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Recent Legal and Policy Developments Regarding the Interactions Between Foreign Investment and Trade

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Introduction

Tolstoy was probably not thinking about the families of investment and trade law when commencing Anna Karenina. Nonetheless, it seems that ‘each unhappy family is unhappy in its own way,’ even when the families in question are foreign investment and trade law. For the latter, the multilateral trading system, characterised by a centralised structure focused on the World Trade Organization (WTO) and its (at least until recently) effective and powerful dispute settlement mechanism, 2018 has not been an easy year. Free trade principles have come under attack more than ever and States have attempted to retain their sovereign authority in areas particularly eroded by the forces of globalisation, while simultaneously opting for the preferential route instead of the multilateral one.¹

As for the former, the fragmented and decentralised foreign investment system, 2018 has seen a further strengthening of consensus regarding the failings of the system and the calls of reform with regard to investment protection standards, investor-state dispute settlement (ISDS) and the overall (im)balance between rights and obligations of host states and foreign investors. Recently negotiated investment agreements – increasingly included as chapters in comprehensive free trade agreements (FTAs) – have generally limited the scope of protection afforded to foreign investment and provided for a more disciplined version of ISDS, while more structured (and thus controversial) reform discussion (focusing on ISDS) has been in full swing within United Nations Commission on International Trade Law (UNCITRAL) Working Group (WG) III.²

Yet, despite their distinctiveness, the global systems for trade and foreign investment have interacted on three fronts – facilitation, national security, and dispute settlement – and the

¹ For example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (entered into force 30 December 2018) (hereafter CPTPP), following the ratification by six parties: Mexico, Japan, Singapore, New Zealand, Canada and Australia; the Agreement between the European Union and Japan for an Economic Partnership (entered into force 1 February 2019); the Agreement between United States of America, the United Mexican States, and Canada (signed 30 November 2018) (hereafter USMCA), which replaces the North American Free Trade Agreement (entered into force 1 January 1994) (hereafter NAFTA); the Comprehensive Economic and Trade Agreement between the European Union and Canada (entered into force 21 September 2017) (hereafter EU-Canada CETA); the Free Trade Agreement between the European Union and the Republic of Singapore (signed 19 October 2018); the Investment Protection Agreement between the European Union and the Republic of Singapore (signed 19 October 2018) (hereafter EUSIPA); the Framework Agreement on Partnership and Cooperation between the European Union and the Republic of Singapore (signed 19 October 2018). Following the signing of the latter three Agreements on 19 October 2018, the European Parliament gave its approval on 13 February 2019. Before the EUSIPA enters into force it must ratified by each Member State of the European Union (EU). See Stephan Grillier, Walter Obwexer, and Erich Vranes, Mega-Regionals Trade Agreements: CETA, TTIP, and TISA – New Orientations for EU External Economic Relations (Oxford University Press 2017).

expectation is that these interactions will continue in the future. These three selected topics intend to capture the most telling overlaps, interactions, and differences that are affecting both the trade and the investment regimes.

The first relates to the discussion around investment facilitation. Based on the success of the WTO Trade Facilitation Agreement (TFA) concluded in 2013 (which attempts to address bureaucratic delays and ‘red tape’ impeding cross-border movement of goods), a group of WTO members are currently leading a discussion exploring options for a multilateral instrument to facilitate foreign direct investment.

The second front of interaction concerns national security as a ground to justify trade or investment protectionism measures. Two noteworthy recent developments are: (1) pursuant to Section 232 of the 1962 Trade Expansion Act, the imposition of tariffs on steel and aluminium imports by the United States based on its perceived need to protect national security; and (2) the agreement reached within the EU on a new EU-wide mechanism for the screening of foreign investments to defend their strategic interests critical for the security and public order.

The third area of interaction is at the ‘dispute settlement’ level. Despite the historical distinctiveness of their respective dispute settlement systems (i.e., a centralised, judicial system for international trade versus a highly diffuse, arbitral system for foreign investment), both families are experiencing an existential crisis of sorts, emphasising that each system has inevitably strengths and weaknesses. Against this backdrop, the aim of this brief chapter is to chronicle the developments that have occurred in these three areas of intersection between trade and investment law. Accordingly, the following sections will focus on investment facilitation (section A), national security (section B) and dispute settlement (section C).

