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*Dynamic Process of Transnational Dispute Settlement as an Autopoietic System?
Implications of North American Experiences to East Asia*

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[Abstract]

This paper aims at offering an alternative approach to understand complex process of dispute settlement by focusing on experiences in North American region, in order to find a way forward for the Asian region. It specifically deals with the recent three disputes on sweeteners, cement and lumber, respectively, each of which went through sequencing and parallel dispute settlement (DS) proceedings and finally resulted in a comprehensive deal between the parties in conflict. While a mutually agreed solution among the parties in conflicts is generally encouraged, it raises important questions as regards the effectiveness of the settlement of international dispute. This paper addresses two issues, namely, the *relationships* between separate DS proceedings and the *role* of separate DS proceedings for the final settlement of the dispute. By referring to theoretical developments regarding the autopoiesis of law and networking, it found that parallel DS proceedings pursued by the parties in conflict were interconnected with one another, and that these DS proceedings played a constructive role for the parties to reach comprehensive agreement to settle the dispute across the board. This paper then found some lessons from the North American experience for the future arrangements of dispute settlement in East Asian region.

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If you govern the people *legalistically* and regulate people's behavior by punishment, they will try to avoid it without having a sense of shame. If you govern them by means of *virtue* and regulate people's behavior with *propriety*, they will have a sense of shame, and correct themselves.

Confucius, *Lunyu* (5th Century BC), Chapter 2, Verse 3. (Emphases added.)

I. Introduction

Potential conflicts between the Regional Trade Agreements (RTAs) and the Agreement Establishing the World Trade Organization (the WTO Agreement)¹ has long been a subject of academic as well as practitioners' concern, as a typical example of the 'fragmentation' of international law. However, the 'difficulties arising from the diversification and expansion of international law'² is what states make of it. Instead of focusing solely on its negative effects, we should look more carefully into the state practice, *i.e.*, how states actually deal with overlapping norms and fragmented dispute settlement (DS) mechanisms, absent a hierarchical order or coordinating mechanisms.

From this perspective, recent experience in North American region provides us an interesting example. In the recent three trade disputes among contracting parties of the North American Free Trade Agreement (NAFTA), a single measure triggered multidimensional complex dispute. While parties sought solution of the dispute through multiple DS proceedings under the NAFTA and the WTO in sequence, then, after years of dispute, they reached a comprehensive agreement that settled the dispute across the board. In two of them, the comprehensive deal was done *after* the issuance of binding DS rulings under the WTO or the NAFTA in order to overrides them.

It would be difficult to identify exact *reasons* why the parties in conflict reached a settlement at last, since a number of different factors may come into play under the specific circumstances of each case. Instead, this paper tries to explore the architecture and possible *reconfigurations* of the process in which parties managed to settle the multi-dimensional complex disputes. It will help us to understand the role of DS mechanism for the settlement of disputes among East Asian countries.

¹ See Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: the WTO-NAFTA 'Spaghetti Bowl' is Cooking', 9(1) *Journal of International Economic Law* (2006), 197.

² *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006.

The primary objective of this paper is to unveil the process of dispute settlement between two out of three NAFTA partners, which go through sequencing and parallel DS proceedings and result in a comprehensive deal. While a mutually agreed solution among the parties in conflicts is generally encouraged, it raises important questions as regards the effectiveness of the settlement of international dispute. Two questions now arise. The first one relates to the relationships between separate DS proceedings: do these fora operate separately, without any connection between each other? If the answer is affirmative, the fragmentation of dispute settlement mechanism would apparently do more harm than good, if any, for an effective settlement of dispute, which asks us to pursue the reduction of the fragmentation. Second question relates to the role of separate DS proceedings to the settlement of the dispute. Do the DS rulings become useless where the parties finally reach a comprehensive deal? If the answer is affirmative, again, it means fragmented DS mechanism has only a limited effectiveness. The secondary objective of this paper is find lessons for East Asian countries from the North American experience.

Section II of this paper outlines the framework of the process of dispute settlement, then looks into three major trade disputes fought between two out of the three NAFTA countries: the *Sweeteners* dispute (US and Mexico), the *Cement* dispute (Mexico and US), and the *Lumber* dispute (Canada and US). While having few additional inputs in terms of facts and specific DS rulings, this paper tries to illustrate the holistic picture of disputes at hand. Section III goes into theoretical investigation of the relationship between segmented DS proceedings, and the relationship between the comprehensive agreement and the previous DS rulings. Finally, Section IV summarizes analyses in the preceding chapters. In addition, we take a brief look at the lesson that could affect the future of dispute settlement among East Asian countries.

Summing up, first of all, our answer is no to both of the above two questions. By focusing on the dynamic process of the dispute settlement as the following, we find spontaneous normative networks that stimulate comprehensive settlement of the multi-faceted dispute. It is this kind of mutual supportiveness of DS proceedings and negotiated deals is that the experience in North America gives East Asian countries useful insights for developing a future framework for the effective settlement of disputes within the region. This finding confirms Professor Nakagawa's analysis on the positive role of negotiated deals for the settlement of trade disputes in East Asia.³

