WTO Litigation, Investment Arbitration, and Commercial Arbitration

Edited by
Jorge A. Huerta-Goldman
Antoine Romanetti
Franz X. Stirnimann

Wolters Kluwer
Law & Business
Summary of Contents

List of Editors v
List of Contributors vii
Foreword xxvii

CHAPTER 1
Cross-Fertilization and Reciprocal Opportunities: An Overview
Jorge A. Huerta-Goldman, Antoine Romanetti & Franz X. Stirnimann 1

CHAPTER 2
Protection of Investors in International Trade and Investment Regimes:
A Practical Comparison
Naboth van den Broek 15

CHAPTER 3
Jurisdictional Overlap in WTO Dispute Settlement and Investment
Arbitration
Brooks E. Allen & Tommaso Soave 45

CHAPTER 4A
Selecting the WTO Judges
Petros C. Mavroidis 103

CHAPTER 4B
The Arbitrator Selection Process in International Commercial Arbitration
Simon Greenberg & Kristina Osswald 115

xiii
CHAPTER 4C
Cross-cutting Observations on Composition of Tribunals
Jorge A. Huerta-Goldman, Antoine Romanetti & Franz X. Stirnimann 129

CHAPTER 5
Experts in WTO and Investment Litigation
Yuka Fukunaga 135

CHAPTER 6
The Use, Non-use and Abuse of Economics in WTO and Investment Litigation
Joost Pauwelyn 169

CHAPTER 7
Searching for the Applicable Law in WTO Litigation, Investment and Commercial Arbitration
Rupert Reece, Alexis Massot & Marie-Hélène Bartoli 199

CHAPTER 8A
National Treatment in WTO Litigation
Tania Parcero Herrera 223

CHAPTER 8B
National Treatment in Investment Arbitration
Sabina Sacco & Mónica C. Fernández-Fonseca 239

CHAPTER 8C
Cross-cutting Observations on National Treatment
Jorge A. Huerta-Goldman 263

CHAPTER 9
Remedies in WTO Dispute Settlement and Investor-State Arbitration: Contrasts and Lessons
Thomas Sebastian & Anthony Sinclair 273

CHAPTER 10
Moral Damages in Investment Arbitration, Commercial Arbitration and WTO Litigation
Bernd Ehle & Martin Dawidowicz 293

xiv
CHAPTER 11
From Annulment to Appeal in Investor-State Arbitration: Is the WTO Appeal Mechanism a Model?
Giorgio Sacerdoti & Matilde Recanati 327

CHAPTER 12
Enforcement against States: Investment Arbitration and WTO Litigation
Petr Poldšek & Sylvia T. Tonova 357

CHAPTER 13A
The Allocation of Costs by Arbitral Tribunals in International Commercial Arbitration
Gustav Flecke-Giammarco 389

CHAPTER 13B
The Allocation of Costs in International Commercial Arbitration, an Opportunity for WTO Dispute Settlement System?
Anant Swarup 421
# Table of Contents

List of Editors v

List of Contributors vii

Foreword xxvii

## CHAPTER 1
Cross-Fertilization and Reciprocal Opportunities: An Overview

*Jorge A. Huerta-Goldman, Antoine Romanetti & Franz X. Stirnimann*

§1.01 Some Examples of Cross-cutting Issues 2

§1.02 The Structure and Content of the Book 4

[A] Part I: General Introduction 4

[B] Part II: Procedure and Evidence 6

[C] Part III: The Applicable Law 8

[D] Part VI: Legal Remedies, Appeals and Enforcement 10

## CHAPTER 2
Protection of Investors in International Trade and Investment Regimes:
A Practical Comparison

*Naboth van den Broek* 15

§2.01 Introduction 15

§2.02 Comparing International Trade and Investment Regimes 16

[A] The WTO and Other International Trade Regimes 16

[1] Institutional Framework 16

[2] Substantive Rules 17

[3] Dispute Resolution 19

[4] Remedies 21

[B] BITs and the General Body of International Investment Law 23

[1] Institutional Framework 23


Table of Contents

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>[3]</td>
<td>Dispute Resolution</td>
</tr>
<tr>
<td>[4]</td>
<td>Remedies</td>
</tr>
</tbody>
</table>

