

Institutional Overlap in International Trade Disputes

Memorandum Prepared for the Princeton
Conference on Nesting and Overlapping Institutions
February 24, 2006

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Preliminary Issues

Before turning to institutional overlap in my area of interest, international trade disputes, I would like to place two minor issues on the table. These questions arose as I read the organizers' extremely helpful overview of the literature, and they speak indirectly to the analytical frame of the conference.

The first is to inquire briefly about the contrast between nested and overlapping institutions. The overview distinguishes the two by depicting nesting as a subset of overlapping commitments wherein nested violations (of the encompassing institution by the subsumed regime) are manifest while overlapping commitments (across parallel institutions) may or may not conflict. In international trade, nesting or overlap occurs most obviously between the WTO and the "spaghetti bowl" of preferential trade agreements (PTAs) among WTO members. I am not sure whether to categorize these PTAs as nested or overlapping. In terms of membership, they appear nested within the WTO, but the breadth and depth of commitments across PTAs vary tremendously, such that the WTO is not always encompassing in scope (commitments may not overlap). If the key criterion is the transparency of violations, some PTAs arguably violate even the minimal tests of GATT Article XXIV (such as coverage of "substantially all trade"). Other PTAs easily surmount its modest hurdles, but include practices (say, on banana imports or steel safeguards) that violate particular WTO provisions. This conceptual ambiguity matters little, but one way to resolve it might be to categorize PTAs only as "overlapping" (being potentially, but not necessarily, in conflict) with WTO law and to narrow the definition of "nested" regimes to require an obvious hierarchical relationship wherein violations would be unlikely — such as when certain signatories to a framework or general convention enter a voluntary protocol under that umbrella (as in environmental and human rights accords). So-called "plurilateral" agreements among subsets of WTO members would thus count as nested, while PTAs would not.

The second is to ask whether differences between the domestic and international levels are as sharp as the overview memo suggests. Whenever a domestic polity has separation of powers, federalism, and / or delegation to quasi-independent agencies, problems of nesting or overlap will be common. The overview memo distinguishes the domestic and international levels based on the degree of ambiguity: at the domestic level

normative hierarchies are more often explicit, and there are more likely to be established procedures for resolving any ambiguities. I agree, but I am not sure that the magnitude of difference is so great as to preclude useful comparisons between the two levels in terms of political tactics, bargaining dynamics, or policy outcomes. U.S. administrative law scholars, for example, might be reluctant to describe their realm as one in which inter-branch or federal-state conflicts are unlikely to fester, given access to courts. The fact that ambiguities can be resolved by domestic courts does not mean that affected parties will pursue litigation, nor that domestic judges will resolve, or even acknowledge, obvious ambiguities when disposing of a case. In sum, there may be selection biases at both levels that obscure the extent of underlying commonalities. At the international level, we may seize on obvious and unresolved conflicts (ignoring overlapping issues where conflicts do not arise), while at the domestic level we focus primarily on conflicts that are resolved authoritatively by courts (ignoring many other conflicts that fester unaddressed).

Dimensions of Overlap

In terms of international trade disputes, there are multiple dimensions of potential overlap. In turn, I will comment on aspects of overlapping institutions in primary treaty rules, dispute settlement procedures, and rulings in force.

The first dimension is within the primary rules or substantive commitments of various trade liberalization agreements. All PTAs, by definition, depart from the nondiscrimination norms of the WTO, but GATT Article XXIV and the WTO services agreement permit such departures if certain criteria are met. To put it mildly, WTO members have not been eager to scrutinize the compatibility of their PTAs with these multilateral requirements. The committee nominally charged with this task remains toothless, and many delegations hope to postpone indefinitely the day when a member state opts to challenge a PTA within the WTO dispute settlement system. More salient conflicts occur in more narrow contexts, when both the WTO and PTAs impose disciplines in different ways on the same trade policies. When such conflicts emerge, there may be a normative hierarchy, but the more encompassing entity of the WTO does not always, or even often, hold the trump. At one end of the spectrum, NAFTA rulings on trade remedies and investment are directly applicable in U.S. law; WTO rulings are not. The ECJ has also held that WTO rules — unlike more precise and definite international treaties — are not directly applicable in the EU. At the other end, APEC is a regional initiative that by design privileged multilateral norms by guaranteeing most-favored-nation access for WTO members beyond the Asia-Pacific. Between these extremes, many PTAs remain silent on which commitments take precedence. In such cases, the decision of which, if any, agreement to privilege may be left to the domestic realm, through instruments of ratification or implementing legislation. The point to note is that hierarchy can be established as a matter of international law or domestic law.