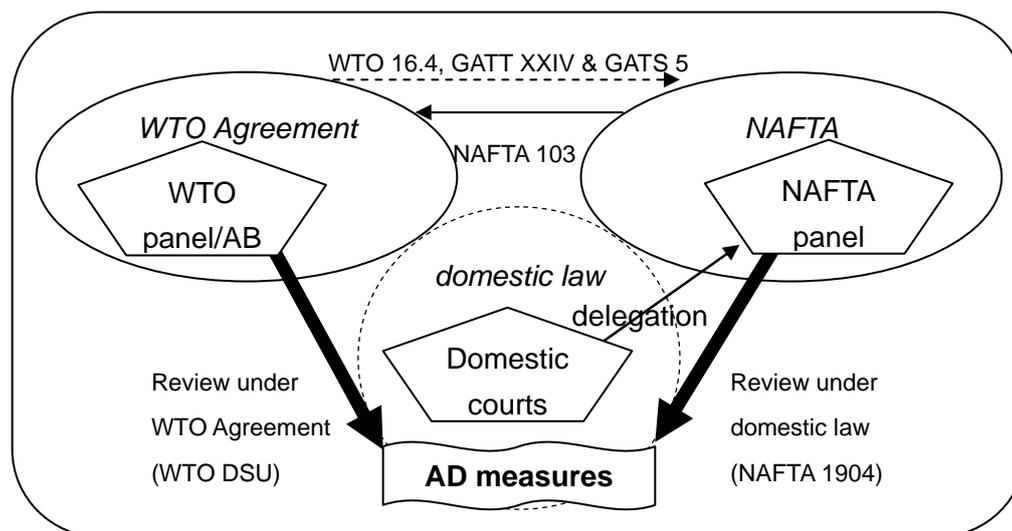
³ Junji Nakagawa, 'No More Negotiated Deals?: Settlement of Trade and Investment Disputes in East Asia,' 10 *Journal of International Economic Law*, 837-67, at 867.

II. Experiences in North America

A. Structures of the Dispute Settlement

Let us illustrate below the relevant structure of the DS mechanisms (Figure 1).

Figure 1. Multidimensional jurisdictions for NAFTA countries



In each case, the cause of the international dispute is a single act, that is, the anti-dumping (AD) or countervailing duty (CVD) measures introduced by a NAFTA country against imports from a NAFTA partner. It is usually the case that trade disputes involving AD measures are complex, multi-dimensional, and multi-faceted, since they involve a variety of actors (including private firms and governments) as well as a variety of norms (including municipal laws, the NAFTA and the WTO Agreement).

While all NAFTA countries are members of the WTO as well, the WTO Agreement and the NAFTA are independent of each other. While each WTO member is required to make their domestic laws in conformity with the WTO Agreement,⁴ the NAFTA has a priority over the WTO Agreement among the NAFTA partners (see horizontal opposing arrows between two ellipses in Figure 1). Moreover, there are no effective allocation of jurisdiction between the DS mechanisms under the WTO and the NAFTA. Even if we assume that the relevant provisions of domestic law and the NAFTA are consistent with the WTO Agreement, there is a risk of conflict between the NAFTA rulings and the WTO rulings. For example, a dispute arising from the identical action may be divided into parts, once they are filed to different tribunals that apply different laws to different aspects of the dispute according the legal formulation of each segment. Then, that measure may

⁴ Article 16.4 of the Marrakesh Agreement Establishing the WTO, Article XXIV of the GATT 1994, and Article 5 of the General Agreement on Trade in Services (GATS).

be found inconsistent with the NAFTA but consistent with the WTO Agreement in a manner contradictory to each other, since the NAFTA dispute settlement panel is independent of the counterpart under the WTO Agreement. Thus, a measure taken by a NAFTA country can be subject to duplicate jurisdiction between the WTO and the NAFTA DS mechanisms (see two downswing arrows in Figure 1).

From the above description of the complex structure for settling disputes, there are considerable risks of conflict in the application of the NAFTA and the WTO Agreement. This brings us to the next question, that is, how, in reality, NAFTA countries manage the risks associated with the lack of coherence in DS mechanisms.

B. Process of the Dispute Settlement

Our first mandate is to examine how (not why) long-lasting complex disputes resulted in solution through a comprehensive agreement, notwithstanding a series of preceding DS proceedings and rulings. We look into the process of each dispute in the following subsections. The numbers listed in Figures 2 to 4 indicate stages of the dispute. Each item represents measures in dispute or cases filed to the DS mechanisms. Bracketed items represent DS proceedings that did not result in the issuance of final rulings before reaching to the comprehensive agreement. Phases are aligned in the chronological order by the beginning time of the procedure.

1. *Sweeteners* dispute

The sequence of this dispute is shown in the diagram below (See Figure 2).

Figure 2. Process of the *Sweeteners* dispute (the US vs. Mexico)

	1	2	3	4	5	6	7	8
	1998	1998-2001	1998-2000	2000-	2000-01	2002	2004-06	2006
WTO			US > Mex ADA		US > Mex ADA		US > Mex GATT	Sugar Deal
NAFTA		US > Mex Ch. 19		[Mex>US Ch. 20]				
disputed measures	Mex AD					Mex Int. tax		

An anti-dumping measure Mexico imposed in 1998 on sweeteners (High Fructose Corn Syrup: hereinafter HFCS) from the US was the trigger of another long and complex trade dispute (Phase 1).⁵

⁵ *Resolución final de la investigación antidumping sobre las importaciones de jarabe de maíz de*

In response to the AD measure, the US requested consultations to the NAFTA DS procedure under Chapter 19 of the NAFTA (Phase 2).⁶ The reason why the US brought actions under the NAFTA first is because Mexican measure intends to counteract US's alleged breach of the NAFTA commitments to open its market to Mexican sugar products.⁷ However, a series of delay in procedural matters led to considerable delays of hearings and the final decision until 2001. Thus, the US shifted its focus to the WTO dispute settlement procedure (Phase 3), and won the case in 2000.⁸ While Mexico filed a separate motion against the US under the Chapter 20 of the NAFTA concerning the US obligation on the market access (Phase 4), the procedure did not make progress as well owing to technical problems regarding the composition of the panel. The US also won another WTO panel case later, as to Mexico's implementation of the first WTO recommendations (Phase 5).⁹

In accordance with the WTO rulings, Mexico lifted the AD measure, but introduced an internal tax on certain sweeteners, including HFCS, instead (Phase 6).¹⁰ While the internal tax is different from the original AD duty, they have similar effect in substance. Swiftly responding to that measure, the US filed another case to the WTO DS procedure, and the WTO panel and Appellate Body found in favor of the US (Phase 7).¹¹ Following the adoption of third WTO recommendations in March 2006, both parties reached agreement on its implementation in June 2006.¹² After that, both parties reached a comprehensive agreement to resolve the dispute across the board (hereinafter the Sweeteners Agreement) (Phase 8).¹³

alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.99 y 1702.60.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.

