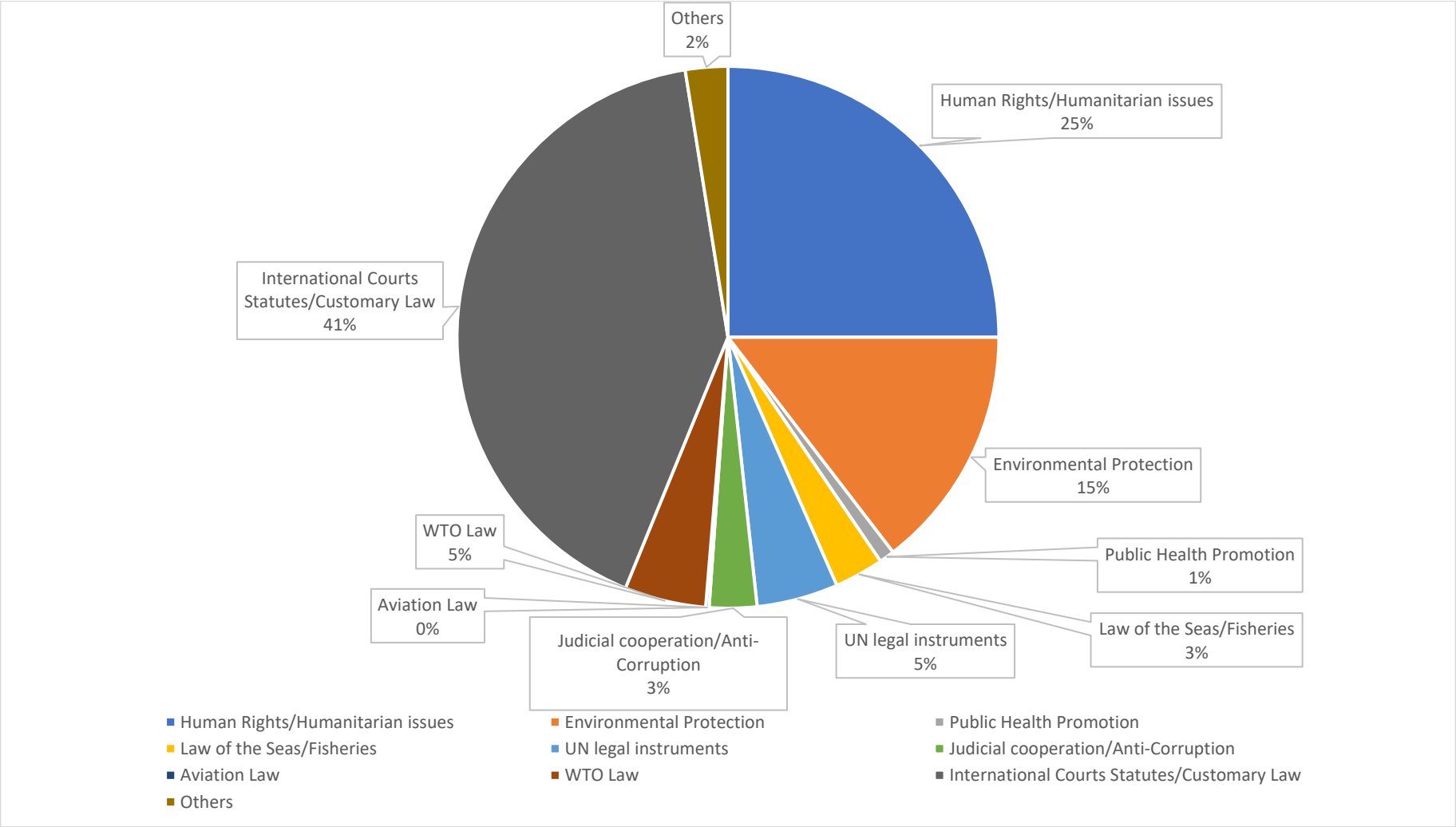

Chart 3 The categories of external international legal sources in the investment arbitral awards

Introducing the case laws/jurisprudence from other international judicial forums may also indirectly channel non-investment treaty norms in the ISDS mechanism and promote judicial engagement between the ISDS and other international judiciaries. Indeed, past investment arbitral jurisprudence frequently mentions external judicial decisions when searching for inspiration and authority outside the ISDS case laws.[351] As a result, I also provide descriptive statistics to show the usage frequency of international courts' jurisprudence.

Figure 10 presents the number of references to other international courts' case laws in the coded investment arbitral awards. We observe that the jurisprudence of the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), are the most widely mentioned case laws outside of the ISDS. For ICJ cases, there are 327 references, and 216 references were made to PCIJ jurisprudence. This empirical evidence strengthens the assertion that international investment law and the ISDS mechanism are rooted in public international law. As Pellet observed, "[n]ot only do … investment tribunals… refer to the jurisprudence of the World Court, but they show a particular deference to it.[352]" To contribute to the soundness of the award, investment arbitral tribunals routinely transpose and apply the ICJ and PCIJ's jurisprudence when issues of public international law are at stake. For example, when the issue before the tribunal concerns the jurisdiction and the admissibility of international judiciaries, the procedural matters before international courts and tribunals, the law of treaties, or state responsibility, the ICJ and PCIJ case laws are the most authoritative and intuitive sources for the investment arbitral tribunals to resort to. Notably, some of the most-cited ICJ cases are those rendered in the past 10 years, suggesting that the ICJ's influence on the ISDS is on the rise. I enumerate the ICJ/PCIJ disputes that are more frequently cited (Table 4). The rulings exerted from the ICJ/PCIJ cases are also listed.

	ICJ/PCIJ case name	**Number of ISDS making references**	**The rulings from ICJ/PCIJ introduced to the ISDS**
1.	Factory at Chorzow (Merits)	166	The standard of reparation must, as far as possible, wipe out all the consequences of the illegal act

[351] ZANG, *supra* note 89, at 38.
[352] Alain Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28(2) ICSID REV. 223, 230 (2013).

2.	Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)	138	The definition of "arbitrariness" (willful disregard of due process of law…which shocks, or at least surprises, a sense of judicial propriety)
3.	Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)	96	The concept of diplomatic protection and shareholder's rights under ISDS
4.	Mavrommatis Palestine Concessions	61	Assessing if "legal disputes" exist between parties
5.	Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)	61	Principle of estoppel, burden of proof, attribution issues,
6.	Oil Platforms (Islamic Republic of Iran v. United States of America)	55	The assessment of assessing jurisdiction *ratione materiae*, Article 31.3(c) of the VCLT
7.	Nottebohm (Liechtenstein v. Guatemala)	36	The issue of "dual nationality" of investors
8.	Gabcikovo-Nagymaros Project (Hungary v. Slovakia)	34	The analytical framework of security exception
9.	Territorial Dispute (Libyan Arab Jamahiriya v. Chad)	32	Treaty interpretation
10.	Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)	29	The legal status of VCLT, attribution issue, precondition of resorting to international courts
11.	Certain German Interests in Polish Upper Silesia (Merits)	28	The status of national/domestic law in international courts
12.	East Timor (Portugal v. Australia)	27	Assessing if "legal disputes" exist between parties
13.	LaGrand (Germany v. United States of America)	26	The legal status of VCLT
14.	Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)	25	Procedural preconditions before submitting a claim to international courts
15.	Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)	23	The concept of diplomatic protection and its relations with ICSID
16.	Rights of Nationals of the United States of America in Morocco (France v. United	23	The scope of the MFN protection does not extend to procedural matters

	States of America)		
17.	Anglo-Iranian Oil Co. (United Kingdom v. Iran)	21	The scope of the MFN protection does not extend to procedural matters, the interpretation of unilateral declaration
18.	Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)	21	The interpretation of the compromissory clause to assess parties' consent to arbitrate
19.	Ambatielos (Greece v. United Kingdom)	18	The interpretation of states' consent to arbitrate
20.	Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)	18	Treaty interpretation approach and the principle of effectiveness
21.	Nuclear Tests (Australia v. France)	18	Unilateral declaration by states and whether it constitutes a legal commitment
22.	Nuclear Tests (New Zealand v. France)	18	Unilateral declaration by states and whether it constitutes a legal commitment
23.	Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)	16	The interpretation of states' consent to arbitrate, the scope of the MFN clause
24.	Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)	16	Discussing if third parties' consent to arbitrate is indispensable (Monetary Gold Principle)
25.	Pulp Mills on the River Uruguay (Argentina v. Uruguay)	16	Burden of proof
26.	Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)	15	Treaty interpretation, consent to arbitrate
27.	Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)	15	Jurisdiction must exist on the day of filing the claim
28.	Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)	15	Assessing if "legal disputes" exist between parties
29.	Northern Cameroons (Cameroon v. United Kingdom)	15	Assessing if "legal disputes" exist between parties based on ensuring the courts' judicial function

30.	Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)	14	Using the interpretive principle for a unilateral declaration to interpret the national investment law
31.	North Sea Continental Shelf (Federal Republic of Germany v. Denmark)	14	Principle of estoppel
32.	South West Africa (Ethiopia v. South Africa)	14	Assessing if "legal disputes" exist between parties
33.	Border and Transborder Armed Actions (Nicaragua v. Honduras)	13	Principle of good faith
34.	Aegean Sea Continental Shelf (Greece v. Turkey)	12	The definition of international agreement
35.	Competence of the General Assembly for the Admission of a State to the United Nations	12	Treaty interpretation
36.	Electricity Company of Sofia and Bulgaria I	12	Concept of *ratione temporis*
37.	Interpretation of Peace Treaties with Bulgaria, Hungary and Romania	12	Assessing if "legal disputes" exist between parties
38.	Serbian Loans	12	The legal status of domestic law and courts' decisions in international courts
39.	Asylum (Colombia v. Peru)	11	The definition of "arbitrariness"
40.	Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)	11	Principle of good faith
41.	Interhandel (Switzerland v. United States of America)	11	Exhausting local remedies as an admissibility issue
42.	Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)	11	Rule of state immunity
43.	Passage through the Great Belt (Finland v. Denmark)	11	The preconditions of interim measures
44.	Phosphates in Morocco	11	The interpretation of the unilateral declaration
45.	United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)	11	Assessing if a legal dispute exists
46.	Avena and Other Mexican Nationals (Mexico v United States of America)	10	Burden of proof
47.	Electricity Company of Sofia	10	The duty of parties to not

	and Bulgaria II		aggravate the dispute
48.	Kasikili/Sedudu Island (Botswana v. Namibia)	10	Treaty interpretation
49.	Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory	10	Treaty interpretation
50.	Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)	10	The status of "legitimate expectation" and the FET

Table 4 The most frequently cited ICJ/PCIJ cases by ISDS jurisprudence[353]

Second, while remote at first glance, the case law of the European Court of Human Rights accounts for a significant number of references by the ISDS adjudicators–98 ISDS decisions refer to ECHR cases. The relevance of the European Court of Human Rights decisions in investment tribunals can be illustrated by several aspects. A preliminary survey demonstrates that a majority of references to ECHR precedents focus on (1) the right to property, which is the guarantee provided by Article 1 of the First Additional Protocol to the ECHR; (2) the due process principle as stipulated in Article 6 of the ECHR; and (3) the concept of regulatory space enjoyed by sovereign states. Similar roles may also be achieved by citing the jurisprudence of the Inter-American Court of Human Rights, where 22 references are made among the coded ISDS cases.

Several cross-references are also made by resorting to the cases in the WTO dispute settlement mechanism (38 references) and the International Tribunal for the Law of the Sea (ITLOS, 20 references). The use of the WTO jurisprudence by investment arbitral tribunals seems to be an intuitive exercise since trade and investment legal terrains are "on parallel tracks headed in the same direction.[354]", namely economic globalization. Trade and investment regimes are converging because these two legal regimes are increasingly codified in the same treaties but are also drafted with common treaty languages that provide similar substantive protections. Hence, investor-state arbitrators may find it useful to resort to the WTO case laws that ascertain overlapping legal concepts between these two fields, such as the non-discrimination principle and general exception clauses.[355] While the subject

[353] This table only lists those ICJ/PCIJ cases that are cited by over 10 investment arbitral awards.
[354] Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12(1) SANTA CLARA J. INT'L L. 35, 60 (2014)
[355] JURGEN KURTZ, THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEM 10-20

matters seem to be remote from the ISDS tribunals, the ITLOS references actually offer valuable guidelines to clarify procedural rules regarding arbitral proceedings.[356] Overall, these simple descriptive statistics reveal that investment arbitral tribunals are not shy about making external references. The referenced points are not limited to the ICJ and PCIJ – which are the predominant sources for interpreting customary law and general principle of laws but are also extended to other specialized international judiciaries, such as the courts of human rights, trade, and the law of the sea. The judicial cross-fertilization observed in investment arbitral awards is distinct from WTO decisions, as these external references introduce not only primary but also secondary rules of international law into the deliberation of investment arbitration. In other words, a broader range of regime-specific legal sources are cited in the context of the ISDS and interact with the provisions of the investment treaty.

(2016).

[356] *See*, *e.g.*, Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award, ¶ 193 (Aug. 6, 2019) (The responding state relied on *Mox Plant (Commission v. Ireland)* case to argue that the tribunal shall not exercise jurisdiction over this case because the subject matters relate to the EU environmental legislation and can only be adjudicated via the ECJ.) *See also* Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex), ICSID Case No. ARB/10/18, Decision on Jurisdiction, ¶ 477 (Aug. 19, 2013) (The tribunal referred to *Guyana v. Suriname* case and discussed if the principle of clean hands forms part of international law.)

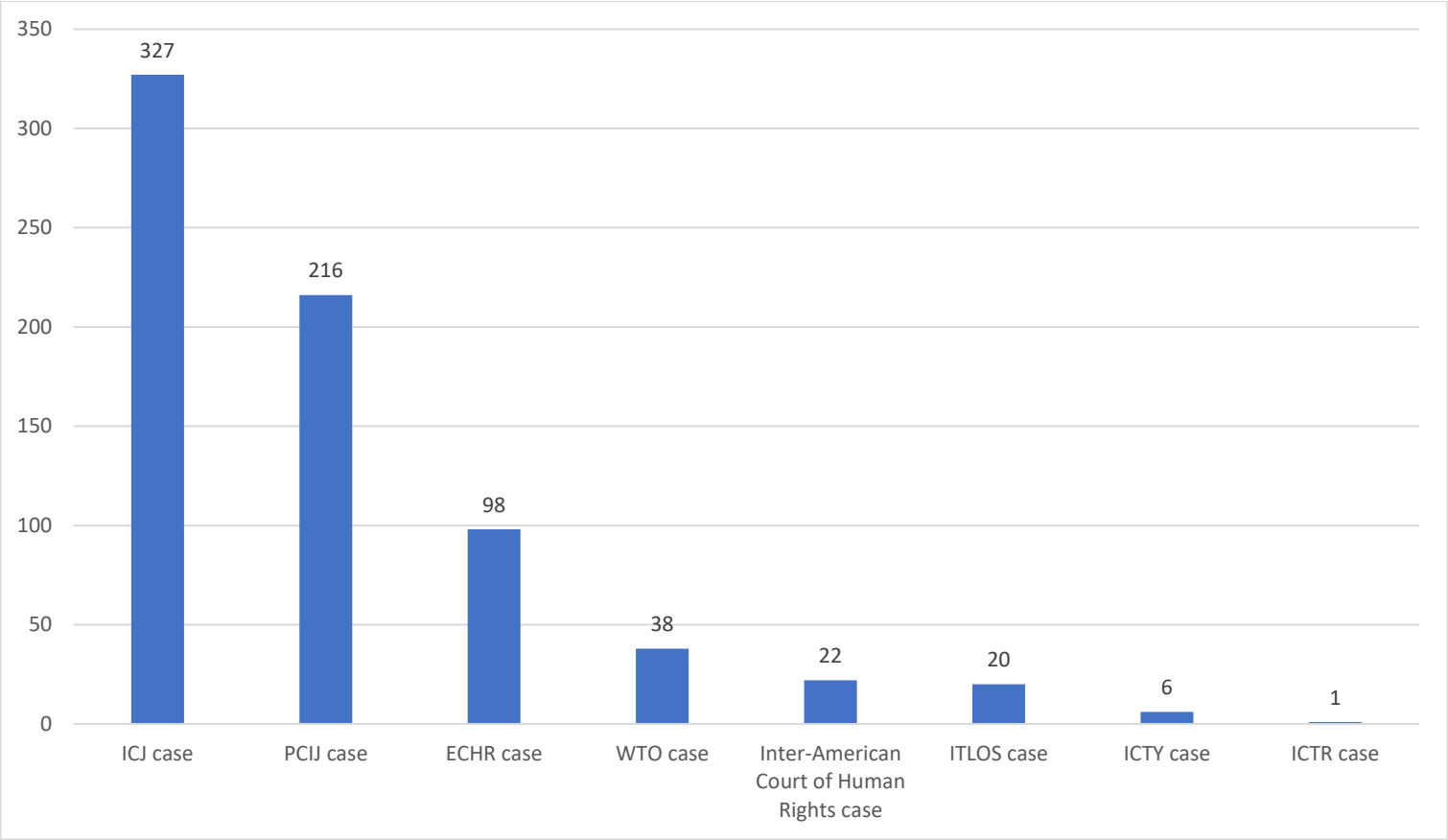

Figure 10 The number of international courts' judgments at investment arbitral awards

B. The Factors Associated with Citing External International Legal Sources

What are the specific factors prompting investment arbitral tribunals to resort to external international legal sources citations? In Chapter I, I proposed several normative and practical appeals that may encourage international adjudicators to embrace external international legal sources argued by disputing parties, third parties, or raised *sua sponte*. In the context of the international investment regime, additional peculiarities contribute to judicial engagements and cross-fertilizations. Similar to the methods applied to the WTO dispute settlement mechanism, this section identifies possible variables that are associated with the extent to which external international legal sources are cited in investment arbitral awards. This section then runs OLS regressions to examine if such associations are statistically significant. Based on the qualitative interview results and the existing literature identifying potential factors that may affect investment arbitrators' attitude toward citing external international legal sources, I focus on the following factors: the nature of the disputing parties, economic sectors involved in the disputes, different generations of investment treaties, the composition of arbitral tribunals, and the involvement of non-disputing parties (e.g., *amicus curiae*).

1. The nature of the disputing parties

As mentioned, conventionally, international investment treaties and the ISDS system are perceived as empowering wealthy multinational enterprises from the global North to sue developing countries over their regulatory measures. For example, the vast majority of the ISDS claims related to mining activities are brought by investors from the global North against low-income countries in the global South. These developing countries usually lack the legal expertise to defend the ISDS claims and have limited financial resources available to participate in the ISDS proceedings.[357] In contrast, investors from the global North have enormous financial resources and strong legal teams to gain an advantageous position in the ISDS proceedings. As a result, it is not surprising that claimants from wealthy countries are able to develop more sophisticated litigation strategies, such as referring to external international legal sources to strengthen the soundness of their claims. Therefore, the

[357] Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights, Note by the Secretary General, UNGA A/78/168 (July 13, 2023).

association between the dynamic of disputing parties and their litigation strategies is worth examining. Depending on the economic development levels of investors' home countries and the responding host states[358], this variable can be defined as a 2 x 2 matrix, namely (1) an investor from a developed country v. a developed host state, (2) an investor from a developed country v. a developing host state, (3) an investor from a developing country v. a developed host state, and (4) an investor from a developing country v. a developing host state.

Table 5 summarizes the statistics from the investment disputes categorized by the dynamic nature of the disputing parties and by the number and percentage of external international legal sources mentioned in each category. The results reveal that foreign investors from wealthy countries are the primary players in investment disputes. These claimants from the global North are responsible for over 84% of investment disputes in our dataset. Notably, disputes raised by wealthy investors appear to introduce more external international legal sources in their awards, regardless of whether the responding host states are developed or developing countries. To some extent, this fact evinces the assumption that foreign investors from the global North are more capable of recruiting attorneys from big law firms with profound experience in ISDS proceedings.

The dynamic nature of disputing parties	Number of Disputes	Number of Disputes Mentioning External International Legal Sources	Number of Disputes without Mentioning External International Legal sources	Percentage of Disputes Referencing to External International Legal Sources	Min. No. sources	Max No. sources	Mean No. sources
Investor from Developed country v. Developed host country	129	119	10	92.24%	0	23	6.39
Investor from Developed country v. Developing host country	342	269	73	78.65%	0	17	3.27
Investor from Developing country v. Developed	14	9	5	64.28%	0	10	3.85

[358] The classification of countries and regions is based on the World Economic Outlook Database maintained by International Monetary Fund (IMF). The country classification in the World Economic Outlook divides the world into two major groups: advanced economies and emerging and developing economies. See https://www.imf.org/en/Publications/WEO/weo-database/2023/April/groups-and-aggregates.

The dynamic nature of disputing parties	Number of Disputes	Number of Disputes Mentioning External International Legal Sources	Number of Disputes without Mentioning External International Legal sources	Percentage of Disputes Referencing to External International Legal Sources	Min. No. sources	Max No. sources	Mean No. sources
host country							
Investor from Developing country v. Developing host country	75	52	23	69.33%	0	20	2.82

Table 5 Disputes Citing External International Legal Sources – By Nature of disputing parties' dynamic

2. Economic sectors of the investment at issue

Second, the nature of investments at stake may also affect any existing external international legal sources in investment arbitral awards. Studies reveal that many of the infrastructural projects subject to ISDS claims have caused detrimental impacts on local communities' right to enjoy a clean, healthy, and sustainable environment.[359] For example, if a foreign investment project at stake concerns mining and extraction activities, the interests and welfare of the local community are more likely to be impacted. In such an investment dispute, external international legal sources protecting human rights, respecting the cultural heritage of indigenous people, or preserving exhaustible natural resources may all be relevant when determining the reasonableness of foreign investors' arguments. On the other hand, for those investments concerning contractual issues, banking services, or other pure business activities, external references may not be that necessary because these types of legal issues could be resolved under the framework of investment treaties. Based on the economic sectors categorized by the International Standard Industrial Classification of All Economic Activities[360], I explore if the concerned economic sectors of the disputes are positively or negatively associated with invoking external international legal sources. The International Standard Industrial Classification of All Economic

[359] Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights, Note by the Secretary General, UNGA A/78/168 (July 13, 2023).
[360] According to UNCTAD Investment Policy Hub, the economic sectors that an investment at issue allegedly belongs involves are categorized by the International Standard Industrial Classification of All Economic Activities, Rev.4 (UN ISIC Rev.4). See https://unstats.un.org/unsd/publication/seriesm/seriesm_4rev4e.pdf.

Activities categorizes three economic sectors: Primary (extraction of raw materials), Secondary (manufacturing), and Tertiary (service industries).[361] Each investment dispute is coded by the nature of the investments at issue.

Table 6 summarizes statistics from the investment disputes categorized by the industrial sectors to which the investment at stake belongs and the number and percentage of external international legal sources mentioned in each category. The results exhibit that external international legal sources are more likely to be cited in disputes concerning investment activities such as mining and quarrying as well as electricity, gas, steam, and air conditioning supply. Such an outcome is unsurprising because both industries may directly influence the welfare of local communities. For mining and quarrying, a significant number of investment disputes or potential ISDS claims arise between foreign extractive corporations and domestic residents. For example, in 1999, Indonesia enacted a law that restricted mining in protected forest areas because of the threat to water supplies of local communities. In response, mining companies from the global North whose operations were affected threatened ISDS claims.[362] Similar circumstances occur in electricity sectors, where countries' energy transition programs are challenged by foreign-owned fossil fuel investors via the ISDS mechanism. These investors alleged that host states' sustainable energy reform measures breached their rights under investment treaties. In the arbitral proceedings, relevant international legal instruments in the field of international environment law, such as the UNFCCC and Kyoto Protocol, might be raised by investors or host states and discussed to determine the legality and necessity of host states' measures.

[361] The primary sector includes following subsectors: (1) Agriculture, and (2) Mining and quarrying. The secondary sector includes following subsectors: Manufacturing. The tertiary sector includes following subsectors: (1) Electricity, gas, steam and air conditioning supply, (2) Water supply; sewerage, waste management and remediation activities, (3) Construction, (4) Wholesale and retail trade; repair of motor vehicles and motorcycles, (5) Transportation and storage, (6) Accommodation and food service activities, (7) Information and communication, (8) Financial and insurance activities, (9) Real estate activities, (10) Professional, scientific and technical activities, (11) Administrative and support service activities, (12) Public administration and defence; compulsory social security, (13) Education, (14) Human health and social work activities, (15) Arts, entertainment and recreation, and (16) Other service activities.

[362] Forestry Act No. 41 of 1999 (Indonesia), https://www.ecolex.org/details/legislation/forestry-act-no-41-of-1999-lex-faoc036649/.

The economic sector that a dispute involves	Number of Disputes	Number of Disputes Mentioning External International Legal Sources	Number of Disputes without Mentioning External International Legal sources	Percentage of Disputes Referencing to External International Legal Sources	Min. No. sources	Max No. sources	Mean No. sources
Primary	115	100	15	86.95%	0	17	4.25
Secondary	77	57	20	74.02%	0	17	3.12
Tertiary	363	290	73	79.88%	0	23	4.03

Table 6 Disputes Citing External International Legal Sources – By Nature of Investments Involved in the Dispute

3. A different generation of international investment treaties

The provisions of investment treaties have been evolving since the first bilateral investment treaty was signed in the middle of the 20th century. The majority of investment treaties concluded before 2005 were first-generation agreements that asymmetrically emphasize the rights and protections for foreign investors, but few stress corresponding human rights, environmental protection, and other public interests of local communities. According to the UNCTAD investigation, only 0.5% of over 2,000 first-generation investment treaties mention human rights and the notion of host states' rights to regulate.[363] Without incorporating treaty provisions preserving states' regulatory space and regulating the responsibilities of foreign investors, states will be unable to invoke their human rights obligations as a defense against taking regulatory action that has an economic impact on a foreign investor.

Notably, the failure to consider non-investment values has been gradually reversed in the language of recent investment treaties. A comprehensive survey focusing on the new generation of international investment treaties signed after 2010 concluded that these new or updated investment treaties entail more legal gateways to accommodate non-economic interests and to respect the state's regulatory space. In the disputes relating to the new-generation investment treaties, we expect more external international legal sources to be introduced to ascertain the notion of non-economic values via the aforementioned "entry points.". To examine this assumption, I divide

[363] Human Rights-Compatible International Investment Agreements, Note by the Secretary-General, UNGA/76/238 (July 27, 2021).

all coded investment disputes into three groups: (1) disputes that are subject to the first-generation investment treaties (i.e., treaties signed before 2005), (2) disputes that are subject to the second-generation investment treaties (i.e., treaties signed between 2005 and 2011), and (3) disputes that are subject to the third generation investment treaties (i.e., treaties signed after 2011).[364]

Table 7 displays summary statistics from the coded investment disputes categorized by their applicable investment treaties and the number and percentage of external international legal sources in each category. Interestingly, the results indicate that while countries noticed the asymmetric nature of investment treaties and started to envisage more entry points for external international legal sources, their efforts seem not to be reflected in real cases. Among the coded cases, over 90% are subject to first-generation investment treaties. For a few disputes subject to second-generation investment treaties, the percentage of citing external international legal sources is even lower than those cases adjudicated by earlier-generation investment treaties.

Generations of investment treaties	Number of Disputes	Number of Disputes Mentioning External International Legal Sources	Number of Disputes without Mentioning External International Legal sources	Percentage of Disputes Referencing to External International Legal Sources	Min. No. sources	Max No. sources	Mean No. sources
First generation (before 2005)	522	421	101	80.65%	0	23	4.04
Second generation (2005-2011)	35	25	10	71.42%	0	11	2.69
Third generation (2011-)	3	3	0	100%	2	2	2

Table 7 Disputes Citing External International Legal Sources – By the applicable investment treaty's generation

4. The composition of arbitral tribunals

The arbitrator's background and its implication on the outcome of arbitral awards have been discussed in the existing literature.[365] Generally speaking, the professional

[364] The cutting point for differentiating "old" and "new" generation investment treaties is based on UNCTAD. See UNCTAD, *Trends in the Investment Treaty Regime and A Reform Toolbox for the Energy Transition*, https://unctad.org/system/files/official-document/diaepcbinf2023d4_en.pdf (2023).
[365] Rodrigo Polanco Lazo & Valentino Desilvestro, *Does an Arbitrator's Background Influence the Outcome of an Investor-State Arbitration?*, 17 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 18 (2018). Michael Waibel & Yanhui Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration*, https://www.yanhuiwu.com/documents/arbitrator.pdf

experience of arbitrators shapes their mindset and their decision-making process. For instance, Roberts contends that arbitrators who have spent the bulk of their career in private practice (e.g., attorney or legal counsel of private sectors) develop the "commercial law" mindset that may shape their idiosyncrasies and their legal analytical framework.[366] In contrast, in international investment arbitration, one hypothesis holds that an arbitrator that comes from legal academia or public service, such as judges in other international judiciaries – especially with a research focus on public international law, may show greater sympathy for the host states' regulatory sphere and may acknowledge the notion of international law coherence[367]. Thus, they would be more confident to refer to external international legal sources in an investment dispute. Furthermore, panel effects influence legal decisions. Conformity pressures the majority-vote deliberative decision-making process of investment arbitration, leading an arbitrator to go along with the majority. Hence, if arbitrators coming from legal academia or having served as adjudicators of other international judiciaries constitute the mainstream voice of the investment arbitral tribunal, we might expect such an arbitral tribunal to exercise judicial engagement and introduce more external international legal sources in their awards if helpful. Thus, I examine whether the arbitral tribunal members' professional background and past experience as international adjudicators may be associated with how frequently external international legal sources appear in one dispute. For this variable, if the majority of the arbitrators in an arbitral tribunal have a legal academia or public service background, then I assign such an arbitral tribunal as having an "academic" composition. Conversely, when the majority of the arbitrators are from private practice, this arbitral tribunal would be considered as having a "private practice" composition.

Table 8 summarizes the statistics of the investment disputes by demonstrating how the arbitral tribunals are composed and the frequency of citing external international legal sources. The outcome shows that for those arbitral tribunals where a majority of arbitrators have an academic background, there is a slightly higher chance that the awards would have external references. Such a result is consistent with scholars' prediction that arbitrators who come from academia or have served as adjudicators of

[366] Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107(1) AM. J. INT'L L. 45, 77 (2013).
[367] Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669 (2007).

other international judiciaries more confidently refer to external international legal sources when necessary.

The composition of arbitral tribunals	Number of Disputes	Number of Disputes Mentioning External International Legal Sources	Number of Disputes without Mentioning External International Legal sources	Percentage of Disputes Referencing to External International Legal Sources	Min. No. sources	Max No. sources	Mean No. sources
Practitioners as majority	247	197	50	79.75%	0	20	3.37
Scholars as majority	308	251	57	81.49%	0	23	4.41

Table 8 Disputes Citing External International Legal Sources – By the composition of arbitral tribunals

5. Participation of amicus curiae

The appeal of promoting transparency of the ISDS mechanism has been prominent for decades, and several initiatives are now codified in the new generation of investment treaties, investment arbitration rules, and the multilateral international convention (i.e., the Mauritius Convention on Transparency). Among these initiatives, enhanced *amicus curiae* participation in the ISDS system may act as an effective channel for NGOs and individuals to bring non-economic concerns into investment arbitral proceedings and to urge investment arbitral tribunals to take broader socio-political contexts into account in their decision-making process. Studies exhibit that NGOs and individuals usually seek to participate in investment disputes as *amicus curiae* if the nature of the cases relates to fulfilling human rights and other public interests.[368] To support their arguments, an *amicus curia* may resort to international conventions or treaties that are the authoritative legal instruments in relevant international legal regimes to make its request more persuasive. As a result, it is expected that when amicus briefs are granted access to an investment dispute, external international legal sources may more likely appear. This variable is a dummy variable where one means an investment dispute involves amicus curiae and zero means otherwise.

Table 9 summarizes the number of investment disputes that involve third-party

[368] *See* Katia Fach Gomez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35(2) FORDHAM INT'L L. J. 510, 543-44 (2012).

intervention as amicus curiae and the frequency of external references in arbitral awards. The data suggests that the acceptance of third-party intervention is still extremely exceptional in the current ISDS mechanism. Nonetheless, among that smaller number of disputes in which NGOs or individuals successfully participated in the arbitral proceedings as amicus curiae, all of these cases mentioned external international legal sources. This result manifests the significant role of amicus curiae in contributing to more judicial engagements and cross-fertilization between the ISDS mechanism and other international legal regimes and judiciaries.

Amicus curiae's participation	Number of Disputes	Number of Disputes Mentioning External International Legal Sources	Number of Disputes without Mentioning External International Legal sources	Percentage of Disputes Referencing to External International Legal Sources	Min. No. sources	Max No. sources	Mean No. sources
Yes	32	32	0	100%	0	23	7.59
No	528	417	111	78.97%	0	23	3.73

Table 9 Disputes Citing External International Legal Sources – By the participation of amicus curiae

6. OLS Regression Analysis

Are these different proportions statistically significant? The OLS linear multiple regression test[369] compares the proportions of citing external international legal sources amid different factors involved in disputes. The null hypothesis states that the proportions among the groups are equal. The dependent variable is the total number of external international legal sources (including other international judiciaries' jurisprudence) in each coded investment award. The independent variables include:

(1) The dynamics of disputing parties. This variable is categorical. Each composition of disputing parties is assigned a number from one to four based on the dynamic of the disputing parties: 1: An investor from a developed country v. A developed host state. 2: An investor from a developed country v. A developing host state. 3: An investor from a developing country v. A developed host state. 4: An

[369] In OLS test, a regression coefficient communicates an expected change in the value of the dependent variable for a one-unit increase in the independent variables.

investor from a developing country v. A developing host state.

