

Chilling International Cooperation: Constraining New Institutions with Old Institutional Rules

Submitted by Mark Axelrod
Department of Political Science
Duke University
mark.axelrod@duke.edu

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Recent research has shown that international institutions do not stand alone. Rather, they have synergistic and dissonant effects, and their rules may often conflict as part of multi-issue “regime complexes” (Raustiala/Victor 2004). Before describing these effects, the following example exhibits demonstrates the importance of institutional interactions.

Chile has developed a regime to prevent overfishing in its waters and protect small populations of endangered fish. Countries are granted the right to control their 200-mile Exclusive Economic Zone (EEZ) by the United Nations Convention on the Law of the Sea (UNCLOS).¹ Because many species swim and migrate great distances, UNCLOS has also determined that coastal states should have the right to regulate some fish on the high seas if events beyond the 200 mile zone would impact a fishery within the EEZ. Chile has attempted to protect swordfish in the South-east Pacific Ocean by banning their import and transshipment through Chilean ports. Though protections for fish seem like a straightforward application of international legal rights, one must consider that UNCLOS is not the only regime in play.

Dismayed by the restrictions placed on its vessels outside the 200-mile zone, the European Union (EU) filed a complaint against Chile before the World Trade Organization (WTO) Dispute Settlement Body based on unfair trade practices.² WTO rules require equal treatment of other Members’ commercial activities. In response, Chile filed suit in the International Tribunal for the Law of the Sea, claiming the right to regulate the local swordfish fishery.³ It seems likely that the filing party would have won its case in each of the respective courts. One might expect to see some sort of coordinating mechanism that could establish a hierarchy between conflicting bodies of treaty law. However, in this case, extrajudicial negotiations yielded a settlement that rendered further tribunal proceedings unnecessary.⁴ Negotiation resulted from uncertainty, and the results were mixed. The EU gained a victory on the opening of Chilean ports to European vessels. European influence will continue to play a major role in a new regime dependent on scientific expertise, but this result was tempered by severe limitations on their fishing privilege.

The negotiation seems to have accomplished a positive outcome. However, the transaction costs of extrainstitutional negotiation are less than ideal. WTO and UNCLOS were both designed to coordinate state behavior, so they do not accomplish their full intentions when further negotiations are necessary. A number of commentators have suggested that the recent proliferation of international institutions will result in increasingly common conflicts. However, actual conflicts are incredibly rare. This paper examines how political actors have managed to avoid conflict, focusing in particular on efforts at the negotiation stage to prevent such clashes. I first engage in a brief discussion of the literature on institutional linkage, drawing on this material to understand why and how negotiators consider interactions at that stage. Next, I look at theories suggesting that institutional conflict should be common. Having established the likelihood of conflict, I view its absence as an interesting puzzle. Relying on concepts of path dependence and persuasion, I construct a theory about institutional coherence and the

¹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

² Chile – Measures Affecting the Transit and Importation of Swordfish, World Trade Organization, WT/DS193/1 (26 April 2000).

³ Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, International Tribunal for the Law of the Sea, Order 2000/3 (20 December 2000).

⁴ Chile – Measures Affecting the Transit and Importation of Swordfish: Arrangement between the European Communities and Chile, World Trade Organization, WT/DS193/3 (6 April 2001).

entrenchment of those institutions that are established early. Finally, I present preliminary evidence of the theory's validity from a variety of international negotiations.

A Brief Note on Issue Linkage: Old and New Theories

In this project, I endeavor to focus on the interaction between a variety of issues in international regimes.⁵ Scholars have long recognized that parties may add issues to the agenda in order to make agreement more likely (Haas 1980; Sebenius 1983; Davis 2004: 157-58). Lohmann (1997) formalizes this process to demonstrate that issue linkage provides additional opportunities for punishing defectors. Aggarwal (1998) characterizes linkage along two dimensions – success or failure, and substantive or tactical linkage – and endeavors to figure out what conditions are conducive to successfully bringing multiple issues under one regime.

Other recent research has focused instead on the effects of linkage between different regimes. Young (2002) suggests that “horizontal interplay” between institutions (ch.5) has resulted in both conflicting and symbiotic results. Helfer (2004) describes parties attempting to circumvent undesirable rules by moving to a different negotiating forum.

Oberthur and Gehring (2000/2003/2004) explain that interactions can take place at any stage of the process – from negotiation to implementation – and may be positive or negative in nature. Rules from one regime may actually enhance the efforts made in another institution, or they may conflict as we have seen above. By providing the important insight that interactions should be analyzed on an individual basis – with one institution serving as the source, and the other as target of the source's influence – these authors have advanced the empirical study of institutional overlap and provided a means for comparison. Building on their source-target model, I focus on individual rules as the level at which there is an opportunity for contestation.

