Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade

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Abstract Preferential trade agreements offer members an alternative to dispute settlement at the World Trade Organization. This gives rise to forum shopping, in that complainants can file regionally, multilaterally, or not at all. What explains this choice of forum? I argue that complainants strategically discriminate among overlapping memberships: on a given measure(s), some prefer to set a precedent that bears only on a subset of their trade relations, others a precedent that bears on all their trade relations, while still others prefer not to set a precedent. Thus, the key to forum shopping is not simply which institution is likely to come closest to the complainant's ideal ruling against the defendant, but where the resulting precedent will be more useful in the future, enabling the complainant to bring litigation against other members, rather than helping other members bring litigation against the complainant. I consider disputes over Mexican brooms and Canadian periodicals.

In 1996, Mexico challenged a U.S. safeguard measure under the provisions of the North American Free Trade Agreement (NAFTA). While few were surprised that Mexico filed this case, many were puzzled by Mexico's decision not to bring it, instead, to the World Trade Organization (WTO).[1] Indeed, the case seemed better suited to the WTO since other members were affected, and because Mexico's arguments largely centered on issues of WTO law. At around the same time, the United States challenged Canadian measures on periodicals at the WTO. Although this case was widely anticipated, some thought the United States might bring it, instead, to NAFTA.[2] After all, it seemed to be a strictly bilateral issue, and it might have

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1. See, for example, de Mestral 2005.
2. See, for example, Reif 2001.

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been easier for the United States to pursue remedies at NAFTA. Why, then, did Mexico and the United States defy expectations in choosing where to litigate these cases? More generally, how do members select among overlapping institutions in deciding which (if any) to petition in trying to resolve their conflicts? This practice, which legal scholars call *forum shopping*, is a key part of any litigation strategy but has received little attention in international relations.[3] This article advances a theory of forum shopping for dispute settlement in international trade.

I argue that a complainant's choice of forum depends on whether it prefers to set a regional or multilateral precedent, or no precedent at all. Setting precedent means adding to an institution's body of case law concerning the obligation(s) in dispute. The incentive for a complainant to do this is that, in addition to curbing the defendant's protectionism, a precedent can facilitate future litigation, and encourage more *ex ante* settlement,[4] in relations with other members of the same institution. The complainant must therefore be strategic about where it sets a precedent: while new case law can be used in litigation against other trade partners, it can also be used by these other trade partners to bring suits against the complainant. Forum shopping is thus about discriminating among overlapping memberships: a complainant may prefer that some precedents pertain only to members of a regional institution, others to members of the multilateral institution, and at times prefer not to set a precedent at all.

Using a two-dimensional spatial model, I show that this decision depends on two variables: (1) the complainant's preference concerning the outcome of the dispute, which I define as being more or less "liberal," or free-trade oriented, than the status quo policies of the defendant, other trade partners, and the likely verdicts of the regional and multilateral institutions; and (2) the complainant's expectation concerning the future value of the precedent set, by which I mean the likelihood that the complainant will use the resulting case law in future litigation against other members, more than other members will use it against the complainant. These variables combine to show that the complainant choice of forum is not simply a function of which institution is likely to come the closest to its ideal ruling against the defendant, but where the resulting precedent will be more useful, facilitating litigation against other members, as opposed to inviting litigation against itself. In particular, an illiberal complainant is more likely to file regionally, and a liberal one multilaterally, even if they expect a more decisive legal victory over the defendant at the other institution. Yet, both will reverse their choice of forum if the expected value of future regional litigation is higher, an illiberal

3. *Black's Law Dictionary* defines forum shopping as "when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict." The importance of forum shopping in domestic litigation is discussed in Clermont and Eisenberg 1995, while its importance in Canada–U.S. trade is discussed in Howse 1998.

4. Setting a precedent can encourage subsequent disputes to end in a negotiated settlement before the panel rules, or deter protectionist practices from arising in the first place. In other words, there is nothing about this argument that suggests that all later disputes will necessarily result in a legal verdict.

complainant because it will be less fearful of being sued by its more liberal multilateral trade partners, and a liberal one because it will be less concerned about suing its less liberal multilateral trade partners.

Forum shopping has broader implications for studying institutions. First, it sheds light on the rational design literature, notably with respect to its treatment of membership. As Koremonos, Lipson, and Snidal put it, membership "is an endogenous design choice" that can later emerge as an exogenous constraint on the use of an institution.[5] This is precisely what is happening here, only that, where forum shopping is concerned, the issue is how the overlap of two (or more) memberships affects not only the relative use of these institutions (that is, where a case is filed), but whether these institutions are used at all (that is, if a case is filed). Importantly, while some institutions have few rules on overlapping memberships, others formally govern these relationships, including through merger, as examples in Central Asia and Africa make clear.[6] Thus, the prospect of forum shopping raises questions about how institutions manage overlapping memberships.

Second, forum shopping also speaks to more general questions about institutional design, notably with respect to the trade-off between "rigidity" and "stability." Echoing Goldstein and Martin's argument that too much legalization may undermine trade liberalization at the WTO,[7] Rosendorff explains that institutions need to strike a balance between legalism (that is, rigidity), which aims at furthering compliance, and flexibility (that is, stability), which helps attract and retain members.[8] While he looks at the Dispute Settlement Understanding (DSU) in this regard, the fact is that, by allowing forum shopping, the WTO and other institutions are also investing in flexibility, giving complainants latitude in deciding where to file cases. This opportunity for forum shopping, like membership, is an endogenous design choice. For example, it has been hotly debated in drafting a dispute settlement mechanism for the World Intellectual Property Organization, where some members prefer to leave the choice of forum to the complainant, but where most "support the view that 'forum shopping' should not be allowed."[9] Thus, forum shopping is a salient—and often contentious—issue in trying to balance rigidity and stability where memberships overlap.

This article proceeds as follows. The first section elaborates the puzzle of forum shopping. The second section develops the argument of this article. The third section probes the usefulness of the argument in explaining the safeguard and periodicals disputes. The fourth section concludes with a discussion of implications for institutional theory.

5. Koremenos, Lipson, and Snidal 2001, 777.

6. As I explain below, the Eurasian Economic Community and the Central Asian Cooperation Organization have merged, while the Common Market for Eastern and Southern Africa and the African Economic Community are scheduled to do so.

7. Goldstein and Martin 2000.

8. Rosendorff 2005.

9. World Intellectual Property Organization 1990.

The Puzzle

Why do complainants file some disputes regionally, others multilaterally, and still others not at all? The most obvious answer would be that institutional rules predetermine where complainants file. The purpose of this section is to show that there is ample opportunity for forum shopping, not least because, as with most other trade agreements, the WTO and NAFTA permit it. The WTO is less forthcoming than NAFTA on this point. On the one hand, the WTO claims "compulsory jurisdiction" over those disputes that arise among its members. On the other hand, the WTO approves preferential trade agreements under Article XXIV of the General Agreement on Tariffs and Trade (GATT), taking into account that many have dispute settlement mechanisms of their own, thus inviting forum shopping. For example, in reviewing the Canada–U.S. Free Trade Agreement (FTA), which preceded NAFTA, a GATT Working Group asked representatives of both countries what would happen "if the conclusions of the bilateral dispute settlement proceedings . . . and those reached under the multilateral dispute settlement proceedings were different or even contradictory. . . ?"[10]

For its part, NAFTA's main dispute settlement mechanism, Chapter 20, explains that "disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement . . . may be settled in either forum at the discretion of the complaining Party."[11] This language is echoed in most other trade agreements, from the U.S.–Chile to the EC–Mexico and Canada–Costa Rica accords.[12] If there is a disagreement over the complainant's choice of forum, NAFTA's Article 2005, paragraph 2, says that "normally" it should hear the dispute, with Articles 2005, paragraphs 3 to 4, claiming jurisdiction over disputes under Article 104 (Environmental and Conservation Agreements), Chapter 7 (Sanitary and Phytosanitary Measures) and Chapter 9 (Standards). These limited claims of jurisdiction, however, reflect the fact that, at the time of its inception, NAFTA either had an exclusive or stronger grasp of these issues in relation to the GATT,[13] though they are unlikely (and, in fact, are doubtful to be able) to prevent a complainant from going, instead, to the WTO.[14]

10. GATT Basic Instruments and Selected Documents 1995, suppl. 38.

11. Article 2005:1. Under the FTA, this was Article 1801:2.

12. Indeed, in reviewing the texts of all trade agreements containing a formal dispute settlement chapter, as listed in the Dartmouth Tuck Trade Agreement Database, I found only a few exceptions that, like the CARICOM–Colombia agreement, make no mention of the opportunity for forum shopping. See Tuck School of Business at Dartmouth, Tuck Trade Agreements Database. Available at ⟨http://cibresearch.tuck.dartmouth.edu/trade_agreements_db/⟩. Accessed 21 March 2007.

