*Bahruz Orujov*, *Jisoo Kim*. Key contrasts between arbitrators in investment contexts and adjudicators in trade disputes. International Law and Integration Problems, 2024, №2 (69), pp. 50-56. DOI: 10.61638/JRVB1864

# KEY CONTRASTS BETWEEN ARBITRATORS IN INVESTMENT CONTEXTS AND ADJUDICATORS IN TRADE DISPUTES

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**Abstract**

*This article attempts to explain key differences between the trade and investment law regimes. It examines how the differing goals of trade and investment law result in different legal interpretations of national treatment. On the other hand, it focuses on differences between the individuals resolving trade and investment disputes to explain why the trade and investment regimes differ. This article also researches why and how the two regimes differ. In this article, we first explain how the different goals of trade and investment law result in differences in the substantive legal analysis. Finally, we observe a common goal shared by both the trade and investment regimes: establishing legitimacy.*

**Keywords**: *investment arbitrators, settlement of investment disputes, trade disputes adjudicators, panelists, appellate body, diplomats, ex-diplomats, settlement of trade disputes, national treatment, trade law, investment law.*

*1. Introduction*

The rise of international organizations and agreements in the last century has resulted in numerous international dispute settlement mechanisms, each with unique historical and functional characteristics. However, the issues these rules address often overlap, leading to multiple forums claiming jurisdiction over the same dispute. For instance, under the North American Free Trade Agreement (NAFTA), parties can choose between the WTO and NAFTA for issues related to both the 1994 General Agreements on Tariffs and Trade (GATT) and NAFTA. Once a party selects the NAFTA forum, it should be exclusive, but the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) grants the WTO exclusive jurisdiction over disputes under the SPS Agreement. While parties may pre-select a mechanism when jurisdictional conflicts arise, this is not always the case. Consequently, the overlapping jurisdictions and lack of hierarchy among these mechanisms have resulted in inconsistent interpretations of similar factual and legal issues. The fragmentation of international law has resulted in inconsistent interpretations by various dispute resolution forums. For instance, the WTO interprets the national treatment principle as a breach when competitive conditions between domestic and imported products are affected, while some arbitral tribunals under bilateral investment treaties (BITs) do not consider this sufficient for a violation. This inconsistency leaves parties uncertain about which precedent to follow. Additionally, BITs often mirror the substantive rights and obligations of WTO agreements but require disputes to be resolved through arbitration rather than the WTO. Consequently, similar disputes can be litigated in both investor-state arbitral tribunals and the WTO, as seen in the softwood lumber dispute between the U.S. and Canada, which involved multiple cases across different forums [6, p. 191-192].

The Bilateral Investment Treaty (BIT) fosters a supportive environment for companies investing in foreign countries. Since the late 1980s, BITs have become widely

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accepted for promoting and protecting foreign investments. These treaties grant investors rights against states that harm their projects through actions like breaking agreements, enforcing discriminatory regulations, revoking licenses, or confiscating property. A BIT is established between two states, creating a legal framework for investment flows between them. Claims under a BIT involve an investor from one state (the home state) and the state where the investment occurs [2, p. 2].

To comprehend the significant differences among these dispute resolution institutions, it is essential to analyze their fundamental characteristics. This examination will illuminate the reasons behind the distinctiveness of these systems, even though they aim to address the same core issues. Initially, it is important to highlight that the resolution of trade disputes aims to foster a competitive landscape among member states. This indicates that the trade framework prioritizes collective welfare, efficiency, liberalization, and state-to-state negotiations regarding market access and trade prospects, rather than focusing on individual entitlements. In contrast, the resolution of investment disputes centers on safeguarding individual rights, particularly the interests of investors within host nations. It becomes evident that the essence of trade dispute resolution is rooted in liberalization, which stands in opposition to the traditional investment framework that emphasizes fairness based on established norms for the treatment of foreign entities, rather than efficiency. This framework is concerned with protection rather than liberalization, focusing on individual rights instead of state-to-state market opportunity exchanges [3, p. 54].

