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# DISAGGREGATING THE REGIONAL- MULTILATERAL OVERLAP:

## THE NAFTA LOOKING-GLASS

Elizabeth Trujillo\*

### INTRODUCTION

In putting together this talk, I wanted to explore regionalism in terms of how it fits into the multilateral trade regime and examine its effects on domestic policy. In this short piece, I use the North American Free Trade Agreement (NAFTA) as a looking glass through which we may understand the legal paradigm that allows the public issue of trade law to intersect with the private interests of private investors through the investment regimes. Regional and bilateral trade regimes have not only been shaped within the traditional paradigms of the General Agreement on Tariffs and Trade (GATT), but also according to their own sets of rules intended to address specific “regional” and domestic issues. NAFTA, in particular, provides us with a lens into understanding the relationship between private investment and the actors – both state and non-state – that influence and participate in trading systems in their larger contexts. The complex interplay between regional and bilateral agreements, state and non-state actors, and private investment regimes, makes us question traditional notions of what is purely domestic policy in the context of trade.

Regional trade agreements may exhibit negative impacts on the multilateral trade regime because of their exclusive, discriminatory and distortive effects.<sup>1</sup> However, they also have positive effects on free trade through the maximization of regional economic opportunities and increased economic integration.<sup>2</sup> Be that as it may, regional agreements are a reality and they are on the rise; the United States alone has entered into around ten new agreements and/or trade negotiations since 2003.<sup>3</sup> They are also very much

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\* Associate Professor, Suffolk University Law School, [etrujillo@suffolk.edu](mailto:etrujillo@suffolk.edu). This essay is based on an article published in 40 CHI. LOY. LAW JOUR 691 (2009) and on a talk presented at Indiana University Law School - Indianapolis, International and Comparative Law Review Conference, February 21-22, 2008. I would like to thank the other speakers at the conference and in particular, the students of the Indiana International and Comparative Law Review for putting together a wonderful symposium and for their thoughtful editing of this essay.

1. WORLD TRADE ORGANIZATION (WTO), WORLD TRADE REPORT 2007, *Foreward* (2007), available at [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) (“The complicated reality about regional agreements is that they are neither all good nor all bad.”).

2. *Id.*

3. In the last eight years, the United has entered into or participated in trade negotiations

alive through their dispute settlement bodies. The recent failure of the Doha Round of the World Trade Organization (WTO) proves that multilateralism is at risk.<sup>4</sup> Still, Member States continue to bring cases before the dispute settlement bodies of the WTO, indicating that the multilateral trade system has ongoing importance in certain contexts. Moreover, private investors look to the WTO's adjudication of national treatment to bolster their own arguments that a nation's regulatory measures are "discriminatory" towards a private investment.<sup>5</sup> If the multilateral system of trade is to survive, the WTO should remain the focal point of that system; therefore, the WTO must be the coordinating force that balances the multi-tiered aspects of free trade agreements.

### I. SUPRANATIONAL/NATIONAL OVERLAPS

By focusing on where various regimes – whether multilateral, regional, or domestic – overlap, I hope to illustrate where increased coordination among the regimes is possible and thereby increase legitimacy within the multilateral framework of the WTO. It is in unpacking these overlaps that "private" regimes emerge as key players that not only influence the formulation of domestic regulatory policy, but also link the international and domestic trade regimes.<sup>6</sup>

In general, two layers of adjudicatory processes exist in the context of regulatory measures: (1) the domestic processes employed by administrative bodies and state and federal courts; and (2) the supranational adjudication by WTO panels and regional tribunals. At the domestic level, it can be unclear whether areas such as environmental or health measures fall under the aegis of state or federal law. We have seen this in environmental policy, for example: states like California have passed regulations modeled after the Kyoto Accords, even though the United States has not signed onto that international agreement.<sup>7</sup>

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with several Latin American regions and countries, including Central America, Ecuador, Bolivia, Panama, and Peru. See Office of the U.S. Trade Representative (USTR), Americas, [http://www.ustr.gov/World\\_Regions/Americas/Section\\_Index.html](http://www.ustr.gov/World_Regions/Americas/Section_Index.html) (last visited Apr. 10, 2009) (listing regional and bilateral trade agreements in the Americas that are pending or currently in force).

4. See *Beyond Doha*, ECONOMIST, Oct. 11, 2008, at 31-33.

5. See generally Elizabeth Trujillo, *From Here to Beijing: Public/Private Overlaps in Trade and Their Effects on U.S. Law*, 40 CHI. LOY. L. J. 691 (2009).

6. See generally *id.*

7. 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.* (reducing greenhouse emissions by 25% by 2020 and 80% by 2050); see also Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22; see generally, International Council for Local Environmental Initiatives, Cities for Climate Protection, <http://www.iclei.org/co2/index.htm> archived at <http://www.webcitation.org/5bTH0wZNB> (indicating a number of U.S. cities and nations participating in this environmental initiative).