13. In particular, there is no equivalent of Article 104 under the WTO, and while Chapters 7 and 9 had no formal equivalent under GATT, they do under the WTO (that is, the Agreement on the Application of Sanitary and Phytosanitary Measures, and the Agreement on Technical Barriers to Trade).

14. Marceau 2001, 1111.

Another key consideration would be differences in law. There clearly are differences in law across the WTO and NAFTA, for example, but there is also a marked degree of convergence in many areas, not least because successive rounds of multilateral obligations have been ratified domestically. As a result, disputes are typically "actionable" under either forum. Indeed, NAFTA directly incorporates various WTO provisions and has been called on to adjudicate these where the law overlaps. For example, in the safeguard dispute, Mexico not only argued that the main legal issues arose under both agreements, but that NAFTA "necessarily [had] jurisdiction to dispose of all overlapping GATT issues involved in that dispute."[15]

A third factor would be the timeliness of proceedings. On this count there is little variation: both fora set out similar timelines, from the duration of consultations to the issuance of an interim and final report. That said, if the timeliness of justice were a main determinant of the choice of forum, complainants might be expected to prefer arbitration to formal dispute settlement (that is, alternative dispute resolution mechanisms under NAFTA or DSU Article 25 arbitration under the WTO), and yet they almost never do.[16]

A fourth factor would be the adoption of panel reports, and appellate review. The FTA/NAFTA never permitted defendants to block panel reports, a feature that compared favorably to GATT, but has been woven into the WTO. Even under GATT, there was far less blocking of reports than of panel requests; but in any case, Canada and the United States had no history of denying the other a legal victory. Appellate review is another feature that distinguishes the WTO from NAFTA, although the trade-off is that WTO verdicts are "binding," whereas NAFTA rulings are not, such that this feature of the DSU is not as germane to regional dispute settlement.

Following from this, a fifth factor would be the availability of remedies at the end of a dispute. The WTO and NAFTA outline similar procedures whereby a wronged complainant might seek redress, though NAFTA provisions, on occasion, allow for more direct compensation, notably the "cultural industries exception" discussed in the case study on *Canada—Periodicals*. Otherwise, complainants at either forum must wait out the defendant's (prospective) compliance. If this is not forthcoming in a timely manner, the complainant can request authorization to suspend "equivalent" benefits to the defendant. Few such requests have been made at either the WTO or NAFTA, and fewer still have been acted upon,[17] suggesting

15. NAFTA Doc. USA-97-2008-01, para. 28. All NAFTA documents are available from the NAFTA Secretariat Web site: ⟨http://www.nafta-sec-alena.org⟩.

16. Three cases have gone for DSU 25 arbitration at the multilateral level, two under GATT and one under the WTO, although the latter was conducted as a DSU 22.6 proceeding on authorization to retaliate, such that it can hardly be counted as a case of arbitration, as per the spirit of this provision. Nonetheless, recourse to arbitration under NAFTA or DSU 25 still hinges on a prior decision to file regionally or multilaterally, bringing it within reach of my argument. Indeed, as in the case of DSU 25, these decisions are fully backed by DSU 21 (on compliance) and 22 (retaliation), such that concern for precedent should be no less pressing in these disputes.

17. Authorization to retaliate has been granted in only seven WTO disputes, and acted upon in four of these.

that remedies, per se, are doubtful to be the deciding issue in the complainant's choice of forum.

This discussion suggests that there is ample opportunity for forum shopping: both NAFTA and the WTO recognize that this can (and will) occur, and their rules and procedures are rarely so different as to prejudge the complainant's choice of "court." This, in turn, begs the obvious question: why not file at both institutions? NAFTA, for one, explicitly discourages this: Article 2005, paragraph 6, says that "the forum selected shall be used to the exclusion of the other. . . ."[18] Still, some might argue that, in practice, multiple filings do happen, as in the most recent iteration of the Canada–U.S. softwood lumber dispute, and *Canada—Agricultural Products*. In fact, neither bears this out: in softwood, most of the disputes filed at NAFTA concerned antidumping and countervailing duties, which fall outside the institution's main dispute settlement mechanism (that is, the one comparable to the DSU);[19] in *Canada—Agricultural Products*, the United States went to the WTO to challenge Canadian efforts to comply with NAFTA.[20] While the article anticipates the circumstances under which a complainant might prefer to file in multiple fora, the point is that, as Marceau explains, "[s]tates do not pursue multiple dispute settlement proceedings needlessly, working instead towards ensuring that their grievances are brought before the most appropriately equipped fora for settling their disputes."[21] How, then, does a complainant select the most appropriate forum?

The Argument

The complainant's choice of forum depends on whether it prefers to set a regional or multilateral precedent, or no precedent at all. By setting a precedent, I mean adding to an institution's body of case law that is followed by its judicial bodies when ruling on subsequent disputes. This definition is not controversial; observers widely subscribe to the view that, as Palmeter and Mavroidis explain, "parties will continue to cite prior reports to panels, and panels will continue to take them into account by adopting their reasoning—in effect, following precedent."[22]

18. The article further states that "unless a Party makes a request pursuant to paragraphs 3 or 4," which invoke the special claims of jurisdiction on the environment, sanitary and phytosanitary measures, and standards, although these paragraphs also insist on pursuing the matter "solely under this Agreement."

19. At NAFTA, disputes over antidumping and countervailing duties are taken up under Chapter 19, which gives the complainant (including firms, who have private standing) "binational" tribunals as an alternative to seeking relief in domestic courts. In this sense, Chapter 19 is not considered comparable to WTO dispute settlement.

20. In other words, this was not an example of the same case being filed twice, but a second dispute arising over the outcome of the first dispute.

21. Marceau 2001, 1081.

22. Palmeter and Mavroidis 2004, 56. See also Davey 1998, 79; Jackson 1998, 83; Komuro 1995, 37; Petersmann 1994, 1175; Huntington 1993, 435; and Van Bael 1988, 69.

Steinberg concurs, arguing that the importance of a ruling "lies not only in its implications for the national measures that are the subject of the decision, but also in its precedential value."[23] Bhala, in a series of seminal articles on the subject,[24] calls this de facto stare decisis, which, in contrast to de jure stare decisis, is followed for extra- and quasi-legal factors, including custom and habit, rather than as a matter of legal requirement.[25] Importantly, Bhala argues that de facto and de jure stare decisis are both "binding" sources of law, in that they establish a presumption that precedents will be followed in the future.[26] The Appellate Body (AB) bears out this view, arguing in a highly important ruling that "[t]he reasoning in our Report in *United States—Shrimp* on which the Panel relied was not dicta; it was essential to our ruling. The Panel was right to use it, and right to rely on it. Nor are we surprised that the panel made frequent references to our Report in *United States—Shrimp*. Indeed, we would have expected the Panel to do so."[27] NAFTA panels similarly follow a de facto stare decisis, as in the safeguards dispute over Mexican broom corn brooms, where the institution's prior ruling in *Canada—Agricultural Tariffs* was central in this case.[28] Equally telling, these bodies of jurisprudence are well known and, at the multilateral level, meticulously catalogued in the WTO Analytical Index, which identifies the key precedents pertaining to each agreement, setting out, for example, that the AB's ruling in *Canada—Autos* is the relevant case law in distinguishing a de facto from a de jure subsidy.[29] In short, as Bhala concludes, it is only "[o]ur intellectual rigidity [that] precludes us from admitting openly that the holdings of the Appellate Body—and, for that matter, panel—reports actually are a source of international law."[30]

Since de facto stare decisis is followed for extra- and quasi-legal reasons, including custom and habit, and not as a matter of legal requirement, it could be argued that precedents from one institution might constrain or shape the rulings of another, making it hard to disentangle different bodies of jurisprudence, and thus to engage in forum shopping. This concern is unwarranted, both in theory and in practice. For its part, the WTO has not cited a single ruling by NAFTA (or any other regional institution),[31] not least because not all WTO members are NAFTA members, and thus are not bound by the precedents of this institution. This logic comes to the fore in *Argentina—Poultry Antidumping Duties*, for example, where the panel found Mercosur's ruling irrelevant to its deliberations. Building on the AB's ruling in

23. Steinberg 2004, 254.
24. Bhala 2001, 1999b, and 1999a.
25. Bhala 1999b, 3–4.
26. Ibid., 9.
27. WTO Doc. WT/DS58/AB/RW, para. 107. All WTO documents are available at ⟨http://www.wto.org⟩. Accessed 12 June 2007.
28. NAFTA Doc. USA-97-2008-01, para. 44.
29. WTO 2003.
30. Bhala 1999a, 850–51.
31. In my effort to survey WTO reports and trade law experts on citations to NAFTA case law, I was unable to turn up a single example.