§2.03 Case Studies: Practical Examples of the Use of Trade and Investment Regimes as Complementary Tools  
[A] Example 1: Discriminatory Regulatory Measures  
[B] Example 2: Interference with Intellectual Property Rights (Compulsory Licensing)  
[C] Example 3: Import Substitution and Support for Domestic Producers  

§2.04 Similarities and Differences: The Benefits of Using Trade and Investment Regimes as Complementary and Alternative Tools  

§2.05 Conclusion  

CHAPTER 3  
Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration  
Brooks E. Allen & Tommaso Soave  

§3.01 Fragmentation and Jurisdictional Overlap  

§3.02 Overlap between WTO and Investor-State Disputes  
[A] WTO Dispute Settlement  
[B] Investor-State Arbitration  
[C] Interaction between the Two Regimes  
[1] Jurisdictional Competition?  
[2] Interaction between Related Proceedings  
[a] Conflicting Factual Determinations  
[b] Conflicting Interpretation and Application of Similar Legal Provisions  
[c] Inconsistent Remedies  
[d] Judicial Economy and Finality  

§3.03 Adjudicative Approaches to Overlap  
[A] Successive Proceedings  
[1] Res Judicata  
[2] Issue Estoppel  
[3] Systemic Interpretation  
[4] Prior Decisions as Evidence  
[a] DSU Provisions  
[b] Comparison of Legal Standards  
[c] Comity  
[d] Existing Jurisprudence  
[i] The WTO: Splendid Isolation?  
[ii] Investor-State Jurisprudence  
[iii] Lessons from the Jurisprudence  

[B] Parallel Proceedings
Table of Contents

[1] Reframing the Dispute 86
[2] Lis Pendens 87
[4] Request for Information and Documents 91
[5] Agreed Sequencing 93

§3.04 Treaty-Based Approaches 94

[A] Role for the International Court of Justice 95
[B] Institutional Coordination 95
[C] Conflict and Coordination Clauses 96

[1] Subject Matter Exclusion 96
[5] Clauses Regulating the Use of Findings from Other Proceedings 100

§3.05 Conclusion 100

CHAPTER 4A
Selecting the WTO Judges
Petros C. Mavroidis 103

§4A.01 Introduction 103
§4A.02 The Judges 104

[A] Panel 104

[2] The Panellists Selected 106

[B] Appellate Body (AB) 107

[2] The AB Members Selected 108

§4A.03 An Evaluation 108

[A] The Selection Process: Have We Come Out of the Middle Ages Yet? 108


[C] The Math Is Complicated, but.... 110

CHAPTER 4B
The Arbitrator Selection Process in International Commercial Arbitration
Simon Greenberg & Kristina Osswald 115

§4B.01 Introduction 115
§4B.02 Background to the Selection of Arbitrators in International Commercial Arbitration 115
§4B.03 Arbitrator Selection Process in Institutional Arbitration: ICC Example 116

[A] Brief Introduction to the ICC 116
[B] Number of Arbitrators 117
## Table of Contents

### Chapter 6
The Use, Non-use and Abuse of Economics in WTO and Investment Litigation

*Joost Pauwelyn*

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§6.01</td>
<td>Possible Roles for Economics</td>
<td>170</td>
</tr>
<tr>
<td>§6.02</td>
<td>Major Advances in the Last Decade</td>
<td>171</td>
</tr>
<tr>
<td>§6.03</td>
<td>Economics in WTO Dispute Settlement (beyond Retaliation)</td>
<td>173</td>
</tr>
<tr>
<td>[A]</td>
<td>'Like Products': Quantitative Studies ‘Not Inappropriate’ but</td>
<td></td>
</tr>
<tr>
<td></td>
<td>‘De-emphasized’</td>
<td></td>
</tr>
<tr>
<td>[B]</td>
<td>'Less Favourable Treatment': No 'Actual Trade Effects’ but</td>
<td></td>
</tr>
<tr>
<td></td>
<td>'Detrimental Impact'</td>
<td></td>
</tr>
<tr>
<td>[C]</td>
<td>Subsidies: Extensive and Increasing Use of Economics</td>
<td>175</td>
</tr>
<tr>
<td>[D]</td>
<td>'General Exceptions': Only the Beginning</td>
<td>177</td>
</tr>
<tr>
<td>§6.04</td>
<td>Economics in Investor-State Arbitration (beyond Damages)</td>
<td>179</td>
</tr>
<tr>
<td>§6.05</td>
<td>The Economics of ‘Necessity’ in the Argentina Cases</td>
<td>181</td>
</tr>
<tr>
<td>§6.06</td>
<td>Caveats and Limits</td>
<td>183</td>
</tr>
<tr>
<td>[A]</td>
<td>Economics Must Be Filtered through Legal Criteria</td>
<td>183</td>
</tr>
<tr>
<td>[B]</td>
<td>Methodological Discipline</td>
<td>186</td>
</tr>
<tr>
<td>[C]</td>
<td>Keep It Simple</td>
<td>189</td>
</tr>
<tr>
<td>[D]</td>
<td>Due Process</td>
<td>189</td>
</tr>
<tr>
<td>[E]</td>
<td>Avoid or Disclose Value Judgments</td>
<td>194</td>
</tr>
<tr>
<td>[F]</td>
<td>Conclusion</td>
<td>196</td>
</tr>
</tbody>
</table>