Massachusetts, on the other hand, has tried to push the federal Environmental Protection Agency (EPA) to pass regulations dealing with fuel emissions causing global warming.<sup>8</sup>

More recently, contaminated pet food and unsafe toys imported from China have stirred anti-globalization sentiment among consumers in the United States and across the world.<sup>9</sup> If the United States were to pass regulations making it more difficult to import such products due to health concerns, which WTO and regional agreements presumably allow through the Agreement on the Application of Sanitary and Phytosanitary Measures and Agreement on Technical Barriers to Trade,<sup>10</sup> it could have implications for U.S. compliance with WTO national treatment requirements and any bilateral treaty between the United States and China that protects mutual most favored nation treatment.<sup>11</sup> For example, although the SPS and TBT Agreements allow for the passage of “legitimate” measures concerning public health and safety, international tribunals struggle with distinguishing “legitimate” measures from illegitimate ones because all such measures have some discriminatory effect on free trade.<sup>12</sup>

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8. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 521 (2007). Another example of the supranational and national overlap in Massachusetts is recent legislation prohibiting the use of trans-fat in restaurants and grocery stores. Not only does this raise questions as to whether such health measures would be supported under U.S. dormant commerce clause jurisprudence, it also raises concern about whether such legislation, although seemingly legitimate, could compromise U.S. compliance with national treatment obligations under the GATT. While some health and safety measures are allowed under the WTO agreements, the scope of such permissible measures is narrow. See 2007 MA H. B. 2147 (MA 185<sup>th</sup> General Court (NS) (restricting the use of foods containing trans- fat). *But see*, “Obama Directs Regulators to Tighten Auto Rules” in THE NEW YORK TIMES, January 27, 2009 (describing President Obama’s instructions to the EPA to begin addressing certain states’ application for stricter fuel emission standards than those required by national regulations). President Obama also ordered the Department of Transportation to formulate rules for higher fuel-economy standards on cars and trucks. See *id.* See also, *California’s EPA Waiver*, LOS ANGELES TIMES, January 29, 2009 (discussing various state initiatives by California and other states to pass regulations to reduce emissions of greenhouse gasses).

9. See *Senate Homeland Security Committee Begins Investigation of Toy Import Safety*, BNA INTERNATIONAL TRADE REPORTER, September 6, 2007; *Brazil Bans Imports of Mattel Toys on Heels of Recall, Lead Paint Issues*, BNA INTERNATIONAL TRADE REPORTER, September 20, 2007; *EU Urges Quality, Safety Assurances For Chinese Food, Consumer Exports*, BNA INTERNATIONAL TRADE REPORTER, July 26, 2007; see also Audra Ang, *China Defends Quality of Its Exported Goods, Problems Attributed to Differing Standards, U.S. Product Designs*, GRAND RAPIDS PRESS, August 28, 2007.

10. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Result of the Uruguay Round vol.1, 33 I.L.M. 1125 (1994) [hereinafter SPS Agreement] and the Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1145 (1994) [hereinafter TBT Agreement].

11. See *e.g.*, James Bacchus, “WTO obligations Still Apply,” *Special to the National Law Journal*, September 10, 2007.

12. See *e.g.*, SPS Agreement and the TBT Agreement, *supra* note 11. See also North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 296–456,

In this way, local governance can be influenced by the supranational adjudicatory processes.<sup>13</sup>

However, these are the overlaps occurring at the domestic level or those having transnational implications. The focus of this essay is instead on the *inter-systemic* overlaps within the trade regimes--the multilateral and the regional and the private investment regime with the public trade regime.

### A. *Inter-Systemic Approach*

#### 1. *Multilateral/Regional Overlap*

In illustrating where the private investment regime can intersect with the public trade regime, the focus will be on the private investment chapter of NAFTA, Chapter 11. Moreover, in describing the "private right of action," this essay refers to actions brought directly before the NAFTA Chapter 11 tribunal by private investors alleging national treatments violations to their investments by their host governments.<sup>14</sup> The use of "public rights of action" refers to those disputes brought by governments for trade matters, without regard to any private actors who may have strongly influenced their governments' decision to bring these disputes in the first place.<sup>15</sup> Though seemingly different, particularly in the remedies they provide to participating parties, the adjudicatory regimes that apply to private and public rights of action share in their common interests, their legal jurisdictional spaces and in their impact on domestic governments.<sup>16</sup> Furthermore, international tribunals in the context of both private and public rights of action depend on domestic governments to enforce their judgments.

Within this context, there are *Vertical Overlaps* in which specific trade issues at the regional level converge with those at the multi-lateral.<sup>17</sup> The U.S.-Canada *Softwood Lumber Dispute* demonstrates this phenomenon. The dispute

605–800 (1993) [hereinafter NAFTA], Chapter 9 on Standard Related Measures and on Chapter 7 on Sanitary and Phytosanitary Measures.

13. 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 (2006) (describing ways in which local governments use international institutions and international law to redefine their domestic legal scope).

14. See Alan Sykes, *Public v. Private Enforcement of International Economic Law: Of Standing and Remedy* (Univ. of Chicago John M. Olin Law & Economics Working Paper No. 235, 2005), available at [http://ssrn.com/abstract\\_id=671801](http://ssrn.com/abstract_id=671801) (noting that investment disputes result in monetary damages for private actors whereas WTO trade disputes provide retaliatory measures as remedies for governments). This essay will borrow from Professor Sykes' use of the terms "public rights of action" as opposed to "private rights of action." *Id.*

15. See *id.* at 3 (distinguishing between public and private rights of action).

16. See *id.* at 7 (describing investment disputes as resulting in monetary damages for private actors whereas WTO trade disputes provide retaliatory measures as remedies for governments). For diagrams illustrating the overlaps described in this essay, see Trujillo, *supra* note 6.