(2) The economic sector of the investment at issue. This variable is treated as a categorical variable. Each dispute is assigned a number from one to three based on the nature of the involved investment: 1: Primary; 2: Secondary: 3: Tertiary.

(3) The composition of arbitral tribunals. This variable is a categorical variable. Each dispute is assigned a number one or two based on the arbitrators' professional background of the tribunal: 1: Arbitral tribunals where the majority of arbitrators come from academic backgrounds or have ever served as adjudicators in other international judiciaries. 2: Arbitral tribunals where the majority of arbitrators come from private practice.

(4) The participation of amicus curiae. This variable is a dummy in which an amicus brief was submitted and accepted by the arbitral tribunal.

I further include the following variables to control for their confounding effects on relationships between explanatory variables and the number of external references in investment arbitral awards. The control variables are:

(1) The generation of applicable investment treaties. This variable is categorical. Each generation of an investment treaty is assigned a number from one to three. 1: A dispute is subject to an investment treaty signed before 2005. 2: A dispute is subject to an investment treaty signed between 2005 and 2011. 3: A dispute is subject to an investment treaty signed after 2011.

(2) The year the dispute is brought. In the *supra* section, I display the tendency to have external international legal sources in investment arbitral awards over time. This variable is a continuous variable coded by the year a dispute is registered. The positive coefficient indicates that external international legal sources are increasingly cited in investment awards over time, and the negative coefficient means the opposite.

In the baseline model, I estimate the following econometric specification[370]:

[370] To run the regression model with several categorical variables by R, I used the "is.factor" function to let R know that the variable (e.g., 1, 2, 3, 4) I created is categorical instead of numeric. And the R will automatically make categorical variables into a series of dichotomous variables. All I need to do is to choose the base argument. The outcome of the regression model run by R is the same as the regression model run by other statistics software (e.g., SPSS) which requires making categorical variables into a series of dichotomous variables. See *Coding for Categorical Variables in Regression Models | R Learning Modules*, UCLA ADVANCED RESEARCH COMPUTING STATISTICAL METHODS AND DATA ANALYSIS, https://stats.oarc.ucla.edu/r/modules/coding-for-categorical-variables-in-regression-models/ (last visited Apr. 24, 2024).

$$Y = \alpha + \beta_1 \cdot Disputing\ Parties + \beta_2 \cdot Economic\ Sector + \beta_3 \cdot IIA\ Generation + \beta_4 \cdot Year\ of\ the\ Dispute + \beta_5 \cdot Arbitral\ Tribunal + \beta_6 \cdot Amicus\ Curiae + \varepsilon_i$$

$$N = 555$$

7. Results and discussion

The table below presents the results of the OLS models. Model 1 examines factors of the professional background of the majority of arbitrators in disputes. Model 2 includes tests of the subject matter of disputes, namely, the alleged infringed investments argued by foreign investors. Model 3 observes the participation of non-disputing parties. Model 4 explores the dynamics of disputing parties by their economic development level. Model 5 tests the "time" factor by observing the year of disputes being raised and the generation of applicable investment treaties. Model 6 is the most comprehensive that jointly examines the associations between the dependent variable and all independent variables.

	Dependent variable:				
	Number of external rulings				
	(1)	(2)	(3)	(4)	(5)
Year.of.the.Case	0.095***	0.094***	0.091***	0.068**	0.066**
	(0.028)	(0.029)	(0.028)	(0.028)	(0.027)
BITs.Gen2	-1.941***	-2.044***	-1.812***	-1.188*	-1.248*
	(0.685)	(0.690)	(0.673)	(0.664)	(0.644)
BITs.Gen3	-2.558	-2.551	-2.532	-1.589	-1.080
	(2.205)	(2.219)	(2.165)	(2.117)	(2.053)
Arbitrator_Variable1	1.034***				0.907***
	(0.324)				(0.300)
Economic.sector_var2		-1.197**			-1.447***
		(0.563)			(0.520)
Economic.sector_var3		-0.255			-0.511
		(0.408)			(0.385)
Amicus.Brief			3.767***		2.935***
			(0.678)		(0.653)
Claimant.x.Respondent1				2.946***	2.861***
				(0.378)	(0.376)
Claimant.x.Respondent3				0.502	0.670
				(1.030)	(1.001)
Claimant.x.Respondent4				-0.471	-0.188
				(0.474)	(0.462)
Constant	-186.994***	-184.361***	-178.598***	-133.732**	-128.572**
	(57.244)	(57.566)	(56.226)	(55.349)	(53.618)
Observations	555	555	555	555	555
R^2	0.045	0.036	0.079	0.135	0.195
Adjusted R^2	0.038	0.028	0.073	0.126	0.180
Residual Std. Error	3.787 (df = 550)	3.809 (df = 549)	3.719 (df = 550)	3.611 (df = 548)	3.497 (df = 544)
F Statistic	6.542*** (df = 4; 550)	4.148*** (df = 5; 549)	11.855*** (df = 4; 550)	14.287*** (df = 6; 548)	13.199*** (df = 10; 544)
Note:					*p<0.1; **p<0.05; ***p<0.01

The results of Model 1 show that when an investment arbitral tribunal is primarily

constituted by arbitrators who come from academia or have been adjudicators of international judiciaries, this "academic" tribunal may include more external international legal sources in its award (regression coefficient = 1.034). This positive association is also statistically significant, reaffirming the arguments made by scholars who hypothesize that arbitrators with academic backgrounds may be more comfortable engaging in cross-references by turning to the norms in other international legal regimes or be more conscious of responding to disputing parties' claims grounded on external references.

Compared with the primary economic sector (i.e., agriculture and mining)[371], Model 2 shows that an investment dispute involving both secondary (i.e., processing, manufacturing, and construction) and tertiary (i.e., service) economic sectors are negatively associated with the amount of external international legal sources cited in an arbitral award. Nevertheless, only the negative coefficient (-1.197) of the secondary economic sector shows a significant result ($P < 0.05$). These outcomes are partly in line with the hypothesis that primary investment activities usually result in more negative impacts on host states' local communities, such as water, air, and soil pollution, cultural heritage derogation, and human rights infringements. Therefore, an arbitral tribunal may more often have to turn to other international legal instruments to adjudicate this type of dispute to cautiously consider sovereign states' regulatory space and public welfare. The negative regression coefficient (-0.255) that exists for the service sector (i.e., "Economic.sector_var3") is a surprise. Originally, I expected to observe a positive association between the number of external references in an award, given that there is a series of investment disputes targeting the EU member states' energy transition programs amid the background of implementing UNFCCC and relevant international legal instruments. This mismatch might be explained by most of the environmental treaties, which, when mentioned, only account for an extremely small portion of the entire award. In other words, those international environmental legal instruments play very limited roles for both disputing parties and arbitral tribunals in the ISDS proceedings. The limited function of international environmental legal instruments in investment arbitral proceedings will be qualitatively discussed in the *infra* section.

Model 3 captures the role of amicus curiae in bringing in more external

[371] The primary economic sector (Economic.sector_var1) is the reference group in the regression model to compare the other two economic sectors.

international legal sources to an investment dispute. Unsurprisingly, compared with a case without amicus curiae, an investment dispute that accepts the submission of an amicus brief cites 3.767 more external international legal sources in the award. The result is also statistically significant. The positive regression coefficient corresponds to the assumption that in investment arbitral practice, disputes that involve vital public interests (e.g., right to water, clean air, and cultural heritage) of the local, regional, or even international community would be more likely to invite third parties to represent public welfare in the ISDS proceeding. For example, in *Philip Morris v. Uruguay*, the tribunal accepted two amicus briefs submitted by the WHO FCTC Secretariat and the Pan-American Health Organization. Both briefs described relevant international conventions and state practices, including the WHO FCTC. The arbitral tribunal drew upon the amicus submissions as authoritative evidence when assessing the rationale for the tobacco control measures enacted by the responding state.[372] In *Biwater v. Tanzania*, the amici (including five NGOs led by the International Institute for Sustainable Development) brought the concept of "right to water" and relevant international human rights laws into the ISDS proceeding despite the responding state failing to resort to external references to make such an argument.[373] The arbitral tribunal appreciated the submission from amici since it found their observations useful. The tribunal recognized the legal status of the right to water and states' duty to provide clean and sufficient water to states' populations under international law. It further considered these human rights when assessing if the responding state violated its investment treaty obligations.[374] Overall, the quantitative result demonstrates that the amicus curiae mechanism is an available vehicle for promoting international law convergence and for facilitating judicial engagements between the ISDS proceeding and other international adjudicative bodies.

Mode 4 depicts the association between disputing parties' dynamics and the frequency of having external references in an arbitral award. Setting the dispute between investors from developed countries against developing host states as the base, the model shows a case initiated by a foreign investor against a state where both

[372] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Written Submission (Amicus Curiae Brief) by the WHO and the Secretariat of the Tobacco Control Convention (Jan. 28, 2015).
[373] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Petition for Amicus Curiae Status, ICSID Case No. ARB/05/22 (Nov. 27, 2006).
[374] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Award, ICSID Case No. ARB/05/22 (July 24, 2008).

parties are from the Global North invites 2.946 more external references in an arbitral award. The regression coefficient is statistically significant at the 0.05 level. This outcome somewhat evinces the advantageous status enjoyed by foreign investors and responding host states from the Global North in terms of their relatively strong legal teams and financial resources. As described/detailed in Chapter I, one of the primary objectives of citing external international legal sources is to strengthen the soundness of legal arguments raised in the ISDS proceedings. Claimants and respondents from the global North are more financially capable of being represented by famous law firms that are more experienced with sophisticated litigation strategies during investment treaty arbitration. As affirmed by one of my interviewees, a senior associate from a well-known firm who was assigned to represent both responding host states and foreign investors from the energy industry, resorting to external international legal sources is useful in many aspects, such as enriching the factual background, bringing evidentiary materials to support the rationale of host states' measures, strengthening the convincingness of investors' arguments, and making comparable references for arbitral tribunals to examine legal principles that are embedded in other international treaties.[375] My interviewee also mentioned that as litigants represented their clients, they exhausted all potential legal bases that may be relevant to the dispute. Nevertheless, my interviewee also warns that parties should refrain from arbitrarily introducing external international legal sources and swamping and unduly delaying the arbitral proceeding since such litigation behavior may irritate arbitrators and backfire.[376] In short, the quantitative and qualitative data manifest the assumption that parties from wealthy countries may be better represented, and referring to external international legal sources is one of the common legal strategies acknowledged by litigators.

Model 5 captures all aforementioned independent variables and their associations with the dependent variable. Basically, all the results remain unchanged except for some variations of the regression coefficient for each independent variable.[377]

In addition to the results of the key explanatory variables, the control variables are worthy of being discussed. First, for the factor "year of the case," a minor positive

[375] Interview with the attorney A of the X law firm, June 24, 2023 (on file with author).
[376] *Id.*
[377] Likewise, the Variance Inflation Factor is used to detect potential multicollinearity issues in my model. The result shows that none of the independent variables in this model exceed 4, which mean that the no multicollinearity issues exist in this model.

regression coefficient (0.066) exists in Model 5, thus displaying an increasing trend of mentioning external international legal sources in investment arbitral awards in each subsequent year. This result should relieve some scholars who criticize the ISDS mechanism for being isolated from other international legal regimes and international judiciaries. It is seemingly reasonable to observe the rising trend of citing external international legal sources because there are more double-hatted adjudicators with profound experience in multiple international judicial bodies that are being appointed in investment arbitral tribunals. However, the time factor shows the opposite direction in the context of the applicable investment treaties. When setting the first-generation investment treaties as the base, Model 5 reveals that a negative regression coefficient (-1.248) exists for the variable "BITs.Gen2". The result is statistically significant. In other words, compared with an investment dispute where the first-generation investment treaty is the applicable law, a dispute that uses second-generation investment treaties as the default applicable law has 1.248 fewer external international legal sources introduced by disputing parties or tribunals. The possible explanations may be twofold. First, the number of disputes that are subject to second or even third-generation investment treaties is still extremely limited. Second, while states put great efforts into reforming new investment treaties with the aim of better balancing investment protection with other policy concerns, their effectiveness is still missing in action as neither responding states nor arbitral tribunals have seriously raised and examined those novel investment treaty provisions (e.g., extensive preambles, general exceptions, and right to regulate clause).[378] As a result, more disputes concerning the interpretation and application of those new-generation investment treaties are needed to explore the association between inserting novel treaty provisions and how frequent external international legal sources are in investment arbitral awards.

8. Some caveats

The results generated from the OLS linear multiple regression are not without caveats. Note that the regression result does not necessarily mean that the decision to mention external international legal sources is because the independent variables exist. I by no means aim to establish a causal link between the independent variables and the outcome variable because the value of the adjusted R-square is small (0.180). For

[378] Similar observation, *see* Alschner & Hui, *supra* note 323, at 363-393.

example, the omitted variable bias may occur given that it is highly likely that other factors may exist and more strongly connect to the existence of external international legal sources in the investment arbitral awards. Even if an award is accessible online, the dataset used to run this regression model is incomplete, given that not all the data regarding the independent variables is publicly available. For example, while I am able to collect all the external international legal sources mentioned in an award, other information, such as the nature of investment involved or the professional background of the arbitral tribunal, might not be publicly available. The incompleteness of the dataset further prevents me from making any causal claims based on the regression results. Rather, the regression analysis should be read as an advanced descriptive statistic that aims to further depict when and why external international legal sources are introduced in the ISDS proceeding. The result should be perceived as important for ongoing dialogue with other doctrinal and empirical research focusing on similar topics.

C. Summary

The quantitative content analysis broadly demonstrates the extent to which external international legal sources are mentioned in the investment arbitral awards. I explore the trend of citing external international legal sources over time, the categories of legal instruments introduced in the investment arbitral awards, and the origins of the cited case laws from other international judiciaries. Moreover, the OLS regression results empirically examined the possible factors associated with the frequency of citing external international legal sources in the investment arbitral awards.

The quantitative approach provides a fundamental understanding of the interactions between international investment law and other international legal regimes. Such a distant reading approach, however, falls short of understanding how these external international legal sources are used by investment arbitral tribunals. In the next section, I exercise the more detailed and sophisticated close reading approach – namely, by conducting a qualitative content analysis to examine the representative cases in depth, and conducting several semi-structured elite interviews to both explain investment arbitrators', litigants' and third parties' attitudes toward referencing external international legal sources and to explore the possible roles of

external international legal sources in investment disputes when they are mentioned and cited.

III. A Close Reading: Qualitative Content Analysis of External International Legal Sources in ISDS Proceedings

To offer a deeper understanding regarding how investment arbitral tribunals tackle external international legal sources raised by the disputing parties or referred to by tribunals themselves *sua sponte*, I center on those investment disputes that have external references pertaining to secondary rules of international law and substantively engage in cross-fertilization between international investment law and these external legal regimes: human rights, environment, trade, and anti-corruption. Selecting these four regimes by no means downgrades the importance of other types of judicial engagements exercised by investment arbitral tribunals. Nevertheless, the interactions between the ISDS and the aforementioned regimes are worth exploring because the data suggests that they are frequently introduced in the ISDS proceedings – even if they seem to be distant from the subject matter of investment treaties.

A. The Multiple Roles of Human Rights References in the ISDS Proceedings

1. Overview

Cross-referencing international and regional human rights instruments and respective jurisprudence attracts the attention of scholars and NGOs. When closely reading the cited legal sources originating from the human rights regime, I observe that human rights external references dominantly come from the regional human rights instruments, with the ECHR and its case law as the majority, followed by the American Convention on Human Rights and its jurisprudence rendered by the Inter-American Court of Human Rights. Notably, the references to regional human rights legal instruments are not limited to those countries that are the member states of that cited human rights conventions. Instead, regional human rights laws may be introduced beyond their territorial scope. For instance, the ECHR and its jurisprudence are cited in investment disputes where neither the responding states nor investors' home countries are contracting parties of the ECHR.[379] Comparing with

[379] *See, e.g.*, Toto Costruzioni Generali S.p.A. v. Lebanon, ICSID Case No. arb/07/12, Decision on Jurisdiction (Sept. 11, 2009). *See also* Roberto Ruoppo, *Common Features of the Right to Property and International Investments: Evidence from the use of ECtHR Case law in Investment Tribunals'*

Global legal instruments are only sporadically referred to, including the UDHR, ICCPR, and ICESCR. A few cases involve very specific human rights citations regarding second or third-generation human rights, such as labor rights and indigenous people's rights. Relevant international legal instruments are introduced to the ISDS proceeding accordingly, including the United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization's fundamental conventions.

In terms of the "actors" who are more inclined to engage in external references to international/regional human rights sources, the academic focus often emphasizes how host states may resort to other international legal instruments or jurisprudence rendered by other international judiciaries to justify the inconsistency of their measures allegedly breaching investment treaties. This is also acknowledged by the arbitral tribunals. For instance, the tribunal in *Azurix v. Argentina* positively affirmed that human rights references offer "useful guidance [e.g.] for [the] purpose of determining whether regulatory actions would be expropriatory and give rise to compensation.[380]" Nonetheless, I find that among the coded disputes, investors have more frequently invoked human rights arguments in the ISDS proceeding by resorting to human rights conventions to support the alleged investment treaty violations. For instance, it is commonly seen that investors' proclamations have advanced when regarding arbitrary detention, denial of justice, denial of the right to a fair trial, and deprivation of the right to property.

The next interesting question is: What are the roles that human rights sources may play in the context of ISDS proceedings? International/regional human rights instruments are introduced to provide guidance to investment arbitral tribunals' decision making regarding substantive provisions of the investment treaties. In the following sections, I illustrate several examples to demonstrate how international human rights legal sources were used by the arbitrators and parties of the ISDS proceedings.

2. Human rights references to elucidate the meaning of protected "investments"

The human rights references, especially for those pertaining to the right to property, are relevant when informing the meaning and scope of "investment" in the

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Decisions, 2(2) THE ITALIAN REVIEW OF INTERNATIONAL AND COMPARATIVE LAW 347, 362 (2022).
[380] Azurix Corp. v. The Argentine Republic, ICSID Case No. Arb/01/12, Award, ¶ 312 (July 14, 2006).

context of the ISDS proceedings. Scholars ascertained the common features of "investment" and "property" and found multiple analogies between international investment and human rights laws. To elaborate, both investment and property share the positive aspect of enjoying the asset with economic values and share the negative feature that the right holders are entitled to resist interference from third parties.[381] The asymmetric relationship between the foreign individual (who is also the property holder) and the sovereign state constitutes the premise of both investment tribunals and the human rights courts. Therefore, the jurisprudence pertaining to property rights protection rendered by international human rights courts is naturally appealing for investment arbitral tribunals. To clarify if certain property rights or economic interests are eligible to be the protected "investment" under investment treaties, the legal guarantees provided by international human rights conventions are repeatedly introduced in investment arbitral proceedings. These commonly cited legal instruments include Article 1.1 of the First Additional Protocol to the ECHR, which provides that individuals and legal persons are entitled to the peaceful enjoyment of their possessions[382]; Article 21 of the American Convention on Human Rights, which protects the right to the use and enjoyment of individuals' property[383]; and Article 17 of the Universal Declaration of Human Rights that covers the right to own property.[384] For foreign investors and investment arbitral tribunals, the fruitful case laws surrounding the concepts of property rights are extremely referenceable to analogically define the protected "investments" underpinned in investment treaties. For example, in *Saipem v. Bangladesh*, the jurisprudence of the European Court of Human Rights was cited to support the assertion that immaterial rights can also be property rights protected by the investment treaty.[385] In *Roussalis v. Romania*, the claimant based his argument on the provision of the right to property stipulated in Article 1 of the First Additional Protocol to the ECHR to argue that the tax claim shall

[381] Ruoppo, *supra* note 379, at 348.
[382] First Additional Protocol to the European Convention on Human Rights, Art. 1.1 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions…..")
[383] American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, Art. 21.1 ("Everyone has the right to the use and enjoyment of his property….")
[384] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), Art. 17.1 ("1. Everyone has the right to own property alone as well as in association with others.")
[385] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶¶ 130 & 132 (Mar. 21, 2007)

also be a protected "investment".[386]

3. Human rights references to distinguish regulatory measures and compensatory expropriation

In cases dealing with the claims regarding the boundary between regulatory takings and indirect expropriation, the concept of "margin of appreciation" and the principle of proportionality developed under the ECHR case laws are applied by investment arbitral tribunals to determine if compensation is needed. For example, in *Tecmed S.A. v. Mexico,* the Mexican government assured the claimant that all the necessary permits would be approved for operating the landfill project. However, the project could not continue since one of the construction permits was denied by the local government due to environmental concerns. The claimant contended that denying the permit that caused the investment project to be terminated constituted a *de facto* expropriation. To determine if the claimant's argument could be upheld, the tribunal referred to the ECHR jurisprudence to define the concept of *de facto* expropriation. The tribunal also introduced the proportionality and balancing test to examine if a regulatory measure that negatively impacts foreign investors' investment interests may eventually amount to an expropriation.[387] Furthermore, the ECHR case *James and Others v. United Kingdom*[388], which is the most frequently cited case in the ISDS proceedings, was mentioned to highlight the vulnerable status of foreign investors and to demonstrate how such a fact should be considered when exercising the proportionality analysis. By referencing *James and Others,* the tribunal concluded that the public purpose of a measure plays a less significant role when the affected individual is a foreigner.[389] In another case, *National Grid v. Argentina*, where the investor claimed damage to its investment arising out of Argentina's emergency measures tackling the financial crisis, the respondent submitted recourse to the ECHR and its relevant case law (e.g., *Jahn and Others v. Germany*[390]) to argue that host states should be accorded a margin of appreciation to determine the necessity of the

[386] Spyridon Roussalis v. Romania, Award, ICSID Case No. ARB/06/1, ¶¶ 63-66 (Dec. 7, 2011).
[387] Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, Award, ICSID Case No. ARB(AF)/00/2, ¶¶ 116 & 122 (July 28, 2000).
[388] James and Others v. United Kingdom, ECtHR Application no. 8793/79, Judgment (Feb. 21, 1986)
[389] Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, Award, ¶ 122, ICSID Case No. ARB(AF)/00/2 (July 28, 2000).
[390] Jahn and Others v. Germany, 43 I.L.M. 522 (2004).

challenged measure.[391] The arbitral tribunal agreed with Argentina that the sovereign state shall enjoy certain regulatory space while resorting to Article 25 of the ILC Draft Articles instead of the ECHR rulings cited by the respondent.[392]

4. Human rights references to shed light on the FET standard

Another important role of global/regional human rights is to illuminate how the FET standard is interpreted. The ISDS jurisprudence reveals that both investors and responding states may benefit from referencing human rights legal instruments to substantiate their arguments. Assessing the legitimate expectations of the investor has become a prominent circumstance to consider human rights. For instance, in *Modev v. US*, one of the investor's FET claims was based on the general immunity conferring Boston's government as disproportionate, thus violating the FET standard under Article 1105 of the North American Free Trade Agreement (NAFTA). To support its assertion, the claimant relied on Article 6.1 of the ECHR, which protects the right to a fair trial, to argue that the local government's immunity from being sued had committed a denial of justice. The tribunal recognized that conferring immunities to state agencies before that states' own judicial system may "raise questions of consistency with Article 6.1 of the European Convention on Human Rights, because they effectively exclude access to the courts in the determination of civil rights.[393]" However, it indicated that the European Court of Human Rights had also affirmed that applying Article 6.1 of the ECHR may not create a substantive right that "has no legal basis in the state concerned.[394]" Ultimately, the tribunal dismissed the claimant's FET argument by ruling that only "limited immunity from suit for interference with contractual relations" was conferred to the city government.[395] Therefore, such an immunity was not disproportionate under Article 6.1 of the ECHR as applied by the European Court of Human Rights and did not amount to a breach of Article 1105 of NAFTA. Another example can be found in *Micula v. Romania*. The claimant accused Romania of trampling on its legitimate expectation by failing to honor the commitments of granting policy incentives for a certain period of time that had been

[391] National Grid plc v. The Argentine Republic, Award, ¶ 247(n), UNCITRAL Arbitration Rules 1976 (Nov. 3, 2008).
[392] ILC Draft Articles, Art. 25.
[393] Mondev International Ltd. v. United States of America, Award, ¶ 143, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002).
[394] *Id*.
[395] *Id*. at 154.

promised. The expert from the claimant's side cited the ECHR's case law on legitimate expectations and legal foreseeability to support its FET claim. [396] While not explicitly responding to the ECHR's jurisprudence used by the claimant, the arbitral tribunal indirectly referred to the criteria developed by the European Court of Human Rights and concluded that revoking the incentive violated the claimant's legitimate expectation and the FET clause.[397]

Hesham Talaat M. Al-Warraq v. Indonesia is the latest and most distinct example of how human rights laws are being used to affect the case outcome. In this case, the claimant submitted that his right to be presumed innocent was infringed upon by the host state, and the criminal proceedings against him were unfair and inconsistent with the fundamental procedural guarantees. To link his claim to Indonesia's investment treaty obligation, the claimant grounded his argument on Article 10.1 of the OIC Agreement, reasoning that the term "basic rights" shall include the civil and political rights of investors.[398] A series of human rights instruments, including Article 11 of the Universal Declaration of Human Rights, Article 14.2 of the ICCPR and its General Comment No. 13, Article 8.2 of the American Convention on Human Rights, Article 6.2 of the ECHR, and Article 7.1(b) of the African Charter on Human and People's Rights, were referred to by the claimant to elucidate the substance of the right to fair trial and the right to be presumed innocent. [399] Nevertheless, the arbitral tribunal perceived that the term "basic rights" under Article 10.1 of the OIC Agreement did not cover the civil political rights as argued by the investor. Rather, Article 10.1 is only concerned with ownership rights when interpreting the term in the specific context of the OIC Agreement.[400] This conclusion, however, does not infer that the human rights references are irrelevant. In contrast, the arbitral tribunal took these human rights legal instruments into account when assessing the sub-elements of the FET claims, including the claimant's right to be present at trial, to defend himself, to be properly informed of the charge, and to be presumed innocent. [401] The arbitral tribunal substantively discussed the states' obligations under Article 14 of the ICCPR

[396] Ioan Micula, Viorel Micula and others v. Romania (I), Award, ¶ 425, ICSID Case No. ARB/05/20 (Dec. 11, 2013).
[397] *Id*. ¶¶ 665-673.
[398] Hesham Talaat M. Al-Warraq v. Republic of Indonesia, Final Award, ¶¶ 218-224, UNCITRAL (Dec. 15, 2014).
[399] *Id*. ¶¶ 240-46.
[400] *Id*. ¶¶ 521-22.
[401] *Id*. ¶ 621.

together with other human rights conventions and concluded that Indonesia failed to afford fair and equitable treatment to the claimant because of its inconsistent human rights laws. Such a FET analysis was, in fact, applying global/regional human rights legal instruments in the context of investment treaty arbitration.[402]

5. Other notable human rights references

In terms of other more specific human rights references (e.g., labor rights, indigenous peoples' rights, or the right to water) in the ISDS proceeding, I observe that most of them are usually overlooked or even rejected for either lacking jurisdiction or disputing parties failing to substantiate their claim. In *UPS v. Canada*, one of the claims brought by the investor was whether Canada unduly restricted postal workers' collective bargaining rights protected by the fundamental conventions of the International Labour Organization. The claimant contended that depriving its collecting bargaining rights constituted a breach of the minimum standard of treatment stipulated in Article 1105 of the NAFTA.[403] Unfortunately, the tribunal was silent on this human rights argument; thus, we are unable to examine how labor rights could play in the ISDS proceedings. In *Grandriver Enterprise v. US*, the claimant invoked a series of international human rights obligations protecting the economic rights of indigenous peoples (e.g., Article 21 of the American Convention on Human Rights, Article 17 of the Universal Declaration of Human Rights, Articles 17 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples, and Article 6(1)(a) of ILO Convention 169), and perceived the principles enshrined in these legal instruments as the customary minimum standard treatments applicable under Article 1105 of the NAFTA. Specifically, the investors contended that Article 1105 of the NAFTA obliged the host state to take "pro-active steps to consult with indigenous investors prior to imposing a measure that will impact upon them or their community," and the US failed to consult the claimant prior to enacting the regulation that negatively affected indigenous communities. The arbitral tribunal acknowledged that previously consulting with the affected indigenous community had gained customary law status. It also condemned the US for failing to consult in advance.[404] Nevertheless, the tribunal contended that the right of consultation is a collective right instead of a

[402] Kube & Petersmann, *supra* note 93, at 78.
[403] United Parcel Service of America, Inc. (UPS) v. Government of Canada, ICSID Case No. UNCT/02/1, Award on the Merits, ¶ 186 (May 24, 2007).
[404] *Id*. ¶¶ 211-12 & 247.

direct right to individuals. Given that the claimants were unable to sufficiently demonstrate that they were the legitimate representatives of *Grandriver*, the tribunal dismissed the "NAFTA Article 1105 claim" (i.e., the FET standard) since individual investors' right to be consulted did not fall within the scope of the minimum standard treatment.[405]

6. Who benefits more from the human rights references?

While human rights issues are relevant in the ISDS proceedings, explicit human rights arguments are rarely made by disputing parties. Where human rights issues have been raised, arbitral tribunals' attitudes toward the applicability and relevance of international human rights law are also diverging. For instance, some arbitral tribunals in Argentinian financial crisis cases adopted a more human rights-friendly approach by actively examining the claims or defenses grounded in the European Convention for the Protection of Human Rights and Fundamental Freedoms, even when the disputing parties are not the contracting parties of the Convention.[406] According to my interviewee, who was the officer working at the Ministry of Finance of Argentina, referring to human rights was actually the last resort, but eventually, such cross-references became successful litigation strategies that resulted in favorable outcomes in some cases.[407] However, others are skeptical about the relevance of international human rights law and the analyses rendered by respective international human rights courts. For instance, in two investment disputes that are factually related, *Pezold v Zimbabwe* and *Border Timbers v Zimbabwe*, the arbitral tribunals refused the human rights arguments initiated by Zimbabwe and an *amicus curiae*. In the former case, the investor cited a series of ECHR jurisprudence for introducing the proportionality principle and argued that the public interests pursued by the challenged measure shall outweigh the affected investment interests. However, the arbitral tribunal dismissed the proportionality argument since "the Tribunal is not aware that the concept has found much support in international investment law.[408]" For the *amicus* submission, the NGO resorted to Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples to support Zimbabwe's measure that recognizes and protects their

[405] *Id*. ¶ 213.
[406] ALVAREZ, *supra* note 79, at 109.
[407] Interview with the government official B of Argentina, June 1, 2023 (on file with author).
[408] Bernhard von Pezold and others v Republic of Zimbabwe, Award, ¶¶ 465-66, ICSID Case No ARB/10/15 (July 28, 2015).

indigenous people's lands. However, the tribunal rejected the relevancy of the external reference and further stated that "the reference to 'such rules of general international law as may be applicable' in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs.[409]"

Additionally, the impacts of these human rights references are also worthy of note. I find that arguments based on external international legal sources introduced by the claimant seem to receive more attention from the tribunals and, thus, exert influence on the results of cases.[410] In contrast, tribunals have predominantly declined to engage with external references or arguments by host state respondents as the defense for their challenged measures.[411] Also, tribunals had inadequately responded to human rights issues raised in amicus briefs – even when the submissions were accepted and the *amicus curiae* demonstrated strong legal or factual relevance to the disputes.[412] In brief, the external references to human rights legal sources exercised by investment arbitral tribunals might necessarily benefit states' duties of protecting and fulfilling human rights, as argued by the convention wisdom.

B. A unilateral reliance on the WTO jurisprudence

1. Overview

International trade and investment are separate legal regimes governed by different sets of rules. Nevertheless, as trade and investment activities are "on parallel tracks headed in the same direction[413]" – namely to promote economic globalization and integration, a wide range of overlaps are increasingly converging between these two legal fields.[414] For example, the General Agreement on Trade in Services (GATS) imposes certain obligations on WTO members to protect the rights and benefits of service suppliers from other members who establish local subsidiaries or

[409] Border Timbers Limited and others v Republic of Zimbabwe, Procedural Order 2, at ¶¶ 25-28, ICSID Case No ARB/10/25 (June 26, 2012).
[410] Steininger, *supra* note 255, at 43.
[411] Coleman et al., *supra* note 15, at 19. *See also* Susan Karamanian, *Human Rights Dimensions of Investment Law*, *in* HIERARCHY IN INTERNATIONAL LAW 236, 261 (Erika De Wet & Jure Vidmar eds., 2012); Kube & Petersmann, *supra* note 93, at 86. Moshe Hirsch, *The Sociology of International Investment Law*, *in* HIERARCHY IN INTERNATIONAL LAW 148-158 (Erika De Wet & Jure Vidmar eds., 2012).
[412] Coleman et al., *supra* note 15, at 19.
[413] Alford, *supra* note 354, at 60.
[414] *See* Sergio Puig, *International Regime Complexity and Economic Law Enforcement*, 17(3) J. INT'L ECO. L. 491, 495 (2014).

companies.[415] Such a mode of trade in service is called "commercial presence" under the GATS and is exactly the type of foreign investment activity that is entitled to investment protection if both WTO members also signed the bilateral investment treaty. In addition, under the Agreement on Trade-Related Investment Measures, WTO members have agreed not to apply certain trade-related measures that restrict or distort foreign corporations' decisions on their investment operations. Those measures include prohibiting local content requirements, unlawful technology transfer, and trade-balancing requirements.[416] These types of provisions that may influence investment interests enjoyed by foreign investors can also be found in most investment treaties. Since both trade and investment legal regimes are equipped with dispute settlement mechanisms to exercise judicial review of treaty parties' violations of international law, it is reasonable to explore cross-fertilization occurring between these two judiciaries. The descriptive statistics conducted in the *supra* section also confirm that the laws of WTO and its jurisprudence account for a significant portion of external citations in the ISDS proceedings. Interestingly, unlike the WTO Panels and the Appellate Body, which rarely relies on the case law from the international investment legal regime, the WTO jurisprudence is a vital lighthouse for investment arbitral tribunals to elaborate the investment treaty clauses that share similarly worded terms with relevant WTO agreements. The empirical finding fails to support the assertion that trade and investment regimes are increasingly converting, given that such a judicial dialogue between the WTO and the ISDS is unilaterally interacting.

