

**WHY DO STATES NEED TO BE AWARE OF THE  
INTERNATIONAL TRADE LAW AND INTERNATIONAL  
INVESTMENT LAW INTERACTION WHEN REGULATING?**

*DEVLETLERİN DÜZENLEME GETİRİRKEN NEDEN ULUSLARARASI  
TİCARET HUKUKU VE ULUSLARARASI YATIRIM HUKUKU DENGESİNİ  
BİLMESİ GEREKİR?*

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**ABSTRACT:** Different areas of law can have overlapping topics. International trade law and international investment law with different historical development and different goals are not detached from each other. There is an interaction between the two areas of law. National legislation might have consequences in both areas of law. Thus it is vital for the states when regulating to take the two legal areas of law into consideration in order to minimize their liability. This study aims to emphasize the interaction between international trade law and international investment law and show why it is important for the state to be aware of this interaction with state's right to regulate on health reasons example.

**Key Words:** International Trade Law, International Investment Law, Interaction Between International Trade Law and International Investment Law, States' Right to Regulate

**ÖZ:** Farklı hukuk alanlarının örtüştüğü konular olabilmektedir. Örneğin uluslararası ticaret hukuku ve uluslararası yatırım hukuku farklı gelişmiş ve farklı amaçlara sahip olsa da birbirinden kopuk değildir ve aralarında etkileşim bulunmaktadır. Ulusal bir düzenlemenin iki hukuk alanında da sonuçları olabilecektir. Bu sebeple devletlerin ulusal düzenleme yaparken iki hukuk alanına da dikkate alması sorumluluklarını azaltması açısından çok önemlidir. Bu çalışma uluslararası ticaret hukuku ve uluslararası yatırım hukuku arasındaki etkileşime dikkat çekmeyi ve devlet açısından bu etkileşimin bilinmesinin önemini vurgulamayı amaçlamaktadır. Çalışmada devletin sağlık sebebiyle düzenleme getirme hakkı örnek olarak incelenecektir.

**Anahtar Kelimeler:** Uluslararası Ticaret Hukuku, Uluslararası Yatırım Hukuku, Uluslararası Ticaret Hukuku ve Uluslararası Yatırım Hukuku Etkileşimi, Devletin Düzenleme Getirme Hakkı.

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## INTRODUCTION

International investment law and international trade law are two distinct areas of law with differences in historical development, agreements, goals and dispute settlement mechanisms. The interaction between the two areas of law has increased within time due to new overlapping topics. This interaction lead to some convergence but some divergence remains between the two systems. Both areas of law usually bind States; thus national legislation has to be compatible with both. Different regulations and rules in the two areas of law would inevitably lead to violation of one, a domestic measure fulfilling the conditions of one area of law might be violating the other and this would lead to state's liability. Differences in the two areas of law especially in dispute settlement mechanisms have created an option for the affected parties, sometimes for the States or to investors for 'a cherry picking' approach- 'forum shopping' to choose the mechanism in one system where it is more advantageous to them. This was not envisioned or desired at the beginning where the trade agreements or the investment agreements were discussed. In order to prevent state's liability and the 'forum shopping' the requirements of international trade and investment law should be considered together. Because different groups negotiate the agreements for the two areas of law it even more important to emphasize the importance of the interaction between the two areas of law especially for drafting the future agreements.

This study aims to emphasize that these areas of law, although developed independently, overlap in some areas. The study also aims to show the interaction between international trade law and international investment law and how national legislation can have consequences in both systems. National legislation on state's right to regulate on health reasons will be taken as an example for this analysis. If states when regulating take two areas of law into consideration it would both prevent 'forum shopping' and states' liability.<sup>1</sup>

### **International Trade Law and International Investment Law**

International trade law and international investment law developed independently with different goals and different characteristics.<sup>2</sup> But the two legal systems are closely related.<sup>3</sup>

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<sup>1</sup> Earlier version of this study with a different scope was published at: Pınar Karacan, "Uluslararası Ticaret Hukuku ve Uluslararası Yatırım Hukuku Etkileşimi: Devletin Sağlık Sebebiyle Düzenleme Getirme Hakkı", Kadir Has Üniversitesi Hukuk Fakültesi Dergisi, Cilt 2, Sayı2, 2005 Aralık, 77-95.

