المعهد العالي للقضاء
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مجلة الدراسات الفقهية والقانونية

مجلة علمية محكمة متخصصة (ربع سنوية)
يصدرها المعهد العالي للقضاء
سلطنة عُمان

في هذا العدد:

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قواعد النشر في مجلة الدراسات الفقهية والقانونية

أولاً- مواصفات البحوث المقدمة للنشر:

تقبل المجلة نشر البحوث التي تمتاز بالعمق والأصالة، والتي تقدم إسهاماً علمياً في مجال الشريعة أو القانون أو القضاء، سواء المكتوبة باللغة العربية أو الإنجليزية، وفي جميع الأحوال يجب مراعاة ما يأتي:

1. أن يرفق مع البحث ملخصين أحدهما باللغة العربية، والآخر باللغة الإنجليزية، بشرط ألا يزيد كل ملخص عن صفحة واحدة، وأن يُذيّل بعدد خمس كلمات مفتاحية.
2. أن تحتوي الصفحة الأولى من البحث على عنوان البحث، واسم الباحث أو (الباحثين)، وجهة عمل الباحث أو (الباحثين) باللغتين العربية والإنجليزية.
3. ألا يكون البحث المقدم للنشر قد نُشر أو قُدم للنشر في مجلة أخرى أو في مؤتمر علمي أو في أي جهة أخرى، وألا يكون مستلاً من كتاب منشور أو رسالة ماجستير أو دكتوراه، وعلى الباحث أن يقدم إقراراً خطياً بذلك مرفقاً ببحثه مع الطلب الخاص بنشر البحث.
4. أن يتحلى الباحث بالأمانة العلمية أثناء كتابة بحثه، والمجلة غير مسؤولة عن أي مخالفة لأصول الأمانة العلمية في أي بحث منشور بها.
5. أن يلتزم الباحث بالأصول العلمية المتعارف عليها في إعداد البحوث والدراسات العلمية، ومن ذلك التقديم للبحث، وتحديد أهدافه، ومنهجيته، والخطة المتبعة في كتابته، وتنسيق أقسامه، والتوثيق الكامل للمراجع، وإدراج خاتمة تتضمن خلاصة ما توصل إليه الباحث من نتائج، وأهم التوصيات التي انتهى إليها، ويُذيّل البحث بقائمة تشمل المصادر والمراجع التي استعان بها الباحث في إعداد البحث مرتبة أبجدياً.
6. أن يكون البحث مكتوباً بواسطة جهاز الحاسب الآلي بصيغة (Word Document)، وبصيغة (PDF).
7. ألا تقل عدد صفحات البحث عن 20 صفحة من حجم (A4)، وبحد أقصى 50 صفحة.
8. يشترط في البحوث المكتوبة باللغة العربية أن تكون بخط (Simplified (Arabic، بحجم (14) بالنسبة إلى المتن، وبالخط نفسه بحجم (12) بالنسبة إلى الإشارات المرجعية (الهوامش)، أما البحوث المكتوبة باللغة الإنجليزية فيشترط أن تكون بخط (Times New Roman)، بحجم (14) بالنسبة إلى المتن، وبالخط نفسه بحجم (12) بالنسبة إلى الإشارات المرجعية (الهوامش).
9. تثبت الإشارات المرجعية (الهوامش) في أسفل كل صفحة، وبتسلسل متصل.
10. لا تقبل البحوث غير المدققة لغوياً سواء المكتوبة باللغة العربية أو الإنجليزية.

ثانياً- إجـــراءات النـــشـــر:

