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)
• 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”

• 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
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)

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
• 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

• 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