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How Best to Protect the Right to Regulate
The WTO or ISA?

Armand de Mestral and
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About the ILRP

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Acronyms and Abbreviations

BIT	bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement
DSU	Dispute Settlement Understanding
FDI	foreign direct investment
GATS	General Agreement on Trade in Services
ISA	investor-state arbitration
ISDS	investor-state dispute settlement
ITO	International Trade Organization
MAI	Multilateral Agreement on Investment
OECD	Organisation for Economic Co-operation and Development
TRIMs	Agreement on Trade-Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership
WTO	World Trade Organization

Executive Summary

International trade law and international investment law share the common objective of removing unnecessary barriers and liberalizing the conditions governing international trade. This paper considers the elements of commonality between the two legal regimes and asks whether this convergence of objectives should lead to convergence of dispute settlement procedures under the World Trade Organization's (WTO's) Dispute Settlement Understanding (DSU) and investor-state arbitration (ISA) under bilateral investment agreements. International investment law has been much criticized as an undue restraint upon the regulatory sovereignty of states, although paradoxically, under the law of the WTO, the sanction upon the losing state of having to withdraw an offending measure weighs more heavily upon states than the duty to make financial compensation. In light of these different remedies, as far as the regulatory powers of states is an issue, it does not appear appropriate to advocate the unification of the two bodies of law at this time. However, they will no doubt continue to interact very closely in the future.

Introduction

Should the distinct fields of law governing international trade and foreign investment be brought closer together? If this happened, would governments be reassured that they were not being deprived of their right to regulate domestic conditions governing health, safety and the environment, when these matters are caught up in international dispute settlement procedures? This paper seeks to answer these questions, particularly as they are posed by the critics of investor-state dispute settlement (ISDS) (frequently referred to as ISA).

Since the genesis of modern international investment law, dating to 1959, when the first bilateral investment treaty (BIT) was signed between Pakistan and Germany,[1] and the birth of the WTO, which can be traced to the 1986–1994 Uruguay Round Multilateral Trade Negotiations,[2] the two fields of law have continued to develop autonomously and have evolved as major parts of international economic law. Recently, however, in particular with the era of so-called mega-regional agreements, there seems to be less that divides these fields of law. A global movement toward the unification of trade and investment law now gives weight to the description of the two fields of law as "inextricably linked" and "twins separated at birth."[3]

Attempts were made to reach multilateral agreement on both trade *and* investment matters after World War II. In 1948, as the draft charter to establish the International Trade Organization (ITO) was presented at a meeting in Havana, the first attempt to reach a multilateral agreement on foreign direct investment (FDI) was under way (in particular, the charter tackled FDI in its articles 11 and 12). However, the Havana Charter, which had the ambitious aim of creating a global regulatory body, while successfully negotiated, was never ratified.[4] In the succeeding years, the Organisation for Economic Co-operation and Development (OECD) made a number of efforts to promote agreement in this field. The Multilateral Agreement on Investment (MAI) was the most ambitious effort made to multilateralize international investment law itself. The project to create a global framework for investment was initiated in 1992 and was ended in 1998. This OECD initiative was grounded in the significant increase in FDI from the early 1980s

1 *Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments*, 25 November 1959, 457 UNTS 6575 (entered into force 28 April 1962).

2 It is noteworthy that the bulk of the work done with respect to the WTO framework was undertaken during the Uruguay Round. See online: <www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm>.

3 Tomer Broude, "Investment and Trade: The 'Lottie and Lisa' of International Economic Law?" (2011) Hebrew University of Jerusalem Faculty of Law Research Paper No 10–11 at 3.

4 See Richard Toye, "Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947–1948" (2003) 25:2 Intl Hist Rev 282 at 294. See also John H Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed (Cambridge, MA: MIT Press, 1997) at 37–38.

to the mid-1990s.[5] After the OECD Investment Committee started its preparatory work in 1992, the negotiations formally began in May 1995 at the annual meeting of the OECD Council at the ministerial level and reached an end in the fall of 1998, with no agreement being found among the 29 OECD member countries and the commission that had taken part in the negotiations.[6]

After highlighting the increasingly artificial dichotomy between international investment and trade law, this paper seeks, in light of the ongoing backlash against ISA, to assess what help, if any, the existing dispute settlement mechanism at the WTO level could be with respect to the legitimacy crisis faced by ISA and in particular regarding its impact on states' sovereign regulatory power.

The Convergence of International Investment Law and International Trade Law

International trade and investment law have developed along largely separate tracks since 1945. But this context has changed over the years, and what justified the separate development of international trade and investment law in the past does not necessarily justify the continued autonomous development of these fields of law. Today's globalized economy has led some to argue that "[h]ad the need (or opportunity) emerged today to draw an international system of international economic law from scratch, it is unlikely that trade and investment would have been treated so separately."[7] In practice, international trade and investment law are much more linked than the initial division between these two fields seems to suggest. The close ties between the two regimes, despite their functional and regulatory separation, are increasingly evident through the ever-increasing globalization of the world economy. Both international investment and trade law aim to ensure the efficient allocation of resources and the achievement of greater economic efficiency through international economic activity.[8] While the general purposes of international trade and investment law are strikingly similar, one must also acknowledge the differences between the two fields and their different dynamics. Accordingly, the consolidation of these fields amounts to an ambitious and complex task, that of sensitizing both fields of law to each other and blending them by more than merely reconciling the procedural and substantive technicalities of international trade and investment law (already an ambitious endeavour in itself[9]), while at the same time acknowledging and preserving each field's individual characteristics and particularities.