<sup>2</sup> Joost Pauwelyn, "The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus", *Graduate Institute of International and Development Studies*, October 1, 2015, (Pauwelyn),

International trade law can be discussed in the World Trade Organization (WTO) framework. WTO, with its General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) agreements, aims to liberalize trade and remove trade barriers. WTO also has a very effective Dispute Settlement Mechanism.<sup>4</sup>

International investment law regulates the treatment of foreign investment and investors and applicable principles.<sup>5</sup> International investment law considers the rights of the investors and ‘market access’ issues within the framework of the host state’s sovereignty rights.<sup>6</sup> The initial source of international investment law is international customary law.<sup>7</sup> Also, the basis of the obligations of international investment is bilateral agreements; and they aim to provide the minimum protection to investors.<sup>8</sup> Bilateral investment treaties (BITs) are about the economic treatment that the investors have once they enter the country.<sup>9</sup>

Between the two areas of law dispute settlement procedures are different from international trade law. The common dispute settlement in international investment law is arbitration. ‘Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (ICSID) is the main agreement in

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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2549050](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2549050), 7; Sergio Puig, “The Merging International Trade and Investment Law”, *Berkeley Journal of International Law*, Vol. 33, Issue 1, 2015, 1-59, 8.

<sup>3</sup> Pauwelyn: 7.

<sup>4</sup> Pauwelyn, 7; Nicholas DiMascio and Joost Pauwelyn, “Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin”, *American Journal of International Law* (10 Am. J. Int’l L. 48) 2008, 53-54 (DiMascio&Pauwelyn).

<sup>5</sup> Pınar Baklacı, *Uluslararası Yatırım Hukukunda En Çok Gözetilen Ulus Muamelesi*, Beta Yayınları, İstanbul, 2009 (Baklacı). For further information: M. Sornarajah, *International Law on Foreign Investment*, 2nd Edition, West Nyack, NY, USA: Cambridge University Press, 2004, Bilgin Tiryakioğlu, *Doğrudan Yatırımların Uluslararası Hukukta Korunması*, Ankara, Dayınlarlı Hukuk Yayınları, 2003, Sedat Çal, *Uluslararası Yatırım Tahkimi ve Kamu Hukuku İlişkisi*, Ankara, Seçkin 2009

<sup>6</sup> Giorgio Sacerdoti, “Trade and Investment Law: Institutional Differences and Substantive Similarities”, *Jerusalem Review of Legal Studies*, Vol. 9, No. 1, 2014, 1-12, 3.

<sup>7</sup> Markus Wagner, “Regulatory Space in International Trade Law and International Investment Law”, *University of Pennsylvania Journal of International Law* (U. Pa. Int’l L, Vol.36), 18-19.

<sup>8</sup> Sacerdoti: 3-4.

<sup>9</sup> Sacerdoti: 5.

this area. Between 2.300 BITs for dispute settlement requires ICSID arbitration.<sup>10</sup> In sum, international investment law deals with the treatment that the foreign investments and investors will have in one's state and consists of the rules and principles in this area.<sup>11</sup>

Although both areas of law aim for economic development when one looks at the differences among them: trade agreements are about the 'market access' and the compromises that states give to services and goods in order to mutually increase trade. International trade law consists of multilateral agreements based on principles of 'non discrimination'.<sup>12</sup> However international investment agreements deal with the protection of the investor once she enters the country.<sup>13</sup>

WTO deals with regulations on 'market access' without discrimination and unreasonable conditions, whereas bilateral investment treaties deal with 'post-establishment' for the foreign investor.<sup>14</sup> Bilateral investment treaties are not part of a structural organization.<sup>15</sup> The two areas of law have different goals. International investment law developed from different jurisdictions on protection of foreign investments.<sup>16</sup> There are also differences on the dispute settlement procedures and who will make the decisions on the disputes.<sup>17</sup> Despite all these differences between the two areas of law there are some areas that overlap these will be discussed in the following sections.