⁶ NAFTA Panel report, *Mexico - Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup Originating from the United States of America*, MEX-USA-98-1904-01, filed on 20 February 1998.

⁷ Alice Vacek-Aranda, 'Sugar Wars: Dispute Settlement under NAFTA and the WTO as Seen through the Lens of the HFCS Case, and Its Effects on U.S.-Mexican Relations,' 12 *Texas Hispanic Journal of Law and Policy* (2006), 121-160.

⁸ WTO Panel report, *Mexico - Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, Report of the Panel, WT/DS132/R, adopted on 24 February 2000.

⁹ WTO Appellate Body report, *Mexico - Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Recourse to Article 21.5 of the DSU by the United States)*, Report of the Appellate Body, WT/DS132/AB/RW, adopted on 21 November 2001.

¹⁰ WTO Panel report, *Mexico - Tax Measures on Soft Drinks and other Beverages*, Report of the Panel, WT/DS308/R, 7 October 2005, para. 2.2.

¹¹ WTO Appellate Body report, *Mexico - Tax Measures on Soft Drinks and other Beverages*, Report of the Appellate Body, WT/DS308/AB/R, adopted on 24 March 2006.

¹² *Mexico - Tax Measures on Soft Drinks and other Beverages*, Agreement under Article 21.3(b) of the DSU/WT/DS308/15, 5 June 2006.

¹³ *Exchange of diplomatic letters between Undersecretary Villalobos and Ambassador Crowder*, 27 July 2006.

2. *Cement dispute*

The US imposed AD duties on the imports of gray portland cement from Mexico in 1990, upon request from its domestic industry (Phase 1).¹⁴

Figure 3. Process of the *Cement dispute* (Mexico vs. the US)

	1	2	3	4	5	6	7
	1990	1990-92	1990-92	1995-96	1998-2001	2003-06	2006
GATT/WTO			Mex>US ADC (1992)			[Mex>US GATT]	Deal
NAFTA				Mex>US Ch. 19 (1996)	Mex>US Ch. 19 (2001)		
domestic courts		Mex>US Admin. suit (1992)					
disputed measures	US AD						

Mexican producers filed a case to the US court against the ITC's injury determination, in vain (Phase 2).¹⁵ In parallel, Mexican government made recourse to the DS procedure under the GATT Tokyo Round Anti-Dumping Code (Phase 3).¹⁶ Although the GATT panel found DOC's initiation of the AD investigation as defective and recommended the US to revoke the AD measure,¹⁷ the panel report was never adopted.

Then, Mexico filed another case to the NAFTA DS procedure upon its entrance into force in January 1994 (Phase 2). While the NAFTA panel found in favor of Mexico with regard to administrative review determinations, it rejected Mexico's main claim regarding the validity of the original determination on the basis of the following three reasons: that the Mexican producers failed to raise claims against the DOC's determination promptly; that the NAFTA panel does not have authority to revoke the determinations issued before the NAFTA came into force; and

¹⁴ *Gray Portland Cement and Clinker from Mexico*, 55 Fed. Reg. 35433 (Aug. 30, 1990).

¹⁵ *CEMEX, S.A. v. United States*, 790 F. Supp. 290 (Ct. Int'l Trade 1992) *aff'd*, 989 F.2d 1202 (Fed. Cir. 1993).

¹⁶ *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, done at Geneva, 12 April 1979; entered into force January 1, 1980. 31 U.S.T. 4919; T.I.A.S. 9650; 1186 U.N.T.S. 2.

¹⁷ GATT Panel report, *United States - Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, Report of the Panel, ADP/82, issued on 7 September 1992 (unadopted).

that GATT DS rulings, whether adopted or not, does not have a binding effect (Phase 4).¹⁸ Mexico continued to bring the case against every administrative review determination to the NAFTA panel, in vain based on a similar reasoning (Phase 5).¹⁹

Thus, Mexico filed a case before the WTO DS panel (Phase 6).²⁰ Nearly at the end of the WTO panel proceeding, in March 2006, both governments reached a comprehensive agreement to resolve the *Cement* dispute across the board (hereinafter Cement Agreement) (Phase 7).²¹

Above all, the Cement Agreement settles or suspends the litigations before the NAFTA and the WTO. Accordingly, the WTO panel was suspended in 2006 and finally lapsed as of 14 January 2007.²² In addition, in accordance with the Agreement, the US domestic industries requested rescission of the administrative review for the most recent period. The US Department of Commerce compromised pending claims to AD duties for entries during that period, as well as entries of Mexican cement that entered the US from August 1, 2005 through April 2, 2006. On the other hand, the Agreement provides mechanisms of export restriction and export license under the regulations of Mexican government.

The Cement Agreement provided that if all interested parties had abided by its terms, the US Department of Commerce would terminate the Cement Agreement on March 31, 2009.²³ Since all the obligations of the Cement Agreement were fulfilled, the US Department of Commerce terminated the Cement Agreement on 31 March 2009, accompanied by the revocation of AD measures in force at that time and the expiration of export licensing scheme on 12 May 2009.²⁴

3. Lumber dispute

It was the AD and countervailing duty (CVD) measures imposed by the US authorities in May 2002 on softwood lumber from Canada,²⁵ that triggered another round of the long-lasting dispute between the US and Canada (See Figure 3 below, Phase 1).²⁶ The imposition of the AD/CVD measure followed the expiry of the

¹⁸ *Gray Portland Cement and Clinker from Mexico*, USA-95-1904-02, 13 September 1996.

¹⁹ *Gray Portland Cement and Clinker from Mexico*, USA-97-1904-02, 4 December 1998;

²⁰ *United States - Anti-Dumping Measures on Cement from Mexico*, Request for Consultations by Mexico, WT/DS281/1, 11 February 2003.