17. *Id.* at 21.

arose as a trade dispute regarding Canadian subsidies paid to the Canadian softwood lumber industry, which prompted the United States government to place countervailing duties on softwood lumber imports from Canada.<sup>18</sup> Subsequently, Canada brought the dispute before a NAFTA Chapter 19 trade panel; both nations ultimately took the problem to the WTO for resolution.<sup>19</sup>

The *Antidumping Investigation on Imports of High Fructose Corn Syrup Originating from the United States of America*<sup>20</sup> dispute between the United States and Mexico provides another example of vertical overlap between regional and multilateral trade regimes. The *HFCS Antidumping Investigation* was first resolved by a NAFTA Chapter 19 panel and then subsequently by the WTO. The two tribunals decided the issue separately and solely according to the framework provided by each respective international trade agreement. Neither tribunal looked to the other's determination for guidance; however, their outcomes did coincide. Softwood Lumber, on the other hand, has been more challenging for WTO and regional panels alike.

## 2. Public and Private Regimes overlap

Among other things, globalism has given rise to a plurality of legal regimes. In the context of trade, the *Softwood Lumber* and *High Fructose Corn Syrup* disputes demonstrate that similar trade issues may be resolved both by a regional tribunal and by a multilateral one. Public rights of actions may be resolved differently by different tribunals or, as in the case of the *High Fructose Corn Syrup* dispute, they may coincide. In any event, these cases exemplify the

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18. 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). Chapter 19 under NAFTA has set up a supranational panel to deal with countervailing and antidumping trade disputes. See NAFTA, *supra* note 13.

19. 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 WLN 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).

20. Panel Report, *Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*, WT/DS132/R (Jan. 28, 2000) (adopted Feb. 25, 2000); Final Decision of Panel, Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America, MEX-USA-98-1904-01 (Aug. 3, 2001)[hereinafter the *HFCS Antidumping Investigation*].

way in which globalism has led to hybridity within the legal landscape, one in which “normative conflict among multiple, overlapping legal systems is unavoidable.”<sup>21</sup>

NAFTA also reveals another result of this hybridity: one in which government-to-government resolution of trade disputes (public rights of action) may eventually evolve into private rights of actions for private investors. To illustrate this, we can once again look to the softwood lumber dispute between Canada and the United States and the sweetener dispute between Mexico and the United States.

*Pope & Talbot v. Canada*,<sup>22</sup> is one example of a foreign investment dispute between the United States and Canada. In this case, a U.S. investor in Canadian softwood lumber brought an investor-state dispute under Chapter 11 of the NAFTA for export bans and other measures imposed by the Canadian government that allegedly had a detrimental effect on the investment. Other foreign investment disputes involving the softwood lumber issue between the United States and Canada also arose around the same time.<sup>23</sup> But in these early cases, the NAFTA tribunal clarified that antidumping and countervailing duty policies were not to be considered in the investor-state arena.<sup>24</sup> Despite the challenges international tribunals face in defining their jurisdictional scopes when dealing with similar issues that arise in both public and private rights of action, government disputes may eventually give rise to private disputes involving foreign investors. In this way, government actions regarding trade will impact foreign investment. What is interesting about the *Softwood Lumber* cases is that they show that in their early years, NAFTA investment tribunals had a perceived need to unpack the public rights of action from private ones; that is, to disconnect the overlap between trade matters from investment matters. This issue did not arise again in the context of NAFTA until 2005 with *Methanex Corporation v. United States of America*.<sup>25</sup> In unpacking these horizontal public/private overlaps, the proximity of interests among free traders,

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21. See generally Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) (describing international law through a pluralist lens). For more discussion on the “pluralist landscape of free trade” see Trujillo, *supra* note 6, Part IV.A.

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

23. These were the “Softwood Lumber cases,” which included the following Canadian investors: *Canfor*, *Tember* and *Terminal*. See NAFTA Panel, *Canada—Softwood Lumber*, US-CDA-2002-1904-02, 2006 WL 4041527 (2006), See also, 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>.

24. The Softwood lumber cases decided that trade disputes could not be “transplanted” into the investor-state dispute arena. See *id.* See also, Trujillo, *supra* note 6.