### **How National Regulations Affect International Trade Law And International Investment Law**

A national legislation can have consequences in both international trade law and international investment law. These consequences may be similar for the two areas of law in some cases, and different in others. The state would be responsible

<sup>10</sup> DiMascio and Pauwelyn: 54-56; Pauwelyn: 7; Sergio Puig, "International Regime Complexity and Economic Law Enforcement", *Journal of International Economic Law*, 2014, 17, 491-516 (Puig (2)),

<sup>11</sup> Esen Akıntürk, Pınar Baklacı, "İki Taraflı Yatırım Antlaşmaları Hakkında Genel Bir İnceleme", *Banka ve Ticaret Hukuku Dergisi*, C. XXV/S. 4/Aralık, 2009, 477-536, (Akıntürk&Baklacı).

<sup>12</sup> Wagner: 12.

<sup>13</sup> Joost Pauwelyn, "The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform, International and Investment Law", Proceedings of the Annual Meeting (*American Society of International Law*), Vol 108, April 2014, 255-258, (Pauwelyn (2)), 255.

<sup>14</sup> Sacerdoti: 5.

<sup>15</sup> Sacerdoti: 7.

<sup>16</sup> Wagner: 34.

<sup>17</sup> DiMascio and Pauwelyn: 59; Pauwelyn: 3.

for any violation: being in compliance with one system cannot be used as an excuse and would not save the state from potential dispute settlement mechanisms. And in some situations, measures required by one system for the state to fulfil, like WTO countermeasures, might violate state's obligations under international investment agreements.<sup>18</sup>

International trade law and international investment law are not detached from each other. As will be discussed in this study there is interaction and even convergence between the two areas of law.<sup>19</sup>

There are two situations to consider when investigating the relationship between international trade law and international investment law. The first situation is where a national legislation has consequences in both systems at the same time. The second situation is "intra regime shifting" where parties choose between one strategy between two different agreements.<sup>20</sup> In both situations, states have to consider both areas of law together and evaluate the interaction between the systems in order to prevent potential conflicts that might raise state's liability. Harmony between international trade law and international investment law is important.<sup>21</sup>

A national legislation having different outcomes in both areas of law would lead to conflict and state's liability.<sup>22</sup> It is argued that having different decisions in both systems would limit and weaken state's 'right to regulate' because the national legislation would be in conflict with one area of law.<sup>23</sup>

There are couple of possible scenarios due to interaction among the two areas of law: when a national legislation is disputed under two systems at the same time, when a national legislation that that qualifies as a trade dispute is disputed under investment rules or vice versa. This situation might be called as an "opportunistic behaviour".

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<sup>18</sup> Junianto James Losari and Michael Ewing-Chow, "A Clash of Treaties: The Lawfulness of Countermeasures in International Trade Law and International Investment Law", *The Journal of World Investment and Trade*, 16, 2015, 274-313 (Losari).

<sup>19</sup> Wagner; Tomer Broude, "Investment and Trade: The 'Lottie and Lisa' of International Economic Law?", in *Prospects in International Investment Law and Policy*, *World Trade Forum*, Roberto Ehandi & Pierre Sauve (ed), Cambridge University Press, 2013, 144-148.

<sup>20</sup> Puig: 36.

<sup>21</sup> Losari and Chow: 274-313.

<sup>22</sup> Puig: 3.

<sup>23</sup> Melida Hodgson, "International Trade Law and International Investment Law: Complexity and Coherence", *Remarks by ASIL Proceedings*, 2014, 252.