Japan—Alcoholic Beverages, which reasons that only adopted reports should carry weight because they are "endorsed" by all the members (which is not true of unadopted WTO reports, much less NAFTA reports),[32] and the requirement in DSU 3.2 for WTO bodies to interpret the institution's agreements for themselves,[33] the panel explained that "we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies."[34] More generally, Pauwelyn points out that, even when hearing cases covering claims similar to those before NAFTA (that is, softwood lumber and sweeteners), WTO bodies have not even mentioned these regional proceedings, much less been guided by the decisions that result.[35]

In a few NAFTA disputes, on the other hand, GATT/WTO decisions have been referenced by panels, not least because the agreement incorporates certain WTO articles. Even here, however, these references have simply been of suggestive value to the panel, much like at the U.S. Supreme Court, where, as in *Lawrence v. Texas*, decisions by the European Court of Human Rights were cited, despite the fact that these have no bearing on the high court's de jure stare decisis.[36] Also like at the U.S. Supreme Court, moreover, NAFTA's references to the WTO have been ad hoc and controversial, rather than setting expectations about the institution's de facto stare decisis. Indeed, even NAFTA's body of jurisprudence is far from porous: in broom corn broom, for example, the panel explained that, since the rule in question was similar across the two institutions, "the Panel chose to rest its decision entirely on NAFTA Annex 803.3(12), without relying on Article 3.1 of the WTO Safeguards Code" or its attending case law.[37] The WTO panel in *Mexico—Soft Drinks* could not agree more that NAFTA should take this tack, reasoning that "any findings made by this Panel, as well as its conclusions and recommendations in the present case, only relate to Mexico's rights and obligations under the WTO covered agreements, and not to its rights and obligations under other international agreements, such as the NAFTA, or other rules of international law."[38]

In short, one can speak meaningfully about separate bodies of de facto stare decisis at the WTO and NAFTA.[39] Other scholars also argue that precedent matters

32. WTO Doc. WT/DS8/AB/R, 14.

33. See Mavroidis, Howse, and Bermann forthcoming, 63.

34. WTO Doc. WT/DS241/R, para. 7.41. Likewise, in *EC—Biotech Products*, the panel explains that both the Convention on Biological Diversity and the Biosafety Protocol are "not applicable" for this same reason. WTO Doc. WT/DS291/R, para. 7.75.

35. Pauwelyn 2006, 202.

36. See Joan Biskupic, "Supreme Court Citing More Foreign Cases," *USA Today*. 7 July 2003, available at ⟨http://www.usatoday.com/news/washington/2003-07-07-foreign-usat_x.htm⟩, accessed 18 April 2007; and Jeffrey Toobin, "Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court," *New Yorker*, 12 September 2005, available at ⟨http://www.newyorker.com/archive/2005/09/12/050912fa_fact⟩, accessed 18 April 2007.

37. NAFTA Doc. USA-97-2008-01, para. 50.

38. WTO Doc. WT/DS308/R, para. 7.15.

39. In discussing the model, and Figure 1, in particular, I will show that, even if there were some unanticipated spillover of precedent from the WTO to NAFTA, the complainant would still engage in forum shopping to discriminate among memberships, and would be more inclined to file at NAFTA as a result.

in trade law and policy, including in studies of forum shopping.[40] The novel contribution of this article is that I specify the precise circumstances under which precedent will lead a complainant to file its dispute in one or the other forum, or to avoid filing at all.

It is logical that the complainant will file in whichever court is most likely to come closest to its "ideal" ruling. Indeed, if the complainant cared only about winning a legal victory over the defendant, this would be the end of the story. The problem, however, is that precedent ensures that a legal victory does not just apply to the complainant's trade with the defendant, but also to its trade with other members of the institution in which the resulting case law was set. Here, precedent can be a double-edged sword: it can make it easier for the complainant to bring litigation against these other members of the institution, but it can also help these other members bring litigation against the complainant. Thus, forum shopping involves discriminating among institutional memberships, the logic being that, on a given measure(s), some complainants will prefer a precedent that bears only on a subset of their trade relations, others a precedent that bears on all their trade relations, while still others will prefer not to set a precedent at all. To generate specific hypotheses, I focus on two variables: (1) the complainant's preference concerning the outcome of the dispute, which I define as being more or less liberal, or free-trade oriented, than the status quo policies of the defendant, other trade partners, and the likely verdicts of the regional and multilateral institutions; and (2) the complainant's expectation concerning the future value of the precedent set, by which I mean the likelihood that the complainant will use the resulting case law in future litigation against other members more than other members will use it against the complainant.

First, to say that the complainant is liberal (illiberal) is simply to say that it prefers a ruling on the disputed measure that is more free-trade oriented (protectionist). For example, the complainant might favor a ruling that advances a fuller interpretation of a member's rights, a stricter understanding of its obligations, or one that otherwise clarifies principles of nondiscrimination in a given issue area. Since the complainant has no incentive to file if it prefers a less liberal outcome than the defendant's status quo policy, the real question is how liberal the complainant is in relation to other trade partners, the anticipated rulings of NAFTA and the WTO, and the expected value of future regional or multilateral litigation on similar matters. I thus model two sets of disputes that are the most generalizable: the first involving an illiberal complainant, the second a liberal one. The model predicts that both "types" of complainants will sometimes choose the regional forum, and at other times choose the multilateral forum. It also predicts that an illiberal complainant, who is nonetheless more liberal than the defendant, may prefer not to file at all.

40. See Acheson and Maule 1999; Gantz 1999; and Goldstein 1996, 553.

Second, complainants are likely to differently weight the expected value of setting a regional or multilateral precedent. A precedent is of value precisely because it is "binding" in the future, but the anticipated returns to setting a regional versus a multilateral one will depend on whether the complainant is more likely to use it against others, as opposed to having it used against itself. The less (more) the complainant expects that the resulting case law will help it litigate others, the more focused it will be on setting a regional (multilateral) precedent, or no precedent at all, simply because of membership. In this sense, the weights reflect the complainant's subjective estimate of the present discounted value of its future litigation, both as a filer, and target, of subsequent disputes.

This discussion of how complainants are likely to weight regional versus multilateral litigation accords with the argument that, under trade agreements, only governments have standing to file disputes, so that they can filter which cases to file, looking to maximize political support.[41] The point here is that, to maximize political support across sectors of the economy that might ask for, or be the subject of, future litigation, governments also need to decide where to file a case, given concern for precedent. For example, the outcome of a subsidies dispute could affect wide sectors of the economy, enabling some to bring suit against foreign rivals while leaving others open to litigation from abroad. In bringing this case on behalf of an influential constituent, the complaining government thus has to decide where to file, looking to secure a legal victory over the defendant, but also maximizing the future returns to the precedent set. If the precedent would open up opportunities for domestic sectors to bring litigation against foreign competitors, for example, the government is likely to more heavily weight future multilateral litigation, such that, in addition to acting on behalf of its industrial constituent in challenging the defendant, it helps other constituents as well. This is a natural extension of the argument that governments covet standing in trade agreements to decide which disputes get filed, leading one to ask where (if at all) they file to maximize political support in the shadow of future litigation.

The Model

To predict why the complainant, *C*, files regionally or multilaterally, or not at all, I develop a two-dimensional spatial model with weighted Euclidean distance. As in Figure 1, there are two policy dimensions, one pertaining to *C*'s trade relations with the defendant, *D*, and the other to *C*'s trade relations with its multilateral partners, which I refer to as "rest of world," or ROW. If *C* was only concerned about winning a legal victory against *D*, a one-dimensional model would be

41. See Sykes 2005; and Trachtman and Moremen 2003. As noted in n. 19, NAFTA gives firms private standing to file cases concerning antidumping and countervailing duties (as well as investor relations disputes), although these fall outside the main dispute settlement mechanism. Otherwise, private standing is a rarity in trade agreements.

