

Trading Rules: Forum Shopping Within and Among International Institutions
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I. ABSTRACT

The contemporary governance of international trade is characterized by complex – overlapping and consequential—institutionalization. “Forum shopping”, the strategic selection of favorable venues from among a plural menu of alternatives, is a logical, important and underexplored consequence of this situation. *Trading Rules: Forum Shopping Within and Among International Institutions* explains the conditions under which, the ways in which and the effects with which states, firms and NGOs forum shop within the international trade regime. It argues that forum shopping 1) responds to the opportunities created by overlapping venues and the incentives provided by their differentiation; 2) unfolds through processes of strategic issue framing; and 3) decreases problem solving efficiency, influences political outcomes and tends to undermine the rule of law. The book tests these arguments against forum shopping within the European Union (EU) and World Trade Organization (WTO) as well as among regional vs. global and economic vs. environmental organizations; explores the diverse processes by which forum shopping unfolds; and examines its consequences for trade policy outcomes and global governance. In so doing, it provides a fuller understanding of the role of institutions in the international political economy and beyond.

II. PROJECT BACKGROUND

Growing institutional complexity stands as a hallmark of contemporary political economy. Perhaps nowhere is this truer than in the area of international trade and trade-related issues, where a bewildering array of regional, sectoral and global institutions coexist, commingle and compete. Under such circumstances, states, firms, NGOs and others with a stake in trade governance confront a wide range of institutional options within which they might conduct their interactions. While this situation is increasingly recognized, theoretical accounts of international institutions have failed adequately to take its measure, with deleterious consequences for understanding such key issues as institutional origins, change and effects as well as the prospects for effective global governance.

The progress of institutional international relations (IR) theory would be hard to deny (Keohane and Martin 1995, 2003; see however Mearsheimer 1994/95). From work on the determinants of institutionalization to analyses of institutional effects, change and design, we have witnessed the emergence of a cumulative research program dedicated to

¹ Among other things, this prospectus is not fully referenced.

understanding the provenance, forms, persistence, change and effects of frameworks of rules. Yet, existing work tends to work from an under-institutionalized status quo. Work on institutional design tends to assume a status quo that is suboptimally institutionalized, given the cooperation problems at hand. Work on institutional persistence and change takes single institutions as given objects of analysis. Work on institutional effects, similarly, addresses itself to interactions within and outcomes resulting from single, exogenously-given frameworks of rules.

This tendency to assume an under-institutionalized status quo makes it difficult to understand the contours and consequences of the increasingly complex institutionalization of much of international life, including trade relations. Errors of omission (failing to grapple with the variably institutionalized status quo) can become errors of commission, inferential errors that undermine various strands of the institutional research program. For example, we cannot infer autonomous institutional effects if we fail to account for institutional origins, since institutions themselves might be mere effects of deeper causes. These origins themselves cannot be properly understood unless they are grounded in a theory of choice among alternatives –why would actors ever create new institutions, when existing ones are available for use or for tailoring to problems at hand? Turning this question around, why would actors ever allow themselves to be constrained by single existing institutions, when anarchy permits unilateral action and dense institutionalization permits “forum shopping”—the strategic selection of favorable venues from among a plural menu of available options? In short, how are the various ways in which actors might approach institutions—their *institutional strategies*—bounded or conditioned by the availability of alternatives? The increasingly complexly institutionalized international environment demands, in brief, work that recognizes a multiplicity of options in the status quo and theorizes institutional choice and constraint in the context of existing alternatives (Lake 1999).

Trading Rules takes the possibility of a variably institutionalized status quo as a starting point and asks how actors come to choose institutions, *given a range of extant alternatives*. More narrowly, it begins to address the demands of a complex institutional environment by providing a theory of “forum shopping” the strategic selection of favorable venues from among a plural menu of alternatives— and testing it against empirical evidence drawn from within and among several key trade institutions. The chapter plan below sets forth the book’s agenda in greater detail.

