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## From Here to Beijing: Public/Private Overlaps in Trade and Their Effects on U.S. Law

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# From Here to Beijing: Public/Private Overlaps in Trade and Their Effects on U.S. Law

By: Elizabeth Trujillo\*

## INTRODUCTION

Despite China's recent achievements at the Beijing Olympics,<sup>1</sup> news involving contaminated pet food and unsafe toys imported from China makes us question the legal frameworks that facilitated such incidents and stirs anti-globalization sentiment.<sup>2</sup> While consumers wonder about the role their governments play in this context and look for remedies that respond in some meaningful way to the forces of globalization, deeper questions lie underneath the surface of the legal remedial work of domestic courts. International trade and globalization have provided greater access to imported goods for consumers and more opportunities for corporations to export their products. However, amid this increasing exchange of goods, the regulatory power of states and the jurisdictional reach of domestic courts are constrained. International regimes such as

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\* Associate Professor, Suffolk University Law School. This paper was presented at the following conferences and faculty workshops: Suffolk University Law School, January 2009; Law and Society Annual Meeting in May 2008, Montreal, Quebec, Canada as part of a panel on the effects of transnational legal processes and international trade on domestic regulatory policy; University of Connecticut School of Law Faculty Workshop Series, University of Connecticut School of Law, Hartford, Connecticut, April 2008; and Junior International Law Scholars Annual Conference, New York Law School, New York, New York, February, 2008. Many thanks to all those participants who have contributed greatly to the development of this piece. Special thanks to Hannah Buxbaum, David Gantz, Joseph Franco, Alasdair Roberts, Jessica Silbey, and Joel P. Trachtman for comments on earlier drafts. My gratitude as well for the wonderful research assistance of Aykut Ozger, Nicole Hostettler, and Merissa Farmer as well as my colleagues at Suffolk University Law School for their support and comments on this Article.

1. See generally Nicholas D. Kristof, *China's Rise Goes Beyond Gold Metals*, N.Y. TIMES, Aug. 21, 2008, at A23 (discussing China's success at Olympics and growing economy).

2. See *Senate Homeland Security Committee Begins Investigation of Toy Import Safety*, 24 INT'L TRADE REP. 1243 (2007); Ed Taylor, *Trade Policy Brazil Bans Imports of Mattel Toys on Heels of Recall, Lead Paint Issues*, 24 INT'L TRADE REP. 1325 (2007); Kathleen E. McLaughlin, *Standards: EU Urges Quality, Safety Assurances for Chinese Food, Consumer Exports*, 24 INT'L TRADE REP. 1072 (2007); see also Audra Ang, *China Defends Quality of its Exported Goods, Problems Attributed to Differing Standards, U.S. Product Designs*, GRAND RAPIDS PRESS, Aug. 28, 2007, at C4.

the World Trade Organization (WTO), through its Member States, encourage the growth of private interests and the expansion of trade, contributing to changing legal and regulatory landscapes. As a result, a collage of trade and private investment regimes has emerged regionally and bilaterally. At times, these regimes, through their various dispute resolution bodies, seem to work in tandem. Other times, though, they collide and conflict with one another on substantive issues relating to trade, private investment, and domestic policy.

This article maps the legal paradigms in place under international trade law and demonstrates the way in which trade issues overlap with the interests of private investors. When WTO panels, in dealing with regulatory measures under national treatment provisions of the General Agreement on Tariffs and Trade (GATT), fail to identify the horizontal and vertical overlaps that exist among trade and investment causes of action, particularly in the context of traditionally state regulated industries, governments (through forum shopping to the WTO) can indirectly assist foreign investors in their private rights of actions against a host government. Furthermore, overlapping disputes in multiple fora can place unnecessary financial burdens on developing nations. A “bottom-up coordination,” that is, from regional tribunals to WTO panels, without the necessary “top-down coordination” by the WTO to regional tribunals can strengthen the power of special interests in influencing and manipulating the WTO system<sup>3</sup> and hurt developing countries by encouraging forum-shopping.<sup>4</sup> By “unpacking” the overlaps between trade and investment causes of action, this paper illustrates that the same non-state actors are bringing similar investment

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3. See, e.g., Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002) (distinguishing between “bottom-up norm creation” and the traditional “top-down” approach to international law where international institutions can influence norms that are implemented by nation-states); See also, Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125 (2005) (using bottom up lawmaking to describe the trade practices that emerge from transnational financial actors and eventually become “hard law” by nation-states). See also, GREG SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* 1-18 (Brookings Institution Press 2003) (describing the relationship between “public-private networks” and international governance, specifically through the “blurring” of the public and private divide in WTO trade litigation).

4. See Joost Pauwelyn, *ICTSAD/GIAN-RUIG, Speaker notes for dialogue on the Mexico Soft Drinks Dispute: Implications for Regionalism and for Trade and Sustainable Development: “Choice of Jurisdiction” WTO and Regional Dispute Settlement Mechanisms: Challenges, Options and Opportunities*, at I.2. (stating that overlapping dispute processes, in terms of differing fora, gives complainants the opportunity to forum shop and thereby place a financial burden on developing countries).

disputes before regional tribunals such as NAFTA and at the same time, lobbying their governments for the trade adjudication before the WTO. By ignoring these overlaps, WTO adjudication becomes fraught with inconsistency and a perceived bias which effectively alienates its members from the multilateral trade system. This is especially relevant in the context of domestic regulation, where national treatment provisions under the GATT limit the extent to which a member state may enforce domestic regulations, even those dealing with safety or health standards.

Hearing of lead contaminated toys may make some shake their fists at the WTO and others in the federal government for not doing more to prevent this, and yet others may shake their fists at the Chinese for their perceived negligence. Though most trade agreements incorporate provisions allowing for domestic governments to pass legitimate regulations regarding health and safety, national and state governments still run the risk of being perceived as protectionist if they pass regulations that do not fall within those strict parameters.<sup>5</sup> Domestic courts may be able to resolve some of the state consumer protection issues, but cannot necessarily reach the foreign manufacturer in any meaningful way to find solutions.<sup>6</sup> Finally, the General Agreement on Tariffs and Trade (GATT) and various other trade agreements cannot properly address these issues either. National treatment provisions within the GATT or the North American Trade Agreement (NAFTA), for example, limit the power of domestic regulation by ensuring that foreign products that are "like" domestic products be treated in a non-discriminatory manner.<sup>7</sup> It can be difficult for states to meet this non-

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5. See, e.g., Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Technical Barriers to the Trade Agreement, Apr. 15, 1994, WTO Agreement, Annex 1A [hereinafter TBT Agreement]; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Sanitary and Phytosanitary Measures Agreement, Apr. 15, 1994, WTO Agreement, Annex 1A [hereinafter SPS Agreement]; see also North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (comparing the agreements as chapters in the NAFTA under chapters 9 (TBT) & 7 (SPS)).

6. See *In re Thomas Trains Paint Litig.*, No. 07 C 3514, 2007 WL 2667851 (N.D. Ill. Aug. 28, 2007). The case involved plaintiffs bringing a class action on behalf of all consumers who purchased Thomas & Friends Wooden Railway vehicles containing lead paint and imported and/or distributed between January 2005 and June 2007 against defendants, including manufacturer and distributors such as RC2 Corp., Learning Curve Brands, Inc. and Apax Partners, Inc. *Id.* RC 2's Thomas Toys are manufactured in China where RC2 has a longstanding investment. *Id.* In 1997, RC2 developed the RC2 Industrial Zone in Dongguan, China where some suppliers also operate facilities. *Id.*

7. See General Agreement on Tariffs and Trade, Art. III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; NAFTA, *supra* note 5, art. 301 (incorporating the national

discriminatory standard. Furthermore, regional dispute settlement bodies tend to look to WTO adjudication of domestic regulatory measures, and this may exacerbate the problem and make it more difficult for states to pass even legitimate regulatory measures to address these issues. This “deferential” approach by regional tribunals results in a “bottom-up coordination” that contributes to the increasing legitimacy of WTO jurisprudence, particularly with regard to national treatment issues.<sup>8</sup> However, unless this “bottom-up coordination” is complemented with “top-down coordination” by the WTO panels, only private interests, through the assistance of states, will continue to be served at the expense of domestic governance.<sup>9</sup>

In illustrating where the trade and investment regimes intersect, this Article will look at WTO and NAFTA adjudication of similar issues such as national treatment.<sup>10</sup> Such overlaps do not necessarily imply that WTO decisions regarding national treatment will automatically be adopted by a regional tribunal dealing with a national treatment issue. Nor do these overlaps mean that a private investment tribunal will necessarily adopt a WTO panel decision as controlling law for its own decisions. However, unpacking these overlaps does illustrate the way in which claimants bringing cases before a regional tribunal use the WTO to *give weight* to their arguments and thereby to the regional tribunal

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treatment provision of GATT Article III).

8. “Deference” as used in this Article does not mean that regional tribunals necessarily agree with and adopt WTO decisions adjudicating similar issues coming up before the regional tribunal at hand. Instead, it refers to the tendency of regional tribunals to look to WTO adjudication and interpretation of similar terminology found in the GATT as found in a regional agreement (i.e. national treatment) in making their own decisions on similar issues.

9. See *supra* note 3 and accompanying text.

10. See Elizabeth Trujillo, *Mission Possible: Reciprocal Deference Between Domestic Regulatory Structures and the WTO*, 40 CORNELL INT’L L.J. 201, 207 (2007) (comparing the NAFTA Chapter 11 adjudication of national treatment with the WTO adjudication under GATT Article III and concluding that the Chapter 11 tribunals tend to give deference to the regulatory context of the measure in question as well as to WTO adjudication of “like products” under GATT Article III); see also Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT’L L. 48, 81 (2008) (comparing WTO and NAFTA Chapter 11 adjudication of national treatment and stating that NAFTA investment regimes have a stronger concern for public policy justifications of discrimination, which the authors term “regulatory context test,” rather than under the WTO adjudication of Article III which uses primarily a “competition test”); see generally Joel P. Trachtman, *FDI and the Right to Regulate: Lessons from Trade Law*, in U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *THE DEVELOPMENT DIMENSIONS OF FDI: POLICY AND RULE-MAKING PERSPECTIVES* 189, U.N. Doc. UNCTAD/ITE/IIA/2003/4 (2003), available at [http://www.unctad.org/en/docs/iteiia20034\\_en.pdf](http://www.unctad.org/en/docs/iteiia20034_en.pdf) (describing the similarities and differences between investment and trade regimes and noting that the political economy of investment is different from trade).

decision, and in turn, enhance the legitimacy of the award.<sup>11</sup> In attempting to unpack these overlaps, this Article identifies the transnational nature of international trade. It will also discuss ways in which the WTO may increase coordination among a plurality of legal regimes that span the domestic and international landscapes. Specifically, it will opine that a procedural mechanism called *reciprocal deference* can help enhance coordination among the various trade regimes.<sup>12</sup> Reciprocal deference is an approach that recognizes the transnational nature of trade and the state and non-state actors working within and around its processes.<sup>13</sup> The current paradigm of trade regimes that lacks coordination allows problems traditionally managed by public entities within a state to fall through the cracks between the international and domestic regulatory and legal frameworks. Reciprocal deference will allow for the pluralist landscape of trade to persist while helping to “manage hybridity” of adjudicatory fora.<sup>14</sup>

Part I of this article illustrates the multi-scalar nature of domestic governance and international trade regimes, multilaterally and regionally or bilaterally.<sup>15</sup> Specifically, it will distinguish between two international adjudicatory regimes: 1) the private investment regime framed within regional trade agreements such as NAFTA and other

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11. The tendency of regional tribunals to “defer” to WTO adjudication in national treatment cases arises from the fact that attorneys for the claimants defer to WTO adjudication in bringing forth their arguments before the regional tribunals. See Trujillo, *supra* note 10, at 206.

12. *Reciprocal deference* was a concept developed in *Mission Possible*. See generally Trujillo, *supra* note 10. Drawing from NAFTA chapter 11 adjudication of regulatory measures and U.S. dormant commerce clause jurisprudence, this procedural mechanism allows for enhanced transparency and clarification for WTO panels of domestic regulatory measures that are legitimate under the GATT. *Id.* at 235. It calls for some deference by WTO panels to domestic regulatory processes and sets guidelines by which measures arising from such processes may be assessed for legitimacy. *Id.* at 236.

13. See, e.g., S.G. Sreejith, *Public International Law and the WTO: A Reckoning of Legal Positivism and Neoliberalism*, 9 SAN DIEGO INT’L L.J. 5, 54 (2007); see generally ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION (1977); Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, in WORLD POLITICS 40 (1974).

14. See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1155, 1197 (2007) (describing a new global world of hybrid legal spaces where “normative conflict among multiple, overlapping legal systems is unavoidable”). Rather than avoiding these eventual conflicts, Professor Berman offers legal pluralism as a means for managing, rather than eliminating, such hybridity. *Id.* at 1197.

15. See Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789, 1814 (2005) [hereinafter Osofsky, *Geography of Climate Change Litigation*] (describing multiscalar); see also Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, 43A STANFORD J. INT’L L. 181, 187 (2007) [hereinafter Osofsky, *Pluralist Legal Dialogue*] (discussing what a model of multiscalar global legal pluralism could look like).

similar regional trade agreements, and 2) the trade regime, located within the multilateral framework of the WTO as well as in regional and bilateral trade agreements. Though seemingly different, particularly in the remedies they provide participating parties, the *public/private overlap* that these two adjudicatory regimes engender share common interests, legal spaces, and impact domestic governance.<sup>16</sup>

Part II describes the way in which the investment and trade regimes overlap. Borrowing from Professor Alan Sykes' distinction of "private rights of action" for foreign investors and "public rights of action" for governments bringing trade disputes, this Section will refer to "public" actions as those formally brought to the WTO or a regional tribunal by a state.<sup>17</sup> However, this Section will not specifically discuss the private actors that influence governments to bring such trade disputes in the first place.<sup>18</sup> It focuses primarily on the overlaps among the adjudicatory processes of the two regimes; however, it also looks at the way in which the regional trade regimes can intersect with the multilateral trade regime of the WTO on substantive trade law.

Specifically, this Section will discuss NAFTA disputes as compared to similar disputes at the multilateral level. One case in particular illustrates this phenomenon. The Chapter 11 investor-state dispute, *Corn Products International v. United Mexican States*,<sup>19</sup> began as a trade dispute between the United States and Mexico for alleged dumping of high fructose corn syrup by the United States into Mexico.<sup>20</sup> Shortly after the U.S. investor brought the *Corn Products*

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16. See Alan Sykes, *Public v. Private Enforcement of International Economic Law: Of Standing and Remedy* 7-8 (Univ. of Chi. John M. Olin Law & Econ. Working Paper No. 235, 2005), available at [http://ssrn.com/abstract\\_id=671801](http://ssrn.com/abstract_id=671801) (describing investment disputes as resulting in monetary damages for private actors whereas WTO trade disputes provide retaliatory measures as remedies for governments); see generally ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004) (discussing the changing relationship between the state and international institutions in the face of globalization).

17. See Sykes, *supra* note 16, at 2. These two types of actions have different enforcement mechanisms: *private rights of action* having monetary damages (by governments to private investors) in contrast with *public rights of actions* where there is no direct remedy of enforcement except through retaliation. *Id.*

18. See, e.g., SHAFFER, *supra* note 3, at 6 (describing the private-public agreements influencing the WTO litigation); see also Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is it Anyway?*, 44 HARV. INT'L L.J. 221, 230 (2003) (discussing the various normative implications of private participation in WTO litigation). *Private* in this piece refers to the private persons ranging from individuals, corporations, to non-governmental organizations suing to "protect a perceived public interest." *Id.* at 221.