**A. Investment Facilitation**

A recent case showing the intersection between trade and investment law and policy revolves around the concept of investment facilitation (IF) and the idea of an IF agreement, which have been gaining popularity in recent years’ policy debates. IF is an expansive notion, not always

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7 Axel Berger, ‘What’s next for the investment facilitation agenda?’ (2018) 224 Columbia FDI Perspectives (herafter ‘Berger, What’s next?’).
clearly defined and sometimes conflated with the concepts of investment promotion or investment retention. Unsurprisingly, IF is often described through a negative approach: it is not about investment protection, investment promotion, policy liberalisation or market access, nor is it about dispute settlement. As its name suggests, IF is about facilitating the relations between investors and host countries.\(^8\)

The idea of an IF agreement is largely drawn from the WTO Trade Facilitation Agreement (TFA), concluded in December 2013 in Bali and entered into force in February 2017.\(^9\) Trade facilitation focuses on bureaucratic delays and ‘red tape’ which pose a burden for moving goods across borders for traders. Accordingly, the TFA (a) contains provisions for expediting the movement, release and clearance of goods, including goods in transit; (b) sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues; and (c) contains provisions for technical assistance and capacity-building in order to ensure implementation with particular regard to developing and least developed countries.

The concept of IF developed over the last five years at national, bilateral, regional and multilateral levels. In one of its first appearances at the national level, IF found its way in the new kind of international investment agreements (IIAs) devised by Brazil, called ‘Cooperation and Investment Facilitation Agreements’ (CIFAs). The first CIFAs negotiations were launched in 2013 and lead to three agreements concluded in 2015 with Mozambique, Angola and Mexico.\(^10\)

The idea of an investment facilitation programme was further elaborated, for example, in the context of the E15 Initiative,\(^11\) in UNCTAD’s Global Action Menu for Investment Facilitation,\(^12\) and further discussed at the G20 Trade and Investment Working Group in 2016 under the Chinese presidency and in 2017 under the German presidency. Within the G20 context, the discussions, however, suddenly stopped due to opposition from India, South Africa, and, unexpectedly, the US. Subsequently, investment facilitation was left out of the agenda of the 2018 Argentinian G20 presidency.\(^13\)

At the bilateral level, an interesting development to report is the EU-India Investment Facilitation Mechanism (IFM), which was launched in July 2017 and has been in full operation

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\(^9\) Protocol Amending the Marrakesh Agreement Establishing The World Trade Organization (n4).


since. The IFM is not WTO-related and offers a platform to address issues faced by existing EU investors in India – and to some extent by companies that consider investing in India, as some of the issues raised under the IFM may be of a nature that discourages new investments. Even more interestingly, at the multilateral level, many new initiatives have flourished. In 2017, proposals specifically focusing on IF were circulated by Russia \(^{14}\) and China. \(^{15}\) In mid-2017, the delegations of eight WTO Members (the so called ‘Friends of Investment Facilitation for Development’) including Brazil, Argentina, China and Pakistan, launched an open-ended, informal dialogue on ‘Investment Facilitation for Development’ in which all WTO Members were invited and encouraged to participate. \(^{16}\) In August 2017, the BRICS countries (Brazil, Russia, India, China, and South Africa) published a common, non-binding framework for IF, thereby giving autonomy to members to decide what policies and tools to adopt. \(^{17}\)

In December 2017, on the margins of the WTO Ministerial Conference in Buenos Aires, Argentina, fourteen emerging economies \(^{18}\) tabled a proposal to inform other WTO Members about the intention to begin ‘structured discussions’ with the aim of developing a multilateral framework on investment facilitation. \(^{19}\) The draft proposal was followed by a joint ministerial statement on IF and development, \(^{20}\) circulated by a more heterogeneous group of 70 countries, which included, among others, developed economies like the EU, Australia, Canada, Singapore, and Switzerland. Both developing and developed countries essentially recognized the ‘dynamic links between investment, trade and development in today’s global economy, as well as the need for closer international cooperation’, and welcomed negotiations that: \(^{21}\)

> “seek to identify and develop the elements of a framework for facilitating foreign direct investments that would: improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention.”