1. يتم إرسال البحث على عنوان البريد الإلكتروني الخاص بالمجلة: hji.journal@hji.edu.om
2. جميع المراسلات الموجهة من الباحث إلى المجلة تكون باسم رئيس التحرير.
3. يرفق الباحث نبذة تعريفية عنه مع الطلب الخاص بنشر البحث.
4. تخضع البحوث الواردة إلى المجلة لفحص نسبة الاقتباس العلمي فيها، والتي يجب ألا تتجاوز (15%)، بحيث لا يقبل البحث إذا تجاوز الاقتباس هذه النسبة.
5. يحيل رئيس التحرير البحوث الواردة للمجلة إلى لجنة النشر العلمي؛ لفحصها والتأكد من عدم تعارضها مع أهداف المجلة، واتخاذ قرار بشأن إحالتها إلى التحكيم من عدمه، فإذا ارتأت اللجنة صلاحية البحث للعرض على المحكمين، عينت محكّمين اثنين له، يكونان من ذوي الاختصاص بموضوع البحث.
6. تعامل البحوث الواردة إلى المجلة مع تقارير المحكّمين المتعلقة بها بسرية تامة.
7. يرسل مدير التحرير إلى الباحث صورة من تقريري المحكّمين مشفوعة بإشعار موجه إليه من رئيس التحرير بإجراء التعديلات المطلوبة على البحث إن وجد، وذلك طبقاً لما ورد في التقريرين، على أن يتضمن الإشعار تحديد مدة للباحث لتنفيذ هذه التعديلات لا تتجاوز شهراً من تاريخ استلامه للخطاب.
8. يرسل الباحث إلى رئيس التحرير نسخة من بحثه بعد إجراء التعديلات المطلوبة مشفوعة بتقرير منه، يبين فيه التعديلات التي أجراها على البحث، وذلك خلال المدة المحددة.
9. يحيل رئيس التحرير نسخة البحث بعد التعديلات التي أجراها الباحث إلى لجنة النشر العلمي، مشفوعة بصورة من تقرير الباحث، وصورة من تقريري المحكّمين؛ للتأكد من إجراء الباحث للتعديلات المطلوبة كاملة، فإذا تيقنت اللجنة من ذلك، أحالت البحث إلى رئيس التحرير تمهيداً للقيام بإجراءات الطباعة والإصدار.
10. يتولى مدير التحرير مراسلة الباحث بإشعار موجه إليه من رئيس التحرير يفيد قبول البحث للنشر أو عدم قبوله، وذلك بناء على قرار لجنة النشر العلمي.
11. إذا قُبل البحث للنشر، يحصل الباحث على إفادة معتمدة من المجلة بقبول البحث للنشر، ترسل له عبر البريد الإلكتروني.
12. يُزود الباحث بنسخة ورقية واحدة من عدد المجلة المنشور فيه بحثه، إضافة إلى مستلة من بحثه ترسل له عبر البريد الإلكتروني.
13. البحث المنشور في المجلة لا يجوز إعادة نشره في أي مجلة أخرى، أو في أي مؤتمر علمي.
14. إضافة إلى إصدار أعداد المجلة في مطبوعات ورقية، يجوز لهيئة التحرير نشر هذه الأعداد على الموقع الإلكتروني للمعهد عبر شبكة المعلومات الدولية (الإنترنت).

محتويات العدد

كلمة العدد

الحمد لله الذي علّم بالقلم، علَم الانسان ما لم يعلم، والصلاة والسلام على معلَم البيان والناطق بأفصح لسان صلى الله وسلم عليه... وبعد،،،

القراء الأعزاء:

تجدد مجلة الدراسات الفقهية والقانونية معكم الصلة العلمية؛ إذ العلم رحم بين أهله؛ حيث تتوارد بين أذهان الباحثين والمهتمين بالشأن القانوني قضايا شتى في مختلف المناحي، تتجدد بتجدد حركة الحياة ومفرزاتها، وتحتاج هذه القضايا من يكشف خبرها وآثارها ومضمونها، فيسعى الباحثون إلى دراستها وسبر أغوارها من أجل استنباط الحكم الفقهي والقانوني لها؛ لتظهر هذه القضايا جلية في وقع الحياة العملية، وهو ما تسعى إليه مجلة الدراسات الفقهية والقانونية في كل إصدار من إصدارتها.

وفي هذا العدد؛ تطالعنا ثمانية أبحاث محكّمة، تناولت مواضيع وقضايا مختلفة ذات واقع ملموس، أعدها باحثون أجلاء، لهم منا جزيل الشكر والتقدير على مشاركاتهم المعطاءة.

والله الموفِّق والمُسْتَعان،،،

د. نبهان بن راشد المعولي

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anywhere the violating State possibly holds its assets – outside the application of a rule related to sovereign immunity.

On the other hand, by the means of WTO law, the foreign investor's home State could[97]:

- pressurize the violating State to remove its inconsistent measures or make them compliant with its WTO obligations, or
- suspend its trade obligations or concessions.

Therefore, each forum's remedial approaches and available remedies as well as enforcement mechanisms may present convenience for the foreign investor.

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(97) Ibid

Therefore, this paper recommends the WTO DSB remedies for the foreign investor who wants to keep its activities within the territory of the host State "in fair competition with the domestic services suppliers" than the potential economic benefits of ICSID[94].

Furthermore, this paper recommends[95] ICSID's remedies (especially, the monetary compensation) for the foreign investor in case:

- when they cover all aspects of the investment and not just IP rights (it is relevant to note that WTO law only ensures compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPS); and,
- When the measure of the host State has critically harmed the position of the foreign investor (in this case, it is noteworthy that the maintenance of the activities of the foreign investor in the host State will become unlikely).

This paper showed that there are possible advantages for the foreign investor for each enforcement mechanisms. Indeed, as this paper explained that the foreign investor – as a private actor – have no standing to enforce the WTO recommendations and rulings – only its home State can do so; therefore, this paper recommends Article 54 of the ICSID Convention for the foreign investor.

Under this provision, every Members are obliged to "recognize awards as binding" and enforce monetary obligations within their jurisdictions, with no likelihood of challenge or appeal[96]. This will permit the foreign investor to enforce an ICSID award

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[94] Ibid.

[95] See Gibson (note 22) 473.

[96] Ibid.

Conclusion

Despite the fact that ICSID and the WTO DSB both use legal means to enforce the international obligations of States in order to prevent them to take measure that affect negatively the foreign economic actor's interests, one may say that the emergence of a global regime for investor protection is still not complete. These two forums have very different remedial regimes and enforcement mechanisms that have practical implications on the foreign investor's rights. This paper showed that there are potential advantages for the foreign investor in each forum's remedial approaches and available remedies.