A technical difference that has been put forward to explain the separate development of both fields of law focuses on the general aim of market liberalization of international trade law, as contrasted with the specific protection of private entities and activities in the field of international investment law. This distinction is particularly expressed through the dispute resolution mechanisms within each field of law, that is, state-to-state dispute settlement in the field of international trade law versus investor-

5 See United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy* (United Nations, 1997) at xv–xvi:

> The global FDI stock, a measure of the investment underlying international production, increased fourfold between 1982 and 1994; over the same period, it doubled as a percentage of world gross domestic product to 9 per cent. In 1996, the global FDI stock was valued at $3.2 trillion. Its rate of growth over the past decade (1986–1995) was more than twice that of gross fixed capital formation, indicating an increasing internationalization of national production systems. The worldwide assets of foreign affiliates, valued at $8.4 trillion in 1994, also increased more rapidly than world gross fixed capital formation.

6 It is noteworthy that other countries were also welcomed in the negotiating process as observers. See OECD, *Ministerial Statement on the Multilateral Agreement on Investment (MAI)*, 28 April 1998, at para 8:

> Ministers welcome the full participation as Observers of Argentina; Brazil; Chile; Estonia; Hong Kong, China; Latvia; Lithuania and the Slovak Republic with a view to their becoming founding members of the MAI. Ministers are committed to pursue an active dialogue with non-members, including on their development interests, particularly with those non-members willing and able to meet the obligations of the agreement.

7 Broude, *supra* note 3 at 3.

8 Accordingly, Adam Smith's "invisible hand" and David Ricardo's comparative advantage theories are applicable to international trade (with respect to the mobility of goods and services) and international investment (with respect to investors' decisions to invest and their responsiveness to market returns) alike.

9 See generally e.g. Nicholas DiMascio & Joost Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" (2008) 102:1 Am J Intl L 48; and Jürgen Kurtz, "The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents" (2009) 20:3 Eur J Intl L 749.

to-state arbitration in the field of international investment law. This has been described in terms of international trade law's "overall efficiency" being distinguished from international investment law's protection of "individual rights."[10]

However, upon analysis, this distinction appears to be both superficial and inaccurate. The aim of international investment law is not simply the protection of individual rights or the protection of private entities and activities. The logic of international investment law, like that of international trade law, is market and welfare driven in that both share the goal of economic efficiency and liberalization of international economic activity. The protection of foreign investors and investment is the means to achieve this goal: by protecting covered foreign investors and investments, international investment law operates through a web of investment agreements that encourages investors to invest abroad, while at the same time restraining the protectionist forces at work within domestic political systems.

Another sign of the convergence of the two fields lies in a shift of business models toward the dominance of the "multinational corporation." The rise of the multinational corporation is both the cause and the effect of a global shift from international trade law to international investment law, as an important percentage of world trade now takes place between affiliated parts of multinational enterprises established in different countries.[11] Many now assert that FDI has "become more important than trade for delivering goods and services to foreign markets."[12] The result of this model is that it has become increasingly difficult, if not impossible, to understand international trade law in isolation from international investment law. Multinational corporations can no longer be seen exclusively as "national champions" and are becoming globally integrated companies[13] that rely on and invest in their locally incorporated foreign subsidiaries to build global supply chains, thereby overcoming trade barriers through increased market access on a global scale. The multinational corporation and its business model have shaken the historical, political and economic foundations upon which international trade — and the separate development of international investment law — were created and developed. Transnational economic activities now take place in a world characterized by the blurring of national economic lines and of the differences that once existed between international trade law and international investment law.

The best evidence of the separate development of international trade and investment law is provided by the trade agreements (including the WTO agreements) that have been concluded, on the one hand, and the web of BITs and other investment agreements, on the other hand. Besides the WTO agreements, an increasing number of preferential and regional trade agreements have been concluded, making trade law hardly less fragmented than international investment law. The vast majority of such agreements have investment chapters, and they protect foreign investors through their investment chapters and through

10 DiMascio & Pauwelyn, *supra* note 9 at 54 [footnotes omitted]:

> With these macroeconomic objectives in mind, governments exchange trade opportunities; they do not allocate individual rights to exporters. They make this exchange not only, or even mainly, to benefit individual exporters, but rather to enable freer trade policies both at home and abroad in the nation's overall interest, including, most specifically, the interest of consumers. In sum, the trade regime is about overall welfare, efficiency, liberalization, state-to-state exchanges of market access, and trade opportunities - not individual rights. The political economy of investment treaties is remarkably different. Traditionally, BITs are about the protection of foreign investments that are already present in the host countries.

11 EC, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Towards a comprehensive European international investment policy* (Brussels: EC, 2010) COM(2010)343 final at 3:

> Through FDI, companies build the global supply chains that are part of the modern international economy. Innovation in transportation and information technologies has in turn facilitated trade and the globalisation of business enterprise beyond the confines of large corporations. Investment and trade are today inter-dependent and complementary. Around half of world trade today takes place between affiliates of multinational enterprises, which trade intermediate goods and services.

12 Karl P Sauvant, "New Sources of FDI: The BRICs — Outward FDI from Brazil, Russia, India and China" (2005) 6 J World Investment & Trade 639 at 639.