²¹ *Gray Portland Cement and Clinker from Mexico: Agreement Between the Office of the United States Trade Representative, The United States Department of Commerce and Secretaria de Economia of Mexico on Trade in Cement*, reprinted in 71 FR 13082 (14 March 2006).

²² WT/DS281/7, 23 March 2007.

²³ Article XI of the Cement Agreement.

²⁴ *Rules: Mexican Cement Import Licensing System*, 74 FR 22094 (12 May 2009). See also the DOC website, <http://ia.ita.doc.gov/cement-agreement/index.html>.

²⁵ Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15545 (2 April 2002).

²⁶ Chi Carmody, 'Softwood Lumber Dispute (2001–2006)', 100 *Am. J.I.L.* 664 (2006).

Softwood Lumber Agreement 1996,²⁷ which was the result of the previous dispute, commonly known as the *Lumber II* dispute.²⁸

Figure 4. Process of the *Lumber* dispute (Canada vs. the US)

	1	2	3	4	5	6	7	8	9
	2002	2002-06	2002-04	2005-06	2005-06	2004-07	2005-06	2006	2007-09
WTO DS			Can > US ADA	Can > US ASCM				Softwood Lumber Agreement (SLA 2006)	
NAFTA DS		Can > US Ch. 19				Ca firm > US Ch. 11			
Domestic courts		Can. firm > US AD law			Can > US APA		US firm > US Const.		
LCIA arbitration									US > Ca SLA
Disputed measures	AD/CVD								

Soon after the imposition of the measures, from June 2002, Canada filed litigations to the NAFTA DS panels over three factors (dumping determination, injury determination and CVD determination) (Phase 2). It was the beginning of the third round of US-Canadian dispute on softwood lumber. At last, Canada obtained three binding rulings that are favorable to it in part. On the other hand, however, it also filed six parallel cases to the WTO DS procedures in April 2003 (Phases 3 and 4), pending the NAFTA DS proceedings. Canadian industries and the government of Canada also filed a lawsuit to the Court of International Trade (Phase 5).²⁹

Canadian producers further filed separate cases to the investor-state arbitration under Chapter 11 of the NAFTA (Phase 6).³⁰ On the other hand, the US association, the Coalition for Fair Lumber Imports, filed a case arguing that the

²⁷ Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America, done at Washington, 29 May 29 1996.

²⁸ This paper deals with the so-called *Lumber III* dispute as a distinct one from the preceding *Lumber I* and *Lumber II* disputes.

²⁹ *Tembec, Inc. v. United States*, 2006 Ct. Intl. Trade LEXIS 107 (CIT, 21 July 2006); *Canfor Corporation v. United States*; *Terminal Forest Products Ltd. v. United States*,

³⁰ As regards its effect on the investor-state dispute, see Matthew T. Simpson, 'Chopping Away at Chapter 11: The Softwood Lumber Agreement's Effect on the Nafta Investor-State Dispute Resolution Mechanism', 22 *American University International Law Review*, 479 (2007).

NAFTA panel review provisions under the NAFTA Implementation Act of 1993 violated the Due Process Clause, the Appointments Clause, Article III, and other provisions of the U.S. Constitution (Phase 7).³¹

Finally, in November 2006, the two governments reached a comprehensive agreement to resolve the *Lumber* dispute across the board (Phase 8). Under this treaty, the US agreed to terminate AD/CVD measures in question retroactively and refund duties collected after 2002. Canada agreed to establish export monitoring system including quotas to support export volume and price of Canadian lumber. Both countries agreed to terminate six pending WTO cases (DS236, DS247, DS257, DS264, DS277, and DS311).³² On the other hand, the SLA did not require termination of NAFTA Chapter Eleven claims, according to the amendment on 12 October 2006.³³

The SLA has its own dispute settlement mechanism assigning the London Court of International Arbitration (LCIA) as the exclusive forum, which the US used as early as October 2007, slightly after a year from the entrance into force of the SLA 2006 (Phase 9). The legal place of arbitration is London, the UK.³⁴

The US requested first arbitration arguing that Canada violated the SLA in calculating export quotas. The LCIA issued arbitral awards in February 2009 for the first request, which found violations of the SLA on the part of Canada and ordered to provide compensatory remedy.³⁵ In January 2008, the US posted a second request for arbitration was in January 2008, concerning the anti-circumvention clause. An award for the second case is expected to be issued before August 2009.

III. Possible Rationales

³¹ *Coalition for Fair Lumber Imports Executive Committee v. United States*, No. 05-1366 (D.C. Circuit, 12 December 2006). It was after the entrance into effect of the comprehensive agreement that the US Court of Appeals (D.C. Circuit) declared the lack of jurisdiction over the claim.

³² *United States – Final Dumping Determination on Softwood Lumber from Canada*, Notification of Mutually Agreed Solution, WT/DS264/29 (16 November 2006).

³³ Annex 2A of the Agreement between the Government of Canada and the Government of the United States of America Amending the Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America Done at Ottawa on 12 September 2006, signed on 12 October 2006. See *Tembec, Inc. v. United States* (D.D.C, August 14, 2008), footnote 2.

³⁴ Article XIV:13 of the SLA 2006.

³⁵ London Court of International Arbitration, Award on Remedies, Case No. 7941 (US v. Canada), 23 February 2009. Full text of the award is available at <http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/USAvCanada09219AwardonRemedies.pdf> or <http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/2006-softwood-lumber-agreement>.

A. Common Features in the Three Disputes

The process of dispute settlement shown in the preceding chapter illustrates interesting phenomena in the settlement of international disputes. The three trade disputes have several common features: they are disputes arising from AD/CVD measures; each of them caused a decades-long serious confrontation between the NAFTA partners; political and economic stakes were so high that parties were not able to settle the dispute by negotiation or consultation, without using the DS proceedings; the dispute was divided into parts and parcel in the course of parallel DS procedures under the WTO Agreement or the NAFTA; and finally, each of them resulted in a comprehensive agreement that settle the dispute as a whole, without regard to the preceding DS proceedings.