If a national legislation violates trade and investment agreements at the same time and is disputed under both systems it is called “cross utilization”.<sup>24</sup> The Australian cigarette case that will be discussed in the following section sets an example. The requirements on cigarette packaging were disputed both as an “investor-state” dispute and also as a trade dispute under WTO.<sup>25</sup> “Cross over” is when legislation about trade is disputed under “investor-state” dispute settlement or when a legislation regarding investment is disputed under trade dispute settlement mechanism.<sup>26</sup>

As stated before interaction between trade disputes and investment disputes, if not properly regulated, would run the risk of inviting further complexities and controversies to the already complex trade dispute settlement proceedings and the “Investor-State Dispute Settlement” (ISDS) proceedings.<sup>27</sup>

Sometimes parties use the interaction between the two systems to their advantage, this can be considered as an “opportunistic behaviour”. Investors aiming to get higher compensation can convert their international trade disputes to international investment disputes and use investment dispute settlement mechanisms.<sup>28</sup> Sometimes it is the states that use this interaction to their advantage. For example states in order to have the decision from a “Investor-State” arbitration enforced or to guarantee application of international investment threaten to suspend international trade advantages or do the opposite and withheld international investment law obligations in order to get the international trade obligations fulfilled.<sup>29</sup> In the *Trucking Services Restrictions* case Mexico under the NAFTA rules used trade tariffs in order to regulate USA’s investment rule violations.<sup>30</sup> Similarly in the *Soft Drinks Tax* case the investment obligations were suspended in order to implement trade rules.<sup>31</sup>

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<sup>24</sup> Jaemin Lee, “Completing Each Other or Stoking Further Complexity? Interaction between International Investment Law and International Trade Law”, *Journal of World Trade*, 422.

<sup>25</sup> Lee: 423.

<sup>26</sup> Lee: 423-424.

<sup>27</sup> Lee: 445.

<sup>28</sup> DiMascio and Pauwelyn: 49; Puig: 14, 19, 23, 27, 31.

<sup>29</sup> Puig: 40; Sergio Puig, “International Regime Complexity and Economic Law Enforcement”, *Journal of International Economic Law*, 2014, 17, 491-516 (Puig (2), 504.

<sup>30</sup> Puig (2): 504.

<sup>31</sup> DiMascio&Pauwelyn: 50; Puig (2): 505.

### **State's "Right To Regulate" On Health Reasons**

The relationship between international investment law and international trade law will be evaluated under state's right to regulate on health reasons. When a state is making policy decisions it has to consider its obligations both under international trade law and international investment law and how both areas of law play out together in order to prevent its international responsibility for possible violations.

In international investment law State's right to regulate especially for public order reasons, is justified under police power doctrine and it justifies its interference with investment guarantees.<sup>32</sup> In these situations the State can regulate the area without paying compensation and take can administrative actions. In international trade law public order can be discussed for state's obligations for reducing trade restrictions and preventing protective measures.<sup>33</sup>

States' obligations under international trade law and international investment law limit their right to regulate nationally. National legislation without raising liability is only possible if the measures are compatible with both international law obligations. For example, in Samoa, the government restricted trade in order to limit consumption of low quality fatty meat to decrease obesity. But due to WTO regulations they were considered as trade restriction and the government had to remove this restriction.<sup>34</sup> Similarly, in Thailand, when the government was planning on adopting legislation for special labelling on goods that are unhealthy for children stating that the consumption should be reduced. Some WTO members notified these measure to the Technical Barriers Committee under the WTO rules and Thailand removed the proposed legislation.<sup>35</sup> As will be discussed below, national legislation has to comply with international trade law requirements: legitimate goal, the least restrictive method and have scientific proof.<sup>36</sup>

In both areas of law there is flexibility for states to take political decisions and decide on national policies for environmental concerns or protection of human health. Under international investment law, states can depend on right to regulate

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<sup>32</sup> Wagner: 35.

<sup>33</sup> Wagner: 35.

<sup>34</sup> Thow, Snowdon, Labonte, Gleeson, Stuckler, Hattersley, Schram, Kay, Friel, "Will the Next Generation of Preferential Trade and Investment Agreements Undermine Prevention of Noncommunicable Diseases? A Prospective Policy Analysis of TPP Agreement," *Health Policy* 119, 2015, (Thow), 88-96.