\(^{14}\) Investment Policy Discussion Group, ‘Communication from the Russian Federation’ (30 March 2017), WTO Document No JOB/GC/120.

\(^{15}\) Communication from China, ‘Possible Elements of Investment Facilitation (21 April 2017), WTO Document No JOB/GC/123.

\(^{16}\) The ‘Friends of Investment Facilitation for Development’ group comprises: Argentina, Brazil, Chile, China, Colombia, Hong Kong, Kazakhstan, Mexico, Nigeria, and Pakistan. See, Joint Communication from the Friends of Investment Facilitation for Development, ‘Proposal for a WTO Informal Dialogue on Investment Facilitation for Development’ (21 April 2017), WTO Document No JOB/GC/122.


\(^{18}\) The fourteen emerging economies were: Argentina, Brazil, Chile, China, Colombia, Hong Kong, China, Kazakhstan, South Korea, Liberia, Mexico, Nigeria, Pakistan, Qatar, and Uruguay.


\(^{21}\) ibid, at 4.
The statement expressly excludes from the scope of future discussions ‘market access, investment protection, and ISDS.’

In early 2018, Brazil submitted to the WTO General Council a draft agreement on investment facilitation inspired by its CFIA model. Through 2018, ‘structured discussions’ took place in Geneva involving: (a) seven meetings organised thematically, (b) guiding questions, background papers and presentations by experts (including from the International Trade Centre (ITC), the Organisation for Economic Co-operation and Development (OECD), UNCTAD, and the World Bank), (c) sharing of domestic and regional experiences, and (d) a checklist of issues raised by Members. These discussions were carried out according to principles of transparency, openness and inclusivity. For example, meetings were open to all Members, attendance or participation did not prejudice Members’ positions on the joint initiative, and full transparency and access to the documents was guaranteed. Further meetings are scheduled to continue throughout 2019.

Among the various elements discussed over the course of 2018, two are worth emphasising. First, discussion focused on streamlining and speeding up administrative procedures and requirements (APRs) and identified several relevant issues: (i) time limits for administrative procedures, (ii) treatment of incomplete applications, (iii) fees and charges, (iv) review of APRs, (v) one stop shop or single window types of mechanisms, and (vi) ombudsperson types of mechanisms. Many, if not all, of these issues find echo in recent FTA provisions guaranteeing due process or procedural fairness particularly with regard to authorisation, licensing and qualification procedures affecting trade in services.

Second, the discussion also focused on cross-cutting topics such as the development dimension and has included the following issues: (i) consideration of challenges faced by developing countries and especially Least Developed Countries (LDCs), (ii) sharing of best practices and information on facilitating FDI to identify global benchmarks for developments (eg, transparency, investors compliance with certain obligations), (iii) special and differential treatment, and (iv) technical assistance and capacity building. One of the reasons for the successful conclusion of the TFA is said to have been the inclusion in the agreement of mechanisms to ensure actual implementation particularly of developing countries including through flexibilities, technical assistance and capacity building. Unsurprisingly, many have highlighted the importance of the link between IF and development, including sustainable

