1

Introduction and overview

ROBERTO ECHANDI AND PIERRE SAUVÉ

The central contribution of international investment flows to world welfare is today beyond doubt. Today's world is one in which more goods and services are delivered to foreign markets through international production than through cross-border trade. With the dramatic growth of trade in services and the increasing fragmentation of production on a global scale, governments in developed and developing countries alike have become acutely aware of the central role that foreign investment plays in positioning their national economies in an interdependent world market and in promoting the well-being of citizens.

Over the two decades from the mid 1990s, investment has also become one of the most dynamic areas of international economic law. Such a trend stems from the negotiation of a patchy but now extensive network of international investment agreements (IIAs) around the globe and from the increasing use to which these agreements are put in addressing conflicts between foreign investors and host states.

Increasing recourse to investor–state arbitration has fuelled the development of a growing body of jurisprudence that is still evolving and has begun to attract significant scrutiny within the legal and academic communities. Heightened judicial activism in the investment field has spawned controversy within civil society, corporate and governmental circles. While many observers view the recent increase in litigation as a natural trend deriving from the development of a rule-oriented international investment regime, others consider the nature and features of investor–state arbitration increasingly ill-suited to addressing the public policy issues at stake in investor–state disputes.

Furthermore, and despite the ever closer interaction between international investment and trade, investment law has tended to evolve separately from the regulatory regime governing international trade. The failed attempt at crafting a Multilateral Agreement on Investment (MAI) in the late 1990s was very much reflective of these two 'solitudes'. Experts

from these fields all too rarely interact with one another. This has fuelled an undue segmentation of these two central pillars of international economic law and policy. With trade and investment increasingly exhibiting complementary features, there is a genuine need to assess and study both phenomena in a more integrated manner and to strive to identify and exploit the natural synergies between them in legal and policy-making terms.

This volume offers a comprehensive multidisciplinary analysis of the key challenges that are reconfiguring international investment relations. Its principal value lies in our ability to bring together many of the leading economists, lawyers and political scientists to share their vast experience not only in the field of international investment law and policy, but also in that of international trade regulation, with a view to providing readers with an overarching view of the interface between these two complementary policy domains.

The volume is structured around six thematic blocks which, taken together, will provide readers with a comprehensive understanding of the main legal and policy issues confronting the international investment community. The volume takes up the following thematic areas:

- new paradigms in the economics and political economy of international investment activity;
- the interaction between international trade and investment regulation;
- the challenge of fostering greater coherence in international investment law;
- the policy-making and rule-making challenges arising from the growth in investment litigation;
- the quest for a better balance between investment protection and liberalisation and other public policy objectives; and
- the way forward for the international investment regime.

Part I of this volume focuses on new paradigms in the economics and political economy of international investment activity. The contributions provide readers with a clear vision of the evolving landscape of international investment flows and the new types of investors emerging in the international arena. Following an introductory overview of the complex environment in which cross-border activity is today unfolding, in Chapter 2, James Zhan describes the ongoing changes in the geography of foreign direct investment (FDI) flows, new investment modalities and the new types of investors dotting the global landscape. Zhan's chapter chronicles the challenges that such transformations entail for governments in

their efforts to promote sustainable development. Chapter 3 by Theodore Moran centres on the analysis of emerging patterns of FDI flows and their impact on economic development. Moran alerts us to the dangers of visualising FDI as a homogeneous phenomenon. He argues that FDI comes in various forms that pose distinctive policy challenges to host countries. His chapter then advances an FDI nomenclature and discusses the advantages and challenges of each kind of FDI as a basis for policy recommendations.

