

GLOBAL TRADE LAW SERIES

PROTECTING INVESTMENT IN SERVICES

INVESTOR-STATE ARBITRATION VERSUS WTO DISPUTE SETTLEMENT

Martín Molinuevo



Wolters Kluwer
Law & Business



30809531

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Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3827-9

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Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

List of Abbreviations

ASEAN	Association of Southeast Asian Nations
BCC	Banque Commerciale Congolaise
BIT	Bilateral Investment Treaty
BTA	Bilateral Trade Agreement
CAFTA-DR	Central American Free Trade Agreement
CAN	Comunidad Andina
CIRDI	Centre international pour le règlement des différends relatifs aux investissements
CNUDCI	Commission des Nations Unies pour le droit commercial international
COMESA	Common Market for Eastern and Southern Africa
CPC	United Nations Central Product Classification
CTS	Council for Trade in Services
DS	Dispute Settlement
DSB	Dispute Settlement Body
DSM	Dispute settlement mechanism
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EAC	East African Community (EAC)
EC	European Community / European Communities
ECT	Energy Charter Treaty
ECOWAS	Economic Community of West African States
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
EU	European Union
FDI	Foreign direct investment
FET	Fair and equitable treatment

List of Abbreviations

FIPA	Foreign Investment Promotion and Protection Agreement
FTA	Free Trade Agreement
FTC	(NAFTA's) Free Trade Commission
FTEPA	Free Trade and Economic Partnership Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade 1994
GATT1947	General Agreement on Tariffs and Trade 1947
GPA	Agreement on Government Procurement
ITO	International Trade Organization
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	United Nations International Law Commission
LDC	Least Developed Country
MAI	Multilateral Agreement on Investment
MERCOSUR	Mercado Común del Sur
MFN	Most favoured nation
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
NT	National treatment
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PTA	Preferential trade agreement
SAR	(China's) Special Administrative Region
SCC	Stockholm Chamber of Commerce
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TBR	Trade Barriers Regulation
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US or USA	United States of America
USC	Unites States Code
USTR	Unites States Trade Representative
WTO	World Trade Organization

Acknowledgements

The completion of this work, my doctoral thesis, is the result of the direct or indirect contribution of many people, all to whom I am deeply indebted. In the first place, I am thankful to my supervisor, Prof. Dr. Thomas Cottier, for trusting me with the opportunity of my Ph.D. studies at the World Trade Institute of the University of Bern, and for his invaluable advice throughout. I owe my gratitude to Pierre Sauvé for his constant support, expert advice, and friendly discussions. I am grateful to my colleagues and friends Rolf Adlung, Martin Roy, Jorge Castro and Hunter Nottage, whose comments and valuable insights enriched different sections of this work. This work also benefited greatly from many enriching, enjoyable, and coffee-filled conversations with Marion Panizzon, Panagiotis Delimatsis, Julien Chaisse, and Nicolas Diebold.

Este trabajo es también un seguramente insatisfactorio homenaje a mis dos mentores en la carrera del Derecho. Le estaré siempre agradecido a José Luis Monti por su guía durante mis primeros años en el Derecho, y por sus enseñanzas que estarán siempre presentes en mi forma de ver y comprender este arte. A Ramon Torrent y sus apasionadas lecciones le debo mi interés por el derecho internacional económico y mis primeros pasos profesionales en este campo, por lo que quedaré siempre en deuda.

Usually less professional, but not less important, was the everyday support of my friends, who looked after my sanity and made the frustration-rich endeavour of writing a Ph.D., a wonderful experience, Bertram Boie, Michelangelo Temmerman, Marianna Corvaglia, and, especially, Juliette Hotz. Similarly, this work would have never been completed without the constant distractions provided by my friends Carsten Fink, Krista Lucenti, Julian Clarke, Arti Daswani, Hannah Irfan, Luis Verdeja, and Hamish Smith, many of whom also contributed substantially to my doctoral work with key insights and suggestions. I cannot thank Mary Brooke Anderson enough for her proficient language review of my writing and her

Acknowledgements

loving support during the last steps of the completion of this work; in fact, I can only hope to continue increasing my dues to her in the years to come.

Por último, debo el presente trabajo a mis padres, Héctor y Anna, cuyo ejemplo académico, profesional y humano ha sido una fuente de fuerza e inspiración a lo largo de mi carrera, y al constante apoyo, aún a la distancia, de mis hermanos, Christian y Ariel, y mis tías, Beatriz y María Amanda. A ellos dedico esta obra, con mi mayor gratitud y afecto.

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Part I

Presentation and Background

Chapter 1

Introduction

I. INTERNATIONAL INVESTMENT LAW VERSUS INTERNATIONAL TRADE LAW

In the last half a century, no area of international law has grown as much in terms of geographic coverage and substantial scope as international economic law.

In the mid-twentieth century, in an attempt to find the formula to prevent the outbreak of prior wars, whether military or economic, about 20 countries promoted the creation of the International Trade Organization (ITO) – an international institution with the mandate to monitor and govern all central aspects of international economic relationships, including international commerce, flow of international investment, and the movement of workers across borders.

The ITO never came into being, and the interested countries had to find a way to address the void left by its failure. The countries saved what they could from it in an instrument that set out a framework for negotiating trade concessions and, importantly, a set of rules that barred governments from raising barriers to the other members of the privileged club. Within a few years the membership to such instrument, the General Agreement on Tariffs and Trade (GATT), had multiplied. Today, over 150 countries, totalling over 95% of the global GDP, are governed by those rules.¹

Roughly one decade later, another trend emerged to fill yet another part of the void: the conclusion of bilateral investment treaties (BITs) designed to protect investors and attract investment flows into locations of comparatively low international standing. Those instruments proved extremely popular. In about 50 years,

1. On the development of international trade law, see generally, Jackson, J.H., *The World Trading System: Law and Policy of International Economic Relations* (1997), 31–78.