### Chapter 7
Searching for the Applicable Law in WTO Litigation, Investment and Commercial Arbitration

*Rupert Reece, Alexis Massot & Marie-Hélène Bartoli*

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§7.01</td>
<td>International Commercial Arbitration</td>
<td>199</td>
</tr>
<tr>
<td>[A]</td>
<td>Arbitral Tribunal's Duty to Give Effect to the Parties' Choice</td>
<td>200</td>
</tr>
<tr>
<td>[B]</td>
<td>The Arbitral Tribunal's Determination in the Absence of Direct Choice by the Parties</td>
<td>203</td>
</tr>
<tr>
<td>[a]</td>
<td>Conflict-of-Laws Approach</td>
<td>203</td>
</tr>
<tr>
<td>[b]</td>
<td>Application of the Specific Conflict-of-Laws Rules Provided for by the Lex Arbitrii Itself</td>
<td>204</td>
</tr>
<tr>
<td>[c]</td>
<td>Direct Approach</td>
<td>204</td>
</tr>
<tr>
<td>[C]</td>
<td>The Limits to the Freedom of Choice: International Public Policy</td>
<td>205</td>
</tr>
<tr>
<td>[D]</td>
<td>Amiable Composition and <em>Ex Aequo et Bono</em> Arbitration</td>
<td>206</td>
</tr>
<tr>
<td>§7.02</td>
<td>Investment Treaty Arbitration: Focus on ICSID Arbitration</td>
<td>207</td>
</tr>
</tbody>
</table>

xxi
Table of Contents

[A] The Parties' Wide Discretion in the Choice of the Substantive Rules of Law
  [1] The Choice of Law in an Underlying Agreement

[B] The Limits of the Arbitral Tribunal's Freedom under the ICSID Convention

[C] The Consequences of the Tribunal's Failure to Apply the Law

§7.03 The Law Applicable to WTO Disputes

[A] The Dispute Settlement System as a Purely Treaty-Based System of Applicable Law
  [1] The DSU Recognizes the 'Covered Agreements' as the Only Source of Applicable Law in WTO Disputes
  [2] The Relevance of Other Sources of Law as a Source of Interpretation of the Provisions of the 'Covered Agreements' Is Also Extremely Limited
  [3] Another Form of Extension of the Applicable Law Is the Inclusion of Provisions Negotiated Outside the WTO within the Scope of the 'Covered Agreements'

[B] Using Commercial Arbitration and Investment Arbitration as a Source of Increased Freedom in the Choice of the Applicable Law
  [1] Using the Alternative Means of Dispute Resolution of the WTO as a Tool to Extend the Scope of the Applicable Law
    [a] The Case of Article 25 Arbitration
    [b] The Case of Ad Hoc Arbitration outside the Context of the DSU
  [2] Could the MFN Treatment Clause be Used to Import Other Substantive Law into WTO / Investment litigation?
    [a] Importing BIT Substantive Law into WTO Litigation through the MFN Clause
    [b] Importing WTO Substantive Law into BIT Arbitration

CHAPTER 8A
National Treatment in WTO Litigation
Tania Parcero Herrera

§8A.01 Introduction
§8A.02 The National Treatment Principle in Article III of the GATT
  [A] Article III: 2 of the GATT: The National Treatment Obligation with Respect to Internal Taxes and Charges
    [1] Internal Taxes or Other Internal Charges
    [2] Internal Taxes or Other Internal Charges: Like Products (First Sentence)
Table of Contents