The following two sections deals with two questions we pointed out in the introductory section, i.e., the relationship between plural DS proceedings and their role for the settlement of dispute, respectively.

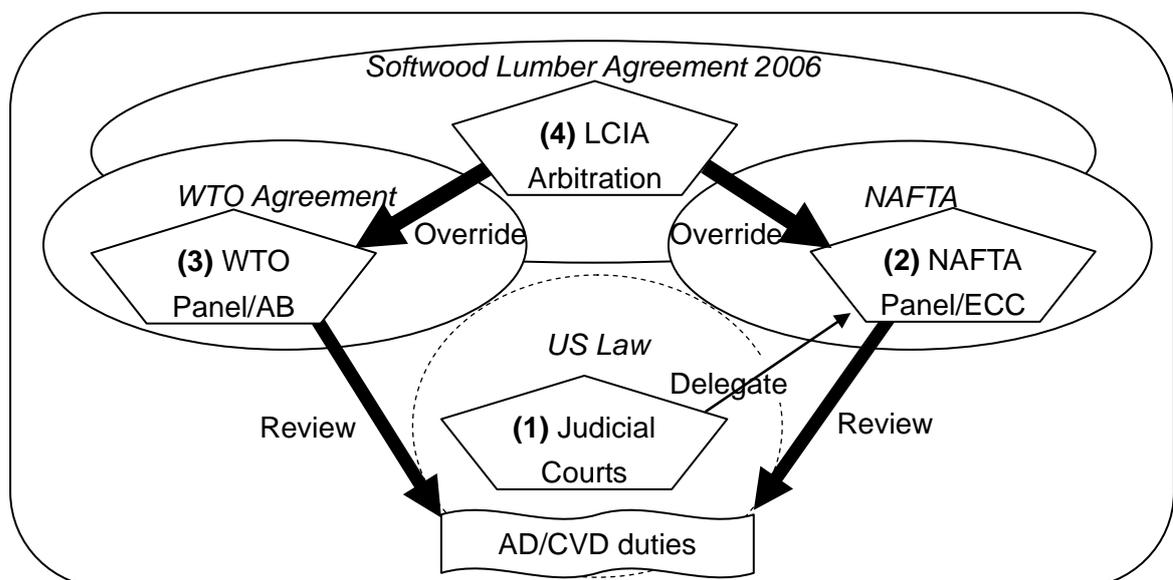
B. Relationship between Concurrent DS Proceedings

1. Can there be a relationship?

The first question is as follows: how do the DS proceedings relate to each other during the course of the back-to-back, parallel recourse to the different fora?

Before looking into specific theoretical framework, we should determine whether there exists a 'process' in the first place. DS procedures under the WTO and the NAFTA may have no bearing with one another. If we stick to the formal separation of treaties and DS proceedings without looking into the actual process of dispute settlement, it leads to the approach that the sequence of the DS proceedings is just a coincidence and has no direct influence to other DS proceeding as well as the comprehensive deal.

Figure 5. Multidimensional jurisdictions in the *Lumber* dispute



It is true that DS procedures under the WTO and the NAFTA are independent of each other. However, there are significant linkages between them and cross references in their rulings. First of all, in the cases where DS rulings were issued, many of them referred to the relevant rulings of their counterparts. Secondly, while Article 2005 of the NAFTA prohibits forum shopping, NAFTA panels and the WTO panels do not reject their jurisdiction based on this provision.³⁶ Thus, to see concurrent DS procedures irrelevant to each other does not fit the reality. We need some theoretical framework that explains the phenomenon that was shown to above.

2. Possible reconfigurations

(a) Political science approach

The first possible approach sees the selection and escalation of the dispute as the result of rational calculation. According to Busch, complaining states choose whether or not to file cases to which for a on the basis of the estimates of the rulings.³⁷ As indicated by the auxiliary lines added to the diagrams below, it seems as if the escalation of the dispute from the NAFTA DS procedures to the WTO DS procedures led the dispute to the comprehensive agreement between the disputing parties (See Figures 6-8).

Figure 6. Process of the *Sweeteners* dispute (the US vs. Mexico)

	1	2	3	4	5	6	7	8
	1998	1998-2001	1998-2000	2000-	2000-01	2002	2004-06	2006
WTO			US > Mex ADA (2000)		US > Mex ADA (2001)		US > Mex GATT	Deal
NAFTA		US > Mex Ch. 19 (2001)		[Mex>US Ch. 20]				
disputed measures	Mex AD					Mex Int. tax		

Figure 7. Process of the *Cement* dispute (Mexico vs. the US)

	1	2	3	4	5	6	7
	1990	1990-92	1990-92	1995-96	1998-2001	2003-06	2006

³⁶ Pauwelyn (2006), *supra* n 1, at 201.

³⁷ Marc L. Busch, 'Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade,' 61 *International Organization* 735 (2007), 737?.

GATT/WTO			Mex>US ADC (1992)				[Mex>US GATT]	Deal
NAFTA				Mex>US Ch. 19 (1996)	Mex>US Ch. 19 (2001)			
domestic courts		Mex>US Admin. suit (1992)						
disputed measures	US AD							

Figure 8. Process of the *Lumber* dispute (Canada vs. the US)

	1	2	3	4	5	6	7	8	9	
	2002	2002-06	2002-04	2005-06	2005-06	2004-07	2005-06	2006	2007-09	
WTO DS			Can > US ADA	Can > US ASCM				Softwood Lumber Agreement (SLA 2006)		
NAFTA DS		Can > US Ch. 19				Ca firm > US Ch. 11				
Domestic courts		Ca firm > US AD law			Can > US APA		US firm > US US Const.			
LCIA arbitration										US > Ca SLA
Disputed measures	AD/CVD									

At first sight, this approach can explain the process of the dispute settlement of the first two cases. If this is the case, to make recourse to the WTO proceeding before going to the NAFTA proceeding is the answer to avoid complexity in process of dispute settlement. However, this approach does not fit the process in the *Lumber* case, especially in which DS rulings are inconsistent with each other.³⁸ In addition, the WTO procedure does not override the NAFTA counterpart or resolve the dispute as a whole, as the disputing parties are well aware of. Thus, this approach does not

³⁸ More specifically, there are inconsistencies between the WTO and NAFTA dispute settlement panel findings in the evaluation of injury determination and the implementation measure in response to the original findings. These inconsistent findings generate 'conflict' in the sense that the subject country cannot obey these findings simultaneously.

fully explain the process we saw above (see Section II), since the superiority of the WTO it assumes does not exist.