Consequently, compliance serves as the solution for trade law, while compensation is the remedy for investment law. This distinction highlights that bilateral investment treaties focus on safeguarding foreign investments already established within host nations. Such investment protection is anticipated to foster investment, stimulate private industrial and financial ventures, and enhance the prosperity of both countries. To clarify further, the trade framework operates as an intergovernmental construct that addresses broad market access and trade opportunities aimed at improving overall welfare. In contrast, the investment framework concentrates on the specific challenges of attracting and safeguarding investments made by individual investors [5, p. 62]. Furthermore, The General Agreement on Tariffs and Trade (hereinafter GATT) national treatment is about competitive opportunities, not actual trade flows. Because trade law's goal is to increase liberalization and market access for imports in the interest of overall welfare, not to guarantee rights or trade flows to individual exporters. GATT national treatment ensures equal competitive opportunities, not actual sales. As the nature of these regimes is different, the subjects who conduct the dispute should be different. Additionally, the principle of national treatment under GATT focuses on providing equal competitive opportunities rather than regulating actual trade volumes. The primary objective of trade law is to promote liberalization and enhance market access for imports to benefit overall societal welfare, rather than to secure specific rights or trade volumes for individual exporters. GATT national treatment guarantees a level playing field in terms of competition, rather than ensuring concrete sales figures. Given the distinct nature of these regulatory frameworks, the entities involved in resolving disputes should also differ. As a result, investment arbitrators possess different professional experiences and incentives compared to World Trade Organization (hereinafter WTO) panelists, members of the Appellate Body, and their associated personnel. For instance,

investment arbitrators typically come from a private commercial background, while WTO adjudicators are predominantly public sector officials. The characteristics of dispute resolution significantly influence the identification of the "judges" involved in conflicts. In the context of trade disputes, diplomats play a central role, whereas in investment disputes, lawyers dominate the proceedings.

*2. Differing Goals of Trade and Investment Law*

*Non-Discrimination* notes that trade law aims to foster a competitive landscape between states in order to further collective welfare, efficiency, and state-to-state negotiations regarding market access and trade prospects [5, p. 54]. In contrast, investment law centers on safeguarding the rights of individual investors [5, p. 56]. The essence of trade regime is rooted in liberalization and efficiency, which stands in opposition to the investment regime's emphasis on the protection and fair treatment of foreign entities [5, p. 56]. Consequently, compliance serves as the solution for trade law, while compensation is the remedy for investment law.

*3. Legal Analysis*

Since trade law is focused on ensuring competitive opportunities, instead of actual trade flows, it is not necessary to prove actual harm. It is sufficient to show that a measure affects competitive opportunities in favor of domestic products, in the abstract. This is linked to the fact that the remedy for a trade violation is an obligation to bring the measure back into conformity with trade law [5, p. 70]. On the other hand, in investment law, actual harm must be proved since the remedy in investment law is compensation [5, p. 70]. If there is no actual harm, there is nothing to compensate for.

Another example of a substantive legal differences between trade and investment law lies in their differing analyses of "likeness". While trade law focuses on competitors, investment law focuses on foreign and domestic investments that raise similar public policy concerns [5, p. 72]. Because trade law prioritizes liberalization and market access, trade law's analysis of national treatment focuses on competitive opportunities. In trade law, "like products" are interpreted as products in a competitive relationship [5, p. 79]. When two competing products are treated differently, there is a presumption that this differential treatment is based on nationality and thus violates national treatment [5, p. 72]. However, competition is not the focus in investment law. Since investment law is focused on security and fairness for individual investors, investment tribunals interpret "likeness" by assessing whether investments are in "like circumstances". In some circumstances, it may be fair to regulate two competing companies differently [5, p. 81]. Investment tribunals must look at the circumstances that would justify governmental regulations that treat foreign and domestic investments differently in order to protect the public interest [5, p. 73].

The object and purpose of investment agreements also greatly influences the test for determining whether a measure treats a foreign investment less favorably than comparable domestic investments. Because the goal is to protect individual investors, national treatment provisions in investment agreements entitle foreign investments to the best treatment afforded to comparable domestic investments. Less favorable treatment is found when there is differential treatment between a foreign investment and any single domestic investment in like circumstances [5, p. 78]. In contrast, trade law evaluates whether a measure has anticompetitive effects upon the entire group of like

foreign products, not upon a single producer [5, p. 82]. This group analysis in trade law is linked to trade law's collective goals of liberalization, efficiency, and market access.