After closely investigating the coded investment awards that have WTO references, I identify the roles of WTO law and its jurisprudence into two categories. First, the WTO law is used to support general propositions, such as the principles of treaty interpretation, general principles of law, and buttressing the procedural rules relating to the function of international judiciaries. Second, the WTO law is introduced to enrich the substantive law of investment protections by referencing the substance of WTO treaty provisions and its jurisprudence to inform the meaning of investment treaty provisions. Specifically, most cases where the WTO law and its jurisprudence substantially shed light on the interpretation of the investment treaty

[415] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994). *See generally* Philip Chang et. al., *GATS, the Modes of Supply and Statistics on Trade in Services*, 33(3) J. WORLD TRADE 93 (1999).

[416] Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186

clause occur in the context of NAFTA disputes between the US, Canada, and Mexico, as well as in investment cases arising from Argentina's financial crisis.

2. Referencing the WTO laws to clarify procedural issues or reaffirm customary international law

In terms of clarifying procedural issues or reaffirming customary international law, the WTO case law and other international judiciaries, such as the ICJ and PCIJ, are equally significant. For example, in *Yukos Universal Limited v. Russia*, the responding state cites two WTO cases[417] together with a series of ICJ cases to introduce the doctrine of estoppel as a general principle of law. The responding state argues that the tribunal shall dismiss Yukos's claim given that it has failed to satisfy the legal standard for estoppel.[418] In *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, the arbitral tribunal references a WTO Appellate Body report[419] and other international courts' case law to generalize the criteria of determining if there has been an abuse of right to elaborate the principle of good faith and to evince its status as a general principle of international law.[420] The tribunal ruled that the restructuring of the claimant's investment constitutes an abuse of rights because it occurred when there were already pending disputes relating to this case. Hence, the foreign investor's claim shall be partially dismissed because the restructuring was solely for the purpose of gaining jurisdiction under the investment treaty.[421] Relying on WTO jurisprudence to manifest the general principles may not be perceived as proof of "convergence" between trade and investment regimes since it could also be found in the case laws of other international courts. However, this type of judicial engagement demonstrates that the WTO dispute settlement mechanism is still seen by investment arbitrators as one of the authoritative and respected sources for investment arbitral tribunals to ascertain legal questions relating to public

[417] Panel Report, *Guatemala – Definitive Anti-Dumping Measures On Grey Portland Cement From Mexico*, WT/DS156/R, ¶¶ 8.23–8.24 (Oct. 24, 2000); Panel Report, *Argentina – Definitive Anti-Dumping Duties On Poultry From Brazil*, WT/DS241/R, ¶ 7.39 (Apr. 22 2003).
[418] Yukos Universal Limited (Isle of Man) v. Russia, PCA Case No. 2005-04/AA227, Final Award, ¶1322 (July 18, 2014).
[419] Appellate Body Repot, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS/108/AB/R, ¶ 166 (Feb. 24, 2000).
[420] Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶¶ 169-175 (June 10, 2010).
[421] *Id*. ¶¶ 186-205.

international law.[422]

3. The idea of trade-infused international investment law?

What does "substantive" trade and investment convergence look like in the context of citing WTO laws in the ISDS proceeding? Regarding trade-infused international investment law, parties or arbitral tribunals have used the Most Favored Nations (MFN) clauses or the National Treatment (NT) clauses formalized in the WTO GATT and GATS Agreements and relevant jurisprudence focusing on these two legal doctrines to shed light on how to interpret the MFN and NT clauses of investment treaties.[423] Referencing the WTO jurisprudence that interprets and applies the rules against discrimination (i.e., MFN and NT clauses) is a pragmatic approach to disputing parties and investment arbitral tribunals. Relying on the cross-pollination of legal concepts and analogical interpretation can give meaning to generic but similar treaty language. As a result, disputing parties and investment arbitral tribunals intend to strengthen the persuasiveness and soundness of their arguments and analyses of MFN and NT provisions in the context of the ISDS. In addition to informing MFN and NT provisions, referencing the WTO agreements may assist in concretizing the scope and concept of other substantive investment protection clauses, such as the FET standards and indirect expropriation, both of which are notoriously ambiguous and expansive. For instance, the TBT Agreement and TRIPS Agreement may be used to import fruitful jurisprudence regarding the nature of countries' restrictive measures that distort both trade and investment activities. Moreover, the WTO jurisprudence offers an instructive analytical framework for investment arbitral tribunals to weigh and balance the legitimate objective of the challenged governmental measures and foreign investors' economic loss resulting from those measures.

For example, a series of investment disputes that emerged under NAFTA's Chapter Eleven (Investment Chapter) engage in crafting "trade-infused" MFN and NT standards in the context of investment law. his situation illustrates a classic scenario in trade-infused international investment law, where such cross-fertilizations usually occur when analogically comparing the element, such as "like products" in trade law to "like circumstances" in investment law, as well as the terms establishing the

[422] Gregory Shaffer et al., *The Extensive (But Fragile) Authority of the WTO Appellate Body*, 79 L. & CONTEMP. PROB. 237, 262-63 (2016).
[423] Puig, *supra* note 414, at 506-07.

conditions of competition, such as "less favorable treatment." For instance, in *Pope & Talbot v. Canada*, the measure at issue concerns Canada's allocation of quotas for softwood lumber exports that constituted discrimination against non-Canadian enterprises. The claimant alleged that the quota violated Canada's NT guarantee under Article 1102 of NAFTA. In response, Canada contended that the quota discrimination had not run against its legal obligation under NAFTA because such discrimination did not "disproportionately disadvantage" foreign actors as a group.[424] The arbitral tribunal extensively walked through the WTO jurisprudence regarding the element of "like product" under Article III of the GATT and eventually dismissed Canada's contention. The tribunal referred to *EC-Bananas, EC-Asbestos,* and *US-Section 337* to reject Canada's argument since none of the WTO jurisprudence relied on disproportionality as an element of its analysis.[425] In addition, the claimant's argument regarding the desirability of referencing the WTO jurisprudence is also noteworthy. The investor claimed that the meaning of the NT in NAFTA's investment chapter has a "generally ascribed meaning derived from WTO reports with appropriate changes depending on its context in the NAFTA.[426]" Although there was no explicit acknowledgment, the fact that the tribunal directly drew on WTO jurisprudence to enlighten the meaning and scope of NT under the NAFTA investment chapter may itself manifest that the claimant's perspective regarding the analogies to WTO law was upheld by the tribunal.

Another more consequential reference to WTO law and its jurisprudence regarding non-discrimination standards was exercised by the tribunal in *Merrill & Ring v. Canada*. In this case, the litigants disputed if the terms "like products" used in GATT and "like circumstances" used in Article 1102 of the NAFTA shall be read equally. The investor proclaimed that the NT clause in the NAFTA reflects the influence of Article III:4 of the GATT, but its application is broader insofar as it applies to investors and investment in the same economic sector competing in the market without being restricted to the same geographical area.[427] In response, Canada responded that the claimant was not discriminated against since the comparators are

[424] Pope & Talbot Inc. v. Canada, UNCITRAL Arbitration Rules 1976, Award on the Merits of Phase 2, ¶¶ 43-45 (Apr. 10, 2001).
[425] *Id*. ¶¶ 46-63.
[426] Pope & Talbot Inc. v. Canada, UNCITRAL Arbitration Rules 1976, Memorial of the Investor Initial Phase, ¶ 49 (Jan. 28, 2000).
[427] Merrill & Ring Forestry L. P. v. Government of Canada, ICSID Case No. UNCT/07/1, Award, ¶¶ 63-64 (Mar. 31, 2010).

those domestic sectors located in the same region. Given that both foreign and domestic log producers on the coast of British Columbia were subject to the same regulation, the claimant did not suffer any nationality-based discrimination. Canada further asserted that even if there is a need to identify other comparators that are in "like circumstances," the treaty language of Article 1102 of the NAFTA enables broader consideration of diverse factors, which include respondent states' public policy concerns.[428] While the tribunal did not exclude the possibility that the NAFTA NT clause may be read in the context of WTO case law emphasizing the notion of ensuring equality of treatment with respect to competitive opportunities, it eventually sided with Canada. The tribunal recognized that the concept of "in like circumstances" under Article 1102 of the NAFTA shall be understood in a broader sense to allow for considering relevant elements.[429] Surveying investment arbitral tribunals' attitudes toward WTO law and jurisprudence with a special focus on the interpretation of non-discrimination provisions, I observe that "like circumstances" encompass not just the consideration of economic competitiveness but also other public policy concerns, such as environmental protection in *S.D. Myers* case. This example demonstrates how investment arbitral tribunals import the WTO laws and relevant Panel and Appellate Body reports to enlighten the interpretation of investment treaty clauses with similar wording. At the same time, the tribunals would not mechanically apply the rulings rendered by the WTO adjudicators but instead tailor the trade law in the context of investment treaties.

Other ISDS jurisprudence shows increasing external references to the WTO laws and cases that go beyond the MFN and NT clauses. For instance, a series of investment disputes that targeted Argentina engaged in cross-referencing the exception clauses in the WTO GATT. In three Argentine financial crisis disputes (i.e., CMS, Enron, and El Paso cases), the tribunals resorted to Article XXI of the GATT. These disputes arose out of the catastrophic economic crisis Argentina underwent in early 2000. The foreign investors in these cases asserted that Argentina's financial emergency measures, which were allegedly implemented amid the unprecedented institutional, social, and economic collapse, constituted violations of the FET, expropriation, and the umbrella clause because the measures significantly impacted

[428] *Id*. ¶¶ 69-74.
[429] *Id*. ¶¶ 86-87.

the value of the claimant's portfolio of invested securities in Argentina.[430] One of Argentina's defenses was the reliance on Article XI of the US-Argentina investment treaty, which excuses any violations of the investment treaty if measures are taken "for the maintenance of public order" or to protect "essential security." [431] Argentina argued that Article XI of the US-Argentina investment treaty was "self-judging." In other words, the arbitral tribunals lack jurisdiction over the issues of whether the measure is necessary and whether the measure is to protect essential security. Instead, the tribunal can only determine if Article XI as a whole had been invoked in line with the principle of good faith under customary international law.[432] To ascertain if Article XI of the US-Argentina investment treaty was self-judging in nature, the arbitral tribunal referred to Article XXI of the GATT, which provides that "Nothing in this Agreement shall be construed…(b) to prevent any contracting party from taking any action *which it considers* necessary for the protection of its security interests….[433]" From these tribunals' perspectives, the critical wording embedded in Article XXI of the GATT, namely "which it [the state] considers," manifested that this provision is self-judging in nature. Without such explicit treaty language, the tribunals in these cases concluded that Article XI of the US-Argentina investment treaty was not self-judging, and they were entitled to exercise their jurisdiction over Argentina's invocation of the essential security exception.[434]

Nevertheless, the interpretation of the "measures not precluded clauses" like Article XI of the US-Argentina investment treaty was inconsistent among the

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[430] The discussion of investment disputes arising out from the Argentina's financial crisis can be found at: Stephen K. Park & Tim R. Samples, *Tribunalizing Sovereign Debt: Argentina's Experience with Investor-State Dispute Settlement Investor-State Dispute Settlement*, 50(4) VAND. J. TRANSNAT'L L. 1033 (2017).

[431] *See, e.g.*, Treaty Between United States of America and The Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Art. XI ("This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.")

[432] Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59(2) INT'L & COMP. L. Q. 325 (2010).

[433] GATT, Art. XXI(b) ("Nothing in this Agreement shall be construed…(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations;…").

[434] Relevant examples, CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, ¶¶ 371-73 (May 12, 2005). Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶¶ 327-332 (May 22, 2007).

investment arbitration community. Unlike the aforementioned tribunals that referenced Article XXI of the GATT, the tribunal in *Continental Casualty v. Argentina* resorted to Article XX of the GATT and a series of WTO cases elaborating the concept of "necessary" to interpret Argentina's plea of necessity within the meaning of the investment treaty between the US and Argentina. Recognizing that Argentina's effort to restore civil peace and normal life destroyed by the financial crisis was a way to maintain public order and essential security interests, the next step was for the arbitral tribunal to assess if those emergency measures adopted by Argentina were "necessary" under Article XI of the US-Argentina investment treaty. The tribunal turned to the "necessity test" developed by the WTO jurisprudence because "the text of Article XI derives from…Article XX of GATT 1947." Hence, it was appropriate to resort to the WTO case law that has "extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT.[435]" Drawing from the WTO jurisprudence that considers a measure to be unnecessary if another less treaty-inconsistent alternative measure is reasonably available and could contribute to the realization of the end goals, the arbitral tribunal ruled that Argentina was not liable on most of the claims because the challenged measures were inevitable, unavoidable, and indispensable and no other reasonably available alternatives existed.[436]

The latest investment arbitral jurisprudence engages in more diverse cross-references to the WTO law. In *Union Fenosa Gas v. Egypt*, the claimant resorted to the WTO jurisprudence on Article XI:1 of the GATT to support the claim that Egypt frustrated the claimant's legitimate expectation protected under the FET standard. The claimant argued that "Egypt's international obligation to ensure compliance with WTO rules in good faith further confirms the [Claimant]'s legitimate expectation that Egypt would neither require nor allow the prioritization or exclusive allocation of natural gas for domestic use in violation of WTO rules.[437]" While the arbitral tribunal regrettably failed to respond to this invocation because other facts were sufficient to conclude the FET violation existed, it did not preclude the noncompliance of the WTO treaty obligations, possibly constituting the ground of investors' legitimate

[435] Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 192 (Sept. 5, 2008).
[436] *Id*. ¶¶ 193, 203, 210, & 214.
[437] Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award of the Tribunal, ¶ 9.20 (Aug. 31, 2018).

expectation if host states make a specific undertaking to investors according to their treaty commitments.[438]

In *Mesa Power v. Canada*, the claimant sought to establish that numerous entities were "state organs" under Article 4 of the ILC Articles; thus, their conduct shall be considered the acts of that state.[439] The claimant further relied on the WTO case that adjudicated similar case facts and characterized these entities as "public bodies" within the meaning of Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM) to support its claim.[440] However, the arbitral tribunal contended that nothing in the WTO jurisprudence determining these agencies at issue as "public bodies" under the SCM changes the fact that they are not "state organs" under Article 4 of the ILC Articles because they are substantially different in terms of the context and is thus of little assistance for the present purpose.[441] This scenario is another where actors in the ISDS proceeding resort to WTO laws and relevant jurisprudence other than non-discrimination treatment standards. However, the arbitral tribunal reaches its conclusion by simply highlighting the different natures of "state organs" and "public bodies" under two different legal regimes without providing a more sophisticated analysis. I perceive that the judicial engagements between trade and investment in this case may be more informative if the arbitral tribunal can further explain how state organs under Article 4 of the ILC Articles and public bodies within the meaning of the SCM Agreement are different, and how such a difference diminishes the relevance of the WTO jurisprudence in the context of investment arbitration.

In contrast, the provisions of the SCM Agreement become useful references and are carefully elucidated in *Resolute Forest Products v. Canada*. In this case, one of the legal issues is if the governmental assistance measures fall within the exclusion provision in Article 1108(7)(b) of the NAFTA that exempts Canada's duties from the MFN and NT obligations.[442] The claimant tried to import the discussions under Article 1.1 of the SCM Agreement to narrow the scope of "subsidy" under Article

[438] *Id*. ¶¶ 9.145-9.146.
[439] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award, ¶¶ 342-345 (Mar. 24, 2016).
[440] *Id*. at 346. Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, ¶¶ 7.234, 7.235, 7.239, & fn. 464, WT/DS412/R (Dec. 19, 2012).
[441] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award, ¶ 347 (Mar. 24, 2016).
[442] North American Free Trade Agreement, Dec. 17, 1992, 32 ILM 289, Art. 1108(7)(b)

1108(7)(b) of the NAFTA.[443] However, the arbitral tribunal rejected such an analogical approach. For one thing, the tribunal ruled that if the parties of the NAFTA intend to make explicit cross-references, they would manifestly indicate such connections as seen in other parts of the NAFTA.[444] For another, the nature of Article 1108(7)(b) of the NAFTA permits nationality-based preferences in relation to subsidies and grants, whereas the objective and purpose of the SCM Agreement is to discipline subsidies. It would also be unrealistic for the NAFTA parties to label their financial incentive programs as "subsidies" within the meaning of the SCM Agreement so as to fall under Article 1108(7)(b) of the NAFTA. Therefore, the arbitral tribunal concluded that the aforementioned considerations differentiated the text of the NAFTA from that of the WTO SCM Agreement. Hence, the arbitral tribunal was not convinced to import limitations found in the SCM Agreement and relevant WTO jurisprudence in order to restrict the applicable scope of Article 1108(7)(b) of the NAFTA.[445] From my perspective, this case offers a more solid rationale to reject the "trade-infusion" argument made by disputing parties. In sum, while some question the idea of trade-infused investment law, it is undeniable that the WTO law and its case law occasionally enrich and illuminate the substance of the investment treaty law. Moreover, we cannot overlook that the WTO law citations may be internalized through the development of the ISDS jurisprudence itself.[446]

C. Limited roles of international environment legal instruments in the ISDS proceedings

1. Overview

The implications of the ISDS mechanism on states' efforts to promote environmental protection and the quality of climate change governance have been substantively discussed. Environmental law scholars and NGOs pursuing the goals of sustainable development expressed their concerns about the overly extensive rights and privileges that investment treaties accord to global enterprises that cause air, water, and soil pollution. This accordance is especially concerning in the context of

[443] Resolute Forest Products Inc. v Government of Canada, PCA Case No. 2016-13, Final Award, ¶ 419 (July 25, 2022).
[444] *Id*. ¶ 415.
[445] *Id*. ¶¶ 420-21.
[446] *See also* Gabrielle Marceau et al., *The WTO's Influence on Other Dispute Settlement Mechanism: A Lighthouse in the Storm of Fragmentation*, 47 J. WORLD TRADE 481, 499 (2013).

shifting energy generation and transmission amid the climate emergency because fossil fuel companies use the threat of ISDS claims, or bring ISDS claims into action, to strategically hamper climate action or seek astonishing levels of compensation. The investment arbitration claims brought by investors against Spain, Italy, and other EU member states materialize into the aforementioned fear of governments and civil society. Similar to the cases targeting Argentina's financial emergency measures, the arbitral tribunals reached different conclusions in interpreting identical investment treaty provisions and addressing similar case facts pose a risk to states' regulatory space and their efforts to implement their obligations under international environmental legal instruments, such as the UNFCCC, Rio Declaration, and other multilateral conventions protecting natural resources.

Investment disputes concerning environmental issues cover a range of governmental measures that encourage renewable energy transition, preserve the biological diversity of ecosystems, and tackle deforestation and desertification. These cases include claims related to terminating mining concession contracts due to environmental concerns[447], prohibiting certain mining activities in designed areas[448], and challenging the policy that encourages the phaseout of coal-fired power plants.[449] In addition, countries' environmental and social impact assessment processes have also been sued when foreign investors' exploitation licenses or permits were revoked.[450] In defending the states' environmental measures in the ISDS proceedings, do the international environmental legal instruments matter?

2. Invisible uses of international environmental law in climate change-related investment disputes

According to the joint submission prepared by the Center for International Environmental Law, The International Institute For Sustainable Investment, and ClientEarth, states' environmental measures have been perceived as "suspicious in the ISDS proceedings instead of acknowledging the concurrent duties and obligations of

[447] Valentyn Drozdenko, Artem Kadomskyi, Igor Kompanets and others v. Republic of North Macedonia, ICSID Case No. ARB/19/9 (Sept. 12, 2019).
[448] Red Eagle v. Colombia Red Eagle Exploration Limited v. Republic of Colombia, ICSID Case No. ARB/18/12, Award (Feb. 28, 2024); Galway Gold v. Colombia Galway Gold Inc. v. Republic of Colombia, ICSID Case No. ARB/18/13 (Mar. 21, 2018).
[449] Westmoreland Mining Holding, LLC v Canada, ICSID Case No. UNCT/20/3, Final Award (Jan. 31, 2022).
[450] Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29, Award of the Tribunal (Oct. 22, 2018).

States outside the realm of international investment law.[451]" In other words, there are extremely minimal implications of the external references to international environmental law on the discussions during the ISDS proceedings. This observation is consistent with my empirical findings. For instance, among the cases targeting the EU members' legislation changes that concern reductions in feed-in-tariffs for renewable energy production, the responding states cite the UNFCCC and Kyoto Protocol in almost all cases. Nevertheless, both legal instruments were mentioned to elaborate on the responding states' commitments to reducing greenhouse gases and allocating resources to address climate change as well as to introduce the responding states' regulatory framework that was modified and altered for renewable energy projects. From my perspective, the explanation for the minimal use of international environmental laws is that the international environmental legal regime lacks highly sophisticated judicial systems that are unable to offer referenceable jurisprudence for investment arbitral tribunals.

3. More visible influences can be seen in other environment protection-related cases

Beyond the renewable energy cases initiated against the EU member states, I observe that external references to international environmental conventions more explicitly influence the adjudicating process. A recent prominent example directly impacting countries' laws and policies to protect the environment is *Eco Oro v. Colombia*. In this case, the international environmental legal instruments justifying host states' legislations and measures aiming at protecting the environment, including the Rio Declaration, the Convention on Biological Diversity, and the Ramsar Convention, were more substantially discussed by disputing parties and the arbitral tribunal. Specifically, in determining if the challenged measure constituted compensatory expropriation, the applicability of the precautionary principle, which is one of the core principles developed under international environmental law, was extensively discussed by the disputing parties and the tribunal. The responding state referred to the preamble to the Convention on Biological Diversity and Principle 15 of

[451] *Investor-State Dispute Settlement (ISDS) Mechanisms and the Right to a Clean, Healthy, and Sustainable Environment*, JOINT SUBMISSION FROM THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL), THE INTERNATIONAL INSTITUTE FOR SUSTAINABLE INVESTMENT (IISD), AND CLIENTEARTH ON THE CALL FOR INPUTS FROM THE SPECIAL RAPPORTEUR ON HUMAN RIGHTS AND THE ENVIRONMENT, at 6 (2023).

the Rio Declaration in order to reflect the factors that shall be examined when applying the precautionary principle, including the seriousness of the threats, the damage that would be irreversible, and the lack of full scientific evidence available at the time the measure was being adopted. Considering the environmental significance of Páramo ecosystems[452] and the threat from mining activities, the tribunal perceived that while the claimant's exploitation rights were deprived, the challenged measure shall be a legitimate exercise of Colombia's police power because the measure was implemented in good faith to protect the fragile ecosystem and was not applied in a discriminatory manner. Hence, the investor's expropriation claim was dismissed, and Colombia was not liable for compensating the *Eco Oro* case since the measure did not constitute an indirect expropriation.[453] Similar discussions about resorting to the precautionary principle to assess if host states' environmental measures constitute an expropriation also occurred in *David R. Aven and others v. Republic of Costa Rica*. The responding state introduced a series of international environmental legal instruments[454] to manifest the application of the precautionary principle to determine if the challenged measure was within the scope of the right to regulate rather than a breach of the FET standard or an unlawful expropriation. Specifically, Costa Rica highlighted the entry points for the external references, namely, Article 10.11 and Article 17.12 of the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA). Article 10.11 subordinates the rights of investors under the investment chapter of the DR-CAFTA to the right of host states to ensure that the investment is carried out in a matter sensitive to environmental concerns. Article 17.2 explicitly recognizes the important role of multilateral environmental conventions and recognizes that parties implementing those legal instruments are critical to achieving the environmental objectives.[455] Based on these provisions, the arbitral tribunal first

[452] According to the Colombian government, "páramo ecosystems" are "high-mountain ecosystems that play a central role in maintaining biodiversity, premised on a unique capacity to absorb and restore water." *See* Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 86 (Sept. 9, 2021).

[453] Notably, the arbitral tribunal eventually held that the challenged measure violated the minimum standard of treatment and that the general environmental exception included in the Colombia-Canada Free Trade Agreement (Article 2201(3)) did not preclude the obligation to pay compensation. This case casts doubt on the effectiveness of states' effort to reform investment treaties by inserting public policy exception clauses to respect sovereign states' regulatory space.

[454] These international legal instruments include the 1972 Stockholm Declaration on the Human Environment and is embodied in the Principle 15 of the Rio Declaration, the Ramsar Convention and the Convention on Biological Diversity.

[455] Dominican Republic-Central America FTA [hereinafter DR-CAFTA], Article 10.11. DR-CAFTA, Article 17.12 ("The Parties recognize that multilateral environmental agreements to which they are all

found that under the DR-CAFTA, as long as the host states' measures are implemented in good faith, the investors' protection is subordinate to Costa Rica's right to regulate in order to ensure that the investments are carried out "in a manner sensitive to environmental concerns.[456]" With such an understanding in mind, the tribunal further referenced the Ramsar Convention and affirmed that protected wetlands existed in this case.[457] The tribunal further sided with the responding state's argument that according to the precautionary principle, the burden of proof shall be shifted to the claimant to evince that developing the project would not harm the environment.[458] After considering the experts' reports on the detrimental effects caused by the investor's project and considering that the claimant failed to prove that its investment was environmentally friendly, the tribunal concluded that the challenged measure protecting wetlands enacted by Costa Rica did not breach the FET standard and was not an unlawful expropriation either.

Much literature focuses on how investors have utilized the ISDS mechanism to dissuade sovereign states from adopting more active environmental measures. However, the investor may also sue the host state for failing to meet its legal obligations under international environmental law. This example can be found in *Allard v. Barbados*. In this case, the claimant operated an environmental sanctuary in Barbados, but it was damaged and ceased to operate because the Barbados Water Authority negligently discharged raw sewage into the wetland managed by the investor. In addition to the conventional claims based on the investment treaty, the claimant also relied on external international legal sources by arguing that Barbados failed to comply with its duties under relevant international environmental treaties, which should be the "relevant rules of international law applicable in the relation between the parties" under the Article 31.3(c) of the VCLT when interpreting the "full protection and security" clause. Specifically, the claimant referred to Barbados' obligations under the Convention on Biological Diversity and the Ramsar Convention and argued that the level of diligence that the host state shall meet should be

party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements (…)")

[456] David R. Aven and others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award, ¶ 412 (Sept. 18, 2018).

[457] *Id*. ¶ 496.

[458] *Id*. ¶¶ 551-53.

heightened.[459] Nevertheless, the arbitral tribunal disagreed with the claimant's assertion. The tribunal perceived that the responding state's obligation under the full protection and security clause is limited to reasonable action or due diligence and is not required to take any specific steps that the investor asks of it. Even though Barbados is a party to relevant international environmental treaties, it would not change such a standard under the investment treaty.[460] The tribunal eventually concluded that there was no breach of the full protection and security clause. In my view, although *Allard*'s claim was ultimately dismissed, this case is unique for the discussion of environmental protection in the context of the ISDS mechanism. Namely, private parties whose interests suffered by states' wrongful acts infringing on environmental goals may also utilize the ISDS as a tool to urge states to fulfill their obligations under international environmental law.

In sum, I demonstrate a discrepancy between quantitative and qualitative empirical results regarding the use of international environmental treaties in the context of the ISDS proceedings. While the quantitative data shows that there are a fair number of cases where disputing parties and arbitral tribunals made references to some important international conventions, in addition to a few disputes, those cited external legal sources neither constitute main arguments for disputing parties' claims nor assert expected influence over tribunals' adjudication process. Especially for the disputes targeting the renewable energy transition policy of EU members, the UNFCCC and Kyoto Protocol were only mentioned as the case background. The most recent investment dispute targeting the Netherlands's climate change legislation aiming to phase out coal power plants will be another touchstone as the challenged legislation resulted from the Netherlands's commitment to the Paris Agreement.[461] Therefore, the extent to which countries' legal obligations under the Paris Agreement will be taken into account in climate change-related investment disputes needs further observation.

D. Global anti-corruption legal instruments are implemented in the context of the international investment regime

[459] Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06, Award, ¶ 230 (June 27, 2016).
[460] *Id.* ¶ 244.
[461] RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4 (2021).

1. Overview

The rise of cross-border corruption has increasingly been perceived as an international public policy issue requiring international cooperative mechanisms and instruments. In 2003, member states of the United Nations adopted the Convention Against Corruption, which was the first legally binding universal anti-corruption instrument.[462] The OECD also adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was the first international anti-corruption instrument focusing on the "supply-side" of the bribery transaction by establishing legally binding standards to criminalize bribery of foreign public officials in international business transactions.[463] Along with the binding legal instruments, there are other non-binding recommendations and guidelines that could be implemented to reinforce states' efforts to prevent, detect, and investigate cross-border corruption.[464]

Under these international legal instruments, the obligations around preventing, detecting, and remediating corruption have extended to both the public and private sectors. Growing attention from the international community leads corruption to be considered an issue in international investment disputes. For example, foreign investors seek to bribe relevant officials of the host state government agency who are in charge of screening investment projects in order to gain more favorable results than competitors. If an investment dispute results from an infrastructure project or a concession is tainted by corrupt conduct between the operators and government officials, how should investment arbitral tribunals deal with the allegations of corruption when examining host states' obligations under investment treaties? And what are the roles of the aforementioned international anti-corruption instruments in the context of investment treaty arbitration?

2. Anti-corruption legal instruments are introduced to determine if corrupt conduct exists

[462] United Nations Convention against Corruption, December 9, 2003, UN Doc. A/58/422 (2003), S. Treaty Doc. No. 109-6, 43 I.L.M. 37 (2004).
[463] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, https://www.oecd.org/corruption/oecdantibriberyconvention.htm.
[464] For example, the 2021 OECD Anti-Bribery Recommendation, OECD Recommendation on Tax Measures for Further Combating Bribery, and OECD Recommendation for Development Co-operation Actors on Managing Risks of Corruption, etc.

By closely reading the ten arbitral awards that cite at least one international anti-corruption convention, I explore two typical functions of the international anti-corruption conventions. First, the external references to global/regional anti-corruption conventions contribute to identifying if the alleged corruption exists. When confronted with the allegations of corrupt conduct, investment arbitral tribunals are first challenged to precisely define the nature of the alleged misconduct. International legal instruments relating to anti-corruption are intuitively attractive to tribunals because they categorize a range of behaviors as acts of corruption. In practice, some misconduct obtains wide international consensus, such as bribery, whereas others enjoy far less, for example, trading in influence (i.e., lobbying).[465] Hence, identifying whether corruption exists often involves importing elements defined by other international laws. For instance, in *BSG v. Guinea*, one of the disagreements between the claimant and the responding state was to what extent a lobbying activity may constitute corruption. Guinea relied on Article 18(a) of the United Nations Convention Against Corruption, which prescribes the active form of "trading of influence" as a kind of corruption. This broad definition of corruption was also supported by the arbitral tribunal, and the tribunal further referred to Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the ECOWAS Protocol to endorse such a conclusion.[466] Moreover, the arbitral tribunal in *Metal-Tech v. Uzbekistan* introduced the list of "red flags," which was developed by relevant international conventions, to serve as the framework to determine if corruption exists. These key factors include (1) an adviser requests urgent payments or unusually high commissions, (2) an adviser has a close personal relationship with the government that could improperly influence the decision-making process, and (3) an adviser requests payments be paid in cash or be paid in a third country.[467] These disputes involving allegations of corruption demonstrate how external references to global/regional anti-corruption treaties can assist arbitral tribunals in determining whether alleged misconduct shall be perceived as corruption that falls within the scope of the international public policy recognized

[465] For instance, while trading in influence is characterized as one types of corruptions in the Council of Europe's Criminal Convention on Corruption, numerous EU members have made a reservation against introducing criminal provisions for trading in influence.
[466] BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea, ICSID Case No. ARB/14/22, Award, ¶¶ 476-486 (May 18, 2022).
[467] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, ¶¶ 291-293 (Oct. 4, 2013)

by the international community.