19. Request for Institution of Arbitration Proceedings, *Corn Prod. Int'l v. United Mexican States*, Oct. 21, 2003 [hereinafter *Corn Products International*].

20. The antidumping dispute was decided by the WTO in Panel Report, Mexico-Anti-

*International* claim under NAFTA, the United States filed a trade dispute with the WTO, *Mexico-Tax Measures on Soft Drinks and Other Beverages*, alleging national treatment violations under GATT by Mexico as a result of a tax passed on soda bottlers using high fructose corn syrup. Whereas the WTO found Mexico in violation of GATT, the NAFTA Chapter 11 tribunal is in the final stages of issuing its decision.<sup>21</sup> It is unclear whether the NAFTA tribunal will be influenced by the WTO decision; however, Chapter 11 tribunals have been known to defer in the past to WTO interpretations of national treatment.<sup>22</sup> This Part will illustrate the importance of unpacking such substantive overlaps so as to 1) diminish the tendency of nations to forum-shop to the WTO in order to gain a strategic advantage in trade and investment disputes, and 2) check the influence of private groups and industrialized nations on the WTO system.<sup>23</sup>

Part III will consider various perspectives on the role of the WTO in the context of trade and domestic regulatory processes. More specifically, it addresses some of the limitations presented by some of these approaches.<sup>24</sup> For example, if the WTO follows a regulatory model for domestic administrative processes, it would in fact direct Member States to harmonize their domestic laws in accordance with global standards and processes.<sup>25</sup> However, this model does not take

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Dumping Investigation of High Fructose Corn Syrup from the United States, WT/DS132/R (Jan. 28, 2000) (adopted Feb. 25, 2000) and a NAFTA Chapter 19 Tribunal in Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America, Mex.-U.S.-98-1904-01 (Aug. 3, 2001)[hereinafter Imports of High Fructose Corn Syrup].

21. The Chapter 11 case, *Corn Products International*, has been decided but not yet published. One source has stated that the decision has come out in favor of the U.S. investor, Corn Products International and that a hearing on damages should be held in August 2008. See News Release, Corn Products International Updates NAFTA Proceedings, Corn Products International, Inc. (Dec. 19, 2007), <http://ir.cornproducts.com/phoenix.zhtml?c=77278&p=irol-newsArticle&ID=1088855&highlight>.

22. See Trujillo, *supra* note 10, at 239 (discussing the tendency of Chapter 11 NAFTA tribunals to defer to WTO interpretation of "like products" regarding national treatment violations).

23. See Pauwelyn, *supra* note 4, at 1.2 (stating that overlapping dispute processes, in terms of differing fora, gives complainants the opportunity to forum shop and thereby place a financial burden on developing countries).

24. See, e.g., Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 305 (2006) (discussing the jurisdictional tension arising from the tendency of national courts to implement global regulatory strategies and international law norms and proposing a functional approach in the economic context).

25. See John O. McGinnis & Mark L. Movsesian, *Commentary: The World Trade Constitution*, 114 HARV. L. REV. 511, 517-19 (2000) (finding weaknesses in the regulatory model and comparing it to the anti-discrimination model which defers more to national governments); see also Trujillo, *supra* note 10, at 232.



into account the transnational nature of trade itself.<sup>26</sup> Public and private networks working across borders, sometimes in tandem, help to increase trade on the ground and shape the laws surrounding its proliferation.<sup>27</sup> Moreover, the *inter-systemic* nature of the trade regimes gives rise to a larger, complex network that is hybrid in nature,<sup>28</sup> but requires coordination. The tendency of regional tribunals to defer to WTO interpretations of trade commitments creates a “bottom-up” coordination that can benefit private actors at the expense of possible legitimate domestic regulatory policy. In doing so, private actors are not only presuming the legitimacy of WTO jurisprudence for strategic purposes, they are also solidifying the WTO as a legitimate adjudicator and creator of international norms through their dispute resolution bodies. Because trade relationships have dimensional complexity, it becomes inherently problematic for WTO panels, in order to achieve consistent and principled adjudicated outcomes in trade disputes, to not unpack policies underlying overlapping trade agreements. Therefore, WTO panels should make a conscious effort to unpack private/public overlaps in order to create “top down coordination” with regional tribunals. A top-down coordination in concert with bottom-up coordination allows the WTO to play an active role in setting international trade norms that take into account the multi-layered aspects of international and domestic adjudicatory processes surrounding domestic regulation. This would be more aligned, for example, with the reality that international institutions, such as the WTO, rely on domestic governments to enforce their decisions. Implementing procedural mechanisms, such as *reciprocal deference*, is one way to encourage this “top down coordination” and unpack these private/public overlaps, enhancing adjudicatory balance within the trade regimes.<sup>29</sup> Furthermore, a procedural mechanism of this kind will not

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26. See generally KEOHANE & NYE, *supra* note 13.

27. Professor Anne-Marie Slaughter, in describing horizontal and vertical relationships in the context of transnational judicial interaction and the emergence of global constitutional jurisprudence, describes a global legal system comprised of “horizontal and vertical networks” at the national and international level, that share a common space arising “from jurisdiction over a common area of law or a particular region of the world.” ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 67 (2004). She describes these networks as moving across border lines, comprised of judges, legislators, governments, intergovernmental and nongovernmental organizations, private corporations, and the like. *Id.*

28. See, e.g., Keith Aoki & Kennedy Luvai, *Reclaiming “Common Heritage” Treatment in the International Plant Genetic Resources Regime Complex*, 2007 MICH. ST. L. REV. 35, 44 (2007) (describing the international overlapping regimes in the context of intellectual property regimes pertaining to legal protections of plant genetic resources).

29. Reciprocal deference allows WTO panels to unpack the overlaps among trade regimes and it provides a procedural mechanism through which deference to domestic regulatory processes is

eradicate the hybrid nature of trade regimes; rather, it will embrace legal plurality in this context while managing it through a dialogical approach spurred on by the WTO itself.<sup>30</sup>

Finally, Part IV will discuss the landscape of current overlapping trade regimes and their non-static nature through a pluralist lens.<sup>31</sup> This Part will attempt to illustrate how inter-regime shifts cause the private and public trade regimes to not be entirely distinct. Rather, they are porous, fluid, and mobile, whereby related issues seep into the private realm of investment as well as into the public realm of trade. This mobility is another means of allowing non-state actors, primarily private investors and industries, to influence domestic governments into bringing trade disputes to the WTO.<sup>32</sup> Additionally, Part IV will discuss bottom-up coordination and demonstrate how regime shifting illustrates the need for top-down coordination from the WTO. It also can encourage dialogue and have positive effects on developing countries. Legal pluralism and regime shifting allow for a dialogical approach to dealing with trade and regulatory matters by facilitating the creation of new international standards and norms.<sup>33</sup>

This Article concludes by depicting the nonstatic nature of international regimes and proposes that *reciprocal deference* is more aligned with this view. It illustrates the ways in which globalization has made room for various legal spaces to emerge and at times, overlap and even collide.<sup>34</sup> The challenge is to “manage hybridity” of trade regimes, without necessarily eliminating the hybridity itself.<sup>35</sup>

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key in understanding the degree of legitimacy in regulatory measures and in increasing transparency at the domestic level. For a detailed discussion of *reciprocal deference* as a possible procedural mechanism for WTO panels dealing with domestic regulatory measures, see generally Trujillo, *supra* note 10.

30. See Berman, *supra* note 3, at 484 (discussing cultural hybridization); see also Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 HASTINGS L.J. 241, 244 (2007) (stating that “[a]chieving more coordination, and even harmonization, among tribunals will require moving beyond the historic distinction between states and individuals in international law”).

31. See generally Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1 (2004) (assessing challenges to TRIPS and the expansion of intellectual property law).

32. See generally SHAFFER, *supra* note 3.

33. See Helfer, *supra* note 31, at 14 (describing that *counterregime norms* are “binding treaty rules and nonbinding soft law standards that seek to alter the prevailing legal landscape”).

34. See Berman, *supra* note 14, at 1196 (describing international law through a pluralist lens). See also Elizabeth Trujillo, *Shifting Paradigms of Parochialism: Lessons for International Trade Law*, 3 J. INT’L L. & INT’L REL. 41, 42 (2007) (University of Toronto Faculty of Law and Munk Centre for International Studies, Peer Review) (discussing parochial interests as they pertain to international trade).

35. See Berman, *supra* note 14, at 1196 (describing a new global world of hybrid legal spaces

Reciprocal deference is one way WTO panels may manage hybridity and increase flexibility and normative change on issues of international trade and international law, while remaining a “neutral” international institution that adjudicates trade matters more centrally.<sup>36</sup> Through procedural mechanisms like reciprocal deference, WTO panels can increase top down coordination by 1) unpacking substantive and jurisdictional overlaps, 2) deferring to regional tribunals for matters that are more appropriately managed at the regional level, and 3) encouraging dialogue among state and non-state actors regarding trade matters.

If the WTO panels remain passive on regional and bilateral issues, it could lose its cohesive force in maintaining the multilateral trade system. The recent failure of the Doha Round<sup>37</sup> indicates the current weakness within the multilateral system that includes not only traditional economic powers such as the U.S. and Europe, but also emerging economies such as India, Brazil, and China. The failure of the Doha Round not only has economic ramifications for free trade, but more importantly, it has symbolic and political consequences globally.<sup>38</sup> Key to maintaining a cohesive globalized trade system is finding ways of coordinating the multilateral trade regime with the regional and bilateral regimes. Such a trade system not only facilitates the exchange of goods and services among nations but it also can help shape domestic regulation. In this view of trade, it is not so surprising that defective products from China, for example, could affect consumers in the United States. The challenge for governments and private actors, though, is to address these issues while navigating through a complex trade system, without losing compliance with international commitments.

## I. THE MULTILATERAL/REGIONAL DISCONNECT

### A. *The Good, the Bad, and the Multi-Scalar*

Two layers of adjudicatory processes can be easily distinguished as taking place in the context of regulatory measures: 1) the processes that

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where “normative conflict among multiple, overlapping legal systems is unavoidable.”). Rather than avoiding these eventual conflicts, Professor Berman offers legal pluralism as a means for managing, rather than eliminating, such hybridity.

36. See Trujillo, *supra* note 10, at 203 (proposing a reciprocal deference approach with which the WTO could handle regulatory measures).

37. Anup Shah, *WTO Doha “Development” Trade Round Collapse*, GLOBAL ISSUES, July 28, 2006, <http://www.globalissues.org/article/663/wto-doha-development-trade-round-collapse-2006>.

38. See *Beyond Doha*, ECONOMIST, Oct. 9, 2008, at 31 (describing the Doha impasse as a reflection of intellectual shifts in international perspectives).

occur at the domestic level among administrative bodies and state and federal courts, and 2) the supranational adjudication that occurs on WTO panels and regional tribunals. These layers are far from two-dimensional, for they intersect with other external and internal factors and shift in their relative judicial impact. At the domestic level, for example, it can be unclear whether environmental or health measures fall under the aegis of state law or federal law.

In the area of environmental law, some states have asserted their power. For example, California has passed regulations prohibiting the use of methanol for reformulated gasoline, as well as other environmental regulations, in hopes of being in line with the Kyoto Protocol even though the federal government has refused to sign onto it.<sup>39</sup> But also in this context, states have backed away from overstepping their state authority and on the other hand, have tried to push the federal government to assert its jurisdiction to pass regulations dealing with fuel emissions causing global warming. *Massachusetts v. EPA*<sup>40</sup> is one example of this phenomenon. In this case, the state of Massachusetts, along with other local authorities and private organizations, brought a claim against the Environmental Protection Agency (EPA) for its refusal to begin regulating the emissions of polluting gases. The EPA responded by arguing that the Clean Air Act does not mandate that the EPA regulate such emissions and that any such regulation would conflict with actions being taken by the President and his cabinet.<sup>41</sup> The U.S. Supreme Court agreed with the petitioners and found that the EPA did have jurisdiction to regulate gas emissions under the Clean Air Act. However, the Court resisted deciding whether the EPA had a duty to do so.<sup>42</sup> Most recently, President Obama directed

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39. See, e.g., CAL. CODE REGS. tit. 13, § 2449 (2008) (regarding fuel emission standards); AB 218 Bill (Saldaña) (phasing out the use of certain hazardous materials found in consumer electronics and being consistent with the European Union's ROHs Directive); California Global Warming Solutions Act of 2006 (AB 32), CAL. HEALTH & SAFETY CODE §§ 38500 *et seq.* (West 2008) (reducing greenhouse emissions by 25% by 2020 and 80% by 2050); see also Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (2007); see generally International Council for Local Environmental Initiatives, Cities for Climate Protection, <http://www.iclei.org/co2/index.htm> (last visited Mar. 1, 2009) (indicating a number of U.S. cities and nations participating in this environmental initiative).

40. *Massachusetts v. EPA*, 548 U.S. 903 (2006).

41. See *id.* at 903. The EPA also claimed that there was no sufficient causal link between greenhouse gases and global warming and therefore it would be "unwise" to set emission standards at this time. *Id.*

42. See *id.* The Court also stated that its review on the statutory issues was narrow and that the EPA had the authority to conclude, after review of the petition, that it could not regulate such emissions but must do so giving reasonable grounds for its decision. *Id.*

the EPA to begin working on applications from California and other states to set stricter standards for car fuel emissions than currently required by national regulations.<sup>43</sup> These various scenarios in dealing with fuel emissions illustrate the multiplicity of public and non-state actors that deal with the multi-scalar nature of environmental regulation in the U.S. at the national and local levels.<sup>44</sup>

Recently proposed Massachusetts legislation prohibiting the sale of foods containing trans fats by restaurants and grocery stores raises questions as to whether, in the interest of health standards, a state can pass legislation that could potentially have important discriminatory effects on interstate commerce and therefore implicate dormant commerce clause jurisprudence.<sup>45</sup> An even larger question is whether such legislation could have discriminatory effects on foreign imports containing trans fats. While trade agreements under the WTO or NAFTA, for example, contain provisions allowing domestic governments to pass legitimate safety and health measures, distinguishing between legitimate measures and illegitimate ones proves to be difficult for international tribunals. It is in the application of these measures where discriminatory effects can be most readily assessed.<sup>46</sup> Nevertheless, in issues such as these that are seemingly “purely domestic” in nature, the jurisdiction of the WTO and/or a regional agreement may come into play.

Finally, recent news about the hazards of Chinese toys comes to mind. If the United States were to pass regulations making it more difficult to import such products as a health measure, it could have implications for U.S. compliance with WTO/GATT national treatment requirements and a bilateral United States/Chinese treaty protecting

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43. See John M. Broder, *Obama Directs Regulators to Tighten Auto Rules*, N.Y. TIMES, Jan. 27, 2009, [http://www.nytimes.com/2009/01/27/us/politics/27calif.html?\\_r=1&partner=rss](http://www.nytimes.com/2009/01/27/us/politics/27calif.html?_r=1&partner=rss). President Obama also ordered the Department of Transportation to formulate rules for higher fuel-economy standards on cars and trucks. *Id.* See also Judith Lewis, Op-Ed, *California's EPA Waiver*, L.A. TIMES, Jan. 29, 2009, at A19 (discussing various state initiatives by California and other states to pass regulations to reduce emissions of greenhouse gasses).

44. See Osofsky, *Pluralist Legal Dialogue*, *supra* note 15; see generally Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks? Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409 (2008) (discussing local efforts in Portland and Tulsa for addressing environmental concerns).