(b) *Normative integrity approach*

The second approach sees the absence of integrity as the main reason of complexity. According to Pauwelyn, the WTO Agreement and the NAFTA should be interpreted in a coordinate manner to allocate proper jurisdictions to either forum in dealing with each dispute. In addition, he argues for the application of international ‘comity’ on the part of both panels under the WTO and the NAFTA.³⁹

On the one hand, the WTO members are required to ensure the conformity of its laws with the obligations under the WTO Agreement.⁴⁰ In the course of the WTO DS proceedings as well, provisions of the member country applicable to that measure are deemed to be consistent with the WTO Agreement unless the provisions themselves are subject to review. On the other hand, the NAFTA panel under its Chapter 19 applies the law of the country that introduced contested measures. Thus, according to this approach, both the WTO panel and the NAFTA panel apply substantially the same norm, that is, the WTO Agreement and the domestic law referred to by the NAFTA that is deemed to be compatible with the WTO Agreement, respectively. It sees the processes of the three recent cases as anomaly.

It is true that, in each case before us, the language of the relevant provisions of U.S. antidumping law is identical or at least closely similar to the GATT/WTO Agreement. Thus, according to this approach, WTO panels and NAFTA panels should have reached consistent reasoning and rulings in evaluating the same action. Thus, the NAFTA panel might have referred to the WTO Agreement in interpreting relevant domestic law, and even gave way to the WTO panel's interpretation of that Agreement.

However, it does not mean the DS panels are required to reach consistent rulings in every case in accordance with the WTO and the NAFTA. While the WTO panels and NAFTA panels sometimes referred to the proceedings or rulings of one another, they do not defer to those of the other tribunal, or try to interpret their applicable laws in a consistent manner. Thus, we cannot adopt this approach, since it tries to explain the DS process on the basis of the relationship between the substantive norms (WTO Agreement and the NAFTA) that is preferable but not existent.

(c) *Networking approach*

Another alternative is the ‘networking’ approach elaborated by Gunther Teubner in the context of seeking the role of law in the era of globalization.⁴¹ This approach is

³⁹ Pauwelyn (2006), *supra* no 1, at 202.

⁴⁰ Marrakesh Agreement Establishing the WTO, Article XVI:4.

⁴¹ Wilfred Jenks addressed this issue from a similar perspective in his earlier contribution concerning the conflict of treaties. See C. Wilfred Jenks, ‘The Conflict of Law-Making

based on his earlier scrutiny on autopoietic, which literally means ‘self-producing’,⁴² systems. The reason why this paper takes up autopoiesis of law is not because several scholars apply it to international legal system,⁴³ but because it consciously deals with a systemic law of conflict within or among autopoietic system.⁴⁴

Networking approach does not assume hierarchical or harmonized integrity of different the legal systems, but focuses on the networks between the state parties which are in a double bind situation between WTO and the NAFTA.⁴⁵ According to Fischer-Lescano and Teubner,

Beyond the alternative of either central coordination or autarky of closed regimes, we are left with a *network* logic. It is characterized by combining two conflicting demands with one another. On the one hand one finds in networks the autonomous and decentralized reflections of networks nodes which seek compatibility with their human and natural environments. On the other, in networks linkages exist between these decentralized reflections in the sense that nodes observe each other closely.⁴⁶

It focuses on the linkage process rather than the substantive relationship of decentralized norms.⁴⁷ According to this approach, it is not institutional settings but the process of interactive connections between actors that provide operative order in the fragmented world.⁴⁸ It finds the maintenance of ‘weak compatibility’ and lines of communication to be useful and appropriate, in order to deal with co-existing legal systems including treaty regimes.⁴⁹

This approach seems to fit the dispute settlement process of the above three

Treaties,’ 30 *British Year Book of International Law*, 403 (1953).

⁴² John Mingers, *Self-Producing Systems: Implications and Applications of Autopoiesis*, Plenum Press, New York, 1995, at 11.

⁴³ See Anthony D’Amato, ‘International Law as and Autopoietic System,’ in Wolfrum and Röben eds., *Developments of International Law in Treaty Making* (Berlin: Springer, 2005), 335.

⁴⁴ Gunther Teubner (1993), *Law as an Autopoietic System* (London: Blackwell, 1993), at 100ff.

⁴⁵ Gunther Teubner, ‘*Altera pars Audiatur*: Law in the Collision of Discourses’, in Richard Rawlings, ed., *Law, Society and Economy* (Oxford: Oxford University Press, 1997), at 160; Andreas Fischer-Lescano & Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 *Michigan Journal of International Law* 999 (2004), at 1017: ‘Following the collapse of legal hierarchies, the only realistic option is to develop heterarchical forms of law that limit themselves to creating loose relationships between the fragments of law. This might be achieved through a selective process of *networking* that normatively strengthens already existing factual networks between the legal regimes.’ (Emphasis added.)

⁴⁶ Fischer-Lescano & Teubner (2004), *supra* n 45, at 1033. Emphases added.

⁴⁷ Gunther Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’, in Gunther Teubner ed., *Global Law Without a State* (1997), at 8; Gunther Teubner (1993), *supra* n 44, at 107-108; Gunther Teubner, ‘Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter,’ in Oren Perez and Gunther Teubner eds., *Paradoxes and Inconsistencies in the Law* (Oxford: Hart 2006), 42.

