The “Spaghetti Bowl” Revisited

Navigating the Web of Overlapping Trade and Investment Treaty Obligations

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“What is the current state of the NAFTA and the WTO, and what should the legal professional be aware of in order to be able to navigate this web?”
What Should the Legal Professional be Aware of?

» Laws and regulations of foreign countries

» Individual trade and investment treaties:
  – WTO Agreement
  – Regional trade agreements
  – BITs/FIPAs

» The web of trade and investment treaties
The Proliferation of Trade and Investment Treaties

» According to the WTO:
  - 271 regional trade agreements in force as of February, 2010
  - 462 notifications, over 300 of which since 1995
  - 406 disputes from 1995 to today

» According to UNCTAD:
  - 2,676 BITs in force as of end of 2008
  - 317 treaty-based disputes reported as of end of 2008
    (of which 70% filed in last six years)
The Spaghetti Bowl Revisited

“ The world trading system is characterized by a chaotic criss-crossing of preferences, with a plethora of different trade barriers applying to products depending on which countries they originate from.” (Bhagwati, 2005)

The spaghetti bowl phenomenon is not limited to trade in goods. It is evident in the way treaties cross-reference one another and are interpreted with reference to the wider network.
An Illustration: The Softwood Lumber Case

» **Lumber III** (1991-1996)
  – Dispute pursued under USCFTA Chapter 19 and GATT ASCM
  – Settled in 13-page U.S.-Canada agreement

» **Lumber IV** (2001-2006)
  – 11 NAFTA Chapter 19 panels
  – 4 NAFTA Chapter 11 tribunals
  – 6 WTO panels
  – 5 U.S. Court of International Trade cases
  – 2 U.S. District Court cases
  – 3 U.S. Court of Appeals petitions
  – Settled in agreement running 86 pages, plus 19 pages of amendments; 13 pages just for signatures of counsel
A Taxonomy of the Treaty Web:
(1) Cross-references

» Parties “affirm existing rights and obligations with respect to each other under the WTO Agreement” (e.g., U.S.-Peru TPA, art. 1.2)

» Parties agree to enhance obligations under another agreement (e.g., U.S.-Peru TPA, arts. 7.3.2 & 7.6.3 re TBT Agreement)

» Convert WTO obligation into FTA obligation
  – U.S.-Peru TPA, art. 10.7.5: Compulsory license not an expropriation if in accordance with TRIPs
  – AANZFTA adopts TRIMS Agreement obligations
A Taxonomy of the Treaty Web:
(2) Treatment required by international law

» Some treaties require treatment no less than “that required by international law” (e.g., U.S.-Egypt BIT, art. II:4; U.S.-Argentina-BIT, art. II:2)

» Could sweep in obligations of other treaties to the extent those obligations are requirements of international law

» But see NAFTA FTC Interpretation (7/31/01): “A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”

» Significance grows as number of treaties grows
A Taxonomy of the Treaty Web:
(3) Choice of forum

» Where dispute arises under more than one agreement, Party required to make definitive choice of forum (e.g., U.S.-Peru TPA, art. 21.3)

» Mexico – Taxes on Soft Drinks (DS308)
  – Mexico asked WTO panel to dismiss in favor of dispute under NAFTA Chapter 20 over U.S. restrictions on sugar imports
  – Panel, AB found no power to decline jurisdiction
A Taxonomy of the Treaty Web
(4) Borrowing from other jurisprudence

» Investor-State tribunals have looked to WTO panel/AB reports for guidance

» *SD Myers v. Canada* (2000)
  – Tribunal looks to WTO panel reports to understand “like circumstances” aspect of national treatment

» *Pope & Talbot v. Canada* (2001)
  – Tribunal looks to WTO panel reports as part of national treatment analysis

  – Tribunal refers WTO cases on “necessity” defense

» *Aguas del Tunari v. Bolivia* (NGO petition, 2002)
  – NGO refers to WTO precedent in urging tribunal to accept amicus submission
A Taxonomy of the Treaty Web:

(5) Claim preclusion

» Respondent seeks to dismiss claim under one treaty based on obligation under another treaty

» *Argentina – AD Duties on Poultry (DS241)*
  
  – Argentina asked WTO panel to dismiss in light of prior MERCOSUR panel ruling or, alternatively, to treat the latter as binding; panel declined

» *EC – Large Civil Aircraft (DS316)*
  
  – EC argues that U.S. estopped from bringing claims under SCM Agreement in view of 1979 and 1992 agreements on aircraft trade
A Taxonomy of the Treaty Web:
(6) Justification

- Respondent seeks to justify its conduct inconsistent with Treaty A by referring to Claimant’s conduct inconsistent with Treaty B

- Mexico – Taxes on Soft Drinks (DS308)
  - Mexico sought to justify soft drink tax by arguing it was necessary to secure U.S. compliance with obligation to establish NAFTA panel to resolve sugar dispute; panel, Appellate Body rejected
Conclusion

The legal professional needs to be aware of not just foreign laws and regulations, not just individual treaties, but the broader treaty web.