Leebron (2002: 6-11) elaborates the difficulty of defining what exactly is an issue area. Furthermore, regimes do not generally interact as whole entities. Rather, it is individual rules within them that have the potential to operate in conjunction or conflict with other rules. To avoid the aforementioned confusion, I propose that this analysis should proceed instead at the rule level. Some linkages, such as those discussed by Davis (2004) and Sebenius (1983) take place inside regimes, while others can be seen in the interaction between regimes within a “regime complex” (Raustiala/Victor 2004). Within an institution, there are obvious reasons to make the rules compatible for the sake of coherence. In addition, most institutions have a centralized negotiating and interpretation process.⁶ I will focus, therefore, on interaction between rules (or potential rules) in different regimes. Proposed rules may result in one of three outcomes: conflict with the existing rule, subordination to the existing rule, or replacement of the existing rule. For a variety of reasons, subordination should be the most common outcome when potential conflicts arise.

Why should we expect conflicts?

Recent years have witnessed a drastic increase in the number of global regimes for a variety of topics. The end of the Cold War has opened the world to new agreements on trade, criminal law, and environmental protection. With the stalemate removed, policymakers have developed these institutions to solve a variety of collective action problems. Along with these new regimes have come a host of tribunals to interpret and enforce their rules. The World Trade Organization Dispute Settlement Body (DSB) is probably the most detailed and well-respected

⁵ I will use the words “regime” and “institution” interchangeably throughout.

⁶ Interestingly (witness UNCLOS and WTO), it seems that the most comprehensive regimes are also the ones with the most formal dispute settlement processes.

of the new courts, but criminal tribunals for the former Yugoslavia and Rwanda, and a new judicial tribunal for the UN Convention on the Law of the Sea (UNCLOS/ITLOS) have also played important roles in the implementation of new global rules (Kingsbury 1999:680). Legal commentators and political scientists have suggested that this proliferation should lead to an increase in conflicts between international institutions (Young 2002: 83,113; Raustiala and Victor 2004: 277). As Trachtman (2002:89) suggests, “while there is room for creative ambiguity..., at certain junctures one organization’s norms will have to trump another’s.”

Pauwelyn (2003) outlines a number of reasons for the likelihood of conflict. First, the lack of a central legislature or executive at the international level (13) means that no effort is made to coordinate rules within one framework. As Young has pointed out, there are turf wars between enforcement agencies even within the US government (Young 2002: 127-28). Without the central (Executive Branch) control directing US agencies, international governance must surely lack coordination. Furthermore, with each party trying to get the best deal in each negotiation, they have little incentive during the bargaining stage to focus on other regimes (*ibid*:133-36). They are also likely to try negotiating in other realms, where they have a relative power advantage (“forum shifting”), in order to achieve their preferences without needing to succeed in any particular negotiation (Helfer 2004; Raustiala/Victor 2004:280). This use of “strategic inconsistency” is expected to result in a proliferation of contradictory rules on the same issue (Raustiala/Victor 2004: 301). However, as in the examples cited by Helfer, this tactic is rarely successful (see Helfer, table 1 at 52). Instead, the second institution may issue a statement about the need to carefully implement the rule in question so as not to affect other issues of international importance. This outcome can not be considered a conflict, but more accurately may be viewed as a refinement of the original rule. Helfer recognizes that this tactic may actually be intended as a “safety valve” to pacify domestic interest groups without actually altering the rules (2004:56).

Second, international law does not have a theory of change that allows for clear replacement of previous norms (Pauwelyn 2003:14). The Vienna Convention on the Law of Treaties⁷ provides a loose set of rules with which to interpret and enforce treaties, but it is applicable only in a few specific situations. Article 30 (“Application of successive treaties relating to the same subject-matter”) lays out rules designed to create certainty in the application of international law. All states expect to follow the same set of rules to understand which treaty takes precedence when applicable conventions conflict. Paragraph 2 allows treaties to explicitly state that they are subject to, or “not to be considered incompatible with, an earlier or later treaty,” in which case “the provisions of that other treaty prevail (Art.30, para. 2).” Next the article provides that without an explicit statement, and if all parties are members of both regimes, “the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty (Art.30, para.3).” That is, new treaties should be interpreted as replacing old provisions if their rules conflict. The rationale is that parties would not bother to negotiate a new treaty if they wanted the old rules to remain in place. To the extent that there is contradiction, it must therefore represent a change in the law. Finally, if one state is party to both agreements and another state is party to only one, “the treaty to which both States are parties governs their mutual rights and obligations (Art.30, para. 4(b)).”