13 See Samuel J Palmisano, "The Globally Integrated Enterprise" *Foreign Affairs* 85:3 (2006) 127 at 129–30:

> Simply put, the emerging globally integrated enterprise is a company that fashions its strategy, its management, and its operations in pursuit of a new goal: the integration of production and value delivery worldwide. State borders define less and less the boundaries of corporate thinking or practice (...).Today, overseas investments continue to be made with a view to gaining access to important sources of foreign demand, but companies are investing more to change the way they supply the entire global market. The global integration of production cuts costs and taps new sources of skills and knowledge.

a variety of other chapters, in particular those dealing with services and regulatory standards.[14]

Treaty practice in both fields also suggests that the historical post-colonial dichotomy between the North (developed countries) and the South (developing countries) is hardly applicable or even relevant anymore. The world economy is characterized today by the enhanced importance being achieved by developing countries and by the rise of emerging nations and markets:[15] countries known for being capital-importing states have become capital-exporting states and vice versa.[16] At the same time, problems traditionally arising from the North–South dichotomy, such as limiting powerful Western investors' negative influence on developing economies and the protection of the latter's regulatory space, now apply among developed countries themselves,[17] making it difficult if not impossible to define an obvious political pattern. In recent years, the majority of investment agreements have been made on a South–South rather than a North–South basis.[18]

Agreements (both trade and investment treaties) answer, in a similar manner, similar concerns, as demonstrated by the proliferation of exception clauses aiming to protect values shared by international trade and investment law, such as the protection of human rights, the environment, labour standards, and human, animal and plant life. Ultimately, both fields are struggling to maintain — or create — a balance between economic and non-economic interests.

In addition, with respect to the means of resolving disputes, international trade law usually provides for state-to-state arbitration, whereas international investment law generally provides for investor-to-state arbitration. However, even these mechanisms that are, on their face, distinct, prove to be similar upon closer inspection, in that state-to-state disputes are, in fact, "representative of agglomerated private claims"[19] and generally take place after states have been pressured by a private company or a given industry to initiate a dispute settlement procedure. The very same measure can often be disputed in either of these fora.[20] The similarities shared by the two systems of dispute resolution constitute fertile ground on which to analyze whether ISDS can learn from the WTO's system of dispute settlement as far as the protection of states' sovereign regulatory power is at issue — a problem that is often raised to question the legitimacy of ISDS and, to a lesser extent, of the WTO dispute settlement mechanism.

The WTO and Investment Law Mechanisms of Dispute Settlement: Merging Dispute Settlement Mechanisms as a Means to Better Protect States' Right to Regulate?

Differences do exist between the international investment law regime and international trade law, despite the fact that their similar purpose is the liberalization of economic transactions on the global level. A core aspect of both regimes

14 See *United States—Sections 301-310 of the Trade Act of 1974* (1999), WTO Doc WT/DS152/R, at paras 7.77–7.78 (Panel Report):

> Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it. Sections 301-310 themselves recognize this nexus. One of the principal triggers for US action to vindicate US rights under covered agreements is the impact alleged breaches have had on, and the complaint emanating from, individual economic operators.
>
> It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect.

15 See James Kynge & Jonathan Wheatley, "Emerging markets: Redrawing the world map", *Financial Times* (3 August 2015).

16 For an example of this trend, see Keith Bradsher, "Ford Agrees to Sell Volvo to a Fast-Rising Chinese Company", *The New York Times* (28 March 2010).

17 See Armand de Mestral, "Investor-State Arbitration Between Developed Democratic Countries" CIGI, Investor-State Arbitration Series Paper No 1, 23 September 2015, online: <www.cigionline.org/sites/default/files/isa_paper_series_no.1.pdf>.

18 This trend was identified by UNCTAD as early as 2006 in "South-South Investment Agreements Proliferating", *IIA Monitor No 1 (2005).*

19 Broude, *supra* note 3 at 8.

20 This is revealed by the softwood lumber disputes between Canada and the United States, and more recently by the dispute between Philip Morris and Australia that was litigated before an ISA tribunal and is also before the WTO. Other examples, such as the HFCS, cases can be cited.

is their respective attempts to strike a balance between trade and investment liberalization and the protection of national regulatory space.[21] This section aims to analyze how gradually the two regimes are moving toward greater convergence with respect to the way in which they achieve this balance: whether the path of ISA or the path of WTO dispute settlement is chosen, a serious limitation of sovereignty will be involved. Paradoxically, despite the considerable criticism of ISA in recent years, the long-standing disciplines imposed by WTO membership that require states to "withdraw the measure" (that is, to eliminate a condition, law or regulation that places a country in breach of its international trade agreements) still weigh more heavily on governments than is the case with ISA, which, for the most part, requires only the payment of damages.

In order to analyze whether the protection of states' regulatory sovereignty can be enhanced in the context of both the WTO's and investment law's respective dispute settlement systems, it is important to first assess the degree of convergence between the two regimes — in other words, the extent to which they differ from one another. Highlighting these differences will enable us to discern the advantages and disadvantages of both regimes when compared to one another with respect to the protection of states' regulatory sovereignty. This analysis of the specificities of both regimes will be undertaken using the lens of states' regulatory sovereignty and whether it is sufficiently taken into account in dispute settlement proceedings.