The second dimension is overlapping dispute settlement procedures. Even when the WTO and PTAs apply identical substantive rules to the same trade policies, the procedures for enforcing those rules often vary. Disputants that are party to a free trade agreement may have the option of pursuing their case either in the WTO or under the

PTA. Forum shopping is a question that scholars (including several at this conference) have begun to address in detail. I would make only two brief observations. First, in forum shopping, a complainant's evaluation of procedural design — such as which mechanism is more authoritative or offers the more effective remedy — is often presumed to be decisive. For example, NAFTA signatories have opted to use the WTO rather than Chapter 20 in most of their intrapact disputes not involving trade remedies. Although many observers fairly attribute this choice to the weaknesses of Chapter 20, it might also reflect non-procedural considerations, such as audience and reputational effects that loom larger in the multilateral setting. Second, because strategic forum choice is not always an option — as certain PTAs include rules that limit the practice — a crucial dimension of bargaining is the inclusion or design of treaty provisions that address it. These “solutions” may take various forms, such as hierarchical constraints (only A), exclusive choice provisions (A or B, but not both), or peace clauses (neither A nor B). Provisions that require “A or B, but not both” may not be terribly effective. The reason is that lawyers can easily disaggregate a single policy into multiple “measures,” challenging some in A and others in B, or challenge the same policy under unrelated rules in both pacts. For example, NAFTA Article 2005 enables signatory states to pursue disputes either in NAFTA or in the WTO, but not both. Canada, as noted below, has nonetheless been able to litigate the softwood lumber dispute in both fora simultaneously, presumably because NAFTA does not create substantive obligations in the area of trade remedies.

A third, less often addressed dimension of potential overlap is the effect of legal rulings across agreements. In regional disputes, for example, it is not always clear what weight arbitrators in a PTA should accord to rulings of violation (or exoneration) by the WTO. The ECJ and Court of First Instance recently held that even adopted WTO rulings of violation with which the EU has failed to comply within the reasonable time period are not directly applicable in EU law (*Van Parijs* and *Chiquita Banana*). The key issue (this month) in the softwood lumber case, discussed below, is whether a WTO panel report certifying U.S. compliance (on material injury) supercedes prior NAFTA rulings of violation. In its ruling, the WTO compliance panel did not make any mention of the many NAFTA arbitrations addressing related aspects of the softwood lumber dispute. Whether regional panels are likely to offer greater deference to, or acknowledge, relevant WTO rulings is not clear. Across domestic systems, there are certain international rules — such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards — that govern the enforcement of foreign judgments. Even in domestic law, however, the rather soft principle of comity commonly applies: judges tend to give some weight to foreign judgments, but out of respect, not obligation. The uncertain status of WTO rulings in regional PTA disputes is likely to remain messy, as litigants on both sides invoke discretionary principles such as judicial comity to their advantage.

Conversely, in WTO disputes, governments may attempt to invoke their legal right to enforce regional trade rulings as a general exception to WTO disciplines. GATT Article XX(d) allows an exception for measures “necessary to secure compliance with laws or regulations which are not inconsistent” with WTO rules. In its sweetener dispute with the US, Mexico took retaliatory measures under NAFTA, which the U.S. challenged in the WTO. Mexico argued at the WTO that it had attempted to convene a panel under

NAFTA Chapter 20, but the US blocked it; that the WTO panel, the only forum for the case, should evaluate Mexico's claim that the US had violated NAFTA, given the identical substantive obligations in the two complaints (NAFTA adopts language from GATT Article III); and that its countermeasures were justified under the Article XX(d) exception, as Mexico acted to secure U.S. compliance with NAFTA, which does not violate WTO rules. The WTO panel rejected Mexico's arguments across the board (WTO Document WT/DS308/R); an appeal on the Article XX(d) issue is pending (DS308/10). Mexico faces long odds on this creative claim, but its tactic highlights interesting aspects of overlap — including the uncertain legal status of any future moves by WTO panels to address alleged violations of NAFTA or other PTAs whose provisions mirror WTO rules. Defendants that retaliate pursuant to formal authorization in PTA legal proceedings may be in a stronger position to invoke Article XX(d), but the WTO panel's interpretation in the Mexico case precludes even those claims (because the panel saw Article XX(d) as referring exclusively to domestic enforcement, not international).

