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Introduction

1.1 Introduction

Modern international law protections for foreign trade and investment were born roughly of the same period. In the immediate decades following the Second World War, states parties agreed to a multilateral compact to liberalize barriers to foreign trade (in the General Agreement on Tariffs and Trade 1947 (GATT))[1] and also entered into treaty protections for foreign investment (beginning with the 1959 West Germany-Pakistan Bilateral Investment Treaty).[2] Yet the inception of these sub-disciplines of international economic law was always grounded in highly distinct strategic imperatives. Their evolution too has been marked by institutional divergence and often, at least among a certain group of commentators that inhabit the separate fields and even across government departments, a perception of the other as irrelevant (at best) or deep distrust (at worst).

Of course, these systems have a fundamental commonality compared to much of the remainder of public international law. The jewel in both crowns is a dispute settlement system that actually 'works' measured by the superficial proxies of activation, jurisdiction and compliance. Yet behind that common façade, the differences are classically thought to outweigh similarities. Distinct historical pathways have led to variances in treaty form, institutional culture and centralization. International trade law has been largely constituted multilaterally with Geneva as an institutional nucleus, especially since the formation of the World Trade

[1] For useful historical accounts that span the inception of the GATT, see A. Brown, *Reluctant Partners: A History of Multilateral Trade Cooperation 1850–2000* (University of Michigan Press, 2003); J. Goldstein, 'Creating the GATT Rules: Politics, Institutions and American Policy' in J. G. Ruggie (ed.), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (Columbia University Press, 1993).

[2] For superb analysis of the complex history of the investment treaty movement, see A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), pp. 1–73.

Organization (WTO) in 1995. The network of bilateral and regional investment treaties, on the other hand, is highly diffuse with no real institutional core, although counter-balanced by a gravitational pull towards established and emerging arbitration centres such as London, Paris, Washington and Singapore. Relatedly, there has always been a degree of sociological separation among actors across both fields. In many states, different government departments have had exclusive carriage for trade versus investment matters. Coupled with the usual tendency of many bureaucrats to jealously defend allocated governmental authority, the upshot is often a regrettable although utterly predictable failure to communicate across the disciplinary divide. More recently, private practitioners have had a much stronger role in investment than trade law, largely because of a fundamental difference across dispute settlement structures. The WTO follows the usual public international law default of state-to-state dispute settlement, which has tended to constrain (in fact but not in law) the opportunities for private legal counsel to appear in WTO dispute settlement. While state-to-state dispute settlement is present in most modern investment treaties, those treaties also offer a powerful augmentation. Foreign investors (from a signatory home state) are afforded standing to claim breach of the underlying treaty bargain by the signatory host state. In many states, especially across North America, enterprising private practitioners quickly identified the powerful legal opportunities embodied in the investment treaty network that could be marketed to their clients, especially under a business model of contingency fees. Needless to say, the private bar occupies a fundamentally different world and incentive matrix than their (mainly government) counterparts engaged in the negotiation and resolution of trade issues and disputes.[3]

The simple fact that foreign investors are parties to investor-state dispute settlement does not in any way lessen the status of international investment law as an integral part of the public international law universe. Various international regimes similarly accommodate non-state

[3] This, of course, is not an absolute distinction, but a difference in degree. As Joseph Weiler has put it, even in the context of the WTO: 'A huge factor in the decision whether to go for legal resolution will have been the conscious and often subconscious input by lawyers driven by ambition and their particular professional deformations. The "we can win in court . . ." becomes in the hands of all too many lawyers an almost automatic trigger to "we should bring the case". Surgeons like to operate: they have been trained to do that. Lawyers like to litigate and win cases.' J. H. H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35(2) *Journal of World Trade* 191, 198–199.

actors as either complainants or respondents in dispute settlement, including both human rights protections and international criminal law. It would be implausible to characterize these regimes as strict carve-outs to public international law, and the investment treaty network is no different. What is more important, but less analysed, are the implications at the outset of using treaty structures to 'depoliticize' investment disputes between foreign investors and receiving (host) states, with 'arbitration' chosen as the adjudicatory model to effect that goal. That choice has positioned the regime, from the perspective of some, closer to the private rather than public law end of a spectrum. This view is strongest among the legal constituency naturally attracted to this field, being those practitioners who have worked in commercial arbitration in the past. Yet that superficial understanding relies mainly on the characterization of the investment dispute settlement system simply within the broad and shared genus of 'arbitration'. It is deeply misleading when one considers the long history of the emergence of investment treaty protections whereby a range of states parties (as capital exporters) strategically sought to employ the new treaty device to counter downward shifts in customary protection for foreign property. Contrary to the private law hypothesis, this is a system with complex and messy roots in the various sources of public international law. Consider this telling difference in the pedagogy of trade versus investment law. A teacher can respectably and accurately begin any course on trade law with its emergence as a modern set of treaty protections in 1947 without any real attention to customary law (outside of the usual framework mechanisms, such as the rules on treaty interpretation).[4] Such an approach would be impossible in investment law, where modern treaty formulae (especially protections against expropriation) are direct transplants from contested debates on customary international law that revert back to the late nineteenth and early twentieth centuries.[5]