Institutional Differences and Their Impacts on the Protection of States' Regulatory Sovereignty

In the context of international investment law, there is, compared to the WTO system, neither an appellate mechanism nor a system of effective authoritative review. Accordingly, international investment law lacks an "authoritative voice" in a system that is essentially decentralized. By contrast, the WTO system is a more unified institution, with one set of agreements and a centralized dispute settlement mechanism. While there is no formal doctrine of precedent in WTO law, panels are expected to follow the decisions of the WTO's Appellate Body. The direct consequence of this observation at the WTO level is the possibility of creating a more coherent body of jurisprudence and the ability of the dispute settlement mechanism to establish general and overarching principles with respect to states' regulatory space through an authoritative process ultimately overseen by the WTO members through the Dispute Settlement Body. An example of a principle developed by the dispute settlement mechanism of the WTO is that of non-discrimination.

In the field of international investment law, on the other hand, while one can argue that arbitrators have shown a concern for the logic and reasoning of other relevant awards, there is no means of ensuring coherence or consistency between one decision and the next. The substantive law is set out in several thousand BITs and investment chapters of regional trade agreements and there is no authoritative process for ensuring coherence of the whole system.

Would international investment law change radically if it were brought within the institutional framework of the WTO by abandoning the system of ISA and making investment disputes subject to the jurisdiction of the WTO DSU, or — even more radically — abandoning the thousands of BITs and investment chapters and replacing them with an amended General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Investment Measures (TRIMs) that would incorporate the substance of the investment protection standards found in these other agreements? This would have the effect of submitting investment disputes to a single procedure and to a single set of rules, as well as moving from a mixed system where private investors make claims against states to a purely inter-state form of dispute settlement — a very radical change from the existing system. It can be argued that this outcome would provide greater protection for the sovereign prerogative of states to adopt regulatory measures to protect public health, safety and the environment, and would avoid unjustified challenges to their regulatory sovereignty.

The shift to an interstate dispute settlement system would surely have an impact on the types of claims that would be brought. Almost certainly, states would refrain from bringing certain claims and making certain arguments that private parties have no compunction in advancing. The number of claims would almost certainly diminish. Three panellists, all named by states, might also be more

21 DiMascio & Pauwelyn, *supra* note 9 at 89.

reticent to accept certain types of arguments. But would WTO panellists be less willing to rule against states if they considered that a state had violated its commitments under WTO law? This is by no means certain. It is possible that some BITs containing very limited exceptions provisions, unlike those included in the most recent BITs, offer too much interpretative latitude to arbitrators and some arbitrators have surely gone beyond the bounds of reasonable discretion in their awards. It is also possible that panellists working within the framework of the WTO, applying a renewed GATS and TRIMs agreement, would be subject to greater restraints under WTO law. But in the final analysis, the limits on the authority of states will depend on the wording of their commitments under WTO law, and there is no assurance that these commitments would not prove to be as limiting on state sovereignty, if not more stringent, than those currently assumed under BITs and investment chapters of regional trade agreements as interpreted by investment arbitrators.

Different Remedies and their Impacts on the Protection of States' Regulatory Sovereignty

WTO law has traditionally been seen as having the positive objective of enhancing trade liberalization. To achieve this goal, the ultimate remedy of WTO law is to "withdraw the measure." While it is true that an expanding case law under GATT exceptions article XX has shown increasing deference to measures of protection of health, safety and the environment, the ultimate sanction remains a very powerful one. WTO law is the result of long negotiations representing a great variety of economic and political interests and is administered by WTO members associated in a multilateral organization. WTO members have the opportunity to comment on panel decisions by participating in the monthly meetings of the Dispute Settlement Board. Thus, there is a sense that WTO panel decisions, however draconian, are taken in a context that is sensitive to domestic regulatory authority. By contrast, international investment law is often seen as aiming solely at protecting foreign investors while paying less explicit attention to the regulatory space of the host state.[22] This is why international investment law's remedies are mostly retrospective and take the form of monetary damages against the state for the economic harm it has inflicted upon an investor; in the WTO system, the remedies are prospective. WTO law is concerned with maintaining rules of a global system applicable to all WTO members, while the award in damages under investment arbitration is designed to remedy the harm — perhaps irrevocable — done to an individual investor.

In the WTO system, two types of remedies exist: compensation[23] and the suspension of concessions or other obligations.[24] Compensation in the WTO system does not involve monetary payment or other remuneration, contrary to what is the norm in international investment law. Instead, the first line of response when a government loses a case is to withdraw the measure. This is the default duty under WTO law. If this cannot happen, compensation will often take "the form of reduction of tariff rate on other products, or greater market access for certain goods of the complaining Member, equivalent to the benefit the respondent Member has nullified or impaired through the ongoing application of its measure."[25] This is designed to ensure that the winning state continues to enjoy a balance of trade advantages equivalent to those originally negotiated and bound by the other WTO member. Accordingly, by contrast with investment law remedies, under the framework of the WTO, compensation is given by different means between states and "compensation is not retroactive, in that it does not compensate the complaining Member for the past harmful effects on the respondent Member's measure. Rather, compensation is prospective in that the respondent Member will 'compensate' the complaining Member for its continued breach of WTO obligations."[26]

Another important distinction with respect to states' regulatory sovereignty focuses on the fact that in the WTO framework, compensation is mutually agreed upon between the implementing

22 See de Mestral, *supra* note 17, and Armand de Mestral & Lukas Vanhonnaeker, "The Impact of the NAFTA Experience on Canadian Policy Concerning Investor-State Arbitration", CIGI, Investor-State Arbitration Series Paper No 13, 4 November 2016.

