FTA/WTO INTERFACE

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Conflict or Convergence?

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INTRODUCTION

I once had the honor of serving as an outside reader, for the University of Ottawa, of a doctoral dissertation on the question of "choice of forum" in the context of the NAFTA and the WTO. The thesis ran to some four hundred pages; what's more, I judged it incomplete at the time.

So when I got Jane's invitation to speak on this topic, the first thing that came to my mind was the opening statement of *The Hitchhiker's Guide to the Galaxy*: "don't panic." I accepted the invitation, looked at the list of speakers, and *then* panicked. So I did what every half-competent diplomat should do in a moment of indecision and ignorance: call capital and ask for instructions. The reply was both swift and brief: Ottawa's talking point for this session was, "it depends".

Well, I'm going to spare you the four-hundred page tome, but permit me to be slightly less cryptic than the proposed two word answer. Even if, for the diplomat, brevity is the soul of wisdom (and good postings) and, as you will see, the sum total of what I will say, in the end, amounts to more or less just that.

I should of course add that these are my views only and do not necessarily represent the views of the Government of Canada.

ELEMENTS OF ANALYSIS

The broad topic of this session is "choice of forum" and, more specifically, the relationship between dispute settlement mechanisms under various FTAs on the one hand, and panel and Appellate Body findings under the WTO Agreement on the other, in respect of "WTO concepts".

Let me note at the outset some misgivings about the notion of "WTO concepts": after all, the WTO Agreement builds on the experience of Members not only in the GATT but also in their own free trade arrangements; and the GATT itself was negotiated against the background of nearly two hundred years of developments in trade theory, three hundred years of international law, and over four thousand years of actual *international* trade, ever since the first Phoenician galleons hauled cloves from the Moluccas to Sidon.

And so, the question is not so much a jurisprudential tug of war over "WTO concepts". Rather, we are really addressing potentially divergent interpretations and determinations where regional trade agreements and the WTO Agreement contain broadly similar substantive rights and obligations.

A second observation relates to a more basic understanding of the relationship of international agreements to one another. From this perspective, a problem of divergence exists only where, in addition to substantive obligations, the RTAs and the WTO have three other points in common, that is, they must *also*:

1) cover at least the same parties, one of which is a Member of the WTO;

2) have similar product coverage; and

3) have broadly similar dispute settlement mechanisms.

In respect of the NAFTA as it relates to the WTO Agreement, these latter three conditions are met quite easily: the parties to the NAFTA are also Members of the WTO; the product coverage is, subject to one important exception (as we will see), the same; and the dispute settlement mechanisms are inter-state, and in principle *adjudicatory* and not diplomatic or political in nature.

The "similar substantive obligations" question is more complex in the context of the NAFTA. But before addressing the specific point, let me make another general observation, this time about the nature of "similarity" in legal obligations.

TAXONOMY OF "SIMILAR OBLIGATIONS"

I suggest that substantive obligations or provisions may be "similar" as between two treaties in one of four ways:

1) direct incorporation from one treaty into the other;

2) implied incorporation;

3) use of same or similar wording; and

4) conceptual similarity/parallelism.

Given the complexity, and the comprehensiveness, of the NAFTA, it would not be surprising to note that we find all four types of similarity as between the NAFTA and the WTO Agreement. For example, Article 301.1 of the NAFTA provides:

> "Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the *General Agreement on Tariffs and Trade* (GATT), including its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement."

By the express terms of the Article, we see a direct incorporation of a provision of the GATT (now, the WTO Agreement) into the NAFTA as an essential obligation of the NAFTA itself. But incorporation need not be express. In the *Supply Management* case under the NAFTA, the panel found that certain rights and obligations contained in Article 4.2 of the WTO *Agreement on Agriculture* were also part and parcel of the NAFTA legal regime governing certain agricultural goods.

Of course, being trade agreements, both the NAFTA and the WTO use similar terminology in respect of certain terms of art: customs duties, rules of origin, and the like. And, finally, even though there may be different sorts of obligations, in certain areas – SPS or TBT matters – both the NAFTA and the WTO draw from the same fount of concepts; there is a certain parallelism, though not exact identity or incorporation, of concepts and obligations.

Naturally each of these gives rise to a different set of issues or concerns about potential divergence in jurisprudence, or the need for deference.

DIVERGENCE, CONVERGENCE, DEFERENCE, OR INDIFFERENCE?