*4. Decision-making by Lawyers or Diplomats*

The WTO dispute settlement system is considered one of the most effective international judicial mechanisms. Under the DSU, any WTO Member can initiate proceedings against another Member for alleged violations of the 'covered agreements' before a neutral panel. Claims must be based on these agreements, not on external legal sources [1, p. 9].

Investor-State arbitration arises from a network of international investment treaties, especially Bilateral Investment Treaties (BITs) and investment chapters in Free Trade Agreements (FTAs). These treaties provide significant protections for foreign investors, including national treatment, most favored nation (MFN) treatment, fair and equitable treatment, full protection and security, and safeguards against expropriation without compensation [1, p. 11-12].

*Rule of Lawyers* posits that the different pool of individuals deciding WTO and International Centre for Settlement of Investment Disputes (hereinafter ICSID) disputes helps explain why the trade and investment regimes differ [3, p. 761]. WTO panelists are predominantly diplomats or ex-diplomats, often without law degrees and with little legal experience. On the other hand, investment arbitrators typically have private law backgrounds, with deep legal expertise [3, p. 763].

We theorize that WTO panelists and investment arbitrators possess different professional experiences partly due to the different goals of the two regimes. The WTO engages in activities beyond resolving legal disputes; it serves as a comprehensive platform for negotiations and oversight, facilitating daily interactions among diplomats [3, p. 796]. While trade disputes involve the resolution of legal matters, they also overlap with diplomatic interactions and trade relations. Consequently, the individuals tasked with resolving these disputes, despite addressing legal concerns, need diplomatic experience to ensure the smooth operation of global trade and competitiveness. Similarly, since the nature of trade disputes involve public, national interests, it is fitting that WTO panelists would have backgrounds as technocrats or political appointees operating in large bureaucracies, where teamwork and policy are valued [3, p. 781]. The public and diplomatic nature of the trade regime's goals of collective welfare and liberalization in the high proportion of WTO panelists with public sector experience.

In contrast, the primary objective of investment disputes is not the liberalization of global trade, but the protection of specific foreign investments. The International Centre for Settlement of Investment Disputes (ICSID) functions solely as a framework of arbitration guidelines, managed by a small group of World Bank officials located in Washington, DC [3, p. 797]. This more legal and private nature of investment law is reflected in how investment arbitrators typically have private law backgrounds. Until recently, the ICSDS operated as a largely technical, depoliticized process that filled gaps in legal institutions of less developed countries [3, p. 764]. Thus, it is natural that investment arbitrators would need legal expertise, instead of diplomatic experience. Furthermore, private law practice and legal academia are fields where individual performance, reputation, and legal expertise are key factors in advancement [3, p. 781]. While this individualism may not be a good fit for the more diplomatic and public

nature of trade disputes, it is likely more compatible with the more legal and private nature of investment law.

Similarly, we hypothesize that different remedies for trade and investment disputes also contribute to the different backgrounds of WTO panelists and investment arbitrators. In investment disputes, the key remedy is compensation to address damages that investors experience. Investment disputes thus necessitate legal proceedings and an understanding of liability, making legal knowledge. The complexity of legal processes inherent in investment disputes attracts lawyers to engage in their resolution.

In contrast, the remedy in trade disputes is compliance, not compensation. The ultimate remedy for trade law violations involves the withdrawal or modification of the inconsistent measure, rather than financial reparations for damages. Thus, resolution of trade disputes requires experience in diplomacy and political strategy. The absence of compensation may lower the need for legal representation, as there is no obligation to demonstrate actual harm to establish a violation.