Indeed, this paper explained that there is no remedy of compensation for damages under WTO law; because, as a response to detrimental measures of the host State that affects an "intellectual property–based investment", the possible remedies under the WTO State-to-State mechanisms only aim at their withdrawal(90), or at their compliance with the standards of the WTO covered agreements – hence, the reestablishment of the IP rights(91). On the other hand, this paper also explained that ICSID "cannot force the host State to withdraw the inconsistent measure that caused the loss of the investor"(92); because the ICSID's remedies aim at awarding reparation by restitution or compensation for damages where the detrimental measures of the host State breach the BIT(93).

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(90) In order to better understand this aim, see Articles 3.7 and 19 of the DSU (note 25) 354-355 and 365-366.

(91) See Ewing-Chow (note 60) 555.

(92) Ibid.

(93) See Molinuevo (note 61) 20-22.

recommendations and rulings. Only its home State can do so. Hence, for Gibson, Article 54 of the ICSID Convention remains a good option for the foreign investor: Under this provision, every Members are obliged to "recognize awards as binding" and enforce monetary obligations within their jurisdictions, with no likelihood of challenge or appeal[87]. This will permit the foreign investor to enforce an ICSID award anywhere the violating State possibly holds its assets – outside the application of a rule related to sovereign immunity.

On the other hand, by the means of WTO law, the foreign investor's home State could (1) pressurize the violating State to remove its inconsistent measures or make them compliant with its WTO obligations, or (2) suspend its trade obligations or concessions[88].

Notwithstanding, as Molinuevo noted, the home State's capacity to have recourse to the suspension of trade concessions represents the advantage, for the foreign investor implicated in the dispute, of keeping the issue at the international level; thus, the private actor does not need to "turn to other fora to seek enforcement of the international rulings" [89]. Therefore, for each enforcement mechanisms, there are possible advantages for the foreign investor.

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[87] Ibid.

[88] Ibid.

[89] Molinuevo (note 61) 25.

by the EC with the requirement of "equivalence" provided by the DSU[83].

In addition, according to the DSU, the concessions or obligations suspended have to be generally in a similar "agreement and sector" as the "agreement and sector" in which the fundamental breach occurred[84]. Therefore, each forum has its own and very specific legal framework and means of enforcement. As a result, these specificities may have practical implications on the foreign investor's rights.

2.2.
Practical implications for the foreign investor rights

With respect to the investor rights, it is noteworthy that in the event of an ICSID award or a recommendation (or ruling) from the WTO DSB related to an "intellectual property–based investment" that was affected by a detrimental measure of the host State, the foreign investor will have to consider the possible enforcement mechanisms provided by the DSU or by the ICSID Convention.[85]

Indeed, each forum support, within their respective legal framework, systems of enforcement against a State that violates its international obligations (WTO Agreements or BITs) [86].

However, it is important to note that the foreign investor – as a private actor – has no standing to enforce the WTO

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[83] United States — Anti-Dumping Act of 1916, WTO Recourse to Arbitration by the United States under Article 22.6 of the DSU – Original Complaints by the EC (24 February 2004) WT/DS136/ARB, 30 para 7.1.

[84] Article 22.3 of the DSU (note 25) 368-369.

[85] Gibson (note 22) 417.

[86] Gibson (note 64) 473.

in the event of a continued non-compliance by the breaching Member State (after the "expiry of the reasonable period of time"[76]), the DSU provides the possibility of "suspension of concessions or other obligations under WTO covered agreements" from the complaining State towards the Contracting State that breached its obligations with respect to WTO law[77].

This constitutes a specific kind of measure known as "retaliation"[78]. By way of example, in the case European Communities (EC) — Regime for the Importation, Sale and Distribution of Bananas[79], Ecuador requested the WTO DSB for an authorisation of suspension of concession under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[80] as well as the General Agreement on Trade in Services (GATS)[81] as a response to the non-compliance of the EC.

In addition, the DSU provides that "the level of the suspension of concessions or other obligations has to be equivalent to the level of the impairment or nullification" [82]. Indeed, in the case United States — Anti-Dumping Act of 1916, the arbitrators expressed the necessity to determine the compatibility of the suspension applied

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[76] Determined pursuant Article 21 (3) of the DSU (note 25) 366.

[77] Articles 22.1 and 22.3 of the DSU (note 25) 367-369.

[78] Sebastian and Sinclair (note 21) 278.

[79] See European Communities (EC) — Regime for the Importation, Sale and Distribution of Bananas, WTO Recourse by Ecuador to Article 22.2 of the DSU (9 November 1999) WT/DS27/52, 1.

[80] It is noteworthy that this Multilateral Agreement is part of the WTO law (covered under the WTO Agreement).

[81] It is noteworthy that this Multilateral Agreement is part of the WTO law (covered under the WTO Agreement).

[82] Article 22.4 of the DSU (note 25) 369.

The second means is related to the possibility of an action of a legal nature by the investor's home State via the mechanism of diplomatic protection as provided by Article 27 of the Convention. The third means is related to the possibility of an action of a legal nature by the investor's home State on the ground of a litigation before the International Court of Justice as provided by Article 64 of the Convention.

