Overlapping Institutions in Trade Policy

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This article examines the effect of overlapping institutions in trade policy, where the World Trade Organization, preferential trade agreements, and other economic negotiation venues give states many options for negotiating rules and settling disputes. This article argues that overlapping institutions influence trade politics at three stages: selection of venue, negotiation of liberalization commitments, and enforcement of compliance. First, lobby groups and governments on both sides of a trade negotiation try to choose the set of rules that will favor their preferred outcome. WTO rules that restrict use of coercive tactics outside of the WTO generate a selection process that filters the most difficult trade issues into WTO trade rounds or dispute adjudication while easier issues are settled in bilateral and regional fora. This selection dynamic creates a challenge at the negotiation stage by disaggregating interest group pressure for liberalization commitments. The narrowing of interest group lobbying for the multilateral process may impede negotiation of liberalization agreements that could only gain political support through a broad coalition of exporter mobilization. At the enforcement stage international regime complexity creates the potential for contradictory legal rulings that undermine compliance, but also adds greater penalties for noncompliance if reputation effects operate across agreements.

For any given trade problem, states face a wide menu of options from which to select trade negotiation strategies. The original goal of leaders who established the multilateral trade regime in 1947 was to eliminate the regional trading blocs that were blamed for the spiraling economic crisis of the 1930s. A single framework was expected to simplify negotiations and promote nondiscrimination. Nonetheless, the General Agreement on Tariffs and Trade (GATT) under Article XXIV allowed for the creation of customs unions and free trade areas so long as they liberalize "substantially all trade," do not increase restrictions for third countries, and are notified to GATT. Even these minimal conditions have not been closely monitored, despite the apparent contradictions between the expansion of preferential liberalization alongside the strengthening of multilateral trade rules based on the principle of nondiscrimination.[1] Consequently, the trade regime encompasses a central multilateral institution, the GATT and its successor World Trade Organization (WTO), and an extensive web of preferential trade agreements (PTAs) at the bilateral and regional level. The number of trade agreements has seen more than a fourfold increase since 1990 and continues to grow steadily.[2] Other fora available to discuss trade policies include the OECD and regional organizations such as APEC. The resulting "Spaghetti bowl of trade agreements" (refer to the figure in Alter and Meunier this volume) has attracted much policy debate and research among economists about trade diversion and welfare effects.[3] Certainly there is no question that the proliferating sets of rules have added complexity for firms and customs officials who must navigate rules of origin and tariff levels that differ by agreement. Equally important is the effect of overlapping institutions for the *politic*s of trade.[4]

This article argues that international regime complexity influences trade politics at three stages: selection of venue, liberalization commitments, and enforcement of compliance.[5] The unit of analysis is the strategy taken to open markets. Adjudication and negotiation are treated as alternative strategies to address trade barriers that may be relevant for each stage.[6] The article shows that international regime complexity in trade produces many of the expected effects highlighted in the framing article by Alter and Meunier: forum shopping, increased reliance on technical experts, small group environments, and competition among institutions.

Selection of Venue

Overlapping institutions raise the possibility of *forum shopping* similar to the practice in a public law context of choosing among court jurisdictions. This article examines the more general categories of negotiations that vary from bilateral to multilateral negotiations or adjudication. Even these trade fora that differ substantially in their institutional form may be used to address similar trade policy issues. For example, steel industry regulations have been addressed in several fora: after a surge of steel imports in

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1998, the United States engaged in bilateral negotiations with exporters such as Japan, Korea, and Russia; a steel subsidies agreement is being negotiated under the auspices of an OECD Steel Committee; the Doha Round negotiation group on WTO rules addresses subsidies and anti-dumping rules that affect the steel sector; and, several WTO dispute panels have ruled on steel anti-dumping and subsidies policies. While it is not uncommon for an issue to be addressed in multiple fora, few are addressed in all possible fora—some selection is made. Trade authorities with limited resources cannot engage simultaneously in negotiations on all fronts for all issues. This section will discuss how resource capacity and domestic pressure influence the choice of forum.