Direct incorporation

The most straight-forward of the four types of similarity is at once the easiest one to tackle and the one that demands the greatest care. Two cases under the Canada-US FTA demonstrate why. These are *Canada – Salmon and Herring* and *United States – Lobsters*.

At issue in both was the interpretation and application of Article 407 of the FTA, which incorporated Article XI of the GATT into the free trade agreement. This was a direct incorporation into one treaty of a provision in another. In both cases, the complainants simply cited GATT panel reports in support of their arguments, and the panels cited those reports, without any further soul-searching as to how Article XI of the GATT, or GATT "jurisprudence", fitted into the scheme of the FTA, or whether it was appropriate at all to so thoroughly rely on GATT panel reports. There is no demurral, there is no qualification, there is no limitation imposed on such use. It is not just that the FTA panel finds GATT panel reports potentially useful, or their analysis persuasive; rather, GATT panel reports are cited as if they were binding.

It is as if Article 407 incorporated not only Article XI of the GATT but also the entire GATT practice, for want of a better word, related to that provision.

And where the *Lobsters* panel looks into the negotiating history to figure out the scope of the provisions at issue, it is not the negotiating history of the FTA that they look into, but that of the GATT.

On the one hand, it is hard to see how the FTA panels in these cases could have justified doing otherwise. After all, there was a reason why the drafters of the FTA *incorporated* provisions of the GATT rather than copying them: the drafters presumably knew what the scope and meaning of

Article XI was in the light of past litigation; they intended *that* GATT-based scope and *that* meaning to apply, rather than some other meaning that might be ascribed to similar – even identical – words in the absence of direct incorporation.

On the other hand – well, not to put too fine a point on it, but though it *was* direct incorporation, we are still talking about different treaties with different overall structures and, crucially, different objectives. An FTA is, by definition, a *free trade* agreement; the GATT *in itself* and outside the negotiating rounds is simply a rules-based framework for international trade. The panels in *Salmon and Herring* and *Lobsters* did not depart from GATT practice, but, in my judgement, they *could* have. And the fact that the provisions were GATT articles, or now, "WTO concepts", should not have *determined* the outcome of an FTA panel's analysis and interpretation, or its reliance on GATT or WTO jurisprudence.

After all, if all the drafters wanted was to let GATT disciplines apply *as GATT disciplines*, they could have simply stayed silent and let the matter be governed directly by the GATT. Or the WTO. In this sense, "direct incorporation" has the potential of distracting the panel from its *real* job of interpreting and applying provisions *in their context and in the light of the object and purpose of the treaty of which they form a part*, even as they may take account of the interpretation of those same provisions in a different context.

And so in respect of a direct incorporation, *empirically* we see a large margin of convergence, but in principle, it need not be so; and, again, *empirically*, the convergence appears to be underwritten by deference to GATT/WTO panel reports; theoretically, it need not be so.

Indirect incorporation

When we come to indirect or implied incorporation, the question ends up being rather more complicated. And the first case under the NAFTA managed to pack the full measure of complexity of the relationship between an RTA and the WTO Agreement.

At least that is what the panel found in the end; for the complainant, the United States, there was no complexity, because there was no incorporation.

The US argued the following: Article 302 of the NAFTA prohibited new tariffs; as required by the Agreement of Agriculture Canada had tariffied its import restrictions on a number of supply-managed sectors and so had introduced "new" tariffs; the new tariffs were therefore inconsistent with Article 302.

As Canada pointed out, however, Article 302 of the NAFTA applied subject to certain exceptions, one of which was Chapter Seven of the same agreement, which governed agriculture. Chapter Seven of the NAFTA, in turn, incorporated Chapter Seven of the FTA, under which certain agricultural sectors continued to be governed by the GATT and agreements concluded under the GATT. The WTO Agreement, Canada argued, was such an agreement; and the Agreement on

Agriculture was an integral part of the WTO Agreement. The Agreement on Agriculture required tariffication but only as a *quid pro quo* for removing agricultural quotas. Canada submitted, and the panel eventually agreed, that Article 302 of the NAFTA did not apply to these resulting tariffs.

Thus, the interplay of these various provisions and the two treaties meant that the scope of Article 302 was limited by a package of rights and obligations negotiated in the context of the WTO Agreement.