45. See H.B. 2147, 185th Gen. Court (Mass. 2007) (restricting the use of foods containing trans-fat).

46. See, e.g., SPS Agreement, *supra* note 5, including annexes; Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods [hereinafter *Marrakesh Agreement*]; TBT Agreement, *supra* note 5, including annexes; NAFTA, *supra* note 5, ch. 9 (discussing Standard Related Measures) and ch. 7 (discussing Sanitary and Phytosanitary Measures).

mutual most favored nation treatment.<sup>47</sup> Though, WTO agreements such as the SPS<sup>48</sup> and the TBT<sup>49</sup> Agreements do allow for domestic governments to pass legitimate measures addressing safety and health measures, trade provisions dealing with sanitary or phytosanitary measures tend to require scientific evidence justifying the regulatory measure, and those dealing with technical barriers also require at a minimum evidence of a legitimate objective.<sup>50</sup> These provisions, while helpful in allowing domestic governments to pass necessary regulations, also do not clarify the degree to which such regulation is in fact legitimate, particularly when there is no clear scientific evidence of potential harm concerning a product.<sup>51</sup> There does not seem to be clear consensus on the best way to apply the precautionary principle in these circumstances either.<sup>52</sup> At a minimum, though, these trade provisions do encourage harmonization of regulatory standards and the creation of international standards regarding product safety.<sup>53</sup> In this way, local governance can be influenced by the supranational adjudicatory processes.<sup>54</sup>

However, this Article's focus is not on these overlaps that occur at the domestic level or have transnational implications. Rather, it is on the international trading landscape consisting of *inter-systemic* overlaps among trade regimes as well as the trade communities made up of public and private actors. This collage impacts not only the

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47. See, e.g., James Bacchus, *WTO Obligations Still Apply*, NAT'L L.J., Sept. 10, 2007.

48. SPS Agreement, *supra* note 5 (directing governments as to how they can apply food safety and animal and plant health measures).

49. TBT Agreement, *supra* note 5 (mandating efforts that regulations, standards, testing and certification procedures do not create unnecessary obstacles for trade).

50. See, e.g., SPS Agreement, *supra* note 5, including annexes; Marrakesh Agreement, *supra* note 46; TBT Agreement, *supra* note 5, including annexes; NAFTA, *supra* note 3, ch. 9 (discussing Standard Related Measures) and ch. 7 (discussing Sanitary and Phytosanitary Measures).

51. See, e.g., NAFTA, *supra* note 5, ch. 9, art. 904.

52. See *id.* ch. 7, art. 715(4) (recognizing the precautionary principle which allows parties to adopt provisional measures where scientific evidence is insufficient as long as those measures are not arbitrary).

53. See *id.* ch. 7, art. 713 (presuming that measures in conformance with international standards are in fact legitimate); *id.* ch. 9, art. 905. Both Chapters 7 & 9 in NAFTA also establish a committee to coordinate harmonization initiatives among the Parties.

54. See David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261, 264 (2005) (discussing limited powers of local governments); see generally David J. Barron & Gerald E. Frug, *International Local Government Law*, 38 URB. LAW. 1, 3 (2006) [hereinafter Barron & Frug, *International Local Government Law*] (describing ways in which local governments use international institutions and international law to redefine their domestic legal scope).

international trading system but also domestic regulatory processes nationally and locally.

As there may be “good and bad” in the jurisdictional and legislative tensions existing between local and federal governments, similarly, regional trade agreements pose good and bad scenarios. As stated in the *2007 WTO Report*, regional trade agreements may have a negative impact on the multilateral trade regime in that they can be exclusive, discriminatory, and have distortive effects.<sup>55</sup> However, they also can enhance free trade, maximizing regional economic opportunities.<sup>56</sup> The interface among competing trade regimes may offer new opportunities for dialogue and for the creation of new norms. For example, the holistic approach of the Free Trade Agreement of the Americas was unsuccessful in its implementation, particularly regarding agricultural subsidies; however, the proliferation of bilateral and regional trade agreements within Latin America since the Miami talks is indicative of a desire for integration and participation in the global economy.<sup>57</sup> Recent challenges in the Doha Round raise concerns about whether the multilateral trade regime can survive, particularly with respect to agriculture, non-agricultural market access, and special safeguard mechanisms for developing nations to counter surges in imports.<sup>58</sup> The rise of regional and bilateral agreements, though, and the ability of states to reach some agreement on these difficult issues illustrate that the WTO is not dead; rather, it is very much alive through its own dispute settlement bodies and the regional tribunals that look to WTO adjudication for guidance and legitimacy.

### *B. Regime Shifting and Overlapping Regimes*

The collage of trade regimes begs the question of how to manage hybridity of tribunals and in turn, the norms and private entities that emerge in and around them. International relations scholars describe the emergence of various international regimes as a result of

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55. WORLD TRADE ORGANIZATION, *WORLD TRADE REPORT* v (2007), available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report07\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf) (stating that “[t]he complicated reality about regional agreements is that they are neither all good nor all bad”).

56. *Id.*

57. In the last eight years, the United States has entered or has been in trade negotiations with several Latin American countries, including Central America, Ecuador, Bolivia, Panama, and Peru.

58. See Daniel Pruzin, *WTO Members Vow to Regroup After the Collapse of Talks; USTR Proposes ‘Early Harvest’ Deals*, 25 INT’L TRADE REP. 1121 (2008); see also *The Doha Round...and Round...and Round*, *ECONOMIST*, July 31, 2008, at 71.

globalization.<sup>59</sup> International regimes and nation-states cooperate to address substantive issue areas of mutual concern and this contributes to the proliferation of new principles, norms, and rules.<sup>60</sup> Professor Laurence Helfer describes this phenomenon in the area of intellectual property rights and various international regimes that contribute to lawmaking in this area; namely, biodiversity, plant genetic resources, public health, and human rights.<sup>61</sup> In these contexts, international agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>62</sup> and the World Intellectual Property Organization (WIPO) play a significant role for state and non-state actors in dealing with intellectual property matters. More specifically, Professor Helfer describes the strategy of “regime shifting” as a means for state and non-state actors to use the lawmaking quality of international regimes to promote their individual interests.<sup>63</sup> As a result, “counterregime norms” may evolve. That is, hard and soft law standards may arise because of state and non-state actors contesting already established norms.<sup>64</sup>

For purposes of the vertical and horizontal overlaps described later in this Article,<sup>65</sup> the disaggregated nature of regimes in the context of “regime shifting” and its effects on the relationship among international regimes provide some insight into the legal impact of these overlaps.<sup>66</sup> In principle, the NAFTA and the WTO regimes are distinct and have jurisdictional boundaries. Whereas the WTO dispute settlement bodies adjudicate matters within the parameters of the WTO Covered

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59. See generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); see also Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 3, 5, 11 (Beth A. Simmons & Richard H. Steinberg eds. 2007) (discussing international regimes).

60. See Helfer, *supra* note 31, at 10–13 (describing the substantive, institutional, and relational aspects of international regimes).

61. *Id.* at 9.

62. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 81 (1994); Marrakesh Agreement, *supra* note 46.

63. See Helfer, *supra* note 31, at 14 (defining *regime shifting* “as an attempt to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another”).

64. *Id.* (describing counterregime norms as “binding treaty rules and nonbinding soft law standards that seek to alter the prevailing legal landscape”).

65. See *infra* Part I.C.

66. The discussion on legal pluralism in Part IV.A is also relevant but can be distinguished in that legal pluralism focuses on the confluence of norms arising from various communities and the conflict that may arise; whereas, regime shifting focus on the hybridity of legal systems that may in of themselves give rise to new norms and shift among themselves. See *infra* Part IV.A



Agreements,<sup>67</sup> NAFTA dispute settlement bodies deal with matters under NAFTA. However, sometimes the NAFTA treaty specifically incorporates GATT provisions and the NAFTA tribunals may look to WTO adjudication in interpreting provisions within the treaty itself.<sup>68</sup> Arguably, the United States, in going to the WTO in *Mexico—Tax Measures*, engaged in an *intra-regime shift* regarding the issue of the alleged national treatment violations.<sup>69</sup> However, in doing so, the United States took the national treatment issue of *Corn Products International* under Chapter 11 of NAFTA to the WTO where it was within its jurisdiction to deal in alleged violations of Article III of GATT. Though it is currently difficult to assess whether this regime shift will necessarily result in the creation of “counterregime norms,”<sup>70</sup> the WTO decision that the Mexican tax measures are per se a national treatment violation has at least some political clout and may have legal impact on the NAFTA Chapter 11 tribunal decision. Moreover, it has pushed Mexico and the United States to discuss their sugar disputes and attempt to reach diplomatic solutions.<sup>71</sup> In this context, the tendency of Chapter 11 investment regimes to look to WTO adjudication of parallel substantive areas in assessing alleged violations under NAFTA is a non-binding soft law standard that seeks to establish a “bottom-up coordination” from regional tribunals toward the multilateral WTO regime.

While “regime shifting” tends to best describe the negotiations stage of treaty-making and more informal international agreements, particularly agreements that arise from unrelated regimes, it also provides a helpful lens for better understanding the movement that occurs between trade and investment regimes in matters of adjudication. Though trade and investment regimes may be two sides of the same coin, it could also be argued that transplanting WTO interpretations of

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67. See GATT, *supra* note 7, art. 23.

68. See, e.g., NAFTA, *supra* note 5, art. 301 (incorporating GATT provisions). For more discussion on ways the NAFTA Chapter 11 tribunals look to GATT adjudication of national treatment in interpreting article 1102 of the NAFTA, see Trujillo, *supra* note 10, at 238–49.

69. See Helfer, *supra* note 31, at 16 (describing state strategy to move “negotiations of new free trade obligations from a multilateral treaty to a regional trade pact or to a web of bilateral trade agreements” as an “intra-regime shift”).

70. See *id.* at 14 (defining “counterregime norms” as “binding treaty rules and nonbinding soft law standards that seek to alter the prevailing legal landscape” and allows states and NGOs to “contest established normative orthodoxies”).

71. See Rossella Brevetti & Michael O. Boyle, *Grassley, U.S. Industry Welcome Agreement with Mexico on Sugar, HFCS*, 23 INT’L TRADE REP. 1168, 1168 (Aug. 3, 2006). *But see* Rossella Brevetti, *Sugar Policy Alliance Urges Rejection of Industry NAFTA Proposal in Farm Bill*, 25 INT’L TRADE REP. 129 (Jan. 24, 2008).

national treatment under GATT into investor-state disputes is a form of *inter-regime shift*,<sup>72</sup> rather than intra-regime. This in turn has helped to solidify the judicialization of WTO jurisprudence and enhance its legitimacy *vis à vis* regional tribunals and nation-states.

The next section will more specifically describe the inter-systemic overlaps between the trade and investment regimes of the WTO and NAFTA and attempt to unpack them.

### C. Vertical and Horizontal Overlaps

In describing the inter-systemic overlaps of the multilateral and the regional, this section borrows from Professor Alan Sykes, who distinguishes between what he calls “private right[s] of action” for foreign investors and “public rights of action” for governments bringing trade disputes.<sup>73</sup> These two rights of action have different enforcement mechanisms: *private rights of action* having monetary damages (by governments to private investors) in contrast with *public rights of action* where there is no direct remedy of enforcement except through retaliation.<sup>74</sup> In this context, Professor Sykes describes the public/private divide in terms of their varying enforcement mechanisms. Whereas a government may have standing before the adjudicatory body of the WTO, a private investor with a stake in the dispute may only petition an adjudicatory body under an investment regime, such as under Chapter 11 NAFTA or Chapter 10 of CAFTA.<sup>75</sup> Though the remedies may vary, it is the domestic government which must enforce either award. In borrowing these distinctions of public/private rights of actions, this Article defines “public” as incorporating rights of action that can only be brought by state actors.<sup>76</sup> However, it does not discount that non-state actors may in fact influence the state in bringing such cause of actions in the first place.<sup>77</sup> Though this Article’s

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72. See Helfer, *supra* note 31, at 16 (describing *inter-regime shift* as the movement of rules and/or negotiations from one venue to a different regime; for example, when a state “introduces rules to protect the global environment into an intergovernmental organization previously devoted to lowering trade barriers”).

73. See Sykes, *supra* note 16, at 2.

74. *Id.*

75. See *id.* (distinguishing between parties choosing between “public and private enforcement of law”). Professor Sykes states: “The choice becomes relevant once parties to an international agreement elect to allow an adjudicatory body to hear complaints. They may then reserve to themselves the exclusive right to petition that body (public enforcement), or allow private actors with a stake in the dispute to petition it (private enforcement).” *Id.*

76. See Lan Cao, *Culture Change*, 47 VA. J. INT’L L. 357, 373 (2007) (stating general principle that public international law deals only with state actors).

77. See SHAFFER, *supra* note 3, at 6 (describing the private/public agreements that stimulate

objective is not focused on incorporating these non-state actors into the description of public rights of action, it does recognize the important role they play in bringing these public rights of action in the first place.<sup>78</sup>

Within this context, we see Vertical Overlaps where specific trade issues at the regional level converge with those at the international. The *U.S.-Canada Softwood Lumber Dispute* demonstrates this phenomenon. It arose as a trade dispute regarding Canadian subsidies on the Canadian softwood lumber industry which led to countervailing duties placed by the U.S. government on softwood lumber imports from Canada. This ongoing dispute began under Chapter 19 of NAFTA as a countervailing duty dispute and then was taken to the WTO by both countries at different points in time.<sup>79</sup> Another example of a public right of action, resolved both regionally and multilaterally (vertically) is *Antidumping Investigation on Imports on High Fructose Corn Syrup Originating from the United States of America*.<sup>80</sup> Unlike in *Softwood Lumber* though, the WTO and NAFTA panels agreed in their resolution of the *Imports on High Fructose Corn Syrup* case and Mexico was found in violation.<sup>81</sup> See Illustration 1, Appendix.

There are also adjudicatory overlaps particularly in the regional context—horizontal overlaps consisting of government-to-government trade disputes (public rights of action) that may evolve into private rights of actions for foreign investors. Because of the proximity of

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state actors to bring WTO litigation, such as antidumping or countervailing duty litigation).

78. For example, private actors such as firms, corporations, and trade groups can bring an antidumping dispute before the U.S. Trade Representative to investigate the matter. It is then the U.S. Trade Representative, on the part of these private actors, which brings the dispute before a tribunal under Chapter 19 of NAFTA.

79. In dealing with U.S. countervailing duties placed on imports of Canadian softwood lumber, this case involved a WTO panel and NAFTA panels making determinations on countervailing duties. The NAFTA Chapter 19 panel agreed with Canada and found “no injury” to the U.S. softwood lumber industry. The extraordinary challenge committee under NAFTA also found the countervailing duties invalid. The WTO as well originally agreed with the Canadians. But, the U.S. decided not to abide by the NAFTA decision, justifying its actions under a safeguard mechanism. On August 30, 2006, the WTO upheld the U.S. choice by supporting the U.S. International Trade Commission’s Section 129 “threat of injury” ruling. NAFTA panel proceedings were thereby suspended. See NAFTA Panel, *In the Matter of Certain Softwood Lumber Product from Canada*, U.S.-Can.-2002-1904-02, 2006 WL 4041527 (NAFTA Binational Panel 2006); see also Northern Ontario Business, “Ontario Lumber Groups Sue Over Softwood,” 2006 WLNR 11191442, June 1, 2006 (stating that the Ontario Lumber Manufacturers Association and the Ontario Forest Industries Association were filing actions challenging the Canadian and U.S. decision to suspend NAFTA panel proceedings regarding softwood lumber).

