

**CENTRE FOR INTERNATIONAL LAW**

***NATIONAL UNIVERSITY OF SINGAPORE***

**Seminar**

**ADJUDICATION OF INTERNATIONAL TRADE AND  
INVESTMENT DISPUTES: WTO AND ICSID –  
SIMILARITIES AND DIFFERENCES**

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# General Exceptions Clauses: WTO and International Investment Agreements (IIAs) Experience

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# General Approach

- ❑ **A. comparison of main features:**
  - Similarities and differences
- ❑ **B. justification for differences**

# Context of dispute settlement

## □ **WTO:**

- Inter-state,
- Multilateral treaty
- Int'l trade law is an organic sub-system of PIL

## □ **ICSID:**

- Private investor-Host State,
- Bilateral treaties (BIT), contracts
- Int'l investment law is a legal "patchwork"

# Subject Matter

## WTO:

- ❑ Breach of market access commitment by importer Member

## ICSID:

- ❑ Breach of treatment obligation by Host State (protection against arbitrary, discriminatory treatment, expropriation, breach of official commitments or contractual obligations of Host State)

# Scope of Dispute settlement system (DSS)

## WTO:

- ❑ Enforce market access commitments for exporters of complaining Member
- ❑ Ensure respect of multilateral obligations (security and predictability) for all Members

## ICSID:

- ❑ Protect rights of individual protected foreign investor (claimant)

# Relation with traditional State-to-State remedies

## **WTO (State-to-State):**

- ❑ is often a form of diplomatic protection, but no exhaustion of local remedies required

## **ICSID (private investor to State):**

- ❑ alternative to diplomatic protection (Art. 27)
- ❑ normally alternative to domestic proceedings ("fork in road", Art.26)

# Law Applicable to Dispute

## WTO:

- ❑ Breach of: Multilateral Trade Agreements
- ❑ To be evaluated: under Customary int'l law of treaty interpretation

## ICSID:

- ❑ Breach of: Relevant BIT, law or contract
- ❑ To be evaluated under: BIT standards, customary int'l law, Host State Law



# JURISDICTIONAL BASIS

## WTO:

- ❑ Dispute Settlement Understanding (DSU)
- ❑ Previous consultation for “satisfactory settlement” (Art. 3 DSU)

## ICSID:

- ❑ ICSID Convention and Rules, BIT (or Uncitral Rules if Uncitral arbitration used under BIT), NAFTA, CAFTA, other FTAs
- ❑ Requirement of 6-month advanced notice in some BITs

# Procedural key features-1

## WTO:

- ❑ Administered, speed, no cost
- ❑ Confidential, Amici curiae (?), open hearings (?)
- ❑ Third Parties: WTO Members (multi-bilateral)

## ICSID:

- ❑ Administered (not so Uncitral), cost reimbursement
- ❑ Confidential, Amici(?), no open hearing (?)
- ❑ No Third Parties (but role of Contracting States in NAFTA)

# Procedural key features-2

## Adjudication

**both impartial, independent, rule-based:**

### **WTO:**

- ❑ Two stages:
- ❑ ad hoc Panel (arbitral features)
- ❑ Appellate Body: permanent Court, appeal in law

### **ICSID:**

- ❑ Ad hoc arbitration
- ❑ possible recourse to Ad Hoc Annulment Committee for grave errors

# Effect, nature of Decision

## WTO

- ❑ Report, becomes “automatically” binding upon adoption by WTO membership
- ❑ Binds parties, but indirectly also: precedent for future cases and guidance for all Members (stability and predictability of WTO rules)

## ICSID:

- ❑ Award binding for parties only
- ❑ Limited precedential value

# Content of Decision

## **WTO: declarative, and**

- ❑ Withdraw, modify WTO-inconsistent Measure (implementation obligation)
- ❑ Reinstate balance of trade rights and obligations
- ❑ Mutually agreed compensation as alternative

## **ICSID: declarative, and**

- ❑ award to claimant of damages suffered due to breach of BIT / FTA / contract by host State

# Enforcement – Remedies if non implementation

## WTO:

- ❑ Multilateral surveillance of implementation
- ❑ Multilaterally authorized trade sanctions

## ICSID:

- ❑ Automatic recognition of Awards
- ❑ Damages enforcement under domestic law
- ❑ Indirect consequences for non-implementing Host State (?)

## B- Reasons for different regime

### WTO:

- ❑ Subject matter is multilaterally inter-State negotiated trade rules and barriers reductions
- ❑ Individual domestic traders or sectors are affected: but Home State decides/runs litigation
- ❑ Shortcomings if domestic application at issue
- ❑ protection for respondent State by Art. XX exceptions

### ICSID:

- ❑ Subject matter: host State BIT commitments to fair treatment, (not under multilateral treaties) or agreed with investor
- ❑ Conditions of competition in host market protected
- ❑ Limited protection if general measures are at issue

# Mutual Support – Possible Interference

- ❑ **Multilevel Judicial Governance**
- ❑ **Conflict of Jurisdictions**
- ❑ **Comity of Judges**
- ❑ **Level of authority, competence**
  
- ❑ **Same rules – same interpretation?**
  - National treatment, MFN, like product/service, necessity defense