Two further chapters in Part I, Chapter 4 by Sébastien Miroudot and Alexandros Ragoussis, and Chapter 5 by Lauge Poulsen, detail the challenges that stem from the changing nature of international investors. Private multinational enterprises (MNEs) are no longer the sole or dominant investors operating in the international arena. Alongside globally active firms, state-owned enterprises (SOEs) and sovereign wealth funds (SWFs) are becoming central actors in cross-border investment. Miroudot and Ragoussis' contribution offers quantitative evidence of the international expansion of public investors and investigates key policy concerns regarding the governance of SOEs, their performance and the environment in which they operate. Their empirical analysis is complemented in Chapter 5 by Poulsen's examination of some of the new issues confronting the international investment regime as a result of the increasing rise of 'state capitalism'. Poulsen's chapter assesses the extent to which the current international investment regime protects sovereign investors and the degree to which measures targeted at such investors in recent years can be deemed IIA-consistent.

The overview of the economics and political economy of international investment is completed by Chapters 6 and 7, where Gary Hufbauer and Stephen Gelb discuss the key findings advanced by Moran, Miroudot, and Ragoussis and Poulsen. While Hufbauer looks at the issue from a horizontal economics and political economy perspective, Gelb tackles the discussion from the vantage point of realities prevalent in developing countries. Both chapters show the importance of multidisciplinary analysis of the evolving influence of geography, new actors and new forms of investment on the development process.

Part II of the volume addresses the interaction between international trade and investment regulation. Chapter 8, written by Mary E. Footer, explores the relationship between trade and investment. Starting with a historical overview of the genesis of both legal regimes, Footer examines the impact of intra-firm investment flows on trade patterns. This is followed with an analysis of the economic and legal interaction between

IIAs and World Trade Organization (WTO) law and concludes with a look at possible future developments in the trade–investment relationship. Chapter 9, by Tomer Broude, starts by observing that a significant proportion of the international trade and investment flows occurring today take place through the global (or regional) supply chains of MNEs. For this reason, trade and investment are more closely tied today than ever before. Despite this increasing complementarity, Broude notes how the convergence of international trade and investment regulation remains piecemeal in character, lacking a unifying logic. Taking the differential treatment of subsidies in trade and investment as an example, he asks whether the continued distinctions between trade and investment law, rooted in historical and political causes that are no longer relevant, are still justified. Broude concludes that the time has come to end the existing legal bifurcation of trade and investment and explore the consolidation of these two fields of international economic law within a single regulatory framework.

Part II deepens Footer's and Broude's discussion of the relationship between international trade and investment through the comments and additional perspectives of Debra Steger (Chapter 10) and Christian Tietje (Chapter 11) on this complex subject. Steger acknowledges the close interaction between trade and investment, and argues that multilateralisation or integration of the trade and investment regimes into a coherent rules-based system should be an overarching goal of global governance reforms. Steger warns of the disadvantages of letting international arbitration tribunals become de facto responsible for harmonising inconsistent or incoherent systems of rules. She argues that only governments have the legitimate authority to negotiate new rules on behalf of their constituents. While recognising the ever closer interaction between trade and investment, Tietje is more cautious on the putative case for fusing trade and investment law. He argues that a close analysis of the different dimensions of the relationship between the trade and investment regimes reveals salient differences between the two legal fields. In his view, further comparative analysis is warranted. Only when the similarities and differences between trade and investment rules and legal regimes become significantly clearer may we contemplate the scope for meaningful convergence. Tietje's contribution advances a number of useful avenues of future research in this regard.

Addressing the fragmentation of the legal framework regulating international investment and the widespread perception that the still nascent jurisprudence has revealed a lack of legal consistency, Part III of the

volume focuses on one of the challenges more frequently raised by investment stakeholders – whether and how to foster greater coherence in international investment law.

In Chapter 12, Andrea Bjorklund starts by addressing the question of convergence on the substantive rules and disciplines of IIAs. Her chapter challenges the notion that convergence in the substantive norms of IIAs is inherently desirable, arguing that convergence should be viewed with caution and sought in some – but not necessarily all – areas of investment law. The very notion of convergence presupposes that consensus exists over the resulting rules. She cautions that this may not be the case given the increasing diversity of constituencies that people the investment policy debate. Bjorklund argues that harmonisation might be the most desirable form of convergence given the current state of investment law, which she describes as uniformity in the interpretation of identical or virtually identical language in the same context, with suitable attention paid to different interpretations stemming from different language or even from the same language in a different context. Her contribution identifies a number of practical ways to promote such an objective.

