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International Trade and Investment Law: Inception, Separation and Engagement

Inception: Distinct Strategic Goals

- GATT 1947:
  - Multilateral compact to liberalize trade restrictions (and constrain beggar-thy-neighbour policies of the early 1930s)
  - Model of “embedded liberalism”
  - Sensitive balance between obligations and exceptions (including, but not limited to, GATT Article XX)

Inception (continued)

- Bilateral Investment Treaties:
  - Contingent reasons for creation of investment treaty protections from late 1960s to early 1970s
  - Developing state hostility to foreign investment rooted in both political (decolonization) and economic/developmental (infant industry) strategies
  - BIT country pairings classically divide between law “maker” and “taker”

Expansion: Late 1980s Onwards

- GATT → WTO:
  - Uruguay Round (1986-1993)
  - Expansion of subject-matter including foreign investment (GATS, mode III)
  - Strengthened dispute settlement (DSU)
- Investment treaties
  - Erosion of constitutive factors
  - Massive growth yet no real assessment of the shape and utility of the regime
  - Triadic structure: NAFTA Chapter 11

Separation

- Historical pathways
- Treaty forms
- Institutional locus
- Distinct activation of dispute settlement
- Sociological:
  - Negotiators
  - Practitioners
  - Scholars

Engagement: Four Key Factors

1. Shared legal norms

- Classically:
  - National and MFN treatment
- Increasingly:
  - Avoidance of “hard conflict” (compulsory licensing)
  - Exceptions (often incorporated by reference): GATT Art. XX/GATS Art. XIV
- Experimentation:
  - 1998/2009 ASEAN investment treaties:
    - Special and differential treatment
    - Emergency safeguard measure

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Engagement (cont.)

2. Shared jurisdictional reach
   - Domestic taxes:
     - WTO Panel and AB: *Mexico – Soft Drinks*
     - ICSID tribunals: *ADM* and *Corn Products*
   - Intellectual property regulation: Australian "plain tobacco" packaging legislation
   - Subsidies:
     - WTO Panel: *U.S.-Continued Dumping and Subsidy Offset Act*
     - NAFTA Chapter 11: *Canfor v U.S* (Statement of claim)
3. Movement of actors
   - Negotiators (especially within FTAs)
   - Adjudicators
   - Scholars (including as expert counsel)

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Engagement (cont.)

4. Cross-fertilization of jurisprudence

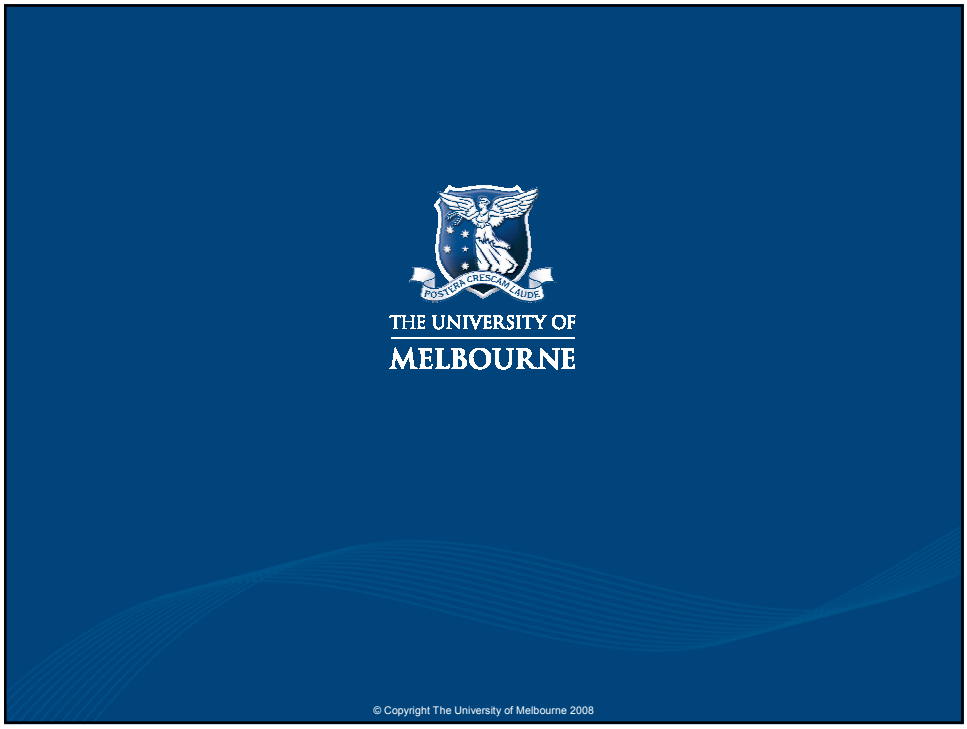
- WTO → Investment Law:
  - National treatment (*SD Myers* and others)
  - Exceptions (*Continental v Argentina)*
- Investment Law → WTO:
  - Appellate Body, *U.S. – Stainless Steel*

Implications and Trajectories

- Methodology (hermeneutics)
  - Legitimacy of adjudication of competing values
  - Role of Appellate Body in building coherence and integrity of legal interpretation
  - Articles 31 and 32, *VCLT*
  - External norms: Article 31(3)(c), VCLT
- Procedural and systemic:
  - Non-disputing party submissions akin to WTO third party participation: e.g., Art. 10.20.2, CAFTA-DR Free Trade Agreement
  - Amicus
  - Tightening of qualifications of arbitrators
  - Contemplation of appellate mechanism

Implications and Trajectories (cont.)

- Substantive:
  - National treatment
    - Investment case-law as a guide for WTO jurisprudence?
  - Fair and equitable treatment
    - *Chemtura v Canada*: SPS-like inquiry?
    - More broadly, shared debate on proportionality review
  - Exceptions:
    - *Continental v Argentina*: precise use of WTO law?
    - But also potential for investment law to guide WTO adjudication on the prudential exception in the GATS:
      - Especially as a check for disguised protectionism (*Fireman's Fund v Mexico* (2006) and *Saluka v Czech Republic* (2006))
- Secondary analysis:
  - What are the specific risks facing foreign investors and how should these be addressed by different treaty disciplines?
  - Role of inter-disciplinary insights (as in WTO law), especially political economy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