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Assessing Convergence in International Economic Disputes – A Framework

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By the early 2000s, the international trade and investment regimes had become leading symbols of the fragmentation of international law.[1] Despite periods of shared history and focus,[2] these two regimes could not be more different in their approach to the regulation of cross-border economic activity. They offered divergent approaches to the model of state membership (multilateral/bilateral), the construction of state

[1] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553–9; Panagiotis Delimatsis, 'The Fragmentation of International Trade Law' (2011) 45(1) *JWT* 87. On fragmentation in other areas of international law, see: Margaret Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012); Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des cours* 101; Tomer Broude and Shany Yuval (eds.), *Multi-Sourced Equivalent Norms in International Law* (Hart, 2011); Marjan Ajevski, *Fragmentation in International Human Rights Law: Beyond Conflict of Laws* (Routledge, 2015); Barbara Stark, 'International Law from the Bottom Up: Fragmentation and Transformation' (2013) 34(4) *Pennsylvania JIL* 687.

[2] From the nineteenth century to the mid-twentieth century, both bilateral Friendship, Commerce and Navigation (FCN) Treaties and colonial-era capitulation agreements between European powers and Asian states often dealt with international trade and investment relations in a single document. Disputes that arose in this period relating to trade and foreign investment were largely resolved extra-legally through diplomatic channels or force. Except for claims commissions and a number of state-state arbitrations, this period saw few instances of formal international adjudication. By the mid-twentieth century the increased legalization and judicialization of international trade and investment law became apparent. However, during this period international trade and investment law – while rapidly expanding – developed along very different paths. The international trade regime witnessed the development of the General Agreement on Tariffs and Trade (GATT) 1947 and later the multilateral World Trade Organization (WTO) regime with a permanent dispute settlement mechanism. In comparison, the international regulation of FDI took a different course; it is a regime governed by over 3,500 bilateral treaty relationships that provide for ad hoc investor-state arbitration should a dispute arise.

obligations (degree of specificity), and dispute resolution (permanence of adjudicatory body, standing for private actors, deference to respondent states, and the types of remedies). After the failure to achieve greater convergence in the 1990s through a WTO-based multilateral agreement on foreign investment regulation, and the subsequent explosion of bilateral investment treaties (BITs) and related disputes, fragmentation in international economic law seemed entrenched.[3]

However, recent trends suggest that international economic law may be witnessing a renaissance of convergence – both parallel and intersectional. For a start, recent bilateral and multilateral free trade agreements exhibit a marked tendency to include chapters on investment protection and investor-state dispute settlement (ISDS),[4] representing a spatial merging of the two fields (see the increasing annual proportion of BITs to treaties with investment protection provisions in Figure 1.1 below). This textual clustering of international trade and investment agreements may result in substantive convergence, especially given the shared objectives of these agreements, liberalizing trade and promoting investments and development, and the need to interpret the provisions in the context of these merged agreements.[5]

Institutionally, the two regimes appear to be creeping towards each other. In the wake of its post-Lisbon competences over foreign direct investment (FDI), the EU has promoted standing investment courts in its new generation of trade and investment agreements,[6] as well as the possibility of a Multilateral Investment Court (MIC)[7] with an Appellate Mechanism that may resemble that of the WTO Dispute Settlement

[3] See Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016), ch 2.

[4] See the Trans-Pacific Partnership (TPP), The Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) and the proposal for the Transatlantic Trade and Investment Partnership (TTIP). Besides investment, these new generation free trade agreements – especially those negotiated by the EU – also include fields that were traditionally not part of trade agreements, such as the liberalization of services, economic development, or the protection of intellectual property rights. See Maxim Usyinin and Szilárd Gáspár-Szilágyi, 'The Rising Trend of Including Investment Chapters into PTAs' (2018) *Netherlands Yearbook of International Law 2017*, ch 9, 267–304.

[5] Art 31, Vienna Convention on the Law of Treaties.

[6] See Arts 8.27 and 8.28 CETA; Arts 12 and 13, Ch II, EU-Vietnam FTA; Arts 9 and 10, Sec 3, TTIP Proposal. See Szilárd Gáspár-Szilágyi, '*Quo Vadis* EU Investment Law and Policy? The Shaky Path towards the International Promotion of EU Rules' (2018) 23(2) *European Foreign Affairs Review* 167.

