A SPECIAL ROLE FOR DSU ARTICLE 23(1) IN INTERNATIONAL TRADE AND INTERNATIONAL INVESTMENT LAW?

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This commentary deals with Article 23(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[1] This special rule, stemming from World Trade Organization (WTO) law, plays a significant role in international investment law. We shall examine the role Article 23(1) DSU assumes in dealing with questions of interpretation and jurisdiction of investment arbitral tribunals in the context of WTO violations.

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1. Understanding on 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 [hereinafter DSU].

I. Preliminary Remarks

Before examining the role of Article 23(1) DSU in the interaction between international trade and international investment law, it is essential to understand why and how issues can arise out of this interaction and become practically significant. The questions that follow address the broader phenomenon commonly referred to as the "fragmentation" of international law. This multi-faceted and complex phenomenon of fragmentation relates to "the rise of specialized rules and rule-systems [of international law] that have no clear relationship to each other", whereby "[a]nswers to legal questions become dependent on whom you ask, what rule system is your focus on."[2] As a result, similar legal questions and concepts, and even factual determinations, may be addressed in differing manners by various adjudicatory bodies.[3] Addressing the same legal questions under WTO law and international investment law might, for example, lead to double or conflicting awards and make it more difficult for respondent states to mount a defense.[4] Parallel litigation and conflicting outcomes may undermine confidence in the overall international legal regime and its ability to

2. Rep. of the Int'l L. Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, at para. 483, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

3. *See* Brooks E. Allen & Tommaso Soave, *Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration*, 30 Arb. Int'l, no. 1, 1, 15 (2014) (addressing the problem of overlapping international disputes, with a focus on parallel or successive disputes before the World Trade Organization (WTO) and investor-state arbitral tribunals).

4. *See* Tania Voon, Andrew D. Mitchell & James Munro, *Good Faith in Parallel Trade and Investment Disputes*, *in* Good Faith and International Economic Law, 60, 70 (Andrew D. Mitchell et al. eds., 2015) (discussing these questions generally vis-à-vis different international fora).

deliver binding and rules-based outcomes.[5] On the other hand, heightened interaction between the systems can also lead to cross-fertilization and greater consistency between neighboring legal regimes.[6] The described parallelism also allows for the adjudication of WTO-inconsistent measures by investors through investment treaty arbitrations. Awards of such arbitrations can not only include retrospective damages typical in investor-state arbitrations, but also prospective relief, which is typical for inter-State proceedings at the WTO.[7]

II. General Notion of Article 23(1) DSU

Pursuant to Article 23(1) DSU, "[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."[8] According to the WTO panel in Sections 301-310 of the United States Trade Act of 1974, this rule dictates that "[m]embers have to have recourse to the DSU dispute settlement system *to the exclusion of any other system*" (emphasis added).[9] While no WTO adjudicatory body appears to have ruled on whether International Investment Agreements (IIAs) fall within the scope of this provision, relevant jurisprudence seems to indicate that it does; the term "seek the redress of a violation" has been read to cover "*any act of a Member* in response to what it considers to be a violation of a WTO obligation by another Member whereby that first Member attempts

5. *Id.*

6. *Cf.* Yamashita Tomoko, *Procedural and Normative Competition between the WTO's Dispute Settlement and the Investor-State Arbitration: Focusing on the National Treatment Principle*, 16 Pub. Pol'y Rev. Japan Ministry of Finance, no. 5, Aug. 2020, at 15 (addressing the question of parallelism in National Treatment provisions under both regimes).

7. *Cf.* Brooks E. Allen, *The Use of Non-pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners*, *in* Performance as a remedy: Non-Monetary Relief in International Arbitration: ASA Special Series No. 30, 281, 298–299 (Schneider, Knoll ed., 2011) (noting the WTO example suggests counsel should be more open to seeking non-pecuniary relief, and arbitrators should give greater consideration to granting it).

8. *See* DSU, *supra* note 1, at art. 23(1).

9. Panel Report, *United States–Sections 301–310 of the Trade Act of 1974*, ¶ 7.43, WTO Doc. WT/DS152/R (adopted Jan. 27, 2000).

unilaterally to restore the balance of rights and obligations by seeking the removal of the WTO-inconsistent measure . . . ." (emphasis added).[10] This assumption is underscored by the findings of the International Law Commission, according to which there is no doubt that this norm "excludes unilateral determinations of breach or countermeasures outside the 'specific subsystem' of the WTO regime."[11]

III. Violation of Article 23(1) DSU and Consequences Thereof for the Jurisdiction of Arbitral Tribunals

We shall now look at different types of state conduct which could lead to a violation of Article 23(1) to consider the implications of such potential breaches for the jurisdiction of arbitral tribunals entrusted with handling questions of WTO law.