⁴⁸ Fischer-Lescano & Teubner (2004), *supra* n 45, at 1039.

⁴⁹ *Ibid.*, at 1045.

cases. Knowing the risk of incompatibility between the separate DS mechanisms, parties in conflict pursued an operational compatibility in the course of DS process as a whole. To the extent that the WTO and the NAFTA are ‘autopoietic,’ their DS panels do not defer to rulings of their counterparts but only take due diligence to other systems by referring to rulings of one another.

Having that said, as we saw in the previous section, interactive connections between the parties do not necessarily occur in all cases. Networking theory is descriptive but not prescriptive: it does not provide logic about how different DS panels pursue compatible rulings with one another during the course of the DS proceedings.

3. Conclusion

As far as our analysis shown above, neither approach fully explains the actual process of dispute settlement in the cases we refer to in this paper. On the other hand, each approach provides us certain clues for further investigation. Informal linkages among DS panels as well as among parties in conflict generate in the course of sequential DS proceedings to address fragmentation of international norms. In this sense, sequencing DS procedures under different treaties did not exist or operate in an isolated manner. Thus, our answer to the first question we dealt with in this section is ‘no’. Back-to-back DS proceedings are connected to one another, as shown in some DS rulings that refer to findings of their counterparts, owing to the parties’ desire for managing fragmented norms.

C. Role of the Dispute Settlement Rulings

1. Are formal DS proceedings useless?

The second question we are to address is whether or not the settlement of disputes through mutual agreement impairs the role of DS proceedings or the rulings. Put differently, is it a waste of time and money to conduct separate DS proceedings if parties finally reach a comprehensive agreement to resolve the dispute?

After the conclusion of the comprehensive agreement, it was no longer necessary to implement preceding DS rulings and ongoing DS proceedings were terminated through mutual withdrawal of the claims. If the sequencing DS proceedings have some linkages between each other, as we found in the previous section, what is the role of these DS proceedings for the settlement of the dispute? This question lingers especially in cases where the formal DS procedures has only limited jurisdiction to deal with complex dispute involving multiple treaty obligations.

2. Possible reconfigurations

Needless to say, amicable settlement of the dispute is encouraged under both the WTO and the NAFTA DS procedures. It is not surprising that parties in conflict reach a compromise after the filing to DS procedures but *before* the issuance of the final rulings of the dispute settlement bodies,⁵⁰ because of the uncertainty of judicial outcome. To the contrary, once the ruling is issued, at least the prevailing party does not have to concede. We must look for more suitable rationale somewhere else. In addition, any agreed solution of dispute is required to be consistent with the international obligations of disputing parties:⁵¹ NAFTA panel decisions are binding,⁵² as well as the adopted WTO panel reports that are binding in substance.

While several authors indicate certain effect of the DS rulings on the subsequent comprehensive agreements,⁵³ they do not pay attention to the situation where the settlement reached after the issuance of DS rulings. In this context, again, Teubner's networking theory is a useful clue to understand the role of DS rulings for the settlement of the fragmented dispute.⁵⁴

While one can argue that each of the treaty regimes under the WTO Agreement and the NAFTA is 'autopoietic,' fragmentation of norms due to the coexistence of the WTO and the NAFTA is apparently not 'autopoietic,' unless the application and/or interpretation of treaties, by themselves or collectively, reproduce the identical system of fragmented norms. Rather, we argue that the WTO and the NAFTA are 'allopoietic' as well, which produce something other than themselves.⁵⁵ In the context of the North American experience, it means the coexistence of the WTO and NAFTA produced an alternative 'network' between state parties of both treaties that finally generated comprehensive agreements to settle complex disputes involving the WTO, NAFTA and domestic laws.

Under the situation of fragmented coexistence of DS mechanisms, each DS mechanism deals with specific disputes in accordance with its internal logic. While DS panels refer to other rules and findings of their counterparts, it is solely the applicable laws which DS panels build their decisions on. Findings of each DS panel aims at an effective settlement of the dispute at hand, with potential conflicts between one another. When a conflict occurs between the findings of different DS panels in terms of the application of different rules, the parties are forced to find a way out of 'double bind' situation. It is this moment that the fragmentation of DS

⁵⁰ Busch, Marc L. and Eric Reinhardt, 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes', 24 *Fordham International Law Journal*, 158, 164 (2000-2001).

⁵¹ See Article 3.7 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*: '[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.'

⁵² NAFTA Article 1904, paragraph 9.

⁵³ Busch and Reinhardt (2006), *supra* n 50, 31; Carmody (2006), *supra* n 26, footnote 674.

⁵⁴ See III.B.2.(c), *supra*.

⁵⁵ Mingers (1995), *supra* n 42, at 11.

mechanism creates conflicts and provides parties an opportunity for a comprehensive settlement of disputes, which ‘allows for the transformation of external incompatibilities into internally-manageable contradictions.’⁵⁶ In this sense, conflicts in norms or findings act as a catalyst for parties to settle the dispute at hand by overriding rules or DS findings that is conflicting each other.⁵⁷ More specifically, the assignment to the LCIA as the exclusive forum in the *Lumber* dispute can be seen as a result of a hybrid network between the parties in conflict.

In addition, in the *Lumber* and *Sweeteners* case, it was the conflicts between the findings resulting from separate DS proceedings before the WTO and the NAFTA panels that affected the settlement of the dispute through negotiation. Absent the superior court to coordinate conflicting rulings, the parties in any case have to resolve conflicts arising from the fragmented proceedings. At first glance, this kind of contradictions is to be eliminated in order to deal with complex disputes involving more than one treaty.⁵⁸ However, from a different perspective, it indicates rather positive role of formal DS procedures. There are potential for conflict in any case, since the roots of conflicts reside in the fragmentation of substantive norms (the WTO, NAFTA and domestic laws). And a back-to-back recourse to multiple DS proceedings helped them to grasp overall picture of the complex dispute in its totality, only after they got enmeshed into the mud of fragmentation.