[7] Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes* (20 March 2018), http://data.consilium.europa.eu/doc/document/ST-12981–2017-ADD-1-DCL-1/en/pdf, accessed 21 June 2018.

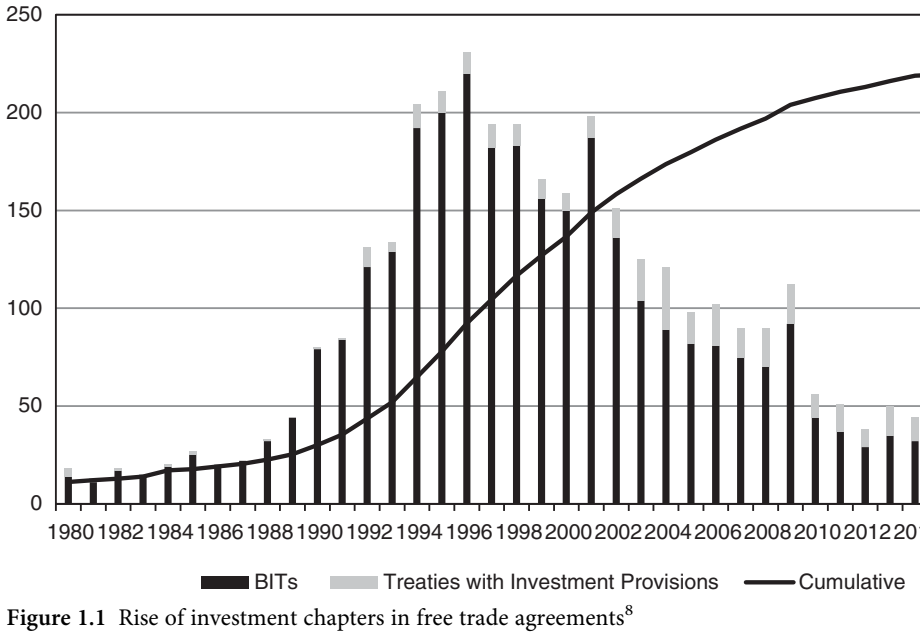

Figure 1.1 Rise of investment chapters in free trade agreements[8]

[8] Source: UNCTAD International Investment Agreement Navigator, http://investmentpolicyh accessed 21 June 2018.

Understanding (DSU). This attempt could result not only in the creation of a standing, multilateral court, but also in considerable design convergence between the WTO Appellate Body and the MIC's Appeals Mechanism. Even China – a state frequently seen as sceptical about international adjudication – has signalled potential support for an appellate review panel in investor-state disputes.[9]

The adjudicative process also reveals signs of convergence. Investment arbitrators have adopted various interpretive techniques common in trade law, possibly because international investment law is undergoing a legitimacy crisis similar to that experienced by the WTO in its early days.[10] These developments may be also a function of purported broader trends of defragmentation across international courts and tribunals.[11] Adjudicatory convergence is enhanced by a growing use of precedents in investor-state arbitrations, which may evince an attempt to create a more judicial-like regime that is coherent, consistent and hierarchical.[12] This has been reinforced, from the bottom up, by private actors that have accelerated the thematic integration by pushing simultaneous litigation on the same issues (e.g. tobacco regulation,[13] market access, intellectual property[14]) in both regimes.

These diverse claims of convergence are of legal, empirical and normative interest. *Legally*, convergence suggests that the tools and techniques in international trade law may be of growing relevance in international investment law and vice versa. Convergence may be reshaping law and legal doctrine.

[9] *United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform)*, Thirty-fifth session, New York, 23–27 April 2018, Intervention of China on 24 April. See also: 'Possible reform of investor-State dispute settlement (ISDS) - Submission from the Government of China', UN Doc No A/CN.9/WG.III/WP.177 (19 July 2019) and Anthea Roberts and Taylor St. John, 'UNCITRAL and ISDS Reform: China's Proposal', EJIL: Talk!, 5 August 2019.

[10] Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Arbitrator?' (2018) 29(2) *European Journal of International Law* 551.

[11] Mads Andenæs and Eirik Bjørge, *Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015); Mads Andenæs, 'Reassertion and Transformation: from Fragmentation to Convergence in International Law (2015) 46 (3) *Georgetown JIL* 685; Jed Odermatt, 'A Farewell to Fragmentation; Reassertion and Convergence in International Law' (2016) 14(3) *IJCL* 776.