80. Imports of High Fructose Corn Syrup, *supra* note 20.

81. See *id.*; see also Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup from the United States, WT/DS132/R (Jan. 28, 2000) (adopted Feb. 25, 2000).

interests among free traders and private investors, a trade issue such as an antidumping dispute may give rise to an investor-state dispute. For example, the well-known *Softwood Lumber Dispute* between the United States and Canada again illustrates this phenomenon. As mentioned above, the *Softwood Lumber Dispute* was a trade problem dealing with U.S. countervailing duties on Canadian imports of softwood lumber.<sup>82</sup> Under NAFTA, investor-state disputes also arose out of the problem. *Pope & Talbot v. Canada* is one example in which a U.S. investor in Canadian softwood lumber alleged Chapter 11 violations under NAFTA due to Canadian export bans on softwood lumber.<sup>83</sup> Such a ban was enacted against the backdrop of a 1996 U.S.-Canadian Softwood Lumber agreement. Other similar foreign investment disputes include the so-called “Softwood Lumber cases” where several Canadian companies (Canfor, Tember, and Terminal) brought complaints against the U.S. government under NAFTA’s foreign-investment chapter for passing countervailing duties on imports.<sup>84</sup> But in these early cases, the NAFTA tribunal was forced to decide on matters of jurisdiction and whether trade disputes could be “transplanted” into the investor-state dispute arena. The NAFTA investor-state tribunal clarified that antidumping and countervailing duty policies were not to be considered in the investor-state arena. Already in the early years of NAFTA, regional tribunals had a perceived need to unpack public rights of action from private ones—trade matters from investment ones. However, these cases also illustrate that government trade disputes may in fact transform into private disputes involving foreign investors, and that government attempts to resolve those trade disputes may also impact foreign investment. For at some level, minimizing trade barriers goes hand in hand with increased foreign investment. See Illustration 2, Appendix.

Another kind of overlap, the vertical/horizontal overlaps may occur simultaneously, particularly when dealing with certain international substantive law issues that implicate domestic regulatory fiscal or non-fiscal measures. These instances are primarily of a vertical and hierarchical nature with respect to regional agreements and the

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82. See NAFTA Panel, In the Matter of Certain Softwood Lumber Product from Canada, U.S.-Can.-2002-1904-02, 2006 WL 4041527 (NAFTA Binational Panel 2006).

83. *Pope & Talbot, Inc. v. Canada*, Interim Award, ¶ 78 (NAFTA Ch. 11 Arb. Trib. June 26, 2000) [hereinafter *Pope & Talbot*].

84. Order for the Termination of the Arbitral Proceedings with Respect to Tembec et al. (NAFTA Ch. 11 Arb. Trib. Jan. 10, 2006), available at <http://www.state.gov/documents/organization/68085.pdf>.

multilateral regime, but the substantive issues can be of a nature that cut across trade issues horizontally as well.

One example is *Corn Products International*, which began as an antidumping dispute between Mexico and the United States regarding Mexican antidumping measures against the importation of U.S. high fructose corn syrup (HFCS). In *Corn Products International*, a U.S. investor in HFCS with the largest share of the market in Mexico brought an investor-state claim against the Mexican government after it passed a tax on Mexican soda bottlers using HFCS, but not those using sugar.<sup>85</sup> Subsequently in 2004, the U.S. government alleged national treatment violations as a matter of GATT law (not NAFTA) in the WTO case, *Mexico-Tax Measures on Soft Drinks and Other Beverages*.<sup>86</sup> Specifically, the U.S. alleged that the tax violated Article III of GATT because it treated “like and directly competitive or substitutable products” differently.<sup>87</sup> The WTO panel and appellate body found Mexico in violation of national treatment requirements under GATT. These decisions were made prior to any resolution of the investor-state dispute under NAFTA. As onlookers await the publication of the award recently granted by the NAFTA Chapter 11 tribunal, it is unclear the impact that an affirmative finding of national treatment violations at the multilateral level will have on a private action at the regional level. However, NAFTA Chapter 11 tribunals have been known to defer to WTO interpretations of Article III of GATT in deciding whether measures affect investments in “like circumstances” at the regional level.<sup>88</sup> See Illustration 3, Appendix.

In this one dispute, a public right of action (government to government), the *Imports on High Fructose Corn Syrup* case, is converging with a private right of action (private investor against the government). Moreover, there are vertical/horizontal substantive convergences regarding the issue of national treatment, in which the private right of action commencing at the regional level becomes a

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85. See *Corn Products International*, *supra* note 19, ¶ 54.

86. WTO Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages* (*Mexico—Taxes on Soft Drinks*), WT/DS308/R (Mar. 24, 2006).

87. See Request for the Establishment of a Panel by the United States, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS08/4 (June 11, 2004) (where the claimant alleged violations under Article III:1, III:2 and III:4 of GATT).

88. See Trujillo, *supra* note 10, at 227–32 (discussing examples of cases in which chapter 11 NAFTA tribunals have looked to WTO adjudication of GATT Article III to assess alleged national treatment violations under article 1102 of NAFTA); see, e.g., Pope & Talbot, *supra* note 83; S.D Myers, Inc. v. Canada, Partial Award, 40 I.L.M. 1408 (NAFTA Ch. 11 Arb. Trib. Nov. 13, 2000); GAMI Investments, Inc. v. Mexico, Final Award (NAFTA Ch. 11 Arb. Trib. Nov. 15, 2004), available at <http://www.state.gov/documents/organization/38789.pdf>.

public right of action between governments before the WTO. In this unique instance, not only are there horizontal overlaps across jurisdictional venues—antidumping disputes impacting foreign investors—but also vertical jurisdictional overlaps with respect to national treatment. See Illustration 4, Appendix.

*D. The “Methanex Effect” Unpacks Vertical/Horizontal Overlaps*

The recent 2005 investor-state dispute under NAFTA, *Methanex Corporation v. United States of America*,<sup>89</sup> attempted to distinguish the jurisdictional sphere of the private rights of action under regional agreements from those under the public rights of action under the WTO dispute resolution bodies. This may be called the “Methanex effect.” In deciding whether California bans on the use of methanol for reformulated gasoline violated commitments under Chapter 11 of NAFTA including national treatment, the regional tribunal concluded that the drafters of NAFTA did not intend that “trade provisions . . . be transported to investment provisions.”<sup>90</sup> Unlike prior Chapter 11 NAFTA tribunals that tended to look to WTO definitions of national treatment under its “like products” test, this regional tribunal asserted its independence and authority in dealing with private rights of action, separate from decisions of the WTO. Despite the Canadian claimant’s attempts to use interpretations of “like products” under Article III of GATT to show the similarity between ethanol and methanol investments, the NAFTA tribunal stated that the comparator should not be as between ethanol and methanol producers, but between other methanol producers since the purpose of the ban—to avoid a legitimate health and environmental hazard—was relevant here.<sup>91</sup>

Finally, the *Methanex* tribunal took an aggressive stance regarding regionalism: it stated that the “like products” test under Article III of GATT should not necessarily apply to “like circumstances” under Article 1102 of NAFTA.<sup>92</sup> In other words, the regional tribunal

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89. *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, ¶ 12 (NAFTA Ch. 11 Arb. Trib. Aug. 3 2005), available at <http://www.state.gov/documents/organization/51052.pdf>.

90. *Id.* at Part IV, ch. B ¶ 37.

91. *Id.* at Part IV, ch. B ¶ 17.

92. See Trujillo, *supra* note 10, at 253; see also Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT’L L. 48, 75 (2008) (stating that the tribunal’s conclusion in *Methanex* was to compare the foreign investment in question to a domestic investment that is like the foreign investment for all purposes other than nationality and therefore, “the effect of the MTBE ban on *Methanex* was to be compared only to its effect upon domestic methanol producers”).

unpacked the substantive legal overlaps previously established by other Chapter 11 claimants and NAFTA foreign investment tribunals. Furthermore, the implication of this decision was to also unpack not only vertical overlaps but also horizontal overlaps between public rights of action under trade and private rights of actions under private investment. Clearly though, the regional tribunal recognized that national treatment issues do overlap with domestic regulatory measures, and in deferring to the legitimate purpose of the methanol ban, decided that in fact, this measure was not discriminatory. See Illustration 5, Appendix.

The next section will more specifically discuss national treatment and the significance that the vertical/horizontal overlap has on this substantive trade issue, and in turn, domestic regulatory policy.

## II. INVESTMENT, TRADE, AND REGULATORY MEASURES

Regulatory frameworks are defined by domestic governments. Within a federal system such as the United States, these frameworks tend to overlap at the state and federal levels in implementation, adjudication, and enforcement of the measures they engender. Spheres of jurisdiction are not easy to define, even at the domestic level. U.S. electrical markets, for example, come under the federal umbrella of Federal Energy Regulatory Commission (FERC), but are “managed” by state administrative agencies. FERC reforms in 1996, and later in 2005, converted previously vertically integrated firms for the generation, transmission, and distribution of electricity into “partially regulated” entities.<sup>93</sup> It is difficult for courts to distinguish between anticompetitive behavior initiated by state action and therefore permissive and that initiated by private actors and therefore, problematic vis à vis federal antitrust laws. For example, expansive applications of U.S. state action immunity doctrine that exempts state-regulated industries from antitrust liability may actually further the effects of capture in dominant suppliers already established in a traditionally regulated market.<sup>94</sup>

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93. See 16 U.S.C. §§ 824–824(n) (2006); Federal Energy Regulatory Commission Order No. 888, 18 C.F.R. ¶ 385 (1996); see also Harry First, *Regulated Deregulation: The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L.J. 911 (2002) (describing electricity deregulation as a “regulated deregulation”); Elizabeth Trujillo, *State Action Antitrust Exemption Collides with Deregulation: Rehabilitating the Foreseeability Doctrine*, 11 FORDHAM J. CORP. & FIN. L. 349 (2006) (discussing FERC reforms and implications on state action antitrust immunity for investor-owned utilities in the context of partial deregulation).

94. See Trujillo, *supra* note 94, at 353 (proposing that broad applications of the state action immunity doctrine by courts assists dominant suppliers at the expense of market entrants).

In the transnational context, whereas regional tribunals seem well aware of the jurisdictional and substantive overlaps and the impact WTO decisions may have on regional disputes, for the most part, WTO panels choose to ignore them, at least in the context of national treatment violations.<sup>95</sup> Regional agreements such as NAFTA and the Southern Common Market (MERCOSUR)<sup>96</sup> incorporate WTO jurisprudence into their own commitments, and in some instances, allow parties to choose to resolve a dispute under the auspices of the WTO rather than a regional dispute resolution body.<sup>97</sup> In this way, regional agreements exercise a form of “bottom-up coordination” with the WTO. In the area of government-to-government trade disputes, we have seen NAFTA Chapter 19 panels making determinations in conjunction with WTO adjudication of the same countervailing or antidumping duties. In some instances, such as the final determination of *Imports on High Fructose Corn Syrup*, the regional tribunals and the WTO panels agree on the outcome.<sup>98</sup> *Softwood Lumber*, on the other hand, has been more challenging for WTO and regional panels alike.

In order to understand the importance of defining these jurisdictional overlaps, it is helpful to delve into WTO adjudication of domestic regulatory measures under Article III of GATT.

#### A. *The GATT Regime and National Treatment*

In making national treatment determinations, WTO panels primarily focus on whether products imported into a territory are “accorded treatment no less favourable than that accorded to like products of national origin.”<sup>99</sup> Specifically, fiscal measures may not be applied “in excess of those applied, directly or indirectly, to like domestic products,”<sup>100</sup> and all measures, fiscal and non-fiscal, “should not be applied to imported or domestic products so as to afford protection to domestic production.”<sup>101</sup> Therefore, key to making national treatment

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95. *But see Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (2007) [hereinafter *Brazil-Retreaded Tyres AB*] (the WTO appellate body considered whether an exception granted under the MERCOSUR justified a Brazilian regulation favoring domestic retreaded tires).

96. MERCOSUR Free Trade Agreement, Southern Common Market (MERCOSUR) Agreement, Mar. 26, 1991 [hereinafter MERCOSUR], available at <http://www.worldtradelaw.net/fta/agreements/mercosurfta.pdf>

97. *See, e.g.*, NAFTA, *supra* note 5, ch. 20; MERCOSUR, *supra* note 96.

98. NAFTA Chapter 19 Tribunal, Mex.-U.S.-98-1904-01.

99. GATT *supra* note 7, art. III, ¶ 4.

100. *Id.* ¶ 2.

101. *Id.* ¶ 1.



determinations is the meaning of “like products” in any given case. In simple terms, the first question posed by the panel in *Mexico—Tax Measures* was whether Mexican sugar was “like” high fructose corn syrup. Is the fact that they both function as sweeteners enough to prove their “likeness” under Article III, or should other factors be taken into consideration such as their physical make-up and tariff classification? Furthermore, should the purpose of the tax be entered into the equation of “likeness?”

WTO panels have struggled with these questions in defining “likeness” in this context over the years. Generally, they take a narrower approach that focuses on 1) the physical characteristics of a product including its properties, nature, and quality; 2) the end-uses of a product in any given market; 3) the tastes and habits of consumers’ tastes and habits, which may vary; and 4) the tariff classification of the products (also known as the Border Tax Adjustment criteria).<sup>102</sup>

However, at times they have expanded the meaning of “like” to incorporate the “aim and effect” of the measure at hand.<sup>103</sup> Most recently, they continue to focus on the Border Tax Adjustment criteria; however, there is a willingness to consider the purpose of the regulatory measure in determining the “likeness” of the products, particularly in instances where health is the primary concern.<sup>104</sup>

While WTO panels have jumped back and forth from a formalist reading of “like products” under Article III to a more contextualized one that considers the “aim and effects” of the measure in question,<sup>105</sup> one case demonstrates the panels’ ability to compromise between the two

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102. See Report of the Working Party on Border Tax Adjustments, ¶ 18, L/2464 (adopted Dec. 2, 1970); see also Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R (Oct. 4, 1996) [hereinafter 1996 *Japan Alcoholic Beverages Appellate Body*].

103. See *United States Measures Affecting Alcoholic and Malt-Beverages*, WT/DS23/R-39S/206 (Mar. 16, 1992) (adopted June 19, 1992) [hereinafter *U.S.-Malt Beverages*]. In determining whether U.S. tax schemes and transportation restrictions on alcoholic beverages were in violation of national treatment commitments under GATT Article III, the GATT panel in *U.S.-Malt Beverages* considered whether U.S. measures were enacted with the aim and the effect to protect a U.S. industry. This decision was ground-breaking for GATT panels because it established the “aims and effects” test in order for GATT panels to consider the protectionist intent behind domestic measures. This test was then rejected by a subsequent 1996 Appellate Body decision, *Japan—Taxes on Alcoholic Beverages*. See also Trujillo, *supra* note 10 at 217–21 (discussing the differences in the analysis of national treatment in these two cases).

104. See, e.g., *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC-Asbestos*], reprinted in 40 I.L.M. 1193 (2001).

105. See generally Henrik Horn & Petros Mavroidis, *Still Hazy After All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination*, 15 EUR. J. INT’L L. 39 (2004).

extremes. In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, the Appellate Body opened the door for expanding the meaning of “like products” without reinstating the “aims and effects” test of *U.S. -Malt Beverages*.