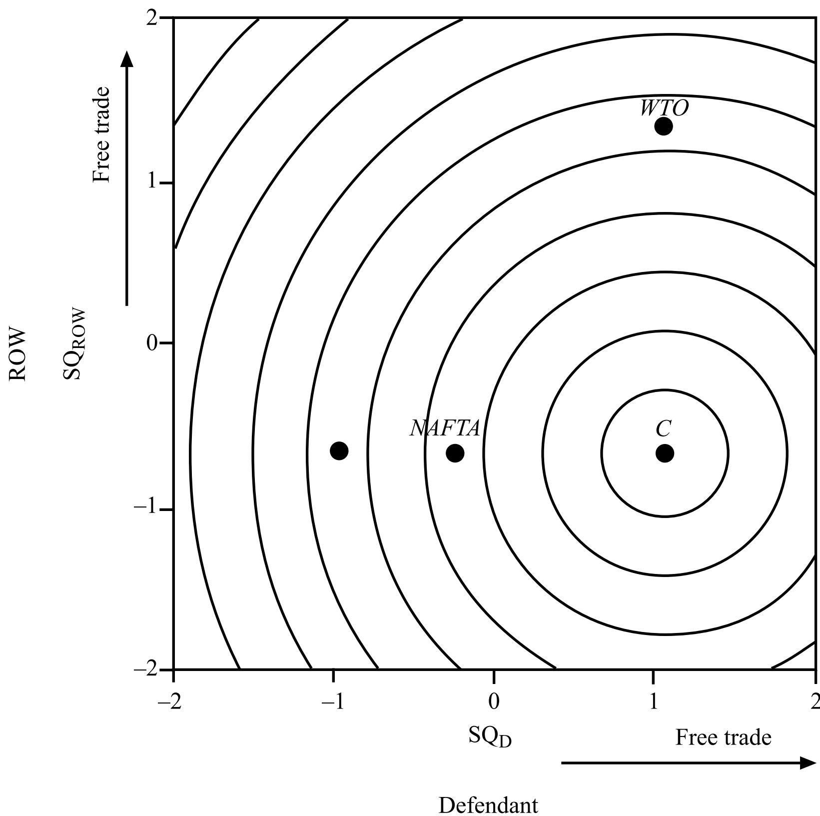

FIGURE 1. *Illiberal complainant, equal weights on future regional and multilateral litigation*

sufficient. But because *C* is also concerned about how, in defeating *D*, the resulting precedent also bears on its other trade partners, *ROW*, it is necessary to use a two-dimensional model (that is, the second dimension is *C*'s relations with *ROW*). First, *C*'s relations with *D* are plotted along the x-axis, with *D*'s status quo policy at SQ_D. Second, *C*'s relations with *ROW* are plotted along the y-axis, with the median multilateral trade partner's status quo policy at SQ_{ROW}. Movement out from the origin represents a gain in trade liberalization in both dimensions.

On Figure 1, the points *NAFTA* and *WTO* are the expected rulings these institutions would hand down in this case, thereby setting precedent. The crucial difference, on this count, is that a NAFTA ruling has no bearing on *C*'s multilateral trade partners and thus has no influence on SQ_{ROW} (that is, filing at NAFTA leaves this policy in place). As a first cut, I follow Goldstein's lead in making the simplifying assumption that NAFTA splits the difference between *C* and SQ_D, given the

political process of appointing panelists.[42] A WTO ruling, by way of contrast, sets a precedent that bears on *C*'s trade with *D* and *ROW*, such that panel verdicts are plotted along a 45 degree line out from the origin.

Last, preferences are assumed to be separable and decreasing in weighted Euclidean distance.[43] As explained above, I allow for *C* to place more or less emphasis on future litigation at NAFTA versus the WTO, weighted by w_D and w_{ROW}, respectively. Here, w_D and w_{ROW} capture the expected returns to this precedent, both in terms of the complainant filing against other trade partners, and these other trade partners filing against the complainant. The role these weights play in the model is taken up momentarily.

C's decision rule is to file with whichever institution offers the greatest utility, or alternatively (and by this same calculation), to let stand the status quo policies of *D* and *ROW* by not filing at all. Utility is increasing in negative distance: the closer *C* is to *NAFTA* than to *WTO*, for example, the greater its utility from filing regionally, as opposed to multilaterally. As noted above, while complainants generally do not file at multiple fora, the model anticipates the circumstances under which *C* might be tempted to do so.

Figures 1 to 3 set out contour maps of *C*'s indifference curves for three weighting schemes of w_D and w_{ROW}: (1) the expected value of future litigation is the same at both institutions; (2) the expected value of future litigation at the regional institution is three times greater; and (3) the expected value of future litigation at the multilateral institution is three times greater. The point is not that, empirically, either weight is likely to be three times greater than the other, but rather to show how the weights make *C*'s indifference curves elliptical, rather than circular, and thus how, intuitively, a greater concern for future regional or multilateral litigation can lead the complainant to choose the opposite forum, holding preferences constant. In particular, where $w_D = w_{ROW}$, *C*'s indifference curves are circular, as in Figures 1 and 4, but where w_D and w_{ROW} are different, *C*'s indifference curves are elliptical, as in Figures 2, 3, 5, and 6. This is important because, where the indifference curves are elliptical, larger distances in one or the other policy dimension yield greater differences in utility,[44] which can reverse *C*'s choice of forum. To

42. Goldstein 1996, 549.

43. The use of weighted Euclidean distance is appropriate in this case because there is a common metric with respect to the two dimensions, as evidenced by the 45 degree WTO line, in particular, and stated in the text.

44. The influence of w_D and w_{ROW} can readily be seen in the *C*'s utility, which is formally written as follows:

$$U_{NAFTA}(NAFTA_D, NAFTA_{ROW}) = -[w_D(NAFTA_D - C_D)^2 + w_{ROW}(NAFTA_{ROW} - C_{ROW})^2]^{1/2}$$

$$U_{WTO}(WTO_D, WTO_{ROW}) = -[w_D(WTO_D - C_D)^2 + w_{ROW}(WTO_{ROW} - C_{ROW})^2]^{1/2}$$

$$U_{SQ}(SQ_D, SQ_{ROW}) = -[w_D(SQ_D - C_D)^2 + w_{ROW}(SQ_{ROW} - C_{ROW})^2]^{1/2}$$

see how, consider the following two sets of trade disputes, one involving an illiberal complainant, the other involving a liberal one.

An Illiberal Complainant

In Figure 1, *C* prefers a more liberal ruling on the disputed measure(s) along the x-axis than *D*, and *C* prefers a more liberal ruling than the one expected from NAFTA. Yet, *C* prefers a less liberal outcome along the y-axis than *ROW*, and *WTO* is, in both dimensions, more liberal than *D* and *ROW*. In other words, *C* wants a more decisive legal victory over *D* than might be expected from NAFTA, but a less liberal precedent than what might be expected from the WTO (given stronger disciplines, for example), since it is less free-trade oriented with respect to the disputed measure(s) than *ROW*.[45] With equal weights on w_D and w_{ROW}, *C* files this case at NAFTA, a counterintuitive choice of forum when looking just at *C*'s dispute with *D*. Indeed, the WTO is expected to rule more decisively than NAFTA against *D* along the x-axis, giving *C* its ideal ruling in this one dimension. But the point is that the choice of forum is not a one-dimensional problem: *C* is also concerned about what a legal victory against *D* means for its trade relations with *ROW*, given precedent. Thus, the reason *C* files at NAFTA is that *WTO* is too liberal a precedent with respect to *ROW*. *ROW*, which is more liberal on the disputed measure(s) than *C*, could later use this precedent against the complainant. As a result, *C*'s concern for *ROW* leads it to select a dispute settlement forum that it would not otherwise choose, were it only concerned about winning a legal victory over *D*.

Here, it is worth asking what would happen if WTO precedents (unpredictably) spilled over to NAFTA. As I explain earlier, this, as a practical matter, does not happen at either the WTO or NAFTA. But what if NAFTA's few references to WTO case law—the WTO has never referenced NAFTA (or other regional) rulings—did prove influential? In Figure 1, which is the most interesting case in this regard (since this would be of most consequence to an illiberal complainant), the answer is that, where such a spillover made *NAFTA* more liberal (as seems reasonable), *C*'s incentive to file regionally would be greater still. Indeed, if this spillover made *NAFTA* just as liberal as *WTO*, this would only help *C* realize a more decisive legal victory over *D*, without the fear of future litigation by *ROW* that would come with filing multilaterally. In other words, even if the precedents were the same, *C* would still engage in forum shopping, looking to discriminate among these two institutional memberships. This speaks to the robustness of my

45. In other words, this is the type of dispute most observers have in mind in arguing that complainants will file regionally to "hide" from more liberal members of the WTO. *C* is more liberal than *D* but less liberal than *ROW*, and while both NAFTA and the WTO would rule against *D*, the WTO's more liberal ruling would be accessible to *C*'s more liberal multilateral trade partners.