<sup>35</sup> Thow: 89.

<sup>36</sup> Thow: 93.

competences and under international trade law they can either have legislation under exceptions articles or fulfil the conditions under Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) for the measures they consider to take.<sup>37</sup>

TBT agreement aims to balance liberalization of trade and member state's competence on regulating own measures for legitimate political goals.<sup>38</sup> TBT Article 2.2 states the legitimate objectives that state can take technical measures and restrict trade.<sup>39</sup> For these measures the states have to fulfil the "necessity test" showing that the measure is the least restrictive measure.<sup>40</sup>

SPS Agreement is about the protection of human, animal and plant health. For the state to have measures to protect human, animal and plant health according to SPS Agreement Article 2.2 scientific evidence is required to show that the measure is necessary.<sup>41</sup> According to the WTO DSB decisions Member States do not have unlimited authority on right to regulate for protection of human, animal and plant health.<sup>42</sup>

States can also restrict trade under GATT Article XX exceptions clause, especially under (b) "necessary to protect human, animal or plant life or health". However, the measures cannot be applied in a manner, which would constitute a means of arbitrary or unjustifiable discrimination between Member States. This provision aims to balance the absolute application of measures with a state's right to take measures that might affect other Member States or be in violation of other regulations.<sup>43</sup>

In sum, under international trade law, if a national measure were taken to protect human, animal or plant health and if it is not arbitrary or a disguised discrimination it would not be violating WTO rules.

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<sup>37</sup> Chris Downes, "Worth Shopping Around? Defending Regulatory Autonomy under the SPS and TBT Agreements", *World Trade Review*, 2015, V. 14, Issue 4, 553-578, 553; Wagner: 85.

<sup>38</sup> Wagner: 62.

<sup>39</sup> Downes: 560; Wagner: 63.

<sup>40</sup> Meri Koivusalo, "Policy Space for Health and Trade and Investment Agreements", *Health Promotion International*, Vol.29, No.S 1, p. i30; Wagner: 64.

<sup>41</sup> Wagner: 56.

<sup>42</sup> Wagner: 60.

<sup>43</sup> Julien Chaisse, "Exploring the Confines of International Investment and Domestic Health Protections-Is a General Exceptions Clause a Forced Perspective?", *American Journal of Law & Medicine*, 39, 2013, 332-360, 344.



Under international investment law, whether the procedures done by states under right to regulate are considered as indirect expropriation or measures under State's police powers is a disputed topic.<sup>44</sup> In indirect expropriation, the property right is not taken but its usage is limited and affected.<sup>45</sup>

In indirect expropriation the state still has to pay compensation. However, for the measures that will be considered as police power measures, the state does not pay any compensation and measures are considered under state's right to regulate. The line between indirect expropriation and police powers is not clear. It mostly depends on the arbitral tribunal's decision.<sup>46</sup> Each case has to be evaluated on its own dynamics. The analysis has to focus on the aim of the measure, level of interference, legitimate expectations and economic impact.<sup>47</sup> For example States' measures on tobacco goods are usually discussed under police power argument.<sup>48</sup>

Even though there are similarities in the two legal areas there might be differences in the outcomes. The cases might be evaluated differently due to differences between the two areas of law. For example, it is "like situations" under international investment law but "like products" under WTO rules.<sup>49</sup> A study that compared and evaluated "national treatment" principle under international trade law and international investment law stated that the differences arise from organizational structure.<sup>50</sup> Another study focused on the differences on proof require-

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<sup>44</sup> Baklacı; Valentina S Vadi, "Global Health Governance at a Crossroads: Trademark Protection v. Tobacco Control in International Investment Law", *Stanford Journal of International Law* (48 Stan. Int'l L 93), 2012, 97 vd, 109-110. For further discussion on expropriation look at: Hümeyra Zeynep Nalçacıoğlu Erden, *Milletlerarası Yatırım Hukukunda Dolaylı Kamulaştırma*, On İki Levha Yayıncılık, İstanbul, 2015, Faruk Kerem Giray, *Milletlerarası Yatırım Tahkiminde Kamulaştırmadan Doğan Tazminat ve Tazminatın Hesaplanmasında Kullanılan Yöntemler*, Beta, İstanbul, 2. Bası, 2013.

