

International Trade and Investment: Towards a Common Regime?

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- Agree with most of Mary's and Tomer's analyses, except that I see more in the WTO on investment and am more optimistic about multilateralization through RTAs (incl plurilateral ones) and eventually WTO
- Multilateralization or integration of trade and investment regimes into a coherent system should be the overarching goal
- Legally separate regimes for trade and investment. With 3000 BITs/RTAs for investment and 300 RTAs for trade, and exponential increase in investor-state arbitration, risks of fragmentation, incoherence and inconsistencies in interpretations of the rules is growing.
- Do not agree with proposed solutions to send claims on WTO law (Mary) or economic effects of subsidies (Tomer) to investment arbitrators under BITs. Compound the coherence problem and add a legitimacy concern.
- Ad hoc investment tribunals do not have the authority or capacity to make complex economic policy decisions relating to allocation of global resources or to apply WTO law.

Real World vs Legal World

- In the real world, of business and policy, trade and investment are inextricably linked and interwoven
- Businesses –make trade or investment decisions depending upon market conditions on short notice
- Growing importance of investment, particularly intra-firm investment over trade
- Policy makers – govts – consider trade and investment together (RTAs: NAFTA, US, EU, TPP)
- Lawyers – WTO dispute settlement, investment arbitration: worlds are separate; different treaties, fora, rules (substantive and procedural), remedies, different bars, arbitrators vs trade policy/law experts.

Government measures not designed solely for trade or investment purposes

- Policy perspective – govt measures often very complex and not easy to categorize as a subsidy, much less as a trade subsidy vs an investment subsidy or R & D subsidy.
- e.g. *Canada – Autos*: tariff exemption for imports of autos and auto parts from companies that had plants in Canada in a base year and that maintained certain production to sales ratios in Canada as well as certain Cdn value-added.
- *Indonesia-Autos, EC – Aircraft* –programs designed to encourage investment in production for trade, competitiveness, R&D– multiple objectives. In *Canada-Autos*, also in distribution (services).

WTO Agmts

- WTO is not strictly about market access, it is also about rules.
- Incl rules for “trade and ...”, “trade-related ...”, such as “trade-related investment” and “trade in services” .
- GATT, Art III:4, TRIMs, Art III: 8 – exempts subsidies from non-discrim obligations (why? Lesson for BITs – taxpayers); BOPs, XI, ...
- GATS does include investment measures through mode 1 and 3 – interesting, means of providing “trade in services” is through “commercial presence”. Integration of trade and investment in provision of services (intangible).
- Fn 8, Art XVI:1, mkt access commitments re mode 1 & 3 – if movement/transfers of capital are also essential to the supply of the services, Member is committed to allow those movements/transfers of capital

Subsidies

- Subsidies covered by GATS Arts II (*Canada-Autos*) and XVI & XVII(commitments).
- True that WTO Annex 1A agmts relate to trade in goods rather than pure investment transactions. However, ...
- SCM Agmt – definition of “subsidy” in Art 1 and “specificity” in Art 2 relate to enterprises not production of goods
- “serious prejudice” – 6.1(b),(c) operating losses of enterprises, (d) direct forgiveness of debt, debt repayment
- Cases have found violations for programs that were investment as well as trade and competitiveness-oriented (*Canada-Autos*).
- Panels and AB have not dwelled on the “goods” aspects of the measures in their analysis (*EC-Aircraft, Canada-Aircraft*)
- National Treatment – BITs: why extend eligibility for all subsidy programs (provide non-discrimination) to foreign nationals? Impact on taxpayers!?

History changing?

- Integrating trade and investment into a multilateral agreement may not be a utopian dream
- They are integrated as chapters in a growing number of RTAs – following the trend set by NAFTA, other US RTAs, and now EU will negotiate RTAs beginning with Canada; US TPP
- Goal of investment chapters in RTAs is not solely protection of investments but also market access
- After MAI debacle, investment was agreed as part of DDR agenda, but withdrawn at Cancun with other Singapore issues
- Developing countries may change their minds after experience with investor-state arbitration – multilateralization would be in their interest (possibly minus i-s arbitration)

Investment arbitration the cure or curse?

- No jurisdiction to hear WTO claims under BITs (difference between “claims” and “arguments”)
- Even as an “argument”, what is the status of WTO agmts and reports in investment arbitration? VCLT 31(3)(c)? Or something less as tribunals have said, not applicable law.
- Legitimacy – wary about using FET or NT to incorporate rules through arbitration that govts did not negotiate nor intend
- Legitimacy, accountability, coherence – ad hoc tribunals comprised of private commercial arbitrators deciding delicate, complex policy issues relating to efficient allocation of global resources/economic effects of subsidies and WTO law?
- Remedy is damages to investor – how does this re-adjust global imbalances in allocation of resources?
- Fragmentation, inconsistency, incoherence – growing problem in investment arbitration, would compound it – why not bring more investment-related cases to WTO (e.g. *Canada-FIT*)

Conclusion

- For businesses and policymakers, trade and investment are two sides of the same coin – inextricably linked
- International legal regimes, however, are spinning into greater fragmentation and incoherence as number of RTAs and BITs with DS and investment arbitration under them continues to grow
- How to encourage greater convergence and coherence of the rules, so that they reflect economic realities and make policy sense?
- Trust private investors to bring claims based on sound economic policy bases (?) and ad hoc tribunals comprised of private arbitrators to decide complex economic policy issues?
- Query whether this is a role even for WTO adjudicative bodies to “fill gaps”, “make law” (*EC-Aircraft*) – perhaps a more coherent result
- Only governments have the legitimate authority to negotiate new rules (based on policy) on behalf of their citizens.
- Ultimate goal therefore should be multilateralization of trade and investment rules into a coherent policy framework.