As international regime complexity in trade increases the role for experts and lawyers it places more demands on state resources. The ability of a state to meet this level of expertise can influence their choice of forum. A brief discussion of standards policies illustrates the point. The Agreement on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Standards (SPS) formally link WTO commitments to international standards set in other international bodies. For example, food safety and labeling regulations that affect trade have been addressed through the activities of the Codex Alimentarius Commission, WTO meetings in the TBT and SPS committees, and in several WTO disputes. U.S. delegates to the Codex meetings typically hold Ph.D. degrees in science or agricultural economics, and technical knowledge facilitates discussions about topics such as food hygiene and additives.[7] Statements in the TBT and SPS committees routinely call for scientific evidence to justify the position on a particular barrier. Several WTO disputes, such as the WTO panel about the EU ban against import of meat treated with growth hormones, have relied upon testimony by scientific experts, both those advising the national governments and those called to testify by the panel.[8] In addition to scientific advice, adjudication across all issue areas has become increasingly legalized and now is conducted largely by professional lawyers, either in-house or hired private counsel.

On the one hand, increasing number of venues and expertise requirements exclude some countries. Developing countries are challenged to meet the levels of expertise and many lack the personnel to participate in all venues. In particular, developing countries are more likely to be absent from standards-setting bodies and are more likely to challenge a trade partner policy by raising it as an issue in WTO committee meetings rather than through adjudication. On the other hand, reliance on third parties can help these countries avail themselves of more institutional options. Coping strategies for developing countries include sharing information about meetings among developing country coalition members, taking advice from NGO groups (some countries have even allowed foreign national representatives of NGO organizations to join as official members of their delegation to WTO negotiations), and hiring foreign law firms or the Advisory Centre on WTO Law to assist with WTO adjudication.[9] Some developing country governments have become quite adept at building strategies across venues, as shown by Larry Helfer's contribution to this symposium. Overall, one would expect larger states to participate across all venues; their forum choices reflect a matter of which issues receive more priority in each venue. For smaller states, there is more likely to be uneven participation across venues with limited options for how to address any particular trade problem.

In addition to resource constraints, domestic political pressure influences choice of forum. On the side demanding liberalization, interest group preferences over choice of fora reflect an underlying concern to get the best outcome for the lowest transaction costs. Sensitivity to the speed and scope of liberalization represent important variables for interest groups. This may lead some groups to explicitly advocate use of one venue. Bilateral or regional negotiations offer the quickest solution by reducing the number of actors and issues. In particular, dynamic industries with rapid product turnover may find WTO negotiations or adjudication too slow to be worth investing resources.[10] In addition, industries with a regional comparative advantage but not a global advantage favor regional agreements that allow them to exclude third parties.[11] Yet given fears of noncompliance, there are distinct advantages to systems with formal rules backed up by a dispute mechanism and a larger membership to amplify the value of a litigated victory.[12] The centralized business organizations that have longer time horizons and aggregate across many export industries (e.g., the U.S. Chamber of Commerce, UNICE of Europe, or Keidanren of Japan) advocate both PTAs and multilateral liberalization, but their major policy statements place greatest priority on gains from the multilateral forum.

The differences in timing and scope of liberalization are also relevant for the preferences for forum choice by interest groups on the side resisting liberalization. From the perspective of protectionist groups, those trying to limit the scope of liberalization may favor bilateral or regional fora while those more concerned about delaying the timing of liberalization will favor multilateral fora that typically have a longer period for negotiation and implementation. The baseline expectation, however, is for protectionist groups to attempt to veto *any* liberalization regardless of forum.