What if that package, the balance of that package, is disturbed or redistributed by a WTO panel? Note that in this case, under Chapter Seven of the FTA, the subject matter is to be *governed* by the GATT – and by implication the WTO Agreement. The "incorporation" of rights and obligations into the NAFTA is indirect and is effected through the exception clause of Article 302 of the NAFTA. What happens in the WTO, therefore, is of prime importance in determining the scope of the NAFTA obligation. Here, a measure of deference appears to be warranted, at least insofar as the scope of the Agreement on Agriculture is concerned; as to the scope of the exception itself, that would be a matter for a NAFTA panel to interpret and apply the words in the light of the NAFTA's object and purpose.

That's all the case law under the FTA and the NAFTA that is directly relevant to the question at issue.

Parallelism

Let me briefly turn to the "parallelism" issue – the fourth type of similarity – because it does raise some interesting questions under the other dispute settlement mechanism of the NAFTA, the Chapter 19 process.

Now, this mechanism does not meet two of the four conditions for "choice of forum" that I identified above: neither the substantive law nor the essential function of the dispute settlement mechanism is "common" or "similar" as between the NAFTA Chapter 19 process and the WTO Agreement. And yet, there is a conceptual connection between the subject matters covered by the two mechanisms: countervailing and antidumping duties.

Here is the challenge: NAFTA Chapter 19 panels apply the national laws of each Party to determinations made by that Party's trade remedy administering authorities. What if the law in question is capable of having a WTO-consistent and a WTO-inconsistent interpretation? What if there is ample WTO case law on the subject matter of the law? And what if, under existing WTO jurisprudence, the municipal law as interpreted and applied by domestic courts, would be considered WTO-inconsistent? Should a Chapter 19 Panel pay heed to existing WTO jurisprudence, and interpret and apply the municipal laws of a Party to the NAFTA consistently with the WTO Agreement, even if it means departing from exiting domestic jurisprudence?

On the one hand, "deference" to WTO jurisprudence may mean ignoring domestic jurisprudence, which would not be appropriate for a Chapter 19 panel. On the other hand, I wonder the extent to which even a purely domestic court – let alone a binational panel established in international law – is free to outright ignore international law and international jurisprudence governing and affecting the substance of municipal law. I don't think there is a clear-cut answer to this sort of a case.

And there, in a nutshell, is why a dissertation – incomplete dissertation – on the topic ran to four hundred pages.

CONCLUDING REMARKS

I close my presentation with two observations.

First, I have not addressed the question of "exclusivity" of the WTO dispute settlement mechanism because I'm not sure it is really relevant in the context of a "choice of forum" situation.

Article 23.1 requires that Members "shall have recourse to" the DSU where they seek "redress of a violation".

Of course, this provision cannot mean that Members of the WTO give up their right to sort out, as between themselves, ways of "redressing a violation". We have had the example of an arbitration *expressly* outside the framework of the DSU, to address the *Bananas* issue – and I think a suggestion that the disputing Parties in that arbitration have violated Article 23.1 for that reason would not be terribly intellectually coherent or politically wise.

Nor would it be appropriate to suggest that any and all "redress" must necessarily follow "recourse" to the dispute settlement mechanism of the WTO. What if in response to a flagrantly WTO-inconsistent trade measure, a Member makes a stern diplomatic warning or even withdraws an ambassador? Would that be in violation of Article 23.1?

All this to say that in my view, Article 23.1 does not constrain Parties to an FTA from arranging for their WTO disputes to be resolved bilaterally, within the context of the FTA dispute settlement mechanism.

The second observation is that as a practical matter, chances are such conflicts will be rare. We have already seen that in at least two cases under the Canada-US FTA, panels were quite sensitive to the GATT jurisprudence in respect of the provisions at issue. More important, parties to FTAs leave matters under the WTO where there is no agreement possible on further liberalization or rule-making *under the FTA*.

In this sense, the nature of disputes that are likely to arise under FTAs is probably going to be different from those under the WTO. Indeed, the experience of the NAFTA is instructive in this regard. We had GATT-like disputes under the FTA, but this was because of the weakness of the

GATT dispute settlement mechanism; such recourse to the NAFTA dispute settlement mechanism would be unlikely today. And where we have disputes in relation to "WTO concepts", they relate precisely to the type of issue that the parties did not manage to resolve in the NAFTA, and so they are litigated under the WTO: *Softwood Lumber*, *Wheat Board*, and *Periodicals*.

At the end of the day, I don't think that there is a coherent, one size-fits-all answer to the question of "conflict". I guess the answer is, "it depends".