25. See *Methanex Corporation v. United States of America*, 44 I.L.M. 1343 (stating that NAFTA did not intend for trade provisions to “be transported to investment provisions”); see also Trujillo, *supra* note 6, at 25 (discussing the “Methanex effect” as one that disaggregates the vertical/horizontal and public/private overlaps).

private investors and government intervention comes to light.<sup>26</sup> Trade disputes, although influenced by private actors, are brought before a trade tribunal by a government against another government. However, such disputes, like an antidumping dispute, may also eventually bring rise to an investor-state dispute which is brought by a private investor against a host government.<sup>27</sup>

### 3. *Multilateral/Regional Substantive Law Overlap*

Horizontal and vertical overlaps also exist in the adjudication of domestic regulatory measures, which may result in national treatment violations both at the regional and multilateral levels. Disputes regarding alleged national treatment violations are those involving regulatory, fiscal, or non-fiscal measures. Under the GATT, WTO panels adjudicate these measures under Article III of GATT.<sup>28</sup> NAFTA incorporates Article III when dealing with trade in goods.<sup>29</sup> Chapter 11 of NAFTA contains its own national treatment provision that requires host governments to “accord to investors [and their investments] of another Party treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”<sup>30</sup> In dealing with matters of national treatment, the understanding of the word “like” becomes important in assessing the legitimacy of regulatory measures.<sup>31</sup> Moreover, NAFTA Chapter 11 tribunals tend to look to WTO interpretations of national treatment under Article III for guidance in understanding the words “like circumstances,” even if they do not necessarily import Article III WTO adjudication of national treatment into their own decisions.<sup>32</sup>

To illustrate this substantive law overlap, it is helpful to focus on a recent investor-state dispute under Chapter 11 of NAFTA, *Corn Products International v. United Mexican States*.<sup>33</sup> This case, along with *ADM v.*

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26. See Trujillo, *supra* note 6 (discussing the horizontal public/private overlaps).

27. There seems to be a correlation between the governments bringing a trade dispute and the nationality of a private investor bringing an investor-state dispute on similar issues and against the same government. For more on this see *generally id.*

28. The first sentence of GATT Article III: 4 reads, “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

29. See NAFTA, *supra* note 13, at art. 301.

30. *Id.* at art. 1102 (1) & (2).

31. See Elizabeth Trujillo, *Mission Possible: Reciprocal Difference Between Domestic Regulatory Structures and the WTO*, 40 CORNELL INT’L L. J. 201, 262 (2007) (discussing various applications of “like products” by GATT/WTO panels throughout the years).

32. For more on the tendency of NAFTA Chapter 11 tribunals to look to Article III adjudication by WTO panels, see *generally id.*; Trujillo, *supra* note 6.

33. Request for Institution of Arbitration Proceedings, *Corn Products International v.*



*Mexico*,<sup>34</sup> emerged as a private right of action from the public right of action discussed earlier, the *HFCS Antidumping Investigation*. Both *Corn Products* and *ADM* dealt with U.S. investors in the Mexican sweetener business that were affected by the Mexican government's actions towards Mexican sugar and the use of high fructose corn syrup in Mexico.<sup>35</sup>

In *Corn Products International*, a U.S. investor brought an investor-state claim after the Mexican government passed a tax on Mexican soda bottlers using HFCS.<sup>36</sup> This was brought a few years after the U.S. government brought the antidumping action against the Mexican government and the WTO and NAFTA decisions finding for the United States. The U.S. investor-claimant, *Corn Products International*, brought the investor-state dispute against the Mexican government in response to a federal tax passed by the Mexican legislature on soda bottlers who used high fructose corn syrup as a sweetener instead of sugar. No such tax was passed for using sugar. *Corn Products International* had the largest market share within the Mexican high fructose corn syrup industry and alleged national treatment violations under Chapter 11 of NAFTA.<sup>37</sup> The decision on this dispute has not yet been made public, but reliable sources claim that the NAFTA tribunal has decided for the U.S. investor.

In 2004, the U.S. government requested that the WTO panel decide whether the tax on the use of high fructose corn syrup passed by the Mexican government was a national treatment violation under Article III of GATT, in *Mexico—Tax Measures on Soft Drinks and other Beverages*.<sup>38</sup> It alleged that the tax violated Article III because it treated sugar and high fructose corn syrup differently in order to benefit the Mexican sugar industry.<sup>39</sup> This case was decided and then taken to the WTO Appellate body, which agreed with the WTO panel's finding that the tax was a national treatment violation.

*Corn Products International* specifically illustrates not only a

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United Mexican States, October 28, 2003 [hereinafter *Corn Products International*] available at [www.naftaclaims.com](http://www.naftaclaims.com).

34. *Archer Daniels Midland Co. v. Mexico*, ICSID Case No. ARB(AF)/04/05 (2007).

35. ADM and CPI worked together with Cargill and A.E. Stately in response to the Mexican tariffs. See e.g., *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.* See Trujillo, *supra* note 6, at Part III.B for more information on “transnational players.”

36. See *Corn Products International*, *supra* note 34.

37. See *id.*

38. See Request for the Establishment of a Panel by the United States, *Mexico—Tax Measures on Soft Drinks and other Beverages*, WT/DS308/4 (June 11, 2004) [hereinafter *Mexico-Tax Measures*]. The claimant alleged violations under Article III:1, III:2 and III:4 of GATT. *Corn Products International* and *Mexico-Tax Measures* when discussed together will be referred to as the *High Fructose Corn Syrup Dispute*.