23 See *Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes*, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994) [*DSU*] at art 22.2.

24 *Ibid* at arts 22.2 and 22.6.

25 Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law: Text, Materials and Commentary*, 2nd ed (Oxford, UK: Hart Publishing, 2012) at 160.

26 *Ibid*.

member and the complaining party. Accordingly, some freedom is left under WTO law to the parties to agree on a mutually acceptable adjustment or compensation, contrary to investment arbitration in which a monetary remedy is directly imposed upon the state.

However, in practice, compensation in the form of tariff adjustment does not always occur,[27] and the complaining WTO member will seek suspension of concessions or other obligations when compliance has not been achieved. This remedy is often referred to as "retaliation" and can take many forms but, "in terms of trade in goods, it usually includes temporary increases in tariff rates by the complaining member on certain products from the member complained against."[28] While the party that is retaliating should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the violation or other nullification or impairment has been found,[29] if it does not appear to be practicable or effective, the complaining party can retaliate in any other sector *under the same agreement*. Only if the last option is not practicable or effective can the DSU allow the complaining party to retaliate under another covered agreement ("cross-retaliation").[30]

Accordingly, even if cross-retaliation is prospective in nature, it also involves a clear intrusion — arguably of a more extensive nature — in a given state's regulatory sovereignty, as "retaliatory measures often target powerful interest groups from the territory of the Member complained against in order to encourage them to lobby for compliance."[31] Such an indirect influence on the policy of a given state explicitly authorized by WTO law by the complaining member is arguably even more intrusive with respect to the former's regulatory sovereignty than what happens in the field of international investment law where the winning claimant is limited to seek monetary reparation through the enforcement of an arbitral award.

In conclusion, with respect to remedies and states' regulatory sovereignty, while international investment could benefit from the mutually agreed aspect of the compensation mechanism under the WTO, it seems that an intrusion in the states' sovereign power to regulate is inevitable and arguably even more important in the WTO framework than under international investment law.

Different Actors and the Protection of States' Regulatory Sovereignty

A last difference between international investment law and WTO law that has an impact on the assessment of the two regimes' intrusion in states' regulatory sovereignty focuses on the actors involved. This difference can be further divided into two subcategories: the parties involved in the dispute as such and the actors that participate in the international adjudication process.

Different Parties Involved in WTO and Investment Disputes

With respect to the parties to a dispute, the dynamics in WTO and investment law disputes are quite different. In the context of the WTO, both parties are necessarily states, whereas in the context of international investment law, one party is a state while the other party is a private actor (i.e., an investor).

Because disputes take place exclusively between states in the WTO, the lawyers involved in the dispute resolution process operate in offices equivalent to the US Trade Representative in the United States, the Trade Law Bureau in Canada or the Directorate General in the European Union. These actors work for states and are thus directly concerned with policy issues such as health or the protection of the environment. Further, states might be less inclined to engage in claims having a negative impact on the regulatory space of their opponents in a system where they risk similar actions coming from other states in case of a future dispute. By contrast, in the context of international investment law disputes, while one party is a state, the other party is a private investor that is arguably less concerned with issues having to do with the state's regulatory space.

While this may be true, the distinction made above may be exaggerated. Joost Pauwelyn has argued

27 One case in which compensation took place was the *Turkey-Textiles* dispute (*Turkey—Restrictions on Imports of Textile and Clothing Products* (1999), WTO Doc WT/DS34/R (Panel Report), as modified by WTO Doc WT/DS34/AB/R, DSR 1999:VI at 2363 (Appellate Body Report)).

28 Lester, Mercurio & Davies, *supra* note 25 at 161–62.

29 *DSU*, *supra* note 23 at art 22.3(a).

30 *Ibid* at art 22.3(c).

31 Lester, Mercurio & Davies, *supra* note 25 at 162.

that WTO disputes may be triggered by private actors "pulling the strings and paying private law firms to do the litigation, before whatever forum or forums are best for the client: in some cases, it may be the WTO; in other, investor-state arbitration; yet in other, parallel proceedings."[32] Having this in mind, the difference between international investment law and WTO law resulting from the different parties involved in disputes is greatly lessened and, in the words of a distinguished arbitrator, it does not seem accurate anymore to argue that in the field of international investment law, claimants are "villains (...) transforming [investment agreements] (...) into an offensive weapon that threatens the capacity of governments to regulate in the public interest,"[33] by contrast to the WTO system of dispute resolution.

Different Adjudicators

The other difference with respect to the actors involved in WTO and international investment law disputes focuses on the adjudicators. In particular, in international investment law, there are currently discussions as to the extent to which an arbitrator's background has an impact on the decisions they render.

The problem arises from the fact that a number of arbitrators in international investment law are drawn from commercial arbitration, a field in which the parties are on an equal footing and in which the question of whether states enjoy a certain amount of regulatory space, while politically significant, is seldom relevant to the outcome of the largely private dispute. On the other hand, because international investment arbitration involves both private actors and states, the system has faced in the past few years a series of challenges involving many issues of public international law. Accordingly, arbitrators coming from a private commercial law background do not necessarily attach as much importance as public international law arbitrators to certain issues, such as the protection of the regulatory space of states. This is changing in the field of international investment arbitration, largely due to increased public attention on the extent to which public policy considerations should play a part in investment arbitration.