[4] This is not to suggest that the WTO is a self-contained system such that external norms have no salience or value. For examination of the intersection of different branches of international law with the WTO, see J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003).

[5] Consider the famous insistence of US Secretary of State Cordell Hull in 1938 that Mexico's expropriation of American oil interests required 'adequate, effective and prompt payment for the properties seized' under customary international law. 'Mexico-United States: Expropriation by Mexico of Agrarian Properties Owned by American Citizens' (1938) 33 *American Journal of International Law Supplement* 191–201. This customary claim is directly incorporated in later US treaties. 1994 US Model BIT, Art. III(1) extracted in

There is a natural tendency to understand the WTO as reflective of a deeper public law vision. That view is superficially grounded in confinement of standing rights to states parties which have inherent, defensive incentives to maintain a set of regulatory freedoms. Yet it is more fundamentally reflective of the sophisticated balance struck at the outset in the GATT. John Maynard Keynes famously described lawyers as the poets of Bretton Woods in their ability to balance vital economic goals (constraining state conduct in the use of border measures restricting foreign trade) with flexibilities (permitting intervention where necessary for public values and short-term political imperatives).[6] These flexibilities enable GATT members to adjust their engagement with the system in times of significant political and societal pressure. In fact, John Ruggie has argued that the GATT's bargain of 'embedded liberalism' – with trade liberalization embedded against extensive flexibilities comprising a subset of shared social purposes among the membership – has been essential to the temporal resilience of state commitment to the trade law regime.[7] These extensive flexibilities include the right of GATT members to take short-term emergency action departing from their GATT commitments where unforeseen developments coupled with the effect of their GATT commitments cause or threaten serious injury to domestic producers.[8] Safeguard measures of this sort are an inherent recognition of the enormous political challenges faced by states when liberalizing trade barriers, which may require short-term breathing space (as a matter of shoring up political support for liberalization) and/or the ability to implement redistributive mechanisms to enable transition of affected industry and workers to more competitive sectors of the domestic economy. Perhaps most famously of all, the GATT elevated certain core public values over and above the immediate project of trade liberalization. Member states have the continuing right under GATT Article XX to directly depart from their commitments to facilitate trade in goods where, for instance, it is 'necessary to protect human, animal, plant life or health'.[9]

C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007), p. 388.

[6] R. Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96(1) *American Journal of International Law* 94, 96–98.

[7] J. Ruggie, 'Embedded Liberalism and Postwar Economic Regimes' in J. Ruggie (ed.), *Constructing the World Polity: Essays on International Institutionalization* (Routledge, 1998), pp. 62–84.

[8] General Agreement on Tariffs and Trade, 30 October 1947, TIAS No. 1700, 55 UNTS 194, Art. XIX.

[9] GATT Art. XX(b).

Despite the nuanced treaty bargain struck in the early years of the international trading system, its judicial arm has not always faithfully endorsed that vision.[10] It is only after formation of the WTO Appellate Body that one can discern a clear break from the questionable hermeneutics of the GATT era, with the Appellate Body endorsing the customary interpretative techniques codified in the Vienna Convention on the Law of Treaties 1969 (VCLT).[11] Although there are downside effects to the 'juridification' of trade law,[12] the Appellate Body's principled insistence on examining the objective bargain struck between WTO members as presented by the treaty text, in light of key contextual indicators (including the architecture of the treaty) and against teleological expressions (set out in preambular recitals), has greatly contributed to the coherence and integrity of trade law jurisprudence.[13] There is, of course, no equivalent of the Appellate Body to insist on principled hermeneutics when it comes to investor-state arbitration. Not surprisingly, then, some arbitral practices mirror the crude adjudicatory habits employed by GATT panels prior to the emergence of the WTO. There is, firstly, a stubborn tendency to preference outcome over process in investor-state arbitral reasoning as is naturally the case in commercial arbitration. But more problematically, a certain group of arbitrators will typically defend aggressive and expansive readings in light of their intuitive view of the role of investment treaties, without testing those claims against objective expressions of purpose in the underlying treaty bargain struck between the states parties.[14]

