

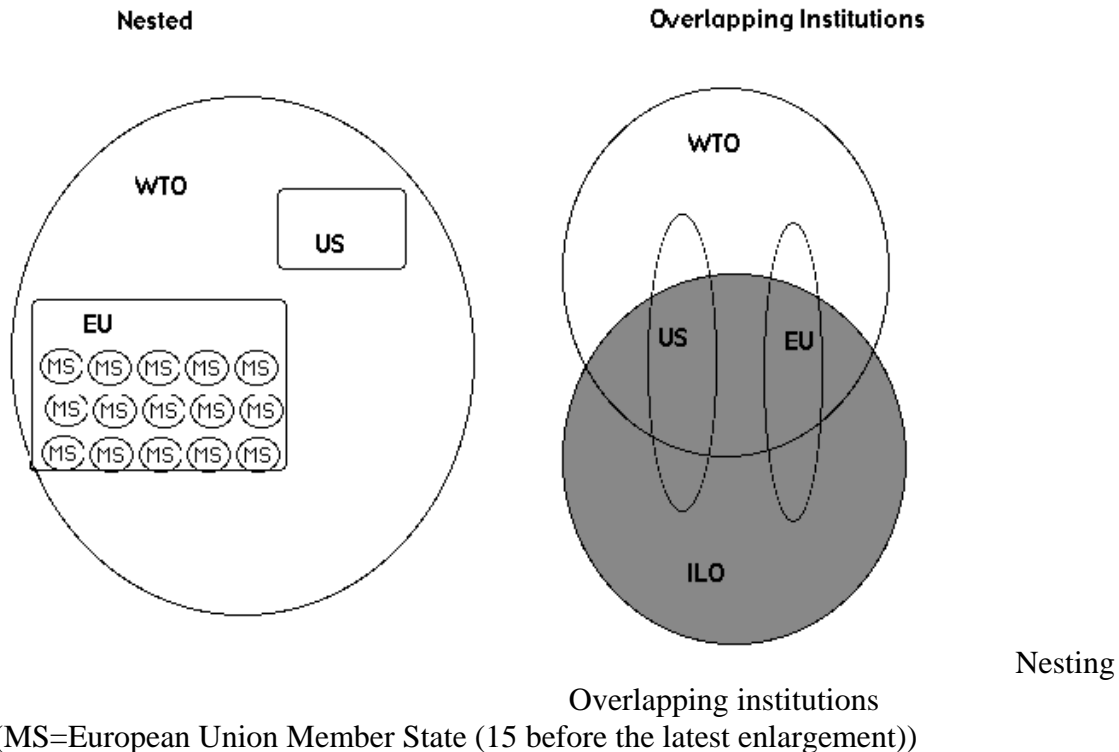
This is a slightly edited literature review from the longer working paper version of the Alter/Meunier Banana Dispute paper.¹ It is our parsing of the nested/overlapping literature:

1. The Problem of Nested and Overlapping Institutions

We define “nesting” as a situation where regional or issue-specific international institutions are themselves part of multilateral frameworks that involve more states or multiple issues. Institutions are imbricated one within another in concentric circles, like Russian dolls. For instance, European states have formed the European Union, which is part of the World Trade Organization. International institutions need not be nested, however, to overlap in authority. With their multiple institutional commitments, member countries stand at the intersection of independent jurisdictions, like in the overlapping middle part of a Venn Diagram. To continue with the example of trade, European states are members of the EU, but they also belong to the WTO and the ILO, they are part of many bilateral trade agreements with third countries, and some of them are constituting members of the G8. We define “overlapping” as distinct, but related to, nesting. In an overlapping jurisdiction context, a conflict across agreements does not per se mean that one rule is a violation of the other. When institutions are nested, however, conflicting policies of the subsumed regime do constitute a violation of the more encompassing institution. Thus nesting is a subset of the more general problem of overlapping commitments, with the conflicting rules more clearly labeled “violations” of the more encompassing institution. As the banana dispute will show, however, the reality of international law is that there is no universally accepted hierarchy of international norms which can be used to resolve conflicts of law. Thus a conflict of international rules may be no more resolvable in a nested context than in an overlapping context. The diagram below captures the difference.

¹ "Banana Splits: Nested and Competing Regimes in the Transatlantic Banana Trade Dispute."
Karen Alter & Sophie Meunier. Northwestern Dispute Resolution Research Center Working Paper # 322.
http://www.kellogg.northwestern.edu/drrc/working_papers.htm

Nested vs. Overlapping institutions



At both the domestic and international levels differentiation is the first approach used to resolve conflicts across rules—an attempt is made to define the realms separately to eliminate the conflict. When differentiation fails, hierarchy becomes necessary.