In Chapter 13, Yas Banifatemi explores the practice of investor–state arbitration and addresses the perceived lack of consistency in the international investment law and arbitration regime. In her view, much of the criticism and commentary seems to pay insufficient attention to the structural features of the arbitral framework. She argues that the actual reasons for jurisprudential divergence are often overlooked. So too are the points of convergence. Banifatemi observes that signs of a maturing regime can be seen in the instances of emerging *jurisprudence constante*. Greater consistency may be achieved, she feels, provided the reality of what can be achieved is more clearly distinguished from prevailing myths.

Chapters 14 and 15 complement the analysis of Bjorklund and Banifatemi, featuring comments and additional perspectives from Michael Ewing-Chow and August Reinisch respectively. Both authors agree on the importance of distinguishing between convergence in the treaty-making stage from coherent interpretations of largely identical standards included in IIAs. Reinisch stresses that one of the basic functions of the law is to produce predictable outcomes and generate confidence. Accordingly, coherence should remain one of the central objectives of the *system* of investment arbitration. Without disagreeing with this view, Ewing-Chow proposes that what is needed is not consistency for consistency's sake – otherwise 'bad laws will remain bad laws'. Rather, the key is that good legal interpretations replace bad ones. Regardless of the

particular perspectives of each author, the contributions by Bjorklund, Banifatemi, Ewing-Chow and Reinisch remind us that fostering coherence in a fragmented international investment regime remains a complex question. Do we want consistency in rule-making? Is such an outcome realistic or even desirable? Should we expect or wish for international tribunals promoting consistent awards given the existing variety in the contents of norms and disciplines across IIAs? And how is one to balance such issues with the need for predictability that international law should also promote? All these questions are taken up in some detail in Part III.

Part IV of the volume focuses on the policy-making and rule-making challenges arising from the recent spurt of investor–state litigation. It begins by focusing on investor–state arbitration and subsequently addresses alternative means of dispute resolution and conflict management for investors and host governments. In Chapter 16, Margrete Stevens focuses on the experience of the main venue of treaty-based investment arbitration, the International Centre for Settlement of Investment Disputes (ICSID). After documenting the considerable and sudden expansion in the ICSID caseload, she identifies ten concrete areas of operation where she suggests the ICSID could make changes with a view both to improving its day-to-day case management capabilities and to positioning itself as a stronger and more effective arbitral institution for the future. Stevens' contribution sheds light on how the ICSID could institute changes both internally and in its relationship with users in adapting to a context that is starkly different from that which prevailed at its inception half a century ago.

International investors, host governments and civil society typically disagree on many aspects related to investor–state arbitration. However, one area of possible agreement is that such litigious procedures have turned out to be slower, more costly and less predictable than originally envisaged. One of the emerging themes in this context concerns alternative means of resolving investor–state disputes. Chapter 17, co-authored by Barton Legum, Anna Joubin-Bret and Inna Manassyan, addresses the topic of mediation as an alternative to investor–state arbitration. Its co-authors describe the work undertaken by the state mediation sub-committee of the International Bar Association (IBA) to draft new rules on investor–state mediation. Chapter 18, by Roberto Echandi, introduces the concept of investor–state *conflict management* mechanisms that, among other objectives, could enable host states and investors to effectively prevent their conflicts from escalating into full-blown international disputes. After analysing the limited experience on the use of

non-litigious means to resolve investor–state disputes, Echandi focuses on the political economy of investor–state disputes and proposes a conceptual framework to guide the design of protocols for the early management of investor–state conflicts. Part IV concludes with the comments of Laurence Boisson de Chazournes (Chapter 19) and Andrea Bjorklund (Chapter 20) on a menu of options for addressing the challenges arising from increased investor–state arbitration.