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22 ibid.
24 For a summary of various elements in IF proposals submitted at the WTO, see ICTSD, Crafting a Framework (n 13).
25 See EU-Canada CETA (n 1) arts 12.3.5 – 12.3.16 of the Chapter on Domestic Regulations; USMCA (n 1) art 15.8; CPTPP (n 1) art 10.8.
In this respect, one suggestion has been to target IF towards foreign investment capable of promoting sustainable development.\footnote{Sauvant and Hamdani, ‘An International Support Programme’ (n 11); Ada Bogliolo Piancastelli de Siqueira, ‘What Can an Investment Facilitation Agreement at the WTO Do for Sustainable Development?’ (2018) ICTSD and World Economic Forum.} One key issue going forward relates to the definition (and thus scope) of IF. IF is an expansive notion, not always clearly defined and sometimes conflated with the concepts of investment promotion or investment retention. In its broadest (and most vague) sense, IF is about facilitating the relations between investors and host countries, helping the former navigate the bureaucracies of the latter where the investment takes place. IF is seen as a group of principles, including transparency, consistency and predictability, aimed at changing national policies, regulations and practices in order to ease investment flows.\footnote{UNCTAD, ‘World Investment Report 2015 – Reforming International Investment Governance’ (2015) Sales No. E.15.II.D.5, 128. In a speech at a meeting of the Structured Discussions on Investment Facilitation for Development on 4 March 2019, WTO Director-General Roberto Azevêdo stated that “For many members, facilitating investment is clearly one such area. It is critical to expanding development, fuelling innovation, generating jobs, and achieving the Sustainable Development Goals.” See World Trade Organization, DG Azevêdo urges open and inclusive discussions on investment facilitation, <https://www.wto.org/english/news_e/spra_e/spra250_e.htm> accessed 1 July 2019.} The potential breadth of IF may be seen in the definition provided by UNCTAD:\footnote{Luciana Ghiotto, ‘A Critical Review of the Debate on Investment Facilitation’ (2018) Investment Treaty News. UNCTAD, ‘Global Action Menu’ (n 12). Italics added.} 

“Investment facilitation is the set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries. It focuses on alleviating ground-level obstacles to investment, for example through improvements in transparency and information available to investors, more efficient and effective administrative procedures for investors, or enhanced predictability and stability of the policy environment for investors.”

An IF mechanism based on such a definition would cover both admission and post-establishment phases (‘to establish and expand their investments’) and may involve both procedural (‘improvements in transparency and information’) and substantive obligations (‘enhanced predictability and stability of the policy environment’). It is not surprising that some have recently argued for future multilateral discussions to ‘remain strictly focused on technical issues directly related to investment facilitation’, without addressing ‘market access, investment protection and ISDS’. Instead of seeking an abstract definition of investment facilitation, they have insisted on defining the scope of an IF framework pragmatically by identifying the specific IF measures that a framework should cover.\footnote{Karl Sauvant, ‘Five key considerations for the WTO investment-facilitation discussions, going forward’ (2019) 234 Columbia FDI Perspectives.}

While the WTO has a troubled history with attempts to negotiate investment rules, there seems to be potential for the current discussions on investment facilitation. It seems unlikely, however, or too early to predict, that an IF agreement under the aegis of the WTO will bring
together all WTO members, as it is the case with the TFA, unless the level of ambition remains low. As often is the case in the multilateral trading system, one should be reminded that the higher the ambition, the harder the negotiations.

B. National Security

A second issue that has taken centre stage in both trade and investment law and policy during 2018 is the deployment of national security arguments to defend national interests. In trade, the issue has been predominantly framed in terms of politically justified exceptions to normal trading rules as a means to protect national industries. In investment law, national security has been instrumental to build ‘walls’ to inspect incoming foreign investments, which might access the national market only if certain security requirements are met.

In trade, the United States government has used national security grounds to justify the imposition of tariffs against imports of steel and aluminium from around the world, in violation of its WTO tariff commitments. In March 2018, the United States’ President Trump explained that without the imposition of these tariffs ‘the industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of aluminium to meet our national security needs — a situation that is fundamentally inconsistent with the safety and security of the American people.’ In other words, the United States sought to justify its action under Article XXI(b)(iii) of the General Agreement on Tariffs and Trade (GATT), which allows a WTO Member to take ‘any action which it considers necessary for the protection of its essential security interests’ (the ‘national security exception’). After several countries brought complaints in the WTO against the American tariffs, the United States argued that ‘issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement’ and that every WTO Member ‘retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests’ pursuant to Article XXI of GATT. The key legal issues are thus whether or not the ‘national security exception’ is indeed justiciable, and if so, what kind or standard of review a WTO panel is permitted to carry out.