A. *Violation Through State Conduct after the Conclusion of an IIA*

Based on the broad definition by the WTO jurisprudence of the term "seek[ing] redress" in Article 23(1) DSU, subsidizing or otherwise incentivizing investors to initiate investment claims based on WTO violations is likely to violate this provision.[12] Such direct actions by Members leading to initiation of investment treaty cases could be seen as an attempt to unilaterally restore the balance of rights and obligations by seeking the removal of the WTO-inconsistent measure.

B. *Violation Through State Conduct Leading to the Conclusion of an IIA*

The mere signing of an IIA, which could open the door to potential interpretations of WTO law through arbitral tribunals, could also constitute a violation of Article 23(1).

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10. Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels*, ¶ 7.207, WTO Doc. WT/DS301/R (adopted June 20, 2005).

11. Int'l L. Comm'n, *supra* note 2, at para. 134.

12. Siqing Li, *Convergence of WTO Dispute Settlement and Investor-State Arbitration: A Closer Look at Umbrella Clauses*, 19 Chicago J. of Int'l L., no. 1, 189, 202–204 (2018), with reference to Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WTO Doc. WT/DS165/R (adopted Jan. 10, 2001).

1. *Generalizing Assessments of Compatibility with Article 23(1) DSU*

Much of the academic literature argues that Article 23 DSU does not prevent WTO members from signing international treaties, including dispute settlement proceedings for rights that run parallel to those of the WTO.[13] This should hold true as long as such agreements are entered into in good faith, and not with the concrete intention of seeking redress for WTO violations in a forum foreign to the DSU such as an arbitral panel.[14] However, in light of the blockage of the Appellate Body and the ongoing, successful efforts of international players to conclude bi- and multilateral treaties, such motives may not be so far-fetched. This could reflect States' interest in opening the door to investment disputes addressing issues traditionally handled in WTO fora.

2. *Framing IIAs as Inter Se Agreements*

However, part of the literature has indirectly – but arguably, rightly – framed the question as whether signing IIAs, which could potentially lend themselves to be utilized to enforce WTO violations, could violate Article 23(1) DSU through the lens of the (general) rules of treaty interpretation. This approach seems preferable to a mere generalization of this question without legal anchorage and deserves a more in-depth analysis.

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13. *See* Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements, in* Regional trade Agreements and the WTO Legal System, 465, 483 (Lorand Bartels & Federico Ortino ed., 2006) (pointing out that in the context of Regional Trade Agreements and the WTO framework, "a distinction must be made between the fact that parallel dispute settlement proceedings can be triggered . . . and the international responsibility of the concerned states that in doing so [they] may be in violation of their treaty obligations."); *but see* Simon Klopschinski, *The WTOs DSU Article 23 as Guiding Principle for the Systemic Interpretation of International Investment Agreements in the Light of TRIPs*, 19 J. of Int'l Econ. L. 211, 229 (2016) (arguing that "it is not improbable that a panel or the Appellate Body could find that an IIA concluded between two WTO Member States is contrary to Article 23").

14. *Cf.* Li, *supra* note 12, at 201 (questioning the lack of State involvement in investment arbitration proceedings on the investor side, given that states sign BITs that "create […] tribunals that reach WTO claims. This [being] especially true when states do so with the intention of seeking redress for WTO violations in a non-WTO forum").

i. Article 41 VCLT and International Trade Law Jurisprudence

According to this notion, signing and ratifying an IIA can constitute an agreement to modify the treaty between the respective WTO Members and would therefore have to comply with the rules to conclude an *inter se* Agreement under Article 41(1) of the 1969 Vienna Convention on the Law of Treaties (VCLT).[15] Pursuant to this provision, such modification is permissible if: a) such possibility is provided by the treaty; or b) is not prohibited by it, and modification:

- "does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations"
- "does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."[16]

Whether IIAs accord with these requirements *vis-à-vis* WTO law is uncertain. No provision in WTO law seems to expressly allow for such modification under Article 41(1)(a) of the VCLT. The only provision meriting attention in this regard and discussed in literature is Article 1(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[17] allowing Members to "implement in their law more extensive protection" than is required by TRIPS itself. However, Article 64(1) of TRIPS subjects all disputes to resolution pursuant to the DSU, including its Article 23(1). As the relationship of both articles remains unclear, so too does the significance of the former in substantiating the compatibility of such derogation with the WTO framework.[18] While there is no explicit WTO jurisprudence on the relationship of both regimes with respect

15. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

16. *Id.* at art. 41(1).

17. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS].

18. *See* Li, *supra* note 12, at 207 (noting that it "remains unclear" whether the practice of allowing private investors to bring WTO claims in arbitral tribunals as a potential application of Article 1(1) of TRIPS contravenes Article 64(1) of TRIPS).

to Article 41 of the VCLT,[19] it still seems prudent to look into general requirements set forth by WTO adjudicatory bodies on waivers of WTO rights to assess compatibility.[20]

This jurisprudence, however, is all but conclusive. According to the Appellate Body Report on "European Communities - Regime for the Importation, Sale and Distribution of Bananas," WTO Members would be able to renounce their right to resort to WTO dispute settlement proceedings either explicitly or implicitly through a waiver.[21] On the other hand, the Panel Report on "Peru - Additional Duty on Imports of Certain Agricultural Products" has been read as indicating that "parties could waive WTO proceedings only when the WTO rules explicitly authorize a departure."[22] In any case, the Appellate Body Report in the *Peru* dispute reads stricter than the aforementioned ruling in the *European Communities* dispute, as it postulates that if such a waiver were possible, "any such relinquishment must be made clearly."[23] Also, Article 23 DSU seems

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19. Note that according to the Appellate Body Report, *Peru - Additional Duty on Imports of Certain Agricultural Products*, ¶ 5.112, WTO Doc. WT/DS457/AB/R (adopted July 31, 2015) [hereinafter Peru — Agricultural Products], "the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41." (footnotes omitted). However, to simplify the present analysis, the problem shall be framed through Article 41 of the VCLT, which will likely lead to the same conclusions.

20. *See* Luiz Eduardo Salles, *A Deal is a Deal: Party Autonomy, the Multiplication of PTAs, and WTO Dispute Settlement*, QIL, Zoom-in 23, 15, 22 (2015) (explaining that the "lack of WTO-recognition of any relinquishment of DSU rights is related to an alleged broader impermissibility of modifying WTO rights and obligations *inter partes*.").

21. *See* Appellate Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Second Recourse to Article 21.5 of the DSU by Ecuador*, ¶ 217 WTO Doc. WT/DS27/AB/RW2/ECU (adopted Dec. 11, 2008), (considering that "the complainants could be precluded from initiating Article 21.5 [DSU] proceedings . . . only if the parties to these Understandings had, either explicitly or by necessary implication, agreed to waive their right to have recourse to Article 21.5."); *see also* Yamashita, *supra* note 6, at 9.

22. Li, *supra* note 12, at 206, referring broadly to Peru — Agricultural Products, ¶ 7.96; *see also* Salles, *supra* note 20, at 28 (indicating that "in *Peru – Agricultural Products* the Appellate Body directed WTO respondents mounting defences based on PTA provisions to channel their case through the WTO provisions explicitly authorizing a departure from WTO rules in PTAs" and holding further that "[i]n this sense, the Appellate Body in *Peru – Agricultural Products* seems to have clogged up the avenue [of modifications of WTO provisions *inter partes*]").

23. Peru — Agricultural Products, ¶ 5.25.

to impede a general waiver of "rights and obligations under the DSU beyond the settlement of specific disputes."[24] Whether IIAs as a whole could fit within this category of specific disputes under the established categories of treaty protection seems questionable. This concern is even more relevant given the inclusion of umbrella clauses in a great number of investment agreements, which elevate all kinds of disputes to the level of public international law, primarily contractual ones.[25]

That said, those arguing for the general conformity of a derogation pursuant to Article 41(1) VCLT have read the jurisprudence as requiring "explicit will" of the parties to be shown in an IIA to comply with the rules of the VCLT.[26] Additionally, pursuant to Article 41(2) of the VCLT, states would – which they seem to have avoided – have to notify other Members of the WTO system for their intention to conclude an IIA, which could touch upon the WTO Agreements.[27]

Some scholars even hold that, if these requirements are not met, arbitral tribunals would supposedly lack jurisdiction over issuing interpretations of WTO law.[28] We will turn to this conclusion at a later stage.[29]

ii. Role of International Trade Law as Lex Specialis to Determine a Potential Derogation

The aforementioned analysis regarding the derogation of Article 23(1) DSU would likely apply *a fortiori* if, following the assessment by the Appellate Body in "Peru - Additional Duty on Imports of Certain Agricultural Products," the question of a waiver was in every case of collision of international norms with Article 23(1) DSU framed in terms of the (specific) provisions of international trade law.[30] This approach has been criticized,

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24. *Id.* ¶¶ 5.26–5.28 with footnote 106.