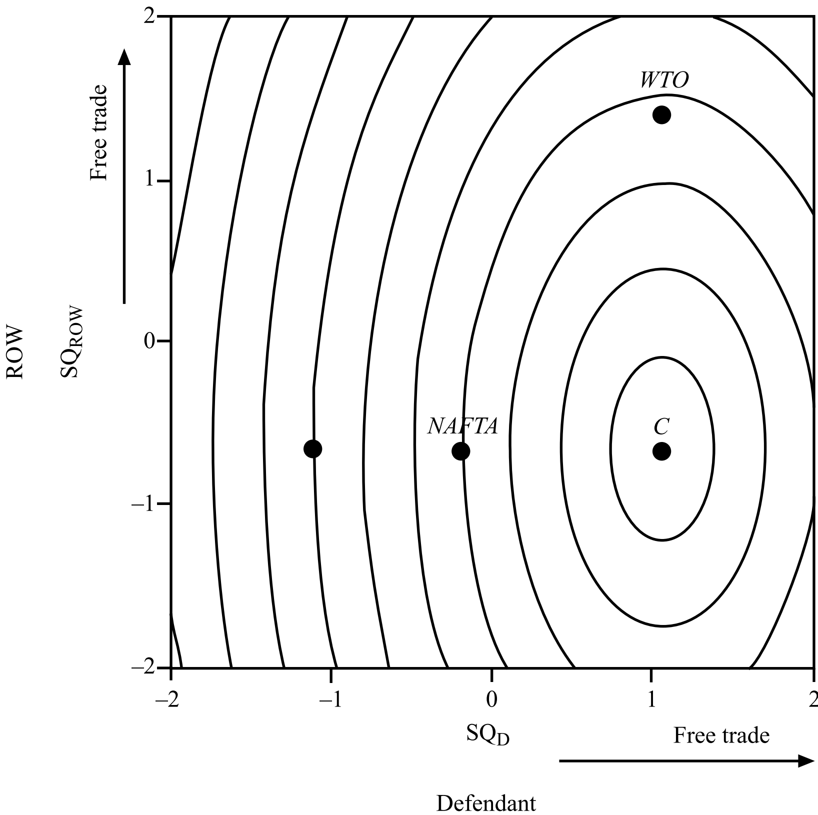

FIGURE 2. *Illiberal complainant, more weight on future regional litigation*

argument; the reality is that, as I note above, WTO and NAFTA precedents do not spill over to the other institution.

Now consider the exact same setup with respect to *D* and *ROW*, but allow for *C* to differently weight the expected value of its future regional and multilateral litigation. In Figure 2, for example, w_D is three times greater than w_{ROW}, so that *C* incurs greater disutility with distance from its ideal point along the x-axis. Here, *C* files against *D* at the WTO, not at NAFTA. Why this reversal in *C*'s choice of forum? The reason is that *C*'s greater concern about future regional litigation outweighs its previous concern for SQ_{ROW}, enabling it to pursue a more liberal ruling at the *WTO* against *D*. In other words, because *C* is less concerned about being sued by its multilateral trade partners with this precedent, it files multilaterally to obtain a more decisive legal victory against *D*, the irony being that, here, a greater emphasis on regional litigation leads *C* to file at the WTO.

Finally, in Figure 3, w_{ROW} is three times greater than w_D, meaning that *C* places more emphasis on future multilateral litigation. Just like in Figure 1, *C* files against

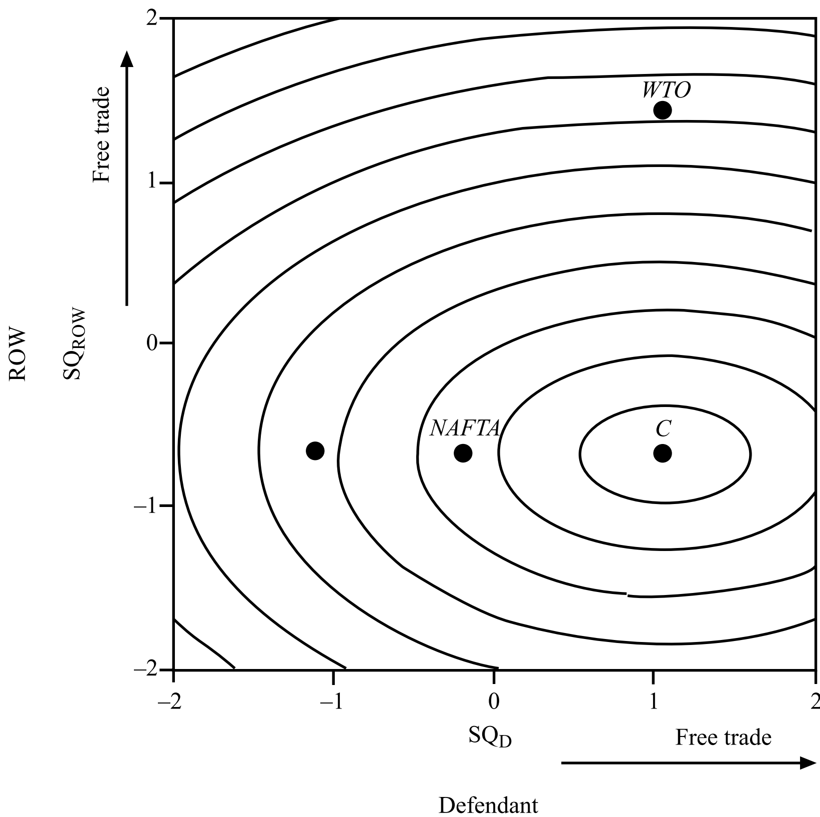

FIGURE 3. *Illiberal complainant, more weight on future multilateral litigation*

D at NAFTA under these circumstances. There is, however, an important twist in the story. Notice, more specifically, that if *C* had no regional forum in which to file this case (that is, there was no NAFTA), it would not take this case to the WTO, whereas in Figure 1, it would take this case to the WTO. What explains this difference? In Figure 3, the emphasis that *C* places on its future multilateral litigation is such that it would prefer to let SQ_{ROW} stand, rather than set a precedent that might be used against it by *ROW*. Thus, *C*'s concern for setting a liberal precedent that could be used by its more liberal multilateral trade partners determines not only where it files this case, but whether it files at all.

To sum up, this illiberal complainant is more likely to file at NAFTA, even though it expects a more decisive legal victory over the defendant at the WTO. It would take this case to the WTO, however, if it placed greater weight on its expected future litigation at NAFTA. Indeed, if this complainant was less concerned about how its more liberal multilateral trade partners would use the resulting precedent, it would seek a more decisive legal victory over the defendant at the WTO.

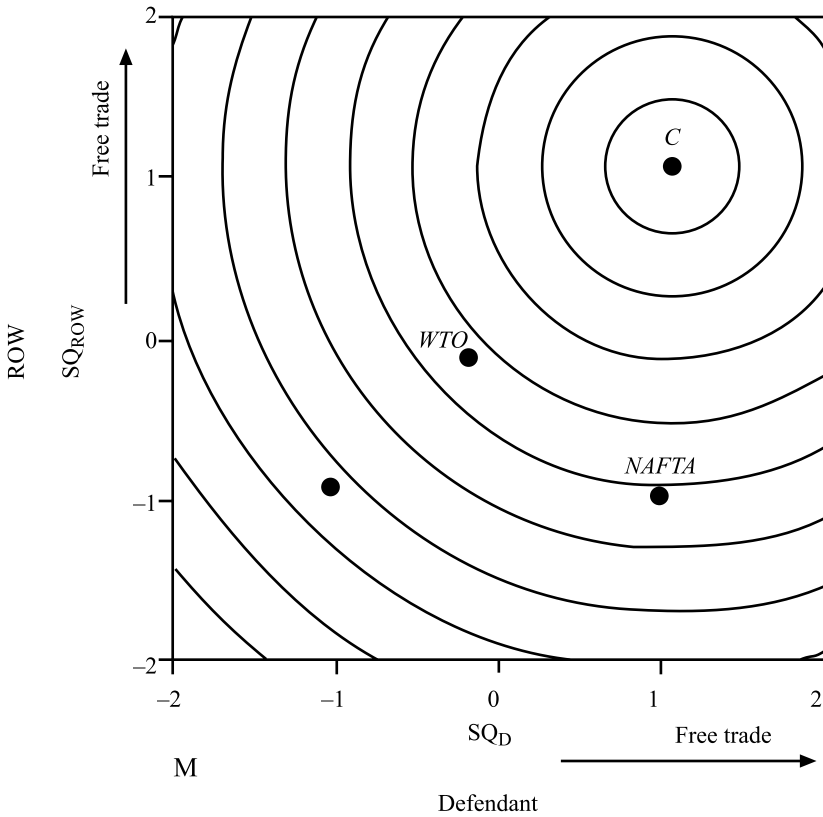

FIGURE 4. *Liberal complainant, equal weights on future regional and multilateral litigation*