Although these rules seem rather straightforward, their actual use has been open to much debate. First, the Vienna rules apply only to issues of the same “subject matter”. Although

⁷ Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980), art. 30, 8 I.L.M. 679.

conflict situations rely on events that encompass more than one discipline and are inherently related to each other, the actual treaties were written to deal with separate issues (Fox 2001).

The subject matter provision seems to be a clear roadblock for application of these provisions. However, even if we were to accept mere linkage through concurrent use of the treaties, we would encounter other problems as well. In applying paragraph 2, we must note that the “date” of a treaty is open to interpretation. Many relevant treaties were negotiated over long periods of time, and it is unclear whether to apply the date of completion, signature, ratification, or entry into force for the parties involved. To that extent, it is obviously possible to encounter overlap between the negotiation and operational dates of the conflicting treaties. Furthermore, it is unclear whether we should focus on the date of a treaty or the date of the particular rule in question. With the advent of the framework convention, most substantive treaty rules are established well after the treaty itself. Finally, paragraph 4(b) becomes confusing when we start to see treaties, such as the Montreal Protocol on ozone-damaging substances, that have rules for non-members as well. These provisions are designed to encourage membership, but they also have the effect of creating confusion about who is covered by the laws of a treaty and when we can ignore a treaty to which only one disputant is a member (*Ibid*).

Third, conflict should be prevalent because national positions do not necessarily remain constant across treaties. The involvement of a variety of domestic actors in the negotiating process leads to incoherent positions on (Pauwelyn 2003: 15-16). It is a cliché to note that “where you stand depends upon where you sit,” but the assignment of different agencies to different negotiations obviously promotes the divergence of rules across issue areas (Davis 2004:157). For instance, the US Trade Representative negotiating position at the WTO is likely to reflect that individual’s training and expertise in commercial matters, while an Environmental Protection Agency representative at climate change talks is more likely to consider the use of trade measures as a tactic to promote environmentally supportive outcomes in that regime. Each government uses some sort of coordinating mechanism through a foreign affairs ministry, but the individual negotiators remain different for each treaty.

Finally, Pauwelyn (2003:16-17) and Young (2002: 130-31) both address the lack of a central adjudicator. In addition to the lack of rules on conflict resolution (described above), no formal arbiter is available to reconcile the results of different agreements, and multiple interpretations may result. In fact, this circumstance seems to be the proximate cause of the swordfish dispute reaching ITLOS and the WTO DSB.

Having described these legal reasons for conflict proliferation, Pauwelyn examines possible solutions. He allows for the possibility of *ex ante* coordination (2003:237-40). However, success is far from guaranteed if it requires parties to accept a less favored outcome in one negotiation in order to provide the public good of regime coherence. Countries are unlikely to accept that role. Once the institutions exist, Pauwelyn describes a “presumption against conflict” in international law. That is, 1) the conflict must be explicit from reading the agreements, 2) the state claiming existence of such a conflict “will have the burden of proving it” and 3) an adjudicator should assume when possible that parties intended to maintain both rules (*Ibid*: 240-74). The WTO Dispute Settlement Body, for instance, has allowed that countries may follow rules for environmental purposes as long as they do not explicitly override WTO agreements.⁸ Similarly, Guruswamy (1998) and Charney (1998) have suggested that rules can be interpreted together to avoid conflict.

⁸ United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia, Appellate Body report (WT/DS58/AB/RW), 21 November 2001 para.130. See also Pauwelyn (269).

Nonetheless, Pauwelyn indicates that a conflict does not actually exist if such an interpretation is available. Helfer points to the existence of conflict “where treaty rules are mutually inconsistent, in the sense that a state’s compliance with one rule necessarily compels it to violate another (2004:76).” There is reason to believe that some rules could be in direct conflict with each other, particularly when one regime promotes free trade and the other hopes to use trade barriers to promote some other result.

With all of these concerns in mind, Young points out that ad hoc negotiation is the most likely outcome, with no coordination between institutions (2002:132). However, as I explore below, ad hoc negotiation does not prevent coordination between regimes. Instead, I expect that self-interested actors will prevent conflicts in order to uphold the benefits received from previous negotiations.