Nevertheless, the Convention makes clear that its Article 54 does not provide a derogation to the applicable rule on sovereign immunity under the jurisdiction in which execution is pursued(72). In fact, only commercial assets of the State permit the execution of the award.(73) As a way of example, in the case AIG and CJSC v. Kazakhstan, the courts of the United Kingdom refused to execute an ICSID award over the Central bank of Kazakhstan's property on the ground that "this property shall not be regarded as in use or intended for use for commercial purposes" (74). Therefore, the mechanisms of the Convention provide the enforcement of an ICSID award; however, it is noteworthy that it may be limited by the application of the principle of State immunity(75).

Moreover, with respect to the WTO DSB, it is relevant to mention that the enforcement mechanisms are framed by the DSU. Indeed,

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(72)See Article 54(2) of the ICSID Convention (note 24) 28.

(73) Indeed, acts jure gestionis are not covered by immunity; see Anastasiia Filipiuk, 'Enforcement of ICSID Arbitration Awards and Sovereign Immunity' (LLM short thesis, Central European University, April 2016) 10.

(74) AIG Capital Partners Inc and CJSC Tema Real Estate Company Limited v The Republic of Kazakhstan [2005] EWHC 2239 (Comm), para 57(2).

(75) S.A.R.L. Benvenuti & Bonfant v People's Republic of the Congo, ICSID Case No. ARB/77/2, Award (8 August 1980) 1 ICSID Reports 330, it is noteworthy that on December 23rd 1980, the Paris Tribunal de Grande Instance refused the execution and enforcement of this award because of the principle of sovereign immunity.

courts that have to enforce the terms of the award cannot review them for procedural or substantive errors[67]. By way of illustration, in the Goetz v Burundi case, the Republic of Burundi enforced an award implying the reimbursement of customs duties as well as taxes and a creation of a new free zone in favour of the claimant[68].

Furthermore, the Convention provides also legal means concerning the non-compliance of a Contracting party with the terms of an award. Most precisely, three different legal means are provided by ICSID.

The first means is related to recognition and enforcement as provided by Article 54 of the Convention. Indeed, another explicit obligation is provided to every Members to recognize and enforce the "pecuniary obligations imposed by that award within their territories as if it were a final judgment of a court" [69].

The award's recognition and enforcement may be acquired from a Member's competent court on simple presentation of the award's certified copy by the ICSID's Secretary-General[70].

In other words, the Convention makes possible for the party aiming at the enforcement and recognition of the terms of an award to go after every asset of the respondent State in all the jurisdictions where they might be located[71].

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[67] Sebastian and Sinclair (note 21) 287.

[68] Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3, Award-in French (9 February 1999) 516-517 para 135.

[69] For the entire and exact provision of the Convention, see Article 54(1) of the ICSID Convention (note 24) 27.

[70] See Article 54(2) of the ICSID Convention (note 24) 28; Antonio R. Parra, 'The Enforcement of ICSID Arbitral Award' (24th Joint Colloquium on International Arbitration Paris, November 2007) 3.

[71] Sebastian and Sinclair (note 21) 286-287.

addition, ICSID's remedies can also be especially appealing in the circumstances when the measure of the host State has critically harmed the position of the foreign investor (in this case, it is noteworthy that the maintenance of the activities of the foreign investor in the host State will become unlikely) [65]. Therefore, there are potential advantages for the foreign investor in each forum's remedial approaches and available remedies.

2.
The contrasting enforcement mechanisms of ICSID and WTO DSB

ICSID awards and WTO recommendations as well as rulings are enforced very differently. Indeed, the foreign investor cannot enforce the WTO recommendations – or rulings. Most precisely, only its home State (as a Member State of the WTO) can do it. Nevertheless, the foreign investor can enforce an ICSID award against the host State without the assistance of its home State.

Thus, trying to understand in details the different enforcement mechanisms of the two forum implies to study their diverging framework (3.1) and practical implications for the investor rights (3.2).

2.1.
Diverging framework of enforcement for each forum

With respect to ICSID, it is noteworthy that its enforcement mechanisms are framed by the Washington Convention. Indeed, Article 53(1) provides an explicit obligation to every Members "to comply with and abide by the award's terms" [66]. Also, domestic

[65] Ibid.

[66] For the exact provisions of the Convention, see Article 53(1) of the ICSID Convention (note 24) 27.

WTO covered agreements – hence, the reestablishment of the IP rights[60]. There is no remedy of compensation for damages under WTO law.

On the other hand, ICSID's remedies aim at awarding reparation by restitution or compensation for damage where the detrimental measures of the host State breach the BIT[61]. Thus, ICSID cannot force the host State to withdraw the inconsistent measure that caused the loss of the investor[62].

For Molinuevo, the WTO DSB remedies may be more appropriate for the foreign investor who wants to keep its activities within the territory of the host State "in fair competition with the domestic services suppliers" than the potential economic benefits of ICSID[63].

