Kluwer Arbitration Blog

Global Perspectives on Teaching International Investment Arbitration: Effective Use of Comparative Analysis of Investment Treaty Arbitration and WTO Dispute Settlement

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The World Trade Organization ("**WTO**") dispute settlement is akin to a distant cousin for the investment law community. Many investment lawyers know little about it except that it exists. It operates under a different treaty framework and involves different procedures from investment treaty arbitration. However, it is one of the two most frequently used international economic dispute settlement mechanisms and has a lot of implications for investment treaty arbitration. Comparative analysis of these mechanisms is useful for students, as well as for academics and practitioners, to gain a better understanding of how they work and can be reformed. This post explains why and how I use comparative analysis in teaching investment treaty arbitration.

1. Why I Use Comparative Analysis

First, it's out of necessity

For over two decades, I have taught international investment law and arbitration, mostly in Japan but occasionally in other countries as well. Teaching international investment law in a country like Japan is challenging because of the limited familiarity of students (and practitioners) with the subject. This unfamiliarity arises from the fact that the country has experienced only a few investment treaty arbitration cases thus far. According to the United Nations Conference on Trade and Development (UNCTAD) Investment Dispute Settlement Navigator, Japanese investors have brought only six investment treaty arbitration claims and Japan has been the respondent in only one case (as of May 2023). In addition, in the cases registered under the International Centre for Settlement of Investment Disputes (ICSID) Convention and Additional Facility Rules since 1966, only three appointments of *ad hoc* committee members (and no appointments of arbitrators or conciliators) have been made from Japanese nationals (as of June 2022).

In contrast, Japan is one of the most frequent users of WTO dispute settlement. Knowledge and experience in trade dispute settlement have accumulated over the years and many accessible books and materials (which often means that they are written in Japanese) are available for students. Many students know at least something about the WTO and its dispute settlement mechanism

through media coverage or their own experiences before taking a course.

Under these circumstances, using comparison with WTO dispute settlement is not only useful but also necessary to help students understand the procedures and the significance of investment treaty arbitration. As Yannick Radi rightly pointed out in a previous post of this series on teaching international investment arbitration, a "macro-geographical" and "micro-intuitu personae" perspective should inform how to design courses.

But it's not just that!

Comparative analysis is useful in classrooms not only in Japan but also in other countries with different audiences. There are several reasons for this.

First, the subject matters of investment treaty arbitration and WTO dispute settlement are similar in that both investment and trade disputes arise out of private parties' economic activities subject to foreign government regulations. The subject matters occasionally overlap as is most vividly illustrated by investment and trade disputes involving Australia's tobacco plain packaging regulations.

Second, despite the similarity of the subject matters, the two mechanisms have very different procedures, and their comparison naturally provokes discussions among students. Let's take the most obvious difference as an example: private investors have access to investment treaty arbitration under certain conditions, while only governments can have recourse to WTO dispute settlement. To be more precise, state-to-state dispute settlement is provided for in most investment agreements but is hardly used while private party-to-state dispute settlement does not exist in the WTO. Perhaps, history explains the difference: investor-state dispute settlement ("**ISDS**") was created to complement, if not replace, ineffective state-to-state diplomatic protection while WTO dispute settlement originated in trade agreements in the 1930s establishing the reciprocal balance of benefits between the contracting states. The difference may also reflect the difference in objectives: investment agreements protect the rights of foreign investors, whereas the WTO agreements protect the rights of members (mostly states). The comparative analysis allows students to put investment treaty arbitration into perspective and reflect on its *raison d'être*. The next section of this blog post briefly describes other differences and some similarities that I use for comparative analysis in my courses.