Canada brought this case against France, challenging a French decree that prohibited importation of asbestos and products with asbestos fibers and imposed penalties for violation of the decree.<sup>106</sup> The Appellate Body agreed with the European Community’s understanding of “like” in this context. It stressed that within the purpose of Article III was the need to look into the legitimacy of regulatory policy itself.<sup>107</sup> That is, the “very reason why the [d]ecree single[d] out asbestos fibers; namely, the fact that asbestos fibers [were] carcinogenic” was an important point.<sup>108</sup> It based its comparison on larger categories than the products themselves; specifically, the French decree denied competitive opportunities equally to “all carcinogenic asbestos [fibers].”<sup>109</sup> In this way, the determination of “likeness” would not establish the discrimination; rather, a conclusive finding of “likeness” would only allow a deeper look into its discriminatory effects and its impact on trade. The Appellate Body therefore contextualized the French decree and its understanding of “likeness” in this regard.

This reading of Article III allows a panel to balance the regulatory measure itself with its impact on trade. As in earlier WTO cases, the focus was on their competitive relationship and market substitutability;<sup>110</sup> however, it found that the effect of the regulatory measure on the products’ market relationship could impact their substitutability.<sup>111</sup>

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106. The claimants alleged that this decree violated the Agreement on Technical Barriers to Trade (TBT Agreement) as well as various provisions of GATT, including Article III. For overview of EC-Asbestos and a comparison to other Article III jurisprudence under the WTO, see Elizabeth Trujillo, *supra* note 10, at 214–25.

107. *EC-Asbestos*, *supra* note 104, ¶ 32.

108. *Id.*

109. *Id.* ¶ 33. The opinion states that the European Community’s interpretation of “like” concluded that, “instead of comparing the products prohibited by the French Decree at issue (all carcinogenic asbestos fibers), the Panel erroneously compared the allegedly ‘like’ products with an arbitrary third category of products, namely ‘fibers with certain applications.’” *Id.*

110. *Id.* ¶ 103.

111. See Robert Howse & Elisabeth Tuerck, *The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 283, 288 (Gráinne de Búrca & Joanne Scott eds., 2001), available at <http://www.worldtradelaw.net/articles/howseasbestos.pdf> (stating that the Appellate body in *EC-Asbestos* reaffirmed the “basic purpose of Article III as the discipline of protectionist measures” and not only guaranteed “market access” of like imported products).

Traditional narrow and formalist interpretations of national treatment by WTO panels (except perhaps in life threatening situations) fail to consider that virtually any domestic regulatory measure is protectionist to some degree. Furthermore, it discounts the rippling effect of WTO adjudication of these measures at the regional and domestic levels, particularly if these entities defer to WTO jurisprudence.

### *B. NAFTA Chapter 11 Foreign Investment Regime*

In the context of private rights of action under the foreign investment chapter of NAFTA Chapter 11, the tendency of claimants and NAFTA tribunals has been to look to WTO interpretations of national treatment standards. More specifically, in order to define “like circumstances” under Article 1102,<sup>112</sup> NAFTA tribunals refer to the “directly competitive or substitutable” standard of the “like products” test under Article III of GATT. This is not to say that a NAFTA Chapter 11 tribunal will automatically adopt a WTO adjudication of national treatment; however, they do tend to incorporate WTO panel interpretations of national treatment into their own understandings of national treatment, even if they may look to other regimes (such as the Bilateral Investment Treaty regime) as well.<sup>113</sup> In doing so, the NAFTA tribunals seem to contribute toward legitimizing the WTO panels and their jurisprudence.

WTO trade panels can learn from NAFTA foreign investment panels in their deferential approaches toward domestic regulatory structures. In other words, NAFTA tribunals seem to recognize the overlaps generated by free trade agreements with domestic regulatory processes.<sup>114</sup> They do not simply discount the possibility of certain

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112. See NAFTA, *supra* note 5, art. 1102 (stating that no Party may treat a foreign investor’s investment less favorably than it treats its own investments in “like circumstances”).

113. NAFTA Chapter 11 panels have also considered the meaning of “like situations” as adopted by the OECD as well as a number of bilateral investment treaty [BIT] decisions in deciding national treatment cases under NAFTA. They also tend to consider the regulatory context of a regulation in interpreting “like circumstances,” whereas the WTO panels look primarily to the competitive substitutability of the products in question. For more discussion, see *supra* note 6. For more discussion regarding the principle of non-discrimination in international law of foreign investment, see generally A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. TRANSNAT’L L. & POL’Y 57 (1998).

114. See Patrisia Isela Hansen, *Dispute Settlement in the NAFTA and Beyond*, 40 TEX. INT’L L. J. 417, 422–23 (2005) (stating that NAFTA tribunals also tend to defer to “prior rulings by domestic tribunals” and explaining that tribunals will consider whether the claimant has exhausted all domestic remedies before challenging a domestic tribunal’s decision). For an example, see *The Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811 (June 26, 2003).

regulatory measures being legitimate and therefore, acceptable under the Article 1102 national treatment requirement.<sup>115</sup>

For example, S.D. Myers, a U.S. investor in the business of treating Canadian polychlorinated biphenyls (PCB) waste, brought a Chapter 11 action against the Canadian government for prohibiting PCB exports.<sup>116</sup> After reviewing records from the Canadian Ministry of Environment, the tribunal found that the intent of the export ban was to protect the Canadian PCB disposal industry, while recognizing that there were indirect but legitimate environmental objectives to the ban.<sup>117</sup> Despite Canada's attempt to comply with its environmental commitments under the Basel Convention, the NAFTA tribunal, after carefully assessing whether the measure 1) had the effect of discriminating on the basis of nationality, and 2) was facially discriminatory, decided that the Canadian government did not prove that this measure was the "least restrictive means" of achieving a regulatory objective.<sup>118</sup>

In yet another Chapter 11 case, *Pope and Talbot*, a US investor accused Canada of violating its national treatment commitments under NAFTA. Canadian fee structures and permit requirements, implemented in accordance with the Canada-US Softwood Lumber Agreement, impacted Pope & Talbot's investments. However, the tribunal, in alluding to the Article III "like products" test, dismissed the 1102 allegation by creating a two-tier analysis under 1102. First, the tribunal considered whether in fact there was a de facto discriminatory measure (facially neutral), and second, it considered the regulatory processes at play in the "like circumstances" analysis. Therefore, if the foreign and domestic investments were in fact "in the same business or economic sector," and were treated differently, the presumption was that they were in "like circumstances." However, the respondent would have an opportunity to show "a reasonable nexus to rational government policies" that do not distinguish between foreign and domestic owned companies, and do not otherwise undermine the trade objectives of NAFTA.<sup>119</sup> Again, in *Pope & Talbot*, the NAFTA Chapter 11 tribunal not only deferred to interpretations of national treatment under Article

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115. See generally Trujillo, *supra* note 10.

116. S.D. Myers, Inc. v. Canada, Partial Award, 40 I.L.M. 1408, ¶¶ 245–246 (NAFTA Ch. 11 Arb. Trib. 2001).

117. *Id.*

118. S.D. Myers v. Canada, Final Award (NAFTA ch. 11 Arb. Trib. Oct. 21, 2002), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/MyersFinalAward-Final-30-12-02.pdf>. See also Trujillo, *supra* note 10.

119. See *Pope & Talbot*, *supra* note 83, ¶¶ 78–79.

III of GATT, but also formulated its own analysis which accounted for legitimate regulatory objectives.

More recent NAFTA Chapter 11 cases seem to follow a similar analysis; however, the focus on domestic regulatory processes seems to be on the rise. *Gami Investments, Inc. v. Government of Mexico* is one example in which the NAFTA tribunal considered the fact that a Mexican law liberalizing the traditionally regulated sugar industries also allowed for governmental supervision and protection from financial crisis.<sup>120</sup> No national treatment violations were found in this case.<sup>121</sup>

Another example, outside of NAFTA, can be found in the investment regime established under the Ecuador-U.S. Bilateral Investment Treaty (BIT). In *Occidental Exploration & Production Co. v. Republic of Ecuador*,<sup>122</sup> the investment tribunal looked to Ecuadorian law to determine whether the U.S. investments in question should only be compared to domestic investments in the same business sector. Since Ecuadorian law did not allow investments in different sectors to be treated differently regarding VAT tax refunds (the measure in question), the tribunal compared the U.S. investment to all investments affected by the VAT law in question. In doing so, the tribunal found that the Ecuadorian government treated the U.S. investment in a discriminatory fashion.<sup>123</sup> More importantly though, the investment tribunal deferred to the regulatory context at hand to determine how to best compare this foreign investment to domestic ones.<sup>124</sup>

### C. *But What About GATT Article XX?*

Though outside the scope of this Article, it is important to mention that NAFTA and other regional and bilateral trade agreements do not incorporate a trade provision comparable to GATT Article XX.<sup>125</sup> This provision exempts certain domestic measures that would otherwise be in violation of national treatment requirements under GATT.<sup>126</sup> Much has

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120. *Gami Investments Inc. v. Gov't of Mexico*, Final Award of the Tribunal (NAFTA Ch. 11 Arb. Trib. Nov. 15, 2004).

121. *See id.*

122. *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, Award, ¶ 173 (London Ct. Int'l Arb. July 1, 2004).

123. *Id.*

124. *See* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaty*, 102 AM. J. INT'L L. 48 (2008) (stating that the test applied by the BIT tribunal in *Occidental* was a significant departure from the traditional "business or economic sector test" of other investment tribunal decisions).

125. GATT, *supra* note 7, art. XX.

126. *Id.*

been written on Article XX and this Article will not detail its intricacies. However, it is relevant to the overlapping construct outlined in this Article. Because regional agreements do not contain a comparable exception for measures that would otherwise be construed as national treatment violations, regional tribunals must rely on the national treatment provisions of the applicable regional trade agreement in order to determine whether a regulatory measure is in fact in violation. In doing so, WTO interpretations of GATT Article III become more relevant.

Generally speaking, Article XX establishes a narrow framework under which certain domestic measures, though having discriminatory effects, may be permitted under GATT if those measures are the “least restrictive means” of obtaining the legitimate governmental objective.<sup>127</sup> It includes areas such as the protection of human, animal, and plant health, and the protection of natural resources and national treasures of artistic and archaeological value.<sup>128</sup> One of the most challenging sections of Article XX is the so-called *chapeau* part of the provision.<sup>129</sup> Though permissible measures under Article XX may have some discriminatory effects, they may not constitute “a means of arbitrary or unjustifiable discrimination.”<sup>130</sup>

In one recent case, *Brazil-Measures Affecting Imports of Retreaded Tyres*, the WTO panel and Appellate Body had to consider whether

127. Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an “Aims and Effects” Test*, 32 INT’L LAW. 619, 621–22 (1998) [hereinafter Hudec, *GATT/WTO Constraints*]. Most cases involving decisions on Article XX involve facially discriminatory measures (*de jure*) and are upheld as satisfying the “necessity” requirement of Article XX, which means that the regulatory measures are inherently compelling. See *id.* See also Joel P. Trachtman, *Regulatory Jurisdiction and the WTO*, 10 J. INT’L ECON. L. 631, 641 (2007). See also generally Robert E. Hudec, *Enforcing International Trade Law* 373–585 (1993).

128. GATT, *supra* note 7, art. XX. Exceptions to Article XX are construed narrowly. See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333 (1999).

129. The *chapeau* states the following:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . .

GATT, *supra* note 7, art. XX.

130. *Id.* See generally Hudec, *GATT/WTO Constraints*, *supra* note 127, at 620, 626–29. See also Trachtman, *supra* note 179, at 636 (discussing the *US-Shrimp* case in which the Appellate Body stressed that the *chapeau* in article XX invoked the delicate balance between the right of member states to come under an exception under Article XX and “the substantive rights of other members under GATT rules”). See generally Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 156–160, WT DS 58/AB/R (Nov. 6, 1998).

Article XX permitted an exemption under MERCOSUR.<sup>131</sup> The dispute was about Brazil's ban on imports of retreaded tires due to environmental and health concerns surrounding the tires. Furthermore, Brazil defended its position as being sustainable under an exemption under the MERCOSUR allowing bans on the importation of retreaded tires into the MERCOSUR region.<sup>132</sup> The WTO panel decision found the measure to be legitimate and necessary to further Brazil's environmental objective.<sup>133</sup> However, it also agreed with the European Union's allegation that the ban was implemented in a way that would discriminate against non-MERCOSUR members.<sup>134</sup> However, the WTO panel disagreed that it was arbitrary and unjustifiable discrimination under the *chapeau*.<sup>135</sup> Ultimately the panel did find that the ban constituted a disguised restriction on trade. The Appellate Body, though, rejected the narrow application of the Article XX *chapeau* in this case, which balanced the effects of the ban by considering the volume of imports affected with the environmental objective of the ban.<sup>136</sup> The Appellate Body instead found that the ban was applied in an arbitrary and unjustifiable way, and it was not the least restrictive means of executing the policy objective.

This case was the first dealing with recycled waste products and had implications for environment and trade policy. However, equally important was the fact that the WTO panel did consider the exemption under a regional trade agreement such as MERCOSUR. Furthermore, the Appellate Body explicitly recognized that Brazil's attempt to comply with exemptions under MERCOSUR was not in itself arbitrary. Also, it clarified that Brazil could have sought to justify the ban under Article 50(d) of the Treaty of Montevideo.<sup>137</sup> In these ways, some reciprocal deference was shown. However, the strict application of Article XX by the Appellate Body forced Brazil to make a choice: either comply with the exemption of MERCOSUR and be in violation

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131. See *Brazil—Retreaded Tyres AB*, *supra* note 95.

132. See *id.* ¶ 3 and note 8 (describing the exemption provided in Article 40 of Portaria SECEX 14/2004 and Article 1 of Presidential Decree 4.592 of February 11, 2003). The members of MERCOSUR include Brazil, Argentina, Paraguay, and Uruguay.

133. See Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, ¶ 7.215, (June 12, 2007) [hereinafter, *Brazil—Retreaded Tyres Panel Report*], upheld under *Brazil—Retreaded Tyres AB*, *supra* note 95, ¶ 211–212.

134. *Brazil—Retreaded Tyres Panel Report*, *supra* note 133, ¶ 7.289.

135. *Id.* ¶¶ 7.354–355.

136. See *id.* ¶¶ 224–234.

137. See *id.* ¶¶ 4.319, 4.321–322.

of the GATT, or be in violation of MERCOSUR in order to comply with this decision by the WTO Appellate Body.

Arguably, Article XX, in combination with the Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) agreements, would allow legitimate regulatory measures to survive.<sup>138</sup> However, the narrow scope of the provision does little to distinguish between legitimate and illegitimate regulatory measures or define the extent of protectionism that GATT will actually tolerate.<sup>139</sup> Furthermore, many regional agreements, such as NAFTA, do not contain a comparable provision;<sup>140</sup> therefore, the determination of the legitimacy of a regulation comes under the national treatment provisions. In these cases, claimants and tribunals will look to WTO interpretations of Article III, rendering this provision particularly important for regional understandings of national treatment and, in turn, adjudication of regulatory measures.

A more contextualized approach by WTO panels toward Article III is important if only to create a more top-down coordination with regional tribunals, such as NAFTA and, in turn, more participation by member states in the adjudication of their own regulatory measures.<sup>141</sup> This aspect of top-down coordination will be discussed later in the section on reciprocal deference.<sup>142</sup>

### III. MANAGING THE OVERLAPPING REGIME CONSTRUCT

In sum, WTO adjudication of trade matters that affect the ability to pass domestic regulatory measures can impact the outcome of an investor-state dispute—that is, it can indirectly influence arbitral panels at the regional level on whether or not to grant monetary damages to a foreign investor. Generally speaking, free trade agreements thrive with the implementation of domestic pro-competitive policies in traditionally regulated markets. It is not irrelevant that the need for Mexico to have access to U.S. markets for surplus sugar production arose from a

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138. See Trachtman, *supra* note 127, at 639 (stating that at the negotiations of the WTO, the TBT agreement, the SPS Agreement, and the GATS provisions supporting mutual recognition and harmonization of regulation were included).

