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## Book Reviews

Jürgen Kurtz. *The WTO and International Investment Law: Converging Systems*. Cambridge: Cambridge University Press, 2016. Pp. 326. \$110. ISBN: 9781107009707.

Jürgen Kurtz's book *The WTO and International Investment Law* deploys an insightful descriptive and analytical approach on the future of both fields – trade and investment law. Arguing for more convergence between them, he offers a new understanding by using an interdisciplinary approach that looks not only at economic and legal factors but also at the sociological factors that are now pushing the two systems together. This approach should be welcomed in times that are characterized by the fragmentation of public international law, in general, and by the tensions between the two pillars of international economic law, in particular.

Kurtz provides empirical reasons for the convergence between the two fields of law. Moreover, he highlights potential for further convergence by identifying shared treaty standards, which could be used in law-making and interpretation by arbitral tribunals. Kurtz also examines World Trade Organization (WTO) jurisprudence and norms that – even though not mirrored in international investment law – may guide the interpretation of investment treaty standards such as fair and equitable treatment. To this end, he engages in comparative public law studies.<sup>1</sup> Apart from general analysis, he also pursues the aim to make proposals for the reform of international investment law. Kurtz's overall claim for convergence of international trade and investment law due to their shared objectives<sup>2</sup> must be differentiated from a call for complete consolidation; he is mindful of the differences between trade and investment.

The book is structured as follows. In the first chapter, the author acknowledges differences between trade and investment law including divergence in jurisprudence relating to provisions with similar wording such as national treatment obligations. In the second chapter, Kurtz then introduces five factors that might promote convergence and lays out his methodology before assessing trade and investment law in their historical genealogy extensively in the third chapter. In the following three chapters, Kurtz analyses three themes of substantive law: national treatment, fair and equitable treatment and general exception clauses. A final chapter on procedural issues discusses reforms of investor–state arbitration.

Kurtz begins with a historical account of the distinct evolutionary pathways that have led to variances in treaty form, institutional culture and dispute settlement. Treaty-based rules on trade and investment law are rooted in friendship, commerce and navigation (FCN) treaties of the 19th century (at 32–34). After World War II, trade and investment issues got separated by the signing of the General Agreement on Tariffs and Trade (GATT) in 1947, which did not deal with foreign investment (directly). It was only 12 years later that the first bilateral investment treaty

<sup>1</sup> For the most comprehensive volume on comparative public law studies in this regard, see S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010). To be precise, Kurtz's approach is not a 'system-internal approach', which tries to give guidance to arbitral decision makers only, but it is addressed at state practice as well. Moreover, Kurtz prefers World Trade Organization (WTO) law as a starting point for comparativism in contrast to domestic analogies.

<sup>2</sup> Whether trade and investment share the same objective is disputed in literature. See only N. DiMascio and J. Pauwelyn, 'Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', 103 *American Journal of International Law* (2008) 48.

(BIT) was signed. In the 1980s and late 1990s, trade and investment commitments expanded. Whereas trade law expanded in coverage with the General Agreement on Trade in Services (GATS), including detailed provisions concerning foreign direct investment, BITs expanded in numbers, reaching 2,946 agreements by the end of 2015.<sup>3</sup> The contemporary period is characterized by WTO dispute settlement becoming 'highly adept at fostering and building legitimacy ... in the eyes of the member states and a standstill in terms of legislative developments at the WTO level at the same time' (at 32). As a result, states are negotiating bilateral and regional free trade agreements (FTAs) that go beyond the status quo of WTO law. These FTAs bring trade and investment matters once more under the same institutional umbrella.

After identifying the pathologies of divergence such as the fact that WTO law and international investment law exist in relative isolation from each other, Kurtz introduces five factors that promote convergence between the two fields. First, they share 'a respectable number of ... micro norms' (at 11). Second, state measures can fall within both fields of law at the same time (for example, Australian legislation on plain packaging of tobacco products). Third, cross-border trade and investment are economically interdependent. Fourth, there exists a cross-fertilization of jurisprudence. Fifth and lastly, Kurtz identifies the movement of actors among the two fields of law as a sociological convergence factor. Adjudicators and scholars act as 'agents of diffusion' (at 20). Kurtz does not identify the new regional trade and investment agreements as a separate convergence factor. He sees 'FTAs as creative laboratories for experimentation' with WTO-laden features (at 12) and makes frequent reference to this key feature of the future trade (and investment) landscape when he discovers convergence between the WTO and international investment law (for example at 12, 70ff, 78).

