

Coherence in Trade and Investment Law

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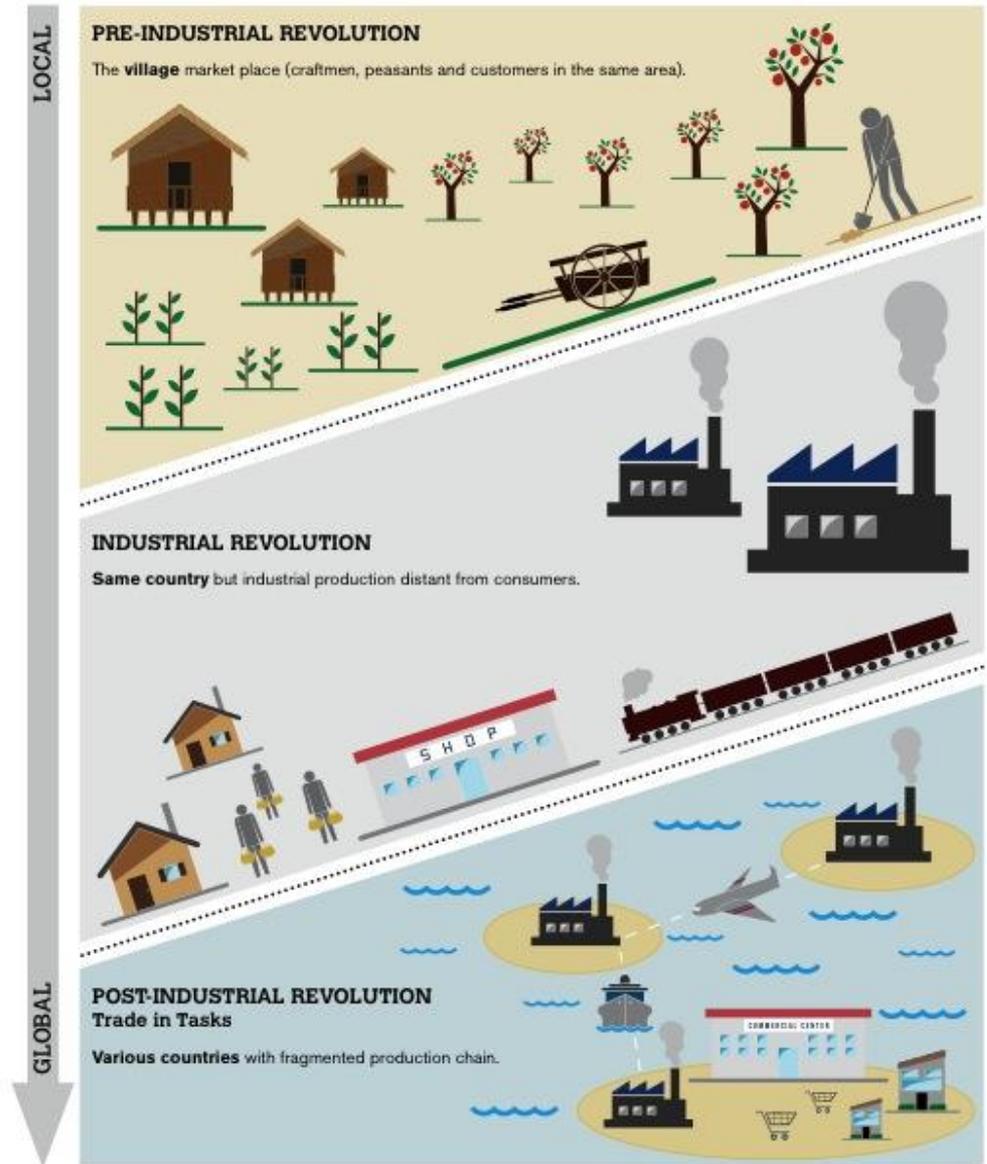
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The History