The payoffs to considering “trading rules” are fourfold. First, such consideration will provide a theory of “forum shopping” to complement existing work on other institutional strategies. In this way, second, it will enhance our understanding of the governance of international trade by capturing a common but neglected way in which trade institutions come into play. Third, by “filling out” actors’ institutional-strategic repertoires, it will begin the process of setting scope conditions on and defining interrelationships among these diverse approaches to institutions. It will, then, inform our understandings of the conditions under which these other strategies come to be pursued and to have autonomous consequences. Fourth and finally, *Trading Rules* informs our understandings of rule governance in increasingly entangled domestic and international

political economies, with policy implications touching on the optimal use, change, selection and creation of institutions quite generally.

This prospectus unfolds in three further parts. Part III lists a table of contents for the book. Part IV provides a more detailed summary of each of the planned chapters. Part V concludes with a plan to bring *Trading Rules* to fruition.

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IV. CHAPTER DESCRIPTIONS

PART I. Framing

Institutional complexity characterizes the contemporary governance of international trade. The trade regime is densely populated, comprised of a wide range of regional, functional and global institutions. At the same time, this institutionalization is consequential, i.e., it matters in terms of shaping outcomes over which political actors have preferences. “Forum shopping”, the strategic selection of favorable venues from among a plural menu of alternatives, is a logical, important and underexplored consequence of this situation. Part I of Trading Rules establishes the background for thinking about these issues (chapter 1) and develops a theory of forum shopping within and among international institutions (chapter 2).

Chapter 1. Institutional Choices: Cooperation, Alternatives and Strategies

The increasingly complex institutionalization of the international system expands the range of alternatives confronting actors as they seek to reach agreements, resolve disputes, and generally to govern their interactions. What drives actors’ choices from among these many alternatives? Chapter 1, based on work co-authored with Duncan Snidal, postulates a repertoire of *institutional strategies* including unilateral action and *ad hoc* cooperation, the use of a given forum, the selection from among a fixed but plural menu of existing venues, the change of existing institutions and the creation of new ones. It identifies existing work on each strategy and specifies the conditions that drive choices from among this set. The key determinant of institutional strategy, in this account, is the relationship between the functional requirements of cooperation problems, the properties of institutions in the status quo, and the process costs associated with each way of approaching institutions. Generally, the better-suited status quo institutions are to the cooperation problem at hand, the more likely low-cost strategies of “use” and “selection” become. As this suitability declines, costlier strategies of “change” and “creation” become likelier.

This move then sets the stage for explaining the choice of specific strategies given the existence of the other options. While we know much about the unilateral, *ad hoc*, use, change and creation strategies, we know relatively less about the strategy of selection, which will form the focus of *Trading Rules*. Chapter 1 then sets forth the plan for the rest of the book and briefly foreshadows the main conclusions, the most important of which is that it is the combination of density (overlap) and consequentiality among institutional alternatives that truly drives “forum shopping,” with important consequences for processes, outcomes and our very understanding of the role of institutions in the increasingly intermeshed domestic and international political economies.

Chapter 2. Trading Rules: Forum Shopping as Institutional Selection

Chapter 2 begins with existing work on the topic of forum shopping, which has expanded in recent years but remains relatively underdeveloped. It begins by laying out the core concept as derived from legal studies of venue choice in jurisdictionally compound settings. It then works down to the more specific setting of international institutions and then to international trade governance. In this last connection, two existing theories merit special consideration. The first is Christina Davis's account of "setting the negotiation table", which emphasizes domestic political economy concerns, and especially the preferences and power of competing domestic interest groups. The second is Marc Busch's legal theory of forum choice focusing on the supply of and demand for binding precedents in trade dispute resolution.

Building from this and other work, Chapter 2 develops a positive theory of forum shopping focusing on the conditions under which, the ways in which, and the effects with which it occurs. The interaction of two sets of factors defines the conditions. On the supply-side, opportunities for forum shopping are defined by the existence of overlapping institutional alternatives. All other things being equal, as the number of alternatives increases, the likelihood of forum shopping increases. On the demand-side, incentives for forum shopping arise with the consequential differentiation of alternative venues. All other things being equal, the greater the differentiation of alternatives in terms of the consequences they produce (e.g., outcomes for plaintiffs and defendants), the greater the likelihood of forum shopping. In terms of the ways in which forum shopping unfolds, I argue that actors will engage in strategic issue definition, "framing" issues so as to fit them within favorable venues. In terms of outcomes, I argue that forum shopping reduces problem-solving efficiency, shapes substantive policy outcomes, and tends to favor skill and power, thus undermining the rule of law.