Evidence of Conflicts

Despite all expectations to the contrary, very few situations result in institutional conflict. Even the situations examined by Helfer (2004) result in rhetorical dissonance without any actual rule conflict. Pauwelyn mentions a few other cases of conflict (2003:3), but the lack of detail makes it difficult to know if these are of the variety that can be presumed away. In any event, there seem to be very few discussions of the conflict problem that mention actual cases. This lack of focus is obviously not a robust measure, but it should lead us to consider why we have not seen more contestation at the implementation stage. Of course, it is entirely possible that other conflicts never reached the stage of formal adjudication because of bilateral negotiations. However, it appears that large scale conflict between international rules has not emerged. I examine therefore the puzzle of legal coherence. Why have conflicts been avoided? By what process did this avoidance happen?

Legal Coherence through Constrained Bargaining

As Young points out (2002:136-37), it is possible for the two institutions to be “rationalized”, usually due to parties’ self-interest. Building on Raustiala and Victor’s concept of the “regime complex”, I recognize that negotiations are path dependent and take place in the shadow of existing institutions (2004:279-80,296-99). In this section, I suggest that existing institutions serve as constraints on the bargaining process. Despite the anarchic nature of interstate relations, existing institutions may supply a “chilling effect” whereby new regimes must comply with previous rules. The result is a conservative international legal system that promotes legal norms established earlier over those that aspire to replace them. In contrast with Krasner’s (1991) suggestion that institutional change is fluid in response to changing power dynamics, this model supports Keohane’s (1984) conjecture that regimes remain in place and provide constraints on the actions of powerful players in the future.

I examine the potential for conflict at the level of individual rule negotiations, viewing each proposed rule that may conflict with existing law as a *renegotiation* of that particular enactment even though they take place under the guise of different institutions. The resulting theory suggests that, in the absence of institution 1, some country preferences would be different regarding the new rule.⁹ Even if these negotiations took place in completely separate “issue

⁹ [This question of the counterfactual continues to be a source of difficulty in my analysis...Institution 1 does, of course, exist and it will be difficult to find parallel cases in which it does or does not exist. I originally envisioned a temporal approach, whereby I would look at the change in a country’s preference for institution 2 after the introduction of institution 1. However, that model requires that institution 2 be in process before institution 1 and begs the question why 2 did not constrain 1 instead of the other way around. Instead, I will need to consider institutions with a clear temporal separation (e.g., International Labour Organisation, founded as part of the Treaty

areas”, the original rule occupies the contested space, restricting further action at the “renegotiation stage” when a replacement is introduced during the negotiation of a new institution. First, I take issue with Krasner’s concept of fluid renegotiation, and move on by suggesting a process of path dependence and increasing returns whereby rule 1 can retain a high degree of support in the face of new negotiations. This approach relies on historical institutionalist concepts to elucidate the changing context negotiators face.

Understanding renegotiation

Krasner (1991) claims that distributional consequences lead to power-based bargaining. In this story, renegotiation reflects a change in relative power and may take place at each instance of a power shift. As such, the more powerful states are able to guide negotiations no matter what rules are already in place. If that were the case, we should expect the most recent rules to represent current power dynamics and to overrule any previous enactments. Instead, negotiations take place within a regime complex and often contain “savings clauses” designed to preserve past bargains at the expense of new rules (Raustiala/Victor 2004:297). Even in Krasner’s most direct example of renegotiation (the Intelsat agreement) (1991:359), the change is not immediate and it is not clear that the new institution directly reflects the new power balance. Instead, one might expect that a shift in the rules still retains some vestiges of the previous arrangement. That is, in rule renegotiation, “power, interests, and ideas do not directly map onto the norms that become enshrined...the content and evolution of rules does not trace neatly back to changes in the underlying driving forces (Raustiala/Victor 2004:296).”

Regimes, in this sense, are characterized by persistence (Keohane 1984: 100-03). That is, rules do not change easily, and new configurations reflect those already in place (North 1990: 92-104). Helfer recognizes the importance of “status quo bias” within a regime, but claims that this bias is diminished when shifting negotiation to a new forum (2004:15). However, his primary example of new rules in new regimes – the shift of intellectual property rules from WIPO to GATT (*ibid*:20) – only demonstrates the potential for leaving behind a regime that did not have enforceable rules.