3. Anti-corruption legal instruments are cited to reject the investment claim in the jurisdiction or merit phase

Second, global/regional anti-corruption conventions and relevant soft law instruments have served as the supporting basis for both claimants and responding states. Allegations of corruption are typically invoked by host states as a defense against investors' claims. Specifically, the host states may proclaim that the arbitral tribunal lacks jurisdiction over the dispute because of the corruption or argue that the claim is inadmissible. The primary debate lies in the legality clause enshrined in some of the investment treaties that require all investments to be procured "in accordance with" the laws of host states. In *Metal-Tech v. Uzbekistan*, the arbitral tribunal perceived the issue of the investment arising from corruption as a jurisdictional question. The arbitral tribunal grounded its reasoning on the applicable investment treaty at stake, which explicitly contained a legality requirement. Given that the investment was established based on bribery and other misconduct, the tribunal ultimately concluded that it lacked jurisdiction because "the rights of the investor against the host state, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear—and rightly so—that in such a situation, the investor is deprived of protection.[468]" A similar perspective is shared by the tribunal in *Inceysa v. El Salvador*. In this case, the tribunal refused to exercise the jurisdiction by applying the "unclean hand doctrine," namely, the claimant cannot seek to benefit from an investment procured by means of corruption and other illegal acts.[469] Aside from perceiving the alleged corruption in the jurisdictional stage, some other tribunals considered this as an admissibility issue. In *World Duty Free v. Kenya*, the tribunal ruled that it could not uphold a claim based on an investment contract obtained through corruption since the corruption is contrary to "international public policy." In order to specify the substance of international public policy, the arbitral tribunal referred to the global and regional conventions regarding anti-corruption[470] to

[468] *Id*. ¶ 422.
[469] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, ¶ 242 (Aug. 2, 2006).
[470] These legal instruments include United Nations Convention against Corruption, United Nations Declaration against Corruption and Bribery in International Commercial Transactions, Inter-American

reinforce the international consensus that corruption infringes on public policy and morality. The tribunal elucidated the consequences of the bribe by reviewing relevant case laws rendered by other tribunals addressing alleged corruption and finally concluded that investors' claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld. As a result, the claim was dismissed at the admissibility stage as the claimant was not entitled to maintain its pleaded claims.[471] Notably, some arbitral tribunals adjudicated the alleged corruption during the merit phase. For example, the tribunal in *Kim v. Uzbekistan* ruled that issues regarding corruption after the initial investment were more "properly addressed at the merits stage.[472]" Similarly, in *Al Warraq v. Indonesia,* the tribunal determined that alleged corruption shall be a merits-based question. Based on Article 9 of the OIC Agreement[473], which is the public interest provision contained in the treaty, the tribunal held that while the responding state's FET breach was upheld, the investor's claim for damage was inadmissible due to its misconduct violating Article 9 of the OIC Agreement and the clean hand doctrine.[474]

4. Anti-corruption legal instruments are used to manifest responding states' investment treaty violations

On a few occasions, the foreign investors also allege corrupt conduct by host states' public officials as the basis for their investment claims. This example can be found in *Chevron and TexPet v. Ecuador (II)*. In determining if the responding state breached its duty under the FET standard, the arbitral tribunal referred to the United Nations Convention Against Corruption to introduce the ideas and seriousness of judicial corruption and bribery as well as how such misconduct could deprive

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Convention against Corruption, EU Criminal Law Convention on Corruption, African Union Convention on Preventing and Combating Corruption, OECD Convention on combating bribery of foreign public officials in international business transactions.

[471] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, ¶¶ 156-57 & 188 (Oct. 4, 2006).

[472] Vladislav Kim v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 552 (Mar. 8, 2017).

[473] Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference [hereinafter OIC Agreement], Art. 9 ("The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.").

[474] Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL Arbitration Rules 1976, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, ¶ 99 (Jun. 21, 2012); Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL Arbitration Rules 1976, Final Award, ¶¶ 683(6), 155 (Dec. 15, 2014).

individuals of their fundamental right to receive a fair hearing by "striking directly at the rule of law, access to justice and public confidence in the legal system;…."[475]." The tribunal found that the Ecuadorian court's judgment rendered against the claimant was procured via bribery and corruption, where there was extensive evidence of fraud and corruption by members of the Ecuadorian judiciary colluding with the lawyers representing the local community. Reading the anti-corruption conventions together with other international human rights instruments pertaining to judicial independence and the right to a fair trial[476], the arbitral tribunal concluded that the responding state had wrongfully committed a denial of justice by failing to maintain an impartial domestic judiciary, thus violating the FET standard under the US-Ecuador investment treaty and customary international law that provides an international minimum standard to aliens.[477]

Lastly, the judicial engagement conducted with the international anti-corruption regime could not only contribute to a more comprehensive dimension of the ISDS adjudicative process but also reinforce the global efforts to combat corruption. Currently, the mechanisms that are being implemented to ensure that contracting parties comply with anti-corruption conventions are mostly soft in nature. Most of the conventions merely require member states of the convention to submit the annual report of implementation without specifying the outcome of non-compliance. The increasing investment disputes resulting from bribery and corruption may lead the ISDS system to be an alternative judicial forum that both examines host states' duty under investment treaty provisions and even backs states' duties of satisfying anti-corruption requirements by the ISDS system – which is one of the most effective international judiciaries.

E. A Critical Appraisal on Judicial Engagements Exercised in the ISDS Proceeding

1. Strategic references of using external international legal sources

Similar to WTO cases, disputing parties in investment disputes rely on external

[475] Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II), PCA Case No. 2009-23, Second Partial Award on Track II, ¶ 9.16 (Aug. 30, 2018).
[476] These include Article 10 of the Universal Declaration of Human Rights, Article 14 of the ICCPR, and Articles 2 and 6 of the United Nations Principles on the Independence of the Judiciary.
[477] Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II), PCA Case No. 2009-23, Second Partial Award on Track II, ¶¶ 10.5-10.6 (Aug. 30, 2018).

international legal sources to enhance the persuasiveness of their legal arguments, while investment arbitral tribunals turn to other international laws and case law from different international judiciaries to supplement or clarify procedural rules. However, compared to participants in WTO adjudication, the use of external international legal sources within the context of Investor-State Dispute Settlement (ISDS) is more varied among investors, host states, and investment arbitral tribunals. Investment arbitral awards often feature more external citations involving substantial interactions between regimes. For example, human rights conventions are frequently referenced by both foreign investors and responding host states. Investors may invoke the concepts of property protection and due process in administrative and judicial proceedings to give specific meaning to the broad legal protections afforded by investment treaties. Conversely, host states might leverage the margin of appreciation principle, the police power doctrine, and the necessity principle from international/regional human rights jurisprudence to defend the legitimacy of their regulatory measures and address the asymmetrical nature of the ISDS system. Additionally, responding states might cite human rights provisions to highlight their obligations under international human rights law, arguing that the interpretation and application of investment treaty clauses should not contradict their human rights commitments.

Investment arbitral tribunals also frequently reference external international legal sources, *ex officio,* to supplement the procedural rules of the arbitral proceedings. However, compared to their counterparts in the WTO, investment arbitral tribunals are generally more receptive to incorporating other international laws that clarify procedural issues. For instance, the ILC Draft Articles on State Responsibility are often cited to introduce or affirm concepts such as the doctrine of attribution, state liability, and the extent of compensation, among others. Precedents from established international courts, such as the ICJ, are also commonly consulted by investment arbitral tribunals when the issues are analogous and well-established in other international legal frameworks. Overall, ISDS proceedings exhibit a higher frequency and quality of cross-references compared to those observed in WTO contexts.

2. Inappropriate uses of external references in the context of the ISDS system

Notably, unlike the Panels and the Appellate Body of the WTO, which are relatively conservative in engaging in substantive judicial cross-fertilization, the

scenario of inappropriate uses in the ISDS system lies at the other extreme. While investment arbitral tribunals are more open to citing and addressing external references, they sometimes inappropriately resort to external international legal sources to resolve legal issues in investment disputes. The inappropriate uses of external international legal sources within the ISDS system can be observed in three areas: human rights, trade, and anti-corruption.

(1) Wrong uses of international anti-corruption instruments

Regarding the judicial engagement between ISDS and international anti-corruption instruments, the primary concern lies in the fact that even when investment arbitral tribunals refer to the same anti-corruption conventions, they adopt different approaches to resolving issues raised in investment disputes involving corruption allegations. These issues include the definition of corruption, the appropriate burden of proof, and the legal consequences if the corruption allegation is proven.[478] For example, in EDF v. Romania, the arbitral tribunal applied the 'clear and convincing evidence' standard of proof, while the 'reasonable certainty' standard was adopted by the arbitral tribunal in Metal-Tech v. Uzbekistan. Given that both cases revolved around the question of corruption in investment activities, I struggle to find reasonable justifications for why the arbitral tribunals set different thresholds for the standard of proof. The legal consequences of corruption in the context of investment arbitration are even more perplexing. As outlined in the previous section, in cases where responding host states argued that the investments in question were compromised by bribery, some arbitral tribunals dismissed the investors' claims due to lack of jurisdiction, reasoning that the investments did not comply with the host states' laws. The "Unclean Hands Doctrine," a common law principle, was applied inconsistently by arbitral tribunals in deciding whether investors' misconduct should affect the outcome of the investment arbitration proceedings.[479] Despite the apparent international consensus on combating corruption in international investment transactions, international legal instruments often lack detailed provisions on the most

[478] *See* Yueming Yan, *References to International Anti-corruption Conventions in International Investment Arbitration and International Investment Agreements*, *in* THE TRANSNATIONALIZATION OF ANTI-CORRUPTION LAW 447, 452-53 (Regis Bismuth et al. eds., 2021).

[479] Patrick Dumberry, *State of Confusion: The Doctrine of "Clean Hands" in Investment Arbitration After the Yukos Award*, 17 J. WORLD INV. & TRADE 229 (2016). *See also* Agata Zwolankiewicz, *The Principle of Clean Hands in International Investment Arbitration: What is the Extent of Investment Protection in Investor-State Disputes?*, 3(1) THE JOURNAL OF THE INSTITUTE FOR TRANSNATIONAL ARBITRATION 4, 24-30 (2021).

contentious issues, such as defining corruption and determining the consequences if the presence of corruption is confirmed. This implies that even if investment arbitral tribunals are inclined to refer to anti-corruption conventions, they may still need to rely on their own interpretations of how corruption affects investor-state disputes.[480]

(2) Wrong uses of WTO laws

Regarding the judicial engagement between the ISDS system and international trade law, I have found that WTO law and its jurisprudence are frequently referenced by investment arbitral tribunals. Case laws from the WTO, especially those relating to the interpretation and application of non-discriminatory treatment standards (such as MFN and NT), assessments of necessity under exception clauses, and the application of customary laws or general principles of law, are commonly cited by tribunals. Unfortunately, some references to WTO provisions and case laws have been flawed. The primary reason for improperly using the WTO laws by investment arbitral tribunals is their failure to account for the distinct institutional frameworks of the two legal regimes, leading to an oversimplification of the governance of trade and investment.[481] I identify several instances of what is perceived as inappropriate uses of external references by investment arbitral tribunals. For example, some investment disputes have drawn analogies from WTO jurisprudence on "like products" to inform the analysis of "like circumstances" in assessing whether a challenged measure breached the non-discrimination (NT) standard under the investment treaty. However, scholars have cautioned that WTO case law regarding the NT standard should not be directly applied to investment law without careful consideration.[482] WTO jurisprudence on assessing "likeness" primarily involves comparing domestic and imported products. The well-recognized test developed by WTO jurisprudence, which examines four elements of products—including their physical characteristics, end-uses, consumer tastes and habits, and tariff classification—may not align perfectly with the nature of investments and investor protection. The role of "competition" in a likeness inquiry, which should be a crucial element in determining whether domestic and foreign investments/investors are in like circumstances, has been dismissed by some arbitral tribunals due to a misinterpretation of WTO case laws regarding the

[480] Yarik Kryvoi, *Economic Crimes in International Investment Law*, 67(3) INT'L & COMP. L. Q. 577-605 (2018).
[481] ALVAREZ, *supra* note 79, at 239-241.
[482] Jiirgen Kurtz, *The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 243 (Stephan W. Schill ed., 2010).

application of the NT standard.[483] Additionally, the regulatory purpose is not considered by the Panels and the Appellate Body in the likeness test under Article III of the GATT, as Article XX of the GATT provides a general exception clause to balance public interests and trade liberalization. However, such a public policy-friendly provision is absent in most old-generation bilateral investment treaties. Therefore, the regulatory purpose should be another important element taken into account in the context of investment arbitration. Yet, in some investment disputes, investment arbitral tribunals have referred to WTO jurisprudence to reject the argument that the regulatory purpose should be considered when determining if the alleged discriminatory measure is inconsistent with the NT standard under the investment treaty.[484] These external references to WTO jurisprudence were made without considering the contextual differences between the WTO and investment treaties. In the investment protection regime, the use of the term "like circumstances" instead of "like products" in investment treaties implies that broader qualitative elements should be considered, as the term "circumstances" suggests a more comprehensive analysis that extends beyond mere economic evidence of competition. Furthermore, the fact that investment treaty protections extend to both investors and their investments adds further complexity to the application of competition analysis, which traditionally focuses on economic impacts.[485] As a result, commentators propose that the external references should shift the focus from the case laws concerning trade in good to the jurisprudence regarding trade in service, as the likeness test under the GATS also covers both "services" and "service suppliers".[486]

Another type of improper use involves references to WTO case law related to the interpretation of the general exception clause under Article XX of the GATT. As discussed in a previous section, the arbitral tribunal in *Continental Casualty v. Argentina* deviated from its peers by invoking Article XX of the GATT to inform the interpretation of the "measures not precluded" clause under Article XI of the US-

[483] *See, e.g.*, Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, ¶¶ 173-76 (July 1, 2004). Methanex Corporation v. United States of America, UNCITRAL Arbitration Rules 1976, Final Award, Part IV, Chap. B, ¶ 33 (Aug. 3, 2005).
[484] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 368 (Sep. 11, 2007). Pope & Talbot Inc. v. The Government of Canada, UNCITRAL Arbitration Rules 1976, Award on the Merits of Phase 2, ¶ 78 (Apr. 10, 2001).
[485] Aphiwan Natasha King, *National Treatment in International Economic Law: The Case for Consistent Interpretation in New Generation EU Free Trade Agreements*, 49 GEO. J. INT'L L. 929, 946 (2018).
[486] *Id.*

Argentina investment treaty. The tribunal argued that the term "necessary" within the "measures not precluded" clause should be interpreted in accordance with GATT Article XX case law, which suggests that the concept of "necessary" does not equate to "indispensable."[487] I contend that the arbitral tribunal misinterpreted the WTO law for two main reasons. First, Article XI of the US-Argentina investment treaty and Article XX of the GATT address different subject matters; in fact, Article XXI of the GATT would be a more appropriate parallel for the "measures not precluded" clause. Second, even if the tribunal believed that Article XX of the GATT could shed light on the interpretation of Article XI of the US-Argentina investment treaty, it inappropriately borrowed the ruling from Article XX of the GATT by incompletely referencing the relevant case law. According to WTO jurisprudence, Article XX of the GATT operates through a two-tier process: a state invoking the general exception clause must first demonstrate that the challenged measure falls within one of the listed exceptions in Article XX of the GATT and then show that the measure is not applied in a manner constituting arbitrary or unjustifiable discrimination as outlined in the chapeau of Article XX. Therefore, the tribunal erred in interpreting the "measures not precluded" clause under Article XI of the US-Argentina investment treaty by solely relying on analyses regarding the term "necessary" under subparagraphs (a) or (b) of Article XX of the GATT without considering the requirements of the chapeau. Such an exercise fails to properly apply the balancing test developed under WTO jurisprudence.[488]

In addition to incompletely introducing the substantive provisions of trade law, another form of inappropriate use involves unnecessary references to WTO case law that could introduce more controversies into the ISDS system. For instance, in determining whether the umbrella clause extends investment treaty protection to contractual violations[489], the arbitral tribunal in SGS v. Pakistan cited WTO case law to introduce the principle of "*in dubio mitius*" and concluded that the umbrella clause would not elevate a contract claim to the international level. While the scope of applicability of the umbrella clause is indeed debated within the international investment legal regime, the citation of WTO case law to introduce a doctrine that has

[487] Continental Casualty Company v Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 85 (Sept. 5, 2008).
[488] More detailed critiques on this case, *see* Alvarez, *supra* note 20, at 194-203. *See also* VALENTINA VADI, ANALOGIES IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 213-15 (2017).
[489] Regarding the concept of umbrella clause, *see* URSULA KRIEBAUM ET. AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 271-285 (3rd ed. 2022).

rarely been invoked by the WTO itself is questionable.[490] Instead, a better approach to clarifying the applicable scope of the umbrella clause would involve examining the precise language of the investment treaty provisions and referring to the preparatory works of that investment treaty.

(3) Improperly borrowing the concepts from international human rights laws

The inappropriate uses of international/regional human rights legal instruments typically occur when investment arbitral tribunals attempt to import and apply the doctrine of the margin of appreciation, which is developed under international human rights judiciary frameworks. Additionally, on some occasions, the right to property, as recognized by numerous international human rights conventions, has been incorrectly analogized by foreign investors and investment arbitral tribunals to clarify the meaning of 'investments' protected under the investment treaty.

"For scholars advocating the application of a comparative public law approach to international investment law and arbitration, the integration of human rights principles into investment law is seen as a positive development. Principles such as the rule of law, proportionality, and due process from public law could be introduced into the ISDS field to enhance the legitimacy of this judicial system and enable investment arbitrators to perform balancing exercises that harmonize investment protection with non-investment concerns. However, I argue that investment arbitral tribunals sometimes incorporate external legal instruments from the international/regional human rights regime without carefully applying their precise and comprehensive rulings. For instance, when applying the proportionality test, investment arbitral tribunals often overlook its context and disregard the tripartite structure developed by international human rights courts.[491] They treated the three elements (i.e., suitability, necessity, and proportionality *stricto senso*), which are supposed to be examined together in sequence, as discrete requirements for the principle.[492] Some arbitral tribunals even blurred the concepts of the ECHR's principle of margin of appreciation and the proportionality principle, where the former is the doctrine that permits the EU

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[490] *See* Christophe J. Larouer, *In the Name of Sovereignty? The Battle over* in dubio mitius *Inside and Outside the Court*, 48-49 (Cornell Law School Inter-University Graduate Student Conference Papers, 2009). *See also* Steve Charnovitz, *The WTO's Environmental Progress*, 10(3) J. INT'L. ECON. L. 701 (2007).

[491] ALVAREZ, *supra* note 79, at 107-08.

[492] N. Jansen Calamita, *The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties*, 2013-2014 Y.B. INT'L INV. L. & POL'Y 157, 172 (2014).

member states to derogate from the obligations laid down in the ECHR.[493] At the level of international judiciaries, the margin of appreciation refers to a certain "latitude of deference" that international adjudicators afford to states. According to ECHR jurisprudence, the extent of the margin of appreciation in each case varies depending on the specific right in question. For example, in cases involving measures related to racial discrimination or the right to life, states are afforded less discretion.[494] While both the margin of appreciation and the proportionality principle aim to balance competing private and public interests, they are distinct legal principles with different elements for scrutiny. Moreover, the appropriateness of transferring the legal term "margin of appreciation" to the ISDS system, which lacks the context of human rights protection, is questionable—especially when this doctrine is introduced in disputes involving non-EU parties.[495] While I also support the idea of investment arbitral tribunals referring to human rights law and its case law to balance the application of investment treaty provisions such as the FET standard and indirect expropriation, it is crucial for these tribunals to acknowledge the subtle distinctions between different legal regimes and provide more robust justifications for their external references.

For disputes that reference international human rights instruments and court rulings to elucidate the scope of protected investments and investors under investment treaties, I posit that the primary point of analysis should still be the applicable investment treaties in question. It is somewhat understandable that some investment arbitral tribunals might be motivated to consult human rights case law regarding property rights, especially when certain asset categories not explicitly listed in the investment treaty hold economic value for foreign investors. For example, in several cases, the alleged investments were arbitral awards or domestic judgments in favor of investors or shares held by investors who were merely minority shareholders.[496] To extend the protections provided by investment treaties, investment arbitral tribunals have drawn from the ECHR jurisprudence under Article 1, Protocol 1 (specifically, the concepts of protected "possessions" and "property") to broaden the scope of

[493] Greece v United Kingdom, App. No. 176/56, at 176, 2 Yearbook of the European Convention 174, 174-199 (1958-1959).
[494] RHONA K. M. SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS 182 (6th ed., 2014).
[495] *See, e.g.*, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion Co-Arbitrator Gary Born, ¶¶ 185 & 191 (July 8, 2016).
[496] Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, PCA Case No. 34877, Interim Award, ¶¶194-95 (Dec. 1, 2008). William Nagel v. The Czech Republic, SCC Case No. 049/2002, Final Award, ¶¶ 300-029 (Sept. 9, 2003).

investments protected under the investment treaty.[497] However, rulings related to Article 1, Protocol 1 of the ECHR cannot be automatically equated with protected investments under investment treaties. During the negotiation of an investment treaty, the definitions and scopes of "investments" and "investors" are deliberately crafted by the drafters, namely the treaty parties. Investment arbitral tribunals should not override such intentional treaty design without substantial justifications. I concur that it may be appropriate to refer to rulings on property rights from the international human rights regime to clarify the meaning of protected investments specified in investment treaties that contain a certain degree of uncertainty or when a provision itself is open to interpretation. However, it should not be permissible to use external references to incorporate economic activities/assets that the treaty parties have intentionally excluded.[498]

3. Summary

Substantial judicial cross-fertilization more commonly occurs in investment awards than in WTO decisions. To strengthen the persuasiveness of their arguments, both claimants and responding host states are incentivized to draw upon external international legal sources. Although these strategic references are not inherently aimed at maintaining coherence in international law, they effectively lead investment arbitral tribunals to assess the legal status and functions of the cited external sources during the adjudication process. Legal sources from human rights, trade, and anti-corruption regimes are frequently cited to support arguments regarding the scope of protected investments, elements of the non-discriminatory treatment standard and the fair and equitable treatment standard, the distinction between regulatory taking and indirect expropriation, and the host states' right to regulate. Unquestionably, these external sources significantly enrich and clarify the contents of investment treaty provisions. For scholars advocating greater judicial cross-fertilization and viewing references to external legal sources as contributing to a more coherent international legal order, the ISDS system appears to be on the right path. However, not all judicial

[497] ALVAREZ, *supra* note 79, at 113-14.

[498] *See, e.g.*, ST-AD GmbH v. Republic of Bulgaria, PCA Case No. 2011-06, Award on Jurisdiction, ¶ 241 (July 18, 2013). In this case, the claimant cited the ECHR's case *Van Marle et al. v. The Netherlands* to argue that the term "property" is synonymous with the procession of objects, and also includes a good reputation of the enterprise. *See also* Ursula Kriebaum, *Is the European Court of Human Rights an Alternative to Investor-State Arbitration?*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 226-28 (Pierre-Marie Dupuy et al. eds., 2009).

cross-fertilizations are desirable. Some investment arbitral tribunals have, unfortunately, improperly used the cited external sources to interpret investment treaty provisions. Such a use of external legal sources can exceed the arbitrators' mandates by deviating from the original intentions of the investment treaty drafters (i.e., states), potentially leading to perceptions of judicial activism among arbitrators and ultimately undermining the legitimacy of the ISDS system.

IV. Chapter Conclusion

With numerous occasions of directly referring to external international legal sources or indirectly citing case laws from other international judiciaries, I scrutinize the possible roles of those external international legal sources mentioned in the ISDS proceedings by exercising quantitative and qualitative content analysis. Without making causal inferences, I apply statistical analysis to demonstrate the associations between the nature of the cases and the frequency of citing external international legal sources. Specifically, the OLS regression is applied to probe the possible factors that might be associated with external international legal sources occurring in investment disputes. The regression results suggest that positive associations exist and are also statistically significant if the tribunal is composed of scholars as a majority, if third parties are involved (i.e., amicus curiae), and/or if disputing parties are both from the global North. Conversely, negative associations are observed and are also statistically significant if the disputes concern the secondary sector and/or if the applicable law belongs to second-generation investment treaties.

The qualitative content analysis investigates the substantive judicial engagements that happened between international investment and other legal regimes–i.e., human rights, environment, trade, and anti-corruption. I examine the role(s) of the aforementioned four international legal regimes when they are introduced in the investment arbitral awards. Human rights legal sources are used to concretize the "uncompleted" treaty language embodied in investment treaties, such as the FET standard and indirect expropriation. Notably, human rights legal instruments are not just referred to by host states to justify their regulatory space. Instead, foreign investors actually benefit from invoking human rights law regarding the right to property or the right to a fair trial to strengthen their claims. The WTO law and its relevant jurisprudence regarding the interpretation of the MFN and NT clauses are

frequently introduced to analogically define the elements of non-discrimination clauses embodied in investment treaties. Also, relevant WTO case law discussing exception clauses (e.g., Articles XX and XXI of the GATT) are also favored by the investment arbitral tribunals when the exception clause is invoked by the responding states. Global/regional anti-corruption legal instruments are referred to by disputing parties and tribunals to determine what constitutes corrupt conduct. The claims may be rejected by arbitral tribunals because they lack jurisprudence or be deemed inadmissible if the investments at stake are established by corruption or other deceitful conduct. In contrast, at the merit phase, investors may also resort to international anti-corruption legal instruments to support their FET claims if corruption is found in responding states' governmental agencies. The external references to international environmental law show greater discrepancies between the quantitative and qualitative results in terms of their importance in the ISDS. In my view, the climate change-related multilateral conventions should play more substantial roles in the investment disputes tackling the legality of responding to states' renewable energy transition programs.

Last but not least, we witness more substantive judicial cross-fertilizations exercised in investment disputes than in WTO decisions. External legal sources related to secondary rules of international law appear more frequently in investment arbitral awards. Moreover, the external international legal sources cited in the context of investment arbitral proceedings are more diverse, and their functions are also more substantial. However, as Alvarez correctly cautioned, some judicial cross-fertilizations conducted by investment arbitral tribunals overlooked the different contexts, treaty design, and remedial schemes between investment treaty regime and other legal regimes. Inspired by Alvarez's analytical approach, I walk through all investment disputes that engage in substantive judicial cross-fertilizations and exemplify several misinterpretations of external international legal sources across the human rights, trade, and anti-corruption domains. While such inappropriate uses only account for a small portion of the cases with external references, they may still cast a shadow on the legitimacy of introducing external legal sources in the context of the ISDS. Hence, it is necessary to ensure that external legal sources are properly used in investment arbitral proceedings. Most importantly, the external international legal sources should be appropriately referenced and analyzed to reconcile the potential conflicts among trade, investment, and other non-economic legal regimes. The next

chapter highlights the deficiencies and shortcomings of current judicial practices regarding cross-fertilizations, and proposes policy recommendations to respond to the challenges.

CHAPTER IV LEGAL AND POLICY RECOMMENDATIONS FOR THE WTO AND ISDS TO ENGAGE IN JUDICIAL CROSS-REFERENCES

This chapter articulates legal and policy recommendations to direct judicial cross-fertilizations that can better enhance the inclusiveness and effectiveness of the WTO and ISDS frameworks. I critically examine the current practices and shortcomings of these two international economic judiciaries in terms of engaging with external international legal sources. I argue that the strategic consideration behind disputing parties, the failure to specify the legal basis of making external references, and the transplant of external legal sources out of context are factors that prevent the expected role of judicial cross-fertilizations in promoting international law coherence. In response to these deficiencies, I draw upon the principles and guidance extracted from the Global Administrative Law theory, International Law Constitutionalism, and Judicial Functionalism to envisage a series of legal and policy recommendations aimed at ensuring that external legal sources are used more effectively and appropriately within judicial processes from interpretative, legislative, and institutional aspects. Overall, these reform proposals advocate for more coherent and integrated judicial cross-fertilizations that allow both the WTO adjudicators and investment arbitral tribunals to better address the complex interplay of trade, investment, and non-economic public interests.

I. Continuing Gaps Exist between Current Judicial Cross-Fertilization and Promoting International Law Coherence

Cross-fertilization and judicial engagement are considered promising judicial behaviors for promoting coherence in international law and strengthening the legitimacy of international judiciaries, as well as the authority of international law as a whole. Following this assumption, scholars might be pleased to see that both the WTO dispute settlement mechanism and the ISDS system resort to other international laws to certain extent.

However, I do not share the same level of optimism regarding the normative expectations of the positive implications brought about by contemporary judicial

cross-fertilizations conducted by the WTO and the ISDS.[499] As shown in chapters II and III, the empirical results raise concerns about the current practice of cross-referencing. To elaborate, the tendency of disputing parties to cite external international legal instruments for strategic reasons makes systemic integration of different international legal regimes an unlikely outcome. Although WTO adjudicators and investment arbitrators are aware of the benefits that external international legal sources can contribute to their adjudication, many of them either fail to elaborate on the rationale for making these external citations or even mistakenly use the cited external international legal sources out of context. For the WTO, although we observe some citations of external legal sources in the Panel and Appellate Body reports, their functions are limited, and most of them do not involve substantive judicial cross-references (i.e., the secondary rules). Nevertheless, in the cases where potential conflicts between the WTO law and other legal regimes might be involved and substantive judicial engagement is needed, the WTO adjudicators fail to take into account relevant external legal sources and examine how to reconcile the values clash. Conversely, investment disputes exhibit a greater degree of substantive judicial cross-fertilization compared to WTO decisions. However, I have identified several instances where investment arbitral tribunals may have transplanted external legal concepts out of context, leading to increased confusion in the interpretation of investment treaty provisions. Both of these "unhealthy" cross-references not only fail to contribute to the coherence between trade/investment and other legal regimes but might also provoke a backlash, undermining the legitimacy of both the WTO dispute settlement mechanism and the ISDS system.

I fully endorse the assertion that both the WTO and the ISDS system should incorporate non-economic concerns more thoroughly into their adjudication processes. Furthermore, I concur that drawing on external international legal sources can contribute to this objective, and it is necessary to refer to external sources when they are pertinent to the trade and investment disputes at hand. However, the current practice of citing external references in both WTO and ISDS judicial proceedings needs to be carefully reviewed to ensure the desired goal of promoting systemic integration of international law is met. How can we ensure that the inclusion of external international legal sources leads to more harmonious interactions between

[499] Similar perspective is also shared by Silvia Steininger, while her observation primarily focuses on investment arbitrations. *See* Steininger, *supra* note 255, at 51-55.

international economic law and other international legal realms? In the subsequent sections, I outline normative foundations and summarize guiding principles drawing from the theories to elucidate how the WTO adjudicators and investment arbitral tribunals should exercise judicial cross-fertilizations to create synergies among international legal regimes and bolster the legitimacy of international trade and investment law, as well as their judiciary systems. Based on these foundations, I propose concrete approaches to ensure a healthier judicial cross-fertilization.

II. Proposed Guidance for Making External References

In this section, I present the guidance drawn from the Global Administrative Law theory, International Law Constitutionalism, and judicial functionalism. The guidance aims to shed light on the pathway for WTO adjudicators and investment arbitral tribunals, helping them avoid the improper uses of external international legal sources and instructing them to appropriately exercise judicial engagement.

A. Global Administrative Law

Global Administrative Law (GAL) is a contemporary analytical framework for understanding the operation of international law. GAL outlines what the international legal system should resemble in an era of globalization. Scholars advocating for GAL posit that we are now living in a world governed by global "inter-public" law. The rules regulating states and individuals' daily activities extend beyond the traditional sources of international law, as stipulated in Article 38 of the ICJ Statute. Instead, decisions made by international organizations, joint statements by government officials in transnational networks, and private entities with regulatory and standard-setting functions all serve as important sources of global governance. [500]

Despite the fact that the concept of GAL itself is still evolving and thus cannot be regarded as a single universal system with well-defined norms and practices[501], its evolutionary characteristic enables GAL to serve as a timely normative framework for

[500] *See* Kingsbury et al., *supra* note 16, at 17.
[501] Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, 2 (IILJ Working Paper 2009/7, 2009). *See also* Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 GLOBAL GOVERNANCE 39, 39-52 (2008).

resolving contemporary challenges in international regulatory regimes. This nature does not imply that GAL lacks substantive rulings. Instead, GAL scholars argue that the scope of GAL encompasses legal principles commonly recognized by all forms of "public law" across different jurisdictions, including both substantive values and procedural requirements associated with the rule of law, such as legality, proportionality, and fundamental rights, transparency, the right to participate, reason-giving, and standards of review. As a normative framework that encapsulates multiple international regulatory regimes under the umbrella term "administrative," GAL emphasizes the importance of viewing intertwined international legal regimes as a unitary governance model that addresses matters of common concern to the international community as a whole.

Having established the fundamental ideas and arguments of GAL, the proponents argue that the international trade and investment legal regimes are both multilateral regulatory systems that aim not only to promote countries' economic growth and individuals' property rights but also to protect "democratic accountability and participation," promote "good and orderly state administration," and protect "rights and other deserving interests[502]" Under GAL, international adjudicators within the WTO and the ISDS should interpret trade and investment treaty provisions in a manner that aligns with the rulings of other relevant regimes. To achieve this goal, GAL encourages WTO and ISDS adjudicators to engage in judicial interactions and cross-fertilization among different international legal regimes, as the legitimacy of international economic law and its judiciary systems necessitates necessary crossings of horizontal boundaries.[503] It emphasizes that the notions of "good governance" and "rule of law" standards should guide deliberations in both the WTO and ISDS systems. It is crucial for WTO adjudicators and investment arbitrators to ensure that these principles are interpreted consistently with those applied by other international courts and tribunals. GAL scholars identify specific areas regarding how WTO and ISDS judicial systems should behave when engaging in cross-references. For example, they endorse the adoption of the proportionality principle and the margin of appreciation—principles commonly applied by international human rights courts—into the WTO

[502] Kingsbury & Schill, *supra* note 17, at 231.
[503] Sungjoon Cho & Jürgen Kurtz, *Convergence and Divergence in International Economic Law and Politics*, 29(1) EURO. J. INT'L L. 169 (2018).

and ISDS frameworks.[504] Most importantly, GAL scholars advocate for international economic judiciaries to deliver judgments and awards with more sophisticated and comprehensive reasoning. To achieve this, WTO and ISDS adjudicators should give external international legal instruments and relevant case law adequate consideration to attain systemic legitimacy. From the GAL scholars' perspective, the cited international legal instruments may include non-binding but equally important international documents (e.g., legal instruments published by the UN human rights bodies[505]) that can illuminate the systemic interpretation of WTO and investment treaty provisions. Cross-references aligned with GAL principles could enhance the institutional legitimacy of both the WTO dispute settlement mechanism and the ISDS system, countering criticisms of economic-centered and power-driven decision-making processes that neglect non-trade and investment values.