39. The United States claimed that “like and directly competitive or substitutable” products (sugar and high fructose corn syrup) were being treated differently. See *id.*

multilateral/regional overlap and a public/private regime overlap, but also a substantive law overlap regarding the issue of national treatment. In other words, this case demonstrates, on the one hand, a trade dispute evolving into a private investment dispute based on a fiscal measure by the Mexican government. On the other hand, it also illustrates a convergence of the multilateral WTO trade regime and the regional private investment NAFTA regime with regard to the issue of national treatment.<sup>40</sup> Interestingly, the same private actors that brought the Chapter 11 disputes regarding high fructose corn syrup also lobbied the U.S. government to bring the WTO action against Mexico in 2004.<sup>41</sup>

## II. WTO, NAFTA, AND DISAGGREGATING OVERLAPS

Through the adjudicatory processes of NAFTA, we can better appreciate ways in which the public regime of trade and the private regime of investment overlap. Furthermore, the various NAFTA tribunals have provided various venues for state and non-state actors to discuss and litigate their disputes with trading partners. However, NAFTA also reveals to us that these same adjudicatory processes may be used to harness power among the various actors through forum-shopping. Investors looking for jurisprudence to give weight to their national treatment arguments look to the WTO for guidance.<sup>42</sup> Governments attempting to exert pressure against their counterparts in a trade dispute bring disputes before a regional tribunal and a WTO panel almost simultaneously, such as in the *Softwood Lumber* disputes. Finally, governments may indirectly aid their own private entities holding investments in countries with which the government has entered into trade agreements by bringing a trade dispute on similar substantive issues to those that are found in an investment dispute by their private entities. The *High Fructose Corn Syrup* dispute is an example of this.

For these reasons, it is important that in dealing with national treatment violations, the WTO recognize the overlaps that exist among various trade regimes and, in turn, take on a stronger adjudicatory role in this regard. To do this, WTO panels should consider the effect of their decisions on regional tribunals. Furthermore, when issues are better settled at the regional level, WTO panels can defer to regional adjudication of certain matters. For example, in *Mexico-Tax Measures*, Mexico requested that the WTO not hear the case

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40. See Trujillo, *supra* note 6, at Part I(c).

41. See James P. Miller, *Sugar spat sours Mexico's taste for corn syrup* *Corn Products International and other corn refiners caught in trade tussle over U.S. barriers to Mexican sugar exports*, CHI. TRIB., February 5, 2004, available at 2004 WLNR 19911704. See also, Trujillo, *supra* note 6, Part III.B (discussing "transnationalism and its players").

42. See Trujillo, *Mission Possible*, *supra* note 32, Part III (describing various NAFTA Chapter 11 decisions where the Tribunal looked to WTO adjudication of Article III and the definition of "like products" in order to apply the "like circumstances" test under Chapter 11 and determination whether a government action violated national treatment requirements).

brought by the United States.<sup>43</sup> The WTO had jurisdiction to decide on matters under its Covered Agreements;<sup>44</sup> therefore, it could also decide on the issue of whether the Mexican tax was placed in violation of national treatment requirements of the GATT Article III. However, Mexico insisted that this tax was in response to the United States' inaction in complying with its agreements regarding market access of Mexican sugar. For some time, Mexico had tried to resolve the problem under a NAFTA Chapter 20 dispute settlement body; however, this was to no avail. The WTO panel and Appellate Body ignored this issue and proceeded to decide on the issue of national treatment. While presumably they acted correctly regarding WTO law, a question remains as to whether WTO panels should urge Member States to resolve regional disputes, such as this sugar dispute between Mexico and the United States, within regional dispute settlement bodies.<sup>45</sup>

Decisions regarding national treatment violations have a direct effect on domestic regulatory measures. After all, virtually all government actions are protectionist to some degree. The challenge for trade tribunals is in discerning those measures that are intended to protect domestic markets at the expense of foreign ones. This is exactly what GATT Article III strives to do. It focuses on whether products imported into a territory are "accorded treatment no less favourable than that accorded to like products of national origin."<sup>46</sup> Furthermore, its purpose is to determine whether a measure has been passed "so as to afford protection" to a domestic market.<sup>47</sup> The operative phrase in making these determinations is "like products." WTO panels must compare treatment of a foreign product to a "like" domestic product.

In a similar way, NAFTA Chapter 11, article 1102, strives to ensure that foreign investments are also afforded treatment that is no less favorable than domestic investments. The operative term within article 1102 is "like circumstances"—foreign investments are compared to those domestic investments "in like circumstances."<sup>48</sup>

43. See *Mexico-Tax Measures*, *supra* note 39.

44. See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, app. 1, 33 I.L.M. 1125 (1994) [hereinafter DSU]. WTO panels occasionally look to other sources of international law, such as Article 31 of the Vienna Convention when dealing with issues of treaty interpretation.

45. See e.g., Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tires* WT/D5332/R (June 12, 2007) [hereinafter *Brazil-Retreaded Tires*] (considering an argument by respondent that it was exempted under GATT because of an exception granted under MERCOSUR which justified a Brazilian regulation favoring domestic retreaded tires); see also Trujillo, *supra* note 6, part II.C (discussing *Brazil Retreaded Tires*).

46. GATT, *supra* note 29, at art. III, para. 4; see Trujillo, *supra* note 6, at part II(a) (discussing GATT Article III).

47. GATT, *supra* note 29, at art. III, para. 1; see Trujillo, *supra* note 6, at part III; see also Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L LAW 619, 621-22 (1998), available at <http://www.worldtradelaw.net/articles/hudecrequiem.pdf> [hereinafter *Requiem*].