[12] Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press, 2017).

[13] See *Philip Morris Asia Limited* v. *The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012–12; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.

[14] See *Eli Lilly and Company* v. *The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2.

Empirically, the discourse has implications for policymaking and adjudication practices. It suggests or reifies a trajectory of reform that would privilege certain policy options and sequences over others. *Normatively*, convergence discourse offers a rebuff to concerns over the legitimacy of international law in general and international economic law in particular. The system is presented as uniform, coherent and stable rather than fragmented, conflicted and chaotic.

Yet, convergence discourse also warrants scepticism. Not all agree that general convergence across international law is as significant as claimed[15] and the identified incidences in international economic law may be both deceptive and misleading. In many cases, the investment chapters of FTAs are cordoned off from the rest of the agreement, with separate rules and procedures for dispute settlement. A single concrete dispute can result in two adjudication processes under the same free trade agreement (FTA), one leading to investor-state arbitration, and the other to a state-state dispute under the agreement's trade rules.[16] Moreover, recent disputes based on investment chapters in FTAs to date (e.g. primarily under the North American Free Trade Agreement (NAFTA) and the Central American-Dominican Republic Free Trade Agreement (DR-CAFTA)) appear to treat the investment chapters as stand-alone agreements with little reference to other sections of these FTAs.[17] In any case, the emergence of a handful of mega-regionals that include both trade and investment chapters[18] does not obviate the reality that the vast majority of trade and investment agreements coexist as separate treaties.

Furthermore, emerging powers such as China and India and the current US administration are signalling their own preferences for the development or even dismantling of various parts of the international economic law regime. International trade law itself is far from being a unified field and we may be witnessing convergence in reverse. The growing spread of bilateral

[15] Malcolm Langford, 'The New Apologists: The International Court of Justice and Human Rights' (2015) 48(1) *Retfærd* 49–78.

[16] Roger P. Alford, 'The Convergence of International Trade and Investment Arbitration' (2013) 12 *Santa Clara Journal of International Law* 35, 44–9; Andrea K. Bjorklund, 'Convergence or Complementarity' (2013) 12 *Santa Clara Journal of International Law* 65, 71–3.

[17] See Nicholas DiMascio and Joost Pauwelyn, 'Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102(1) *AJIL* 48–89.

[18] Following the CJEU's *Opinion 2/15* on the competences to conclude the EU-Singapore FTIA, the European Commission decided to split the EU-Singapore FTIA into a separate trade and a separate investment agreement.

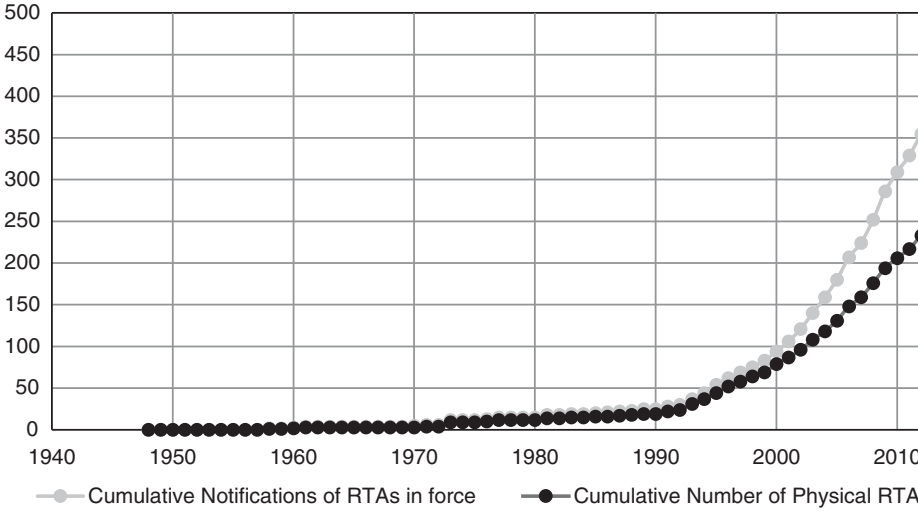

Figure 1.2 Evolution of regional trade agreements (1948–2017)[19]

[19] Source: WTO Secretariat, http://rtais.wto.org/UI/Charts.aspx#, accessed 21 June 2018.

and regional free trade agreements (see Figure 1.2 above) now resembles the diffuse and fragmented web of international investment agreements (IIAs) that has resulted from years of largely bilateral agreements (see Figure 1.1 above). These types of preferential regional free trade agreements often contain their own dispute settlement mechanisms, which all combined may increasingly come into conflict with the monopoly on international trade dispute settlement that the WTO has largely held since its inception. Finally, it is not clear how adjudicatory practices and interpretations have converged: doctrinal variance remains a strong feature of investor-state arbitration and WTO dispute settlement processes make little reference to other regimes, especially international investment law.