WTO dispute settlement is a more institutionalized system compared to investment arbitration. Panelists differ significantly from Appellate Body (AB) members, while arbitrators and annulment committee members are more similar. This leads to a clear hierarchy between panels and the AB, but a looser relationship between ICSID tribunals and annulment committees. Firstly, the AB is a permanent body, whereas committees are ad hoc, creating distinct roles for panelists and AB members, unlike the blurred lines in investment arbitration. Secondly, appeals to panel reports are common, while annulments are rare. This means arbitrators have more freedom in their decisions, while panelists must consider previous AB rulings, supported by the AB's permanence. Lastly, investment arbitration lacks functional specialization, as many lawyers serve as both arbitrators and counsel. With 76% of arbitrators being lawyers compared to only 19% among panelists, it's clear that trade panelists and lawyers come from different backgrounds, while investment arbitrators and counsel often overlap [4, p.21].

*5. A Common Goal: Legitimacy*

Although the trade and investment regimes serve different goals, both need to establish institutional legitimacy. Both the trade and investment regimes strive for legitimacy, but achieve it through different methods.

Despite that fact that WTO panelists frequently lack legal qualifications, the WTO dispute resolution mechanism has developed a complex and esteemed body of jurisprudence. This is partly because the legitimacy of the WTO panelists is rooted in the broader institutional framework of the WTO. A panelist's relative inexperience or lack of status is compensated by the existence of a skilled secretariat and the overall control of WTO members [3, p. 801]. *Rule of Lawyers* notes that the existence of a prestigious and experienced legal secretariat and appellate body and alleviates concerns that panelists have comparatively little legal experience or prestige [3, p. 794-795].

*Rule of Lawyers* further argues that WTO dispute settlement is successful *because* it run by relatively inexperienced trade diplomats. The fact that panelists are predominantly diplomats or ex-diplomats embedded in the Geneva trade community helps the WTO dispute resolution system maintain a sufficient levels of political support and participation necessary for legitimacy [3, p. 801]. By contrast, there has been much criticism against the individuals adjudicating ISDS cases. Observers argue

that the investment framework is dominated by "private judges" rather than sovereign states. Arbitrators have been criticized for operating in confidentiality, exhibiting bias towards large multinational corporations, disregarding potential conflicts of interest, and rendering inconsistent rulings [3, p. 763].

However, it is crucial for investment arbitrators to have deep legal expertise and high status because ICSID lacks the broader institutional framework to instill legitimacy. The pool of investment arbitrators has been described as a "small group of socially prominent actors", "graduates from elite law schools", and "stars" [3, p. 780]. This high social status of investment arbitrators helps create legitimacy. Similarly, ICSID's lack of an appeals system can partly explain the high proportion of repeat appointments of the same small pool arbitrators [3, p. 794]. Investment arbitrators are far more likely to be re-appointed than WTO panelists. While this practice has been criticized for being closed and elitist, it can be used to enhance the consistency of investment decisions [3, p. 777].

*Rule of Lawyers* was written before the recent WTO appellate body crisis. Thus, *Rule of Lawyers* cited the existence of a strong appellate body as part of the institutional framework that compensated for panelists' lack of legal expertise or status [3, p. 794]. However, given the current appellate body crisis, that no longer stands true. If a WTO panelist's relative inexperience or lack of status is no longer compensated by the existence of a permanent, more prestigious and experienced appellate body, there may be more interest in having WTO panelists with higher levels of professional prestige and status. Furthermore, some WTO members have set up a multi-party interim appeal arbitration arrangement. If this practice of ad hoc arbitration continues, we wonder if there will be more convergence in the composition of trade arbitrators and investment arbitrators.

*6. Conclusion*

This paper has synthesized the complementary explanations offered by the two papers by illustrating how the distinct goals of the two regimes leads to differences in the legal analyses and the composition of who resolves disputes.

Since trade law aims to advance efficiency and liberalization, legal analysis tends to be more abstract, focusing on competitive opportunities for groups of competitors. The diplomatic nature of the trade regime's goals of collective welfare and liberalization are also reflected in how most WTO panelists have public sector experience, not deep legal experience. On the other hand, investment dispute resolution focuses on protection of individual rights, not state-to-state exchanges of market opportunities. Thus, legal analysis in investment law does not focus on competition and instead looks at whether there has been actual harm to a single investor. Furthermore, since the investment dispute resolution regime does not also function as a diplomatic forum as the WTO does, investment arbitrators tend to have private law backgrounds.

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**Date of receipt of the article in the Editorial Office**
**(25.07.2024)**