Third, both investment treaty arbitration and WTO dispute settlement are currently facing an existential crisis and undergoing a review and reform process. While efforts to reform investment treaty arbitration continue in various forums including the United Nations Commission on International Trade Law (UNCITRAL) Working Group III, an increasing number of countries choose not to include ISDS in their investment agreements or to withdraw from existing agreements with ISDS. Meanwhile, the WTO dispute settlement reform talks have been progressing slowly and the future of the dysfunctional Appellate Body remains dim. Although the crisis of investment treaty arbitration and that of WTO dispute settlement pose different concerns and issues, lessons can be drawn from comparative analysis. Needless to say, what works in one mechanism cannot necessarily be transposed to the other. In this regard, it is rather ironic that a multilateral investment court is expected to improve ISDS by bringing consistency and coherence, while the WTO Appellate Body, which contributed enormously to ensuring consistency and

coherence, was criticized for engaging in law-making. Nevertheless, the comparative analysis offers students insights into what reform options are available.

2. How I Use Comparative Analysis

In order to use comparative analysis effectively, it is crucial to select the most relevant differences and similarities for comparison. Below are two comparisons that I often use in my courses.

Selection of tribunal members

One of my favorite topics for comparison is the selection of tribunal members.

In investment treaty arbitration, arbitrators are generally appointed by the parties and appointments by appointing authorities are often secondary choices. The parties' control over the appointment of arbitrators is one of the most important factors in ensuring the legitimacy of investment treaty arbitration at least in the eyes of the parties. In contrast, the parties in WTO dispute settlement have limited control over the appointment of tribunal members. WTO dispute settlement panelists are largely appointed by the WTO Director-General, and Appellate Body members are appointed by a consensus of the Dispute Settlement Body, a political organ of the WTO.

The attributes of tribunal members are also different. While investment arbitrators almost always have a background in law, regardless of whether they are commercial lawyers or public international law academics, WTO dispute settlement panelists are often current or former government officials who may not have legal training.

In investment treaty arbitration, there is a concern that double-hatting may undermine the independence and impartiality of arbitrators and the reputation of investment treaty arbitration. According to the ICSID, double-hatting is generally understood as the practice by which one individual acts in two different roles in ISDS cases simultaneously or within a short time period. However, such concern is hardly heard of in the context of WTO dispute settlement. The lack of concern is probably explained by the fact that the practice of double-hatting is relatively limited in the WTO, whereas it is quite common in investment treaty arbitration.

The purpose of these comparisons is not to determine which mechanism is better. Clearly, there is no better or worse mechanism, just different ones. My objective is to instigate students to ask questions such as why the mechanisms are different, whether the differences are justified, and whether they can cross-fertilize their experiences.

Interpretation and application of law

Another interesting topic for comparison is the interpretation and application of law. The practices of investment treaty arbitration and WTO dispute settlement have much in common, but there are also notable differences that merit discussion.

For example, both investment treaty arbitration tribunals and WTO panels interpret applicable law

in accordance with customary rules of interpretation of public international law, particularly those codified in the Vienna Convention on the Law of Treaties ("**VCLT**"), but their approaches to precedent are different: investment treaty arbitration tribunals are occasionally cautious in deciding whether to follow interpretative precedents of previous tribunals, while, conversely, WTO panels generally hesitate to deviate from previous interpretations by other panels and the Appellate Body.

In terms of the application of law, both investment treaty arbitration tribunals and WTO panels generally recognize the need to preserve the right to regulate, at least to some extent, but they differ significantly in how to pay deference to the respondent's rights. For example, the legitimacy of the respondent's measure may be taken into account in the examination of the fair and equitable treatment obligation under an investment treaty (See, e.g., Award (4 May 2017), *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À.R.I. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, paras. 362-363), whereas, in WTO dispute settlement, the question of legitimacy may arise as part of justification by an exception clause (See, e.g., Appellate Body Report (3 December 2007), *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, paras. 214-215).

Again, the purpose of the comparison is not to teach what is the "right" approach to the interpretation and application of law. Rather, I guide students to explore how their approaches are different, why they are different, and whether the practices of one can be transposed to the other.

3. What Can Be Achieved

My course objective is not to give students answers but to encourage them to think and dig deeper. I like asking them questions and giving them different perspectives so that they can see the complexity of the issues. Comparative analysis of investment treaty arbitration and WTO dispute settlement is extremely useful for achieving this objective.

*To see our full series of posts on Teaching International Investment Arbitration, click **here**.*

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