This volume therefore aims to contribute to both the general debate on the fragmentation of international law and the particular discourse concerning the interplay between international trade and investment,[20] with a specific focus on dispute settlement.[21] It especially seeks to move beyond broad observations or singular case studies to provide an informed and wide-reaching assessment by investigating multiple standards, processes, mechanisms and behaviours. The topic is also timely, given the new reform processes in international investment law and dispute resolution, the ongoing public backlash against investment law and its recent return in trade law, the proliferation of more complex FTAs, and the continuing impasse of the multilateral trade system in achieving the Doha Round of trade negotiations – in which presumptions about the state of the two systems abound.

[20] Kurtz (n. 3); Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014–2015) 36(1) *Pennsylvania JIL* 1; Debra P Steger, 'International Trade and Investment: Towards a Common Regime?' in Roberto Echandi and Pierre Sauvé (eds.), *Prospects For International Investment Law and Policy* (Cambridge University Press, 2013), p. 156; R Michael Gadbaw and Robert B Thompson, 'Trade, International Economic Law, and the Challenges of the Global Economy: A Symposium in Honor of John H. Jackson' (2014) 14 *JIEL* 601; Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) *AJIL* 45; Andrew Mitchell, Elizabeth Sheargold and Tania Voon, 'Good Governance Obligations in International Economic Law: A Comparative Analysis of Trade and Investment' (2016) 17 (1) *JWIT* 7.

[21] Todd Allee and Manfred Elsig, 'Why Do Some International Institutions Contain Strong Dispute Settlement Provisions? New Evidence from Preferential Trade Agreements' (2016) 11(1) *The Review of International Organizations* 89; Alford (n. 16); Bjorklund (n. 16); Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus' (2015) 109(4) *AJIL* 761; DiMascio and Pauwelyn (n. 17).

1 Research Design

Comparing adjudication in international trade and investment law, we ask: To what extent has convergence (or divergence) occurred? And, under what conditions does it emerge? In order to provide sufficient focus and an original answer to these questions, the authors concentrate on the *adjudication of disputes* rather than the broader treaty framework. The volume is thus structured around three aspects of adjudication: *design* of the dispute settlement system (Part I), the *conduct* of the adjudicative process (Part II) and the *behaviour* of the adjudicators (Part III). While this limits the potential field of convergence, it is important to remember that much of the controversy around both systems surrounds their adjudicatory dimensions (especially in international investment law).

Methodologically, a normative stance is largely eschewed in favour of a range of 'doctrinal', quantitative and qualitative approaches that are used to address the research questions. However, most authors also take up normative questions in their conclusions – looking ahead to what forms of convergence or divergence might be necessary and desirable. Moreover, divergence might be preferred in some circumstances. Not all convergence may be healthy. For example, the WTO Appellate Body's interpretation of the national treatment obligations under the GATT may not always be appropriate for investor-state arbitration tribunals given different treaty wordings across BITS.

2 Thinking about Convergence and Divergence

In determining the *extent* of convergence, it is important to recognize that there is no bright line or clear yardstick for determining its nature or degree. Signs of 'convergence' for one scholar might be deemed as random, insignificant, secluded or momentary by another. Thus, no strict definition of divergence or convergence is offered in the book, and the authors are free to confine themselves to a singular understanding if so desired.

This is further complicated by the terms themselves. According to the *Oxford Dictionary*, the verb 'to converge' entered the English language in the seventeenth century as a composite Latin word made up of *con* ('together') and *vergere* ('incline'). While the verb implies some form of 'finality' (the meeting of elements from different directions at a certain 'end point'), the noun 'convergence' refers to a process without the need

of a 'final point'. Divergence, with *dis* ('in two ways'), denotes the reverse process of drifting apart, moving into different directions – but without connoting a complete dissolution. Both concepts, albeit opposite to one another, denote an *ongoing process*, without the necessity of some form of result. Considering this lack of finality, it is somewhat impossible to establish an endpoint.

