

# THE PRINCIPLE OF EFFECTIVE INTERPRETATION IN THE WORLD TRADE ORGANIZATION AND INVESTMENT ARBITRATION: DIFFERENCE IN PARAMETERS?

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## ABSTRACT

*The upsurge of investment treaties and cases of investment arbitration demonstrates the dramatic growth of foreign investment laws in the past few decades. This is, however, accompanied by a growing concern over whether investment arbitration has reduced the scope for state regulation. A major source of concern is the lack of clear and coherent reasoning that demonstrates the public law sensibilities by investment arbitration tribunals. This contrasts with the situation of the World Trade Organization (WTO) Appellate Body, which has received wide support and trust as an efficient and legitimate state–state dispute settlement forum. Behind this support, there is the Appellate Body’s continuous effort to achieve coherence and integrity in legal interpretation, and the institutional sensitivity it has developed since its creation. Despite the differences in text, object, purpose, structure, context, and remedy between trade law and investment law, there are fundamental commonalities between investment arbitration and the WTO dispute settlement system. One such commonality is that they both face the same normative question of how much interference by the adjudicating bodies should be permitted when reviewing government actions in light of the obligations under international economic law. With this background,*

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*this article proposes that, in certain contexts, WTO jurisprudence will provide helpful guidance with investment arbitration in addressing the legitimacy concern. As one such “context”, this article examines the – explicit or implicit – use of the principle of effectiveness by the WTO Appellate Body and investment arbitration tribunals, as this is an area of examination that vividly demonstrates the difference in approach between these dispute settlement forums. It contrasts the Appellate Body’s approach in this regard with the approaches used by investment arbitration tribunals, which reveals a remarkable difference. While the Appellate Body has assessed the interpretation “in the light of the broader context”, that is, the context of the treaty as a whole, and recognised the relevance of extrinsic international norms for interpretation, the tendency of investment arbitration tribunals is to – with important exceptions – focus on the narrow parameters of the principle in order to give full effect to the term being interpreted. This article concludes by arguing that investment arbitration tribunals should incorporate the approach used by the WTO adjudicatory bodies in applying the principle of effective interpretation, in order to address the legitimacy concern over investment arbitration.*

**KEYWORDS:** *investment arbitration, WTO jurisprudence, principle of effective interpretation, public policy goals and protection of investment/trade*