Nevertheless, according to Gibson, ICSID's remedies (especially, the monetary compensation) may be more advantageous for the foreign investor in the event that they cover all aspects of the investment and not just IP rights (it is relevant to note that WTO law only ensures compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPS) [64]. In

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[60] Michael Ewing-Chow, 'Thesis, Antithesis and Synthesis: Investor Protection in BITs, the WTO and FTAs' (2007) 30 University of New South Wales Law Journal, 555.

[61] Martín Molinuevo, 'Can Foreign Investors in Services Benefit from WTO Dispute Settlement?' (2006) NCCR Trade Regulation Working Paper No 2006/17, 20-22.

[62] Ewing-Chow (note 60) 555.

[63] Molinuevo (note 61) 22.

[64] Christopher Gibson, 'Latent Gounds in Investor-State Arbitration : Do International Investment agreements Provide New Means to Enforce Intellectual Property Rights ?' in Karl P. Sauvant, Yearbook on international investment law & policy 2009-2010 (Oxford : Oxford University Press, 2010) 473.

However, scholars noted[54] that these "recommendations" turn into "rulings" (pursuant WTO law [55]) upon being adopted[56].
In addition, the WTO remedies must follow a very specific reasoning, in order to be applied. Indeed, in the case United States - Import Measures on Certain Products from the European Communities[57], because a "recommendation" to remedy a violating measure that has ceased to exist would not be logical, it was underlined that the DSB shall follow a specific order in its reasoning; hence, first, it has to (1)find of a breach of WTO law by a government measure, then (2)request that the violating State bring the measure in conformity with WTO law, and finally (3)provide "recommendations" on how to implement it.[58]

1.1.
Practical implications on the foreign investor rights

With respect to the investor rights, it is noteworthy that, as a response to detrimental measures of the host State that affects an "intellectual property–based investment", the possible remedies under the WTO State-to-State mechanisms only aim at their withdrawal[59], or at their compliance with the standards of the

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[54] Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn, The World Trade Organization: Law, Practice, and Policy (Oxford: Oxford University Press, 2015) 114.
[55] Indeed, both Articles 21.3 and 21.5 of the WTO DSU combine the notions of "recommendations" and "rulings"; see DSU (note 25) 366-367.
[56] In accordance to Articles 16.4 and 17.14 of the DSU (note 25) 363,365.
[57] United States - Import Measures on Certain Products from the European Communities, WTO Report of the Appellate Body (11 December 2000) WT/DS165/AB/R.
[58] Ibid 23-24 para 81.
[59] In order to better understand this aim, see Articles 3.7 and 19 of the DSU (note 25) 354-355 and 365-366.

Based on this reasoning, ICSID refused to award compensation for moral damage in the Technicas Medioambientales v Mexico[48] case and awarded reparation for moral damages in the Funnekotter v Zimbabwe[49] case. Therefore, the various remedies available under ICSID are mainly based on reparation by compensation and restitution.

Furthermore, with respect to the WTO DSB, scholars interpreted its available remedies as lex specialis, hence distinct from remedies deriving from the "principles of law of reparation under general international law" such as compensation or restitution[50].

Indeed, according to WTO law, in the circumstances where there is a breach of any covered agreement, "the action is considered to constitute a case of nullification or impairment" [51]. Thus, for the academia, these two notions of "nullification or impairment" are very specific to WTO law and do not fit within the concept of breach under general international law[52].

Most precisely, the remedy will be a "recommendation" from the WTO DSB (after having concluded that a government measure is breaching the obligations contained within a WTO agreement) to the breaching Member State to "bring the measure in conformity with these obligations" [53].

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[48] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) 79-80 para 198.

[49] Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award (22 April 2009) 47 para 147.

[50] Ehle and Dawidowicz (note 45) 317.

[51] Most precisely, see Article 3.8 of the DSU (note 25) 355, and Article XXIII:1 of the General Agreement on Tariffs and Trade, 39-40.

[52] Ehle and Dawidowicz (note 45) 317.

[53] For the exact wording of the provision, see Article 19.1 of the DSU (note 25) 365.

destruction or irreversible deterioration of the dispute's subject matter[41].

Furthermore, ICSID may also award moral damages in specific situations. Indeed, in the DLP v Yemen[42] case, the arbitrators stated that it is only "in specific circumstances" that "moral damages – covering, for example, "loss of reputation" – may be granted to a legal person" [43]. The tribunal also emphasized the fact that moral damages – even though difficult to be estimated or measured by monetary standards – are "very real" within "exceptional circumstances" [44].

Notwithstanding, in order to award moral damages, ICSID must establish a "causal link between the violation of the BIT and the claimant's loss" [45]. Indeed, in the Biwater v Tanzania[46] case, the tribunal stated that reparation for any BIT breach, in the event of a violation of an international standard or an unlawful expropriation, will be awarded only if there is an adequate "causal link between the investment treaty's actual violation and the loss sustained by the claimant" [47].

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[41] Sebastian and Sinclair (note 21) 280.

[42] Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award (6 February 2008).

[43] Ibid 65 para 289.

[44] Ibid.

[45] Bernd Ehle and Martin Dawidowicz, 'Moral Damages in Investment Arbitration, Commercial Arbitration and WTO' in Jorge A. Huerta-Goldman, Antoine Romanetti and Franz X. Stirnimann, WTO Litigation, Investment Arbitration, and Commercial Arbitration (Wolters Kluwer Law & Business, 2013) 305.