[a] Whether Imported and Domestic Products are Like Products 227
[b] Whether the Imported Products are Taxed in Excess of the Domestic Products 228

[3] Internal Taxes or Other Internal Charges: Directly Competitive or Substitutable Products (Second Sentence) 228
[a] Whether the Imported and the Domestic Products are Directly Competitive or Substitutable Products 229
[b] Whether the Directly Competitive or Substitutable Imported and Domestic Products Are Not Similarly Taxed 230
[c] Whether the Dissimilar Taxation Is Applied So as to Afford Protection to Domestic Production 230

[B] Article III:4 of the GATT: The National Treatment Obligation with Respect to Internal Laws, Regulations and Requirements 231
[1] Like Products 231
[2] Laws, Regulations, or Requirements Affecting Their Internal Sale, Offering for Sale, Purchase, Transportation, Distribution, or Use 232

[3] Less Favourable Treatment 233

§8A.03 The National Treatment Principle in Other Goods Disciplines 234
[A] The SPS Agreement 234
[B] The TBT Agreement 235
[C] The TRIMS Agreement 235

§8A.04 The Covered Agreements 236
[A] The GATS 236
[B] The TRIPS Agreement 237

§8A.05 General Exceptions 237
§8A.06 Conclusion 238

CHAPTER 8B
National Treatment in Investment Arbitration
_Sabina Sacco & Mónica C. Fernández-Fonseca_ 239

§8B.01 Introduction 239
§8B.02 The National Treatment Standard in IIAs and Other Public International Law Instruments 240
§8B.03 The National Treatment Standard as Interpreted by International Investment Tribunals 246
[A] 'Like Circumstances' or 'Similar Situations' 247
[B] Less Favourable Treatment 256
[C] Absence of a Reasonable Justification for the Differentiated Treatment 259

§8B.04 Conclusion 261

xxiii
# Table of Contents

## CHAPTER 8C

Cross-cutting Observations on National Treatment  
*Jorge A. Huerta-Goldman*

1. **§8C.01 Observation 1: Single Global Test versus Several Tests**
2. **§8C.02 Observation 2: Same Text versus Different Texts**
3. **§8C.03 Observation 3: The Three-Element Tests**
   - [A] Like and Similar
   - [B] Less Favourable Treatment
4. **§8C.04 Observation 4: Non-discrimination versus the Right to Regulate**
   - [A] The Violation – General Exception Link in the GATT and GATS
   - [B] Building up the Balance in the TBT Agreement
   - [C] The Balance in BITs
   - [D] Some Final Observations on Policy Space and Non-discrimination

5. **§8C.05 Conclusion**

## CHAPTER 9

Remedies in WTO Dispute Settlement and Investor-State Arbitration: Contrasts and Lessons  
*Thomas Sebastian & Anthony Sinclair*

1. **§9.01 Introduction**
2. **§9.02 The ILC’s Articles on State Responsibility and Two *Lex Specialis* Systems**
3. **§9.03 Remedies under the WTO’s Dispute Settlement Understanding**
   - [A] Available Remedies
   - [B] Enforcement Mechanism
4. **§9.04 Remedies in Investment Treaty Arbitration**
   - [A] Available Remedies
     - [1] Restitution and Other Non-pecuniary Remedies
     - [2] Compensation
   - [B] Enforcement Mechanisms
     - [1] ICSID Arbitration
     - [2] Non-ICSID Arbitration
5. **§9.05 Contrasts and Conclusions**

## CHAPTER 10

Moral Damages in Investment Arbitration, Commercial Arbitration and WTO Litigation  
*Bernd Ehle & Martin Dawidowicz*

1. **§10.01 Introduction: The Notion of ‘Moral Damages’**
2. **§10.02 Moral Damages as a Remedy in International Law**
3. **§10.03 Moral Damages as a Remedy in Investment Arbitration**