25. Li, *supra* note 12, at 206–207; *see also id.* at 205 with footnote 115 (pointing out that "the fact that investors increasingly base their claims upon umbrella clauses between two states under Most Favored Nation doctrine might turn Article 23 from a relational matter into an absolute one").

26. Yamashita, *supra* note 6, at 1, 9.

27. *Id.* at 9–10.

28. *Id.* at 10.

29. *See infra* Part III.3.

30. *See* Peru — Agricultural Products, ¶ 5.112 (noting that WTO agreements "contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41.").

rather unsurprisingly.[31] It could lead one to assume that parties can waive WTO proceedings only when the corresponding rules of the WTO explicitly authorize them to do so.[32] In light of the restrictive nature of these clauses, derogation and coordination between investment and trade law procedures could therefore be "clogged up."[33] However, commentators have also stated that specific provisions such as Article XXIV of the General Agreement on Tariffs and Trade (GATT)[34] – a provision dealing in part with the freedom of Contracting Parties to enter into free trade agreements – would anyways not govern *inter se* agreements set out in investment treaties.[35] It seems questionable whether this logic of exclusivity of WTO/GATT norms over general rules of treaty interpretation of international law still applies in lack of a *lex specialis* governing the subject matter at hand. Only time and further adjudication will tell where this *lacuna* regarding provisions allowing for waivers for the introduction of IIAs leaves us regarding a violation of Article 23(1) DSU.

iii. Conception Denying Possibility of Derogation Per Se

In this context, some outright deny the possibility of waiving the DSU mechanism,[36] interpreting Article 23(1) of the DSU as an "absolute jurisdictional promise" by WTO members to the other members without allowing for a potential derogation

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31. *See* Joost Pauwelyn, *Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution After 20 Years of WTO Jurisprudence*, *in* PROCEEDINGS OF THE QUÉBEC CITY CONFERENCE ON THE WTO AT 20, HELD IN SEPT. 2015, 21-22 (C. E. Côté, V. Guèvremont, R. Ouellet eds., 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731144 (pointing out that "[t]he AB's apparent defensive attempt to shelter the WTO treaty from outside (FTA) attack would then, in effect, equate an almost imperialistic proclamation of WTO supremacy over all other international law, not just when it comes to deciding cases under WTO dispute settlement … but as a matter of public international law *more generally* . . . .").

32. *See* Li, *supra* note 12, at 206 (discussing the panel rationale in *Peru—Additional Duty on Imports of Certain Agricultural Products*).

33. Salles, *supra* note 20, at 28.

34. 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 [hereinafter GATT 1994].

35. *See* Pauwelyn, *supra* note 31, at 24 (noting that GATT Article XXIV does not impose the enactment of inter se trade restrictions and consistently allows some inter se trade restrictions to persist).

36. *See* Kwak & Marceau, *supra* note 13, at 482–483 (discussing Article 23 DSU and the quasi-automaticity of the DSU mechanism as preventing the suspension of the DSU mechanism from happening).

at all.[37] Whether this notion corresponds with the above discussed WTO/GATT jurisprudence, and if so, to what degree, is unclear. However, the above analysis shows that there are no convincing arguments for denying a derogation *per se* without any further reason.

iv. Interim Result

Nevertheless, the considerations made above demonstrate that while great uncertainty remains around the violation of Article 23(1) DSU through signing IIAs, this question should be answered understanding IIAs as *inter se* agreements – both under the specific regime of WTO/GATT law – or in the context of general provisions of treaty interpretation, where the outcome does not necessarily indicate a violation. To limit this uncertainty, treaty drafters should take this into account when negotiating and implementing IIAs; drafters should at least incorporate a clear waiver of WTO rights into their agreements and communicate this to their fellow WTO members.

Of course, the question remains whether such violation of Article 23(1) of the DSU could have consequences for adjudication on the international level, and consequently, whether Article 23(1) DSU can help prevent – or even trigger – the issues resorting from the phenomenon of fragmentation. We turn to this issue in the next section.