48. NAFTA, *supra* note 13, at art. 1102.

In dealing with regulatory measures, WTO panels have fluctuated from a more formalist reading of GATT Article III to a more contextualized interpretation.<sup>49</sup> NAFTA Chapter 11 tribunals, on the other hand, tend to be more formalized in interpreting “likeness” and in finding comparators; however, they then contextualize the regulatory measure by attempting to balance its legitimate purpose against its discriminatory effects. In applying article 1102, a NAFTA Chapter 11 tribunal may determine whether the differences in treatment of investments *in like circumstances* has a “reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.”<sup>50</sup> At times, though, NAFTA Chapter 11 tribunals may instead look more closely at the measure in question and its connection to the domestic regulatory processes in place.<sup>51</sup> For the most part, NAFTA tribunals take a two-step analysis in adjudicating alleged national treatment violations. On the one hand, they look to WTO interpretations of “like products” in finding its investment comparators under “like circumstances.”<sup>52</sup> On the other hand, NAFTA tribunals are willing to delve into domestic regulatory structure and contextualize the regulatory measure in question for legitimacy purposes.

Various NAFTA investor-state decisions have looked to WTO interpretations of “like products” in order to determine the “likeness” of investments protected under NAFTA Chapter 11.<sup>53</sup> While NAFTA tribunals do

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49. See Trujillo, *Mission Possible*, *supra* note 32, at 235. In determining “likeness,” WTO panels look to primarily four factors: 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). 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*]. However, in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* the WTO panels showed a willingness to expand the meaning of “likeness” to incorporate the regulatory measure itself. See *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).

50. Pope & Talbot, para. 78. See also Trujillo, *Mission Possible*, *supra* note 32, at 244-245 (discussing the balancing test incorporated by *Pope and Talbot* into national treatment determinations under Chapter 11 NAFTA). It is important to note that in *Gami Investments, Inc. v. The Government of Mexico*, the NAFTA tribunal did not apply the Pope & Talbot balancing test; however, after deciding that the policy in question was legitimate, it did look closely at the administrative processes in Mexico allowing for expropriation of sugar mills that were financially troubled in order to save them from insolvency. See *Gami Investments, Inc. v. The Government of Mexico*, Final Award (Nov. 15, 2004), para. 110-115. See also Trujillo, *Mission Possible*, *supra* note 32, at 245-247 (comparing *Gami Investments* to *Pope & Talbot*).

51. See e.g., *Gami Investments*, *supra* note 51.

52. An affirmative determination creates a presumption of a national treatment violation that may be rebutted by the balancing test laid forth in *Pope & Talbot*.

53. See Trujillo, *Mission Possible*, *supra* note 32, at part III.A; see also Trujillo, *supra* note

not necessarily defer to WTO panels in the strictest sense, they do look to WTO panel interpretations of the meaning of “like products” for guidance in understanding “likeness” under the NAFTA Chapter 11 regime. Furthermore, this tendency to “defer” is brought first by the claimants in the investor-state disputes; in this way, they give legitimacy to their arguments. However, NAFTA tribunals have shown a greater willingness to defer to the regulatory processes of the domestic governments in assessing whether measures are in fact discriminatory.<sup>54</sup>

Furthermore, NAFTA Chapter 11 tribunals do attempt to unpack the trade issues from the investment ones. Though there are public/private overlaps and substantive law overlaps among public and private rights of action, tribunals for cases such as *Methanex* have explicitly unpacked these overlaps in making their determinations. In this 2005 case in which a Chapter 11 tribunal had to decide whether California bans on the use of methanol for reformulated gasoline was a national treatment violation, the tribunal decided that ethanol and methanol producers were not “in like circumstances.”<sup>55</sup> Rather, only methanol producers should be compared to each other and that the purpose for the ban, which was to avoid legitimate health and environmental hazards, was an important consideration in the determination of national treatment violations.

### III. RECIPROCAL DEFERENCE AND DISAGGREGATING OVERLAPS

The tendency of NAFTA tribunals to look to WTO adjudication indicates that, despite recent challenges to the multilateral system through the failure of the Doha Round, regional tribunals and state and non-state actors look to WTO dispute settlement bodies for legitimacy. Therefore, it is within its dispute settlement bodies that the WTO may retain its relevance for trade.

The resulting hybridity of various trade regimes and their adjudicatory

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6, at part I.

54. See Trujillo, *Mission Possible*, *supra* note 32, at part III.A (discussing investor-state awards under NAFTA Chapter 11 that look to WTO adjudication of GATT Article III for guidance in determining “like circumstances” in alleged national treatment violations); 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, 71-81 (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 UN CONFERENCE ON TRADE AND DEVELOPMENT, THE DEVELOPMENT DIMENSIONS OF FDI: POLICY AND RULE-MAKING PERSPECTIVES* 189, UN 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 similarities and differences between investment and trade regimes and noting that the political economy of investment is different from trade). 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.