[10] M. Trebilcock and R. Howse, *The Regulation of International Trade*, 3rd edn (Routledge, 2005), pp. 514–545; R. Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence' in J. H. H. Weiler (ed.), *The EU, The WTO and the NAFTA: Towards a Common Law of International Trade* (Oxford University Press, 2001), pp. 52–53.

[11] Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 ILM 679 (1969), Arts 31–32.

[12] Weiler, 'The Rule of Lawyers and the Ethos of Diplomats', 191–207.

[13] E.g. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (WT/DS58/AB/R, 12 October 1998), paras 121–122 (where the Appellate Body criticizes the panel for 'constructing an *a priori* test' that has no basis in the text of the treaty clause at issue).

[14] See, e.g. *SGS Société de Surveillance v. Republic of the Philippines*, Decision on Jurisdiction (ICSID Case No. ARB/02/6, 29 January 2004), para. 116; *Azurix Corp. v. The Argentine Republic*, Award (ICSID Case No. AB/01/12, 14 July 2006), para. 372; *Enron Corp. Ponderosa Assets LP v. The Argentine Republic*, Award (ICSID Case No. ARB/01/3, 22 May 2007), para. 331.

1.2 Pathologies of divergence

These variances between the two systems have produced a range of troubling pathologies. Poor interpretative methods in investment arbitration have led to wildly inconsistent outcomes. The reflexive defence that arbitration is appropriately limited to particularistic and retrospective resolution of disputes is weakened under close observation. States can be, and often are, repeat players and therefore have legitimate reasons to understand their prospective risk profile when regulating as a matter of potential investment treaty breach. There is, in short, a sharp distinction between commercial arbitration (based on a specifically negotiated contract between key parties) and investment treaty arbitration (where the subject matter of the dispute will normally engage general legal regulation that is passed at some later stage after entry into the BIT). The problem of inconsistency (both in method and outcome), however, should be distinguished from that of incoherence. A certain set of arbitral awards have simply ignored the parameters of the treaty bargain and instead created strained and largely implausible legal constructions.[15] The tolerance of states parties to arbitral incoherence is rapidly eroding, which stands in vivid contrast to state acceptance of the judicial project ushered in by the WTO Appellate Body. While some may be content to limit their reaction to intervention (via contemporaneous or prospective treaty change), others are simply exiting the investment treaty system (in whole or in part) altogether.[16]

The WTO too is faced with charged systemic challenges. In 2001, the WTO membership launched the Doha Round of negotiations, but there is little reason to expect conclusion in the near future. States parties are instead bifurcating their treaty commitments by supplementing WTO obligations with bilateral and regional free trade agreements (FTAs). Critically, the latter often combine both investment and trade

[15] Cf. *Pope & Talbot v. Canada*, Award on the Merits of Phase 2 (UNCITRAL Arbitration, 10 April 2001), paras 110–111; *SD Myers v. Canada*, Partial Award (UNCITRAL Arbitration, 13 November 2000), paras 259–269 (both ruling that NAFTA Art. 1105 adopts an additive component that extends beyond customary international law) with *The United Mexican States v. Metalclad Corp.*, Supreme Court of British Columbia (Tysoe J.), 2001 BSCS 664, paras 64–66 (criticising both awards as ignoring the plain text of that treaty provision). For detailed critique, see below Ch. 6, section 6.3 ('What role for consistency and/or coherence in investor-state arbitration?').

[16] This strategy has been confined to a handful of Latin American states such as Bolivia, Ecuador and Venezuela. Recently, Indonesia has announced a revision (and possibly termination) of its BIT program. B. Bland and S. Donnan, 'Indonesia to Terminate More than 60 Bilateral Investment Treaties', *Financial Times* (26 March 2014).

commitments under a common institutional umbrella, evidencing a tangible connection between the two fields. There are complex questions as to the institutional and substantive role of WTO law and dispute settlement across the growing universe of FTAs. These include not only the contested issue of whether WTO dispute settlement organs may appropriately consider the other trade commitments of WTO members during adjudication,[17] but also the degree of influence of WTO jurisprudence in FTA adjudication, including during investor-state arbitration (within a given investment chapter).[18]