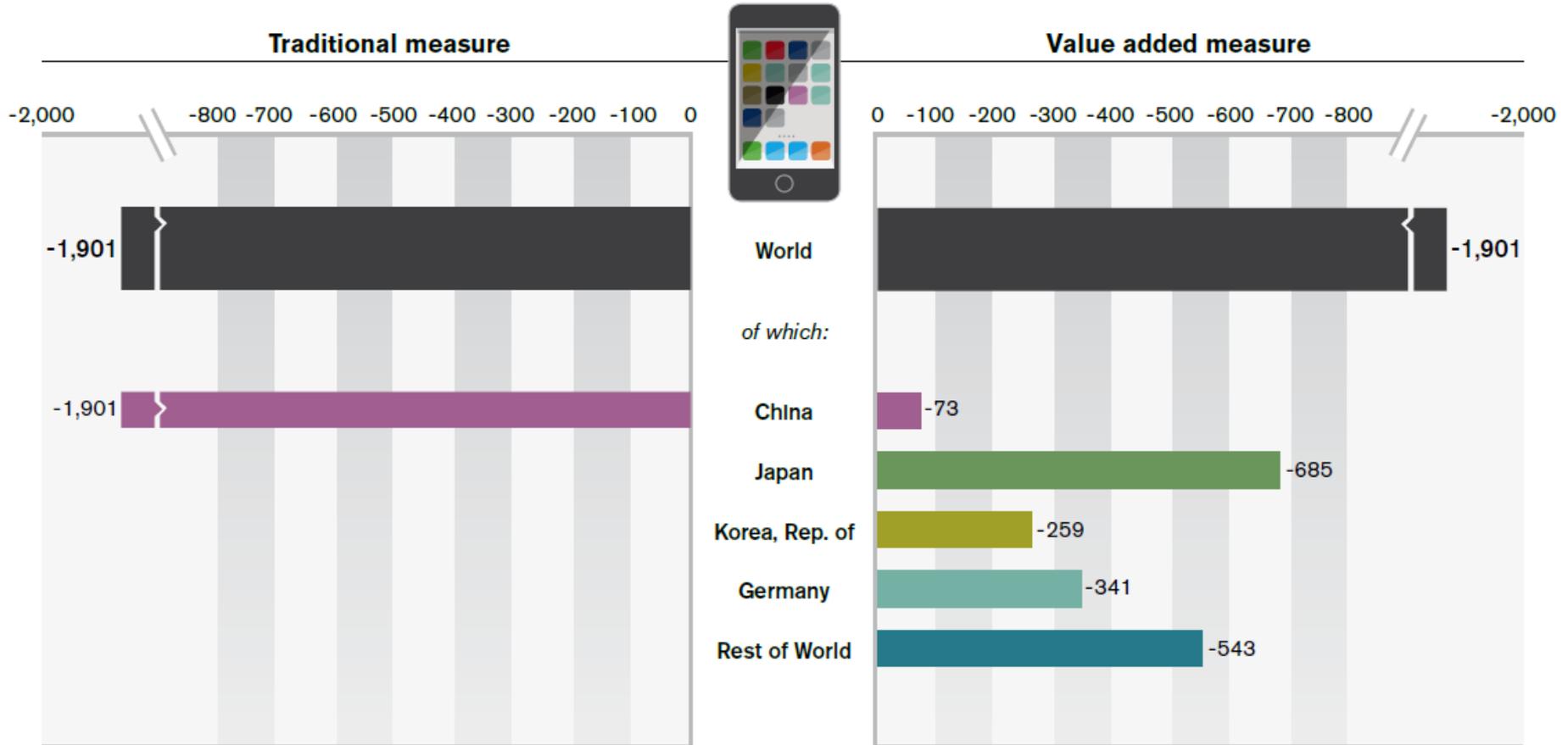
- 1945 negotiations for the Havana Charter and the ITO attempted to also incorporate investment rules. However, negotiators could not agree on the disciplines.
- Later Bilateral Investment Treaties (BITS) developed with the first Germany-Pakistan BIT signed in 1959.
- For a long time the negotiators and experts formed two separate communities.
- In 1994, NAFTA was the first major treaty to attempt to integrate the two regimes.
- Investment rules negotiations were suggested early in the WTO Doha Agenda but later taken off because there was no consensus.
- New FTAs like the TPP attempt to provide for both trade and investment protection and facilitation.

From Single Producer to Global Value Chains

- Globalization, Technology and MNC have changed trade patterns.
- Behind the border measures (including investment ones) are more important to trade flows.
- The investment protection and facilitation contribute to the attractiveness of individual states and even of regions.
- Thus, trade policy is becoming more interconnected with investment policy.