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35 General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194, Art XXI(b)(iii).
36 See for example United States — Certain Measures on Steel and Aluminium Products, Request for the Establishment of a Panel by China, WTO Dispute No DS522, 5 April 2018.
37 United States – Certain Measures on Steel and Aluminium Products, Communication from the United States to the DSB, WTO Dispute No DS522, 11 June 2018.
38 Other pending WTO disputes where the security exception has been invoked are DS512: Russia – Measures Concerning Traffic in Transit (panel composed on 6 June 2017) and United Arab Emirates – Measures Relating to Trade in Goods and Service, and Trade-Related Aspects of IP Rights, WTO Dispute No DS526, panel
In investment, several countries, including China, Australia, India, Sri Lanka and Nigeria, have in the last few years decided to set up or step up their own national security-based review of inward foreign investment.\textsuperscript{39} The latest to join the trend is the EU. Based on a 2017 European Commission’s proposal,\textsuperscript{40} in November 2018, the European Parliament informally agreed with the EU Council and Commission on the EU framework for screening of incoming foreign direct investment (FDI) to ensure security and public order.\textsuperscript{41} The European Parliament formally (and overwhelmingly) endorsed the framework in February 2019 via Regulation (EU) 2019/452.\textsuperscript{42} As the EU is the world’s leading destination of FDI, the new EU framework aims to improve the effectiveness of the EU’s fragmented system of monitoring FDI inflows in order to protect EU Members’ security and public order. Regulation 2019/452 makes express reference to the impact of FDI on ‘critical infrastructure, technologies and inputs which are essential for security or the maintenance of public’ order as well as the fact that FDI is ‘controlled directly or indirectly, for example through significant funding, including subsidies, by the government of a third country or is pursuing State-led outward projects or programmes’.\textsuperscript{43}

The framework does not establish EU-level screening, nor does it harmonise the screening mechanisms currently existing across the fourteen EU Member States. Rather, it sets up an overarching, common legal framework in which Member States’ screening mechanisms can develop.\textsuperscript{44} In other words, the framework aims to enhance the coordination of screening between the EU Commission and Member States by ‘setting out the terms, conditions and procedures to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments on grounds of security or public order’.\textsuperscript{45} The framework is rather broad in scope, as it covers investments which establish or maintain lasting and direct links between investors from third countries, including state entities, and undertakings carrying out an economic activity in a Member State.\textsuperscript{46} Portfolio investment, however, is not included, possibly inspired by the Opinion 2/15,\textsuperscript{47} wherein the EU Court of Justice clarified that, in the context of the EU-

\textsuperscript{39} Desierto, ‘Protean “National Security”’ (n 33).
\textsuperscript{40} European Commission, Proposal of 13 September 2017 for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union.
\textsuperscript{45} The Regulation (n 42) art 2(4).
\textsuperscript{46} ibid, art 2.
\textsuperscript{47} Opinion 2/15 of 16 May 2017, ECLI:EU:C:2017:376.
Singapore FTA, portfolio investment and ISDS provisions fall outside the exclusive competence of the EU.\textsuperscript{48}

The new framework rules provide a non-exhaustive list of factors that ‘may be taken into consideration’ in the screening process, with implications for: (i) critical infrastructure (including energy, transport, communications, data, space, and finance), (ii) critical technologies (eg, semiconductors, artificial intelligence, and robotics), and (iii) access to sensitive information. The European Parliament added fields such as health, water, media, defence, biotechnology and food security.\textsuperscript{49} Another factor to be taken into account is whether a foreign investor is controlled or funded by a third country. Regrettably, the Regulation does not explain what the consequences are for those investments that actually affect public order or security. Nor does the Regulation offer guidance on how Member States should coordinate their different approaches when it comes to sanctions against investments considered dangerous after the screening has been conducted.\textsuperscript{50}

The EU mechanism builds on the need for more robust common action to protect the single market, as urged by France, Germany, and Italy.\textsuperscript{51} To this end, great emphasis is placed on cooperation and mutual assistance between the Commission and the Member States. The Regulation requires those Member States that screen FDI to notify the Commission of their mechanisms and planned amendments, and to provide an annual report on their application.\textsuperscript{52} The Commission is authorised to issue a non-binding opinion if:

(a) FDI in a Member State may affect the security or public order of projects ‘of Union interest’.\textsuperscript{53} The Regulation defines such projects as involving a significant share of EU funding and provides an exhaustive list of those projects meant to have a significant share: Horizon 2020, Galileo & EGNOS, Copernicus, Trans-European Networks for Transport, for Energy, for Telecommunications, the European Defence Industrial Development Programme, and the Permanent Structured Cooperation;\textsuperscript{54} or