A Liberal Complainant

Relaxing the assumption that NAFTA splits the difference between *C* and *D*, consider Figure 4. Here, *C* prefers a more liberal outcome on the disputed measure than *D* along the x-axis, and *ROW* and *WTO* along the y-axis.[46] Of special interest is that, looking along the x-axis, *NAFTA* is a more liberal outcome than *WTO*.[47]

46. I assume that *C* is also more liberal than the third member of NAFTA, whose preferences would only be of interest in this case if it were more liberal than *C*, *D*, *ROW*, *NAFTA* and *WTO*, which is hard to justify.

47. For example, NAFTA had stronger disciplines on traded services than GATT, and the U.S.–Singapore bilateral has (in some regards) stronger disciplines on intellectual property than the WTO, such that it is not difficult to imagine a regional institution being more liberal than the multilateral institution, especially as the former increasingly tackles the so-called "new age" issues, including traded service and intellectual property.

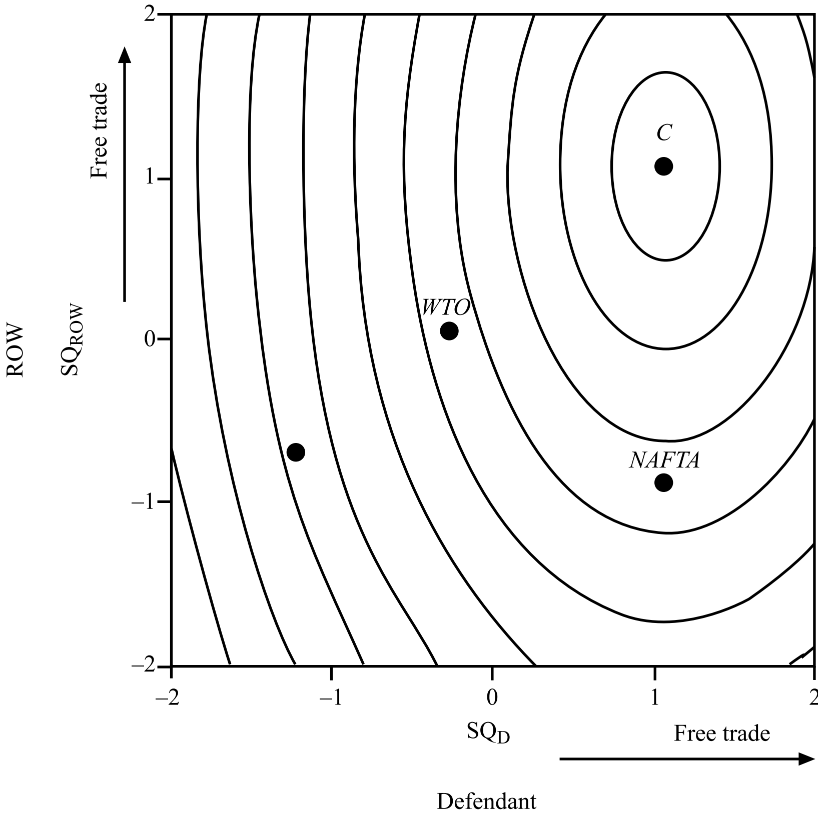

FIGURE 5. *Liberal complainant, more weight on future regional litigation*

Indeed, the regional forum is poised to give *C* its ideal ruling in this one dimension. But again, forum shopping is not a one-dimensional issue. In fact, with equal weights on w_D and w_{ROW}, *C* files this case at the WTO, even though the multilateral court is expected to hand down a less decisive legal victory. Why this choice of forum? The reason is that *C*'s strong liberal orientation, in relation to all its trade partners, leaves it unwilling to let SQ_{ROW} stand, and thus less inclined to file this case regionally. To be sure, this would deprive it of using this precedent against other protectionist trade partners, and thus it files at the WTO, despite the fact that NAFTA promises to give it more of what it wants in its dispute with *D*. Of course, under these circumstances, there would be incentive for the complainant to file at both fora, although as pointed out above, this rarely (if ever) happens. Regardless, this complainant is certain to file at the WTO, given its interest in setting a multilateral precedent to use against others.

Compare this to Figure 5, where w_D is three times greater than w_{ROW}. Here, *C*, instead, files against *D* at NAFTA. The reason is that, where *C* is more concerned

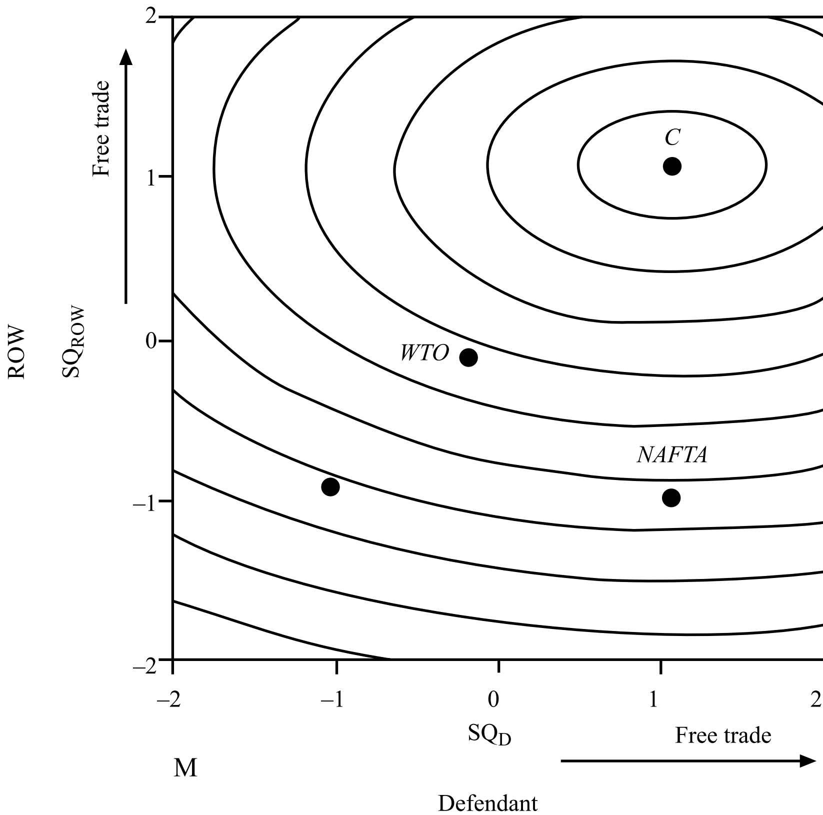

FIGURE 6. *Liberal complainant, more weight on future multilateral litigation*

about future regional, as opposed to multilateral, litigation, it can pursue the more decisive legal victory against D that NAFTA is poised to deliver, whereas above, its unwillingness to let SQ_{ROW} stand leads it to file at the WTO.

If, on the other hand, C weights w_{ROW} even slightly more than w_D, this only serves to reinforce the decision it reaches in Figure 4, which is to file this case at the WTO, as in Figure 6. Indeed, a greater concern for *ROW* will only encourage C to file multilaterally, looking to strike down not only SQ_D, but SQ_{ROW} as well. The key here is that this choice of forum is robust to the fact that NAFTA would give C more of what it wants in its dispute with D alone (that is, in this one dimension).

In sum, this complainant is more likely to file multilaterally, even though it expects a more decisive legal victory over the defendant at NAFTA. It would take this case to NAFTA, however, if it put less weight on its expected future litigation at the WTO. Indeed, if this complainant was less concerned about being able to influence its (illiberal) multilateral trade partners, it would seek the more decisive legal victory over the defendant at NAFTA.

The Case Studies

To assess the usefulness of the model's predictions, I revisit the safeguard and periodicals disputes in this section. Other scholars have also argued that precedent looms large in these cases, and I draw on their work. The original contribution of this article is that I specify, and seek to empirically substantiate, not only the precise circumstances under which precedent should be expected to matter, but at which dispute settlement institution.