55. See *Methanex*, 44 I.L.M. 1343, at part IV, ch. B.

processes have resulted in a “spaghetti bowl” of trade regimes,<sup>56</sup> or, as Professor Sunjoon Cho has stated more precisely in light of the growing importance of Asian nations in trade, an “Udon bowl.”<sup>57</sup> Through procedural mechanisms, for example, WTO panels may “manage hybridity” among the multiple overlapping trade regimes.<sup>58</sup>

A procedural mechanism that I call *reciprocal deference* will not only help “manage hybridity,” but also enhance coordination among the regional/bilateral regimes and the multilateral regime, and will increase transparency within domestic regulatory processes.<sup>59</sup> First, reciprocal deference would treat *de jure* (facially non-neutral) discriminatory measures differently from *de facto* (facially neutral) ones. In dealing with *de facto* discriminatory measures, reciprocal deference would be most relevant with those measures that have discriminatory effects and non-discriminatory ones that place “incidental burdens” on trade.<sup>60</sup> Second, reciprocal deference would unpack multilateral/regional overlap and recognize any impact it may have on a regional tribunal. It would allow for WTO panels to consider whether certain issues would be best decided regionally or bilaterally. Finally, in making a national treatment determination, it would allow a respondent to prove the legitimacy of its measures. In this way, WTO panels can learn from the NAFTA Chapter 11 investment regime: they may defer to national democratic and transparent regulatory processes and try to assess the regulatory measure in question within the context of the regulatory framework in which it was born. Though WTO panels are not in the best position to determine the legitimacy of these measures as a matter of substantive law, they may place this procedural burden on responding Member States to prove that in fact such measures are legitimate within their context.<sup>61</sup>

While there are similarities in a reciprocal deference model to that of an antidiscrimination model proposed by Professors McGinnis and Movsesian, they do differ in significant ways.<sup>62</sup> First, the antidiscrimination model focuses

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56. See Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO- NAFTA ‘Spaghetti Bowl’ Is Cooking*, 9 J. INT’L ECON. L. 1, 3-4 (2006) using the Spaghetti Bowl analogy to describe the multiplicity of trade regimes).

57. See Professor Sungjoon Cho’s presentation at Indiana University School of Law - Indianapolis Symposium.

58. Berman, *Global Legal Pluralism*, *supra* note 22, at 1196 (offering legal pluralism as a way to “manage hybridity”).

59. See generally Trujillo, *Mission Possible*, *supra* note 32, for a more detailed discussion on reciprocal deference.

60. See *id.* at 257.

61. See *id.* at 256-261.

62. 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). In the antidiscrimination model, the authors propose “determinate rules” for WTO panels to use in order to assess “covert protectionism.” The rules are based on the requirements of transparency, performance orientation and consistency in order to distinguish legitimate regulations by Member States from illegitimate ones. See *id.* at 572-578; see also

more on risk assessment mechanisms and scientific evidence as a means to determine procedural legitimacy. In this way, this model does not take into account those regulatory measures that are passed by domestic governments through transparent, democratic processes, but are not based on precise science or perhaps do not implicate science at all. For example, a hypothetical proposal to universalize healthcare may not have concrete scientific benefits and may be, at least in the short-term, economically burdensome on a society. However, despite the possible anti-competitive effects of placing price caps on certain necessary drugs, it is feasible that a domestic government may consider these costs to be a necessary social burden in order to embrace a possible social value, such as universal healthcare.<sup>63</sup> A similar point could be made regarding environmental regulation with respect to a tax on gasoline. Such a measure may create economic burdens on the automobile sectors;<sup>64</sup> however, they may also help open up new markets for fuel-efficient cars or hybrid vehicles.<sup>65</sup> A cap and trade system may have similar effects on the energy sector.<sup>66</sup>

Second, unlike the antidiscrimination model, reciprocal deference unpacks the existing jurisdictional and substantive law overlaps. In this way, incentives on state and non-state actors to forum shop will diminish. Also, intersecting interests of state and non-state actors will surface. Third, reciprocal deference does not discount that the WTO may also have a role as a regulatory commission in setting standards for free and fair trade and in other specific areas such as intellectual property rights, labor, environment and transparency.<sup>67</sup> In this way, the WTO can continue to contribute to the harmonization of regulatory standards among its Member States.

Finally, reciprocal deference would increase dialogue among Member States in sorting out common regional or bilateral issues, and it would allow the WTO to be a forum where domestic administrative bodies may have the

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Trujillo, *Mission Possible*, *supra* note 32 (discussing the antidiscrimination model by Professor McGinnis and Movsesian).

63. Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 801-02 (2008) (discussing Canadian's belief that universal health care is part of their identity).

64. See *Oberstar to State: Raise the Gas Tax, Congress will Help on Transportation if Minnesota Steps Up*, STAR TRIBUNE, Feb. 25, 2007, available at 2007 WLNR 3784312; Jonathan Marshall, *Size Of Gasoline Tax Has Many Driving In Circles It Does Lousy Job Of Pricing Social Costs Of Getting Around By Car*, S.F. CHRON. B3, May 13, 1996, available at 1996 WLNR 3396794. See also, Steven Mufson, *Talk of Raising Gas Tax Is Just That*, WASH. POST, Oct. 18, 2006, at D01. But see, David C. Holzman, *Driving Up the Cost of Clean Air*, 113 ENVTL. HEALTH PERSP. A246, A248 (2005) (discussing current vehicle use and the environmental and long-term costs of such use).