Part V of the volume addresses another key concern in the debate on international investment law, that of how best to promote an appropriate balance in IIAs between investment protection and other key public policy objectives. Recognising that the international investment regime is often criticised for the asymmetry it generates between the rights of investors and those of host states to adopt regulatory measures for the public good, Chapter 21, co-authored by Anne Van Aaken and Tobias Lehmann, explores economic insights into the link between foreign investment and sustainable development. The authors advance a number of interpretative arguments and techniques that could be applied to investor–state arbitration with a view to making sustainable development objectives more prominent in international adjudication. Chapter 22, co-authored by Barton Legum and Ioana Petculescu, focuses on a very concrete legal issue, addressing the potential legal impact of embedding in IIAs a clause providing for general exceptions along the lines of Article XX of the General Agreement on Tariffs and Trade (GATT). The authors ask whether the inclusion of such a clause would be compatible with the goals of investment protection treaties and whether it would enhance the existing legal framework by helping balance investor rights and the regulatory powers of the host state. Part V concludes with the comments of Céline Lévesque (Chapter 23) and Susan Franck (Chapter 24). Lévesque argues that including a general exception like that of GATT Article XX in IIAs may well limit, rather than expand, the 'policy space' sought by host governments. In Chapter 24, Franck addresses the question of balancing from a different perspective, focusing on the management of stakeholders' expectations of the international investment regime. Franck's contribution not only addresses the main points raised in Part V of the volume, but also links her analysis to the central point advanced by Echandi in Chapter 18 on the need for the current international investment regime to complement international adjudication with additional mechanisms of conflict management.

Part VI, the concluding section, looks to the future by exploring possible ways forward for the international investment regime. This part

features several contributions by prominent academics and practitioners advancing novel ideas on the question of whether and how the current fragmented international investment regime could gradually evolve into a more coherent international governance system.

Part VI comprises five chapters. Chapter 25 by Christoph Schreuer focuses on the issue of coherence and consistency in international investment law. After observing that international investment law often lacks coherence and consistency in several regards, Schreuer offers a number of possible remedies. He states that some of these remedies – such as proper interpretations of most-favoured nation (MFN) clauses – are widely available, but that their effectiveness is somewhat limited. Some of the other possible remedies – such as the negotiation of a multilateral agreement on investment – which would be highly effective, appear unattainable at least for the time being. Thus, he posits that a realistic option for achieving consistency of interpretation of IIAs might be the introduction of a preliminary rulings procedure. Chapter 26 by Rudolph Dolzer focuses on the debate surrounding the issue of consistency in investment arbitration. Dolzer identifies three fundamental lines of argument, which are different in nature and lead to different solutions, namely, embracing the status quo, calling for a major regime overhaul, or improving the current regime in an incremental manner. Chapter 27 by Peter Muchlinski focuses on the key issues that, in his view, should guide the reform of the international investment regime so as to foster greater systemic coherence. Muchlinski argues that to promote such an endeavour, the reforms should take into account at least three fundamental dimensions: first, a reconsideration of the conceptual basis of IIAs, second, a discussion of the constitutional legitimacy of IIAs, and third, a recalibration of the balance of rights and responsibilities of both parties to such agreements.

As in each of the previous parts, Part VI of the volume complements the analyses undertaken with comments and additional perspectives, in this case by Marino Baldi in Chapter 28, and Rainer Geiger in Chapter 29. As the various chapters of Part VI evidence, no discernible consensus has yet to emerge globally on the best way forward for the international investment regime. However, the reflections on offer in the volume's concluding part offer a rich menu of options with which to reconfigure the new international investment agenda and guide the discussion that investment stakeholders will need to hold as part of the evolutionary process of international investment law.

The editors hope that readers will find fresh and multidimensional perspectives on the prospects of international law and policy in this volume.

The contributions we have assembled represent an attempt to combine a strong economic and political analysis with a comprehensive legal assessment of the issues confronting all investment stakeholders – governments, legal practitioners, academics, international organisations and representatives from civil society, including in the corporate world. The editors feel strongly that such multidimensionality holds the key to advancing a workable future agenda of interest to the world's increasingly diverse investment community.

PART I

Current paradigms in the economics and political economy of international investment activity