Stilwell and Tuerk (1999) take the concept a step further, suggesting that such constraints exist for new institutions as well as negotiation of new rules in old regimes. They note the potential for a “chilling effect” of existing international institutions (specifically the WTO) on new environmental treaties. Rather than create a potential conflict or have the new rule overturned, negotiators may be inclined to back away from any potential overlap and create weaker institutions in terms of the resulting institutional scope and legalization (Conca 2000:488-89; Eckersley 2004:text accompanying notes 9-10[get new page number]). In terms of the rule level analysis outlined earlier, a “chilling effect” would lead to subordination of proposed rules to those already in existence. I characterize this “chilling effect” as a path dependent constraint on the available bargaining space. The paper proceeds by outlining why negotiators would allow the original rule to constrain them.

Path Dependence and Increasing Returns

Pierson and Skocpol suggest that historical institutionalism is a helpful approach when dealing with the effects of, and interactions between, multiple institutions (2002:706-07). Historical understandings of these interactions allow us to study the sequence of events leading to a decision and carefully grasp the context in which a particular rule was negotiated. Path

of Versailles, and the WTO, formed in the late ‘80s and early ‘90s with the GATT predecessor in the late 1940s), and I will need to construct a theory of a world without the original institution. Another approach will be paired case studies with similar rule proposals that were negotiated before and after the “source” institution. For example, the ozone and climate change regimes both attempted to apply trade sanctions for noncompliance. These respective negotiations took place before and after establishment of the WTO.

dependence results from “increasing returns” of decisions past. That is, as an earlier choice produces results that frame future interaction, there are increasing costs to reversing that decision. Pierson uses Levi’s analogy of tree climbing to demonstrate that the other options remain available but are more difficult to reach (by leaping across, or climbing down one side and back up the other) once actors embark on a particular path (2000:252). Importantly, the institution does not stay intact of its own accord. Actors “work to maintain the configuration with only incremental adjustments even when economic, cultural, and geopolitical circumstances shift (Pierson/Skocpol 2002:708).” That is, parties engage in a conscious effort to maintain the status quo once they have enacted a rule. There are four primary reasons that actors prefer such rule maintenance. A brief discussion of each follows.

1. Legal Uncertainty

Faced with legal uncertainty, people often resort to negotiation. Uncertainty increases the degree of risk one faces in carrying out any action (D’Amato 1983: 5). In an economic sense, this risk raises expected costs and makes the transaction less likely (Williamson 1985; Coase 1988). When it is unclear which laws hold sway, the legal system is compromised. Its impact declines because people shy away from using the law to accomplish their goals. As such, we are talking about two levels of legalization. At the basic level are the laws or treaties that cover each subject area in international life. Though each set of rules may clearly indicate which actions are legal within that institution, states must consider whether their actions are legal under all other commitments as well. Even though institutions are fragmented, the requirements are still simultaneous. At the second, or systemic, level, therefore, we would expect to see some mechanism that coordinates these treaties so as to determine which one is applicable in which situation and how we should go about determining its legal effects. Behavior cannot be guided by law unless people are clear on what to expect from a legal system. Without knowing which law applies, they have no chance of acting appropriately or bargaining in the shadow of the law.

In the swordfish case discussed above, uncertainty reduced institutional efficiency. In order to avoid such a situation, actors should consider the increasing returns from the rules of institution 1. Suppose that the Law of the Sea regime came first.¹⁰ Before introduction of trade rules, UNCLOS would therefore have increased certainty regarding necessary actions under international law. By providing countries with the rule that they should take measures to protect local fish stocks, UNCLOS clearly established what was expected of its members. However, once trade regime rules were introduced, it became unclear what action was legally acceptable. Without a second-level regime to dictate hierarchy between the rules, this lack of clarity led to legal uncertainty and negated the benefits of clear UNCLOS rules. I expect that negotiators, wishing to avoid such a situation, will stay away from the creation of rule conflicts. This expectation demonstrates why we should not see conflict, but it leaves open the possibility that parties will allow new rules to override existing provisions. A transaction costs model and preferences for the status quo explain the tendency to retain existing rules.

2. Transaction Costs Model

One source of increasing returns is the investment that parties have made in designing the original regime (Koremenos et al. 2001). Having created an institution that reduces transaction costs of their activities (Keohane 1984:89-92,100-103), any other model will necessarily be more expensive. Authors cite a number of reasons for these high transaction costs. First, the bureaucracy designed to implement the original institution has developed expertise about the rule

¹⁰ Due to the prolonged nature of UNCLOS and WTO negotiations and ratification periods, as well as the pre-existence of GATT, it is not clear which rule actually came first in this case. Perhaps such clarity could have prevented conflict, but that question will be reserved for another time.

in question. Any attempt to alter the rule would require reeducation of bureaucrats and participants (Pierson 2000:254). In addition, collective action is not an easy feat (*ibid*: 258), especially at the international level. Having spent the high startup costs to reach a collective solution in the first place, it would be much less costly to retain that rule instead of replacing it through a new attempt at overcoming collective action problems. If actors are concerned with retaining the previous regime, they may be willing to forego some marginal benefits of the new rule in order to avoid regime conflict (Aggarwal 1998: 23-24). Even if the total cost of change was less than that for continuation on the same path, discount factors play an important role. Because switching costs are evident in the short run and efficiency benefits only appear in the long run, we should expect actors to take the costs of change more seriously than the benefits, and ultimately to refrain from engaging in the process of change (Pierson 2000:262).