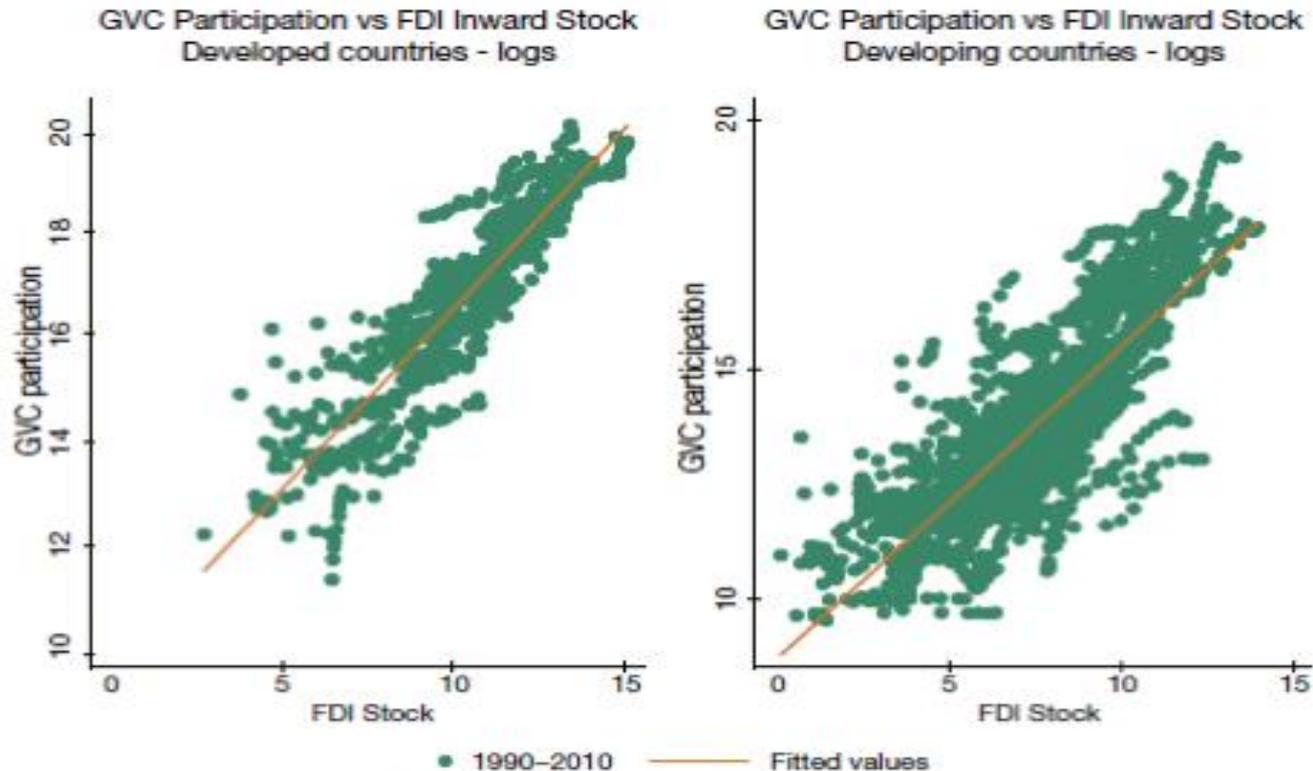


Made in the World



Source: Meng and Miroudot, based on Xing and Detert (2010)

FDI and GVC Participation



Source: UNCTAD-Eora GVC Database, UNCTAD FDI Database, UNCTAD analysis.

Note: Data for 187 countries over 20 years. The regression of the annual GVC participation growth on the annual FDI inward (stock) growth yields a positive and significant correlation (at the 5 per cent level) both for developed and developing countries ($R^2 = 0.77$ and 0.44 , respectively). The correlation remains significant considering the two time periods 1990 - 2000 and 2001 - 2010 separately. Regressions use lagged (one year) inward FDI (stock) growth rates and include year fixed effects to account for unobserved heterogeneity.

Coherence

- Economic Policies
- Business Processes
- Legal Coherence
 - Avoidance of Conflict between the regimes
 - Convergence of the regimes for similar regulatory issues
 - Coordination between the rules to promote both trade and investment protection and facilitation.

CONFLICT BETWEEN REGIMES

Mexico Sugar Disputes

- *WTO: Mexico – Antidumping Investigation of HFCS (2000)*
- *FTA: NAFTA Chapter 19 (2001)*
- *WTO: Mexico – Soft Drinks (2005)*
- *Investor-State Arbitration (NAFTA Chapter 11):*
 - *ADM v. Mexico (2007)*
 - *Corn Products v. Mexico (2008)*
 - *Cargill v. Mexico (2009)*

Independent investor rights

“The State of nationality of the Claimant does not control the conduct of the case [...] The individual may even advance a claim of which the State disapproves or base its case upon a proposition of law with which the State disagrees.” (Para. 173)

Countermeasure cannot affect independent rights

“[...]CPI, has rights of its own under Chapter XI of the NAFTA [...] Even if the doctrine of countermeasures could operate to preclude the wrongfulness of the HFCS tax vis-à-vis the United States [...], they cannot do so vis-à-vis CPI.” (Para. 176)

(Corn Products International v. Mexico, ICSID, Decision on Liability, 15 January 2008)

Core Issue

Should a state be liable for a WTO-approved trade countermeasure in International Investment Law?