C. *Violation of Article 23(1) DSU as An Impediment to Jurisdiction of Investment Tribunals?*

As discussed above, some commentators have linked a violation of Article 23(1) DSU to the jurisdiction of an investment tribunal dealing with a case revolving around WTO violations.[38]

However, the conclusion establishing a lack of jurisdiction for investment tribunals because of such an infringement of a specific provision in international trade law can hardly be endorsed.

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37. Salles, *supra* note 20, at 21.

38. *See, e.g.,* Li, *supra* note 12 at 231 (noting that "Article 23's exclusive jurisdiction clause covers the claims brought by private investors in arbitral tribunals"); *see also* Yamashita, *supra* note 6, at 10 (arguing that "without such States' will, even if investors ask for interpretations of the WTO Agreements as aforementioned cases, any arbitral tribunal cannot interpret the Agreements as it lacks jurisdiction over the disputes.").

It is unclear how violating Article 23(1) DSU by concluding an illegal *inter se* Agreement (or by subsidizing or incentivizing investors to bring an investment claim related to WTO law) impacts the jurisdiction of a tribunal, as there is no overarching "international constitution" mandating the relationship – and most importantly, hierarchy – between the different dispute settlement procedures (and norms) of both systems.[39] The need to distinguish between "the fact that parallel dispute settlement procedures can be triggered . . . and the international responsibility of the concerned States that in doing so [they] may be in violation of their treaty obligations" has therefore rightly been pointed out.[40] Proponents of the idea that a violation of Art. 23(1) DSU impacts the jurisdiction of a tribunal would have to find anchors in the nomenclature of international investment law to make the case that such a violation would prompt an investment tribunal to deny its jurisdiction. Even limiting the interpretative power of tribunals "merely" to cases where such a "process of interpretation does . . . convert the IIA into a vehicle to enforce WTO law against one of the contracting States to the IIA" is neither convincing, nor normatively anchored.[41] According to this view, a tribunal would have to ask itself whether, pursuant to the concept of *Kompetenz-Kompetenz*, the interpretation would turn an IIA into a mere vehicle. However, denying jurisdiction around this hardly objectifiable "standard" cannot be the answer to avoid further fragmentation of public international law.

D. *Investors Not Impeded to Assert Trade Law Violations by Article 23(1) DSU*

This parallelism of both systems is further underscored by looking at the issue from the perspective of the investors. Due

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39. *See* Kwak & Marceau, *supra* note 13, at 484 (noting that concerning the relation of WTO and Regional Trade Agreements, "there is no 'international constitution' regulating the relationship between the dispute settlement procedures of regional and other multilateral agreements, nor any treaty provision on the matter in the WTO or elsewhere"); *see also*, Int'l L. Comm'n, *supra* note 2, at para. 324 (clarifying that the aforementioned principles of treaty interpretation cannot be understood as forming a constitution mandating the hierarchy between both systems).

40. Kwak & Marceau, *supra* note 13, at 483.

41. *But see* Klopschinski, *supra* note 13, at 229 (arguing that arbitral tribunals should refrain from interpretations that trigger this issue).

to the fact that Article 23 DSU addresses only WTO Member States, this provision does not *prima facie* prevent investors from asserting trade law violations in investment disputes.[42] This assertion only holds true under the direct rights theory of investors, meaning that the investor when asserting rights are not "stepping into the shoes of the home State" (in which case Article 23(1) DSU would apply to them), but rather are exercising their own rights.[43]

E. *Interim Result*

In summary, even if *arguendo* states party to an IIA violate Article 23(1) DSU by signing IIAs or subsidizing or incentivizing investors to bring a claim, there are no convincing arguments for this fact to impair a tribunal's power of interpreting IIA provisions through seeking guidance from international trade law. A tribunal must not (and should not) deny its jurisdiction on grounds of a supposed violation of Article 23 DSU, as the WTO framework is neither exclusive nor compulsory.[44] Equally, investors are at least under the predominant contention not generally barred from asserting trade law violations in investment fora.

Taking a brief look at the WTO ambit, WTO Member States are neither generally barred from inter-State proceedings in the WTO nor bound to the conclusions of an ISDS award on the same facts of a parallel or subsequent investment claim.[45]

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42. *See* Klopschinski, *supra* note 13, at 228 (presenting that DSU Article 23 does not prohibit private investors from asserting TRIPs in investment disputes).