3. Conclusion

To address the fragmentation of international law, this paper examined state practice concerning the way North American countries use multiple DS fora for settling complex disputes. Apparently, the fragmentation of DS mechanism caused a sequence of litigations toward multiple DS fora. While states do not originally intend to stick in the mud of repetitious DS proceedings, either party that lost its case tends to take the other side to another tribunal, hoping to take something back. However, fragmented DS proceedings helped them to grasp overall picture of the complex dispute in its totality, only after they got enmeshed into the mud of fragmentation.

The role of fragmented DS mechanism should thus be evaluated against this background. The process of dispute settlement may help the disputing parties to clarify, sort out, and constitute their interests and the essence of the dispute. Even

⁵⁶ See Gunther Teubner, ‘Hybrid Networks Beyond Contract and Organisation,’ in Marc Amstutz and Gunther Teubner eds., *Networks: Legal Issues of Multilateral Co-operation* (Oxford: Hart Publishing, 2009), at 16.

⁵⁷ Namely, according to Teubner, ‘Under certain conditions, however, hybrid arrangements provide for an institutional environment in which paradoxical communications is not repressed; not only is it tolerated, it is also invited, institutionally facilitated and sometime, rendered productive’. See Teubner (2009), *supra* n 56, at 17.

⁵⁸ Nakagawa (2007), *supra* n 3, 858.

the winning party come to realize that a victory in the intergovernmental DS proceedings is not the end of the story, that is, effective remedies is required for the private actors who are directly involved in the dispute.⁵⁹ It affected the parties' motivations to settle the dispute in a comprehensive manner through negotiation. This led to the comprehensive agreement that override preceding DS rulings and lawsuits, providing private parties with side payments.

The 'conflict' in the international obligations brings the implementing country a double bind situation when that country is to implement both treaties at the same time. In other words, the DS panels served to expose reveal conflicts to build a momentum for a comprehensive settlement of the dispute that is effective in the sense that it dispenses with the double bind situations. Therefore, seen from the above analysis, the answer to the second question is 'no.'

IV. Conclusions: Lessons for Asia

Let us sum up our observations by answering to the two questions raised at the beginning of the paper. First of all, are the DS proceedings are isolated when each of them deals with respective segment of a dispute? The answer is 'no.' Then, does the settlement of dispute through the comprehensive agreement impair the role of formal DS procedures? The answer is 'no,' again, as far as these three cases are concerned.

The fragmented process of dispute settlement took a significant role in all three interesting cases we dealt with in this paper. The term 'process' is not limited to formal DS proceedings, but covers a progressive development as a whole to settle a complex and multi-dimensional dispute. The analysis of dynamic process of dispute settlement indicates an evolution of an allopoietic system out of plural autopoietic systems such as the WTO and the NAFTA regimes, without formal integration of dispute settlement mechanisms under the WTO and the NAFTA. While Teubner's argument does not focus on international legal issues, and not free from criticism,⁶⁰ it gives us a useful insight to understand the process of settling fragmented and complex international disputes. Further research is necessary to scrutinize its applicability to other disputes or in other areas.

What can Asian countries learn from the experience in North America? This paper tries to cast light on its implications to East Asia. As is repeatedly

⁵⁹ See *e.g.*, the Opening Statement of Ambassador Michael Wilson before the Canadian Parliament Standing Committee on International Trade, August 21, 2006; Announcement by the Honourable David Emerson, Canadian Minister of International Trade, and the Honourable Maxime Bernier, Canadian Minister of Industry, 14 December 2006.

⁶⁰ See Oren Perez, 'Multiple Regimes, Issue Linkage and International Cooperation: Exploring the Role of the WTO,' 26 *University of Pennsylvania Journal of International Economic Law* (2006), 735-78.

pointed out, there are significant differences in legal, historical and political environment between these two regions. First of all, there have been no regional trade agreements or other regional integration frameworks among East Asian countries. Liquidation of the past is still a significant stumbling block in the effort to a forward-looking partnership. Intra-region competition in trade, investment and energy areas is increasing. However, East Asian countries are moving forward to a foundation of better neighborly relationship through legalization and institutionalization of economic and political partnership. It is already reported that East Asian countries are coming to proactively use WTO DS mechanism in order to solve trade disputes among them, while still relying on negotiated deals.⁶¹ In this regard, the experience in North America also tells us that a mere legalization is not the end of the story. As long as the fragmentation of norms and coexistence of overlapping DS mechanisms remains, legalistic actions sooner or later faces paradoxical double-bind situations.

However, the primary obstacle in Asia would be the lack of common legal background. Especially shown in the *Lumber* dispute, choosing the LCIA as the sole forum and choosing London as the place of arbitration under the SLA 2006 means the law of England has a substantial effect on arbitral proceedings. Compared to other cases, it seems English law as their common legal background was an important factor for the US and Canada to establish new DS scheme, while contracting out existing DS mechanisms under NAFTA and the WTO.

In this context, one of the few common backgrounds shared by East Asian countries, at least among China, Japan, Korea and Taiwan, would be the Confucianism. In a famous passage of *Lunyu* quoted at the beginning of the paper, Confucius does not necessarily deny the role of law and legal procedures, but indicates the importance of endogenous obedience and settlement of disputes. We should depart from the oft-said dichotomy of law and negotiation, or that of lawsuit and amicable solution. Experiences in North America also tells us that a pursuit of DS proceedings does not necessarily prevent mutually agreeable solution of the dispute, but helps parties to consolidate multi-dimensional issues of conflict and to converge with an overarching agreement.

Finally, it is not a matter of whether East Asian countries should pursue aggressive (or moderate) legalism or whether they should aspire to negotiated settlement of disputes. What is required for East Asian countries is to seek a multi-dimensional perspective for the process of dispute settlement in order to provide parties effective options for reaching a transparent and flexible settlement of dispute.

⁶¹ See Nakagawa (2007), *supra* n 3, 841.