One final point about overlapping legal rulings is that uncertainty may arise even within agreements, not just across them. In NAFTA, for example, there are distinct procedures for general, investment, and trade remedy disputes (not to mention the side accords). In addition to Canada's multiple Chapter 19 filings on softwood lumber, three private Canadian firms have challenged the U.S. under Chapter 11 on investment. Chapter 11 specifies that to the extent of any conflict between it and other chapters, the others shall prevail (Art. 1112). Chapter 19 states that no provisions of other chapters "shall be construed as imposing obligations on a Party with respect to the Party's antidumping law or countervailing duty law" (Art. 1901). Despite these obstacles, three Canadian firms opted to bear the costs of investor-state arbitration. Whether and how the Chapter 11 panel will address the various Chapter 19 rulings remains unclear. Even within the WTO, where the Dispute Settlement Understanding (DSU) provides a unitary system for resolving conflicts, member states have at times agreed to ad hoc procedures whose legal relationship to the DSU is ambiguous. For example, in the closing hours of the Doha Ministerial, Latin banana producers endorsed the Lomé waiver only after being offered an expedited arbitration procedure to determine whether the EU had set the new tariff for 2006 at a level that preserved their market access. Latin countries invoked that procedure twice in 2005 and prevailed both times, thereby reducing the tariff from 230 Euros per ton to 187, then to 176. The status of these victories under the DSU, however, is uncertain, as the Latin countries remain unsatisfied with the EU regime. Panama, Nicaragua, and Honduras have initiated a new DSU case against the EU, while Ecuador and others continue to explore their options — which could include attempting to revoke the Lomé waiver and requesting (or, for Ecuador, renewing existing) authorization to retaliate against the EU. The Hong Kong Ministerial was salvaged in December only after the Director General appointed the Norwegian foreign minister to offer his "good offices" in facilitating consultations. These "good offices" are not clearly within the provisions of the DSU (Article 5 authorizes something similar). Even in the formal WTO, procedures can thus be created from whole cloth or utilized only informally, with their legal status ambiguous. As a result, the Latin banana producers have enjoyed strategic flexibility in their uphill battle to negotiate improved market access in the EU.

Insights and Conjectures from Cases

Without delving into too much detail, I would like to offer a few observations about the implications and effects of overlap in two specific cases. For strategic litigation tactics, I will summarize aspects of the U.S.-Canada softwood lumber dispute in NAFTA and the WTO. For strategic judicial behavior, I will briefly comment on two WTO rulings reviewing nonreciprocal trade preferences for developing countries.

The softwood lumber dispute between Canada and the United States (as well as Canadian provinces and industry associations on both sides) is a particularly complicated case of institutional overlap. This conflict has erupted several times since the 1980s. The saga's current chapter is known as "Lumber IV." Canada responded to U.S. antidumping and countervailing duties in 2001 with what might be termed a shotgun, or machine-gun, legal game plan. Its attorneys basically filed everywhere on everything. On the three core issues — threat of material injury, calculation of the dumping margin, and subsidy calculation — Canada filed cases in both the WTO and under NAFTA Chapter 19. To date, these six complaints have yielded no fewer than *twenty* panel or appellate rulings in two and a half years. One more report is pending, and still others may yet be requested.

Canada's approach has been to ratchet up political pressure on the US through the cumulative effect of a series of adverse legal rulings. To an extent, the strategy has been successful: Canada has prevailed, on balance, in all but one of the rulings, as arbitrators have concluded repeatedly that the Department of Commerce or International Trade Commission (ITC) failed in one way or another to abide by U.S. or WTO law. Through multiple remands in NAFTA, the tariffs on both fronts (dumping and subsidy) have declined somewhat over time. Nevertheless, tariffs remain in effect, and the U.S. has steadfastly refused to refund roughly \$5 billion in accumulated duties — which, under the Byrd Amendment, may yet be distributed to U.S. producers, despite Canada's successful WTO challenge against Byrd Amendment disbursements.