[46] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (24 July 2008).

[47] Ibid 230-231 paras 779-780.

remedies are alien to the long established WTO practice where remedies have traditionally been prospective"[36].

Thus, each forum use distinct approaches of remedies: ICSID recognizes the right to (1) demand restitution as a primary remedy and (2) obtain compensation as well as moral damages (in exceptional circumstances); and, the DSU does not allow the WTO adjudicative bodies to award monetary compensation[37]. This dissimilarity associated with available remedies will be further discussed in the next section.

1.1

Distinct available remedies under each forum :

It is worth noting that according to the Charzow Factory case (mentioned above), reparation may take the form of "restitution in kind" or "payment of a sum of its equivalent in value (i.e. monetary compensation)" [38].

With respect to ICSID's procedures, monetary compensation and damages are the dominant remedies awarded. Nevertheless, the Centre also recognizes to claimants the right to request restitution as a primary remedy. Hence, in the case in Micula v Romania[39], the claimant demanded "the restitution of the legal framework as in force at the time of the approval of the project" and, "alternatively adequate compensation for the losses suffered" [40]. However, scholars noted that, in practice, restitution in kind remains hardly awarded – especially, in case of a material

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[36] Ibid 43-44 para 6.106.

[37] Sebastian and Sinclair (note 21) 276.

[38] See Charzow Factory Case (note 27) 47.

[39] Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2004).

[40] Ibid 8 para 14.

This standard of compensation – known as a "retrospective approach" – is generally applied by ICSID arbitrators. By way of example, in the MTD Equity v Chile[29] case, the Tribunal applied the compensation's standard proposed by the claimants exactly as stated, in the Charzow Factory case, by the PCIJ[30]. The same reasoning was applied in the CMS v Argentina[31] case.

However, the WTO DSB does not act in accordance with the same standard because it has a "prospective approach". Most precisely, according to DSU's provisions[32], the Organisation's dispute settlement system will generally apply a remedy that takes the form of an order to a State that is in violation with WTO Agreements to remove its breaching measure[33].

Hence, on the opposite of ICSID, the WTO DSB does not set an "obligation of reparation" but an "obligation of cessation". In other words, even though the DSU provides suspension of concessions as well as compensation to Contracting parties, they stand only as "temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time" [34]. By way of example, in the case United States – Import measures on certain products from the European Communities[35], the panel stated that "retroactive

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[29] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (25 May 2004).

[30] Ibid 87-88, para 238.

[31] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (12 May 2005) 115 paras 400-401.

[32] Most precisely, Articles 19.1 and 21.3 of the DSU (note 25) 365,366.

[33] Sarooshi (note 26) 15.

[34] For the exact wording of WTO law related to "compensation", see Article 22.1 of the DSU (note 25) 367.

[35] United States – Import measures on certain products from the European Communities, WTO Report of the Panel (17 July 2000) WT/DS165/R.

investors cannot enforce the WTO Agreements – because it is only WTO Member States that can initiate a case before the WTO DSB[25]. Thus, although they both may cover a particular activity (as an "IP-based investment"), these forums have distinct approaches (2.1) of available remedies (2.2) that have implications on the investor rights (2.3).

1.1
Distinct approaches to remedies from the two forums

One major difference between ICSID and WTO DSB lies in the fact that they do not act in accordance with the same standard approach to remedies. Indeed, according to Sarooshi[26], with respect to ICSID, it is noteworthy that tribunals usually act in accordance with the principle laid down, by the Permanent Court of International Justice (PCIJ), in 1928, in the important Charzow Factory[27] case. This principle stated that all the illegal act's consequences must be "wiped out" by "reparation" in order to "re-establish the situation which would have existed in case of the non-commission of the illegal act" [28].

Centre; see World Bank, ICSID Convention, Regulations and Rules (Washington: ICSID 2006) 18.

[25] Most precisely, according to Article 1.1 of the Annex 2 of the WTO DSU, only Members States of the WTO fall within the jurisdiction ratione personae of the WTO DSB; see the WTO Annex 2 – Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU), 353.

[26] Dan Sarooshi, 'Investment Treaty Arbitration and the World Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?' (2014) 49 Texas International Law Journal,14.

[27] Case concerning the Factory at Charzow, PCIJ Case No. 13, Claims for indemnity – Merits (13 September 1928).

[28] Ibid 47.

are guaranteed and protected. Hence, the scope of the paper will only cover these two specific areas within ICSID and WTO DSB as well as their practical implications on the rights of the foreign investor. In other words, the question of competing legal regimes (related to the applicable law issues) and overlapping mandates (related to jurisdictional issues) of the two forums will not be analysed in this paper.

Thus, this paper will be organised in two main Sections: Taking into account the practical implications on the foreign investor rights of both ICSID and WTO DSB, Section 2 will analyse their contrasting remedial regimes and Section 3 will analyse their enforcement mechanisms. This will then be followed by concluding remarks.