xxiv
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.04</td>
<td>Moral Damages as a Remedy in Commercial Arbitration</td>
<td>§10.04</td>
<td>313</td>
</tr>
<tr>
<td>10.05</td>
<td>Moral Damages as a Remedy in WTO Litigation</td>
<td>§10.05</td>
<td>317</td>
</tr>
<tr>
<td>10.06</td>
<td>Conclusion: Is ‘Cross-Fertilization’ Possible and Appropriate?</td>
<td>§10.06</td>
<td>319</td>
</tr>
<tr>
<td>11</td>
<td>From Annulment to Appeal in Investor-State Arbitration: Is the WTO Appeal Mechanism a Model?</td>
<td>§11.01 Introduction</td>
<td>327</td>
</tr>
<tr>
<td></td>
<td></td>
<td>§11.02 Appellate Review in the WTO</td>
<td>331</td>
</tr>
<tr>
<td></td>
<td></td>
<td>§11.03 The Functions of the WTO Appellate Review in a Comparative Perspective</td>
<td>335</td>
</tr>
<tr>
<td></td>
<td></td>
<td>§11.04 Review and Annulment of Awards under the ICSID Convention: The Applicable Rules</td>
<td>336</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[A] The Individual Grounds for the Annulment of ICSID Awards</td>
<td>340</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[B] The Practice of Ad Hoc Committees: From Self-restraint to Judicial Activism?</td>
<td>343</td>
</tr>
<tr>
<td>11.05</td>
<td>Proposals for an Appeal Mechanism in International Investment Dispute Settlement</td>
<td>§11.05</td>
<td>348</td>
</tr>
<tr>
<td>11.06</td>
<td>Final Comments and Conclusions: Is the WTO Appeal Mechanism a Model?</td>
<td>§11.06</td>
<td>351</td>
</tr>
<tr>
<td>12</td>
<td>Enforcement against States: Investment Arbitration and WTO Litigation</td>
<td>§12.01 Enforcement in WTO Dispute Settlement</td>
<td>358</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[A] Legal Framework</td>
<td>358</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[B] Experience with WTO Enforcement</td>
<td>366</td>
</tr>
<tr>
<td></td>
<td></td>
<td>§12.02 Enforcement of Investment Treaty Awards Against States</td>
<td>371</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[A] Legal Framework</td>
<td>371</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[B] Experience with Enforcement of Investment Treaty Awards against States</td>
<td>373</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[1] ICSID Awards</td>
<td>374</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[a] Enforcement in National Courts</td>
<td>374</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[b] Diplomatic Protection</td>
<td>378</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[c] ICJ Proceedings</td>
<td>380</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[d] World Bank Benefits</td>
<td>380</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[2] Non-ICSID Awards</td>
<td>381</td>
</tr>
<tr>
<td>12.03</td>
<td>Intersection of Enforcement in Investment Treaty Arbitration and WTO Dispute Settlement</td>
<td>§12.03</td>
<td>385</td>
</tr>
</tbody>
</table>
Table of Contents

CHAPTER 13A
The Allocation of Costs by Arbitral Tribunals in International Commercial Arbitration
Gustav Flecke-Giammarco 389

§13A.01 Introduction 389
§13A.02 Main Categories of Costs Incurred in ICC Proceedings 393
[C] Substantive Cost Claims for Items outside the Scope of Article 37(1) 401
§13A.03 Procedure Followed to Determine the Costs of the Arbitration 402
[A] Article 37(1): Costs Fixed by the Court 405
[B] Article 37(4): Costs Fixed and Allocated by the Arbitral Tribunal in the Final Award 406
[C] Article 37(3): Costs Fixed and Allocated by the Arbitral Tribunal Prior to the Final Award 406
§13A.04 Methods Applied for Allocating Costs 408
[A] Exercise of Arbitral Tribunals’ Wide Discretion in a Two-Step Process 409
[B] Sources of Arbitral Tribunals’ Discretionary Power 409
[C] Costs Follow the Event 411
[D] Cost Apportionment 412
[E] American Rule 413
§13A.05 Suggested Purpose of Cost Allocation in ICC Proceedings 413
[A] Considering the Outcome of the Case 415
[B] Considering the Parties’ Conduct 416
§13A.06 Conclusion 418

CHAPTER 13B
The Allocation of Costs in International Commercial Arbitration, an Opportunity for WTO Dispute Settlement System?
Anant Swarup 421

§13B.01 Introduction 421
§13B.02 Developing Countries in the WTO Dispute Settlement Mechanism 422
§13B.03 Litigation Costs in the WTO 423
§13B.04 Proposals on Litigation Costs in the WTO 426
§13B.05 Discussion of the Proposals in the WTO 430
§13B.07 Procedural Costs 432
§13B.08 Party Costs 433
§13B.09 Cost Allocation Methods 436
§13B.10 Conclusion 438

xxvi