

## ZOOM IN

### *The Question:*

**Regulatory autonomy and liberalization of trade and investment flows: how are these competing interests balanced by international economic law?**

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It has often been argued that trade and investment treaties unduly restrain the host State's prerogatives and in particular its capacity to meet its responsibilities in areas such as the protection of the environment, human rights and other social values. The extent to which this argument is substantiated remains subject to controversy.

With respect to international trade law, a number of complaints questioning the regulatory autonomy of the respondent State have been filed before the GATT 1947 and WTO. In a first phase, once having found that the measure being challenged was contrary to commitments concerning, *inter alia*, market access or national treatment, they raised the issue of interpreting and properly applying exception clauses. In particular, under GATT Article XX, the analysis is first focused on the 'necessity' of the trade-restrictive measure for the realization of the protection of the national interest at issue (or on its 'relation' with the fulfilment of that interest); then, subsequently the discriminatory or protectionist intent pursued through its application is scrutinized (e.g. GATT 1947 *Tuna I* and *Tuna II*; WTO *US-Gasoline*, *US-Shrimps*, *Brazil-Retreated Tyres*, and *EU-Seal products*). With the entry into force of the WTO agreements, similar claims have also been discussed with reference to the GATS (e.g. *US-Gambling*, *China-Audiovisuals*).

A second wave of disputes has been settled more recently. Their driver has been the inclusion within the WTO legal order of new provisions recognizing the exercise by members of regulatory autonomy, so as to pursue legitimate objectives. Reference may be made, *inter alia*, to the new agreements on technical barriers (TBT) and on sanitary and



phytosanitary measures (SPS). They authorize States to introduce domestic regulations regarding the functioning of the relevant markets or setting the products' characteristics or their related processes and production methods (as well as issues like testing, certification, packaging and labelling); at the same time, they include specific substantive obligations as to the content or effects of regulations. In three recent disputes (the so called *Trilogy cases*), for the first time the WTO dispute settlement organs have decided on the interpretation and scope of the TBT agreement (*US-Clove cigarettes*, *US-COOL*, and *US-Tuna*).

As for investment treaties, it is true that they are manifestly unbalanced in favour of foreign investors. This is not inherent in these treaties: it is a deliberate choice of the contracting parties. In some cases, the problem lies more in the negotiators' poor understanding of the implications and potential consequences of these treaties. Yet, the real question is how States could take full advantage of investment treaties as a vehicle for economic development without compromising on their social values and most prominently the promotion of sustainability and the protection of the environment, labour standards and human rights.

From this perspective, a trend can already be detected in the most recent bilateral and regional investment treaties to include provisions intended to ensure the host State more leeway in protecting non-investment values and to strike a better balance between the rights and the obligations stemming from investment treaties. These provisions include special or general exception clauses safeguarding the police powers of the host State, as well as increasingly sophisticated clauses on the protection of the environment, human rights and labour standards. Some treaties governing foreign investment in Africa, furthermore, have even introduced substantive obligations upon foreign investors and the home State.

The following papers by Appleton and Cotula are aimed at discussing to what extent the existing international legal framework adequately safeguards State's regulatory powers, keeping in mind the need to ensure a stable and predictable legal framework for trade and investment. Particular attention is paid to the following sub-questions: are States able to effectively exercise their regulatory powers under current customary international law and investment treaty law? Are special and general exceptions clauses necessary and efficient? How



could the exercise of regulatory powers relating to non-investment or non-trade values be better protected? Is it appropriate to borrow principles and clauses from other sources of public international law?