Chapter 2 concludes by setting up the empirical examination to be undertaken in Parts II and III of the book.

PART II. Intra-Institutional Perspectives

Scholars frequently suggest that the field has focused on a broad conception of international institutions (IIs) to the detriment of the internal dynamics and "actual workings" of international organizations (IOs). Trading Rules offers a unified logic of forum shopping that applies to institutional choice within and among institutions. Part II begins intra-organizationally, examining forum shopping within the world's two most highly-institutionalized trade regimes: the European Union (EU, chapter 3) and the World Trade Organization (WTO, chapter 4). Part III will then examine forum shopping among regimes.

Chapter 3. Procedural Politics: Forum Shopping Within the European Union

The European Union (EU) represents the most densely institutionalized trade regime in the international system. It is also extremely complex, characterized by a wide array of variably overlapping and consequential rules. It thus provides fertile terrain for thinking about the political economy of forum shopping. In the EU, forum shopping takes the

form of “procedural politics”, the everyday choice of lower-order rules from a fixed but plural menu of extant alternatives defined by the higher-order (treaty/constitutional) framework (Jupille 2004). This chapter substantially extends existing work on procedural politics earlier and later in time, generating new inferential opportunities by virtue of additional and substantial over-time variation on both the supply-side (the existence of multiple procedural alternatives) and the demand side (consequential differentiation among those alternatives). The EU thus provides multiple opportunities to test expectations about the conditions under which, the ways in which, and the effects with which forum shopping occurs within international institutions.

Chapter 4. Encoding Disputes: Forum Shopping Within the GATT/WTO

The 1947 General Agreement on Tariffs and Trade (GATT) and its successor from 1995, the World Trade Organization (WTO), have underpinned the international trade regime throughout the postwar period. This chapter examines the market for dispute settlement procedures within the GATT/WTO. Three periods of dispute settlement have characterized the GATT/WTO, providing considerable variation on the “supply side” of the forum shopping equation. In the first period, running until 1979, the 1947 GATT dispute settlement provisions pertained. The 1979-1994 period was governed by the so-called Tokyo Round agreements, which had instituted a series of plurilateral “codes” governing, among other things, disputes arising in specific sectors (e.g., government procurement, technical barriers to trade). During this period, some issue areas fell within the ambit both of GATT 1947 dispute settlement procedures and under specific procedures set forth in the Tokyo Round Codes. This gave rise to new opportunities for forum shopping which had previously been absent. The third period dates from the 1995 founding of the WTO, in which a single streamlined dispute settlement procedure applies. I thus expect variations in forum shopping over time as a function of these supply-side differences (with more forum shopping during the Tokyo Round period), as well as predictable patterns of variation within the Tokyo Round period itself. Confirming evidence will substantiate earlier findings from the EU, suggesting that systematic forum shopping is not just an artifact of that unusually rule-governed regime.

PART III. Inter-Institutional Perspectives

Having examined forum shopping within international institutions, I proceed in part III to examine forum shopping among regimes differentiated both vertically (nested) and horizontally (linked). This examination both generalizes the intra-institutional account and provides validation across a broader range of less deeply institutionalized settings.

Chapter 5. Nested Regimes: Regional and Global Rules for Trade Dispute Settlement

The 1947 GATT foresaw the possibility of Preferential Trade Arrangements (PTAs), and specifically Regional Trade Agreements (RTAs), but this has not meant that the relationship between these “nested” arrangements has not been difficult (on nesting see Aggarwal 1985, 1998; Alter and Meunier 2006). While most analysts have focused on

the compatibility of regional agreement with global norms, analysts have recently turned attention to the possibility that strategic actors might forum shop among regional and global trade dispute settlement rules. This chapter will examine these dynamics, with special attention on the key arrangements within the Western Hemisphere, the North American Free Trade Agreement (NAFTA) and the Common Market of the South (MERCOSUR). Given a potential trade dispute among partners to both regional and global agreements, how do they choose a forum within which to settle? Chapter 5 argues that consequential differentiation among alternative venues –i.e., variation on the “supply side”—represents a key determinant of forum shopping. Whereas the relatively consequential NAFTA dispute resolution mechanism provides a real alternative to *ad hoc* bilateral or global dispute resolution, the moribund Mercosur arrangements offer no real alternative. Thus, I expect to find more extensive pursuit of forum shopping strategies (i.e., fuller consideration of the regional alternative to bilateral or global venues) in the former than in the latter case.