Hence, a critical feature in the selection dynamic is the relative flexibility of one forum over another to exceptions. The capacity for respondent governments to refuse concessions at the bilateral level limits the issues that will be negotiated bilaterally to those without strong domestic opposition from interest groups. For example, Pekkanen, Solis, and Katada argue that Japan began to pursue

bilateral agreements when political sensitivity required negotiating flexible agreements that allowed carve-outs to avoid harming key domestic constituencies such as farmers.[13] Even the market power of the United States and EU is limited in its coercive capacity. While the United States and EU can force their priorities into bilateral agreements with small states that depend on access to their markets, such tactics are less viable with other major trading powers. The WTO rules against unilateral sanctions have raised the costs of coercive bilateral negotiations, which are no longer seen as legitimate and may face countersanctions.[14] The U.S. attempt in 1995 to threaten sanctions against Japan for its refusal in bilateral talks to make concessions on auto market access led to Japan filing a WTO suit against the United States and brought a quick settlement in which the United States backed down on its major demands.

The exclusion of specific products and issues is more difficult in the multilateral forum. To the extent that the gains of multilateral liberalization depend upon broad participation, all states face incentives to support an inclusive issue agenda. During the early agenda-setting stage of trade rounds, consensus rules produce law-based bargaining that increases participation by adding issues.[15] With the demands of the increasing membership, even agriculture and textile issues had to be included on the agenda of the Uruguay Round and Doha Round. For example, Korea gained a carve-out excluding rice from liberalization in the bilateral PTA with the United States that was concluded in March 2007, which contrasts with partial opening of its rice market in the Uruguay Round over intense domestic opposition. It is even harder for the respondent to veto adjudication. WTO rules eliminated the GATT practice of allowing a state to block a panel against its policies. As a result, disputes with strong resistance to liberalization are the most likely to end up in WTO trade rounds or adjudication.

The resulting pattern is clear. The main venue to address trade problems among the U.S., EU, and Japan is the WTO, while they each pursue PTAs with smaller states where the trade structure and exceptions in the agreement reduce domestic adjustment costs. Agricultural topics with entrenched opposition are mainly negotiated in the Doha Round while information technology, where there was little organized opposition, was dealt with in a sectoral agreement in the WTO among members willing to sign up.

Actors develop trade strategies to use a particular venue for a trade problem according to their expectation of which will deliver a better outcome. Each forum offers tradeoffs: reliance on experts and adjudication can provide objective standards but also become its own capacity constraint; larger membership increases the scope for benefits and high enforcement but reduces flexibility to choose partners and exceptions. Within the context of international regime complexity in trade, few problems are addressed in isolation. On the one hand, the selection dynamic discussed here pushes many controversial topics into the WTO. On the other hand, actors strategically operate across venues so that actions taken in a bilateral or regional forum can change politics in ways that will spill over to influence WTO negotiations. This leads to the next question: how does international regime complexity influence liberalization?

Liberalization Commitments

This section will focus on the outcomes for the level of liberalization commitments across different venues given conditions of international regime complexity. The question of whether PTAs represent a building block or a stumbling block for multilateral liberalization has been a focus of substantial research, with evidence cited to support both positions.[16] Recent empirical research shows that membership in a PTA does not make a state more or less likely to liberalize multilaterally.[17] As a positive force, the ability to choose among competing jurisdictions and use exit as a form of leverage encourages more liberalization. Yet it also undermines liberalization by disaggregating interest group lobbying.

Competition among multiple jurisdictions can improve institutional performance by creating a market for production of a public good.[18] First, through expansion into new issue areas, one can see "PTAs as test beds for multilateral action."[19] Provisions on labor or environment regulations that have been too controversial to include among the diverse membership of the WTO have been successfully negotiated first in bilateral agreements. Each PTA acts as a template for future agreements—indeed, there is considerable path dependency as most agreements closely follow the text of previous agreements. The expansion of countries accepting such rules on a bilateral basis facilitates eventually incorporating the issue into the multilateral rules. Second, as an alternative to the multilateral system, regional agreements can provide bargaining power vis à vis other states that fear exclusion.[20] The United States successfully used this strategy when it pushed forward with NAFTA and APEC in the early 1990s when the Uruguay Round negotiations were deadlocked. The threat of a competing trade regime of regional blocs pushed states to renew their commitment to the multilateral negotiations. Similarly, following the impasse at the Cancun meeting of the Doha Round in September 2003, the United States increased efforts to negotiate free trade agreements with Latin American states.[21] This is only a credible option, however, when the PTA includes a large economic area.[22]