At the domestic level, the problem of nested institutions is usually solved through hierarchy, with a clear division of authority ensuring that different actors are supreme within their domain. For example, federalism involves working out the division of authority between federal, state, and local government, so that it is clear which actors have ultimate authority over a given policy issue. State and local politics often takes place in the shadow of federal politics, with all actors understanding that disgruntled groups may appeal to federal entities, and federal actors might invalidate state and local decisions or rule that state actors have final authority. The key difference between the domestic and international context is that the question of who has final authority and which rules trump is generally clearer or at least there is an established authoritative process to resolve any remaining ambiguities- an appeal to the courts.

At the international level the absence of a clear hierarchy makes dealing with the problem of overlapping authority more complex. It really is not clear who has the final authority to resolve conflicts across international agreements. Legal suits regarding the same issue may occur in multiple venues, creating the possibility that the ruling or legal argument of a supreme court may be rejected by another authoritative supreme court. The reality that their rulings may be contradicted as well as the inherently fluid and political nature of international politics makes legal decision-makers far more hesitant to weigh in

to resolve disputes about hierarchy, and legal rulings regarding disputes about hierarchy tend to be less definitive compared to the domestic context. The lack of hierarchy influences policy-making too because negotiations take place with the realization that actors must obtain a waiver from the other institution or risk efforts within the overlapping or more encompassing institution to override the conflicting agreement.

Even though all nations in the world are increasingly entangled in multiple international commitments, the issue of institutional nesting has not yet been the object of many studies in political science [The work of Vinod Aggarwal is an exception, and we have asked Vinnie to summarize his sense of the debates in which he has been a chief participant. Our parsing of the literature is as follows].

One can find references to nesting in different literatures with a focus on two distinct issues: 1) typologizing differences in types of institutions; 2) thinking about the choice of forum that institutional nesting creates. This paper proposes a third focus: 3) thinking about how the existence of nesting itself generates a distinct type of politics.

1. Literature Typologizing International Institutions and their Politics

The fact that there are encompassing institutions (UN) and substantively similar regional institutions defined by membership (e.g. NAFTA, EU, ASEAN), functionally-specific institutions (e.g. WTO, Lomé, WHO) as well as “emanations”—“second-order IGOs created through actions of other Inter-governmental Institutions (IGOs) of other institutions” (Shanks, Jacobson, and Kaplan 1996: 594) creates the possibility for nesting and overlapping jurisdictions.

A number of scholars have hypothesized that different types of institutions—encompassing, functional, regional, and emanations-- have different attributes which themselves generate different politics. For example, in a study that tracks the creation and dissolution of IGOs from 1980-1992, Cheryl Shanks, Harold Jacobson and Jeffrey Kaplan find that statistically speaking institutions that are emanations are created more often than first-order institutions, and dissolved more readily than IGOs created from scratch. They surmise that because “emanations” are created by politics within the IGO itself, emanations are perhaps easier to create than IGOs created from scratch. Also decisions about the design and mandate of emanations are not controlled to the same extent by the most powerful states as are IGOs created from scratch. Because the functional role of the emanated institution can be reabsorbed into the encompassing IGO, emanations may also be somewhat easier to eliminate (1996).

Liesbet Hooghe and Gary Marks create a different typology in which there are multiple, potentially overlapping, institutions. They emphasize a crucial distinction between “type I governance” and “type II governance.” “Type I governance systems” are federal systems where multiple levels of governance institutions are embedded into national systems of hierarchy. Type II governance systems lack a federal hierarchy to resolve conflicts. While domestic systems can in theory also have Type II governance structures, a crude cut one could take is that the difference between Type I and Type II governance is itself, in large part, the difference between domestic and international

politics. Each type of governance has different characteristics that will affect politics within each system. Type I governance has institutions with general purpose jurisdictions, with non-intersecting memberships, a limited number of jurisdictional levels, and a system-wide architecture that helps resolve conflicts across levels. A key political difference is that type I systems are often rooted in communal identities, and Type I politics is oriented towards voice (expressing dissent within the system rules of the game), rather than exit. The situation we are discussing—overlapping and nested international institutions—fits in Marks and Hooghe’s “type II governance model.” Type II governance has institutions that are task-specific jurisdictions, with intersecting memberships, and many jurisdictional levels. The fact that type II jurisdictions are set up functionally to solve particular problems has consequences. First of all, type II jurisdictions may be dissolved (like emanations) when the functional or coordination need no longer exists. And as Hooghe and Marks note, membership in type II institutions comprises only one aspect of a member’s identity. Thus you can get identity conflicts in Type II (a.k.a. nested/overlapping) contexts. Also, where politics in Type I systems was dominated by “voice” strategies, in type II systems one more readily sees “exit” strategies. Because type II situations are marriages of convenience where the possibility of exit is always present, type II governance systems, they argue, tend to be more flexible and pliable.