Chapter 6. Linked Regimes: Trade and Multilateral Environmental Agreements (MEAs)

The relationship between multilateral environmental agreements (MEAs) and the trade regime has vexed policymakers since the emergence of an environmental agenda in the 1970s. The use of trade-related environmental measures (TREM) to mitigate the worst ecological consequences of certain economic activities –such as the production of ozone-depleting chlorofluorocarbons (CFCs) or the trade of recyclable industrial waste— frequently comes into conflict with the trade regime’s emphasis on the free movement of goods and services. Yet, when states, firms, NGOs and others interact with respect to such questions, weak or unclear jurisdictional requirements open the question of forum choice and raise the specter of forum shopping. The most straightforward proposition about the determinants of forum shopping in such situations focus on the demand-side: actors preferring to prioritize environmental (trade) protection will tend to favor the selection of environmental fora, while those prioritizing free movement will tend to promote use of the general (or, where RTAs exist, regional) trade regimes. Chapter 6 will test this and related propositions against data to be determined and will conclude with briefer empirical probes into trade-linked regimes in the areas of human rights and social standards.

PART IV. Conclusions

Chapter 7. Conclusion: Institutional Complexity, Forum Shopping and Global Governance

Students of comparative and international political economy have long since recognized that complex and multilevel interactions increasingly shape economic and political outcomes of interest. Yet understandings of the increasingly complex institutional environment governing those interactions have not kept pace. *Trading Rules* focuses on one aspect of this problem by considering the conditions under which, the ways in which and the effects with which states, firms and NGOs “forum shop” – strategically select

favorable venues from among a plural menu of extant alternatives—within the increasingly complex international trade regime. It argues that forum shopping 1) responds to the opportunities created by overlapping venues and the incentives provided by their differentiation; 2) unfolds through processes of strategic issue framing; and 3) decreases problem solving efficiency, influences political outcomes and tends to undermine the rule of law. The book tests these arguments against forum shopping within the European Union (EU) and World Trade Organization (WTO) as well as among regional vs. global and economic vs. environmental organizations; explores the diverse processes by which forum shopping unfolds; and examines its consequences for trade policy outcomes and global governance.

This move yields a fourfold payoff. First, it provides a theory of “forum shopping” to complement existing work on other institutional strategies. In this way, second, it enhances our understanding of the governance of international trade by capturing a common but neglected way in which trade institutions come into play. Third, by “filling out” actors’ institutional-strategic repertoires, it begins the process of setting scope conditions on and defining interrelationships among these diverse approaches to institutions, identifying not just how these strategies operate (and with what consequences), but *when* they will do so. Fourth and finally, *Trading Rules* informs our understandings of rule governance in increasingly entangled domestic and international political economies, with policy implications touching on the optimal use, change, selection and creation of institutions quite generally.

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V. WORK PLAN

I foresee the following schedule for completion of the project just laid out.

Time period	Planned Activities
Present – Spring 2007	<ul style="list-style-type: none"> • Coding of EU data and chapter 3 write-up for presentation at EUSA and APSA 2007 meetings; • Coding of WTO data and chapter 4 write-up for presentation at APSA 2007 meetings
Spring-Fall 2007	<ul style="list-style-type: none"> • Revisions of chapters 3 and 4; exploratory research for chapters 5 and 6. • Grant proposal for 2008 fieldwork.
Spring 2008	<ul style="list-style-type: none"> • Fieldwork during “research semester”: Brussels (EU); Geneva (WTO); Asunción, Montevideo, and possibly national /financial centers (Mercosur); Washington, DC, Ottawa and Mexico City (NAFTA); secretariats TBD (MEAs).
Summer-Fall 2008	<ul style="list-style-type: none"> • Write-up of a first draft for selective presentation at conferences and complete submission to a major university press in early 2009.