139. See Trujillo, *supra* note 10, at 231–32. See generally Hudec, *GATT/WTO Constraints*, *supra* note 127, at 621–23.

140. However, MERCOSUR does contain Article 50(d) of the Treaty of Montevideo which is similar to the provisions under GATT Article XX(b), allowing exemptions for measures dealing with health of human, plant, and animal life. MERCOSUR, *supra* note 96.

141. See Trujillo, *supra* note 10, at 234–38 (arguing for a more contextualized approach by WTO panels in their application of GATT Article III).

142. See *infra* Part III.C (discussing reciprocal deference).



regulatory structure in Mexico that traditionally protected Mexican sugar.<sup>143</sup>

Given that the WTO can only work within the parameters of its Covered Agreements, the WTO system must also rely on its member states to promote these multilateral goals at the domestic level. Even if the WTO is a central regulatory commission for trade (which is arguable), the WTO cannot properly carry the burden of dealing with the various regulatory schemes and domestic and regional overlaps. Much less can it decide which regulatory measures are legitimate as a matter of domestic law. In terms of enforcement and domestic regulation, the realist view of the nation-state as the principal actor in international law rings true for the WTO because of its reliance on the nation-state to enforce its decisions.<sup>144</sup> However, the WTO cannot hide behind international law interpretations of its Covered Agreements<sup>145</sup> and ignore that some domestic regulation may be legitimate even if it does not come under the narrow aegis of GATT Article XX exceptions.<sup>146</sup> On the one hand, WTO panels are understandably skeptical of regulatory measures in the face of free trade, for regulatory measures can masquerade as legitimate when in reality they may be passed to sustain protectionist and parochial paradigms. In other words, regulatory measures can be used to protect domestic markets at the expense of outsiders. However, current interpretations by WTO panels

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143. Panel Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, ¶¶ 4.71–.110, WT/DS308/R (Oct. 7, 2005). Sugar industries have been regulated in many countries, including the United States. See Hillary E. Maki, *Trade Protection vs. Trade Promotion: Are Free Trade Agreements Good for American Workers?* 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 883, 889, 891–94 (2006). See also Catherine Richert, *U.S. Sugar Growers Look to Farm Bill for Protection*, CONG. Q., Jan. 16, 2006, <http://public.cq.com/docs/cqm/cqmidday110-000002656147.html> (last visited Feb. 16, 2009) (describing that in light of NAFTA requirements to open trade barriers regarding sugar trade between Mexico and the U.S. by 2008, U.S. sugar growers have proposed a bill to reinstate sugar quotas on Mexican sugar imports).

144. See, e.g., HANS J. MORGENTHAU & KENNETH W. THOMPSON, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER & PEACE* (6th ed. 1985); KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979); Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond*, in *NEOREALISM AND ITS CRITICS* 158, 158–201 (Robert O. Keohane ed., 1986). For an overview of the development of international relations theory from realism to neoliberalism, see generally OONA A. HATHAWAY & HAROLD HONGJU KOH, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* (2005); PAUL R. VIOTTI & MARK V. KAUPPI, *INTERNATIONAL RELATIONS THEORY: REALISM, PLURALISM, GLOBALISM, AND BEYOND* (Allyn & Bacon 3d ed. 1999).

145. International law rules of interpretation as found principally under Article 31 of the Vienna Convention. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 8 I.L.M. 679 (1969).

146. See GATT, *supra* note 7, art. XX. See also Hudec, *GATT/WTO Constraints*, *supra* note 127, at 620, 626–29.

of national treatment standards under GATT fail to consider that virtually any domestic regulatory measure is protectionist to some degree. Furthermore, WTO panels discount the rippling effects of their decisions on regional adjudication and domestic legislative policy.<sup>147</sup> Whether it is the WTO's role to look into the legitimacy of domestic regulatory measures as a matter of substantive law is an important question, but is beyond the scope of this discussion.<sup>148</sup>

With the proliferation of regional and bilateral trade agreements, other overlaps between trade and investment rights of action (public and private) are bound to occur. Since 2004 alone, according to the Office of the United States Trade Representative, the U.S. has completed and implemented ten free trade agreements with various countries such as Chile, Singapore, Australia, the Dominican Republic, and the Central American countries through the Central American Free Trade Agreement (CAFTA).<sup>149</sup> The first investor-state dispute was filed by the United States Railroad Development Corporation (RDC) in 2007 against Guatemala, claiming violations of national treatment, minimum standards of treatment, and expropriation under CAFTA.<sup>150</sup> Other claims are emerging as well. For example, the U.S. company Pacific Rim Cayman LLC, recently filed a complaint against the government of El Salvador under CAFTA for its failure to issue exploration and exploitation permits to which the company claims to be entitled. Pacific Rim claims losses to its investment as a result of the government's action.<sup>151</sup> In this scenario, vertical/horizontal overlaps become

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147. See Barron & Frug, *International Local Government Law*, *supra* note 54, at 21, 38.

148. Early GATT cases such as *Malt-Beverages* attempted to delve into issues of substantive legitimacy through the aims and effects test; however, this has been rejected by later GATT and WTO panels. See *U.S.-Malt Beverages*, *supra* note 103.

149. See Office of the United States Trade Representative, *Bilateral Trade Agreements*, [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html) (last visited Feb. 18, 2008).

150. See Inside US Trade, *State Case Under CAFTA Against Guatemala*, GLOBAL EXCH., Mar. 23, 2007, <http://www.globalexchange.org/countries/americas/guatemala/4566.html>. See also Press Release, R.R. Dev. Corp., RDC Files Claim to Institute Binding International Arbitration Under CAFTA Against the Republic of Guatemala (June 15, 2007), available at [http://www.rrdc.com/news\\_rdc\\_CAFTA\\_claim\\_06\\_15\\_2007.pdf](http://www.rrdc.com/news_rdc_CAFTA_claim_06_15_2007.pdf). Another investor-state arbitration has recently been initiated by a U.S. energy company, TCW Group, Inc., against the Dominican Republic. See *On Behalf of its Investing Clients, TCW Announces Expropriation and Other Treaty Claims Against the Dominican Republic*, BUS. WIRE, Mar. 20, 2007, available at <http://www.allbusiness.com/services/business-services/4336488-1.html>. Many thanks to David Gantz for his assistance in this respect.

151. See Press Release, Pacific Rim Mining Corp., Pacific Rim Files Notice of Intent to Seek CAFTA Arbitration (Dec. 9, 2008), available at [http://www.pacrim-mining.com/s/News\\_2008.asp?ReportID=331320&\\_Type=2008-News-Releases&\\_Title=Pacific-Rim-Files-Notice-of-Intent-to-Seek-CAFTA-Arbitration](http://www.pacrim-mining.com/s/News_2008.asp?ReportID=331320&_Type=2008-News-Releases&_Title=Pacific-Rim-Files-Notice-of-Intent-to-Seek-CAFTA-Arbitration).

extremely relevant and they challenge WTO panels to consider them in their adjudication.

### A. *The Regulatory Approach*

The regulatory approach to viewing the WTO provides a framework for the international trade regime in which the WTO becomes the central focus.<sup>152</sup> In this landscape, the WTO *regulates* international trade through GATT and its Covered Agreements. The committees and working groups study the current impact of trade on countries and, as a result, draft amendments to, and new interpretations of the Covered Agreements. These may lead to increased harmonization of international standards.<sup>153</sup>

The WTO *manages* the behavior of nation-states through its dispute settlement bodies. Through their decisions, the WTO panels and Appellate Body implement the rules as set out by GATT and its Covered Agreements. The effect of these decisions is to grant this international institution some legitimacy within the international trade community. Regional tribunals such as NAFTA contribute to this image of legitimacy by looking to WTO awards for interpretations of provisions under regional agreements that also appear in GATT, such as national treatment. In time, the WTO has gained a stronger hold on the international community as having the final say on matters of international trade.<sup>154</sup>

However, recent challenges to the Doha Round may jeopardize this centralized focus on the WTO as the guarantor of international trade and the force behind harmonization of international trade standards.<sup>155</sup> Despite these challenges, the dispute settlement bodies remain active and their judicial impact at the regional level cannot be denied. To view the WTO as a supra-national institution loses sight of its many layers. Even though its judicial awards have a “top-down” effect on the regional tribunals as well as state politics, they can only be enforced by nation-states. Furthermore, nation-states initiate causes of action before WTO panels and many players influence the nation-states in doing so.

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152. See JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT & THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 133–34 (2000). See also McGinnis & Movsesian, *supra* note 25, at 549–71.

153. See AMAN, *supra* note 16, at 51–54 (discussing the “statecentric approach” to the WTO and explaining that this vision of the WTO may conflict directly with domestic law).

154. See *id.* at 54 (discussing the “democracy deficit” that the WTO in this role may produce on domestic administrative processes).

155. See Pruzin, *supra* note 58.

A closer look into who these players are helps to unveil the many layers to the international trade regime.<sup>156</sup>

### B. *Transnationalism and its Players*

A transnational view to international trade, while not entirely eliminating the relevance of the nation-state, does envision a world in which a centralized international authority is replaced by the formation of regimes. These regimes engender sets of rules and norms around which private and state actors may coalesce to find common ground on issues dealing with globalization.<sup>157</sup> To view trade agreements as solely state-driven instruments misses the transnational landscape of entities that drive free trade in the first place.<sup>158</sup>

In the context of the sugar dispute between Mexico and the United States, for example, some of the major interested players include U.S. sugar and corn industries.<sup>159</sup> These same entities have also lobbied for free trade under NAFTA when it meant that they might find a new market in Mexico for U.S. sugar and corn. These industries compete with one another domestically in the sweetener business because of the long-time subsidies to the sugar and corn markets by the U.S. government.<sup>160</sup> The United States Corn Refiners Association has a major niche in the production of high fructose corn syrup which uses yellow corn (produced in the U.S.) as its main base component.<sup>161</sup> The

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156. See Sol Picciotto, *Introduction: Reconceptualizing Regulation in the Era of Globalization*, in NEW DIRECTIONS IN REGULATORY THEORY 1, 1–11 (Sol Picciotto & David Campbell eds., 2002).

157. See, e.g., S.G. Sreejith, *Public International Law and the WTO: A Reckoning of Legal Positivism and Neoliberalism*, 9 SAN DIEGO INT'L L.J. 5, 46–73 (2007). See generally KEOHANE & NYE, *supra* note 13; Keohane & Nye *supra* note 13, at 39–62.

158. See, e.g., James N. Rosenau, *TURBULENCE IN WORLD POLITICS: A THEORY OF CHANGE AND CONTINUITY* (1990).

159. See generally Corn Refiners Association, <http://www.corn.org> (last visited Feb. 16, 2009). Corn Refiners Association is the national trade association based in Washington, D.C. that represents the U.S. corn refining industry. *Id.* See generally American Sugar Alliance, <http://www.sugaralliance.org> (last visited Feb. 16, 2009). The American Sugar Alliance represents sugarcane and sugarbeet farmers, processors, refiners, suppliers, workers, and others associated with the U.S. sugar industry. *Id.*

160. See Rossella Brevetti & Michael O. Boyle, *Grassley, U.S. Industry Welcome Agreement with Mexico on Sugar, HFCS*, BNA INT'L TRADE REP., Aug. 3, 2006, at 1168. *But see* Rossella Brevetti, *Sugar Policy Alliance Urges Rejection of Industry NAFTA Proposal in Farm Bill*, BNA INT'L TRADE REP., Jan. 24, 2008, at 129.

161. Member companies from the major corn producing states include the following: Archer Daniels Midland Company; Cargill, Inc.; Corn Products International, Inc.; National Starch, L.L.C.; Penford Products Co.; Roquette America, Inc.; Tate & Lyle Ingredients Americas, Inc. See Corn Refiners Association, *Member Companies*, <http://www.corn.org/membercompanies.html> (last visited Feb. 16, 2009).

friction between these two U.S. special interest groups carries over into Mexico which also subsidizes the production of sugar. However, the Mexican high fructose corn syrup industry is dominated by the U.S. players.<sup>162</sup>

One of the most important players, for example, is Archer Daniels Midland Company (ADM), a leader in the processing of corn, soybeans, wheat, and cocoa. Ethanol and high fructose corn syrup are some of its primary products.<sup>163</sup> It has, for example, established in 1993 a joint venture in Mexico with A.E. Staley Manufacturing Company (Staley) called Almidones Mexicanos, S.A. de C.V. (ALMEX).<sup>164</sup> ALMEX has storage facilities and transports and distributes the high fructose corn syrup produced in the United States by ADM and Staley. In 2003, ADM and Staley filed a Chapter 11 complaint against the Mexican government for several actions allegedly directed against the two companies, such as an antidumping action, a tax on soda bottlers using high fructose corn syrup, and new permit requirements.<sup>165</sup> These and other actions affected ADM's and Staley's combined investment of around \$55 million.<sup>166</sup> Along with Corn Products International, ADM and Staley represent a large portion of the high fructose corn syrup market both in Mexico and the United States. All three brought NAFTA Chapter 11 investment claims against the government of Mexico for allegedly passing measures to protect its sugar industry and serve as non-tariff barriers against the United States.

Sugar is to Mexico what softwood lumber is to Canada. The softwood lumber disputes are riddled with private players as well as government actors. The softwood lumber industry has traditionally

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162. The Mexican market for soft drinks is dominated by multinational corporations such as *Coca-Cola* (71.9% of market) and *Pepsi Cola* (15.1% of market). See Panel Report, *Mexico-Tax Measures on Soft Drinks and Other Beverages*, ¶ 2.6, WT/DS308 (Feb. 24, 2005) [hereinafter *Mexico-Tax Measures*], available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file273\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file273_6449.pdf). See also Trujillo, *supra* note 10, at 250-51 (describing U.S. influence in Mexico in the soda production market).

163. See Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the NAFTA, Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas Inc. & United Mexican States, Oct. 13, 2003, available at [http://www.naftaclaims.com/disputes\\_mexico\\_adm.htm](http://www.naftaclaims.com/disputes_mexico_adm.htm) [hereinafter ADM & Staley].

164. Staley is an indirect wholly owned U.S. subsidiary of a British corporation, Tate & Lyle PLC. See Tate & Lyle, <http://www.tlna.com/TateAndLyle/default.htm> (last visited Feb. 24, 2009).

165. Final Award, Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas Inc. & United Mexican States, Sept. 26, 2007, available at [http://www.naftaclaims.com/disputes\\_mexico\\_adm.htm](http://www.naftaclaims.com/disputes_mexico_adm.htm).

166. See ADM & Staley, *supra* note 163.

been regulated by the Canadian government and its provinces.<sup>167</sup> The large U.S. housing and construction industries produce high demands for softwood lumber because of its use as a base building component. States like Idaho have been gravely affected by the cheaper price of Canadian softwood lumber. Canadian subsidization of this industry has created tension between two extremes of the coin of trade: on the one hand U.S. consumers benefit from the lower cost of softwood lumber; on the other, the U.S. softwood lumber industry suffers as a result of the demand for cheaper Canadian goods.<sup>168</sup>

Furthermore, the environmental concerns revolving around the demand for softwood lumber cannot be ignored either. However, the NAFTA Environmental Side Agreement cannot properly address these issues.<sup>169</sup> For one thing, this agreement imposes an obligation on the NAFTA governments to adhere to domestic environmental laws without defining baseline standards that must be met, other than domestic ones already in place. Furthermore, the Environmental Side Agreement establishes a Commission on Environmental Cooperation (CEC) composed of a council headed by the environmental ministers of each of the NAFTA countries.<sup>170</sup> Though the council also consists of an independent advisory committee, the council cannot escape political capture by whatever political party is in power at any one time; this affects its aggressiveness in addressing environmental issues. However, the NAFTA Environmental Side Agreement has been useful in raising awareness of the link between trade and the environment.<sup>171</sup> Citizen

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167. See *supra* note 79 and accompanying text.