In his comparative analysis of adjudicators in the WTO system and in investment arbitration, Pauwelyn highlights that WTO panellists are predominantly diplomats or ex-diplomats with relatively little adjudicatory experience and often without law degrees.[34] Furthermore, they work in close association with the WTO Secretariat. In contrast, in the investment arbitration system, investment arbitrators are usually elite lawyers coming from the private sector with extensive legal expertise and experience compared to the typical WTO panellist. Both types of adjudicators attract their own share of criticism in their respective adjudication systems. Indeed, in the WTO system, panellists can be criticized for their inexperience, while the investment arbitration system can be criticized because it is "run by highly specialized and experienced lawyers":[35]

> [U]ntil recently, ISDS operated as a largely technical, depoliticized process meant to fill deficiencies and gaps in the relatively weak domestic legal institutions of less developed countries, with the process dominated by outside experts — specialized, elite private lawyers or legal academics who basically formed their own closed network, to a great extent removed from politics and government oversight.
> (...)
> In this new context, what is needed from ISDS adjudicators is not so much (or only) technical expertise and experience to fill gaps in domestic court systems, but representativeness, inclusiveness, and trust by governments and other stakeholders so as to justify ISDS's intrusion in the domestic legal process.[36]

It remains true that, while from the perspective of the states' regulatory sovereignty WTO panellists come from a background that seemingly better equips them to ensure the "presence of sufficient levels of political support, participation, and opportunities for expressing preferences or

32 Joost Pauwelyn, "The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus" (2015) 109:4 Am J Intl L 761 at 767.

33 Charles H Brower, II, "Structure, Legitimacy, and NAFTA's Investment Chapter" (2003) 35 Vand J Transnat'l L 37 at 59 [footnotes omitted].

34 Pauwelyn, *supra* note 32.

35 *Ibid* at 764.

36 *Ibid* [footnote omitted].

‘voice’,”[37] they are still subject to criticism for their lack of experience, which is valid when one has to take a position on regulation at the domestic level: “the judges issuing these [WTO] decisions which have an impact on the shaping of regulation at the domestic level are typically unfamiliar names, often unknown even to the Geneva experts (...). The typical WTO judge is a government official, not necessarily of high seniority, who is or has spent some time in Geneva representing his/her country before the WTO.”[38]

With respect to investment arbitration, conscious of the criticism, international investment law practice is gradually adjusting, as can be witnessed in the context of the negotiation of new investment chapters in trade and mega-regional agreements. This is illustrated by the practice of the European Union that is in the process of negotiating and concluding ambitious agreements such as the Comprehensive Economic and Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP). In particular, it is noteworthy that these agreements[39] include the proposal to create a novel “investment court system” modelled on the WTO dispute settlement system. The system would imply the *public* appointment by the parties to the respective agreements of 15 “arbitrators” (CETA) or “judges” (TTIP). For instance, article X.25(4) (Chapter 10) of CETA provides that:

> the Committee on Services and Investment shall establish, and thereafter maintain, a list of individuals who are willing and able to serve as arbitrators and who meet the qualifications set out in paragraph 5. It shall ensure that the list includes at least 15 individuals but may agree to increase the number of individuals. The list shall be composed of three sub-lists each comprising at least five individuals: one sub-list for each Party, and one sub-list of individuals who are neither nationals of Canada nor the Member States of the European Union to act as presiding arbitrators.

Article 9(2) of the TTIP’s draft investment chapter provides that:

> The [...] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal. Five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries.

Such developments illustrate another type of increasing convergence between international investment law and WTO law centred around their respective dispute settlement mechanisms, with investment arbitration trying to adjust and answer to criticisms targeting investment arbitrators. Ultimately, however, an analysis of the types of adjudicators involved in both the WTO and investment law’s respective systems of dispute resolution illustrate how both fields struggle with finding the appropriate adjudicators to decide on matters having to do with states’ regulatory sovereignty. Accordingly, one could argue for the merging of international investment law within the WTO framework only if the latter would also be open to altering its current system of dispute settlement with respect to its adjudicators, on the basis of what is being done in international investment law and conversely. More transparency concerning the selection of WTO panellists, and greater autonomy vis à vis the Secretariat, might not be welcomed by all WTO members but could have a salutary impact upon the development of WTO law.

37 *Ibid* at 763–64.

38 Petros Mavroidis, “Selecting the WTO Judges” in Jorge Huerta-Goldman, Antoine Romanetti & Franz Stirnimann, eds, *WTO Litigation, Investment and Commercial Arbitration: Cross-Fertilization and Reciprocal Opportunities* (Kluwer Law International, 2013) at 103. See also Pauwelyn, *supra* note 32 at 778; and JHH Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement” (2001) 35:2 J World Trade 191 at 197 and 202:

> [GATT panellists have] an ethos which favoured 5:4 outcomes rather than 9:0 (...). Custodianship over the Law of the GATT was far from both the minds, and let us be frank, the ability of many Panellists. (...)
>
> I would further argue that the profile of the ideal individual Panellist, or the ideal Panel, given the new reality of WTO dispute resolution, is not reflected in the current roster nor in the selection and composition of Panels. The life experience, professional backgrounds of Panellists have to be commensurate with the evident gravity and profundity of the issues decided in a globalized world. This I submit has conspicuously not been the case in some of the most important instances. Who decides is an important element in the paradigm of legitimacy. Internal legitimacy is, here too, bought at the expense of external legitimacy.