B. International Law Constitutionalism

Another theoretical argument offering guidance for WTO adjudicators and investment arbitral tribunals to engage in cross-fertilization is international law constitutionalism. According to Peters, international law constitutionalism is "an intellectual movement with both reconstructs some features and functions of international law (in the interplay with domestic law) as 'constitutional' and even 'constitutionalist' (positive analysis), and also seeks to provide arguments for their further development in a specific direction (normative analysis).[506]" From the perspective of international law constitutionalists, the diverse legal instruments and case laws emerging from various international legal regimes collectively form a body of global constitutional law. The constituent instruments of international organizations are intuitively viewed as essential components of the international legal constitution, although the structural features of these instruments vary significantly across different legal regimes.[507] However, regardless of these variations, scholars in this field argue that these legal domains should embody the following core values of the international

[504] Kingsbury & Schill, *supra* note 17, at 250-276.
[505] Stewart & Badin, *supra* note 501, at 25. Nevertheless, scholars also suggest that the WTO adjudicators and the ISDS arbitrators should exercise a form of judicial review to ensure that the cited international soft law are published in the procedures in line with the spirit of the GAL.
[506] Anne Peters, *Are We Moving towards Constitutionalization of the World Community?*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 118-19 (Antonio Cassese ed., 2012).
[507] Peters, *supra* note 57, at 1017.

legal constitution: the rule of law, the protection of fundamental rights and freedoms, the containment of political and economic power, and the accountability and democracy of international judiciaries.[508]

International law constitutionalism is fiercely criticized by some observers (especially the realists in the field of international relations) as a naive imagination aimed at achieving unity and harmony in international law.[509] It is true that the idea of having a single constitutional document and hierarchical structure for the international legal system is an unrealistic advocacy. It is also true that different international legal regimes may have their own constitution-like legal instruments, and sometimes these may bear seemingly inconsistent or even incompatible goals, a phenomenon Peters refers to as "sectoral constitutionalization."[510] However, these scattered constitutional legal documents among various international legal regimes may actually coexist and potentially compensate for each other's deficiencies. To leverage the strengths embedded in other legal regimes and reach a consensus on certain fundamental values (e.g., the rule of law, due process, and democracy), both the rule makers (namely, treaty negotiators) and the rule appliers (namely, international courts) serve as vehicles to facilitate communicative dialogue and eventually integrate various international legal regimes.

Hence, international law constitutionalism offers insightful analytical tools for understanding how international law evolves and functions. It provides procedures and mechanisms to reconcile the diverging values of various international legal fields and to resolve conflicts. Among these tools, I particularly emphasize the role of international courts in promoting and protecting fundamental values—both procedural and substantive—across international legal regimes and in upholding the legitimacy of international law within the intellectual framework of international law constitutionalism. Specifically, international adjudicators should recognize that the world of international law comprises individual sub-legal regimes, and that potential conflicts might arise among these fields. During the adjudication process, international adjudicators should seek to mitigate such conflicts by accommodating external perspectives raised by dispute participants. Consequently, as two significant international judicial forums, the WTO dispute settlement mechanism and the ISDS

[508] Mattias Kumm et al., *How Large is the World of Global Constitutionalism*, 3(1) GLOBAL CONSTITUTIONALISM 1, 3 (2014).
[509] *See, e*.g., Jan Klabbrs, *Constitutionalism Lite*, 1 INT'L ORG. L. REV. 31, 49 (2004).
[510] Peters, *supra* note 57, at 1021.

systems are naturally expected to embody these constitutional elements by being attentive to concerns beyond their legal domains and mitigating the potential clashes between trade/investment and other legal regimes.

C. Judicial Functionalism

Judicial formalism and functionalism represent distinct frameworks that guide how courts should operate.[511] Judicial formalism dictates that judicial decisions should be made solely according to written or established rules, without considering factors such as the law's purposes or the systemic policy implications of judicial decisions.[512] To ensure the predictability, stability, and modesty of the judicial system, formalists argue that strict adherence to the letter of the law is preferable "even if the consequences of [the] decision seem either to frustrate the purpose behind those words or to diverge significantly from what the decisionmaker thinks — the rule aside — should be done.[513]"

Conversely, judicial functionalism encourages international adjudicators to adopt a pragmatic approach and be open to considering relevant legal sources from outside their legal domain.[514] Namely, international adjudicators should engage in policy thinking and consider the broader consequences of their judicial decisions during the adjudication process.[515] From the functionalists' perspective, the ultimate goal of adjudication is to render "the best decision having in mind present and future needs.[516]" In terms of determining the content of the rules, functionalists are more open to allowing the judicial branch to perform certain law-making functions. Therefore, they would be willing to take into account the external regulatory environment and evolving social contexts when adjudicating disputes.

When do formalism and functionalism prevail? Scholars suggest that institutional characteristics and other contextual factors may influence international adjudicators in their assessment across the spectrum between these two ideologies. In general, the

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[511] Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates*, 55(3) UNIV. TORONTO L. J. 853, 860-67 (2005).
[512] JEAN D'ASPREMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES 12-37 (2011).
[513] Frederick Schauer, *Formalism*, 97 YALE L. J. 509, 538 (1988).
[514] RICHARD A. POSNER, REFLECTIONS ON JUDGING 5 (2013).
[515] Richard Chen, *Formalism in Investment Treaty Arbitration: A Critical Assessment*, at 16 (working draft, on file with the author).
[516] *Id.*

functionalist approach may be more appealing if the area of law and its judiciary require a more inclusive decision-making process and a particular need for tailored judgments.[517] Additionally, functionalism is likely to be more effective if the legal domain is still in its early stages of development, leaving adjudicators with few or no authoritative sources to rely on.[518] Last but not least, a functionalist approach may be more appropriate in a legal system with a capable judiciary but lacking an attentive legislature.[519]

Having explored the distinct arguments and advocacies for both functionalism and formalism, I argue that while the formalist approach might still be the primary rhetoric for the adjudication, the functionalist approach should also be seriously considered in the context of the WTO dispute settlement mechanism and the ISDS system when addressing non-trade and investment concerns. The reliance on broad treaty language within WTO-covered agreements and investment treaties, coupled with an absence of binding legal precedents, suggests that both the WTO and the ISDS framework are bereft of the requisite formal legal foundations necessary for strict formalist interpretation. Furthermore, the reluctance of treaty parties to revisit the reasonableness of treaty provisions, due to high renegotiation costs in both trade and investment legal regimes, also supports a more significant role for WTO Panels/Appellate Bodies and investment arbitral tribunals in developing pragmatically effective rulings. In my view, the functionalist approach is particularly appealing when WTO adjudicators and investment arbitrators are tasked with tackling disputes involving both economic and non-economic concerns. Instead of adhering to a formalist approach by mechanically sticking to written provisions, I suggest that, with functionalism in mind, WTO Panels/Appellate Body and investment arbitral tribunals should also consider the overall policy goals and the broader consequences of their rulings. Harmonizing the different values pursued by various international legal regimes should definitely be considered by the two international economic courts when adopting the functionalist approach.

Moreover, adopting a functionalist approach in resolving trade and investment disputes, particularly those impacting public welfare, could further bolster the institutional credibility of both the WTO and the ISDS system. A socio-legal

[517] *Id*. at 22, n. 117.
[518] *Id*.
[519] *See* Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L. J. 529, 642 (1997).

perspective that explains adjudicators' motivations to follow certain practices includes the desire to ensure the implementation of judgments, to influence the development of policy and law, and to increase the legitimacy and authority of their respective court or tribunal.[520] The legitimacy of an international judiciary depends on the degree to which the court renders high-quality rulings motivated by the law. This factor can explain the judicial behavior of citing external international legal sources in disputes involving public policy concerns, as there is a strategic trade-off between pressures for adhering to written laws (judicial formalism) and appeasing the audience (judicial functionalism).[521]

Judicial functionalism is also desirable for adjudicators in international economic courts, as it ensures the evolving growth of the international economic legal framework. This approach equips the international economic judiciaries with the flexibility to adapt to emerging challenges and new areas of concern. New challenges may arise within a particular treaty regime. However, these concerns can hardly be addressed immediately through a legislative approach since treaties are difficult to modify, especially in multilateral settings such as the WTO.[522] WTO laws and most investment treaties were drafted over three decades ago. While the treaty parties might have had specific intentions during the negotiations, it is impossible for them to foresee new developments after the treaties come into force. New international legal sources that emerge after the creation of the WTO and the conclusion of investment treaties represent commensurate legal and factual evolutions that should be considered by the adjudicators of the WTO and investment arbitral tribunals if they are relevant to interpreting the meaning of WTO and investment law. In this sense, judicial functionalism posits that the role of international economic judiciaries is not only to settle disputes but also to clarify and even develop the law for the benefit of the contracting parties and the entire system.

Finally, one caveat should be noted before concluding this section. I do not advocate for the wholesale adoption of functionalism, nor does it encourage the WTO Panels/Appellate Body and investment arbitral tribunals to completely disregard treaty provisions, thereby risking being labeled as judicial activists. The fundamental

[520] Erik Voeten, *International Judicial Behavior*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 550 (Cesare P. R. Romano et al. eds., 2014). *See also* Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POLITICAL RESEARCH QUARTERLY 749 (1994).
[521] Voeten, *supra* note 520. *See also* R. Dainel Kelemen, *The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU*, 34(6) COMP. POL. STUD. 622 (2001).
[522] de Andrade, *supra* note 601, at 237.

principle for international adjudicators is not to alter the rights and obligations of the treaty parties. Instead, a more nuanced approach, as elaborated in the preceding section, should emphasize the legal justifications for the use of external international legal sources.

D. How do the normative foundations dictate adjudicators to appropriately engage in judicial cross-fertilizations

The GAL, International Law Constitutionalism, and Judicial Functionalism offer instructions for international courts and tribunals to ensure their rulings contribute to improved global governance. Addressing cited external international legal sources is essential for assessing if an international court or tribunal functions in a way that enhances coherence within international law. Previous chapters have offered empirical evidence indicating that external international legal sources are referenced in WTO decisions and investment awards more frequently than scholars might expect from a quantitative standpoint. However, qualitative and legal analyses of those external references question the effectiveness of judicial cross-fertilization as a means to enhance coherence in international law. This skepticism arises from the limited functions of the cited external legal sources, the strategic motives behind these external references, and instances where the WTO and ISDS systems have inappropriately used external legal sources.

Building on the principles set by the GAL, International Law Constitutionalism, and Judicial Functionalism, I outline key guiding principles for WTO adjudicators and investment arbitral tribunals in their practice of judicial cross-fertilization. These guiding principles are intended to form the foundation for the legal and policy recommendations envisaged in the subsequent section.

1. Balancing the textual and teleological interpretative approach

International adjudicators play a crucial role in shaping the broader legal landscape with their decisions. Accordingly, the Judicial Functionalists argue that adjudicators should extend their interpretive efforts beyond merely adhering to the literal text of treaties and seeking their ordinary meanings. Instead, they advocate for a more expansive approach that takes into account the objective of the treaties being interpreted and the policy implications of their rulings. This guidance is particularly

pertinent for WTO adjudicators. As demonstrated in Chapter II, both the Panels and the Appellate Body have a tendency to focus primarily on the ordinary meanings of treaty terms, often at the expense of other critical interpretative elements that could provide deeper insights into the treaty language. Moreover, there is a noticeable conservative trend among adjudicators to avoid delving into policy debates that emerge during the adjudication process. Such a tendency poses an unduly restraint on the WTO adjudicators to look beyond the WTO legal provisions and poses a risk of overlooking the notion of other international legal sources in given disputes. Given that the Preamble of the WTO Agreement references the promotion of non-trade values, the teleological approach to interpretation, which is also acknowledged as one of the important elements when interpreting the treaty under Article 31.1 of the VCLT, should be equally embraced by the WTO Panels and the Appellate Body to ensure a well-rounded decision-making process.

2. Enhancing the understanding of the notion of judicial cross-fertilizations

The GAL and Judicial Functionalism encourage adjudicators in the international judicial system to make use of system-protective reasoning to promote an institutional framework for cooperation among international judiciaries, compliance with international law, and the maintenance and development of the democratic, rights-respecting international community. In this vein, international courts are anticipated to enhance dialogue amongst themselves to cultivate shared understandings and bolster the legitimacy of judicial authority. Through such judicial dialogues, international courts have the opportunity to exchange specialized legal knowledge unique to their respective domains, learn from each other's decisions, and work towards common goals while acknowledging and respecting the significant variations in interests that characterize their individual legal spheres.

3. Providing a legal basis for engaging in judicial cross-fertilizations

According to the GAL, providing detailed reasoning for decisions is essential for upholding due process and the rule of law. This aspect becomes particularly crucial in the practice of judicial cross-fertilization, where referencing external international legal sources beyond the directly applicable law demands thorough justification. Nevertheless, the empirical findings reveal that both WTO adjudicators and investment arbitration tribunals frequently neglect to explicitly state the legal rationale

for incorporating external legal references into their decisions, despite the potential necessity and validity of such judicial cross-fertilization. Failing to specify the legal grounds for referencing external international legal sources could lead to allegations of judicial activism, thereby jeopardizing the credibility of the adjudication process and potentially the integrity of the WTO and ISDS system. Therefore, it is imperative for the WTO and investment arbitration tribunals to rigorously justify their reliance on external international legal sources within their rulings.

4. Exercising the principle of proportionality when addressing potential conflicts

In instances where the WTO adjudicators and investment arbitral tribunals have been requested to address the potential clashes between economic interests and other public concerns represented by different legal regimes, both bodies have displayed a lack of a uniform strategy for reconciling these clashes. In light of this inconsistency, International Law Constitutionalism underscores the critical role that international judiciaries play in addressing and alleviating the legal and normative conflicts that emerge. To effectively manage the competing interests advocated by different legal regimes, International Law Constitutionalism proposes that adjudicators should not prioritize one legal framework over another. Instead, they ought to apply the principle of proportionality, making decisions that better reconcile public values without establishing a hierarchy among the involved legal regimes. This approach aims to ensure a more balanced and equitable resolution that respects the diverse objectives of the various legal systems at play.

5. Clarifying the relationship between economic and non-economic interests in the legal instruments

The ongoing reform initiatives wave in the realms of international trade and investment agreements emphasizes the importance of preserving sovereign states' autonomy so as to safeguard their public and security interests. The inclusion of specific treaty clauses that define the interplay between trade/investment agreements and other non-economic treaties equips international economic courts with the tools to address conflicts through references to external international legal sources. This is because the contracting parties have explicitly given adjudicators the authority to expand their scope of deliberation to include legal sources outside their immediate

legal framework. In other words, the process of judicial cross-fertilization carried out by WTO adjudicators and investment arbitration tribunals would be more legitimate if trade or investment agreements provide more legal gateways that introduce external legal sources. From the perspective of the GAL, International Law Constitutionalism, and Judicial Functionalism, such a reformative approach is advocated as it represents a direct and effective strategy to avert conflicts and maintain the coherence of international law.

E. Summary

The arguments presented in this section highlight how judicial engagement and cross-fertilization, as exercised by WTO adjudicators and investment arbitration tribunals, could not only enhance the self-legitimacy of these international economic, judicial bodies but also facilitate the harmonization of economic and non-economic values embodied by different international legal regimes. This is particularly relevant in trade and investment disputes where there are usually intertwined interests involved. Moreover, these frameworks illuminate the boundaries of citing external international legal sources to prevent potential adverse effects. For instance, GAL scholars advise that references to external legal sources should align with the principles of public law or serve to emphasize the importance of constitutional values that are broadly acknowledged. Likewise, international law functionalism contends that the functionalist approach should never exceed the mandate given by disputing parties, resulting in adding to or diminishing the rights and obligations of the treaty parties.

Building on the theoretical foundation established, I present legal and policy recommendations from judicial, legislative, and institutional perspectives. The aim is to provide a concrete approach for enhancing the effectiveness of judicial engagements conducted by WTO adjudicators and investment arbitration tribunals.

III. Legal and Policy Approaches Toward Healthier Judicial Engagements

In this section, I explore ways in which the WTO law and international investment law architecture can accommodate non-economic values buttressed by other international treaties and conventions when they cross paths.

A. Interpretative Approach

For international judiciaries, their primary responsibility is to interpreting treaty provisions to determine the rights and obligations therein, as well as resolving any discrepancies in the understanding of treaty terms between disputing parties. Consequently, it is logical to begin by examining how the interpretative approach can guide WTO adjudicators and investment arbitrators to appropriately conduct judicial cross-references. This is particularly crucial for mitigating potential conflicts among various international legal regimes.

1. External international legal instruments as factual references to search ordinary meanings

In Chapters II and III, I identified that external international legal instruments are occasionally cited or introduced as factual references to inform the meaning of the WTO and investment treaty provisions. According to Article 31.1 of the VCLT, a treaty term is interpreted in good faith in accordance with the ordinary meaning to be given to those terms of the treaty. Identifying the "ordinary meaning" of the treaty term is usually the very first step for the international courts to interpret the treaty provision. In practice, treaty interpreters may rely on multiple methods to ascertain the ordinary meaning of a treaty term, such as adjudicators' personal knowledge and dictionaries. For instance, the WTO Panels and the Appellate Body heavily rely on dictionaries to examine the ordinary meaning of terms and provisions in WTO covered agreements.[523] The Panel in *China-Publications and Audiovisual Products* is a prominent case where over 10 dictionaries were used to explore the ordinary meaning of the treaty terms of the WTO law.[524] While the role of dictionaries is not that prominent in the context of investment treaty arbitration, they are still considered to be useful interpretative tools for investment arbitrators to find the ordinary meaning of investment treaty terms.[525]

Nevertheless, relying on dictionaries is not without criticism. The use of dictionaries may be manipulated with the illusion of pursuing objectiveness. As

[523] In terms of the use of dictionaries in the WTO, *see* CHANG-FA LO, TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES: A NEW ROUND OF CODIFICATION 166-177 (2017).
[524] *Id*. at 165-66.
[525] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Service*, WT/DS285/AB/R, ¶ 164 (Apr. 7, 2005).

McRae correctly points out, "anyone who has pleaded a case knows that you can usually find a dictionary meaning to support the meaning that your clients prefer.[526]" Mavroidis also indicates that the adjudicators of both the WTO dispute settlement mechanism and the ISDS system tend to explore the ordinary meaning of treaty terms by giving a definition to each term in a mechanical manner without holistically considering other equally important elements when exercising treaty interpretation, such as the object and purpose and the context of the WTO agreements and investment treaties.[527]

As mentioned, the judicial formalist's approach that adheres to the treaty text has been criticized for overlooking the broader picture of the dispute. Being in line with the ideology of Judicial Functionalism, I argue that the dictionaries should by no means be the only sources for the WTO Panels/Appellate Body and investment arbitral tribunals to use to ascertain the ordinary meaning of treaty terms. Instead, I propose that other international treaties with the same terms should be a valuable reference point when exercising Article 31.1 of the VCLT to search for the ordinary meaning. For example, when interpreting the non-lowering of standards provision in investment treaties that prohibits host states from lowering their labor protection standards in exchange for attracting foreign investment, the ILO legal instruments would be useful sources to clarify the definition of labor rights.

Unlike dictionaries, international treaties are negotiated by sovereign states, and the contents, structure, and wording are all consciously drafted. In other words, the terms used in treaties are more authoritative and closer to how contracting parties intend to interpret treaty terms.' In fact, the use of external international legal sources as important references to illuminate ordinary meanings is also recognized by the WTO and the ISDS. For instance, as mentioned *supra*, the Panel in *EC-Biotech* considered other rules of international laws may "aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used.[528]" In addition, referencing other international conventions that address emerging issues may also enrich the ordinary meaning of the

[526] Donald McRae, *Treaty Interpretation and the Development of International Trade by the WTO Appellate Body*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 360, 364 (G. Sacerdoti et al. eds., 2006).
[527] Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102(3) AM. J. INT'L L. 421, 446-450 (2008).
[528] Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, ¶¶ 7.92 (Nov. 21, 2006).

WTO and investment treaty provisions so as to aid these two international economic legal systems in being evolutionary and capable of responding to potential new regulatory challenges.

In brief, the current judicial practice of relying on other international laws to identify the ordinary meaning of treaty terms of the WTO covered agreements and investment treaties should be further encouraged. Nevertheless, one caveat should be made. In practice, many of such external references were made without fully explaining the rationales or the purposes. In considering the principles of the GAL and international law constitutionalism, including the rule of law and the reasoned adjudication, the WTO adjudicators and investment arbitrators should always specify the legal basis (i.e., Article 31.1 of the VCLT) when exercising similar judicial engagements in future disputes.

2. External international legal instruments are cited to mitigate conflicts

As demonstrated, a plethora of academic papers highlights the notion of systemic interpretation and its role in overcoming the conflicts arising from international law fragmentation. Among the legal tools, Article 31.3(c) of the VCLT is perceived as the rule of thumb for those advocates who encourage systemic interpretation by taking into account relevant international rules applicable to the parties. The role of Article 31.3(c) of the VCLT is also endorsed by the ILC's "Report of the Study Group on Fragmentation of International Law," which calls it the "master key to the house of international law"[529] to promote systemic integration of different international legal regimes in the decentralized and spontaneous world.[530]

Relying on Article 31.3(c) of the VCLT is not without prerequisites, and the elements of this Article themselves need to be interpreted. Scholars categorize four elements necessary to understand the function of Article 31.3(c) of the VCLT. First, which provisions constitute "rules of international law" under Article 31.3(c)? Second, how should the relevancy of the rules be determined? Third, which rules of international law are considered "applicable"? And fourth, what are "parties" meant? Does it refer to parties to the dispute or, more broadly, parties to the treaty being

[529] Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. a/cn.4/l.682, YILC, 2006, Vol. ii, Part Two, p. 175 ff., ¶ 420.
[530] *Id*. ¶ 480.

interpreted?[531] These elements are elucidated as follows.

Regarding the criteria for relevancy, the ordinary meaning of "relevant" refers to rules "touching on the same subject matter" as the treaty provision being interpreted.[532] However, the extent to which the identity of the "subject matter" need not be completely the same. The ICJ also supports the broader understanding by ruling that inasmuch as partial identity exists between the treaty to be considered and the treaty to be interpreted, then the element of relevancy under Article 31.3(c) of the VCLT is satisfied. [533]

In terms of the scope of "parties," the primary discrepancy here rests on whether relevant rules of international law under Article 31.3(c) of the VCLT refer to those international laws applicable to "parties of the dispute" or whether they need to be applicable to "all parties" of the treaty being interpreted.[534] I side with the majority's opinion that dismisses the restrictive approach adopted by the Panel in *EC-Biotech.*[535] In response to the Panel's interpretation that Article 31.3(c) requires that all parties to a treaty be bound by another legal instrument, the ILC's report correctly pointed out that:

> *"Bearing in mind the unlikeliness of a precise congruence in the membership of most important multilateral conventions, it would become unlikely any use of conventional international law could be made in the interpretation of such conventions. This would have the ironic effect that the more membership in a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the rest of international law. In practice, the result would be the isolation of multilateral agreements as 'islands' permitting no references inter se in their application….This, of course, would be contrary to the legislative ethos behind most of multilateral treaty-making, and presumably, with the intent of most treaty makers.[536]"*

In other words, the restrictive understanding held by the Panel in *EC-Biotech* may lead to an ironic result; namely, it would be highly unlikely for a multilateral

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[531] *See* PANOS MERKOURIS, ARTICLE 31.3(C) VCLT AND THE PRINCIPLE OF SYSTEMIC INTEGRATION: NORMATIVE SHADOWS IN PLATO'S CAVE 18 (2015). *See also* LO, *supra* note 523, at 215-17.
[532] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 433 (2009). *See also* MERKOURIS, *supra* note 531, at 21.
[533] Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, ¶ 112, [2008] I.C.J. Rep. 1 (June 4, 2008).
[534] *See generally* McLachlan, *supra* note 156.
[535] Regarding this Panel's argument, *see* chapter II of this dissertation.
[536] Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. a/cn.4/l.682, YILC, 2006, Vol. ii, Part Two, p. 175 ff., ¶¶ 471-72.

convention to be able to accept any external references even if most of its members are also treaty parties to that international treaty that is intended to be considered. Given that the operation of Article 31.3(c) of the VCLT would only influence the treaty meaning in the context of disputing parties, and such an interpretation considering the rulings of the external legal instrument would by no means be extended to other non-disputing parties nor add to or diminish rights and obligations of the treaty being interpreted, I maintain that the meaning of "parties" under Article 31.3(c) of the VCLT should be understood as "parties of the dispute."

Turning to another element regarding the scope of "rules of international law," scholars and relevant case laws unanimously affirmed that customary international law and general principles of law, as well as international treaties, are eligible to be the rules of international law considered under Article 31.3(c) of the VCLT. In addition to those legal sources, I further submit that international rules that could be considered under Article 31.3(c) of the VCLT should not preclude those non-binding international legal instruments.[537] This understanding can be supported by the ordinary meaning of this Article. The deliberate choice of the term "applicable" over "binding" by the drafters of Article 31.3(c) of the VCLT suggests that the rules considered relevant may extend beyond those that are binding international legal sources.[538] With this understanding, any soft law instruments that are "surrounding" (i.e., to be able to supplement, clarify, or implement) the international treaties, customary international law, or general principle of law, could all be the object considered by treaty interpreters.

Notably, while there have been fruitful discussions pertaining to individual elements of Article 31.3(c) of the VCLT, very few provide concrete steps for international adjudicators to apply this Article when tackling values conflicts in practice. When deliberating the "weight" to be given to the law being "taken into account" under Article 31.3(c) of the VCLT in the context of systemic interpretation, the ILC Report simply put that "[t]he question of the normative weight to be given to particular rights and obligations at the moment when they appear to clash with other rights and obligations can only be argued on a case-by-case basis.[539]"

[537] Peters, *supra* note 57, at 1025.
[538] Similar perspective, *see* Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), merits, November 6, 2003 (separate opinion of Judge Simma), ¶ 9.
[539] Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. a/cn.4/l.682, YILC, 2006, Vol. ii, Part

Based on the arguments raised by the GAL, international law constitutionalism, and judicial functionalism that all stress the notion of promoting international law coherence, I propose that operating Article 31.3(c) of the VCLT should be a legal gateway for the WTO Panels/Appellate Body and investment arbitral tribunals when exercising the principle of proportionality to adjudicate the disputes that involve value conflicts. In other words, when an external international legal source meets all requirements of Article 31.3(c) of the VCLT and is "taken into account" by the WTO adjudicators or investment arbitral tribunals for the purpose of exercising systemic interpretation, the adjudicators should first identify the values pursued or protected by the two international legal sources (i.e., purpose test). Second, the adjudicators should examine if the measure at issue based on the external treaty adopted by responding parties contributes to achieving the goal pursued or protected by that external treaty (i.e., suitability test). Besides, whether the measure is the least restrictive and without any alternatives that are capable of achieving the identical goal should be assessed (i.e., necessity test). Third, the adjudicators should weigh both the intensity of interference with rights protected by the WTO laws or investment treaties and the importance of the rights being protected or realized by external international legal instruments–i.e., proportionality *strictu sensu* test. For this test, decision-makers determine whether the marginal benefits to the respondent and the marginal cost to the claimant are significantly disproportionate.[540] This process of weight and balance cannot be conducted arbitrarily but is supposed to be justified by collecting empirical evidence so as to be contestable.[541]

As deliberated in the previous chapters, while Article 31.3(c) of the VCLT is occasionally cited by the WTO adjudicators and investment arbitral tribunals as the basis for introducing external legal sources, there is no consistent approach to "take into account" external references and elucidate their relationship with the WTO laws and investment treaties. Here, I give a hypothetical case to demonstrate how Article 31.3(c) of the VCLT should be operated to exercise the systemic interpretation. Suppose that country A imposes a sales ban on seafood sold by company B, which is a global enterprise with headquarters registered in country C and a subsidiary in county A. The rationale for the sales ban is that country A receives the notice from the

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Two, p. 175 ff., ¶ 473-74.

[540] Jamal Greene, *Foreword: Rights as Trumps*, 132(1) HARV. L. REV. 28, 59 (2018).

[541] Anne van Aaken & Roee Sarel, *Framing Effects in Proportionality Analysis: Experimental Evidence*, at 13-14 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4251219.

ILO and confidently believes that the seafood supply chain of company B involves forced labor and inhumane practices among its fishing workers. To challenge the validity of the sales ban, company B brings an arbitration claim through the bilateral investment agreement between country A and country C, arguing that the sales ban is inconsistent with the FET standard. To defend the legality of the measure, country A submits that the measure is adopted to comply with its duties under relevant ILO legal instruments, such as the ILO Convention Concerning Work in Fishing Sector[542] and the ILO core labor standards (for which country C is also the contracting party to both legal instruments).[543] In determining if the FET standard is breached, especially when examining if the sales ban is "fair" and "equitable," the investment arbitral tribunal, in this case, should rely on Article 31.3(c) of the VCLT to take the ILO conventions into account and exercise the proportionality test. From my perspective, the sales ban satisfies the "purpose test" and the "suitability test" since the objective of the measure is to protect the vital labor rights recognized by international conventions and can contribute to such a goal by imposing pressure on the company to eradicate the forced labor issue happening in its supply chain. The "necessity test" may also be met if country A proves that no other less restrictive economic alternatives are available. Lastly, in comparing the seriousness of the emergency that forced labor practices may threaten fishers' rights to health and life with the economic loss resulting from the sales ban, I suggest that the tribunal should give more weight to the responding state's regulatory space in implementing its obligation under the ILO conventions. After applying Article 31.3(c) of the VCLT and taking into account the ILO conventions, company B fails to establish that the sales ban is inconsistent with the FET standard under the investment agreement because applying the sales ban is not disproportionate and is thus fair or equitable to the investment interests owned by company B.

Overall, referencing external international legal sources is beneficial for treaty interpreters when probing the ordinary meaning of the treaty terms and when being tasked to mitigate conflicts between various international legal regimes. When the disputes involve certain non-economic values being protected by other international laws and might potentially clash with each other, the WTO adjudicators and

[542] Convention concerning Work in the Fishing Sector, opened for signature 14 June 2007 (entered into force 16 November 2017).
[543] ILO Declaration on Fundamental Principles and Rights at Work (1998).

investment arbitral tribunals should endeavor to interpret respective treaty terms by considering relevant external legal sources in order to both aid in comprehending the treaty provisions of the WTO and investment treaty and to ensure the coordination and harmonious co-existence of various international legal systems.

B. Legislative Approach

In recent years, there has been a wave of voices among members of the international economic law community that appealed to reform the current regulatory models that are criticized for systematically siding on trade and economic interests.[544] Various reform proposals are envisaged for recrafting the WTO dispute settlement mechanism, the ISDS system, and substantive trade and investment provisions.[545] These proposals share the ultimate goal, namely, to restore the legitimacy of these two international economic judiciaries.

The empirical evidence supports the assumption that the treaty and the institutional designs affect international adjudicators' willingness to engage in judicial cross-referencing.[546] Such a finding is especially evident when comparing the findings from the WTO and the ISDS chapters of this dissertation. I reveal that investment arbitral tribunals enjoy more freedom to engage in cross-references and judicial fertilization compared with the WTO adjudicators because the investment treaty provisions may directly link with the concept of other international law (e.g., FET standard), and the institutional instruments such as ICSID also explicitly contain "international law" as the applicable law for the ICSID tribunal. In contrast, Article 3.2 of the DSU restricts the WTO adjudicators from interpreting the WTO covered agreements with the customary rules of treaty interpretation. In other words, they are unable to directly rely on "international law" to be the applicable law in resolving trade disputes.

The issue of judicial engagement may unavoidably involve political causes.

[544] Cho & Kurtz, *supra* note 503, at 182-86.
[545] *See, e.g.*, WOLFGANG ALSCHNER, INVESTMENT ARBITRATION AND STATE-DRIVEN REFORM: NEW TREATIES, OLD OUTCOMES 95-107 (2022). *See also* Junji Nakagawa, *Mainstreaming Non-trade Concerns in International Trade Law*, *in* CHANGING ORDERS IN INTERNATIONAL ECONOMIC LAW (VOL. 1) 151 (Dai Yokomizo et al. eds., 2023).
[546] Wolfgang Alschner, *Locked in Language: Historical Sociology and the Path Dependency of Investment Treaty Design*, *in* RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW 347 (Moshe Hirsch & Andrew Lang eds., 2018)

Hence, scholars pointed out that fundamental value conflicts arising from the international law proliferations would be better resolved "politically" (i.e., by the international lawmakers, namely sovereign states) but not "technically" (i.e., by international courts and tribunals).[547] In other words, for scholars who perceive that citing external international legal instruments is one kind of judicial activism, the fundamental approach to mandate international adjudicators to engage in judicial fertilization would be undergoing treaty reforming projects. Currently, the reform proposals for the WTO and the ISDS system are wide-ranging – from minor changes to overwhelming revolution. I, however, focus on those proposals that can substantially and specifically instruct healthier judicial engagements.