<sup>45</sup> Pınar Baklacı, "Uluslararası Yatırımlarda Dolaylı Kamulaştırma ve Düzenleyici Yetkiler", *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni*, 28 (1-2)/1-24/2008, 2008 (Baklacı 2).

<sup>46</sup> Bryan Mercurio, "International Investment Agreements and Public Health: Neutralizing a Threat Through Treaty Drafting", *Bulletin World Organ*, 2014, 92:520-525, 521.

<sup>47</sup> Andrew Newcombe, "The Boundaries of Regulatory Expropriation in International Law", *ICSID Review-Foreign Investment Law Journal*, Vol. 20, No. 1, 2005; Catherine Yannaca-Small, "Indirect Expropriation" in International Investment Law", 22, [https://www.oecd.org/daf/inv/investment-policy/WP-2004\\_4.pdf](https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf).

<sup>48</sup> Newcombe.

<sup>49</sup> Newcombe: 355.

<sup>50</sup> DiMascio and Pauwelyn: 59, 79-82.

ments in both legal areas.<sup>51</sup> The investors in investment disputes cannot assume that there would be similar results with international trade disputes and vice versa.<sup>52</sup>

Realizing the differences in both legal areas is vital to the state when determining its own national policies. States, by knowing the differences and the interaction between the two areas of law and acting accordingly, would minimize possibility of conflicts.<sup>53</sup> As will be discussed below negotiated agreements might take these into consideration when drafting new agreements.

#### **Philip Morris Asia Case**

In the mostly discussed Philip Morris Asia case, the Australian government's regulation on plain packaging of cigarettes was both disputed under the WTO Dispute Settlement Body and under 'investor-state' dispute arbitration under the United Nations Commission on International Trade Law (UNCITRAL) rules based on the provisions of the 'Hong Kong-Australia Bilateral Investment Treaty'.<sup>54</sup>

In 2011, Australian government accepted a plain packaging requirement for cigarettes where the requirement affected the trademark signs on the package. The reason for the legislation was based on scientific publications and WTO and World Health Organization (WHO)'s Framework Convention on Tobacco Control (FCTC). The legislation was disputed both under international trade and international investment agreements.<sup>55</sup> "Investor-state" arbitration started when Philip Morris Asia (PMA), a subsidiary of International PM went to arbitration against Australia based on "Hong Kong-Australia Bilateral Investment Treaty".<sup>56</sup> On February 2011 PMA became a sole shareholder. This changed its position since it weakened its arguments since it was aware of the draft legislation once the investment started.<sup>57</sup> Australia government requested that the jurisdiction issues to be separated from the essence arguments. The Arbitral Tribunal accepted the demand.

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<sup>51</sup> Voon: 795.

<sup>52</sup> DiMascio and Pauwelyn: 88.

<sup>53</sup> Tania Voon, "Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law", *Journal of International Economic Law*, 2015, V.18, Issue 4, 795-826.

<sup>54</sup> Pauwelyn: 8.

<sup>55</sup> Gleesson, Tienhara, Faunce, "Challenges to Australia's National Health Policy from Trade and Investment Agreements", *Ethics and Law*, MJA 2011, 196:1-3, 2011 (Gleesson vd.).

<sup>56</sup> Gleesson: 1.

<sup>57</sup> Gleesson: 1.