The use of PTAs as both templates and bargaining leverage for multilateral negotiations generates the kind of chessboard politics discussed by Alter and Meunier. Some provisions in PTAs are negotiated in anticipation of their impact on the multilateral process. A smaller state may

extract concessions in exchange for agreement to the template desired by the larger state. For example, Whalley discusses how Canada offered to include service liberalization provisions in NAFTA because it knew that the United States wanted to use these provisions in the ongoing multilateral talks and would offer Canada better terms on other issues in the bilateral package.[23] Analysis of the effects of PTAs in isolation would overlook these reverberations.

One must also consider the possibility that use of the exit strategy in narrow trade agreements will erode support for multilateral liberalization. Research has shown the importance of cross-sector linkages to promote liberalization by using exporter gains to offset importer concessions.[24] To the extent that export industries gain market access through bilateral, regional, or sectoral agreements, however, they have fewer incentives to lobby for the multilateral process. This dynamic has contributed to deadlock in the Doha Round. The success of sectoral negotiations to liberalize information technology, financial services, and telecommunications has removed these industries from the coalition needed to support broad liberalization.[25] Companies are reported to have shifted their lobbying efforts away from the multilateral round to instead focus on bilateral agreements that can be negotiated more quickly and shaped to address key issues of importance to business such as investment.[26] EU Trade Commissioner Peter Mandelson said this change in business lobbying makes it harder for negotiators to gain political support and deprives them of "countervailing pressure" necessary to balance agriculture groups.[27]

Whether overlapping institutions will have a positive or negative impact on negotiations for the core multilateral framework depends on the relative economic stakes for the most powerful actors and the perceived stability of the rules. Uruguay Round negotiations presented the prospect for new gains for American and European business in the areas of services and intellectual property, and the outdated provisional GATT system was seen to be at risk of collapse. Under these conditions, the rise of competing regional agreements generated renewed political commitment to achieve success in the multilateral forum. In contrast, industries in both developed and developing countries have seen the Doha Round as offering few gains, while the strength of the WTO system makes the status quo appear to be a safe fall-back option. As attention shifts to other arenas, the unraveling of interest group support reduces the prospects for substantial multilateral liberalization.

Enforcement of Compliance

By reducing the clarity of legal obligation, international regime complexity can generate more litigation and contradictory rulings at the enforcement stage. First, some policies may be interpreted as consistent with PTA rules but not the WTO or vice versa. This can lead to legitimate confusion about the appropriate policy as well as strategic forum shopping in the choice of litigation venue to challenge policies. The trade regime presents an institutional context with highly legalized dispute settlement mechanisms in both PTAs and the WTO.[28] For example, the United States and Canada engaged in over a decade of litigation about Canadian subsidy policies for its timber industry with each side citing NAFTA and WTO adjudication decisions to support their position. As the legal interpretation deadlocked, neither side changed their policies until eventually a bilateral political settlement was signed in September 2006. This case has led many to fear that proliferating rules will contribute to wasteful litigation. Second, the increase of rulings that overlap for a substantive issue may create further tensions for compliance. In another example, Brazil has been faced with a dilemma as a WTO panel has ruled against the policy reform that it had introduced in order to comply with a ruling by the regional trade court of Mercosur.[29]