1.1
The contrasting remedial regimes of the ICSID and WTO DSB:

Legal instruments covering international investment and international trade are enforced in very different ways. Indeed, the terms of a Bilateral Investment Treaties[23] (BIT) can be enforced by private foreign investors – without the interference of their home State – before ICSID[24]. Notwithstanding, private foreign

[23] They are understood as international legal instruments setting "the conditions and terms for private investment by nationals (natural or legal persons) of one State in another State"; see <https://www.law.cornell.edu/wex/bilateral_investment_treaty> accessed 23 January 2022.

[24] Most precisely, according to Article 25 of ICSID Convention, any juridical or natural person who held a "different Member State's nationality" from "the State party to the dispute – deriving directly from an investment – on the date on which both parties consented to submit such dispute to conciliation or arbitration" fall within the jurisdiction ratione personae of the

activity is both covered by ICSID Convention and WTO Agreements (such as an "Intellectual Property (IP)–based investment"[22]).

However, in that particular case, the contrasting remedial regimes and enforcement mechanisms of each forum may have practical implications on the foreign investor's rights. It is noteworthy that Sovereign Wealth Funds ("SWF") – such as the Oman Investment Authority or the Abu Dhabi Investment Authority – may be regarded as distinct entities from the foreign government possessing them, therefore having a position of "foreign investors" in international investment law. Indeed, as long as State-controlled entities act in a commercial instead of a governmental capacity, they are not automatically excluded from the system of protection instituted by international investment law.

With this in mind, this paper seeks to compare and contrast the functions of the ICSID and WTO DSB with reference to their remedial regimes and enforcement mechanisms. Indeed, because the regimes related to remedies and enforcement – for a particular forum – generally involve the means with which a person's rights

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Litigation, Investment Arbitration, and Commercial Arbitration (Wolters Kluwer Law & Business, 2013) 273.

(22) In fact, intellectual property rights are recognized as a form of "investment" holding right to protection under BITs with respect to Article 25 of the ICSID Convention and are also protected by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which is covered by WTO law. However, the host State of the investment must be a Member State of the WTO Agreement and, at the same time, a Contracting party of a BIT with the home State of the foreign investor. For further details, see Christopher Gibson, 'A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation' (2010) 25 American University International Law Review, 358.

multilateral trade agreements that focus at "disciplining" an intensely broad series of measures such as restrictions on import as well as export, or national measures which affect trade (for example health or environmental measures) [16].

In addition, it has a binding dispute settlement mechanism in charge of enforcing these obligations[17]. Hence, the rules that apply to every disputes arising out from the WTO Agreements are provided by the "WTO Understanding on Rules and Procedures Governing the Settlement of Disputes[18] (DSU)" [19]. Since 1995, 611 disputes have been brought to the WTO and over 350 rulings have been issued[20]. Thus the WTO DSB is also an important forum.

Furthermore, these two forums appear to be similar. Indeed, they both enforce States' international obligations in order to hold them back from taking measures that affect negatively the foreign economic actors' interests[21] – especially, when an economic

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<https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm> accessed 23 January 2022.

[16] Nathalie Bernasconi-Osterwalder, 'democratizing international dispute settlement: The case of trade and investment disputes' (Center for International Environmental Law conference, Doha, 29th October – 1st November 2006) 2.

[17] Ibid.

[18] It is in effect since January 1995.

[19] Daniel T. Shedd, Brandon J. Murill and Jane M. Smith, 'Dispute Settlement in the World Trade Organization (WTO): An Overview' (2012) Congressional Research Service Report RS20088, 1.

[20] See <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 29 March 2022.

[21] Thomas Sebastian and Anthony Sinclair, 'Remedies in WTO Dispute Settlement and Investor-State Arbitration : Contrasts and Lessons' in Jorge A. Huerta-Goldman, Antoine Romanetti and Franz X. Stirnimann, WTO

In addition, various benefits are provided by ICSID to both the host State and the foreign investor: The latter acquires direct access, in case of a dispute, to an effective international forum and the host State makes its investment climate better by providing access to international arbitration – hence, this climate will probably attract additional international investments(10). It is relevant to note that the access to ICSID arbitration and conciliation remains voluntary; however, from the moment when arbitration is consented, it becomes binding for the parties(11).

Thus, ICSID is an important forum. Indeed, for the Royal Institute of International Affairs, it is one of the principal mechanisms for the "the settlement of investment disputes under four recent multilateral trade and investment treaties" (12). It is noteworthy that all ICSID Contracting States must enforce as well as recognise arbitral awards(13).Statistically, 838 cases were registered by ICSID, as of June 2021, under its Convention and Additional Facility Rules(14).

On the other hand, as a consequence of the Uruguay Round, the World Trade Organisation (hereinafter WTO) was instituted on January 1st 1995 under the "Marrakesh Agreement establishing the WTO" (WTO Agreement) in order to regulate the international circulation of trade(15). In fact, the Organisation covers various

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(10) Ibid, 2 para 8.

(11) The Royal Institute of International Affairs (RIIA), International Environmental Disputes: International forums for non-compliance and dispute settlement in environment-related cases (2001) 9.

(12) Ibid.

(13) Ibid.