(b) FDI in a Member State may affect the security or public order of other Member States. On this issue, the Commission’s opinion must be taken into the ‘utmost account’ and the Member States should provide an explanation to the Commission if its opinion is not followed, although the opinion technically remains non-binding and advisory in

\textsuperscript{48} ibid, para 305.
\textsuperscript{49} ibid, art 4.
\textsuperscript{50} For example, according to the Italian screening mechanism a suspected transaction might be declared void. In France null and the investor might incur in criminal penalties, whereas in Finland the government retains the power not to confirm the transaction. See Frédéric Wehrlé and Joachim Pohl, ‘Investment Policies Related to National Security: A Survey of Country Practices’ (2016) OECD Working Papers on International Investment, No 2016/02, OECD Publishing, Paris.
\textsuperscript{52} The Regulation (n 42) arts. 3(7), 5, 6(1).
\textsuperscript{53} ibid, art.8.
\textsuperscript{54} ibid, art. 8(3) and Annex.
nature. All Member States are also given the opportunity to comment on, or share relevant information about, FDI undergoing screening in another Member State that is likely to affect security or public order.\(^{55}\)

While the mechanism focuses on enhancing cooperation, the Member States remain free to derogate from the free movement of capital on grounds of public policy and public security.\(^{56}\)

In other words, the authority to make a final decision on a transaction does not emanate from the EU but Member States, unlike the more centralised powers bestowed to the Committee on Foreign Investment in the United States (CFIUS).\(^{57}\)

Further problems on the cooperation front are likely to emerge in those Member States that do not have a screening mechanism in place. The Regulation does not impose a duty on the Member States to establish a screening device. If a Member State decides to implement screening of FDI, it must ensure that its screening mechanisms are transparent, non-discriminatory, and compliant with the time-limits for national FDI review procedures.\(^{58}\)

Additional problems the Regulation introduces include: (a) whether, and if so to what extent, the Commission and other Member States can influence FDI in Member States that do not have a national screening mechanism;\(^{59}\) and (b) whether the Member States undertaking the FDI screening will resort to other regulatory means to restrict or block the transaction in question.\(^{60}\)

As the professed need for ‘national security’ protection is spreading across all countries, the need to elaborate on principles and practices to limit possible abuses of national security justifications will inevitably grow as well. Whether or not the pending WTO disputes will be able to offer some guidance is unclear. One would hope that such an important and delicate issue will not be left to be decided by international judicial or arbitral bodies,\(^{61}\) but through international cooperation. As will be examined in the next section, there may indeed be limits to the extent that international dispute settlement tribunals can function as substitutes for policy-making.\(^{62}\)

C. Dispute settlement

\(^{55}\) ibid, art. 6(2).

\(^{56}\) Treaty on the Functioning of the European Union (entered into force 1 December 2009), art 65(1)(b).

\(^{57}\) CFIUS’ role is to evaluate whether and to what extent such transactions could impact US national security. If a transaction could pose a risk to US national security, the President may suspend or prohibit the transaction, or impose conditions on it. CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended (section 721), and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800 and 31 C.F.R. Part 801, as amended.

\(^{58}\) The Regulation (n 42), art 3(2).

\(^{59}\) Dammann de Chapto and Brüggemann, ‘European Union Introduces FDI Screening Mechanism’ (n 43).

\(^{60}\) ibid, see also Carlos Esplugues, ‘A Future European FDI Screening system: Solution or Problem?’ (2019) 245 Columbia FDI Perspectives.


It is undeniable that the successes attributed to the international investment and trade regimes are due to the successes of their respective dispute settlement systems. After all, if an international obligation does not have an effective enforcement mechanism, it likely loses much of its relevance. In the last twenty years, the number of investor-state arbitrations brought on the basis of investment treaties has almost reached the four-digit stratosphere, while the number of consultations brought within the WTO dispute settlement system since 1995 has reached almost 600. Despite these numbers, both systems have faced controversy.