168. See Katherine Yung, *Toppled by Tariffs: U.S.-Canada Timber Fued Spotlights NAFTA's Shortcoming Job Losses, Soft Prices and Bitterness Flow When Rules Don't Work*, DALLAS MORNING NEWS, May 11, 2003, at 1D; For more discussion on the state and non-state actors in Canada and the United States responding to the *Softwood Lumber Dispute*, see Peter Kennedy, *Analyst Slams Softwood Proposal, While Abitibi Boss Leans Toward Deal; Proposal to Cap Canada's Share of U.S. Market at 34 Per Cent Called -- Disgusting'*, GLOBE AND MAIL, Apr. 27, 2006, at B3; Peter Kennedy & Barrie McKenna, *Canfor Suing US Over Lumber Duties Claims Punitive Tariffs on Canadians*, GLOBE AND MAIL, Nov. 6, 2001, at B1; Brian Milner, Column, *Taking Stock: Lumber Dispute: Free Trade American Style*, GLOBE AND MAIL, Apr. 3, 2001, at B17; Simon Tick & Peter Kennedy, *Both Sides Standing Firm in Dispute on Softwood*, GLOBE AND MAIL, Aug. 2, 2003, at B1.

169. See North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 (1993). The agreement entered into force January 1, 1994. *Id.*

170. See *id.* art. 9.

171. Richard Fisher, *Trade and Environment in the FTAA: Learning from the NAFTA*, in GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERIC TRADE, 183, 187-95 (Carolyn L. Deere & Daniel C. Esty eds., 2002). Fisher states that the NACEC has been successful in a number of ways including the following:

[T]hrough a combination of research, newsletters, and new tools for environmental monitoring and data collection, the NACEC has improved understanding of trade and

participation through the citizen submission process to initiate a review of treaty commitments also helps to gather information from the ground up and enhances local understanding of environmental issues more generally.<sup>172</sup>

In sum, at the grass roots level, state and non-state actors are at the center of these two NAFTA disputes. These players contribute to the confluence of public and private interests both domestically and internationally with regard to ways of dealing with a problem, and internationally with respect to the trade disputes that have arisen both at the regional and multilateral levels. Transnationalism and legal pluralism in this context offer a lens through which to view international trade regimes as fluid and engendering multiple norms and lawmaking communities.<sup>173</sup> They also reveal that these different communities may collide at various levels, offering new opportunities for negotiation; however, they may also reconstitute themselves, allowing new norms to trickle down and take effect at a grass roots level.<sup>174</sup>

### C. *Reciprocal Deference Procedural Mechanism*

The challenge for WTO panels is to respect legitimate domestic regulatory policies while still implementing international standards that allow for predictability in their adjudication of domestic regulatory policy. Though it is not the role of WTO panels to decide whether domestic measures are legitimate as a matter of substantive law, they must have some procedural basis upon which to assess issues of legitimacy. A regulatory model would be weak in formulating these assessments. Procedural mechanisms that place the burden on member

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environment issues. . . . [It] has initiated a range of initiatives that support greater environmental cooperation among the NAFTA countries. . . . [It] has made important contributions to improving the enforcement of environmental laws by devising tools and mechanisms to promote pollution control, investigation, and reporting as well as public participation. . . . [Through] consistently working to seek public input and incorporate the insights and expertise of civil society into its activities and projects, the NACEC's initiatives have been greatly enhanced.

*See id.* at 187–89.

172. North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 (1993); *See also* Kal Raustiala, *Citizen Submissions and Treaty Review in the NAAEC*, in *GREENING NAFTA; THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION*, 256 (David L. Markell & John H. Knox eds., 2003).

173. *See also* AMAN, *supra* note 16, at 85 (stating that “the more pluralist approach, in which the WTO is not a suprafederal structure but an agency of states, obviates the questions of a single or unified ‘world demos’ in favor of a plural demos for whom democracy is not just a structural question (of state representation) but also a basis for inclusion in substantive and procedural terms”).

174. For more discussion, *see infra* Part IV.

states to maintain transparent political processes and prove the need for regulatory measures would allow for more coordination between the WTO and member states as well as with regional tribunals.

In a procedural mechanism called *reciprocal deference*, the WTO may have a stronger impact at the domestic level rather than solely as an outside enforcer for free trade.<sup>175</sup> In a reciprocal deference approach, member state respondents would have the burden of proving the legitimacy of their facially neutral regulatory measures according to their own transparent regulatory schemes. Furthermore, it would create a space for WTO panels to unpack the vertical/horizontal overlaps that are at play and recognize that certain regional disputes are best resolved at the regional level.

Though similar to the antidiscrimination model proposed by Professors McGinnis and Movsesian,<sup>176</sup> the reciprocal deference approach differs in a few ways: (1) it does not rely solely on risk assessment and science to determine procedural legitimacy; (2) it recognizes the jurisdictional overlaps at play among regional tribunals, domestic administrative processes, and the WTO; (3) it does not discount a regulatory model in setting standards in specific instances such as labor, health, the environment, and transparency issues; and (4) it encourages dialogue between domestic administrative bodies and the WTO forum, thereby increasing WTO's "influence" at the domestic level without imposing normative standards *per se* or ignoring the possibility for legitimate regulatory policy.

Much like the antidiscrimination model which encourages deference to national risk assessment mechanisms to distinguish between legitimate and non-legitimate measures, reciprocal deference also recognizes that it is within the domestic regulatory processes that protectionist measures may best be curtailed.

Some may ask if a strategy that encourages deference to domestic institutions just incites institutions to pass protectionist measures under the guise of legitimate and transparent democratic processes. While there is concern for protectionist capture at the local level, the regulatory model does not necessarily eliminate this at the domestic level. Furthermore, special interest groups at the domestic level will battle against each other, and the democratic process will ultimately decide how best to comply with free trade commitments.<sup>177</sup> A

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175. The author has coined the term "reciprocal deference," as used in this context. See Trujillo, *supra* note 10, at 256–61.

176. McGinnis & Movsesian, *supra* note 25, at 566–71.

177. See *id.* at 515 (discussing the positive effects on free trade that special interest groups



regulatory model may run the risk of capture as well, particularly if it does not encourage fluidity and change. The WTO's ability to influence the behavior of its member states rests primarily in its ability to authorize members to retaliate against other members not in compliance with GATT agreements. Ultimately, however, the WTO relies on its member states to enforce its decisions.<sup>178</sup> Too much retaliatory behavior by member states leads to isolationism, which is exactly what GATT was intended to prevent. Furthermore, the WTO may shape public perception of a nation's willingness to remain committed to the international regime as a whole.<sup>179</sup> In doing so, the WTO may increase its legitimacy as an international adjudicatory body for trade and be a catalyzing force around which various public and private networks may coalesce.

Other obvious drawbacks to this procedural mechanism (and even to the antidiscrimination model) include the effects it may have on less developed nations. These nations may not be able to afford to gather the information necessary to prove to the WTO panels the legitimacy of their regulatory measures or to implement national risk assessment mechanisms. This is a significant concern, and greater technical assistance from the international community, including the WTO, is necessary in this context. While being an important drawback, it also allows for increased transparency, particularly in countries where little administrative accountability exists.

The reciprocal deference approach is just one piece of the larger puzzle of cohesiveness and coordination between WTO adjudicatory power and domestic implementation of WTO policies. It is not the final solution, but it provides a procedural safeguard for WTO adjudication of internal regulatory measures. For example, if the panel finds that as a matter of GATT law, the measure in question is facially neutral yet has some protectionist effects on trade, the panel should ask the legislature implementing the measure to prove the corresponding domestic need. It will then be up to the WTO panel to make a final determination as to compliance with GATT and the Covered Agreements. But, in this context, WTO panels may have the discretion to push regional tribunals to settle matters within their own jurisdiction (particularly if there is an ongoing relevant public or private right of action pending), thereby

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may have at the domestic level).

178. See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 901-04 (1995).

179. See *id.* at 895-901.

unpacking overlaps and minimizing the influence of private rights of action on WTO judicialization.

#### IV. COORDINATION THROUGH RECIPROCAL DEFERENCE

Much like domestic governance within the United States, the international trade scheme incorporates the multi-scalar-supranational regimes of the WTO and the regional tribunals against the backdrop of domestic trade legislation and regulatory policy.<sup>180</sup> Be that as it may, regional trade agreements are a reality and are very much alive through their dispute settlement mechanisms. This collage of trade regimes creates opportunity for diversity as well as conflict.

##### A. *The Pluralist Landscape of Free Trade*

It could be argued that trade has emerged into a pluralist landscape, beyond the centralized umbrella of the WTO and its agreements. Legal pluralism can be used to explain hybridity of norms going as far back as the western medieval period.<sup>181</sup> It recognizes that norms may be created through various local communities without the formality of a sovereign to back them.<sup>182</sup> Legal pluralism recognizes that even if there is a lack of a formal and unified state to enforce them, various levels of norms can impact individuals in their choices. Even family relationships and attitudes may be governed by various layers of law that are beyond the parameters of the state.<sup>183</sup> Although overlapping norms, practices, and legal systems have arguably existed throughout western history, modern legal pluralists view these conflicts among different bodies of law as “fundamental.”<sup>184</sup> Legal pluralism welcomes

180. See *infra* Part IV.A–C. See also Osofsky, *Geography of Climate Change Litigation* *supra* note 15, at 1813–15 (describing the multiscale nature of environmental litigation).

181. See Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 375–411 (2008) (providing a history of legal pluralism). Professor Tamanaha describes at least three major axes of legal pluralism during the mid to late medieval period: “coexisting, overlapping bodies of law with different geographical reaches; coexisting institutionalized systems; and conflicting legal norms within a system.” See *id.* at 378.

182. See Berman, *supra* note 14, at 1157 (stating that “legal pluralists have long noted that law does not reside solely in the coercive commands of a sovereign power”). See also Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 507–11 (2005) [hereinafter Berman, *Law & Globalization*] (discussing legal pluralism).

183. See Carol Weisbrod, *The Family*, in BUTTERFLY, THE BRIDE: ESSAYS ON LAW, NARRATIVE, AND THE FAMILY 73, 82 (1999) (analyzing Kafka’s *Letter to His Father* as suggesting that within Kafka’s family interacting legal regimes were at play that included the law of the state, the household, religious-social, and private or “conscience”).

184. See Tamanaha, *supra* note 181, at 389 (clarifying that legal pluralists construe the hybridity of legal institutions and bodies of law “as fundamental, ineradicable, and important characteristics central to the operation and functioning of these systems”). Professor Tamanaha

the conflict that overlapping legal regimes may create because conflict engenders dialogue and the evolution of new norms. It is in the interface of conflict that change may occur.

It seems counterintuitive to view free trade through the lens of legal pluralism when presumably the WTO has institutionalized trade and has become the ultimate enforcer of its own supranational laws established through its Covered Agreements. However, this more unitary view of the WTO comports with a regulatory model of the WTO. The hope of free traders is that over time, the “top-down” international law making processes of the WTO (primarily through its dispute resolution bodies) become accepted by member states and internalized into their domestic regulatory processes. Furthermore, deference by regional and bilateral tribunals to WTO adjudication of national treatment creates a “bottom-up” coordination that further solidifies the legitimacy of the WTO as a supranational law making institution.

However, the pluralist story surrounding trade regimes lies in the increasing importance of the various regional and bilateral tribunals that have emerged in the last ten to fifteen years.<sup>185</sup> On the one hand, these

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goes on to explain that “[g]lobal legal pluralism, when viewed in this light, in a sense is ‘produced’ when one takes seriously the global or transnational legal order, while keeping an eye on the evident and inevitable divergences and conflicts.” *Id.* See also Berman *supra* note 14, at 1157–1237. For more discussion on legal pluralism, see BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION (2d ed. 2002); LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); Gunther Teubner, ‘Global Bukovina’: *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3, 3–22 (Gunther Teubner ed., 1997); Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1443–62 (1992); David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425, 425–54 (1980); John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 1–39 (1986); Sally Engle Merry, *International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism*, 41 STUD. IN L. POL’Y & SOC’Y 149, 149–65 (2008); Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC’Y REV. 869, 870 (1988); Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC’Y REV. 719, 719–45 (1973); Balakrishnan Rajagopal, *The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, 18 LEIDEN J. INT’L L. 345, 345–87 (2005); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 963–79 (2004); Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J. L. & SOC’Y 296, 296–321 (2000).

185. See, e.g., NAFTA, *supra* note 5; MERCOSUR, *supra* note 96; The Central America-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html); The United States-Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html).

tribunals look to WTO interpretations of trade law in areas such as national treatment and in this way, draw strength from the perceived legitimacy of the WTO as a centralized institution for free trade matters. On the other hand, these same tribunals assert some independence from the WTO in unpacking the overlaps that exist between the multilateral and regional regimes and refusing to transplant public trade issues into matters of private investment. The *Methanex* case was an example of this.<sup>186</sup> These various trade regimes are new fora for the development and implementation of various trade norms. At times, these fora may collide, as in the cases surrounding the softwood lumber dispute between the United States and Canada. However, collision also engenders dialogue, and out of the dialogical approach of the dispute settlement process may emerge cooperation and a new set of norms. Over time, some norms may solidify and become hard law.

Despite the positive results legal pluralism may offer in this context, the WTO must remain the central focal point for the multilateral system if it is to be effective in maintaining a cohesive, globalized, trading community. The WTO must be the coordinating force that balances the multi-tiered aspects of free trade agreements. It can do this not by ignoring the pluralist landscape of other adjudicatory processes affecting trade (regional, bilateral, domestic) but by recognizing the existence of other such processes at the regional and bilateral levels. Reciprocal deference is one procedural mechanism that WTO panels can use to help increase this kind of recognition while “managing [the] hybridity” that legal pluralism envisions.

### *B. Bottom-Up Coordination*

While legal pluralism gives us insight into the forces that collide to engender norms among communities and legal regimes, regime shifting gives insight into the fluid, porous nature of international trade when it is viewed as an instrument of transnationalism and not solely as the expression of a centralized international authority. The multiplicity of norms arising from international trade can be vast.<sup>187</sup> The judicial activism of the WTO dispute resolution bodies also grounds the convergence among norm-creating communities, eventually allowing for WTO interpretations of national treatment and regulatory policy to reconstitute themselves at the domestic level.

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186. See *infra* Part IV.B.

187. See *Mexico-Tax Measures*, *supra* note 162. For more discussion, see *supra* Part III.B.

Industrialized nations benefit from regime shifting in that their rich legal resources make forum shopping more readily available.<sup>188</sup> Certain issues that remain unclear or are stricter under regional agreements, such as NAFTA, can be resolved under the WTO and perhaps result in more favorable decisions. One clear example of this was the WTO case, *Canada—Certain Measures Concerning Periodicals*,<sup>189</sup> in which the United States brought a WTO dispute against the Canadian government for passing an eighty percent excise tax on imported split-run periodicals. Canada first argued, unsuccessfully, that the GATS<sup>190</sup> rather than GATT applied, since the tax applied to the service of advertising in split-run periodicals rather than to goods. Then Canada tried to argue that split-run periodicals were unlike non split-run periodicals, particularly since Canada had not committed to liberalizing its cultural industry sectors. Therefore, this was a legitimately protected sector in Canada. The Appellate Body agreed with the United States and found Canada in violation of GATT Article III:2.