(14) International Centre for Settlement of Investment Disputes World Bank Group, the ICSID Caseload-Statistics (Issue 2021-2) 7.

(15) Indeed, WTO guarantees that trade circulates as "freely, predictably and smoothly as possible", see

activities are more and more “bundled together”, and (2)from a legalistic point of view, with respect to substantive discipline, investment and trade obligations (such as national treatment or protection of intellectual property rights) tend to overlap[6]. In addition, these specific international law’s areas provide more effective dispute settlement mechanisms than any other field: the International Centre for the Settlement of Investment Disputes (hereinafter ICSID) in respect of international investment and the World Trade Organisation Dispute Settlement Body (hereinafter WTO DSB) that administers disputes between the World Trade Organisation’s Member States[7].

On one hand, ICSID was instituted by the “1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention also known as Washington Convention)” that came into force on the 14th of October 1966[8]. This Convention aims at stimulating economic development by the means of private international investment’s promotion[9].

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[6] Joost Pauwelyn, ‘The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus’ (2015) Graduate Institute of International and Development Studies (IHEID),8.

[7] Yasuhei Taniguchi and Tamoko Ishikawa, ‘Balancing Investment Protection and Other Public Policy Goals: Lessons from WTO Jurisprudence’ in Julien Chaisse and Tsai-yu Lin, International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita (Oxford: OUP 2016) 68.

[8] See<https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx> accessed 23 January 2022.

[9] Christoph Schreuer, ‘International Centre for Settlement of Investment Disputes (ICSID)’, 1 para 3.

Introduction

It is noted that "International investment law[1] and international trade law[2] share similar aims" [3]. It is true. In fact, foreign economic actors are aware that foreign direct investment[4] (FDI) and trade are two forms (occasionally alternative, but increasingly complementary) of servicing foreign markets[5].

Pauwelyn noted that world trade and investment regimes converge because: (1)from a business point of view, investment and trade

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[1] "International investment law" may be understood as the body of rules that covers relationships between foreign investors (private and State owned businesses) and investor-receiving States (host States); see Surya P Subedi, 'International Investment Law' in Malcom D. Evans, International law (Oxford: Oxford University Press, 2014) 727.

[2] "International trade law" may be understood as a body of rules that governs the international exchange of services and goods and covers relations between States for administering, regulating and organising their domestic markets with respect to international trade; see <https://definitions.uslegal.com/i/international-trade-law/> accessed 23 January 2022.

[3]See the introductory remarks by Andrew Mitchell in 'International Trade Law and International Investment Law: Complexity and Coherence (Proceedings of the Annual Meeting)' (2014) 108 American Society of International Law, 251.

[4]The United Nations Conference on Trade and Development (UNCTAD) defines FDIs as "long-term investments which indicate a lasting control and interest by a person resident within one economy (parent enterprise or foreign direct investor) in a business resident within an economy different of that of the foreign direct investor (foreign affiliate, affiliate enterprise or FDI enterprise); see <http://unctad.org/en/Docs/wir2007p4_en.pdf> accessed 23 January 2022.

[5] Rafael Leal-Arcas, International Trade and Investment Law: Multilateral, Regional, and Bilateral Governance (Cheltenham, UK; Northampton, MA: Edward Elgar, 2010) 3.

أنظمة حل المنازعات في كل من منظمة التجارة العالمية والمركز الدولي لتسوية المنازعات وأثرها على حقوق المستثمر الأجنبي (دراسة مقارنة)

وضاح بن طالب بن يحيى الهنائي*

الدكتور/ صالح بن حمد بن محمد البراشدي**

الملخص:

ظهرت عدة آليات دولية لنظر مختلف منازعات الاستثمار، كآلية تسوية المنازعات التابعة لمنظمة التجارة العالمية، والمركز الدولي لتسوية منازعات الاستثمار، إلاّ أنه وبالنظر لوظائف آلية تسوية المنازعات التابعة لمنظمة التجارة العالمية، والمركز الدولي لتسوية منازعات الاستثمار يظهر بأن هناك اختلافاً من الناحية العملية ومن حيث الآثار وكلاهما يؤثّر على حقوق المستثمر، تسعى هذه الورقة العلمية إلى تقييم آلية تسوية المنازعات في إطار هذين النظامين.

الكلمات المفتاحية: تسوية منازعات الاستثمار – منظمة التجارة العالمية – الاستثمار– حقوق المستثمر.

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The Implications of ICSID and WTO Dispute Settlement Body On the Foreign Investor's Rights (A Comparative Study)

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Abstract:
As a result of supra-national dispute resolution, a global regime for investor protection is emerging. However, the study of the functions of the WTO Dispute Resolution mechanism and ICSID shows that they have both practical and different implications on the foreign investor's rights. With the contrasting remedial regimes as well as enforcement mechanisms of ICSID and WTO Dispute Settlement Body, this paper provides a certain assessment of the distinct available remedies under each forums and the diverging framework of enforcement for both ICSID and the WTO within the range of international investment law and the protection of the foreign investor's rights.

Keywords: ICSID Convention – WTO Agreement – Investment – Investor's Rights.

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