With regard to ISDS, investment arbitration has attracted intense criticism on multiple fronts. Given the ad hoc nature of arbitral tribunals and the lack of a centralised system, the symptoms of the crisis in the investment regime are diffuse and have materialised in a widespread sense of malaise towards arbitral tribunals. It is not surprising that some of the most recent international investment agreements concluded by states that have historically been supportive of investment protection and arbitration seem to move away from investor-state arbitration as the preferred mode of dispute settlement. For example, the agreement reached in 2018 between the United States, Mexico and Canada to replace the 1994 NAFTA has greatly limited the scope of ISDS. Similarly, recent EU FTAs have replaced investment arbitration with a new court-like system – the Investment Court System (ICS). An increasing number of investment agreements have circumscribed the range of potential claims to be resolved by an arbitral tribunal, such as through the tobacco carveouts included in the CPTTP, the 2018 Kazakhstan-Singapore BIT, and the 2019 Australia-Singapore FTA. Most interestingly, the idea of establishing a permanent multilateral investment court (MIC), which would eventually replace investor-state arbitration, has been advanced by the EU and has been discussed in the context of the UNCITRAL Working Group (WG) III on ISDS reforms.

Interestingly, at the time when the investment regime looks to the WTO for inspiration in reforming ISDS, the WTO’s very own, centralised, dispute settlement system, and particularly its crown jewel, the Appellate Body (AB), has been at the centre of some heated controversy. Over the course of the last fifteen years, the United States government in particular has raised

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66 USMCA (n 1) Annexes 14-C, 14-D, 14-E.
67 CPTTP (n 1) art 29.5.
various concerns regarding the role and practice of the WTO AB. The Bush and Obama administrations were the first to take concrete action against the AB: respectively, in 2007, the former did not put forward one US member for reappointment (Merit Janow); in 2016, the latter blocked the reappointments of Jennifer Hillman (an American national) and Chang Seung Wha (a Korean national) to a second (and final) term. However, it is the current Trump Administration that has intensified the offensive against the AB by blocking the appointment of any new AB members from 2017 onwards.

On 27 August 2018, at the meeting of the WTO Dispute Settlement Body (DSB), the United States raised its latest objection concerning the reappointment of former UN Ambassador Shree Baboo Chekitan Servansing from Mauritius, whose first term as AB member was due to expire on 30 September 2018. The latest objection means that since October 2018, only three members have been serving on the AB: Ujjal Singh Bhatia (an Indian national), Thomas R. Graham (an American national) and Hong Zhao (a Chinese national). As the AB operates in divisions of three members, the AB will still be operational. However, the remaining members’ workload will more than double, and more worryingly, there is the possibility that the AB will be paralysed if any of the three members has to recuse themselves due to direct or indirect conflicts of interest.

While the concerns raised by the United States revolve around the way the AB has interpreted/applied certain specific procedural and substantive rules, the underlying theme behind much of the criticism is the way in which the AB has understood and practised its role as appellate tribunal. In its latest report, US Trade Representative (USTR) has stated that the ‘United States has grown increasingly concerned with the activist approach of the Appellate Body on procedural issues, interpretative approach, and substantive interpretations.’

With regard to procedural rules, the United States has complained (for some time and along with other WTO Members) about the failure of the AB to adhere to the 90-day deadline for the issuance of its reports. Article 17(5) of the WTO Dispute Settlement Understanding (DSU) states in part that ‘[i]n no case shall the proceedings … exceed 90 days’. In addition, the United States has complained that AB members have continued to serve on the AB after the expiration of their terms in order to complete the disposition of cases assigned prior to the expiry of their term. While this possibility is expressly provided for by Rule 15 of the AB Rules of Procedures, these Rules were drafted by the AB; the AB has notified the DSB of these Rules but the DSB has not formally approved of them.

72 ibid, 24-5.
73 ibid.
With regard to substantive rules, the United States has complained that the AB has interpreted some WTO-covered agreements in ways that add to or diminish the rights and obligations provided in the WTO covered agreements, which is expressly prohibited by the DSU (Article 3(2)). In particular, the United States has expressed significant concerns about a number of AB interpretations under the Agreement that significantly restrict the ability of WTO Members to counteract trade-distorting subsidies provided through State-Owned Enterprises (SOEs).

In particular, the United States has criticised the AB’s findings on the definition of ‘public body’ (ie, whether a SOE can be deemed to confer a subsidy) and on the simultaneous application of countervailing duties and anti-dumping duties under a non-market economy methodology.