39 As well as the recent free trade agreement (FTA) with Vietnam (*Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam*, negotiations concluded on December 2, 2015; not yet signed).

Concluding Remarks: The Desirability of a Single Dispute Settlement Mechanism for WTO and Investment Disputes in Light of States' Regulatory Sovereignty

International trade law and international investment law have been described as "twins separated at birth." They are two distinct legal regimes that gradually developed separately and yet they share so many things in common that some argue for a consolidation of the two fields into one, despite the important differences that persist between them: "[a]lthough the legal 'orders' of international trade and investment law may be converging, the legal 'fields' remain, to date, surprisingly distinct."[40]

The convergence between the two orders can be illustrated and explained by several factors. First, today's globalized world, in which economic operations are dominated by so-called global supply chains across borders, requires trade and investment to be dealt with together. Second, the substantive disciplines themselves overlap. This is particularly evident with the GATS, mode 3 of supply,[41] and the TRIMs.[42] They share common ground and strongly converge around the standard of non-discrimination, which has led investment tribunals in the past to rely on WTO case law when interpreting and applying the standard in the international investment law context. The trade and investment instruments themselves illustrate such a convergence. Investment agreements are increasingly included within broader FTAs, the GATS regulates FDI to a certain extent, and exceptions provisions within investment agreements are increasingly integrating WTO language.

In light of this convergence between international investment law and WTO law, one of the most important questions at the centre of the complex debate in the international investment law community (and certainly as important in WTO spheres) is: what restraints should be put upon states' regulatory sovereignty, and where should they remain free to adopt protections for their public health, safety and environment they deem necessary? As has been illustrated, neither regime has fully answered this question under their respective systems, which raises the question: as far as states' regulatory space is at issue, is it preferable to let international investment law and WTO law continue to evolve separately, given the "improvements" of recent investment agreements in this respect? In other words, what benefits, if any, would come from the integration of international investment law within the framework of the WTO?

While international investment law has a lot to learn from WTO law, the integration of the former in the latter would not substantially enhance the protection of states' regulatory sovereignty, especially in light of recent developments in the field of international investment law. While several years ago exceptions provisions, and in particular the GATT's article XX general exception clause, were much more advanced than exceptions clauses provided in investment agreements, recently, and in an effort to more accurately take into account the regulatory sovereignty of states, modern investment agreements have provided for an array of new and more detailed exceptions clauses, including wording inspired by GATT article XX.[43] In addition, while the investment law regime does not have a system of binding precedent as is functionally the case in the WTO mechanism, it does not as such prohibit investment tribunals from relying on WTO case law to interpret exceptions in

40 Pauwelyn, *supra* note 32 at 762.

41 See e.g. OECD, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* (OECD, 2002); WTO Council for Trade in Services, Mode 3 – Commercial Presence – Background Note by the Secretariat, S/C/W/314, 7 April 2010; Bart De Meester & Dominic Coppens, "Mode 3 of the GATS: A Model for Disciplining Measures Affecting Investment Flows?" in Zdenek Drabek & Petros C Mavroidis, eds, *Regulation of Foreign Investment: Challenges to International Harmonization* (Singapore: World Scientific Publishing, 2013); and Kavaljit Singh, "Multilateral Investment Agreement in the WTO: Issues and Illusions" (2003) Asia-Pacific Research Network.

42 In particular, it is noteworthy that the TRIMs Agreement was negotiated in the aftermath of the *FIRA* case (Panel Report, *Canada—Administration of the Foreign Investment Review Act*, adopted 7 February 1984, WTO Doc L504, 30S/140). On the discussions around this case in the negotiation of the TRIMs, see Lester, Mercurio & Davies, *supra* note 25 at 670–71.

43 Armand de Mestral & Lukas Vanhonnaeker, "Exception Clauses in Mega-Regionals (International Investment Protection and Trade Agreements)", in Thilo Rensmann, ed, *Mega-Regional Trade Agreements and the Future of International Trade and Investment Law* (New York: Springer, 2017).

investment agreements in the limited areas where there is convergence of the two fields. Furthermore, while no *de lege* precedent exists in investment arbitration, it is noteworthy that a certain de facto system of precedent is gradually emerging.[44]

With respect to the different remedies in the international investment law and WTO regimes, it is not certain that WTO remedies, if adopted in the context of investment arbitration, would significantly enhance the protection of states' regulatory sovereignty in international investment law. Both regimes do impact states' regulatory sovereignty to different extents, and that of the WTO is arguably more far reaching in this respect.

Finally, with respect to the different actors involved in the respective adjudication processes, it appears that among the parties themselves there does not appear to be any great demand to substitute one system for the other. While investment arbitration has much to learn from the WTO in terms of broader experience of the adjudicators with respect to public law issues, the WTO system of dispute settlement also displays some deficiencies concerning a lack of expertise on the part of its adjudicators. It would not appear effective to trade one deficiency for the other by integrating the international investment law order within the WTO order, especially in light of the fact that the ongoing developments in the field of investment arbitration, most notably with the recent proposition of an investment court system, seem to take into account some of the weaknesses of investment arbitration.