Does such forum shopping among alternative adjudication venues undermine compliance? Evidence suggests that the above examples may be anomalous and are unlikely to have widespread effect on the regime. There have only been a handful of trade disputes in which two states have engaged in litigation at both the regional and multilateral levels on essentially the same policy issue.[30] Davey notes that even as PTAs have established dispute systems closely modeled on the WTO system, they are infrequently used. He contends that higher legitimacy and enforcement power make states view the WTO dispute mechanism as more effective.[31] NAFTA members settle most of their trade disputes in the WTO.[32] Moreover, the value of setting a precedent in the multilateral forum makes the regional option appealing only in a narrowly constrained set of circumstances when their industry is strong relative to their regional partner but weak relative to the WTO membership.[33] Solving some matters in the regional forum can even reduce the caseload of WTO adjudication. Over one hundred disputes about anti-dumping and countervailing duties have been resolved through the NAFTA Article 19 provisions that allow companies to challenge government decisions through an expedited NAFTA panel process.

Compliance disputes can have a positive effect when they push forward negotiation on rules. In the case of the steel negotiations, the victory by the EU and other complainants in a WTO panel against U.S. safeguard tariffs protecting its steel industry was cited as adding more momentum to the OECD talks.[34] Brazil and other agricultural export states have used victories in WTO disputes against U.S. and EU agricultural subsidies to add pressure for concessions on agriculture in the Doha Round.[35] Even when ambiguity of rules pushes political debates into the implementation and interpretation phase as suggested by Alter and Meunier, an increase of compliance disputes may in turn push forward the politics for negotiating new agreements.[36]

Overlapping institutions can also promote greater compliance by increasing incentives to maintain a good reputation. As noted by Keohane in his discussion of regime compliance, "disturbing one regime does not merely affect behavior in the issue-area regulated by it, but is likely to affect other regimes in the network as well. For a government rationally to break the rules of a regime, the net benefits of doing so must outweigh the net costs of the effects of this action on other international regimes."[37] In this way reputation effects may ripple across regimes. Multilateral trade dispute settlement gains enforcement power from its role to provide information about reputation to the broader membership; the expectation is that states with a bad reputation will suffer a penalty in future interactions.[38] The proliferation of trade agreements increases the occasions at which a state faces a penalty for a poor reputation. A state that frequently violates its WTO commitments could be given worse terms in bilateral trade agreements, or find itself unable to find any partner willing to negotiate a PTA. For example, negotiations for an economic partnership agreement between Japan and China have been slowed by concerns that China's poor compliance with the WTO TRIPS agreement make its compliance with any "WTO plus" commitments unlikely. Russia's poor compliance with intellectual property provisions in bilateral agreements has been cited as a factor slowing its ability to gain approval for WTO accession.[39] One would expect these reputation penalties to eventually encourage higher compliance across venues.

The tendency for international regime complexity to generate "small group environments" will work in favor of a dynamic where overlapping institutions magnify reputation effects to increase compliance.[40] As the same people engage each other across institutional fora, which is especially common among the expert group of trade lawyers engaged in litigation, there is rapid diffusion of information about specific cases. This close network of repeat players helps to uphold a common reputation for a state within the trade regime.

Concluding Remarks

Trade policy is a rich area for research on overlapping institutions given the large number of agreements regulating trade. This article suggests that decisions at every level of a trade negotiation must take into account related institutions. First, the choice of institutional venue is constrained by both legal and political pressures such that many politicized disputes are filtered into the WTO. Second, competition between bilateral and multilateral venues for making liberalization commitments can generate complementarities or undermine support for multilateral liberalization. Finally, at the enforcement stage, multiple rules add complexity that could increase litigation. But at the same time, international regime complexity encourages stronger compliance by adding more incentives to uphold a good reputation. Failure to take into account the selection process created by overlapping institutions could lead to mistaken conclusions about institutional effectiveness. In particular, multilateral institutions may look less effective than bilateral institutions, when they are actually getting harder issues. Willingness of states to negotiate and comply with agreements depends on the broader context of overlapping institutions. Economists have long disagreed over the welfare effects from overlapping regional and multilateral trade agreements. There is need for more political scientists to join this debate and research the political effects of overlapping institutions on such critical variables as bargaining power, interest group mobilization, and reputation.

