GENERAL INTERESTS OF HOST STATES IN INTERNATIONAL INVESTMENT LAW

It is a function of sovereign States to take action in order to maintain their financial stability, stimulate economic development or to further their non-economic interests (such as health, the environment and food security). However, such measures can conflict with the rights granted to foreign investors under international treaties. Regulators and policy makers must take States' international commitments towards foreign investors into account when making decisions and when negotiating must also avoid resorting to protectionism in drafting new treaties.

With this tension in mind, this book offers a balanced reappraisal of bilateral treaties and regional agreements on foreign investments. The sensitive issues are examined in the light of the case law of arbitral investment tribunals and other international courts, and the analysis highlights how cross-fertilisation between trade and investment law can assist in resolving conflicts.

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EDITORS' PREFACE

This volume brings together sixteen specialists, mostly academics but also practising lawyers in the field of international investment and trade law. The focus of their contribution is primarily the 'protection' of general interest of host States under bilateral investment treaties and other agreements, and on how to reconcile this concern with the traditional primary focus of those treaties, namely the protection of foreign investors.

The issue of safeguarding the policy space of host States when they adopt general regulations and measures in the pursuit of public interest which are liable to prejudice and discriminate against foreign investors has come to the forefront with the recent economic and financial crises. Prudential and other urgent measures for the preservation of financial stability and the viability of the banking system have been accused of having discriminated against foreign business entities and investors. Already before the crisis, the challenge of general measures by aggrieved investors in high profile arbitral litigations, resulting in huge amounts being awarded to claimants at the cost of host States' budgets, has raised the issue of the proper limits of the protection afforded by Bilateral Investment Treaties (BITs) against general measures and regulation that may qualify as indirect expropriation. This would extend treaty coverage well beyond the traditional core protection against arbitrary, discriminatory and confiscatory measures.

As a result, the very legitimacy of BITs and of the direct arbitral dispute settlement process they establish has been questioned. A few countries are opting out from the system or at least signalling their rejection of direct investor–State arbitration. This would mean re-politicising investment disputes and discriminating against investors from weaker countries unable to obtain effective diplomatic protection from their home States. The process of negotiating new treaties goes on, however, to the point of involving the two largest world economies, the United States and China. The trend includes major regional trade agreements comprising investment chapters, on the model of NAFTA, being negotiated in the

Transatlantic and Transpacific arenas as well as in the Far East. In all of these negotiating fora, new clauses are being devised, with a view to shielding host States from potentially abusive claims by investors against bona fide non-discriminatory general regulation in the public interest. This evolution puts pressure on arbitral case law and should encourage both treaty negotiators and arbitrators to look at WTO law and its jurisprudence for a model of a multilateral, more balanced and legitimate system.

Finally, given the active role of the European Parliament in shaping the investment policy of the European Union, the EU may well become not just a new actor but a new type of actor in the evolution of investment law and policies. Current negotiations of investment chapters in free trade agreements and economic partnership agreements between the EU and major trade partners can contribute to the emergence of a new pattern in international investment law that is more deferent to the general interests of host States.

This collection of chapters investigates systematically these current pressing issues from a variety of points of views. Most of them stem from a collective research on the evolution of international investment law, financed by the Italian Ministry of Education and University (PRIN project 2008–12, Grant No. 602366). The European dimension has been added, with chapters by authors from various other countries, thanks to the participation of Bocconi University through its International Law and Economics programme of the PhD school in the Marie Curie 'DISSETTLE' (economic dispute settlement) doctoral and post-doctoral programme, financed by the European Commission (Grant No. 264633). This project links the Geneva Graduate Institute, Université Libre of Brussels and the Universities of St Gallen, Warsaw and Bocconi, focusing on both the legal and economic dimensions of investment, trade and competition international dispute settlement. The Editors thank Dr Geraldo Vidigal and Dr Emily Lydgate, the DISSETTLE researchers at Bocconi University, for their valuable assistance with the final revision of the volume.