1. Reform proposals for the WTO dispute settlement mechanism

As the multilateral mechanism administering trade deals annexed to its constituent agreement, the WTO operates as a rules-based, member-driven organization. All major decisions, including adopting or revising the WTO agreements or the rules governing dispute settlement procedures, require all members' positive consent in principle. This reality makes the controversies caused by judicial engagements almost impossible to be resolved by reforming the rules of dispute resolutions. The paralysis of the Appellate Body has triggered the WTO members' awareness regarding the flaws of the current dispute settlement mechanism, and an informal meeting concerning dispute settlement reform, including the future of the Appellate Body, is ongoing.[548] However, very few members have noticed how inappropriate cross-references may further harm the legitimacy of the WTO dispute settlement mechanism.[549]

Compared with other more troublesome issues, such as the necessity to resume the Appellate Body, or the extent to which members can exert their control over the dispute settlement process, the issue of regulating the external references should be relatively undisputed. For members who fear the WTO Panels/Appellate Body as

[547] Peters, *supra* note 57, at 1027. *See also* International Law Commission, Draft Conclusion of the Work of the Study Group, UN Doc A/CN.4/L.682/Add.1, at 484 (May 2, 2006). *See also* Kelly, *supra* note 20, at 358.
[548] *Members told "finish line within reach" in dispute settlement reform talks*, WORLD TRADE ORGANIZATION (Dec. 18, 2023), https://www.wto.org/english/news_e/news23_e/dsb_18dec23_e.htm.
[549] The US, which is the primary actor contributing to the Appellate Body's paralysis, ironically raises the concern that the current dispute settlement mechanism fails to preserve the policy space for members to address their critical interests. *See* id.

being judicial activists, instructing the WTO adjudicators to appropriately conduct judicial cross-fertilizations without adding to or diminishing WTO members' rights and duties should be in line with the WTO members' interests at large.[550] Likewise, members who advocate the WTO dispute settlement mechanism as being a more inclusive judicial forum that can fully accommodate non-trade concerns in given disputes should also welcome this reform.

In terms of a specific approach to materialize the reform, I propose that members should endeavor to initiate discussions in the topmost decision-making body of the WTO, namely the Ministerial Conference. According to Articles IV and IX:2 of the WTO Agreement, the Ministerial Conference enjoys the authority to take decisions on all matters under any of the covered-agreements, including the procedural rules for dispute settlements. Once a decision receives support from all WTO members without objection, then it becomes the subsequent agreement reached by WTO members and shall be the context of relevant WTO provisions when they are interpreted.[551] The contents of the proposed decision should focus on recalibrating the scope of Article 3.2 of the DSU. On top of that, the decision should recall the preamble of the WTO Agreement that pursues economic development in a way that balances the needs of raising the standards of living, preserving the environment, and protecting other non-trade concerns.[552] The main focus of the decision should further clarify the current language used in Article 3.2 of the DSU, which provides that the Panels and the Appellate Body shall interpret the WTO agreements in accordance with customary rules of interpretation of public international law. However, it is silent on the broader question of the application of other rules of public international law.[553] Past WTO jurisprudence has affirmed that the VCLT qualifies as the public international law under Article 3.2 of the DSU because the VCLT codifies customary rules of treaty interpretation.[554] From my perspective, however, the scope of public international law should be expanded beyond those rules regarding treaty interpretation. The decision

[550] Opposite perspective, *see* Kelly, *supra* note 20, at 365.
[551] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU*, WT/DS27/AB/RW/USA; WT/DS27/AB/RW2/ECU, ¶ 390, (Nov. 26, 2008). *See also* ASIF H. QURESHI, INTERPRETING WTO AGREEMENTS: PROBLEMS AND PERSPECTIVES 81-82 (2nd ed. 2015).
[552] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement], Preamble.
[553] DSU, Art. 3.2.
[554] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at 17 (Apr. 29, 1996).

may consider including the paragraph modeling on Article 42 of the ICSID Convention that indicates "rules of international law" as the applicable law for resolving trade disputes. With such clarification and empowerment, the WTO adjudicators would more confidently look outside the WTO laws and engage in judicial cross-references if needed. Alternatively, the decision could also shed light on the interpretative process by emphasizing the notion of systematic interpretation enshrined in Article 31.3(c) of the VCLT. Regardless of encouraging the WTO adjudicators to engage in cross-references when such a judicial practice is necessary, the bottom line of this approach shall always stick to the last sentence of Article 3.2 of the DSU, namely, the external references and resulting rulings shall by no means add to nor diminish the rights and obligations provided in the WTO covered-agreements.

Another revising proposal is the regulations that specify the conditions to which *amicus curiae* briefs can be submitted.[555] As noted, the *amicus curiae* is one of the primary contributors that introduces external international legal instruments in the context of the ISDS. Nevertheless, I do not observe such a trend in the WTO dispute settlement mechanism. One possible explanation is that the DSU fails to establish a set of clear rules regulating participation from public society. In practice, while there is no explicit permission for or prohibition of accepting *amicus curiae* briefs, Panels, and the Appellate Body have been requested to accept or reject such submissions from NGOs or academia representing affected social interests from time to time. [556]And so far, it has been extremely rare that the Panels and the Appellate Body exercised their discretion to accept unsolicited *amicus curiae* briefs or at least invite disputing parties to comment on the *amicus* submissions. The legal basis that was referred to by the WTO adjudicators was in two Articles of the DSU: Article 13, which authorizes the Panels to seek information from any relevant source, and Article 17.9, which empower the Appellate Body to adopt procedure rules that are not inconsistent with the DSU. [557] However, none of these provisions directly and comprehensively stipulate the procedural requirements of admitting *amicus curiae* briefs in the WTO

[555] QURESHI, *supra* note 551, at 246-49.
[556] WORLD TRADE ORGANIZATION, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 163-66 (2017).
[557] DSU Art. 13 "1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate….2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter…." DSU Art. 17.9 ("Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.")

dispute settlement proceedings. Hence, I suggest that the proposed decision should also formulate the procedural rules to regulate the *amicus* brief submissions so as to open a channel for the WTO adjudicators to receive external references that might be relevant to adjudicating disputes.

Currently, the Special Sessions of the Dispute Settlement Body were established by the Trade Negotiations Committee during the Doha Round in February 2002. A series of formal and informal negotiations aimed at polishing the DSU are ongoing.[558] If the WTO members reach a consensus on the aforementioned items, the Trade Negotiation Committee will report to the General Council to seek adoption by all WTO members. The modest approach I proposed should be more acceptable to the WTO members given that it has nothing to do with adopting new or revising existing WTO covered agreements. For example, several initiatives advocating the establishment of a formal mechanism to screen the *amicus curiae* submissions have been raised to amend the DSU.[559] As an integral component of the GAL for better multilateral trade regulatory governance, these reform proposals that instruct the WTO adjudicators to carefully assess the non-trade concern represented by the external international legal sources could also find support from the GAL disciplines, such as reasoned decisions, rule of law, and public participation.

2. Reform proposals for the ISDS system

Unlike the WTO, the bilateral or plurilateral nature of investment treaties or agreements reserves more flexibility and creativity for contracting parties to reshape the outdated treaty provisions so as to address emerging concerns and challenges. Several waves of reform happened to investment treaties after the contracting parties realized that investment treaties were utilized by foreign investors to threaten the legislations or regulatory measures that were enacted to stabilize financial conditions, restore public order, or realize public welfare.[560] The so-called "new-generation" investment agreements, as demonstrated in the previous chapter, are updated to

[558] *Negotiations to improve dispute settlement procedures*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm (last visited Apr. 3, 2024).
[559] TN/DS/W/1 – Contribution of the European Communities and its member states to the improvement of the WTO Dispute Settlement Understanding; TN/DS/W/38 Dispute Settlement Body - Special Session - Contribution of the European Communities and its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding - Communication from the European Communities.
[560] Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myths versus Reality*, 42(1) YALE J. INT'L L. 1 (2017).

contain new provisions clarifying the scope of protection, omitting controversial investment protection clauses, and including new exceptions clauses to preserve more policy space for host states. The most prominent models can be found in the EU's investment chapter in the comprehensive and enhanced partnership agreements with Canada, Singapore, and Vietnam. On the procedural side, states have concluded new investment treaties incorporating the transparency rules, third-party participation, and arbitrators' eligibility. More aggressively, led by the EU and followed by India and Brazil, these economies either replaced the *ad hoc* arbitration with a standing court-like tribunal with an appellate mechanism or entirely removed the ISDS system from their new concluding investment agreements or their mode investment treaties.[561] On the substantive side, innovations are introduced to balance the needs of investment protections and host states' regulatory authority. Examples include the preambular language highlighting the right to regulate, specific carve-out clauses excluding certain policy spaces from the application of investment protection, and the WTO-like exception clause. Scholars and international society felt positive about the reform projects. As Spears pointed out, these "new-generation IIAs [i.e., international investment agreements] provide arbitrators with new analytical devices for adjudicating disputes involving competing policy objectives.[562]" From the theoretical perspective, all these reform innovations may encourage investment arbitral tribunals to responsibly make reference to external international legal instruments in the event of disputes concerning both investment interests and other important values because these novel provisions can serve as the gateways to introduce relevant external international legal sources in the context of investment arbitral proceedings.

However, those scholars might be disappointed. I have shown that, for the initial group of cases brought under new-generation investment agreements, there is no positive correlation between the frequency of citing external legal sources and new-generation investment agreements embodying more public policy-friendly provisions. This result casts doubt on how effectively the current reform efforts pursue more balanced investment treaties. In other words, the innovations envisaged in the new generation investment agreements still fail to pay enough deference to host states'

[561] COOPERATION AND FACILITATION INVESTMENT AGREEMENT BETWEEN THE FEDERATIVE REPUBLIC OF BRAZIL AND ___, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download. (last visited Apr. 5, 2024)
[562] Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13(4) J. INT'L ECON. L. 1037, 1044 (2010).

regulatory spaces and still overlook the important non-investment concerns embedded in other international laws. Why do these reform efforts fail to realize the promise expected by contracting parties and civil society? Alschner applied the empirical approach to assess the disputes brought under the new generation investment treaties. He argued that the innovative provisions are not as effective as expected due to the MFN clause, customary international law, and the precedents that revert to how those old-generation investment treaties are interpreted. Investment arbitral tribunals have reversed innovative reforms by applying the MFN clause to import the more favorable clauses in old-generation investment treaties, by requiring states to undertake more stringent legal obligations in view of the evolving nature of customary international law, or by citing precedents that were rendered in the context of old generation investment treaties to circumvent the reform efforts.[563] In brief, the new treaties still result in old outcomes.

I by no means mean to degrade the immense effort and wisdom spent by states and international society to restore the balance in the international investment regime. However, I would like to highlight a relatively unnoticed clause that can not only instruct investment arbitral tribunals to consider external international legal instruments but can also prevent arbitral tribunals from reverting to old-generation investment treaties and circumventing the reform effort.

Following the ideology of international law constitutionalism, the values represented by different international legal regimes can be better considered and harmonized by investment arbitral tribunals if a mechanism is established to coordinate potential discrepancies between different treaties. Hence, the "relational clause" that aims to bridge interactions between international investment law and other legal regimes is crucial. This type of conflict avoidance and reconciliation provision can be found in Article 20 of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression, under the heading "Relationship to other treaties: mutual supportiveness, complementarity and non-subordination. [564] " This Article exemplifies two scenarios of legal regimes'

[563] ALSCHNER, *supra* note 545. at 45-46.

[564] Convention on the Protection and Promotion of the Diversity of Cultural Expression, 2440 U.N.T.S. 311, Mar. 18, 2007, Art. 20. ("1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties

interactions and underlines coordinating approaches to instruct treaty interpreters to handle the regime interactions and even tackle the potential legal and normative conflicts that might happen between this Convention and other international legal instruments. First, if specific treaty provisions in another international instrument seem to be compatible with the object and purpose of this Convention, Article 20(1)(a) suggests that parties of the Convention shall foster mutual supportiveness between that external international legal instrument and the Convention. Second, if potential conflicts might exist between this Convention and other international treaties, the similar disciplines of Article 31.3(c) of the VCLT were used as a model for Article 20(1)(b), which requires that treaty interpreters shall take into account the relevant provisions of this Convention when interpreting or applying other treaties. Similar relational clauses can also be found in the Agreement between the United States of America, the United Mexican States, and Canada (i.e., the USMCA). Article 1.3 of this Agreement manifests the relations between itself and other international environmental and conservation agreements. This Article provides that a party's obligations under this Agreement shall not preclude the party from taking a particular measure to comply with its obligations under the international environmental and conservation agreements listed in this Article[565] as long as the primary purpose of the measure is not to impose a disguised restriction on trade. This Article may be revised to include any amendments to these listed agreements or to include any new environmental and conservation conventions agreed on by parties.[566]

A more comprehensive and progressive regulatory scheme also envisaged from the idea of relational clauses can be found in the EU's modern trade agreements. Since the EU-South Korea trade agreement, the chapters titled "Trade and Sustainable Development" have been included to formalize a more inclusive trade and investment

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shall take into account the relevant provisions of this Convention. 2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.")

[565] The covered agreements under this Article include: (a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended; (b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as adjusted and amended; (c) the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, done at London, February 17, 1978, as amended; (d) the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar, February 2, 1971, as amended; (e) the Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980; (f) the International Convention for the Regulation of Whaling, done at Washington, December 2, 1946; and (g) the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington, May 31, 1949.

[566] Agreement between the United States of America, the United Mexican States, and Canada, Art. 1.3.

agenda. As a general rule, both sides agree to implement or ratify ILO fundamental conventions and multilateral environmental agreements, such as the UNFCCC, the Paris Agreement on Climate Change, and the Convention on Biological Diversity. Chapters on trade and sustainable development in more recent treaties also touch upon matters such as gender equality, indigenous culture preservation, and codes of conduct for multinational enterprises.[567] Notably, the commitments under the trade and sustainable chapters are binding and enforceable through the dedicated dispute settlement mechanism. In the event of a dispute, recommendations are made by an expert panel with specific knowledge of law, public policy, and the required expertise related to the nature of the dispute. The standing committee established under the trade and sustainable chapter is in charge of monitoring the enforcement of the panel's recommendations.[568] Some recent agreements even authorize the complaining party to adopt sanctions against the counterparty that fails to comply with the recommendations. By including this type of provision in future investment treaties, investment disputes concerning responding states' legal obligations under relevant international environmental and labor conventions would be directed to the state-to-state dispute settlement, allowing these disputes to be better adjudicated with specialized panelists and comprehensive procedural rules instead of the traditional approach to ISDS.[569]

From my perspective, the relational provisions are rooted in international law constitutionalism. Aside from emphasizing the notion of creating synergies between investment and other legal regimes, these relational provisions establish the hierarchical-like structure among those international treaties by prioritizing the integrity of labor rights, environmental protection, and sustainable development-related international conventions. Practically, these relational provisions that respect contracting parties' legal obligations under other international treaties have several advantages. First, they explicitly clarify the superiority of those international conventions that aim to secure fundamental public interests. With such a clear mandate, arbitral tribunals can confidently refer to relevant international conventions external to the investment regime if the challenged measure is to implement responding states' duties under those cited conventions. Second, the effectiveness of

[567] *See, e.g.*, Free Trade Agreement between the European Union and New Zealand, Chapter 19.
[568] Free Trade Agreement between the European Union and New Zealand, Article 26.13(3)(b).
[569] Free Trade Agreement between the European Union and New Zealand, Article 26.16.

relational clauses would not be circumvented by applying the MFN clause since the relational provision is a brand-new regulatory model dealing with the overarching relationships between investment and non-investment regimes. Therefore, arbitral tribunals are not allowed to refer to the MFN clause to exclude applying relational clauses because the MFN clause can "only attract matters belonging to the same category of subject as that to which the clause itself relates.[570]"

C. Institutional Approach

The architecture of international courts and the cooperation between international administrative bodies of multilateral conventions may both affect how judiciaries operate.[571] To ensure the WTO adjudicators and investment arbitrators correctly approach external international legal sources, I suggest the following institutional creations or renovations for international economic judiciaries and the respective administrative bodies that can contribute to better judicial engagements.

1. Renovating or reinforcing the function of formal/informal judicial dialogues

Scholars propose judicial dialogue to depict the interactions between different international courts and tribunals, to evaluate the extent to which external international legal sources would be referred to by other international judiciaries, and to assess the role of such external references for the cited judicial forum. For those international adjudicators sitting in various judicial forums, they communicate with each other directly or via their judgments. From a socio-legalist's perspective, judicial communication is growing, and such interactions would potentially affect each other's decision-making for legal issues.[572] As Slaughter indicated, such "transjudicial communication" has become integral to a "new world order,[573]" resulting in an emerging "global jurisprudence" created by a community of courts at the global level.[574]

What factors trigger the increasing prosperity of transjudicial communication? International adjudicators refer to external international legal sources to enhance the

[570] ALSCHNER, *supra* note 545. at 145.
[571] Tom Ginsburg, *The Institutional Context of the International Court of Justice* 14 (University of Chicago, Public Law Working Paper No. 779, 2021).
[572] Martinez, *supra* note 74.
[573] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65-103 (2004).
[574] Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L. J. 191 (2003).

quality of their reasoning. Some scholars additionally explain the incentive of participating in transjudicial communication from behavioral studies' perspectives. The behavioral assumption underlying transjudicial communication is that adjudicators hope to ensure their decisions are influential. If international adjudicators decline to participate in transjudicial dialogue, their ability to exert their influence on other courts would be undermined.[575] Following the same school of thought, scholars submitted that the judicial ideology held by international adjudicators matters when deciding whether to make reference to external legal sources.[576]

I concur with the prevailing view that the emerging transjudicial dialogue marks a positive development for the international legal system. For international courts or tribunals, participating in transjudicial dialogue represents a pragmatic approach to mitigating negative effects and capitalizing on the proliferation of international law. This proliferation is evident in the practice of treaty bodies and judiciaries engaging in contact and exchanging information to identify potential common goals and shared principles.[577] In the past, however, the arguments for transjudicial dialogue faced criticism for relying solely on selective cases that engage in external references without providing empirical evidence of the extent of such reliance on external international legal sources, the factors explaining variations in this practice, and the functions of these external citations.[578] Addressing these criticisms is a primary contribution of this dissertation, which aims to bridge the aforementioned knowledge gaps with empirical evidence presented in previous chapters. Moreover, the current practice and academic focus of transjudicial dialogue predominantly revolves around how international courts or tribunals engage in transjudicial dialogue through external citations that align with the international legal regime to which the court belongs. Only a limited number of works focus on assessing the desirability of establishing more concrete institutional arrangements to facilitate transjudicial communication. I propose for a more proactive and institutionalized approach to judicial dialogue to foster appropriate and orderly judicial engagements by WTO and ISDS adjudicators. The format of such judicial dialogue can vary, depending on the dynamic relationships between international courts and tribunals.

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[575] Voeten, *supra* note 167.
[576] *See* Ryan C. Black & Lee Epstein, *(Re-)Setting the Scholarly Agenda on Transjudicial Communication*, 32(3) L. & SOC. INQUIRY 789, 801 (2007).
[577] Peters, *supra* note 57, at 1026.
[578] For detailed elaboration of this criticism, *see* Black & Epstein, *supra* note 576, at 795-96.

First, I propose that the ICJ could potentially serve as a platform for encouraging and regulating judicial dialogue. For both the WTO dispute settlement mechanism and the ISDS system, the significant role of ICJ jurisprudence in informing the adjudication processes of the two international economic judiciaries is evident. However, given that the legal status of "precedents" is supplementary, another question arises: Can and should the ICJ play a more proactive role in mitigating potential conflicts amid the proliferation of international law and judicial engagements? Scholars have envisioned a platonic blueprint for creating a hierarchy of international tribunals, arguing that when there are conflicts in rulings among international judiciaries on the same subject matters, the courts should refer the case to the ICJ, which would then act as the appellate court to mitigate such conflicts.[579] However, it is widely recognized that no hierarchy has been envisaged for the relationship between the ICJ and other international courts.[580] Expecting the ICJ to function as a quasi-constitutional court to address conflicting interpretations between other international judiciaries is not only practically unrealistic but also undesirable, considering its conservative tendency to address sensitive legal issues and the limited mandate provided by the ICJ Statute.[581]

With that being said, the ICJ could still serve as a lighthouse, guiding adjudicators of international courts to appropriately address conflicts among different international legal systems.[582] Without establishing a hierarchical and centralist structure that places the ICJ in a superior position above other international judicial forums, I suggest that current judicial engagements practiced by international courts could be further enhanced if the ICJ were to serve as a platform for deliberating legal issues that may result in norm or value conflicts. A forum or the informal arrangements operated by the ICJ could facilitate judicial communication and solicit a common understanding among international adjudicators—that they are all part of the international legal system and should, therefore, strive to promote the internal

[579] Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 798-801 (1999).
[580] de Chazournes, *supra* note 67, at 22. Andrew Lang, *The Role of the International Court of Justice in a Context of Fragmentation*, 62 INT'L & COMP. L. Q. 777, 778-79 (2013). *See also* ICTY's perspective in terms of itself and the ICJ. Judgment, Prosecutor v. Kvocka (IT-98-30/1), Appeals Chamber, 25 May 2001, ¶ 15. ("[T]his Tribunal is an autonomous international judicial body, and although the ICJ is the "principal judicial organ" within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts.")
[581] Karen J. Alter, *The International Court of Justice in Comparison: Understanding the Court's Limited Influence*, 21(3) MELBOURNE J. INT'L L. 676 (2021).
[582] Similar perspective, *see* Lang, *supra* note 580, at 805-06.

coherence of that system.[583] For instance, inter-court workshops could be organized annually by the ICJ, inviting international adjudicators from prominent judiciaries (e.g., the WTO, investment arbitral tribunals, ITLOS, human rights courts, and other regional dispute settlement mechanisms) to promote information exchange, periodic review, normative borrowing, and mutual scrutiny among these international judiciaries and their represented legal regimes. Such a platform was once organized in early 2000.[584] Hence, it should be a practical option for the ICJ to retrieve a similar mechanism amid the more diverse and complicated international disputes. Additionally, inter-organizational cooperative mechanisms can raise awareness about addressing conflicts. For example, the WTO established the Committee on Trade and Environment in 1995 as a standing forum to lead discussions among all WTO members about the implications of trade policies on environmental protection and vice versa.[585] Furthermore, built-in mechanisms in trade or investment regimes can also help create greater synergies between different values and interests. Taking the WTO as an example again, Article V of the WTO Agreement stipulates that the General Council shall make appropriate arrangements for cooperation with other relevant international governmental organizations that share responsibilities related to the WTO. [586] In practice, the WTO Secretariat collaborates with numerous implementing bodies of multilateral conventions in areas such as the environment, climate change, and labor rights. For example, the WTO Secretariat engages in technical dialogues with the ILO to support its members' global economic policies. These activities include compiling statistics, conducting research regarding the nexus between trade and labor protection, and providing technical assistance and training. The WTO Secretariat also attends sessions of the ILO Governing Body as observers.[587] Additionally, the current Trade Policy Review Body has the potential to provide a forum for WTO members to discuss the relationship between trade and non-economic concerns represented by various international laws. Studies have shown that the operation of trade policy reviews systematically engages not only in issues surrounding members' commitments under the WTO but also extends to assessing the

[583] *See* Slaughter, *supra* note 574, at 217.
[584] *See* Webb, *supra* note 106, at 167.
[585] *Trade and Environment*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/envir_e/envir_e.htm#multiEAG. (last visited Apr. 6, 2024)
[586] WTO Agreement, Art. V:1.
[587] *The WTO and International Labour Organization*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/coher_e/wto_ilo_e.htm. (last visited Apr. 6, 2024)

social, environmental, and human rights impacts of members' trade policies.[588] From my perspective, if these institutional arrangements place more emphasis on the roles that judicial bodies could play in mitigating conflicts, they could further contribute to illuminating the path for WTO Panels/Appellate Bodies and investment arbitral tribunals to duly exercise judicial cross-fertilizations.

2. Strengthening the knowledge of public international law for WTO adjudicators, investment arbitrators, and relevant secretariats staff/clerks

The diversity within adjudicator pools plays a vital role in ensuring that decisions made by international judiciaries remain impartial without favoring or discriminating against any specific group of countries, subject matters, or ideologies. Unfortunately, adjudicators from both the WTO dispute settlement mechanism and the ISDS system have been criticized for coming from a small, homogenous circle with similar backgrounds and ideologies. For instance, through social network analysis, Puig observed that a majority of investment arbitrators are repeatedly appointed from an extremely homogenous group—namely, white, male, and predominantly from the Global North.[589] Several trade law scholars have indicated that the WTO dispute settlement mechanism exhibits an institutional bias favoring a specific version of trade liberalization.[590] More recently, Pauwelyn and Pelc suggested that bias exists among chairs of the Appellate Body, who are more susceptible to political pressure (e.g., when the chair of the Appellate Body holds the nationality of the responding member) from powerful countries within the WTO.[591] Given these circumstances, it seems difficult to expect WTO adjudicators and investment arbitral tribunals to engage in judicial cross-references in a manner consistent with my proposals.

A more critical issue in discussing how to ensure the appropriate exercise of judicial engagement lies in the knowledge background of international adjudicators. Currently, adjudicators for both the WTO and the ISDS do not necessarily possess knowledge of international law. For instance, after surveying the Indicative List of Governmental and Non-Governmental Panelists maintained by the WTO Secretariat, I

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[588] DESIERTO, *supra* note 7, at 232-33.
[589] *See* Puig, *supra* note 292, at 387.
[590] Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42(2) VAND. L REV. 383, 391 (2009)
[591] Joost Pauwelyn & Krzysztof Pelc, *Are WTO Rulings Biased? The Role of Institutional Design in Protecting Judicial Autonomy*, 21-24 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4480161.

find that a significant portion of panelists lack a background in public international law.[592] A similar trend is observed among the most frequently appointed investment arbitrators, who often come equipped with profound experience in dispute resolution for commercial disputes but lack experience in applying and interpreting rules of international law.[593] The disparity in adjudicators' abilities to tackle interactions and complexities among international regimes may further influence their attitudes toward the functions and the appropriate use of external international legal sources in the context of the WTO and the ISDS system.

To address the biases presented in both international economic courts and to enhance the abilities of WTO adjudicators and investment arbitrators to properly assess external international legal sources, I argue that two institutional reform proposals could be considered. First, the diversity of WTO adjudicators and investment arbitrators should be further improved. Specifically, more adjudicators knowledgeable in public international law should be added to the pool to increase the likelihood of assembling panels or arbitral tribunals where a majority of members are cognizant of the potential roles of external international legal sources and can incorporate them accurately. In the context of the WTO, the diversity of the panelist pool can be enhanced through appointments made by WTO members. Regarding the ISDS system, arbitration institutions (e.g., ICSID, ICC, or the Permanent Court of Arbitration) should strive to assign chairs capable of applying and interpreting rules of international law and who recognize the value of exercising judicial cross-references in the ISDS.

Second, capacity-building projects should cover the staff and judicial clerks who assist WTO adjudicators and investment arbitral tribunals in analyzing legal issues and drafting decisions. The expanding roles of WTO Secretariat staff and the legal assistants/secretaries to investment arbitral tribunals are increasingly recognized.[594] Especially in the context of WTO adjudications, the Secretariat staff are significantly involved in almost every stage of the dispute settlement process, including writing issue papers, participating in the Panel's internal deliberations, and drafting final

[592] *Indicative List of Governmental and Non-Governmental Panelists*, WT/DSB/44/Rev.54 (June 30, 2021). *See also* Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109(4) AM. J. INT'L L. 761, 773 (2015).
[593] *See* Pauwelyn, *supra* note 592, at 774-75 fig. 3.
[594] Pauwelyn & Pelc, *supra* note 169, at 534.

reports.[595] Cottier insightfully captures the significant influence of WTO Secretariat staff on the adjudication process, describing that "[I]t is obvious that . . . Panel reports cannot be the sole responsibility of three part-time panelists. It is shared with the WTO Secretariat . . . . The professionalism of the Secretariat and its institutional memory are the main capital in WTO dispute settlement.[596]" As permanent employees of the WTO, they also have a greater incentive not only to resolve the specific case before them but to consider the overarching impacts of the rulings on the sustainability of the WTO legal system and to maintain such an "institutional memory." Hence, these behind-the-scenes actors are key to determining if external international legal sources will be appropriately used in the WTO. Considering the indispensable function of these staff members in the WTO and the ISDS system, I argue that staff assisting both the WTO Panels/Appellate Bodies and investment arbitral tribunals should also possess knowledge of interpreting and applying rules of international law, ideally with an understanding of how to properly engage in judicial cross-fertilization.

IV. Chapter Conclusion

The WTO dispute settlement mechanism and the ISDS system are grappling with disputes involving increasingly complex and intertwined issues. Adjudicators in these two international economic judiciaries are called upon to address arguments based not only on trade or investment treaty provisions but also on other rules of international law. The empirical results reveal the scale, functions, and potential roles of citing external international legal sources in both the WTO dispute settlement mechanism and investment arbitral tribunals. If the contribution of judicial engagement in mitigating normative conflicts is evaluated solely based on quantity, the current judicial cross-fertilizations conducted by the WTO and the ISDS could be viewed as satisfactory by some scholars who advocate for more judicial engagement among various international legal regimes.

However, I argue that the current judicial engagements exercised by disputing parties, WTO Panels/Appellate Body, and investment arbitral tribunals are not

[595] *Id.*
[596] Thomas Cottier, *Recalibrating the WTO Dispute Settlement System: Towards New Standards of Appellate Review*, 24(3) J. INT'L ECO. L. 515, 522 (2021).

without limitations. A close examination of how external international legal sources are used in these judiciaries shows that, on many occasions, external references are introduced strategically by disputing parties to support their arguments and legal reasoning. Such a strategic approach is distant from promoting coherence in international law in disputes involving value conflicts. Even worse, in some cases, external references are improperly cited by adjudicators, leading to greater confusion. Moreover, both WTO adjudicators and investment arbitrators often fail to provide a legal basis for justifying their external citations. Without specifying a clear rationale for citing external legal sources, both international judiciaries run the risk of facing criticism for judicial activism, which could potentially erode their legitimacy.

The proliferation of the international legal system has led to an increase in potentially applicable legal sources in international courts and tribunals. With the boundaries of international legal regimes increasingly blurring, judicial cross-references are expected to become more prevalent. It is essential to ensure that future judicial engagements by WTO adjudicators and investment arbitrators avoid repeating the same mistakes. Based on theoretical frameworks, including GAL, international law constitutionalism, and judicial functionalism, I propose legal and policy recommendations from interpretative, legislative, and institutional perspectives to help instruct judicial cross-fertilizations and coordinate the growing complexity among international trade, investment, and other legal domains. The interpretative approach includes guidance on using Article 31 of the VCLT. To elaborate, when WTO adjudicators use external international legal instruments to clarify specific treaty terms, these references can be valuable sources for determining the ordinary meanings of the terms under Article 31.1 of the VCLT. If adjudicators must address value conflicts in trade or investment disputes, Article 31.3(c) should be applied when taking into account relevant rules of international law applicable to the disputing parties. The legislative approach includes adopting a decision to clarify the relationship between WTO law and other international laws and formalizing rules on amicus curiae submissions, as well as strengthening linkages between international investment law and other legal regimes by formulating a “relational clause” that clarifies the relationship between international legal regimes. This guidance would enable investment arbitral tribunals to appropriately address potential value conflicts in investment disputes. Finally, the institutional approach focuses on both organizational and individual levels, advocating ICJ to play a more active role in

leading the informal arrangements, such as collaborations between various international judiciaries, to promote more communications among international courts, including information exchange, experience sharing, and judicial communication. On an individual level, diversifying the pool of international adjudicators and the staff assisting in the deliberation of legal reasoning is essential. This ensures that those involved in the decision-making process possess a comprehensive understanding of the notion of judicial cross-fertilizations and contribute to the coherence of the international legal system.

CHAPTER V CONCLUSION

I. Summary of Empirical Findings and Evaluations on Current Judicial Cross-References

The proliferation of international legal regimes and judiciaries indicates that international law is recognized by the international community as an important instrument for governing increasingly complex global affairs. Due to the diverse aspects of global governance, an international dispute may involve various international legal regimes and be subject to the jurisdiction of multiple international courts or tribunals. Among these, trade and investment disputes involving non-economic values pursued by other international legal regimes have attracted attention from legal academia. This is because the WTO dispute settlement mechanism and the ISDS system have been criticized for overlooking external legal sources, even when those external treaties or courts' rulings are closely relevant to the disputes. To promote inclusiveness in the WTO and the ISDS, scholars advocate for a concept of "judicial dialogue" that encourages WTO adjudicators and investment arbitral tribunals to engage in judicial cross-fertilization – namely, to reference relevant international legal sources when necessary. Nevertheless, over several decades, there has been no comprehensive research that empirically examines the extent to which the WTO dispute settlement mechanism and the ISDS system interact with external international legal sources.

To fill the current knowledge gap, I employ both quantitative and qualitative research methods to answer the following questions. First, how frequently are external international legal sources cited/invoked in the WTO Panel/Appellate Body reports and investment arbitral awards? Second, what kinds of external international legal sources are cited/invoked in the Panel/Appellate Body reports and investment arbitral awards? Third, what factors may be positively or negatively associated with the frequency of citing external international legal sources in the WTO Panel/Appellate Body reports and investment arbitral awards? Fourth, what are the roles of external international legal sources when referred to or cited in WTO and investment arbitral proceedings? And five, does using external international sources contribute to international law coherence? The empirical findings and normative arguments for these five research questions are summarized as follows.

A. External International Legal Sources Are More Frequently Mentioned in the WTO Decisions and Investment Awards Than Expected

Regarding the first question, I found that both WTO decisions and investment arbitral awards actually mentioned external international legal sources more frequently than some scholars have suggested. In the context of the WTO, over 50% of the Panel and Appellate Body reports cited at least one external legal source, either raised by the disputing parties or by the adjudicators themselves. Judicial cross-fertilization is even more prevalent in the context of the ISDS system, with more than 80% of investment awards mentioning one or more external legal sources. In addition, I further observe the trend of citing external international legal sources in the WTO decisions and investment arbitral awards over time. The quantitative analysis reveals the extent of judicial engagements undertaken by WTO Panels, the Appellate Body, investment arbitral tribunals, and disputing parties. It preliminarily challenges the doctrinal claims by showing that external legal sources are cited more frequently than previously thought.