In conclusion, as illustrated by the past failed attempts to multilateralize international investment law, integrating international investment law within the WTO framework would represent a very complex task, despite the numerous and increasing points of convergence between the two systems. This analysis further finds that with respect to the protection of states' regulatory sovereignty, undertaking such a daunting task does not seem to be the most efficient way to answer concerns, especially in light of the recent developments regarding the substantive and procedural aspects of recent investment agreements that have been or are being negotiated.

Addendum

One final thought may be in order, in light of the recent decision on provisional application of CETA. Due to ongoing opposition in some states concerning the wisdom of committing to ISA in CETA, the decision was made to exclude these provisions from the provisional application of CETA. If agreement cannot be reached in the European Union during the process of ratification of this "mixed treaty," it may become necessary for Canada to agree to drop ISA in CETA permanently. If this happens, Canada and the European Union may well have taken one step in the complex process of shifting investment disputes from the mixed sphere to the purely interstate sphere, as only the general interstate dispute settlement provisions of CETA will apply.

44 Andrea K Bjorklund, "Investment Treaty Arbitral Decisions as *Jurisprudence Constante*" in Colin Picker, Isabella Bunn & Douglas Arner, eds, *International Economic Law: The State and Future of the Discipline* (Oxford, UK: Hart Publishing, 2008).

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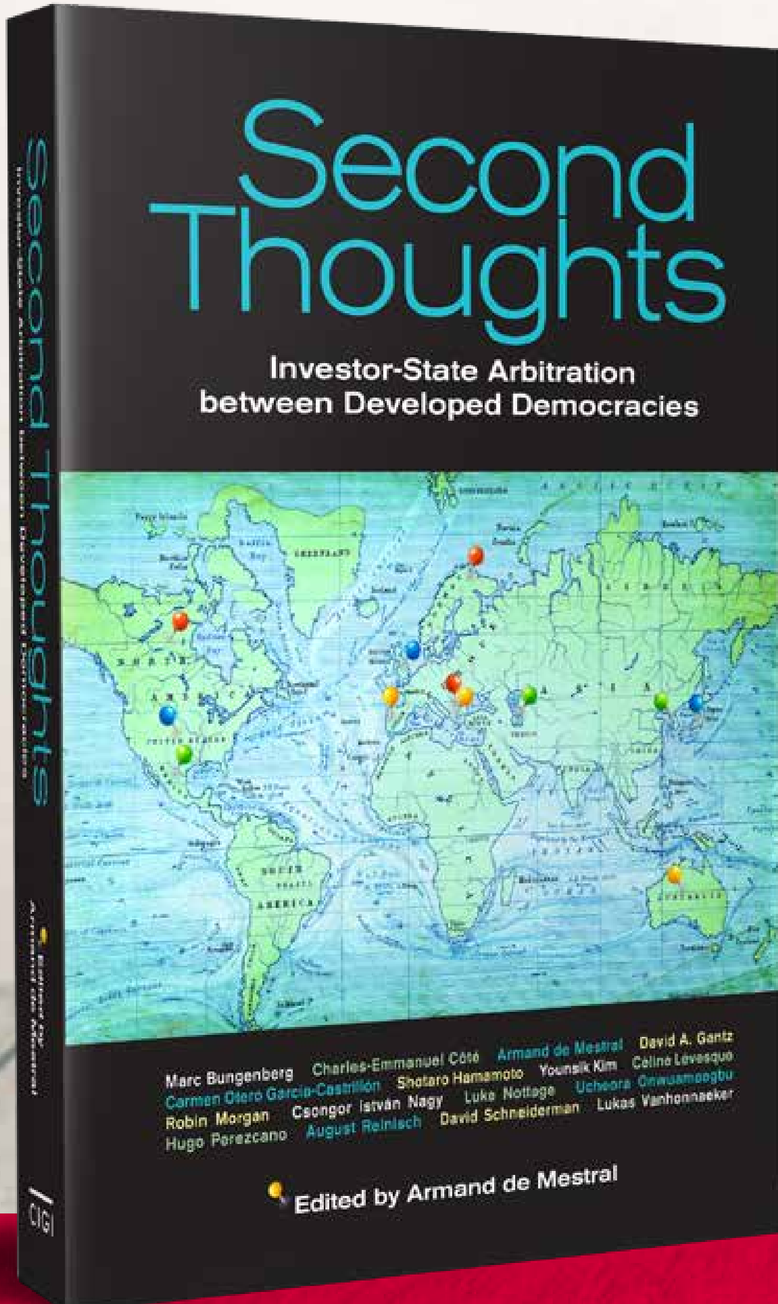

Second Thoughts

Investor-State Arbitration between Developed Democracies

Edited by Armand de Mestral

Since the first international investment agreement was negotiated nearly six decades ago, developed countries have sought to protect their investors against the possible failure of host countries (usually a developing country) to respect treaty standards. The North American Free Trade Agreement and the European Energy Charter, both dating from 1994, marked the first instances of developed countries signing an agreement containing provisions for investor-state arbitration (ISA) between themselves. Since then, ISA has become a standard feature of international investment agreements, even as the chorus of protest against ISA from civil society groups (and some nations) has grown louder.

Second Thoughts gathers the reflections of 16 international investment experts, examining experiences of ISA in Canada and various parts of the world, and asking whether ISA is appropriate between developed democracies.

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