43. Li, *supra* note 12, at 199–201.

44. *Cf.* Tania Voon, Andrew D. Mitchell & James Munro, *Good Faith in Parallel Trade and Investment Disputes*, *in* Good Faith and International Economic Law, Oxford University Press, 60, 76 (Andrew D. Mitchell, M. Sornarajah & Tania Voon ed., 2015) (pointing out that "[a]lthough this provision appears to endow the WTO dispute settlement system with 'compulsory and exclusive' jurisdiction over WTO violations, it 'cannot prohibit tribunals established by other treaties from exercising jurisdiction over the claims arising from their treaty provisions that run parallel to, or overlap with, the WTO provisions'"; *see* also Kwak & Marceau, *supra* note 13, at 476 (as quoted in the preceding passage).

45. *See* Li, *supra* note 12, at 204 (noting that an arbitration award may not constitute a final determination of a WTO violation). *See also* Kwak & Marceau, *supra* note 14, at 483 (highlighting that "[i]t is equally wrong to argue for an exclusive allocation in favour of the WTO forum for any 'trade'

WTO adjudicatory bodies also cannot and should not reject or deny claims in deference to non-WTO proceedings.[46] It follows that the potential outcomes of the parallelism between the two systems, as outlined above, can indeed become pressing.

III. Residual Role of Article 23(1) DSU in Guiding Interpretation?

While the denial of jurisdiction in case of a violation of Article 23(1) DSU can hardly be substantiated, this provision emphasizes the general concerns regarding the interplay of both systems and calls for further attention on not only the role of international investment law in international trade law, but also arguably the role of the latter in international investment law.

While even the aforementioned approach advocated by *Klopschinski* of denying jurisdiction of tribunals in situations of interpretations of IIAs through the lens of trade law remains unsubstantiated where "this process . . . does . . . convert the IIA into a vehicle to enforce WTO law against one of the contracting States to the IIA"[47], Article 23(1) DSU as proposed by *Klopschinski* could still assume a residual role when *interpreting* international investment law. Hereby Article 23(1) DSU could lend itself useful as a form of "Guiding Principle" in the interpretation of international investment law in light of international trade law.[48]

According to *Klopschinksi*, the violation of this provision reinforces the above discussed hesitations regarding the employment of umbrella clauses and the incorporation of WTO law into the Fair and Equitable Treatment (FET) standard as "international law," leading to a direct violation of FET when trade law is infringed.[49] Arguably, such conduct would by itself violate

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matter"). For a discussion of possibilities on how to achieve coherent outcomes in parallel in subsequent proceedings, see Brooks E. Allen & Tommaso Soave, *supra* note 3, *passim*.

46. Joel Trachtman, *Jurisdiction in WTO dispute settlement*, *in* Key Issues in WTO Dispute Settlement, The First Ten Years, 132, 140 (Rufus Yerxa & Bruce Wilson ed., 2005).

47. Klopschinski, *supra* note 13, at 229.

48. *See generally* Klopschinski, *supra* note 13, *passim*.

49. *See* Klopschinski, *supra* note 13, at 228, 232–238 (outlining the current state of the fair and equitable treatment (FET) standard and its relation to TRIPS).

Article 31(3)(c) VCLT, whereby treaty interpretation mandates to arrive at a consistent meaning with other applicable norms such as the international trade law regime.[50] However this concept is rather vague – does it imply that in every case where WTO/GATT law may be relevant to the international investment law, one should refrain from recourse to the former? The exact impact of Article 23(1) of the DSU in this context merits more elaboration. However, if this exercise results in increased protectionism based on one's own normative framework and less actual engagement with the foreign system, it should not be endorsed.

IV. Conclusion

In light of all the considerations, one ought to establish that Article 23(1) DSU does not seem to impede tribunals from looking into international trade law to *interpret* norms of IIAs pursuant to Article 31(3)(c) VCLT. Whether Article 23(1) DSU assumes a sort of residual role when *interpreting* law outside of the international trade law ambit remains to be seen. Therefore, the different manifestations of fragmentation in international law will continue to shape and influence both regimes as well as their relationship, likely with even greater frequency and impact in the future. While this presents risks for both systems, it also offers potential opportunities. Overall, this underscores the importance of ongoing discourse between the two systems, and Article 23(1) DSU does not pose an obstacle to such dialogue.

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50. *See*, Int'l L. Comm'n, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, para. 251 (21), *in* [2006] Y.B. 2 Int'l L. Comm'n 175, Part Two, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (indicating that "Article 31, paragraph (3) (c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning.").