Keohane (1984:247) points out that institutions have value beyond their concrete purposes. I borrow this concept to point out the importance of transaction costs when a single rule, applicable across all issue areas, may have different effects in different regimes. That is, when institution 1 has created an efficient rule “A” and institution 2 would benefit from the rule “not A”, we have reason to believe that rule “A” will have a better chance of remaining in place even if, all else equal, exogenous factors would otherwise make the parties prefer “not A” in institution 2. Rather than go through the effort of replacing that work and starting from scratch, they are likely to stick with previous rules that require less effort to maintain than to renegotiate. Put another way, once you have begun climbing a tree, you may realize that your route is more difficult than another one you could have chosen. However, once you have reached a relatively high branch, it will be even more difficult to climb back to the ground and begin the whole process again in a different direction. As North (1990:93) has suggested, path dependence does not necessarily lead you to the most efficient route considered from the origin, but rather it guides you to the most efficient route given your earlier decision (see also Pierson 2000:253). So too a different rule may be more expedient in institution 2, but it will also be far more costly at this point than retaining the rule that was created under the guise of institution 1.

3. *Interests in the Status Quo*

The study of international relations requires that we understand parties’ preferences (Moravcsik 1998) in order to gain an idea of what outcome suits them best. Without some sense of their interests, we cannot hope to figure out what strategies they will pursue or the eventual outcomes that will emerge. In this case, I suggest that at least some parties will be very happy with the rule as it was established in institution 1. Any efforts to renegotiate that rule during the framing of institution 2 will face an uphill battle because powerful interests desire that the status quo be maintained. Changes are unlikely unless they are Pareto optimal (i.e., harm *nobody* and help at least one other player). If one player is particularly fond of the rule as established, they will be likely to reject attempts at change unless they are offered some sort of side payments.

Kahneman and Tversky (1979) claim that this preference has actually strengthened as a result of the existing institution. “Prospect theory” demonstrates that it is harder to take something away from someone who has been given a particular benefit than it is to deny them that pleasure in the first place. Put simply, we place higher value on the things we have than on those to which we aspire. Therefore, a loss hurts an individual more than a comparable gain helps that same person.

The entrenchment of preferences toward rule 1 may take two primary forms. First, we should note that powerful actors were responsible for the distribution of benefits in the first instance (Krasner 1991). To the extent that they are still powerful and continue to like the rule, there is little reason to believe that they should have an interest in overturning it now. Furthermore, if those powerful states designed the regime to maximize their future benefits, they

may have included procedural rules allowing them to further increase their power over time within that institution, even if their overall power is reduced during the same period (Pierson 2000:259).

Second, even less powerful actors may have invested a great deal in adapting to institution 1. If they built parts of their economy around efforts to comply with institution 1's rules, they should be less than enthusiastic about overturning those rules in the process of creating institution 2. Fioretos (2001) notes the importance of domestic institutions for determining negotiating positions in the European Union. He finds that countries wanted to retain their institutions without adjusting for new multilateral rules. Similarly, I expect that any investment in complying with the rule in question will reduce a country's interest in altering it. Aggarwal (1998:26) notes that "states often have vested interest groups that benefit from the organization. These pressure groups and domestic bureaucratic groups are also likely to resist institutional innovation."

4. Identities tied to Compliance with Institution 1

Finally, constructivists would suggest that institutions guide the formation of identities. That is, according to the theory, parties follow legal rules in part because the rules have become norms of practice in international affairs. By upholding such principles, a state is able to participate in international society it adores (Finnemore/Sikkink 1998; Risse/Sikkink 1999). If it has adopted these norms, it may be difficult to cognitively reorient efforts to overrule them. I surmise that this sort of identity change is a less helpful predictor of increasing returns and institutional stability. If, as the Constructivist research paradigm itself suggests, identities can change over time, then we should expect norms to be flexible in light of legal shifts.