Kurtz describes his approach with a geometrical image, arguing 'that the twin strands of international trade and investment law represent a pair of congruent geometrical helices with the same axis' (at 24). This 'double helix' model, he claims, has a common telos and unifying purpose – the extension and safeguarding of competitive opportunities for trade, services and investments worldwide (at 24). Kurtz supports his convergence thesis with theoretical justifications for joint constraints on state sovereignty by using an interdisciplinary approach. Kurtz highlights that convergence should not be the one and only goal but that it should also aim at ensuring legitimate public policy (at 32).

The book is a valuable contribution to the theorization of world trade law and international investment law – the 'Lottie and Lisa of International Economic Law',<sup>4</sup> as we could call them. However, whereas Lottie and Lisa sound like equals, Kurtz suggests most of the time that international investment law could learn from its older sister in order to become more sustainable and to better accommodate states' sovereignty to regulate in the public interest. Kurtz's goal is to 'foster progressive and sustainable systemic reform' (at 28). The greatest part of the book consists of an analysis of shared procedural and substantive norms. Kurtz focuses on how substantive provisions are articulated across the two legal regimes and identifies commonalities and differences in framing and in how they are interpreted in dispute settlement.

Kurtz first analyses WTO jurisprudence on national treatment and what could be drawn from it for interpreting national treatment obligations in investment agreements. He illustrates the implications of the cross-fertilization of hermeneutics and jurisprudence across international economic law. He uses a method of comparativism that goes beyond identifying the textual variances and focuses on the telos of non-discrimination in international economic law (at 79ff).

<sup>3</sup> United Nations Conference on Trade and Development, *World Investment Report* (2016), at 101. General Agreement on Trade in Services 1994, 1869 UNTS 183.

<sup>4</sup> See Broude, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law?', in R. Ehandi and P. Sauvé (eds), *Prospects in International Investment Law and Policy* (2014) 139.

The national treatment commitment laid down in Article III of the General Agreement of Tariffs and Trade (GATT) is characterized by a clear statement of its purpose to prevent protectionism in the use of domestic taxes and regulations.<sup>5</sup> By contrast, national treatment clauses in international investment law do not include any guidance as to the ultimate purpose of non-discrimination (at 84). Kurtz argues that GATT Article III(1) reflects the political economy of trade policy with its 'constant and structural bias towards protectionism' (at 87). According to Kurtz, the risk of protectionism characterizes the political economy of investment policy in a similar way, and he therefore proposes the application of an 'anti-protectionism test' in international investment law.

In his in-depth analysis of the national treatment commitment in both fields of law, Kurtz criticizes the way WTO jurisprudence has been used in investment arbitration. He shows that both regimes – trade and investment – have much to learn from each other (in both ways). His comparative analysis focuses on three questions that investment arbitral tribunals have asked to determine a breach of law (at 95ff): '(i) is competition a necessary condition of foreign and domestic investors standing in "like circumstances"; (ii) what constitutes "less-favourable treatment" of foreign investors, especially in cases involving an origin-neutral measure and (iii) is protectionist purpose on part of the regulating state required as a condition of breach and, if so, what indicia should be used to evidence such purpose?'

Most investment arbitration tribunals follow WTO jurisprudence by postulating that competition between foreign and domestic goods or services is a necessary condition of likeness when assessing a breach of the national treatment obligation. Kurtz analyses the rulings of some arbitral awards that did not apply a competition-based reading of national treatment to highlight their problematic understanding of the national treatment commitment. The purpose of a competition test as a condition of likeness is to avoid protectionist state behaviour. It can prevent, as he claims, 'hidden forms of discrimination' (at 101). He further identifies various investment arbitral awards that have given a 'misleading account of ... national treatment' jurisprudence in WTO law such as *Methanex* (at 101ff) and *Occidental* (at 97ff), leading to problematic inconsistency in the legal tests applied in investment arbitration.<sup>6</sup> Most importantly, Kurtz suggests applying an 'anti-protectionism test' as a motive review of state regulation. This motive review, according to Kurtz, should consist of taking into account a broad range of evidential sources such as the text of the measure and legislative record, which might reveal protectionist intent. Protectionist intent, Kurtz argues, is a prerequisite for finding a violation of the national treatment obligation in order to prevent inadequate restriction of states' policy space to regulate in the domestic sphere. Unlike WTO law, most international investment agreements do not provide for exemptions for measures promoting socio-political values.