These typologies are useful in introducing the idea that politics can be vastly different depending on the nature of the international institution, but they do not get us far in understanding how the nested nature of international institutions is shaping politics.

2. The Opportunity Politics of the Choice of Forum

When institutions overlap, it is sometimes possible for actors to pick and choose which institutional forum to use. The “choice of forum” literature confronts the issue of nesting as an opportunity, examining the advantages and disadvantages offered by different types of institutional choices, and the political factors that shape the choices made—for example in choosing to use the OECD instead of the WTO, or in choosing European or national legal mechanisms to address a particular policy issue (Walders and Pratt 2003; ; Abbott and Snidal 2000, 1998).

The state-centric “choice of forum” international relations literature tends to take as a starting point a situation where some problem needs to be solved, asking how states make institutional choices about how to address this issue. For example, Vinod Aggarwal’s book *Institutional Designs for a Complex World: Bargaining, Linkages and Nesting* hypothesizes about the conditions under which states choose to address a problem by creating a nested versus a parallel institution (Aggarwal 1998). Duncan Snidal and Kenneth Abbott consider the benefits that different institutional mechanisms and fora may offer, thinking about how states may make decisions about which international institution to use to address a problem. They also consider how choice of forum decisions may be linked together as part of an incremental strategy to over time build international support for a more binding and enforceable commitment (Abbott and Snidal 1998, 2003, 2000). And the voluminous work on issue linkage and complex interdependence considers how the engagement of states across issues and institutions

creates opportunities and resources that can be drawn on in the crafting of common policies to address common problems.

The interest group based “choice of forum” literature considers the behavior of sub-state actors in the choice of forum. For example, Christina Davis considers how interest groups influence the choice of forum of states in addressing issues (Davis 2003). Gregory Shaffer examines how interests try to influence their states’ behavior differently in the US and the EU (Shaffer 2002). Alter considers how the organization of interests shape which groups embrace the “choice of forum” opportunity presented to them (Alter 2000: ; Alter and Vargas 2000).

The mere existence of the choice results from the nesting and/or overlapping of institutions. But these studies are more interested in the choice itself rather than in the central topic of this paper—the politics created by the fact that multiple international institutions can create conflicting commitments.

3. The Consequences of Institutional Nesting on Politics

Many studies explore what are implicitly overlapping/nested political contexts, but none seem to consider directly how nesting in itself impacts politics. For example, there is a lot of work examining how politics at the domestic and international level mutually affect each other. The two-level games literature is explicitly about how the nested domestic level can be used and manipulated in international bargaining (Evans, Jacobson, and Putnam 1993: ; Putnam 1988). There is also work that identifies relationships between nested and overlapping international institutions. For example Eric Reinhardt and Edward Mansfield investigate how the GATT/WTO may itself contribute to the formation of regional trade units nested within or parallel to the WTO (Reinhardt and Mansfield 2003).² There is also scholarship that investigates distinct problems created by the overlapping locuses of authority at the international level. For example, legal scholars have considered how overlapping authority creates the potential for incongruity in the law (Kingsbury 1999: ; Weiler 2000), and perhaps a cross-national peer pressure on judges to resolve these incongruities by making different bodies of law converge to a single standard (Weiler 1994: ; Slaughter 1994). Finally, there is scholarship that considers how the numerous crosscutting relationships between different international actors are shaping how these actors relate to each other. For example, Gregory Shaffer, Eric Reinhardt, Christina Davis and Marc Busch consider how the WTO itself creates opportunities and disadvantages for developing countries in their relationships with wealthy industrialized countries (Busch and Reinhardt 2003: ; Davis 2003). Although this work implicitly explains some of the consequences of nested authority, it does not provide much of a launching point to consider how the nesting and overlapping nature of international institutions itself influences international politics.

² The Reinhardt/Mansfield study suggests that encompassing institutions in themselves contribute a the politics that proliferates a situation of nested institutions, a reality that is further supported by the Shanks, Jacobson and Kaplan finding that international institutions tend to proliferate through emanation.