However, if legal coherence is itself an overriding norm of international relations, then we should expect to see the use of persuasion techniques by actors who wish to maintain the status quo. Previous work (Risse 2000; Finnemore 2003) suggests that rhetorical persuasion may be used to convince other players that their preferences should change as the result of something they had not previously considered. If this technique is actually useful, it may also be available for convincing other negotiators that the bargaining space is smaller than it appears as a result of existing rules. Such a tactic may not easily convince a massive team of industrialized country negotiators. However, small delegations that are unable to research every issue or attend every simultaneous subgroup meeting may be willing to rely more on technical claims made by experienced lawyers. Positive reaction to such a technique by parties not otherwise inclined to maintain the existing rule would indicate the presence of a coherence norm and the potential for successful persuasion.

I have discussed four reasons to expect increasing returns from a rule once it is established in international law. It would appear that these four pathways operate together to achieve a conservative international legal system in which change is slow and uncommon. Furthermore, due to the importance of institutional factors in some of these explanations, I expect to see stronger path dependence from the most legalized of existing rules (Abbot et al. 2000). Additionally, increasing size and experience of delegations supporting the status quo should result in less likelihood of conflict with, or replacement of, the existing rule.

Testing the Model

[PLEASE NOTE THAT THESE ARE VERY PRELIMINARY RESULTS. FURTHER DOCUMENTARY AND INTERVIEW RESEARCH WILL BE USED TO CONSTRUCT COMPARATIVE CASE STUDIES.]

A few case studies will help us to see the effects of increasing returns to rules in international institutions. These brief vignettes will illustrate some of the ideas described above. However, they should not be considered as a comprehensive test of the theory. As such, I recognize that I am selecting on the dependent variable. Future research will address this problem and more carefully specify the categories I wish to explore within each case.

In each of the following situations, new negotiations have been “chilled” by concerns about an existing rule, meaning both that the existing institution was noted as a constraint by some party during negotiations and that this mention resulted in a weakening or withdrawal of a particular measure. The trade example is useful because it encompasses so many other issues, both substantively and in terms of enforcement techniques, that are discussed in other international fora. We first look at the impact of WTO rules on negotiation of two environmental agreements, then look at the WTO’s own efforts to bend to existing institutions.

Convention on Biological Diversity (CBD). From the very beginning, CBD participants took note of existing institutions. The first CBD documents indicate that scientific experts were aware of existing institutions dealing with biodiversity, finding that a new convention was necessary to coordinate the activities taking place under other regimes and to extend the practice worldwide to “all species, ecosystems and habitats (UNEP 1988a).” This new effort would replace a “fragmented system” and would avoid the need to renegotiate other conventions. The first draft of the convention explicitly acknowledged the need to coordinate with other international conventions (UNEP 1988b). However, involved experts soon turned as well to the potential for not-so-complementary interactions. By the third meeting of experts in July 1990, there was already extensive concern for the impacts of trade institutions on available bargaining space (UNEP 1990a). Though national negotiators had not yet joined the process, experts were already raising alerts about the potential impacts of GATT discussions on intellectual property rights (IPRs). At that stage, discussions had already begun regarding legal implementation in the face of existing treaties with conflicting rules. A number of mechanisms were suggested for reducing any expected conflict, mostly centered around further discussion (UNEP 1990b). Thus, the zone of bargaining was truncated before the parties even reached the table. In this case, we cannot credit the chilling effect to anything other than benign concern on the part of experts who wanted the institution to be as robust as possible. Using the efficiency rationale, these scientific experts persuaded CBD negotiators to weaken some provisions in order to accommodate other present and future institutions.

Once CBD took effect, discussions about new protocols and implementation of rules continued to take place in the shadow of trade and other institutions. CBD and the Food and Agriculture Organization (FAO) both made an effort to harmonize the institutions’ rules (UNEP 1994). As a result, a set of additional negotiations were introduced to revise the International Undertaking on Plant Genetic Resources (IUPGR) in coordination with CBD rules. At the third Conference of the Parties in 1996, there were further discussions about coordination (UNEP 1996 a/b). A later German submission outlines potential conflicts between CBD and intellectual property rights rules, thus encouraging action to narrow CBD’s scope (UNEP 2001). While such reports did not themselves result in a weakened CBD, they were designed to advise the Parties on future action that would allow better linkages, most likely entailing an eventual reduction of CBD scope and precision.