Finally, the United States has also raised certain concerns that more directly relate to the way the AB has exercised its adjudicative functions. The United States has complained that AB (and panel) reports include findings unnecessary for resolving a dispute or on issues not presented in the dispute. The United States has argued that the ‘purpose of the dispute settlement system is not to produce reports or to “make law”, but rather to help Members resolve trade disputes among them. WTO Members have not given panels or the AB the power to give “advisory opinions”’. In addition, the United States has complained about the AB’s insistence that it can review the meaning of a Member’s domestic measure as a matter of law, instead of acknowledging it to be a matter of fact beyond the AB’s review. The DSU limits appeals to ‘issues of law covered in the panel report and legal interpretations developed by the panel’ (Article 17(6)). Lastly, the US has complained that the AB claims that its reports are entitled to be treated as precedent by subsequent panels absent ‘cogent reasons’, despite the lack of an express basis for this in the DSU.

One can see how some of the same criticisms have been levied against investment treaty arbitration. Two criticisms have been: (1) the excessive duration (and resultant higher costs) of investment arbitration proceedings; and (2) the expansive interpretations by arbitral tribunals

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76 DSU, Dispute Settlement Rules (n 74) art.3(2).
77 USTR, ‘2018 Trade Policy Agenda’ (n 71), 23.
78 Dispute Settlement Body, ‘Minutes of Meeting Held on 25 March 2011’ (9 June 2011) WTO Document No WT/DSB/M/294, at 18 (U.S.), 21 (Mexico), 22 (Turkey), 24 (EU), 25 (Canada), 25 (Australia), 26 (Japan), 29 (Argentina). The United States has also raised concerns with regard to the AB’s interpretation of the WTO’s Agreement on Safeguards (entered into force 1 January 1995) and Agreement on Technical Barriers to Trade (entered into force 1 January 1995).
79 USTR, ‘2018 Trade Policy Agenda’ (n 71), 26. In relation to Argentina – Measures Relating to Trade in Goods and Services, Appellate Body Report, WTO Dispute No DS453, the United States noted that more than two-third of the AB analysis (46 pages) was obiter dicta.
81 ibid.
of investment protection guarantees (in particular the fair and equitable treatment standard (the ‘FET Standard’)) to the detriment of states’ right to regulate.\footnote{The European Commission has pointed out, for example, that the obligation to guarantee a ‘stable business environment’ under the FET has been interpreted by some arbitral tribunals as offering a general guarantee against repeated legislative changes. See European Commission, Concept Paper, Investment in TTIP and beyond – the Path for Reform (2015), <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 1 July 2019. See further Federico Ortino, “The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?” (2018) 4 JIEL 845.}

However, an interesting aspect of the current discussions with regard to dispute settlement reforms in both trade and investment is that they seem to point to two opposite directions. While in the discussion about ISDS, the general direction of travel points to a more centralised, court-like system (i.e., a multilateral investment court), in the discussion about the WTO dispute settlement, the underlying sticky point raised by the United States is the very existence, and modus operandi, of a centralised, court-like institution for the settlement of trade disputes (i.e., the Appellate Body). Thus, one lesson that can be learnt is that there is no magic solution to any of the criticisms against the two dispute settlement mechanisms – each has its own shortcomings. For example, moving away from a court-like system (for trade disputes) may weaken some of the ‘rule of law’ features (like certainty, equality, impartiality) that characterise permanent judicial systems, while setting up a court-like system (for ISDS) may worsen the imbalance between a powerful judicial function and a weak political decision-making function. Any future reforms should be aware of these shortcomings and be prepared to make any necessary trade-offs.

**D. Concluding remarks**

This brief overview offers a glimpse of some of the areas of intersections between trade and investment law and policy. While both systems are facing serious challenges, the future does not need to be apocalyptic. Not only are the systems are still standing, but there seems to be consensus regarding the need to preserve each system, albeit perhaps in appropriately reformed versions. And this is where any analysis on the interaction between trade and investment may offer valuable insights about each system’s strengths and weaknesses, as well as useful lessons for each system’s inevitable future reforms.