Despite these broadly shared challenges, there is a troubling omission of the WTO in texts devoted to investment law, and vice versa. In the most insightful books dealing with the WTO, investment issues (other than those directly implicated by the WTO treaties) are covered summarily within a few pages, usually characterized as part of a future reform agenda for WTO coverage.[19] When it comes to investment texts, any discussion of WTO law is normally at best a truncated suffix to national treatment analysis.[20] To be sure, there have been a growing number of penetrating analyses of the intersections between the two fields authored largely by leading and emerging scholars of WTO law.[21] Yet these aside,

[17] To date, the Appellate Body has resisted this at least in part of its jurisprudence. *Mexico – Tax Measures on Soft Drinks and other Beverages,* Report of the Appellate Body (WT/DS308/AB/R, 6 March 2006), para. 75. But compare the following (on elucidation of a factual point): *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body (WT/DS332/AB/R, 3 December 2007), para. 228.

[18] For thoughtful criticism of the use of WTO law in parts of investor-state arbitration, see J. Alvarez and T. Brink, 'Revisiting the Necessity Defence: *Continental Casualty v Argentina*' in K. Sauvant (ed.), *Yearbook of International Investment Law and Policy* (Oxford University Press, 2012), pp. 319–362.

[19] E.g. P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2005), pp. 702–706; M. Matsushita, T. Schoenbaum and P. Mavroidis, *The World Trade Organization: Law, Practice and Policy*, 2nd edn (Oxford University Press, 2006), pp. 831–849. But for a notable exception engaging in detailed analysis of the theory and practice of investment treaty protection (with a focus on the NAFTA), see Trebilcock and Howse, *The Regulation of International Trade*, pp. 439–470.

[20] E.g. R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), pp. 184–186.

[21] As an illustrative ledger consider: Weiler, *The EU, The WTO and the NAFTA*; F. Ortino, 'From "Non-Discrimination" to "Reasonableness": A Paradigm Shift in International Economic Law' (Jean Monnet Working Paper No. 01/05, April 2005); N. DiMascio and J. Pauwelyn, 'Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102(1) *American Journal of International Law* 48; T. Broude, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law?' in R. Echandi and P. Sauvé (eds), *Prospects in International Investment Law and Policy*

one can still identify questionable methodologies across the secondary literature. The exponential growth of arbitral adjudication has fuelled an understandable desire among the practising community to be the first to enter and establish authority, often as a way of building market share in this lucrative field. This often cashes out as an uncritical acceptance of the merits of individual treaty norms across much of the burgeoning literature. Many of these investment lawyers engage the case law technically and doctrinally in order to synthesize and thereby minimize areas of conflict. That avenue is effectively foreclosed in the WTO given the important systemic role of the Appellate Body in offering a rigorous proxy for qualitative assessment of jurisprudential evolution. Yet it naturally raises the question of precisely what factors should be taken into account when sorting and reviewing the growing mass of arbitral cases.

On this key challenge, there is typically little consideration in investment treaty manuscripts of disciplines other than law in attempting to probe and test the contemporary justifications for particular investment protections.[22] To be sure, there are green shoots of inter-disciplinary examination, both on the assessment of causal linkages (between entry into treaties and foreign investment flows),[23] as well as sophisticated economic analysis of key substantive protections.[24] Yet most of the investment literature still stands in disjuncture with the WTO, where inter-disciplinary insights (especially from economics) fuel powerful and

(Cambridge University Press, 2014), p. 139; M. Wu, 'The Scope and Limits of Trade's Influence in Shaping the Evolving Investment Regime' in Z. Douglas, J. Pauwelyn and J. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014), p. 171; M. Wagner, 'Regulatory Space in International Investment Law and International Trade Law' (forthcoming, 2015) *University of Pennsylvania Journal of International Law*.

[22] A. van Aaken and T. Lehmann, 'Sustainable Development and International Investment Law: A Harmonious View from Economics' in Echandi and Sauvé, *Prospects in International Investment Law and Policy*, p. 317: 'Whereas in trade law economic insights have been widely applied, even in application of the law, this is true to a much smaller extent in [international investment law]. Furthermore, the political economy rationale has been explored in trade law, but not in international investment law.'

[23] For a recent and excellent study in the growing stream of secondary literature on the question of causal linkage, see T. Allee and C. Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 63 *International Organization* 401–432.