Finally, the CBD Secretariat’s legal advisor reports that most questions he receives relate to the intersection of CBD with other agreements, especially trade. Parties may request advisory opinions from the Secretariat as they continue to negotiate new provisions. In this case, he is often asked to explain whether a particular new rule will be incompatible with existing

institutions (phone interview, Dan Ogolla, 29 March 2004). Once again, the parties are unable to overrule the existing arrangement, but they may allow their ideas for a new regime to be set aside.

Cartagena Protocol on Biosafety (CPB). The Biosafety Protocol was negotiated by CBD parties in response to growing concerns about the safety of trade in living modified organisms (LMOs). From the beginning, one aspect of this discussion was rules for “handling, transport, packaging, and identification” of LMOs. Because the WTO often prohibits labeling of products, some parties opposed this provision in order to avoid conflict (CBD Secretariat 2004:59). A number of parties also explicitly expressed concern that a strong protocol would conflict with WTO provisions. While the EU requested language noting the “consistency between the Protocol and the Agreements under the WTO,” Australia wanted assurances that CPB would “not override or duplicate any other international legal instrument in this area,” and the United States pushed for language requiring that “nothing...shall affect the rights and obligations of countries under [prior] agreements (*Ibid.*: 110).” In the end, this language ended up in the preamble as a savings clause “[e]mphasising that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements (*Ibid.*: 14).” Although “the above recital is not intended to subordinate this Protocol to other international agreements (*Ibid.*),” such a statement has the clear impact of reducing the new Protocol’s scope, and therefore its overall strength.

Ironically, shortly before the aforementioned WTO/UNCLOS swordfish case, Chile presented a proposal for more precise dispute settlement procedures that would take into account WTO rules, thus reducing CPB’s scope at the implementation phase (UNEP 1998). This proposal has not been accepted. However, it does seem to represent an ongoing effort to force CBD to account for trade rules in a coherent international regime.

Convention on Persistent Organic Pollutants (POPs). The POPs Convention has encountered WTO influence in a similar way. According to Stilwell and Tuerk (1999), countries that export these chemicals have cited “potential conflicts with WTO obligations” in order to reduce the available bargaining space.¹¹ The parties have also attempted to coordinate with other institutions, particularly the World Health Organization (UNEP 1999), but such actions do not seem to constrain the scope of POPs. Nonetheless, other proposals have been made in an attempt to limit the issues covered by POPs. Canada tried to include explicit recognition of WTO rules by “requesting the Secretariat to cooperate with the [WTO] (International Institute for Sustainable Development 2003).” The POPs Convention has recently taken effect, but it seems to be conscious of the potential for overlap with trade requirements.

World Trade Organization (WTO). Lest we think that the WTO is the only institution responsible for controlling rule innovation, we should note a few instances in which the WTO has also faced a threat from existing institutions. First, labor standards have been proposed by some industrialized countries as an important aspect of trade that should be regulated by the WTO. However, developing countries have cited the existence of an International Labor Organization (ILO) as sufficient reason to avoid the issue in the WTO. They suggest that these separate issue areas should be considered separately despite the obvious interaction between trade and labor. These actors have successfully kept labor standards out of the WTO, in part because of their commitment to keep the institutions separate (Elliott 2000; O’Brien et al. 2000:72). In that sense, WTO’s scope has been reduced because of the pre-existing ILO.

¹¹ They cite UNEP/POPS/INC.3/CRP.27, a negotiating document that outlines party submissions on paragraphs 1 and 2 of article D. Unfortunately, this document was not available to me, so I was unable to determine exactly what approach the parties have taken.

Nonetheless, many of these same countries succeeded in getting parties to add a paragraph opposing trade protectionism in the ILO Declaration on Fundamental Principles and Rights at Work (O'Brien et al. 2000:105). As such, their motivation would seem to be the more consequential logic of preventing institutions they do not like. If they were truly concerned with a coherent legal system, they would not have promoted overlap in one institution without the other. Note also that this result goes against the expectation that only institutions of a legalistic nature can exert a "chill."

WTO has also been forced to look into the issue of overlap with environmental agreements. The Committee on Trade and Environment (CTE), founded during the Uruguay Round, has now been charged with establishing some way of coordinating WTO rules with multilateral environmental agreements. The 2001 Doha Ministerial Declaration includes an agreement between the parties to negotiate on "the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs) (para. 31(i))." This mandate has resulted in a series of recent meetings and a compilation of relevant MEA provisions. The mere fact that CTE is examining the problem indicates the potential for reduced scope of WTO activity. However, there is no evidence as yet that WTO action has been constrained by environmental treaties. It can, nonetheless, no longer be said that WTO does not deal with external constraints in the same manner as other regimes.

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