Interestingly, the United States could easily have brought the case under NAFTA, which begs the question why it chose not to do so. Article 2106 and its Annex<sup>191</sup> contain a Canadian cultural industry exception to trade liberalization policy, allowing the Canadian government to protect its culture, which likely influenced the United States to take the dispute to the WTO rather than to a NAFTA tribunal. Clearly, regime shifting in this context served the interests of the United States best and strengthened the utility of GATT Article III more generally than under NAFTA. No cultural exceptions dispute has been brought before a NAFTA tribunal to date.

However, there has been much discussion among states concerning the role of trade on culture. This finally evolved into the creation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in March 2007.<sup>192</sup> With eighty members,

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188. *But see id.* (demonstrating that developing states as well as NGOs can use regime shifting as leverage in treaty negotiations).

189. Appellate Body Report, *Canada-Certain Measures Concerning Periodicals*, WT/DS31/AB/R (June 30, 1997), available at [http://www.worldtradelaw.net/reports/wtoab/canada-periodicals\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/canada-periodicals(ab).pdf).

190. General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1167 (1994), available at <http://www.worldtradelaw.net/uragreements/gats.pdf>.

191. Article 2106 and Annex 2106 follow the cultural exception as established under the Canadian-United States Agreement and applies it more broadly to include individuals and enterprises. *See* NAFTA, *supra* note 5, art. 2106–07.

192. UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005 (2005) [hereinafter UNESCO Convention], available at <http://unesdoc.unesco.org/omages/0014/001429/142919e.pdf>.

including industrialized nations such as Germany and the United Kingdom, the UNESCO Convention has shifted the discussion of culture from international trade regimes to the realm of the United Nations and has alerted the international community to the importance of preserving culture in the context of free trade.<sup>193</sup> In this way, the disappointing WTO decision for Canada has allowed for the creation of a non-binding counter-regime norm, such as the UNESCO Convention, through regime shifting.

While regime shifting can help to increase dialogue among nations as in the example of cultural industries, it can also enhance the effects of “bottom-up coordination” through intra-regime shifts. However, it offers few answers for inter-regime shifts that paralyze the application of shared substantive issues. For example, the tendency of Chapter 11 tribunals to defer to WTO adjudication of Article III in deciding alleged national treatment violations seems to imply that a WTO finding of Mexico’s lack of compliance with commitments under GATT will naturally result in a NAFTA finding that Mexico’s tax also violated Chapter 11 national treatment obligations. It is not a necessary conclusion that a national treatment violation in the trade context will result in a violation in the investment context. In fact, *Methanex* clarifies that the two do not necessarily follow. However, the ostrich-like behavior of WTO panels to not address the regional context of a trade problem, that is, this lack of top-down coordination by WTO panels, leads to uncertainty and a disconnect among regional trade regimes and the multilateral regime.<sup>194</sup> Regime shifting may encourage the proliferation of soft and hard law doctrines in the context of international law and international trade, but it offers little for coordination among the regimes, particularly in the context shared substantive issues such as national treatment.

### C. Reciprocal Deference and Managing Hybridity

Of much concern to citizens and to the international community is the effect that increased international trade will have on issues that are inherently addressed locally, such as the environment, labor, economic

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193. The United States is not a member of the UNESCO Convention; however, China is a member. UNESCO, <http://www.portal.unesco.org/la/convention.asp?KO=31038&language=E&order=alpha> (last visited Mar. 1, 2009). For a full list of member states as of March 2008, see *id.*

194. *But see Brazil—Retreaded Tyres Panel Report*, *supra* note 133 (discussing that the WTO panels for the first time addressed an exemption arising under a regional agreement, MERCOSUR, and decided whether Brazil’s attempt to comply with this exemption was in fact a violation of GATT provisions).

development, and distribution of municipal services such as water, waste, and energy. While the WTO panels choose not to address issues outside the scope of trade, and perhaps rightly so, there is a growing concern among NGOs and others that the long-lasting effects of trade and investment liberalization will be difficult for local governments to manage. Perhaps this is the point of free trade: to ensure that destructive parochial attitudes do not hinder the positive effects that free flow of goods, services, and capital have on local communities. While this Article does not attempt to determine whether increased trade is good or bad for local communities, it hopes to illustrate that free trade and its institutions also impact the relationship among international and domestic paradigms of governance. Trade and investment liberalization together encourage the blurring of lines between the public and private domains and put into question the role of government *vis á vis* the WTO and regional trade agreements.

In discussing legal pluralism, Paul Berman has stated that “[s]tudies of the international legal order . . . must address the interplay of a wide variety of normative commitments and law-giving entities.”<sup>195</sup> The procedural nature of reciprocal deference allows the WTO panels to manage trade without avoiding the hard questions of legitimate regulatory policy and domestic governance. It does not ask the WTO panels to address issues of legislative intent behind domestic measures; however, it allows the WTO panels to place the burden back onto the responding states to prove the legitimacy of their regulatory measures. Reciprocal deference emulates NAFTA Chapter 11’s two-step adjudicatory process in dealing with domestic regulation. Even if there is a finding of “like products” and “less favourable treatment,”<sup>196</sup> the WTO panel can delve into the regulatory context of the measure by placing the burden on the responding state to prove that no other alternative means exists other than this measure. Furthermore, reciprocal deference allows a WTO panel to unpack the vertical and horizontal overlaps between the regimes at play and their inter-systemic substantive overlaps and better address the issue at hand. While the WTO panel cannot per se adjudicate a “NAFTA issue,” nothing prevents a WTO panel from “remanding” a case back to the regional tribunal after it has decided the issue under its own jurisdiction. In this way, increased dialogue may occur among the regimes and among WTO member states on issues of regulatory policy and regional integration. This “top-down coordination” effect of reciprocal

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195. See Berman, *Law & Globalization*, *supra* note 182, at 511.

196. NAFTA, *supra* note 5, art. III:2, III:4.

deference will not eliminate “bottom-up coordination” or the shifting that occurs among the pluralist landscape of regimes; however, it will help the WTO better “manage hybridity”<sup>197</sup> and help enhance coordination and transparency among the regimes and within local governance.

### CONCLUSION

Robert Hudec described the WTO on the one hand as a “freestanding institution” and on the other “as an ingredient of the domestic decisionmaking process of national governments.”<sup>198</sup> In this role, the WTO has the challenging risk of enforcing the economic goals of the global community while also preserving non-economic objectives of the WTO, including development, peace, transparency, and just distribution of economic assets through economic interdependence and multilateralism. Even if viewed as a regulatory model, the WTO as a central regulatory commission for trade cannot properly carry the burden of dealing with the various regulatory schemes and domestic and international overlaps. Much less can it decide which regulatory measures are legitimate as a matter of substantive domestic law. However, it cannot ignore them either, for regulatory measures can masquerade as legitimate when in reality they may be passed to sustain protectionist and parochial paradigms.

Enforcement of WTO decisions may only occur at the domestic level. While incorporating the standards set by the WTO, most sovereign member states already have administrative processes to manage trade issues and many have entered into their own regional and bilateral trade agreements, as authorized under Article XXIV of GATT. Member states and private entities do, however, look to the WTO both for political support to criticize restrictive trade measures of their counterparts and for affirmative rulings on those policies. In this way, the WTO is as much an internal player in domestic trade and regulatory policy-making as it is an external adjudicator.

Whereas regional tribunals seem to be defining the jurisdictional scope of their adjudicatory processes, both in relation to other regional adjudicatory processes and *vis à vis* the multilateral processes, WTO panels for the most part ignore the question all together. Although, arguably *Brazil-Retreaded Tyres* indicates an initial shift by WTO

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197. See Berman, *supra* note 14, at 1196–1234.

198. Robert E. Hudec, *Comment by Robert E. Hudec, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 297* (Roger B. Porter et al. eds., 2001).



panels in this respect. Cases such as *Corn Products International*, *Softwood Lumber*, and *Methanex* illuminate the vertical and horizontal overlaps that exist among multilateral resolutions of trade matters and regional resolutions of foreign investments matters.

Unpacking the vertical/horizontal overlaps among trade regimes is important for WTO dispute settlement bodies so that it may remain a “neutral” international institution that manages and adjudicates trade matters. With the proliferation of regional and bilateral trade agreements, other overlaps of trade and investment regimes of action (public and private) are bound to occur.<sup>199</sup> The challenge for WTO panels is to respect legitimate domestic regulatory policies while still implementing international standards that allow for predictability in their adjudication of domestic regulatory policy. Though it is not the role of WTO panels to decide whether domestic measures are legitimate as a matter of substantive law, they must have some procedural basis upon which to assess issues of legitimacy. A regulatory model would be weak in formulating these assessments. Procedural mechanisms that place the burden on member states to maintain transparent political processes and prove the need for regulatory measures would allow for more coordination between the WTO and member states as well as with regional tribunals.<sup>200</sup>

Through procedural mechanisms, such as reciprocal deference, WTO panels can unpack these overlaps and push regional tribunals on matters that are more appropriately managed at the regional level. In an interview in *Fortune Magazine*, the famous architect Santiago Calatrava described a bridge as “a symbolic gesture, linked with the needs of people who cross over it, and with the idea of overcoming or surmounting obstacles.”<sup>201</sup> Bridges are also “work[s] of art” that help to “shape our daily lives.”<sup>202</sup> This simple analogy is very telling for those who see the international community as one that is pluralist in nature, consisting of state and non-state actors forming networks to bring about change. The WTO is an institution around which all these players may coalesce and renegotiate international trade norms.

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199. See Joel P. Trachtman, *International Trade: Regionalism*, in RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW 151, 151–76 (Andrew T. Guzmán & Alan O. Sykes eds., 2007) (discussing regionalism as an “accelerating phenomenon” and as creating “international economic law subsystems”).

200. International efforts should be made in the context to assist lesser developed economies in meeting this burden of proof and maintaining transparency.

201. Julie Schlosser, *Calatrava’s Lightness of Being*, FORTUNE MAG., Nov. 13, 2006, at 127, 132.

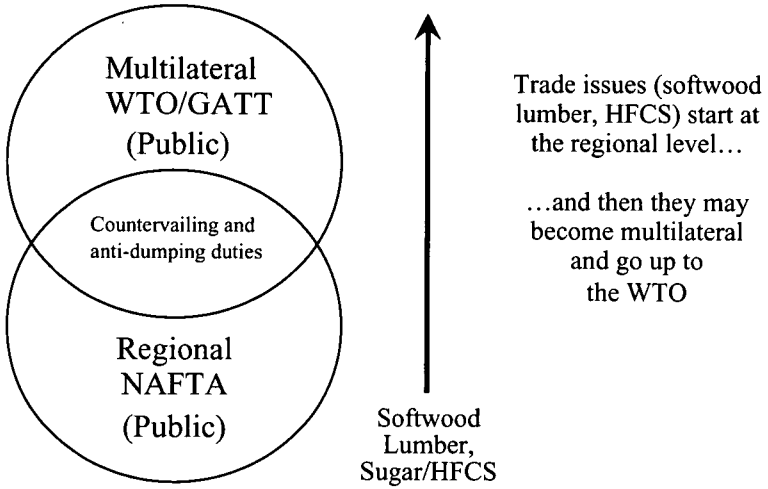
202. *Id.* at 131–32.

However, a recent push for regionalism and the challenges of the Doha Round raise doubt as to the strength of the multilateral trade regime. Creating bridges that may bind these networks is important. Procedural mechanisms, such as reciprocal deference, allow for increased coordination, enhanced transparency, and accountability at the domestic level. They can help to build sustainable bridges among the various trade regimes, allowing an international network that can influence domestic governance without eliminating its relevance.

APPENDIX

*Illustration 1*

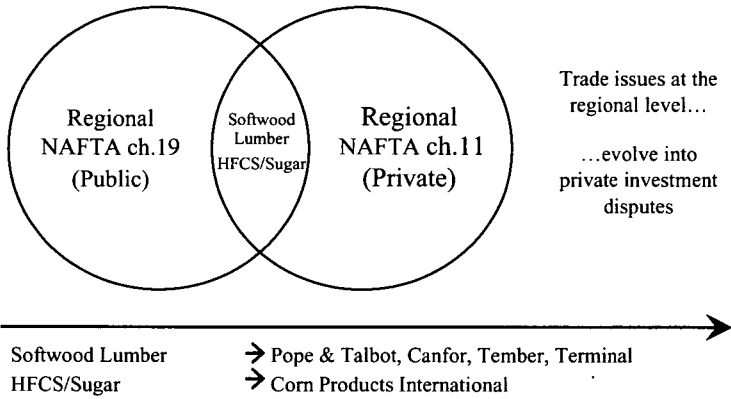
**Vertical Trade Overlap**  
(Public to Public)



APPENDIX

*Illustration 2*

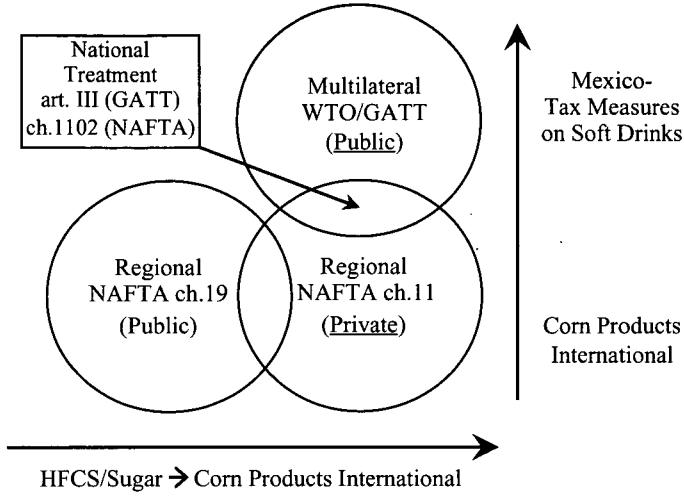
# Horizontal Public/Private Overlap



APPENDIX

Illustration 3

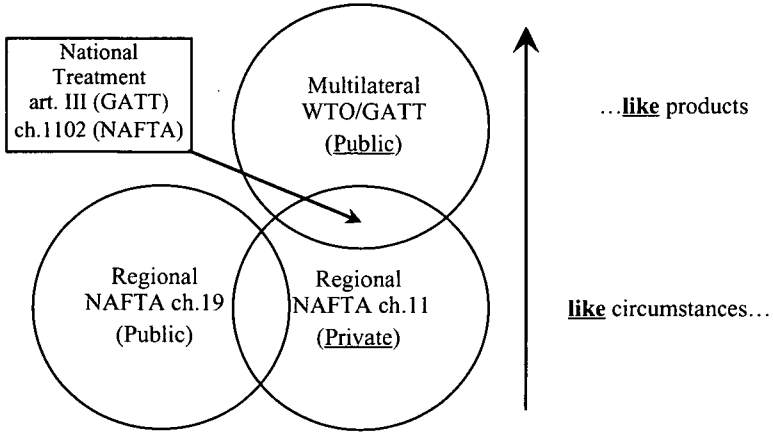
# Horizontal / Vertical Overlaps



APPENDIX

Illustration 4

# Substantive Law Overlap



Bottom-up coordination only (no top-down coordination)

APPENDIX

Illustration 5

# “Methanex Effect”

