

FOREWORD

Perhaps it is not a coincidence that the third volume of the Indian Journal of International Economic Law addresses issues of both trade and investment – with the latter being predominant. Traditional issues of trade regulation are the topic of the paper on exhaustion of remedies in anti-dumping procedures. The papers on precedents in investment disputes and on sovereign wealth funds relate to the problem of foreign direct investment. The contribution addressing intellectual property and the issue of TRIPS-plus obligations equally does so, as both protection of intellectual property and the regulation of services in GATS inherently address investment. The same is true for competition law where trade and investment intrinsically merge.

Trade regulation dominated the ascent of international economic law in the first decade following the conclusion of the Uruguay Round in 1995. It placed this field at the heart of international law thanks to WTO dispute settlement and the impressive proliferation of case law of panels and the Appellate Body. Current work and scholarly interests pay considerable attention to investment issues. The present papers offer a welcome contribution to this debate which needs to carefully address the interface of trade and investment protection. The two fields increasingly overlap on substance while following entirely separate procedural structures.

The past and current differences between the two fields are striking. While trade disputes are framed by a multilateral order and transparency, investment disputes continue to follow the traditions of 19th century *ad hoc* arbitration. Neither transparency nor legal security is secured, given that there are more than two thousand bilateral investment protection agreements. Although they overlap, they do not share a common language or common standards. The possibility for private companies to directly challenge governmental regulations and action amounts to the most prominent feature and explains the attractiveness of this avenue. Yet, the appointment of arbitrators is often not transparent, and the role of precedents is not settled. The companies involved often do not wish to share the outcomes with the public, contributing to the law as a public good. For many years, access to decision and rulings

was accidental. Yet, the most important differences relate to substantive law. While trade rules seek an appropriate balance between trade and non-trade concerns in the process of progressive liberalization and regulation, refined in WTO dispute settlement, investment protection agreements primarily aim at serving the needs and interests of investors. For those affected, the costs can be high: governments are increasingly engaged in costly disputes, seeing policy space in domestic policies reduced and threatened. Most of the agreements do not provide exceptions for non-economic concerns comparable to those within the WTO. People affected by and large depend upon governments to defend their interests and property rights; often they see themselves without appropriate remedies. The recent shift in foreign direct investment from flows to the South to flows to the North, and the new phenomenon of large-scale investment by emerging economies in particular in Africa, calls for a review of the traditional foundations of investment protection law. There is a need to broaden the scope of interests taken into account, ranging from non-economic goals to property rights and human rights. There is a need to take into account environmental concerns, in particular those relating to the complex regulatory issues of climate change. There is a need to find ways and means to prevent disputes arising in the first place and to reinforce the bargaining tools not only for those benefitting, but also for those being affected, by foreign direct investment.

The task ahead consists in bridging the conceptual gaps between trade and investment, and in bringing about greater coherence between these two main fields of international economic law. It is pleasing to see that the Indian Journal of International Law has embarked on this journey. It can play an important role in the upcoming debate.

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