On December 2015 the Arbitral Tribunal unanimously accepted the jurisdiction objection.<sup>58</sup> The dispute under WTO has not been decided yet. There are five opponents: Ukraine<sup>59</sup>, Honduras<sup>60</sup>, Indonesia<sup>61</sup>, Dominic Republic<sup>62</sup> and Cuba<sup>63</sup>. They claim that Australia's legislations are in violation of TRIPS, Technical Barriers to Trade-TBT and GATT. There is record number of third parties involved in this case. Ukraine's settlement offer was accepted on May 2015. The decision was expected in the second half of 2016 but there is still no decision.<sup>64</sup>

### **New Agreements**

The new trend in agreements is to include both trade and investment issues in the same agreement. Trade agreements include investment chapters. This approach was first seen in North American Free Trade Agreement (NAFTA), a trade agreement with an investment chapter, Chapter 11. Later with the changes with the Lisbon Treaty investment became part of exclusive competences in the EU and this was reflected in the new agreements such as: Comprehensive Economic and Trade Agreement (CETA), Transatlantic Trade and Investment Partnership (TTIP).<sup>65</sup> Because the actors such as the United States (US) have similar views it was reflected in Trans-Pacific Partnership (TTP). Many Modern Comprehensive Trade agreements both have provisions on trade and investment.<sup>66</sup> Investment treaties where initially negotiated as a single agreement are now negotiated as a part of bilateral or regional trade agreements.<sup>67</sup>

As argued by Schill reintegration of trade and investment rules unchains the formerly distinct fields and requires thinking them together.<sup>68</sup> Investment law can learn from WTO experience both institutionally where it has a permanent dispute settlement structure and also resolving issues between economic interest and competing concerns, such as human rights, environment or development where WTO

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<sup>58</sup> <https://www.ag.gov.au/tobaccoplainpackaging>

<sup>59</sup> 28 September 2012.

<sup>60</sup> 25 September 2013.

<sup>61</sup> 26 March 2014.

<sup>62</sup> 25 April 2014.

<sup>63</sup> 25 April 2014.

<sup>64</sup> [www.ag.gov.au/tobaccoplainpackaging](http://www.ag.gov.au/tobaccoplainpackaging)

<sup>65</sup> Pauwelyn: 8.

<sup>66</sup> Wagner, 11.

<sup>67</sup> Mercurio.

<sup>68</sup> Schill, W. S. (2016) "Editorial: US versus EU Leadership in Global Investment Governance", *The Journal of World Investment & Trade*, 17, 1-6.

has more experience.<sup>69</sup> Trade lawyers can also learn from many aspects of international investment law.<sup>70</sup> But one should not forget that there is differences between the two areas of law and provisions serve different purposes. There are risks with boundary crossing one cannot assume that WTO law can transpose onto investment law.<sup>71</sup>

### CONCLUSION

International trade law and international investment law are two distinct areas of international economic law but they interact. They are separate but overlapping regimes. The interaction leads to “forum shopping” since trade and investment disputes are closely connected. Also when a national measure is in conformity with one area of law it might be in conflict with the other area of law. It is important to know the interaction between the two areas of law for drafting future agreements. Emerging issues in both areas of law overlap significantly. As argued by Lee if interaction between trade and investment disputes is not properly regulated it would run the risk of future complexities and controversies.<sup>72</sup> The economic political environment has changed and the agreements have to adjust to the new dynamics.

It is important to find a way to avoid “forum shopping” and having different decisions from different dispute settlement mechanisms.

Also realizing the differences in both legal areas is vital to the state when determining its own national policies. States, by knowing the differences and the interaction between the two areas of law and acting accordingly, would minimize possibility of conflicts.<sup>73</sup> States being aware of the possible consequences in both legal areas can draft the agreements more clearly, give detailed definitions in the agreements, include forum selection clauses in the agreements and even carve-out some areas that would be considered in the scope of state’s right to regulate.

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<sup>69</sup> Schill: 2.

<sup>70</sup> Schill: 2.

<sup>71</sup> Jose E. Alvarez, ‘Beware: Boundary Crossing’-A Critical Appraisal of Public Law Approaches to International Law, *The Journal of World Investment & Trade*, 17, 2016, 171-228, 179.

<sup>72</sup> Lee.

<sup>73</sup> Voon: 795-826.

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