

# The New World of International Trade Arbitration

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Roger Alford (Editor) (Notre Dame Law School (on leave))

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In the past twenty years the world of investment arbitration has taken the commercial world by storm. There are over 2,750 bilateral investment treaties and almost every one of them has an arbitration provision. Investment arbitration is now a prominent feature of the arbitration landscape.

Just as BITs have proliferated in recent years, so too have free trade agreements. There are approximately 380 free trade agreements now in existence, and yet the question of dispute settlement in the FTA context has rarely featured in the discussion. Sure, there have been NAFTA Chapter 20 cases, and the occasional *ad hoc* dispute—such as the Canadian-U.S. Softwood Lumber dispute. But international trade arbitration pursuant to FTAs is still in its infancy.

The recent EU-South Korea FTA signed last month may signal a new era of FTA arbitration. The dispute settlement chapter of this FTA combines features of both investment arbitration and the WTO DSU.

The procedures are similar to investment arbitration. There are provisions for the request for arbitration, establishment of an arbitral panel, rules on arbitrator conduct, rules governing proceedings, evidence gathering and hearings, time limits for the award, etc. There are a few unique provisions, such as drawing arbitrators by lot from a roster of fifteen, and adopting the seat of arbitration as either Seoul or Brussels, depending on which State is the complaining Party. But in most respects the procedures are familiar to other forms of arbitration involving States.

When it comes to remedies, however, the FTA arbitration rules are similar to the WTO. A non-complying State may offer compensation for a violation, or failing that, be subject to retaliatory countermeasures (i.e., increased tariffs). Those tariff increases may not exceed the level applied to other WTO members, but will result in the suspension of duty-free benefits under the FTA. Similar to the WTO, disputes as to compliance measures or deadlines are subject to further arbitration. The traditional recognition and enforcement questions under the New York Convention are irrelevant in this context.

Over 50% of all trade in goods occurs on a preferential basis. Like BITs, FTAs will continue to proliferate. Sophisticated dispute resolution mechanisms in FTAs are long overdue. The future portends a new world of international trade arbitration, and a growing international trade arbitration bar.