Broom Corn Brooms

This dispute had all the markings of a case destined for the WTO. Indeed, the U.S. safeguard affected other members besides Mexico, one of which filed on its own in Geneva, and seemed to center on aspects of WTO law. Nonetheless, Mexico filed, instead, at NAFTA. Why?

The United States undertook safeguard actions to protect its domestic corn broom manufacturers in 1996. The U.S. International Trade Commission (ITC) conducted three investigations, two global and one bilateral, and, having reached affirmative injury determinations in all three, slapped duties on Mexican broom corn brooms through December 1998. Interestingly, while many U.S. trade partners were exempt from these duties, including large suppliers such as Honduras, Hungary, Panama, and even Canada, the other U.S. NAFTA partner, Colombia was not, nor shy about taking this dispute to the WTO.[48] More interesting still, Mexico's main legal argument pivoted on obligations under WTO law (GATT Article XIX and the Safeguards Agreement), which the United States insisted NAFTA had no jurisdiction to adjudicate. Why, then, given the opportunity to ally with Colombia, and the centrality of WTO law, did Mexico file this case at NAFTA? The literature finds this puzzling. For example, noting that this dispute could have gone to either forum, de Mestral observes that "[i]t is not known why Mexico chose to proceed under NAFTA."[49] Reif agrees, insisting that "it is not entirely clear why the Mexican government selected NAFTA" in this dispute.[50] This article's model sheds light on this puzzle.

Mexico clearly reasoned that the dispute could be "brought in either a NAFTA or a GATT/WTO forum."[51] It invoked WTO obligations concerning global safeguard measures and, before the NAFTA panel, cited GATT/WTO precedents on "like goods" for the sake of injury tests, which went to the heart of its legal complaint that the ITC had failed to include plastic brooms in deciding that a surge of

48. Colombia requested consultations with the United States at the WTO. See WTO Doc. WT/DS78/1.
49. de Mestral 2005, 9.
50. Reif 2001, 14.
51. NAFTA Doc. USA-97-2008-01, para. 28.

imports had caused "serious injury" to domestic manufacturers.[52] The United States objected that NAFTA had no business adjudicating WTO law, and that the ITC had not violated NAFTA obligations by failing to determine whether plastic and broom corn brooms competed directly in the domestic market, having first concluded that the two types of brooms were not "like goods."[53] In reviewing this, NAFTA was expected to be more deferential to the ITC than the WTO. NAFTA was less likely to revisit the ITC's decision to use a hypothetical comparison of these goods, for example, which the WTO did in *Canada—Periodicals*. Thus, the multilateral forum was expected to be more liberal than the regional one.

Mexico's policy orientation on safeguards has not been substantially more liberal than the United States or others. It has notified eighteen safeguards to NAFTA, but only one to the WTO, which suggests it has sought to manage its safeguard actions regionally. Of course, much of this pattern owes to NAFTA's special agricultural provisions on safeguards, but this is precisely the point: when Mexico has used safeguards, it has been to relieve more costly adjustments than the WTO generally accommodates. Indeed, Mexico's recent proposal on how to reform the WTO's handling of safeguards to help countries solve deeper problems, within the rule of law, speaks to this concern.[54] It also sheds light on how Mexico might weigh the expected value of regional versus multilateral litigation, for if "bad cases make bad case law," it would be particularly risky to take this dispute to the WTO, especially given the novelty of the Safeguards Agreement, the propensity for these cases to attract third parties, and the fact that challenges of safeguards at the WTO tend to succeed.[55] Thus, concern for setting too liberal a precedent at the multilateral institution would be expected (at least) to balance Mexico's reliance on its bilateral trade relations with the United States (including in broom corn brooms), implying an equal weighting of w_D and w_{ROW}.

According to this setup, Figure 1 should help explain Mexico's choice of forum in this dispute. Mexico was more liberal on this measure than the United States, though not (generally speaking) more so than third parties, weighted w_D and w_{ROW} (at least) equally, and could have expected a tougher stance against the defendant at the WTO than at NAFTA. Under these conditions, then, Figure 1 predicts that Mexico would file at NAFTA, even though the WTO is expected to give it more of what it wants in its trade relations with the United States, and this because of concern for setting an overly liberal precedent at the multilateral forum.

Gantz lends weight to this interpretation of Mexico's choice of forum, arguing that "[p]erhaps either or both countries were mindful that a decision based on GATT Article XIX or the WTO Safeguards Agreement would create a precedent that might be relied upon in the future by a WTO panel; whereas, a decision based

52. Ibid., para. 36.
53. Ibid., para. 27.
54. WTO Doc. MTN.GNG/NG9/W/18.
55. To date, all safeguards adjudicated by panels have been found to be in violation of WTO obligations.

solely on NAFTA Chapter 8 could have repercussions only for future safeguards disputes under NAFTA."[56] Figure 1 helps anticipate when this concern would loom large, though it is worth noting that, even if Mexico had weighted w_{ROW} more than w_D (that is, Figure 3), the same outcome would obtain, the only difference being that, had Mexico not been able to file this case at NAFTA, it would not have filed it, instead, at the WTO. In this sense, the overlap of these two dispute settlement institutions encouraged Mexico's decision to legally challenge the U.S. safeguard, rather taking matters into its own hands, or acquiescing.

Periodicals

There has been some speculation that *Canada—Periodicals* might have been better handled at NAFTA, but even among those who agree that the WTO was the more appropriate court to hear this case, there is little agreement on why. The case involved a variety of Canadian restrictions on so-called "split-run" periodicals from the United States. These U.S. magazines competed for Canadian advertising dollars but had included little domestic content. While the value of the advertising revenue at stake was low (by some estimates just several hundred thousand Canadian dollars), and the legal issues straightforward, this dispute became a test case of "cultural industry" protection, which is the interesting aspect of this example. On the one hand, Canada had an exemption concerning cultural industries under NAFTA (Article 2106), grandfathered in from the FTA (Article 2005). On the other hand, the exemption also calls on Canada to compensate the United States for using it, potentially making it easier for the complainant to seek damages. As a result, the cultural industry exception figures prominently in the debate over how the United States shopped fora in this dispute.

Gantz, for example, explains that the United States went to the WTO to argue about national treatment, whereas NAFTA's cultural industry exception might have precluded such arguments.[57] Reif is less convinced, arguing that "the cultural industries protection provision provided a possible exemption for Canada, albeit in an unclear fashion and in terms that would have given the United States the right to impose trade retaliation against Canada. . . ."[58] For their part, Acheson and Maule, who have written not only on this dispute, but on cultural industry protection more generally, conjecture that the United States went to the WTO to avoid putting NAFTA Article 2106 to the test for political, as much as for—if not more so than—legal reasons.[59] Marceau describes *Canada—Periodicals* as a "good example" of forum shopping, suggesting that NAFTA was an equally viable court to hear this case.[60] This article's model helps explain the U.S. preference for the WTO.

56. Gantz 1999, 1071.
57. Ibid., 1077.
58. Reif 2001, 16.
59. Acheson and Maule 1999, 201.
60. Marceau 2001, 1110.

Canada is an important market for U.S. "cultural" products such as periodicals, television shows, and film. Since the interwar period, as Acheson and Maule explain, the United States has championed a free-trade agenda in these cultural products, over the opposition of Canada, Europe, and others. Indeed, screen quotas were exempted from the GATT because of political pressure from these countries, a cleavage that also formed over commercial television when, in the 1950s, the United States sought to amend the multilateral rules to remedy restrictions on programming.[61] Trade in periodicals has been no less controversial; dating back to the 1960s, for example, Canada has introduced measures to preserve the market share, and advertising dollars, earned by domestic firms. Needless to say, these measures have caught the attention of other countries that have also been keen to defend their cultural industries.