[24] E.g. J. Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press, 2014); A. van Aaken, 'International Investment Law between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12(2) *Journal of International Economic Law* 507.

compelling critiques of legal mechanisms, including the right of WTO members to impose anti-dumping and countervailing duties.[25] International investment law (at least as an area of practice) remains dominated by an epistemic community,[26] which often results in a troubling thinness to the analysis of legal protections aimed fundamentally at economic and political issues.

The opposition to rigorous engagement between the two fields is especially evident at the sharp point of adjudication. Of course, there are legitimate concerns of problematic transplant or thin comparativism where an adjudicator crudely draws on an external norm without considering the implications of systemic or normative variances. There are echoes of that objection in the decision of the International Court of Justice (ICJ) in the *Whaling* case.[27] Some of the individual justices sharply criticise the influence of WTO law on the majority's ruling on the Whaling Convention.[28] On first principles, one would expect criticisms of this type to have less salience across the twin pillars of international economic law given their likely common goals and instrumental effects. One might even suggest that this objection is especially implausible where both systems share a textually similar legal norm such as national treatment. Yet paradoxically, this is precisely the setting in which we find the most strident claims of divergence especially within the arbitral jurisprudence. Within the growing body of arbitral case law, that resistance reaches its apotheosis in the *Methanex v. US* award, where the NAFTA Chapter 11 Tribunal summarily asserted that 'the intent of the drafters [of NAFTA was] to create distinct regimes for trade and investment'.[29] For the *Methanex* Tribunal and its ideological successors,[30] there is simply no role for WTO law to offer interpretative guidance in the adjudication of shared or similar norms in bilateral and regional investment treaties. At its heart, this opposition is based on

[25] E.g. A. Sykes, 'International Trade: Trade Remedies' in A. Guzman and A. Sykes (eds), *Research Handbook in International Economic Law* (Edward Elgar, 2007), 62–112.

[26] For penetrating analysis of the sociological composition of that community, see M. Hirsch, 'The Sociology of International Investment Law' in Douglas *et al., The Foundations of International Investment Law*, pp. 146–148.

[27] *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, International Court of Justice (31 March 2014).

[28] *Whaling*, Dissenting Opinion of Judge Owada, paras 33–34.

[29] *Methanex Corp. v. US*, Final Award of the Tribunal on Jurisdiction and Merits (UNCITRAL, 3 August 2005), Pt IV, Ch. B, p. 18 (para. 35).

[30] *Corn Products International, Inc. v. The United Mexican States*, Decision on Responsibility (ICSID Case No. ARB(AF)/04/01, 15 January 2008), para. 121.

a rigid assumption of legal and institutional divergence between the two systems and a strict belief that they seek to achieve fundamentally different purposes.

1.3 Five convergence factors

This deep separation between the two systems, embedded in variances in treaty text, jurisprudence and across stakeholder perceptions and methodologies, is increasingly neither feasible nor desirable. Five powerful factors are pushing them together with, as yet, uncertain trajectories and end-points.

Firstly, both systems share common and important legal terrain. Indeed, the usual assumption (at least among investment lawyers) of hermetic separation breaks down under careful observation. Consider the manner in which foreign investment in the services sector is regulated extensively within the WTO against the vital role of that sector as a proportion of global foreign direct investment (FDI) flows.[31] There are four modes of service supply defined in the WTO General Agreement on Trade in Services (GATS), with the third encompassing provision of services through 'commercial presence' of a foreign supplier.[32] The common coverage of foreign investment issues extends far beyond FDI in the GATS. Performance requirements are disciplined both under many BITs[33] as well as in the WTO Agreement on Trade-Related Investment Measures (TRIMs).[34] These are conditions imposed on foreign investors (often linked to the grant of an incentive by the host state) that may be explicitly trade distorting, such as local content obligations (mandating that products produced by the investor in the host state contain local materials), or export performance requirements (requiring a certain proportion of the investor's output to be exported). Many BITs also include intellectual property within the scope of assets

[31] In the early 1970s, the services sector accounted for only one-quarter of the world FDI stock. In 1990, this share was less than one-half, but by 2002, it had risen to about 70 per cent. UNCTAD, *World Investment Report 2004* (United Nations, 2004), p. xx.

[32] General Agreement on Trade in Services, Annex 1B, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Art. I(2)(c).

[33] 2004 US Model BIT, Art. 8, extracted in McLachlan *et al., International Investment Arbitration*, pp. 398–399.

[34] Agreement on Trade-Related Investment Measures, Annex 1A, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.