While the indeterminate nature of these concepts makes the task methodologically challenging, we can identify four relevant types of convergence (with corresponding divergence), which we use to analyse the volume's results.

- The first is *absolute* convergence or divergence, in which adjudication of international trade and investment disputes occurs under an identical/completely separate framework of rules and processes. It would suggest that the two legal orders are conceptually, structurally and interpretively the same/different with virtually complete overlap/no overlap. Such convergence or divergence is hard to find in international law, even in nominally similar fields such as human rights.
- The second is *structural*, where the design and structures of dispute settlement mechanisms – under international trade and investment agreements – are separate but similar. Each regime remains distinct, but the dispute settlement processes become increasingly indistinguishable. This has partly occurred with fields such as human rights and international criminal law; although divergence is equally common, particularly with new regional courts in Africa and the Caribbean.[22]
- The third is *sociological*, through which the network and community of actors involved in the adjudication of international trade and investment disputes (parties to disputes, counsel and adjudicators) increasingly converge and engage with each other through judicial or general dialogue, cross-citation and double-hatting across the two regimes.[23]

[22] Theresa Squatrito, 'Resourcing Global Justice: The Resource Management Design of International Courts' (2017) 8 *Global Policy* 62.

[23] For an analysis of the actors involved in the different regimes, see Malcolm Langford, Daniel Behn and Runar Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) *JIEL* 301; Marcelo Varella, 'Building International Law from the Inside Out: The Making of International Law by Infra-State and Non-State Actors', https://ssrn.com/abstract=2288209, accessed 21 June 2018; Rachel Cichowski, 'Women's Rights, the European Court, and Supranational Constitutionalism' (2014) 38 *Law and Society Review* 489.

- The final is *epistemic*, with the cross-usage of similar interpretive techniques and methods between trade and investment tribunals. Such interpretive convergence would also suggest that there is learning between the two regimes – whether doctrinally or strategically. Andenæs and Bjørge claim that this is now common between a range of international courts on questions of human rights.[24]

Moreover, we can seek to evaluate the degree, direction and permanence of convergence and divergence. Thus, which field is moving towards the other, to what extent, and for how long? Is investment law moving steadily towards trade law, is it the reverse, or is it mutual? In addition, we can ask what happens in the shadow of convergence – are other less visible areas diverging? As discussed, both concepts – convergence and divergence – albeit opposite to one another, denote an *ongoing process*, without the necessity of some form of result. Various views 'on converging and diverging trends' are constantly put forward in the literature, including studies on harmonization,[25] unification,[26] Europeanization,[27] internationalization[28] and defragmentation.[29]

[24] Andenæs and Bjørge (n. 11).

[25] See Larry Catá Backer, *Harmonizing Law in an Era of Globalization: Convergence, Divergence and Resistance* (Carolina Academic Press, 2007); Silvia Fazio, *The Harmonization of International Commercial Law* (Kluwer, 2007); Stephen Weatherill and Stefan Vogenauer (eds.), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart, 2006).

[26] See Alkuin Kölliker, *Flexibility and European Unification: The Logic of Differentiated Integration* (Rowman and Littlefield, 2006); Sacha Prechal and Bertvan Roermund (eds.), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press, 2008).

[27] See Francis Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart, 2000); Thomas Watkin (ed.), *Europeanisation of Law* (BIICL, 1998); Jan Wouters et al. (eds.), *The Europeanisation of International Law* (Springer, 2011).

[28] Marcelo Varella, *Internationalization of Law: Globalization, International Law and Complexity* (Springer, 2014); Jan Klabbers and Mortimer Sellers (eds.), *The Internationalization of Law and Legal Education* (Springer, 2009); Jens Drolshammer and Michael Pfeifer (eds.), *The Internationalization of the Practice of Law* (Springer, 2001).

[29] Martti Koskenniemi (ed.), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' Report of the Study Group of the ILC, Erik Castrén Institute Research Reports (2007); Margaret Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2015); Andrzej Jakubowski and Karolina Wierczyńska (eds.), *Fragmentation Versus the Constitutionalisation of International Law: A Practical Inquiry* (Routledge, 2016); Philippa Webb, *International Judicial Integration and Fragmentation* (Oxford University Press, 2016); Andenæs and Bjørge (n. 11).