Notes

1 Srinivasan 1998.
2 Medvedev reports an increase from 53 agreements in effect in 1990 to 229 in effect in 2004 (Medvedev 2006, 11). WTO Director General Pascal Lamy has estimated that 400 will be in force by the year 2010 (http://www.wto.org/english/news_e/sppl_e/sppl53_e.htm).
3 See, for example, Bhagwati and Panagariya 1996.
4 For a more comprehensive review of the economic and legal dimensions of overlap between PTAs and the WTO that are not addressed here, see Bartels and Ortino 2006.
5 On the sources of international regime complexity see Aggarwal 1998.
6 Davis 2003, Davis and Shirato 2007, and Mansfield and Reinhardt 2003 have shown that states use adjudication or negotiation to solve similar problems. Petersmann 2006 provides legal and normative analysis for how adjudication and negotiation represent alternative strategies.
7 See http://www.fsis.usda.gov/regulations_&_policies/Codex_Delegates_and_Alternates/index.asp for list of delegates and their qualifications.
8 Pauwelyn 2002.
9 Shaffer and Mosoti 2002; Patel 2008.
10 Davis and Shirato 2007.
11 Chase 2003; Busch 2007.
12 Martin 1992; Drezner 2006.
13 Pekkanen, Solis, and Katada 2007.
14 Schoppa 1997.
15 Steinberg 2002.
16 Bhagwati and Panagariya 1996; Mansfield and Milner 1999; Krueger 1999; Kono 2007. Note that an area for further exploration is the effect of regional agreements on bilateral agreements (see Brummer 2007).
17 Goldstein, Rivers, and Tomz 2007.

18 Hooghe and Marks 2003, 240.
19 Barton, Goldstein, Josling, and Steinberg 2006, 55.
20 Whalley 1998; Mansfield and Reinhardt 2003.
21 *Financial Times,* December 6, 2003.
22 Drezner 2006, 91.
23 Whalley 1998, 78.
24 Destler and Odell 1987; Davis 2004.
25 Aggarwal 2001.
26 *Financial Times,* December 12, 2005; October 18, 2006.
27 Ibid.
28 Some RTAs include provisions for compulsory jurisdiction or a forum choice clause, but even these measures leave open considerable leeway for the complainant to choose jurisdiction (see Kwak and Marceau 2002).
29 Brazil adopted a policy to restrict the import of re-treaded tires because they were breeding grounds for mosquitoes. After a Mercosur court ruled that the policy was a violation, Brazil changed the policy to exempt the type of re-treaded tires traded with its Mercosur trade partners. The new policy was then challenged by the EU (WTO DS 332), and the WTO Appellate Body ruled in December 2007 that while WTO agreements (Article XX) gave Brazil the right to ban tires for public health, the Mercosur exemption violated WTO non-discrimination principles.
30 Another case with multi-level litigation is the European banana import regime, which was contested at the WTO and also led to litigation brought by Germany before the ECJ (Alter and Meunier 2006). The United States and Mexico have engaged in litigation in NAFTA and WTO about trade in sugar and taxes on soft drinks. Brazil challenged duties on poultry imports by Argentina in Mercosur and then WTO adjudication.
31 Davey 2006.
32 Mexico, Canada, and the United States have initiated 28 WTO complaints against each other in contrast to only three complaints under NAFTA Article 20 dispute settlement. There have been many NAFTA Article 19 disputes, in which industries directly challenge specific antidumping or countervailing duty decisions. These cases are not parallel to the government to government legal challenges about rule compliance in WTO and NAFTA article 20 disputes, but offer a venue that settles some issues before they could rise to government disputes.
33 Busch 2007.
34 *Financial Times,* December 6, 2003.
35 *Inside U.S. Trade,* November 17 and October 27, 2006.
36 Alter and Meunier 2009.
37 Keohane 1984, 104.
38 Maggi 1999.
39 *Inside U.S. Trade,* September 7, 2007.
40 Alter and Meunier 2009.

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