Second, Kurtz evaluates the role of science in determining whether regulation is rational in both trade and investment law. He argues – on the basis of jurisprudence on the SPS Agreement – that (in distinct cases) science could be taken into account by arbitrators to make interpretation of the fair and equitable treatment provision in investment agreements more predictable.<sup>7</sup> This novel argument derived from WTO jurisprudence cannot be based on common treaty standards since there is no such provision as fair and equitable treatment in WTO law. Third, he investigates GATT and GATS-like exception clauses. In his view, including exception clauses modelled after WTO law in international investment agreements is the most suitable way to achieve a

<sup>5</sup> General Agreement on Tariffs and Trade 1994, 55 UNTS 194.

<sup>6</sup> UNCITRAL, *Methanex Corporation v. United States of American*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; ICSID, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, Final Award, ICSID Case no. ARB/06/11.

<sup>7</sup> Agreement on Sanitary and Phytosanitary Measures 1994, 1867 UNTS 493.

more balanced investment regime (at 228). Fourth, Kurtz addresses dispute settlement in the WTO and investor–state arbitration. Here, he identifies options for the reform of arbitral procedures, including the constitution of an appellate body to review arbitral awards.

Kurtz convincingly addresses the ‘delicate question’ of how the conflict between liberalizing trade and investment and state regulation for legitimate public purposes may be resolved (at 26). Throughout the book, he offers reform proposals addressed at government officials and adjudicators in order to guide the process of convergence into the direction of a justifiable and sustainable level of commonality between the two legal systems, which leaves enough policy space to regulate in the domestic sphere. Even though Kurtz focuses very much on what international investment law could learn from WTO law, the book aims to reform both pillars within the general field of international economic law.

*The WTO and International Investment Law* is an inspiring and rich book based on the assumption of a need for change in international investment law and arbitration. Clearly, comparative public law can encourage a reconsideration of the status quo. Such reconsideration might lead to a broader change in the framework of international investment protection, which was once intentionally isolated from the larger body of international law, making it more transparent and allowing for greater deference to governmental measures. However, it is questionable whether investment tribunals which favour investment protection over policy space for states to regulate would use the approach for a reconsideration of the investment regime. Moreover, from a normative perspective the contracting states should be the driving forces for reform of the investment regime. Without doubt, this book is a comprehensive and stimulating study by an expert in both fields that will deepen understanding of the relationship between trade and investment. The author masterfully brings together discourses that are taking place between scholars and practitioners in each regime but frequently in relative isolation from each other.

Rhea T. Hoffmann

University of Erlangen-Nürnberg  
Email: [rhea.hoffmann@fau.de](mailto:rhea.hoffmann@fau.de)

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Serena K. Sharma and Jennifer M. Welsh (eds), ***The Responsibility to Prevent: Overcoming the Challenges to Atrocity Prevention***. Oxford: Oxford University Press, 2015. Pp. 480. £60. ISBN: 9780198717782.

The failed and controversial responses to humanitarian crises, such as those in Yugoslavia (1992–1995), Somalia (1992), Rwanda (1994) and Kosovo (1999), urged the international community to tackle the problem of the protection of innocent people from gross violence. One response was the introduction of the doctrine of the responsibility to protect (R2P) by the International Committee of Intervention and State Sovereignty (ICISS) in 2001. According to the ICISS, R2P consists of three pillars: (i) the responsibility to prevent; (ii) the responsibility to react and (iii) the responsibility to rebuild. The ICISS report begins its formulation of the responsibility to prevent with the following statement:

This Commission strongly believes that the responsibility to protect implies an accompanying responsibility to prevent. And we think that it is more than high time for the international community to be doing more to close the gap between rhetorical support for prevention and tangible commitment. The need to do much better on prevention, and *to exhaust prevention options before rushing to embrace intervention*, were constantly recurring themes in our worldwide consultations, and ones which we wholeheartedly endorse.<sup>1</sup>

<sup>1</sup> G. Evans and M. Sahnoun (Co-Chairs), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001), at 19 (emphasis added).