This setup suggests that this periodicals case should be interpreted through the lenses of Figure 6: the United States, which weighted w_{ROW} more heavily than w_D, was far more free-trade oriented than the defendant, other trade partners, and either dispute settlement forum on the issues at stake, and thus should have had a strong preference for filing at the multilateral, as opposed to the regional institution, looking to set a precedent that would bind members other than Canada. This interpretation is endorsed by Acheson and Maule, who submit that, "[b]y placing the dispute before the WTO, the United States was able to test its views on cultural policies in a forum where, if it won, it could use the precedent as a lever to alter similar policies of both Canada and other countries, such as France and Australia."[62] Likewise, in its NAFTA Statement of Administrative Action, the U.S. government explained that it "is committed to using all appropriate tools at its disposal to discourage Canada and other countries from taking measures that discriminate against, or restrict market access for, the U.S. film, broadcasting, recording and publishing industries."[63] This goal has also been pursued through subsequent U.S. bilateral agreements, including its FTA with Chile, which permits only a few narrow exceptions concerning cultural industries, and its FTA with Morocco, which avoids cultural exceptions. Other indications that the United States was eager to signal to other countries its dissatisfaction with Canada's cultural industry protectionism include the government's self-initiation of a Section 301 case, and the threats of retaliation that followed in the wake of this investigation, by some estimates reaching into the billions of (US) dollars for a dispute that centered on a few hundred thousand (Canadian) dollars in advertising revenue.[64]

The competing explanation, of course, is that the United States was deterred from filing at NAFTA by the cultural industry exception. This is less persuasive, but the reason why illustrates the importance of the article's argument. In particular,

61. Acheson and Maule 1999, 56–59.
62. Ibid., 201.
63. NAFTA Statement of Administrative Action 1993, 221–22.
64. See Krikorian 2005.

NAFTA Article 2106, which builds on the FTA's Article 2005, is widely regarded to permit the United States to retaliate for a measure taken to protect Canadian cultural industries that would otherwise not be permitted. To be sure, U.S. industries have rallied around this "notwithstanding" interpretation of the exception, rooted in the wording from the FTA, and have signaled their clear willingness to retaliate.[65] In this sense, the greater prospect of getting trade remedies at NAFTA, versus the WTO, might have been expected to encourage the United States to file at the regional institution. Given that trade remedies are thought to shape patterns of forum shopping, this is an important competing explanation, yet one that comes up short against the article's argument.

Conclusions

Dispute settlement institutions are springing up across the landscape of the global economy. As a result, an increasing number of countries have an alternative to the multilateral rules and procedures of the WTO. This gives rise to opportunities for forum shopping, in that complainants can select among overlapping institutions in deciding where (if at all) to argue their case. The key, in this regard, is that, through precedent, a legal victory against the defendant also bears on the complainant's relations with other members of the same institution. I argue that whether the complainant prefers to set a regional or multilateral precedent (or not file at all) thus depends on two variables: (1) the complainant's preference concerning the outcome of the dispute, which I define as being more or less liberal, or free-trade oriented, than the status policies of the defendant, other trade partners, and the likely verdicts of the regional and multilateral institutions; and (2) the complainant's expectation concerning the future value of the precedent set, by which I mean the likelihood that the complainant will use the resulting case law in future litigation against other members more than others will use it against the complainant. These variables combine to show that the complainant choice of forum is not simply a function of which institution is likely to come the closest to its ideal ruling against the defendant, but where the resulting precedent will be more useful, facilitating litigation against other members, as opposed to inviting litigation against itself. Forum shopping is thus about discriminating among overlapping memberships: by filing its dispute regionally or multilaterally (if at all), the complainant chooses which members will be affected by the precedent it establishes.

65. U.S. Trade Representative Carla Hills testified before the Senate Finance Committee that "[t]he Canadians have taken a cultural derogation just as they took a cultural derogation in the Canadian free trade agreement.... We for our government have said, if we suffer any economic harm as a result of their exercising any rights pursuant to that cultural derogation, we reserve the right to retaliate"; U.S. Senate 1992. See also Hedley 1995, 687.

Forum shopping thus has implications for the study of institutions more generally. First, it engages the discussion in the rationalist design literature about membership. This approach sees membership as an outcome to be explained but also observes that the decision on who is permitted to join an institution can later emerge as a constraint on its use, since membership determines "which actors will have standing in subsequent institutional negotiations."[66] Along the same lines, I argue that the complainant's choice of forum is a decision about which membership it wants to "have standing" to use a precedent in future litigation. This shifts the focus from the determinants of membership, per se, to the politics of overlapping memberships.

In particular, while some institutions choose to accommodate overlapping memberships, others have made different design choices. On the one hand, for example, Chile has bilateral agreements with all three NAFTA members but is not, itself, a member of this institution. On the other hand, the Eurasian Economic Community and the Central Asian Cooperation Organization have decided to merge, rather than overlap, as has the Common Market for Eastern and Southern Africa and the African Economic Community.[67] In these instances, the concern is that overlapping memberships pose countless challenges, not least with respect to dispute settlement. In this sense, forum shopping draws attention to how institutions manage their overlap, including through merger.

Second, forum shopping offers insights into broader questions of institutional design. The debate over the greater legalization of international relations stands out in this regard.[68] As Rosendorff explains, while a more legalized dispute settlement system may promote greater compliance, more flexible ones that allow for "efficient breach" under conditions of severe domestic political pressure are likely to be more stable, and thus attract and retain a wider variety of members.[69] Like Schwartz and Sykes,[70] he argues that the DSU is, in fact, quite flexible.[71] In much the same way, forum shopping is an investment in flexibility, giving complainants latitude to decide where to argue a case. For example, an illiberal complainant who might not otherwise take its dispute to the WTO may, instead, take it to NAFTA, bringing the rule of law to bear on a case that might have been fought on other terms. The trade-off, however, is that the resolution of this dispute may run afoul of WTO law, and thus undermine compliance.

Not surprisingly, there is variation in the rules on forum shopping across institutions. For example, the Israel–Turkey bilateral and the South Asian Association

66. Koremenos, Lipson, and Snidal 2001, 778.
67. In the latter case, this merger is proposed for a future date in Article 178:1(c) of the Common Market's treaty.
68. See Abbott and Snidal 2000; and Goldstein and Martin 2000.
69. Rosendorff 2005.
70. Schwartz and Sykes 2002.
71. Rosendorff 2005.

for Regional Cooperation agreement make no formal provisions for forum shopping, while the Chile–El Salvador and European Communities–South Africa accords leave the choice of forum to the complainant. The draft text of the Free Trade Area of the Americas has an entire article on forum shopping, in which it says that members can file regionally or at the WTO, although there is considerable debate over whether they can file at other regional institutions.[72] While NAFTA claims jurisdiction with respect to disputes over sanitary and phytosanitary standards, the Canada–Chile bilateral says exactly the opposite, demanding that these cases be filed, instead, at the WTO. Two points follow from this discussion.

First, since most institutions allow forum shopping, this suggests a strong preference for stability over rigidity in the design of trade agreements. Indeed, if provisions of this sort are, as I have argued, an investment in flexibility, the striking feature of some of the recent trade agreements, such as the Central American Free Trade Agreement–Dominican Republic–U.S. accord, is that they invest substantially in laying out opportunities for forum shopping.[73] Of course, trade agreements do not all go about this the same way, as is clear with respect to how NAFTA, as opposed to the Canada–Chile bilateral, deals with sanitary and phytosanitary disputes. As more institutions overlap, different approaches to contending with forum shopping will surely merit the attention of international relations scholars.

Second, where forum shopping is possible, this may help explain why some dispute settlement institutions are more legalistic than others. For example, Smith argues that these institutions are likely to be more legalistic where the economic power of members is more symmetrical, and where they aspire to closer integration.[74] Yet, he finds examples that challenge his theory, including institutions that exhibit little legalism despite ambitions for deep integration. A different—but complementary—hypothesis is that, where such members have access to other dispute settlement fora, they are likely to build more flexibility into at least some of these institutions, resulting in less legalism than might otherwise be expected.[75] In this sense, forum shopping calls attention to the trade-off between rigidity and stability not just within, but across institutions.

72. More specifically, Article 8.1 of the dispute settlement chapter stipulates that: "Disputes within the scope of application of this Chapter that are also eligible for submission to the dispute settlement system of the World Trade Organization [or that of a regional agreement to which the Parties to the dispute are Party,] may be submitted to any of these fora, at the discretion of the complaining Party." The brackets indicate that would-be members disagree on the provision concerning forum shopping across regional trade agreements. See Free Trade Agreement of the Americas (FTAA), Draft Agreement: Chapter XXIII Dispute Settlement. Available at ⟨http://www.ftaa-alca.org/FTAADraft03/ChapterXXIII_e.asp⟩. Accessed 19 April 2007.

73. See Article 20.3 of the CAFTA-DR-US accord. Available at ⟨http://cibresearch.tuck.dartmouth.edu/trade_agreements_db/⟩.

74. Smith 2000.

75. In fact, McCall Smith hints at this explanation but notes that it is beyond the scope of this theory. See ibid., 171.

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