B. The Range of External Legal Sources Exhibits more Diversity in the ISDS System than in the WTO

Second, the external international legal sources referenced can broadly be classified into two categories: primary and secondary rules. Within the WTO, commonly cited external legal sources include rules derived from customary international laws, general principles of law, and jurisprudence from other international courts that do not involve secondary rules. Specifically, most of those cited legal sources are not used to interpret or clarify the substantive laws of the WTO but are typically invoked to clarify procedural issues or to confirm the existence of customary rules that do not belong to specific legal regimes. For instance, the Statute of the ICJ, the ILC Draft Articles, and ICJ case law that involve the deliberation of primary rules frequently appear in WTO decisions. Additionally, soft law instruments issued by relevant international organizations, such as the WHO and the OECD, are commonly referenced in reports from both the Panel and the Appellate Body to serve as the evidentiary materials for supporting or attacking the efficacy of responding

states' measures. In the realm of investment arbitration, customary international law, general principles of law, and case law from other international courts also constitute a significant portion of the external legal sources cited. Nevertheless, unlike its fellow judiciaries, there is an increase in substantive judicial cross-fertilization that introduces customary laws, general principles of law, or other international courts' jurisprudence that belong to secondary rules within the ISDS framework. Specifically, global and regional human rights conventions, environmental protection treaties, WTO agreements, and anti-corruption legal instruments are increasingly incorporated into investment awards.

I highlight how diverse international legal sources are incorporated into WTO decisions and investment awards, showcasing the connections between trade, investment, and other legal realms. Notably, sources embodying customary international law, like the ILC Draft Articles on State Responsibility and ICJ case laws, are among the most cited. Predominantly, these external references contribute to judicial cross-fertilization regarding procedural rules. Nonetheless, the research also identifies instances of substantive judicial cross-fertilization by the WTO Panels, Appellate Body, and investment arbitral tribunals, particularly in their references to legal sources pertaining to secondary rules, including human rights, environmental protection, climate change, and other legal regimes.

C. OLS Liner Regression Analysis Is Performed to Investigate the Determinants of Citing External Legal Sources

Third, factors associated with the frequency of citing external international legal sources in both WTO decisions and investment awards were tested through two OLS linear multiple regression analyses. In the context of WTO decisions, the nature of the disputes and the disputing parties were examined. Specifically, the WTO decisions mentioned more external international legal sources when the disputes involved technical barriers to trade, sanitary and phytosanitary measures, and other matters related to members' regulatory space. Meanwhile, as the two major players in the WTO dispute settlement mechanism, we observed more external international legal sources cited in the Panel and Appellate Body reports when the EU was involved in the disputes (either as claimant or respondent). In contrast, the US refers to fewer external legal sources in the cases. Both results are statistically significant. For

investment arbitral awards, I examine variables including (1) the economic development of the disputing parties, (2) the nature of the investment at stake, (3) the composition of the arbitral tribunals, and (4) the involvement of non-disputing parties. I also include the year of the case and the generation of the applicable investment treaties as two control variables. The regression results indicate positive associations when the disputing parties are from developed countries when the majority of arbitrators on the tribunals come from legal academia, and when there are submissions from amicus curiae. In contrast, a negative association is observed if the investments at issue are in the secondary sector[597] (using the primary sector[598] as the reference group in the regression model). All the outcomes mentioned above are statistically significant.

D. The Functions of Cited External Legal Sources in the WTO and the ISDS Are Identified

Acknowledging that the aforementioned quantitative analyses do not account for the functions of the cited external international legal sources in WTO decisions and investment arbitral awards, qualitative content analyses were conducted to explore how these external legal sources are utilized by disputing parties or adjudicators. In the context of the WTO, those cited external legal sources largely belong to the primary rules of international law. The functions of external international legal sources are to (1) serve as factual conclusions, (2) inform the meaning of specific WTO provisions, (3) demonstrate the existence of customary international law, and (4) fill legal gaps, especially in procedural rules. The roles of secondary rules of international law that belong to specialized legal regimes, including human rights, environmental protection, and public health legal instruments, are relatively limited, as most are merely mentioned as factual backgrounds of the disputes. On the few occasions when disputing parties attempt to engage in substantial judicial cross-fertilization by referring to secondary rules, the Panels or the Appellate Body either ignore the cited external references or deem them irrelevant to the disputes at hand. Overall, the Panels and the Appellate Body are more inclined to reference external legal sources that pertain to primary rules of international law that do not belong to

[597] Namely the manufacturing sector.
[598] Namely agriculture, and mining and quarrying sectors.

specific legal regimes.

Turning to the ISDS system, the collected investment awards showcase a more dynamic use of external sources compared to the WTO, with a greater prevalence of secondary rules being cited and more substantive judicial cross-fertilizations identified in investment disputes. I identify four major types of substantive judicial cross-fertilizations in investment arbitral awards. In terms of references to human rights law, both investors and host states relied on human rights conventions and relevant case law to bolster their claims under investment treaty provisions (e.g., the concept of property rights and protected investments) and to introduce legal doctrines (e.g., the right to a fair trial and the margin of appreciation). The national treatment standard, general exception, security exception clauses, and relevant WTO case law are favored by disputing parties and arbitral tribunals to clarify the understanding of respective clauses in investment treaties with similar language. While the role of environmental protection conventions and climate change legal instruments is not as prominent as expected, they are occasionally referred to by disputing parties to introduce legal principles from environmental law (e.g., the precautionary principle) and to support their legal analyses of substantive investment treaty obligations. Last but not least, global anti-corruption legal instruments serve as useful references for identifying the existence of bribery and corruption in establishing and operating investments. The asserted illegality of investments due to corruption can affect the jurisdiction of arbitral tribunals or the admissibility of claims. Similarly, corruption within the host state's judicial system may also constitute a violation of substantive protections under investment treaties (e.g., the FET standard).

E. Does Using External Legal Sources Always Contribute to International Law Coherence?

Do external references in international economic judiciaries lead to a more inclusive international economic legal regime? Or, conversely, do references to those external international legal sources unfortunately create more chaos among different international legal regimes? In my view, neither argument fully captures the implications of external references in WTO dispute reports and investment arbitral awards. Instead, a more instrumental or strategic ideology appears to be the driving force behind the use of external references by disputing parties. To elaborate, the

ultimate goal of citing external legal sources is to enhance the persuasiveness of their arguments to obtain better outcomes of the disputes. Therefore, while current judicial engagements conducted in the WTO dispute settlement proceedings and investment arbitral tribunals seem to be flourishing, it is questionable whether all such cross-references truly contribute to coherence in international law, given that many of these external citations are not made for the purpose of mitigating potential conflicts between trade/investment and other legal regimes.[599] Even more concerning are the risks associated with the inappropriate use of external international legal sources, which may exacerbate the legitimacy deficit in both the WTO and the ISDS system. From my perspective, both the WTO and ISDS jurisprudence have, on some occasions and in various ways, improperly referred to external international legal instruments. Specifically, WTO adjudicators have been relatively passive in responding to arguments based on external legal sources in disputes where disputing parties attempt to introduce human rights, environmental protection, or climate change laws to engage in substantive judicial cross-fertilization. In my view, such reluctance prevents WTO adjudicators from engaging in the weighing and balancing of different values in cases involving value conflicts. In contrast, investment arbitral tribunals appear to be more comfortable with engaging in substantive judicial cross-fertilization and considering the non-investment values underpinning relevant external international legal sources. However, some investment arbitral tribunals have unfortunately transplanted external international legal sources out of context to interpret investment treaty provisions. These decontextualized external references occur when tribunals use human rights conventions, WTO agreements, and anti-corruption legal instruments to inform their interpretation of investment treaty provisions. For instance, some investment arbitral tribunals borrow the concept of the right to property from the ECHR when determining the scope of protected "investments" under the applicable investment treaty. However, relying on such external references may inadvertently circumvent the specific definition of investment intentionally established by the contracting parties of the respective investment treaty. This represents a common improper use of external legal sources by investment arbitral tribunals.

Furthermore, on many occasions, when referencing external international legal

[599] Similar perspective, *see* Alvarez, *supra* note 20. *See also* Steininger, *supra* note 255.

sources, WTO adjudicators and investment arbitral tribunals simply cite them without explaining the necessity of making such external references. The lack of clear guidelines and a transparent methodology for specifying the rationales for resorting to external international legal sources may not only undermine the intended purposes of cross-fertilization but also erode the legitimacy of both the WTO dispute settlement mechanism and the ISDS system. Exercising judicial cross-fertilizations without providing justification could be perceived as "judicial activism," exceeding the mandate and potentially altering the rights and obligations of WTO members and parties to investment treaties.[600] For example, Howse criticized the Appellate Body in US-Shrimp for not clarifying the legal basis (e.g., Article 31.3(c) of the VCLT) before exercising what he called "evolutionary interpretation" by referring to other international environmental conventions to determine the meaning of 'exhaustible natural resources' under Article XX(g) of the GATT. Many WTO members were displeased with and strongly opposed the Panel and Appellate Body's evolutionary approach, viewing it as an overreach of WTO jurisdiction by the disputing parties.[601] Overall, the dissertation contends that the legal basis for engaging in judicial interactions and cross-references should be clearly specified to better fulfill the demands and achieve the beneficial effects of resorting to other international legal instruments while also enhancing adjudicative legitimacy in both the WTO and the ISDS. Only through correct and orderly interactions between international economic regimes and other international legal frameworks can we effectively reduce uncertainties associated with WTO and investment treaty provisions and ensure greater predictability in the judicial decisions rendered by WTO and investment arbitral tribunals while engaging in cross-fertilization.[602]

II. Legal and Policy Recommendations for a More Inclusive and Orderly International Economic Judiciary

International legal regimes have become even more proliferated compared to nearly 20 years ago, when Joost Pauwelyn's influential manuscript "*Conflict of Norms*

[600] Kelly, *supra* note 20, at 358.
[601] Minutes of Meeting held in the Centre William Rappard on 6 November 1998, WT/DSB/M/50, at 5 (Dec. 14, 1998). *See also* Mariana Clara de Andrade, *Evolutionary Interpretation and the Appellate Body's Existential Crisis*, *in* EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW 230, 232 (Keith Abi-Saab et al. eds., 2018).
[602] Ruoppo, *supra* note 379.

in Public International Law: How WTO Law Relates to Other Rules of International Law" was published, and the ILC's report on the fragmentation of international law was adopted. After decades of observation, scholars increasingly agree that concerns about the fragmentation of international law may have been exaggerated. Studies show that actual legal conflicts due to inconsistent interpretations of the same legal doctrines or treaty provisions by international courts are, in fact, less common than anticipated. Such an observation is also evinced by my empirical results, where I do not discover any legal conflicts caused by the WTO decisions and investment awards when they exercise judicial cross-fertilizations.[603] Contrary to being viewed as a risk, the proliferation of international law and judicial forums is considered an opportunity. The increased diversity and convergence of international legal regimes and judicial bodies suggest that the notion of international law is progressively being recognized. However, the legitimacy of international laws and their respective judiciaries rely on the consent of sovereign states. International adjudicators are expected to perform their duties impartially and within their mandates, ensuring their actions do not exceed the given authority. As the proliferation of international courts and unregulated judicial engagements may raise concerns about the legitimacy of international law[604], the pressing questions become when, how, and why to facilitate proper judicial engagements and the cross-fertilization of different legal concepts originating from various legal regimes among judicial bodies.[605]

I focus on two key international economic judiciaries: the WTO dispute settlement mechanism and the ISDS system. It represents the first comprehensive study to analyze WTO Panel and Appellate Body reports, as well as investment arbitration awards that reference external legal sources. The goal is to explore the judicial cross-fertilization conducted within the realm of international economic judiciaries. Grounded in empirical findings, I delve into the existing arguments advocating for promoting judicial engagements and cross-fertilizations across different legal regimes and their judiciaries to achieve greater coherence and

[603] This is contrary to my belief in the very beginning stage of this dissertation project, as the original research goal was to examine the scale of international law fragmentation. However, after collecting and analyzing the data, I realized that currently, the assertion of international law fragmentation seems to still exist in the doctrinal level. Hence, I shift my research focus from examining whether the international law is fragmented to evaluating the scenario of international law proliferation.
[604] POPA, *supra* note 148, at 74.
[605] Pierre-Marie Dupuy & Jorge E. Viñuales, *The Challenge of "Proliferation": An Anatomy of the Debate*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 135 (Cesare P. R. Romano et al. eds., 2023).

convergence on overarching issues within the international legal framework. After reviewing the data and empirical results, I adopt a more conservative stance toward such expectations. It proposes that cross-fertilizations may be driven by motives not only promoting coherence within the international legal system. Instead, the pattern of citing external legal sources, as revealed, tends to be selective and often lacks the systematic approach expected of an ideal managerial approach. A possible explanation for this discrepancy between the theoretical "law in books" and the practical "law in action" might lie in the underlying motivations of the actors involved, particularly the disputing parties referencing external legal sources. In most cases, the desire to secure a favorable outcome in their immediate dispute takes precedence over contributing to the coherence of the international legal system. Moreover, the dynamic incentives behind citing external legal sources can lead to inappropriate use, especially when the external legal sources are applied out of context. Worse still, both the WTO and investment arbitral tribunals usually fail to articulate the legal basis for the inclusion of external citations. This lack of justification may further undermine the already delicate legitimacy of both the WTO and investment legal regimes.

In light of these considerations, I propose a structured roadmap designed to assist WTO Panels, the Appellate Body, and investment arbitral tribunals in effectively handling external legal sources presented during the deliberation. Anchored in foundations such as GAL, International Law Constitutionalism, and Judicial Functionalism, I offer three legal and policy recommendations from interpretative, legislative, and institutional dimensions. To elaborate, the interpretative approach clarifies the application of Article 31 of the VCLT, particularly when international adjudicators are requested to reconcile conflicts between trade/investment laws and other legal regimes. The legislative approach advocates future reforms within the WTO and investment treaties, emphasizing the need for feasibility and effectiveness. For the WTO, it suggests leveraging the Ministerial Declaration to direct Panel and Appellate Body members to appropriately engage in cross-fertilization within their mandate. It also proposes the inclusion of civil society in discussions, enriching the dialogue with a broader range of perspectives. In the context of investment treaty reform, incorporating relational clauses could optimally clarify the relationship between investment treaty provisions and other international legal sources. Lastly, the institutional approach underscores the role of the ICJ in facilitating informal mechanisms in order to facilitate inter-judicial dialogue and communication. Regular

informal judicial dialogues are recommended to cultivate a mutual understanding of international law proliferation and the importance of engaging in cross-fertilization when necessary. Additionally, I call for diversifying the pool of adjudicators within both the WTO dispute settlement mechanism and investment arbitration, aiming for a more representative and inclusive judiciary.

The proliferation of the international legal system underscores its evolution towards a more developed legal regime. Given the lack of a hierarchical structure and a central judicial authority to ensure consistency among international legal regimes, I shed light on the current practices of judicial engagements and cross-fertilizations undertaken by the WTO dispute settlement mechanism and investment arbitral tribunals underpinned by empirical evidence. It further offers law and policy recommendations to instruct WTO adjudicators and investment arbitrators to conduct cross-fertilizations more effectively and orderly, thereby fostering more comprehensive and inclusive decisions. Overall, I enrich the academic discourse on fragmentation, proliferation, and judicial engagements within international law, contributing valuable inputs to its dynamic processes.

APPENDIX: INTRODUCTION OF TOPIC MODELING AND THE MOST DISTINCTIVE WORD ANALYSES ADOPTED FOR BUILDING THE DICTIONARY

The primary goal of the data collection is to identify if a given WTO decision or investment arbitral award has one or more external legal sources mentioned. Hence, before initiating the data collection process, it is necessary to have a preliminary understanding of the whole structure and content of the documents and then select the possible "keywords" that might point to external legal sources in judicial decisions. To achieve this goal, I apply the computational method, including the topic modeling and the most distinctive word analysis, to help me efficiently build the fundamental understanding of the collected data.

Topic modeling is a useful text analysis tool for "discovering the main themes that pervade a large and otherwise unstructured collection of documents.[606]" I produce topic models using Mallet[607] with default settings (20 top terms for each topic) and removing stop words (e.g., "and," "or," and "is"). The topic modeling approach can help probe the "key terms" that may be associated with the external international legal sources cited in the collected documents. The table below is an example to demonstrate the excerpted topic models applied to investment arbitral awards. The software does not assign a label for each "topic." In contrast, we have to determine the subject for each topic according to our domain knowledge. For instance, Topic 8 might be related to the investment disputes that involve host states' renewable energy policies. Topic 40 is related to public health issues in investment arbitral proceedings.

Topic	Top terms
8	ect italy energy decree article plants gse italian conto award incentives energia law romania scc incentive plant member tribunal arbitration
13	ect spain energy regime article regulatory para plants electricity measures spanish tribunal law return reasonable case paras tariff renewable spain's
37	environmental costa statement exhibit project claim dominican rica republic ballantines dr-cafta nationality property article states award national park phase united
40	para investors project jrp report tobacco nova respondent paras exhibit canada health article pca scotia point environmental nafta reply counter-memorial
45	czech republic slovak bankruptcy media council cet cme čnts statement union cnts banka agreement proceedings claim licence treaty health csob

[606] David M. Blei, *Probabilistic Topic Models*, 55(4) COMMUNICATION OF THE ACM 77 (2012).
[607] Mallet is a powerful toolkit for topic modeling, a technique used to analyze large volumes of unlabeled text.

49	argentina concession argentine contract measures tariff bit agba argentina's emergency crisis service tariffs regulatory province economic water article para framework

Table 1 Excerpted interesting topic models of the full corpus

Furthermore, I am aware of the concern of solely relying on the topic modeling because the "lists of top terms may overrepresent extremely high or low-frequency terms at the expense of more meaningful words.[608]" Therefore, I further carry out the "most distinctive word" (MDW) analysis, which can calculate the "average, or 'expected,' frequency" of all the words of a large dataset, then calculate "the actual — or 'observed' — occurrence" of each word in different component parts of the corpus, in order to highlight "those instances that reveal a significant observed-over-expected ratio.[609]" In the context of this dissertation, the MDW analysis can investigate which words that are relevant to the ideas of public interests, such as health, environment, human rights, etc, appear more often than statistically expected in one subcorpus versus another.[610] This method can further facilitate the work of identifying "keywords" that are highly likely connected to external international legal sources. The example of the MDW analysis is demonstrated below.

Subcorpus	**MDW**	**Interpretive label**	**Observations**	**P-value**	**Odds-ratio**
FS	energy	Environmental measures	4784	4.51E-06	1.101035673
FS	corruption	Good governance	668	2.17E-09	1.433476395
FS	bribe	Good governance	200	1.21E-08	1.98019802
FS	bribery	Good governance	189	2.65E-07	1.871287129
FS	bribes	Good governance	90	0.000133788	2
FS	health	Public health measures	361	4.75E-11	1.337066069
FS	pollution	Environmental measures	85	0.036851431	1.440677966
FS	rio	External legal sources/ Environmental measures	92	0.001511838	1.735849057
FS	wildlife	Environmental measures	62	0.002587236	1.9375

[608] Mark Algee-Hewitt, *Computing Criticism: Humanities Concepts and Digital Methods, Debates in the Digital Humanities*, at 13.
[609] Lisa Mendelman & Anna Mukamal, *The Generative Dissensus of Reading the Feminist Novel, 1995-2020: A Computational Analysis of Interpretive Communities*, 6(3) J. CULTURAL ANALYTICS 31 (2021).
[610] The code of MDW analysis is on file with author.

FI	sustainability	Environmental measures	234	0.001402214	1.384615385
FI	environmental	Environmental measures	3326	1.56E-07	1.142562693
FI	environment	Environmental measures	1547	0.002435717	1.119392185
FI	ilc	External legal soruces	1404	6.88E-05	1.17
NP	water	Environmental measures	953	3.97E-132	5.573099415
NP	waters	Environmental measures	228	5.48E-51	16.28571429
NP	sustainable	Environmental measures	28	0.016587501	2.333333333
NP	human	Human rights	176	4.09E-19	3.826086957
NP	covenant	External legal sources/Human rights	15	0.002349722	7.5
NP	anticorruption	Good governance	19	0.000221231	9.5
NP	sanitation	Public health measures	44	3.07E-11	22

Table 2 Excerpted MDWs by subcorpus illustrate how these communities highlight different categories of public interests in investment arbitral awards.

Finally, based on the topic modeling and MDW analysis results, I created the dictionary listing “keywords” that may link to external international legal sources in the context of the WTO Panel/Appellate Body reports and investment arbitral awards. I then manually code all the collected WTO decisions and investment awards in accordance with the dictionary to compile the codebook for quantitative analysis.

BIBLIOGRAPHY

I. Books

ANDREA GATTINI ET. AL. (EDS), GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION (2018)

ANNE-MARIE SLAUGHTER, A NEW WORLD ORDE (2004)

ASIF H. QURESHI, INTERPRETING WTO AGREEMENTS: PROBLEMS AND PERSPECTIVES (2nd ed. 2015)

CHANG-FA LO, TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES: A NEW ROUND OF CODIFICATION (2017)

DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE (2004)

DIANE A. DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE AND INVESTMENT (2015)

EMMA AISBETT ET AL., RETHINKING INTERNATIONAL INVESTMENT GOVERNANCE: PRINCIPLES FOR THE 21ST CENTURY (2018)

GRAHAM COOK, A DIGEST OF WTO JURISPRUDENCE ON PUBLIC INTERNATIONAL LAW CONCEPTS AND PRINCIPLES (2015)

GUS VAN HARTEN, THE TROUBLE WITH FOREIGN INVESTOR PROTECTION (2020)

HEGE E. KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW (2013)

JAMES HARRISON, THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANISATION (2007)

JEAN D'ASPREMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES (2011)

JOEL P. TRACHTMAN, THE FUTURE OF INTERNATIONAL LAW (2014)

JOHN MERRILLS & ERIC DE BRABANDERE, MERRILLS' INTERNATIONAL DISPUTE SETTLEMENT (7th ed., 2022)

JONATHAN BONNITCHA ET AL., THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME (2016)

JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER NORMS OF INTERNATIONAL LAW (2003)

JOSE E. ALVAREZ, THE BOUNDARIES OF INVESTMENT ARBITRATION: THE USE OF TRADE AND EUROPEAN HUMAN RIGHTS LAW IN INVESTOR-STATE DISPUTES (2018)

JOSE E. ÁLVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT (2011)

JURGEN KURTZ, THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEM (2016)

KAREN ALTER & LAURENCE HELFER, INTERNATIONAL LEGAL TRANSPLANTS: THE LAW AND POLITICS OF THE ANDEAN TRIBUNAL OF JUSTICE (2014)

KAREN ALTER ET AL. (EDS.), INTERNATIONAL COURT AUTHORITY (2018)

KAREN ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014)

LILIANA E. POPA, PATTERNS OF TREATY INTERPRETATION AS ANTI-FRAGMENTATION TOOLS: A COMPARATIVE ANALYSIS WITH A SPECIAL FOCUS ON THE ECTHR, WTO AND ICJ (2018)

MADS ANDENAS & EIRIK BJORGE (EDS.), A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW (2015)

MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009)

MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW (2011)

MICHELLE Q. ZANG, JUDICIAL ENGAGEMENT OF INTERNATIONAL ECONOMIC COURTS AND TRIBUNALS (2020)

PANOS MERKOURIS, ARTICLE 31.3(C) VCLT AND THE PRINCIPLE OF SYSTEMIC INTEGRATION: NORMATIVE SHADOWS IN PLATO'S CAVE (2015)

PETER VAN DEN BOSSCHE & WARNER ZDOUC, LAW AND POLICY OF THE WORLD TRADE ORGANIZATION (4th ed., 2017)

RHONA K. M. SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS (6th ed., 2014)

RICHARD A. POSNER, REFLECTIONS ON JUDGING (2013)

SARAH JOSEPH, BLAME IT ON THE WTO: A HUMAN RIGHTS CRITIQUE (2011)

THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1998)

URSULA KRIEBAUM ET. AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (3rd ed. 2022)

VALENTINA VADI, ANALOGIES IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2017)

WOLFGANG ALSCHNER, INVESTMENT ARBITRATION AND STATE-DRIVEN REFORM: NEW TREATIES, OLD OUTCOMES (2022)

WORLD TRADE ORGANIZATION, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM (2017)

II. Book Chapters

Anne Peters, *Are We Moving towards Constitutionalization of the World Community?*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 118 (Antonio Cassese ed., 2012)

Anne Peters, *Fragmentation and Constitutionalism*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 1011 (Anne Orford et al. eds., 2016)

Antonio A. Cancado Trindade, *A Century of International Justice and Prospects for the Future*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 56 (Mads Andenas & Eirik Bjorge eds., 2015)

Antônio Augusto & Cançado Trindade, *A Century of International Justice and Prospects for the Future*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 56 (Mads Andenas & Eirik Bjorge eds., 2015)

Armin von Bogdandy & Ingo Venzke, *The Spell of Precedents: Lawmaking by International Courts and Tribunals*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 503 (C. P. Romano et al. eds., 2014)

Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, *in* EL NUEVO DERECHO ADMINISTRATIVO GLOBAL EN AMERICA LATINA 221 (Benedict Kingsbury et al. eds., 2009)

Chiara Giorgetti & Mark Pollack, *Beyond Fragmentation*, *in* BEYOND FRAGMENTATION: CROSS-FERTILIZATION, COOPERATION, AND COMPETITION AMONG INTERNATIONAL COURTS AND TRIBUNALS 1 (Chiara Giorgetti & Mark Pollack et al. eds., 2022)

Chien-Huei Wu, *From Fragmentation to Coherence: A Constitutionalist Take on the Trade and Public Health Debates*, *in* FRAGMENTATION VS THE CONSTITUTIONALISATION OF INTERNATIONAL LAW: A PRACTICAL INQUIRY 222

(Andrzej Jakubowski & Karolina Wierczynska eds., 2016)

Daniel Behn et al., *Introduction: The Legitimacy Crisis and the Empirical Turn*, *in* THE LEGITIMACY OF INVESTMENT ARBITRATION EMPIRICAL PERSPECTIVES 1 (Daniel Behn et al. eds., 2022)

Donald McRae, *Treaty Interpretation and the Development of International Trade by the WTO Appellate Body*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 360 (G. Sacerdoti et al. eds., 2006)

Erik Voeten, *International Judicial Behavior*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 550 (Cesare P. R. Romano et al. eds., 2014)

Ernst-Ulrich Petersmann, *The Promise of Linking Trade and Human Rights*, *in* LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES 46 (Daniel Drache & Lesley A. Jacobs eds., 2014)

Gregory Shaffer, *Public–Private Partnerships in WTO Dispute Settlement: The US and EU Experience*, *in* THE WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA 148 (Yasuhei Taniguchi et al. eds., 2007)

Jean d'Aspremont, *International Customary Investment Law: Story of a Paradox*, *in* INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS 6 (Tarcisio Gazzini & Eric De Brabandere eds., 2012)

Jiirgen Kurtz, *The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 243 (Stephan W. Schill ed., 2010)

Junji Nakagawa, *Mainstreaming Non-trade Concerns in International Trade Law*, *in* CHANGING ORDERS IN INTERNATIONAL ECONOMIC LAW (VOL. 1) 151 (Dai Yokomizo et al. eds., 2023)

Kal Raustiala, *International Proliferation and the International Legal Order*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 293 (Jeffrey L. Dunoff & Mark A Pollack eds., 2013)

Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 927 (Peter Cane & Herbert M. Kritzer eds., 2010)

Mads Andenas & Eirik Bjorge, *Introduction: From Fragmentation to Convergence in International Law*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND

CONVERGENCE IN INTERNATIONAL LAW 1 (Mads Andenas & Eirik Bjorge, eds., 2015)

Marc L. Busch & Krzysztof J. Pelc, *Ruling Not to Rule: The Use of Judicial Economy by WTO Panel*, *in* THE POLITICS OF INTERNATIONAL ECONOMIC LAW 26 (Tomer Broude et al. eds., 2011)

Margaret Young, *Fragmentation, Regime Interaction and Sovereignty*, *in* SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY 71 (Christine Chinkin & Freya Baetens eds., 2015)

Mariana Clara de Andrade, *Evolutionary Interpretation and the Appellate Body's Existential Crisis*, *in* EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW 230 (Keith Abi-Saab et al. eds., 2018)

Marion Dumas & Jens Frankenreiter, *Text as Observational Data*, *in* LAW AS DATA: COMPUTATION, TEXT, AND THE FUTURE OF LEGAL ANALYSIS 59 (Michael A. Livermore & Daniel N. Rockmore eds., 2019)

Moshe Hirsch, *The Sociology of International Investment Law*, *in* HIERARCHY IN INTERNATIONAL LAW 148 (Erika De Wet & Jure Vidmar eds., 2012)

Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, *in* THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 31 (Grainne De Bu´rca & Joanne Scott eds., 2001)

O Thomas Johnson Jr & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011 at 692 (Karl P Sauvant ed., 2012)

Philippa Webb, *Factors Influencing Fragmentation and Convergence in International Courts*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 146 (Mads Andenas & Eirik Bjorge eds., 2015)

Philippe J. Sands & Ruth Mackenzie, *International Courts and Tribunals, Amicus Curiae*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudiger Wolfrum ed., 2011)

Pierre-Marie Dupuy & Jorge E. Vinuales, *Human Rights and Investment Disciplines: Integration in Progress*, *in* INTERNATIONAL INVESTMENT LAW 1739 (Marc Bungenberg et al. eds., 2015)

Pierre-Marie Dupuy & Jorge E. Viñuales, *The Challenge of "Proliferation": An Anatomy of the Debate*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 135 (Cesare P. R. Romano et al. eds., 2023)

Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, *in* HUMAN RIGHTS IN DEVELOPMENT YEARBOOK 1999/2000: THE MILLENNIUM EDITION 51 (Hugo Stokke & Anne Tostensen eds., 2001)

Stephan Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, *in* INTERNATIONAL JUDICIAL LAWMAKING 133 (Armin von Bogdandy & Ingo Venzke eds., 2012)

Stephan W Schill, *International Investment Law and Comparative Public Law: An Introduction*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3 (Stephan W Schill ed., 2011)

Susan Karamanian, *Human Rights Dimensions of Investment Law*, *in* HIERARCHY IN INTERNATIONAL LAW 236 (Erika De Wet & Jure Vidmar eds., 2012)

Ursula Kriebaum, *Investment Arbitration - Illegal Investment*, *in* Austrian Arbitration Yearbook 307 (Christian Klausegger & Peter Klein eds., 2010)

Ursula Kriebaum, *Is the European Court of Human Rights an Alternative to Investor-State Arbitration?*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 226 (Pierre-Marie Dupuy et al. eds., 2009)

Wolfgang Alschner & Kun Hui, *Missing in Action: General Public Policy Exceptions in Investment Treaties*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY (Lisa Sachs et al. eds., 2018)

Wolfgang Alschner, *Ensuring Correctness or Promoting Consistency? Tracking Policy Priorities in Investment Arbitration through Large-Scale Citation Analysis*, *in* THE LEGITIMACY OF INVESTMENT ARBITRATION EMPIRICAL PERSPECTIVES 230 (Daniel Behn et al eds., 2022)

Wolfgang Alschner, *Locked in Language: Historical Sociology and the Path Dependency of Investment Treaty Design*, *in* RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW 347 (Moshe Hirsch & Andrew Lang eds., 2018)

Yueming Yan, *References to International Anti-corruption Conventions in International Investment Arbitration and International Investment Agreements*, *in* THE TRANSNATIONALIZATION OF ANTI-CORRUPTION LAW 447 (Regis Bismuth et al. eds., 2021)

Yuka Fukunaga, *Interpretative Authority of the Appellate Body: Replies to the Criticism by the United States*, *in* THE APPELLATE BODY OF THE WTO AND ITS

REFORM 167 (Chang-fa Lo et al. eds., 2021)

III. Journal Articles

Agata Zwolankiewicz, *The Principle of Clean Hands in International Investment Arbitration: What is the Extent of Investment Protection in Investor-State Disputes?*, 3(1) THE JOURNAL OF THE INSTITUTE FOR TRANSNATIONAL ARBITRATION 4 (2021)

Alain Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28(2) ICSID REV. 223 (2013)

Andrew Lang, *The Role of the International Court of Justice in a Context of Fragmentation*, 62 INT'L & COMP. L. Q. 777 (2013)

Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15(3) INT'L J. CONST. L. 671 (2017)

Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L. J. 191 (2003)

Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1995)

Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107(1) AM. J. INT'L L. 45 (2013)

Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 17 (2010)

Anthony J. Colangelo, *A Systems Theory of Fragmentation and Harmonization*, 49 N.Y.U. J. INT'L L. & POL. 1 (2016)

Aphiwan Natasha King, *National Treatment in International Economic Law: The Case for Consistent Interpretation in New Generation EU Free Trade Agreements*, 49 GEO. J. INT'L L. 929 (2018)

Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMPORARY PROB. 15 (2005)

Benjamin Faude & Michal Parizek, *Contested Multilateralism as Credible Signaling: How Strategic Inconsistency Can Induce Cooperation Among States*, 16 THE REVIEW OF INTERNATIONAL ORGANIZATIONS 843 (2021)

Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L. Q. 279 (2005)

Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L. J. 529 (1997)

Chang-fa Lo, *Normative and Operational Linkages Between Human Rights Law and BITs – Building A Firmer Status of Human Rights in Investor-State Arbitration*, 8(1) CONTEMP. ASIA ARB. J. 1 (2015)

Damien Charlotin, *The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis*, 20 J. INT'L ECON. L. 279 (2017)

David Held, *Cosmopolitanism: Globalisation Tamed?*, 29 REVIEW OF INTERNATIONAL STUDIES 465 (2003)

David M. Blei, *Probabilistic Topic Models*, 55(4) COMMUNICATION OF THE ACM 77 (2012)

David W. Leebron, *Linkage*, 96(1) AM. J. INT'L L. 5 (2002)

Emmanuel Gaillard & Ilija Mitrev Penushliski, *State Compliance with Investment Awards*, 35(3) ICSID REV. 540 (2020)

Eric de Brabandere, *NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12(1) CHI. J. INT'L L. 85 (2011)

Erik Voeten, *Borrowing and Nonborrowing Among International Court*, 39(2) J. LEGAL STUD. 547 (2010)

Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669 (2007)

Ernst-Ulrich Petersmann, *Human Rights and the Law of the World Trade Organization*, 37(2) J. WORLD TRADE 241 (2003)

Ernst-Ulrich Petersmann, *Neo-Liberal, State-Capitalist and Ordo-Liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System*, 38 CHINESE (TAIWAN) Y.B. INT'L L. 1 (2020)

Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60(2) STAN. L. REV. 595 (2007)

Frederick Schauer, *Formalism*, 97 YALE L. J. 509 (1988)

Gabrielle Marceau et al., *The WTO's Influence on Other Dispute Settlement Mechanism: A Lighthouse in the Storm of Fragmentation*, 47 J. WORLD TRADE 481 (2013)

Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other Treaties*, 35 J. WORLD TRADE 1081 (2001)

Gary Born & Stephanie Forrest, *Amicus Curiae Participation in Investment Arbitration*, 34(3) ICSID REV. 626 (2019)

Gas Van Harten, *Arbitrator behavior in asymmetrical adjudication: An empirical study of Investment treaty arbitration*, 50(1) OSGOODE HALL L. J. 211 (2012)

Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849 (2003)

Graham Cook, *Flying Under the Radar: Non-WTO International Law Sources in Recent WTO Cases (2015-2020)*, J. INT'L TRADE & ARB. L. 10 (2021)

Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106(1) AM. J. INT'L L. 1 (2012)

Gregory Shaffer et al., *The Extensive (But Fragile) Authority of the WTO Appellate Body*, 79 L. & CONTEMP. PROB. 237 (2016)

Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT'L L. 189 (2015)

Henrik Andersen, *Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions*, 18 J. INT'L ECON. L. 383 (2015)

J. C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9(4) THE REVIEW OF INTERNATIONAL ORGANIZATIONS 385 (2014)

J. Patrick Kelly, *Judicial Activism at the World Trade Organizational: Development Principles of Self-Restraint*, 22 NW. J. INT'L L. & BUS. 353 (2001-2002)

Jamal Greene, *Foreword: Rights as Trumps*, 132(1) HARV. L. REV. 28 (2018)

James Crawford, *Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture*, 1 J. INT'L DISP. SETTLEMENT 3 (2010)

Jan Klabbrs, *Constitutionalism Lite*, 1 INT'L ORG. L. REV. 31 (2004)

Jean-Michel Marcoux, *Transnational Public Policy as a Vehicle to Impose Human Rights Obligations in International Investment Arbitration*, 21(6) J. WORLD INV. & TRADE 809 (2020)

Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17(3) EUR. J. INT'L L. 647 (2006)

Jenny S. Martinez, *Towards An International Judicial System*, 56 STAN. L. REV. 429 (2003)

Joel P. Trachtman, *The Constitutions of the WTO*, 17(3) EUR. J. INT'L L. 623 (2006)

Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?* 271 COLL. COURSES HAGUE ACAD. INT'L L. 101 (1998)

Jonathan I. Charney, *The Implication of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69 (1996)

Joost Pauwelyn & Krzysztof Pelc, *Who Guards the "Guardians of the System"? The Role of the Secretariat in WTO Dispute Settlement*, 116(3) AM. J. INT'L L. 534 (2022)

Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95(3) AM. J. INT'L L. 535 (2001)

Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109(4) AM. J. INT'L L. 761 (2015)

Jose E. Alvarez, *Beware: Boundary Crossings - A Critical Appraisal of Public Law Approaches to International Investment Law*, 17 J. WORLD INVESTMENT & TRADE 171 (2016)

Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59(2) INT'L & COMP. L. Q. 325 (2010)

Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42(2) VAND. L REV. 383 (2009)

Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7(1) PERSPECTIVES ON POLITICS 13 (2009)

Karen J. Alter, *The International Court of Justice in Comparison: Understanding the Court's Limited Influence*, 21(3) MELBOURNE J. INT'L L. 676 (2021)

Katia Fach Gomez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35(2) FORDHAM INT'L L. J. 510 (2012)

Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates*, 55(3) UNIV. TORONTO L. J. 853 (2005)

Laurence Boisson de Chazournes, *Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach*, 28 EUR. J. INT'L L. 13 (2017)

Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POLITICAL RESEARCH QUARTERLY 749 (1994)

Lisa Mendelman & Anna Mukamal, *The Generative Dissensus of Reading the Feminist Novel, 1995-2020: A Computational Analysis of Interpretive Communities*, 6(3) J. CULTURAL ANALYTICS 31 (2021)

Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 J WORLD TRADE 499 (2001)

Manfed Elsig & Mark A. Pollack, *Agents, Trustees and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L L. 391 (2014)

Mao-wei Lo & Chien-Huei Wu, *From US-HKPA, HKHRDA TO HKAA: The Turnings of the US' China Policy and the End of Hong Kong's Full Autonomy*, 21(2) UCLA J. INT'L L. & FOREIGN AFF. 93 (2021)

Mariana Clara de Andrade, *Path to Judicial Activism? The Use of "Relevant Rules of International Law" by the WTO Appellate Body*, 15 BRAZ. J. INT'L L. 307 (2018)

Marianna Karttunen & Micheal O. Moore, *India–Solar Cells: Trade Rules, Climate Policy, and Sustainable Development Goal*, 17(2) WORLD TRADE REV. 215 (2018)

Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002)

Martti Koskenniemi, *Expanding Histories of International Law*, 56(1) AM. J. LEGAL HIST. 104 (2016)

Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences*, 54 J. WORLD TRADE 667 (2020)

Mattias Kumm et al., *How Large is the World of Global Constitutionalism*, 3(1) GLOBAL CONSTITUTIONALISM 1 (2014)

Mees Brenninkmeijer & Fabien Gélinas, *Counterclaims in Investment Arbitration: Towards an Integrated Approach*, 38(3) ICSID REV. 567 (2023)

N. Jansen Calamita, *The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties*, 2013-2014 Y.B. INT'L INV. L. & POL'Y 157 (2014)

Nancy L. Leech & Anthony J. Onwuegbuzie, *Beyond Constant Comparison Qualitative Data Analysis: Using NVivo*, 26(1) SCHOOL PSYCHOLOGY QUARTERLY 70 (2011)

Paola Conconi & Tania Voon, *EC–Seal Products: The Tension between Public*

Morals and International Trade Agreements, 15(2) WORLD TRADE REV. 211 (2016)

Patrick Dumberry, *Are BITs Representing the "New" Customary International Law in International Investment Law?*, 28(4) PENN STATE INT'L L. REV. 675 (2010)

Patrick Dumberry, *State of Confusion: The Doctrine of "Clean Hands" in Investment Arbitration After the Yukos Award*, 17 J. WORLD INV. & TRADE 229 (2016)

Patrick M Norton, *The Role of Precedent in the Development of International Investment Law*, 33(1) ICSID REV. 280 (2018)

Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102(3) AM. J. INT'L L. 421 (2008)

Philip Chang et. al., *GATS, the Modes of Supply and Statistics on Trade in Services*, 33(3) J. WORLD TRADE 93 (1999)

Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791 (1999)

R. Dainel Kelemen, *The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU*, 34(6) COMP. POL. STUD. 622 (2001)

Rachel Harris & Gillian Moon, *GATT Article XX and Human Rights: What Do We Know from the First 20 Years?*, 16(1) MELBOURNE J. INT'L L. 1 (2015)

Ren Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229 (2001)

Renee Chartres & Bryan Mercurio, *A Call for an Agreement on Trade-Related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards*, 37(3) N.C. J. INT'L L. & COM. REG. 665 (2011)

Robert Howse & Joanna Langille, Continuity and Change in the World Trade Organization: Pluralism Past, Present and Future, 117(1) AM. J. INT'L L. 1 (2023)

Robert O. Keohane & Lisa Martin, *The Promise of Institutionalist Theory*. 20(1) INTERNATIONAL SECURITY 39 (1995)

Roberto Ruoppo, *Common Features of the Right to Property and International Investments: Evidence from the use of ECtHR Case law in Investment Tribunals' Decisions*, 2(2) THE ITALIAN REVIEW OF INTERNATIONAL AND COMPARATIVE LAW 347 (2022)

Rodrigo Polanco Lazo & Valentino Desilvestro, *Does an Arbitrator's Background Influence the Outcome of an Investor-State Arbitration?*, 17 THE LAW AND

PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 18 (2018)

Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12(1) SANTA CLARA J. INT'L L. 35 (2014)

Ryan C. Black & Lee Epstein, *(Re-)Setting the Scholarly Agenda on Transjudicial Communication*, 32(3) L. & SOC. INQUIRY 789 (2007)

Sergio Puig, *International Regime Complexity and Economic Law Enforcement*, 17(3) J. INT'L ECO. L. 491 (2014)

Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387 (2014)

Silvia Steininger, *What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration*, 31 LEIDEN J. INT'L L. 33 (2018)

Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 GLOBAL GOVERNANCE 39 (2008)

Stephan Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L. J. 1083 (2011)

Stephen K. Park & Tim R. Samples, *Tribunalizing Sovereign Debt: Argentina's Experience with Investor-State Dispute Settlement Investor-State Dispute Settlement*, 50(4) VAND. J. TRANSNAT'L L. 1033 (2017)

Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27(1) YALE J. INT'L L. 59 (2002)

Steve Charnovitz, *The WTO's Environmental Progress*, 10(3) J. INT'L. ECON. L. 701 (2007)

Sungjoon Cho & Jürgen Kurtz, *Convergence and Divergence in International Economic Law and Politics*, 29(1) EURO. J. INT'L L. 169 (2018)

Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1558 (2005)

Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13(4) J. INT'L ECON. L. 103 (2010)

Tamar Megiddo, *Beyond Fragmentation: On International Law's Integrationist Forces*, 44 YALE J. INT'L L. 115 (2019)

Tania Voon, *Can International Trade Law Recover? The Security Exception in WTO Law: Entering A New Era*, 113 AM. J. INT'L L. 45 (2019)

Thomas Cottier, *Recalibrating the WTO Dispute Settlement System: Towards New*

Standards of Appellate Review, 24(3) J. INT'L ECO. L. 515 (2021)

Thomas Dietz et. al., *The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System*, 26(4) REV. INT'L POLITICAL ECONOMY 749 (2019)

Thomas Streinz, *Winners and Losers from the Plurality of International Courts and Tribunals: Afterward to Laurence Boisson de Chazournes' Forward*, 28 EUR. J. INT'L L. 1253 (2018)

Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103(1) ETHICS 48 (1992)

Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005)

Tomer Broude, *Behavioral International Law*, 163 U. PA. L. REV. 1099 (2015)

Valentina Vadi, *Critical Comparisons: The Use of Comparative Law in Investment Treaty Arbitration*, 39(1) DENV. J. INT'L L. & POL'Y 67 (2010)

Vassilis P. Tzevelekos, *The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?*, 31 MICH. J. INT'L L. 621 (2010)

Vivian Kube & Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration*, 11(1) ASIAN J. WTO & INT'L HEALTH L. AND POL'Y 65 (2016)

W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15 ICSID REV. 362 (2000)

William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963 (2003)

Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myths versus Reality*, 42(1) YALE J. INT'L L. 1 (2017)

Yarik Kryvoi, *Economic Crimes in International Investment Law*, 67(3) INT'L & COMP. L. Q. 577 (2018)

Yonatan Lupu & Eric Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42(3) BRITISH J. POLITICAL SCI. 413 (2012)

IV. WTO Cases and Materials

Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R (June 9, 2020)

Appellate Body Report, *Canada – Measures Relating to the Feed-in Tariff Program (Canada – Feed-In Tariff Program)*, WT/DS426/AB/R (May 24, 2013)

Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (2009)

Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R (June 7, 2016)

Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998)

Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU*, WT/DS27/AB/RW/USA; WT/DS27/AB/RW2/ECU (Nov. 26, 2008)

Appellate Body Report, *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (May 18, 2011)

Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Module*s, WT/DS456/AB/R (Sept. 16, 2016)

Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (1997)

Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012)

Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities (US – Certain EC Products)*, WT/DS165/AB/R (Jan. 10, 2001)

Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998)

Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (May 23, 1997)

Appellate Body Report, *United States – Measure Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 20, 2005)

Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (May 20, 1996)

Appellate Body Report, *United States – Tax Treatment for "Foreign Sales*

Corporations", WT/DS/108/AB/R (Feb. 24, 2000)

European Economic Community – Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, adopted on 25 January 1990, BISD 37S/86

Panel Report, *Argentina – Definitive Anti-Dumping Duties On Poultry From Brazil*, WT/DS241/R (Apr. 22, 2003)

Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (June 28, 2018)

Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/R (Dec. 19, 2012)

Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R; WT/DS432/R; WT/DS433/R (Mar. 26, 2014)

Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R (Nov. 27, 2015)

Panel Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R (Sept. 18, 2000)

Panel Report, *European Communities – Measures Affecting Importation of Certain Poultry Products*, WT/DS69/R (Mar. 12, 1998)

Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R; WT/DS293/R, (Sept. 29, 2006)

Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada*, WT/DS48/R/CAN (Feb. 13, 1998)

Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R (Nov. 25, 2013)

Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R (Oct. 24, 2000)

Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R (Feb. 22, 2016)

Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R (Apr. 26, 2019)

Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual*

Property Rights, WT/DS567/R (June 16, 2020)

Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R (Feb. 19, 2009)

Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to article 21.5 of the DSU by the United States*, WT/DS381/RW/USA; WT/DS381/RW2 (Oct. 26, 2017)

Panel Report, *United States – Origin Marking Requirement*, WT/DS597/R (Dec. 21, 2022)

Panel Report, *United States – Origin Marking Requirement*, WT/DS597/R/Add.1 (Dec. 21, 2022)

Request for consultations by Venezuela, *United States – Measures Relating to Trade in Goods and Services, Request for consultations by Venezuela*, WT/DS574/1 (Aug. 1, 2019)

V. Investment Awards and Materials

Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, Award, SCC Case No. V 116/2010 (Dec. 19, 2013)

Antoine Goetz et al. v Republic of Burundi, Award, ICSID Case No. ARB/95/3 (Feb. 10, 1999)

Antonio Del Valle Ruiz and others v. Kingdom of Spain, PCA Case No. 2019-17, Final Award (Mar. 13, 2023)

Azurix Corp v Argentine Republic, ICSID Case No ARB/01/12, Award (July 14, 2006)

Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain, PCA Case No. 2017-25, Final Award (Nov. 9, 2021)

Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award (Aug. 6, 2019)

Bernhard von Pezold and others v Republic of Zimbabwe, ICSID Case No ARB/10/15, Award (July 28, 2015)

Biloune and Marine Drive Complex Ltd v Ghana Investment Centre and the Government of Ghana, UNCITRAL, Award (June 30, 1990)

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Award, ICSID Case No. ARB/05/22 (July 24, 2008)

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Petition for Amicus Curiae Status, ICSID Case No. ARB/05/22 (Nov. 27, 2006)

Border Timbers Limited and others v Republic of Zimbabwe, Procedural Order 2, ICSID Case No ARB/10/25 (June 26, 2012)

BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea, ICSID Case No. ARB/14/22, Award (May 18, 2022)

Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012)

Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, PCA Case No. 34877, Interim Award (Dec. 1, 2008)

Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II), PCA Case No. 2009-23, Second Partial Award on Track II (Aug. 30, 2018)

Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40, Award (Dec. 6, 2016)

CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005)

Continental Casualty Company v Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008)

Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-2, Award (Mar. 15, 2016)

Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29, Award of the Tribunal (Oct. 22, 2018)

David R. Aven and others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award (Sept. 18, 2018)

Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (Sept. 9, 2021)

Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007)

Galway Gold v. Colombia Galway Gold Inc. v. Republic of Colombia, ICSID Case No. ARB/18/13 (Mar. 21, 2018)

Gas Natural SDG, SA v Argentine Republic, ICSID Case No ARB/03/10, Decision of

the Tribunal on Preliminary Questions on Jurisdiction (June 17, 2005)

Guris Construction and Engineering Inc. and others v. Arab Republic of Syria, ICC Case No. 21845/ZF/AYZ, Final Award (Aug. 31, 2020)

Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL Arbitration Rules 1976, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims (Jun. 21, 2012)

Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL Arbitration Rules 1976, Final Award (Dec. 15, 2014)

Hulley Enterprises Limited (Cyprus) v. Russia, PCA Case No. 2005-03/AA226, Opinion of Advocate General Paul Vlas (Apr. 23, 2021)

Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006)

Ioan Micula, Viorel Micula and others v. Romania (I), ICSID Case No. ARB/05/20, Award (Dec. 11, 2013)

Liberian Eastern Timber Corporation v Republic of Liberia, ICSID Case No ARB/83/2, Award (Mar. 31, 1986)

Merrill & Ring Forestry L. P. v. Government of Canada, ICSID Case No. UNCT/07/1, Award (Mar. 31, 2010)

Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016)

Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016)

Metalclad Corporation v United Mexican States, ICSID Case No ARB(AF)/97/1, Award (Aug. 30, 2000)

Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013)

Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervenes "Amici Curiae", UNCITRAL Arbitration Rule (1976) (Jan. 15, 2001)

Methanex Corporation v. United States of America, UNCITRAL Arbitration Rules 1976, Final Award (Aug. 3, 2005)

Mondev International Ltd. v. United States of America, Award, ¶ 143, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002)

National Grid plc v. The Argentine Republic, UNCITRAL Arbitration Rules 1976,

Award (Nov. 3, 2008)

Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colombia, ICSID Case No. UNCT/18/1, Award (Mar. 12, 2021)

Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex), ICSID Case No. ARB/10/18, Decision on Jurisdiction (Aug. 19, 2013)

Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Decision on Jurisdiction (Mar. 5, 2008)

OAO Gazprom v. The Republic of Lithuania (I), SCC Case No. V125/2011, Final Award (July 31, 2012)

Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award (July 1, 2004)

Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (Sep. 11, 2007)

Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06, Award (June 27, 2016)

Peter de Sutter and Kristof De Sutter v. Republic of Madagascar II, ICSID Case No. ARB/17/18, Award (Apr. 17, 2020)

Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Written Submission (Amicus Curiae Brief) by the WHO and the Secretariat of the Tobacco Control Convention (Jan. 28, 2015)

Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion Co-Arbitrator Gary Born (July 8, 2016)

Plama Consortium Limited v. Bulgaria, Final Award, ICSID Case No. ARB/03/24 (Aug. 27, 2008)

Pope & Talbot Inc. v. Canada, UNCITRAL Arbitration Rules 1976, Award on the Merits of Phase 2 (Apr. 10, 2001)

Pope & Talbot Inc. v. Canada, UNCITRAL Arbitration Rules 1976, Memorial of the Investor Initial Phase (Jan. 28, 2000)

Pope & Talbot v. Canada, Interim Award, UNCITRAL Arbitration Rules 1976 (Mar. 25, 1999)

Red Eagle v. Colombia Red Eagle Exploration Limited v. Republic of Colombia, ICSID Case No. ARB/18/12, Award (Feb. 28, 2024)

Resolute Forest Products Inc. v Government of Canada, PCA Case No. 2016-13, Final Award (July 25, 2022)

Rosinvest UK Ltd v The Russian Federation, UNCITRAL, SCC (079/2005), Award (Sept. 12, 2010)

RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4 (2021)

Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (Mar. 21, 2007)

Salini et al v. Morocco, Decision on Jurisdiction, ICSID Case No. Arb/00/4 (July 23, 2001)

Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgyz Republic, ICSID Case No. ARB(AF)/06/1, Decision on Jurisdiction (Sept. 13, 2007)

South American Silver Limited v. Plurinational State of Bolivia, PCA Case No. 2013-15, Award (Nov. 22, 2018)

Spyridon Roussalis v. Romania, Award, ICSID Case No. ARB/06/1 (Dec. 7, 2011)

ST-AD GmbH v. Republic of Bulgaria, PCA Case No. 2011-06, Award on Jurisdiction (July 18, 2013)

Tecnicas Medioambientales Tecmed S.A. v The United Mexican States, ICSID Case No. Arb (AF)/00/2, Award (May 29, 2003)

Toto Costruzioni Generali S.p.A. v. Lebanon, ICSID Case No. arb/07/12, Decision on Jurisdiction (Sept. 11, 2009)

Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Annulment (Dec. 30, 2015)

Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award of the Tribunal (Aug. 31, 2018)

United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (Oct. 17, 2001)

United Parcel Service of America, Inc. (UPS) v. Government of Canada, ICSID Case

No. UNCT/02/1, Award on the Merits (May 24, 2007)

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016)

Valentyn Drozdenko, Artem Kadomskyi, Igor Kompanets and others v. Republic of North Macedonia, ICSID Case No. ARB/19/9 (Sept. 12, 2019)

Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction (June 10, 2010)

Vladislav Kim v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction (Mar. 8, 2017)

Westmoreland Mining Holding, LLC v Canada, ICSID Case No. UNCT/20/3, Final Award (Jan. 31, 2022)

William Nagel v. The Czech Republic, SCC Case No. 049/2002, Final Award (Sept. 9, 2003)

World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Final Award (Oct. 4, 2006)

Yukos Capital Limited (formerly Yukos Capital S.A R.L.) v. Russia, PCA Case No. 2013-31, Final Award (July 23, 2021)

Yukos Universal Limited (Isle of Man) v. Russia, PCA Case No. 2005-04/AA227, Opinion of Advocate General Paul Vlas (Apr. 23, 2021) [Unofficial English].

Yukos Universal Limited (Isle of Man) v. Russia, PCA Case No. 2005-04/AA227, Final Award (July 18, 2014)

VI. Other International Courts Cases and Materials

Advisory Opinion, Certain Expenses of the United Nations, (United Nations) (1962) I.C.J. Report

Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14/1-A, Prosecutor v. Aleksovski, Judgement of 24 March 2000

Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), merits, November 6, 2003 (separate opinion of Judge Simma)

Case of Cossey v. United Kingdom, 184 Eur. Ct. H.R (ser. A) (1990)

Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, [2008] I.C.J. Rep. 1 (June 4, 2008)

Declaration of Judge Greenwood, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo), Compensation, Judgment, ICJ Rep 2012.

German Interests in Polish Upper Silesia (Germany v. Poland), Judgment, [1926] PCIJ Series A, No.7.

Greece v United Kingdom, App. No. 176/56, at 176, 2 Yearbook of the European Convention 174 (1958-1959)

International Criminal Tribunal for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić (1995), Case No. IT-94-1-A, ¶¶ 23-25)

Jahn and Others v. Germany, 43 I.L.M. 522 (2004)

James and Others v. United Kingdom, ECtHR Application no. 8793/79, Judgment (Feb. 21, 1986)

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 198

Prosecutor v. Tadic, ICTY Appeal Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995

The Mavrommatis Palestine Concessions. Publications of the Permanent Court of International Justice. Series A No. 2

VII. International Legal Instruments

Agreement between the Government of the United Mexican States and the Government of the People´s Republic of China on the Promotion and Reciprocal Protection of Investments

Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation

Agreement between the United States of America, the United Mexican States, and Canada

Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India

Agreement on Investment between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations

Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India

Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference

Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120

Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493

Agreement on Trade-Related Aspects of Intellectual Property Right, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299

Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186

American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 125

Canadian Model Foreign Investment Promotion and Protection Agreement

Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031; T.S. No. 993

Comprehensive Economic and Trade Agreement Between Canada, of the One Part, and the European Union [and its Member States], of the Other Part, Canada-EU, Oct. 30, 2016, 2017 O.J. (L 11) 23.

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 I.L.M. 493

Convention concerning Work in the Fishing Sector, opened for signature 14 June 2007 (entered into force 16 November 2017)

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221

Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, 143

Convention on Combating Bribery of Foreign Public Officials in International

Business Transactions

Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 24

Convention on the Protection and Promotion of the Diversity of Cultural Expression, 2440 U.N.T.S. 311, Mar. 18, 2007.

Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 1084, 996 U.N.T.S. 245

Dominican Republic-Central America Free Trade Agreement

Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 100, 34 I.L.M. 360

European Union-China Comprehensive Agreement on Investment

European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221

First Additional Protocol to the European Convention on Human Rights

Framework Convention on Tobacco Control, *opened for signature* June 16, 2003, 2302 U.N.T.S. 166

Free Trade Agreement between the European Union and New Zealand

Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China

General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)

General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994)

Guidelines for Implementation Article 11 of the Framework Convention on Tobacco Control

Guidelines for Implementation Article 13 of the Framework Convention on Tobacco Control

International Center for the Settlement of Investment Disputes Convention Arbitration Rules

International Labor Conference, 86th Sess., Geneva, Switz, *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up*, June 18, 1998, 37 I.L.M. 1237, 1237-38 (1998)

International Center for the Settlement of Investment Disputes Convention, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171

International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3

International Plant Protection Convention

Investment Promotion and Protection Agreement Between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore

Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22

Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154

Morocco-Nigeria Reciprocal Investment Promotion and Protection Agreement

Multiparty Interim Appeal Arbitration Arrangement

North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289

Rio Declaration on Environment and Development, Jun. 13, 1992, 31 I.L.M. 874

Treaty Between the United States of America and The Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment

United Nations Convention against Corruption, December 9, 2003, UN Doc. A/58/422 (2003), S. Treaty Doc. No. 109-6, 43 I.L.M. 37

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397

United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 10.

Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948)

Understanding on the Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

United Nations Declaration on the Rights of Indigenous Peoples, Sep. 13, 2007 G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007)

Vienna Convention for the Protection of the Ozone Layer, Mar 22, 1985, 1513 U.N.T.S. 323

Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969)

VIII. Website and Other Internet Sources

Aditya Rathore & Ashutosh Bajpai, T*he WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?*, JURIST (Apr. 14, 2020), https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/

Anne van Aaken & Roee Sarel, *Framing Effects in Proportionality Analysis: Experimental Evidence* (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4251219

Breaches of IIA provisions alleged and found, UNCTAD INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement

Chronological List of Disputes Cases, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

CODEX ALIMENTARIUS COMMISSION, https://www.fao.org/fao-who-codexalimentarius/home/en/

Coding for Categorical Variables in Regression Models | R Learning Modules, UCLA ADVANCED RESEARCH COMPUTING STATISTICAL METHODS AND DATA ANALYSIS, https://stats.oarc.ucla.edu/r/modules/coding-for-categorical-variables-in-regression-models/

COOPERATION AND FACILITATION INVESTMENT AGREEMENT BETWEEN THE FEDERATIVE REPUBLIC OF BRAZIL AND ___, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download

ICJ Judge Peter Tomka appointed to investment arbitration tribunals despite ICJ guidelines against "double-hatting", INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Nov. 24, 2020), https://www.iisd.org/itn/en/2020/11/24/icj-judge-peter-tomka-appointed-to-investment-arbitration-tribunals-despite-icj-guidelines-against-double-hatting/

Investment Dispute Settlement Navigator, INVESTMENT POLICY HUB https://investmentpolicy.unctad.org/investment-dispute-settlement.

ISLG, https://new-investorstatelawguide-com.ezproxy.law.stanford.edu/

Joost Pauwelyn & Krzysztof Pelc, *Are WTO Rulings Biased? The Role of Institutional Design in Protecting Judicial Autonomy* (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4480161

Joost Pauwelyn, *Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution After 20 Years of WTO Jurisprudence* (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731144

Margaret A. Young, *Fragmentation*, *in* OXFORD HANDBOOK OF INTERNATIONAL LAW, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0113.xml

Members told "finish line within reach" in dispute settlement reform talks, WORLD TRADE ORGANIZATION (Dec. 18, 2023), https://www.wto.org/english/news_e/news23_e/dsb_18dec23_e.htm

Michael Waibel & Yanhui Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration*, https://www.yanhuiwu.com/documents/arbitrator.pdf

Ministry of Environment, Forest and Climate Change (India), *Impact of Climate Change and National Action Plan on Climate Change* https://pib.gov.in/newsite/erelcontent.aspx?relid=44098 (2008)

Nathalie Bernasconi-Osterwalder, *Interpreting WTO Law and the Relevance of Multilateral Environmental Agreements in EC-Biotech*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (2007), https://www.ciel.org/wp-content/uploads/2015/03/BIICL_ECBiotech_7Jun07.pdf

Negotiations to improve dispute settlement procedures, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm

The Environment: A Specific Concern, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm#:~:text=In%20its%20report%2C%20the%20Appellate,%E2%80%9Callow%E2%80%9D%20them%20this%20right

The Foundation of International Human Rights Law, UNITED NATIONS, https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html

The Multilateral Agreement on Investment Draft Consolidated Text, ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (Apr. 22, 1998), https://www.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf

THE WORLD ORGANISATION FOR ANIMAL HEALTH, https://www.woah.org/en/home/

The WTO and International Labour Organization, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/coher_e/wto_ilo_e.htm

The WTO, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/thewto_e.htm

Trade and Environment, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/envir_e/envir_e.htm#multiEAG

TRADELAWGUIDE, https://www-tradelawguide-com.ezproxy.law.stanford.edu/Home/Welcome

UNCTAD INVESTMENT TREATY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement

UNCTAD, *Trends in the Investment Treaty Regime and A Reform Toolbox for the Energy Transition*, https://unctad.org/system/files/official-document/diaepcbinf2023d4_en.pdf (2023)

United States Trade Representative, 2019 *Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program* 6, 148 (2019), https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf

United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (Feb. 2020)

WHO remains firmly committed to the principles set out in the preamble to the Constitution, WORLD HEALTH ORGANIZATION, https://www.who.int/about/who-we-are/constitution

World Economic Outlook Database maintained by International Monetary Fund (IMF), https://www.imf.org/en/Publications/WEO/weo-database/2023/April/groups-and-aggregates

IX. Others

Christophe J. Larouer, *In the Name of Sovereignty? The Battle over* in dubio mitius *Inside and Outside the Court* (Cornell Law School Inter-University Graduate Student Conference Papers, 2009)

Committee on Technical Barriers to Trade, *Decision on Principles for the Development of International Standards, Guides and Recommendations* (November 2000, G/TBT/9)

Diplomatic Protection – Title and texts of the draft articles on Diplomatic Protection adopted by the Drafting Committee on second reading, International Law Commission 58th session, A/CN.4/L/684 (2006)

High Commissioner for Human Rights, Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/9 (July 2, 2003)

Human Rights-Compatible International Investment Agreements, Note by the Secretary-General, UNGA/76/238 (July 27, 2021)

IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Man, Asbestos, Vol.14.

ILC, Final Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 420, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006)

Indicative List of Governmental and Non-Governmental Panelists, WT/DSB/44/Rev.54 (June 30, 2021)

International Law Commission, Draft Conclusion of the Work of the Study Group, UN Doc A/CN.4/L.682/Add.1 (May 2, 2006)

International Law Commission, Report on the Work of Its Fifty-second Session, UN GAOR, 55th sess., Supp. No. 10, UN Doc. A/55/10 (2000)

Investor-State Dispute Settlement (ISDS) Mechanisms and the Right to a Clean, Healthy, and Sustainable Environment, JOINT SUBMISSION FROM THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL), THE INTERNATIONAL INSTITUTE FOR SUSTAINABLE INVESTMENT (IISD), AND CLIENTEARTH ON THE CALL FOR INPUTS FROM THE SPECIAL RAPPORTEUR ON HUMAN RIGHTS AND THE ENVIRONMENT (2023)

Jesse Coleman et al., *Human Rights Law and the Investment Treaty Regime* (CCSI Working Paper 2019)

Mark Algee-Hewitt, *Computing Criticism: Humanities Concepts and Digital Methods, Debates in the Digital Humanities*

Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights, Note by the Secretary-General, UNGA A/78/168 (July 13, 2023)

Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc.

a/cn.4/l.682, YILC, 2006, Vol. ii.

Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law* (IILJ Working Paper 2009/7, 2009)

Richard Chen, *Formalism in Investment Treaty Arbitration: A Critical Assessment* (working draft, on file with the author)

United Nations, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (Addendum to the Report of the Special Rapporteur on the Right to Food, Olivier De Schutter) UN Doc A/HRC/19/59/Add.5 (19 December 2011)

UN Committee on Economic, Social and Cultural Rights 'General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities: restricting marketing and advertising of certain goods to protect public health' (10 August 2017) UN Doc E/C.12/GC/24.

Stephan W. Schill, *Sources of International Investment Law: Multilaterization, Arbitral Precedent, Comparativism, Soft Law* (Amsterdam Law School Legal Studies, Working Paper No. 2017-19, 2017)

Tom Ginsburg, *The Institutional Context of the International Court of Justice* (University of Chicago, Public Law Working Paper No. 779, 2021)

Tsai-yu Lin et al., *Problems Using the Latest Institutional Arbitration Rules for Investment Treaty Disputes* (2023) (on file with the author)