Countermeasures in WTO Law

Requirements for Lawful Trade Countermeasures
DSB authorization required

Art. 22.3(a) DSU

Proper subject

Art. 22.4 DSU

Level of Countermeasures
(equivalent)

Art. 3.7 & 19.1 DSU

Non-retroactive remedies

Art. 3.7 & 22.2 DSU

Prior authorization from the
DSB

Countermeasures in International Investment Law

- Not provided in most IIAs, but follows CIL.
- Customary International Law – Articles 49, 51 and 52 ILC Articles on State Responsibility
 - Existence of an internationally wrongful act
 - **Targeted party**
 - Offer to negotiate
 - **Proportionality**
 - Temporary
 - Absence of an impending dispute

Analyses by Investment Tribunals

	<i>ADM v. Mexico</i>	<i>Cargill v. Mexico</i>	<i>Corn Products v. Mexico</i>
Availability of Countermeasures under Chapter 11	Yes, under CIL	No	No
Reasons	Art. 1131 (1) NAFTA “A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”	Investors have independent rights under Chapter 11	Conferral of procedural rights implies intention to confer substantive rights. Investors have rights.
Finding	Non-proportionate countermeasure ? Inter-state obligations v. obligations to private individuals	Although jurisdiction exists, countermeasures cannot preclude wrongfulness against investors	Countermeasures cannot preclude wrongfulness against investors

Reducing the Conflict

1. Jurisprudential

2. Legislative

Dealing with the Jurisprudence

- Just because an investor has a direct procedural right to bring a claim , it does not by itself mean that he/she has an independent right.
- In IIAs, investor rights are not independent because:
 - States continue to have the ability to amend or terminate IIAs without the agreement of the investors (see *e.g.* Mauritius Convention on Transparency); and
 - IIAs are not *erga omnes* obligations or equal to human right treaties.

Legislative

- Joint interpretation
- Amendment (see e.g. *2002 Thailand – Russia BIT, Article 3(5)*)
Nothing in this Agreement shall oblige the Contracting Parties to grant to investor and investment of each other the treatment under this Article which is more favourable, than the treatment that they will grant to each other pursuant to the obligations under the Agreement Establishing the World Trade Organization (WTO) of April 15, 1994, including obligations under General Agreement on Trade in Services (GATS) and also under any other multilateral arrangement concerning the treatment of investments which both Contracting Parties are parties to.

TPP Article 29.4

- “Nothing in this Agreement shall be construed to prevent a Party from taking action, including maintaining or increasing a customs duty, that is authorised by the Dispute Settlement Body of the WTO or is taken as a result of a decision by a dispute settlement panel under a free trade agreement to which the Party taking action and the Party against which the action is taken are party.”
- This is similar to a clause that my then colleague James Losari and I suggested prior to the final draft of the TPP to avoid a clash of treaties between the WTO, other RTAs and IIAs.
- See Junianto James Losari and Michael Ewing-Chow, “A Clash of Treaties: The Lawfulness of Countermeasures in International Trade Law and International Investment Law” (2015) 16 Journal of World Investment & Trade 274-313.

CONVERGENCE OF THE REGIMES

Common Regulatory Issues

- Plain Packaging Cases
- At the WTO: Australia — Tobacco Plain Packaging (Cuba) (Dominican Republic), (Honduras), (Indonesia) - pending...
- Before Investment Tribunals:
- *Philip Morris Asia v Australia* - Tribunal declined jurisdiction because of abuse of rights
- *Philip Morris v Uruguay* – Tribunal found that state had policy space to enact legislation and there was no denial of justice

Incorporation of Similar Exceptions

- The ASEAN Comprehensive Investment Agreement (ACIA), ASEAN IIAs and various other agreements based on the Canada Foreign Investment Promotion and Protection Agreement (FIPA) Model have seen fit to incorporate text similar to the WTO's **GATT Article XX** exception.
- However, the US Model BIT has consistently resisted this over the years because of concerns about it being too broad.
- This resulted in Australia insisting on a specific carve out for arbitration on tobacco control measures in the TPP (TPP Article 29.5). This ad hoc approach is perhaps a second best alternative to a common text providing for policy space.

COORDINATION BETWEEN REGIMES

Remains to be seen...

We are testing out new models and ideas of how to draft facilitation rules in both trade and investment

Conclusion

- Coherence is needed for:
 - Avoidance of Conflict
 - Convergence and Common Text for Policy Space
 - Coordination to Protect and Facilitate Trade and Investment