The exception to this rule is a recent article by Kal Raustiala and David Victor where what they are calling “regime complex” (the nesting and overlapping nature of institutions) is seen as generating its own set of politics. Raustiala and Victor focus on how a concern about conflicting obligations shapes the negotiation process itself, leading to efforts to avoid or resolve conflicts (through differentiation) as well as “strategic ambiguity” where conflicts between rules are intentionally allowed to persist. Raustiala and Victor’s article, like ours, is an inductive exercise—theirs focused on how the “regime complex” influences the creation of agreements and ours on how the “regime complex” complicates the resolution of disagreements. As they point to in their conclusion, the “regime complex” contributes to an implementation and interpretation politics—our study is an investigation of this politics (Raustiala and Victor 2004).

In a nutshell our argument is that at the international level the nesting of international institutions creates a problem of overlapping jurisdictions with no hierarchy to resolve conflicts across regimes, a problem that is exacerbated when institutions not only overlap but are also nested one within another. The overlapping of jurisdiction creates the opportunity for policy-entrepreneurs and interests groups to choose across political forums, picking the most authoritative forum willing to adopt their policy preference. Policy entrepreneurs will frame their issue to build political consensus within their chosen decision-making institution and to fit the style of the decision-making forum, with the policy outcome being a mixture of the preferences of the policy entrepreneurs and existing repertoire of policy formula within the decision-making regime. Those actors wanting a different policy may respond, however, by appealing to a different forum that has overlapping authority, seeking an authoritative decision that contradicts or undermines the policy of the other institution. Thus for forum shoppers, the nested context can generate a shifting “framing” of the issue depending on the forum in use (with different framings having substantive and political repercussions).

We are concerned here with decision-makers. The reality of forum shopping creates dilemmas for decision-makers, who try to avoid being gamed by forum shoppers while keeping their options open by adopting strategies to maximize international bargaining leverage. In a nested context, there is a real possibility that sub-level policy decisions may be condemned, contradicted, or supplanted by the more encompassing institution. For decision-makers, the nested context leads to positions on international issues that are quite different from the “domestic” position they might advocate, when it is clear where final authority resides.

Since the problem of no hierarchy to resolve conflicts of rules is considerable, we need to consider why countries allow this problem to persist as the reluctance of states to solve the “lack of hierarchy” problem shapes the overall nested political context. Essentially states want to eat their cake, but still have it too. They want to bind themselves and others to a system of rules while retaining the right to violate the rules when necessary, even though keeping the exit option open weakens the system of rules.

For many lawyers, the intent to create binding laws is enough to make the WTO legal obligations legally supreme to conflicting domestic laws. After all, you cannot still have your cake after you have eaten it. Yet we can see countries and political actors

explicitly adopting positions that fudge the issue of who has the higher authority to resolve conflicts, so as to keep their exit option (and with it supreme sovereign authority). For example, states strengthened the WTO dispute resolution system to make the rules more binding, by allowing for retaliation against countries that violate WTO rules. Some lawyers would argue that this intentional strengthening of the WTO system makes WTO law supreme to domestic law. Judith Hippler Bello, however, argues that the WTO system actually gives countries a choice to follow WTO rules or accept retaliatory “suspension of concessions”, fudging the issue of whether or not WTO rules are legally supreme to the domestic policies that flatly contradict them (Hippler Bello 1996). Lawyers can contest her interpretation, but her interpretation is the position within the United States and Europe which *have* chosen to accept retaliation rather than change their rules. This political fudge is explicit. John Jackson’s chronicle of “the great sovereignty debate” where US ratification of the WTO agreement was debated shows that advocates of Uruguay Round ratification themselves promoted the understanding that US sovereignty was not compromised because the US could always choose to violate WTO rules (Jackson 1997). Thus what Raustiala and Victor call “strategic ambiguity” is itself a political strategy. Sometimes the strategy entails creating overlapping regimes with different rules so that each actor can point to their favored regime to promote their position, sometimes the strategy involves keeping the hierarchical relationship between commitments intentionally ambiguous and unresolved.

What is unique to international politics is that these ambiguities can persist for long periods of time, allowing conflicts to fester. In the domestic realm, conflicts between rules as well as the question of which and how rules are binding, can be resolved in court. The absence of hierarchy makes resolving similar issues far more complicated at the international level.

The next two sections show how the nesting of institutions themselves contributed to the somewhat counter-intuitive European banana protocol, as well as the difficulty of resolving the banana dispute. We strip away each of the nested institutions to reveal how absent the overlapping and nested regimes, the policy and conflict resolution process would likely have been different.

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