The most interesting aspect of the dispute at this juncture is the way in which Canada's solitary legal defeat, which occurred in the WTO, has seemingly legitimized U.S. refusals to comply with Canada's repeated legal victories in NAFTA. For any duties to be applied, against dumping or subsidies, the ITC must find that the U.S. industry has suffered or faces a threat of material injury. Canada successfully challenged the initial May 2002 ITC injury determination in both NAFTA and the WTO. After no fewer than three remands by a NAFTA panel, the ITC in September 2004 issued a revised finding that no threat of injury existed. Rather than revoke the duties, the U.S. in November 2004 requested an Extraordinary Challenge Committee (ECC) for the NAFTA panel, alleging one panel member had a conflict of interest. During the same month, to comply with a WTO ruling, the ITC again redid its injury analysis — after reopening the record and taking new information into consideration, which NAFTA forbids — and determined that a threat of injury remained. This threat, the U.S. insisted, justified the continuing antidumping and countervailing duties, even after the ECC in August 2005 upheld the NAFTA panel on all accounts. In November 2005, a WTO compliance panel affirmed the

U.S. position, concluding that Canada had failed to prove that the ITC injury findings could not have been reached by an unbiased and objective decision maker.

At this point, the divergent legal results have led to stalemate. When the U.S. failed to comply with NAFTA rulings after the ECC decision, Canada terminated bilateral discussions and filed suit in the U.S. Court of International Trade (CIT) to compel the U.S. to end the duties and refund past payments. Canada also appealed the WTO compliance panel report, which should lead to an Appellate Body decision in April 2006. For its part, the U.S. relied on the WTO ruling not only to justify continuing the tariffs, but to reject the propriety of Canada's CIT suit — where U.S. government attorneys, to the amazement of observers, pursued a scorched-earth approach, initially refusing to cooperate even in scheduling conferences with the judge. Hearings are now on the calendar, and a CIT ruling is expected by June 2006, which may then be appealed to the U.S. Court of Appeals for the Federal Circuit.

Ironies abound in the current situation. Canada insists that WTO reports — in contrast to directly applicable Chapter 19 rulings — have no effect in U.S. law, while the United States (a frequent critic of WTO trade remedy decisions) contends that the WTO compliance panel has rendered the entire series of prior NAFTA rulings moot. The CIT and Federal Circuit proceedings should be interesting, especially in terms of whether, and if so how, U.S. judges address the WTO panel and (forthcoming) Appellate Body reports reviewing the November 2004 ITC injury determination. At the same time, U.S. lumber firms have challenged the constitutionality of NAFTA Chapter 19 panel procedures in the D.C. Circuit, and the Chapter 11 case of the three Canadian firms is pending. The upshot of this multi-dimensional legal dispute may be to reveal the limits of litigation even in a target-rich setting of overlapping obligations and procedures. At the least, it demonstrates how a single defeat in one legal forum may postpone or foreclose compliance with a string of legal victories elsewhere — even when the formal status of these rulings in domestic law would suggest otherwise. Overlapping jurisdiction is not always a blessing.

As for strategic behavior by judges, the Appellate Body's decision in April 2004 to overturn a WTO panel and affirm the legality of Generalized System of Preferences (GSP) schemes for developing countries under GATT's Enabling Clause reveals how reluctant even authoritatively positioned judges may be to confront potential conflicts between the WTO and economic arrangements among subsets of member states. India challenged an EU program that provided variable benefits to different developing countries, and the initial panel agreed that the EU scheme violated the WTO norm of nondiscrimination. The implications of this ruling for a range of preferential market access programs extended by OECD countries were tremendous, and it sparked protests by benefactors and beneficiaries alike. Although explosive politically, the panel report was well-reasoned in terms of substantive law. Nevertheless, the Appellate Body reversed, concluding that GSP programs can extend special treatment for certain countries as long as they do not discriminate against members with the very same development, financial, or trade needs that the schemes are designed to address. With this ruling, the WTO arguably dodged a bullet. The ambiguous legal status of GSP schemes under the WTO remained intact, and usefully so, despite recourse to binding review.