65. David L. Greene et al., *Fuel Economy Rebound Effect For U.S. Household Vehicles*, 20 Energy J. 1, 7 (1999). See also, Holzman, *supra* note 65.

66. See, Robert N. Stavins, *A Meaningful U.S. Cap-And-Trade System To Address Climate Change*, 32 HARV. ENVTL. L. REV. 293 (2008).

67. See generally McGinnis & Movesian, *supra* note 63, for more discussion on the regulatory model as opposed to the antidiscrimination model; see also Trujillo, *Mission Possible*, *supra* note 32.

opportunity to demonstrate the legitimacy of its measures. In this way, the WTO may also influence domestic administrative processes and encourage increased transparency within these processes.<sup>68</sup>

### CONCLUSION

While it may seem counterproductive for WTO panels to encourage “deference” to regional tribunals when necessary and to domestic regulatory processes for assessing issues of legitimacy, such deference would allow the WTO to remain relevant as a coordinating force within multilateralism and among the plurality of trade regimes. Those institutions closest to the execution of a domestic regulatory measure are actually in the best position to judge the legitimacy of a measure, but they also have the highest incentive to further those measures for reasons other than public purpose.<sup>69</sup> For this reason, WTO panels and NAFTA tribunals are skeptical of the legitimate intent of domestic regulatory measures. However, the decisions of these same international tribunals are only as powerful as their ability to convince domestic governments to enforce their decisions. Therefore, WTO panels and regional tribunals cannot ignore domestic administrative processes. They must participate in the dialogue of free trade. It is within these same regulatory structures that protectionism can best be combated.

Reciprocal deference encourages transparency and accountability within domestic regulatory structures by requiring that respondents on a WTO dispute prove the legitimacy of their measures. Such a burden perhaps is least effective with respect to nations that need transparency the most, the lesser developed nations. For this reason, the international community and the WTO itself should make resources available to less developed nations that are respondents.

Already emerging economies such as India, China and Brazil are gaining importance within the international trading community. In encouraging dialogue from them and enhancing transparency within those governments, they may set an example for other emerging economies to increase transparency.

An argument may be made that the WTO is not the proper forum for such dialogue because the WTO texts do not support the idea that the trade regime should be viewed as a “constitutional polity.”<sup>70</sup> After all, if there are conflicting adjudicatory results among the trade regimes, this would actually stir on dialogue among the political players; and in turn, create change through diplomatic negotiations. At some level, this may be true and this essay

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68. See Trujillo, *supra* note 6, at part III(C).

69. See David Gantz, *A Post-Uruguay Round Introduction To International Trade Law In The United States*, 12 ARIZ. J. INT’L & COMP. L. 1, 9–10 (1995) (stating that U.S. trade law results from the political process which includes various special interests); see also Trujillo, *Mission Possible*, *supra* note 32 at 236.

70. Jeffrey L. Dunoff, *The Politics of International Constitutions: The Curious Case of the World Trade Organization*, in *Ruling the World? Constitutionalism, International Law and Global Governance* 178 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).



recognizes that the WTO can not bear the burden of resolving all conflicts among domestic regulatory processes and trade. However, the adjudicatory process of the WTO does carry some clout in the international trade landscape. In incorporating procedural mechanisms that increase transparency and strategic fairness for resolution of trade disputes, the WTO only increases its legitimacy as the final adjudicatory of trade matters. In addition, the regional tribunals that look to WTO adjudication for guidance on regional adjudication also contribute to the legitimacy of the WTO.<sup>71</sup> At times, conflicting outcomes are unavoidable and normative change could still arise from these conflicts. However, increased coordination among the multilateral, bilateral, and regional legal spheres is important for a globalized trading system to emerge.

Disaggregating the overlaps that exist among trade regimes and state and non-state actors will also help reduce forum-shopping, which ultimately gives the wealthier nations who can afford to forum shop a strategic advantage over lesser developed nations. The tendency of claimants and regional tribunals such as NAFTA Chapter 11 tribunals to look to WTO jurisprudence regarding the adjudication of regulatory measures ultimately solidifies the legitimacy of WTO jurisprudence in a “bottom-up coordination.”<sup>72</sup> It is also important for the WTO to engage in a “top-down coordination” where it moves away from adjudication under the strict parameters of its Covered Agreements and defers, when necessary, to the adjudication of regional and bilateral tribunals as well as to the administrative regulatory processes of its Member States. In this way, it can be the promoter of free trade and also a forum for dialogue among various state and non-state interests with regard to regulatory measures. It can also take on a stronger adjudicatory role rather than rely solely on its role as a supranational institution issuing normative standards.

In order to preserve its power, the WTO must share its adjudicatory power and force regional and bilateral tribunals to settle matters regionally. They must also be the coordinating force of the global trade system by creating concrete linkages to its Member States and their regional concerns. Regionalism will continue to grow; however, it may expand while remaining grounded within a multilateral structure that holds the global trading system together in a cohesive web of international and domestic adjudicatory processes.

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71. See Trujillo, *supra* note 6 (discussing the tendency of regional tribunals to look to WTO adjudication in the area of national treatment and describing this phenomenon as “bottom-up coordination.”).

72. Trujillo, *supra* note 6, at part IV(b) (describing “bottom-up coordination”).