

Introduction:

A Project on Global Trade Ethics, WTO reform and Domestic Politics

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There is little doubt that we need to rethink the politics of international trade regulation to reflect an agenda where “trade and...” issues pervade the agenda of global economic governance: trade and finance, trade and development, trade and labor, trade and human rights, trade and the climate change, trade and geo-politics. Can we continue to rely on increased trade to fuel growth while living within the means of the planet? Is the “trading away poverty” an effective strategy for development? How should we think about balancing concerns over free trade and (perceived) fair trade in a world, drawing the line between protection (of workers, consumers, the environment, the rights of others) and protectionism? Such questions and the concerns they reflect have become only more pronounced in the context of the economic recession currently gripping the world. It is clearly impossible to question the foundations of global financial governance without revisiting those of trade. Notwithstanding the recent publicised declarations of political support for the completion of the Doha Round by G20 leaders, worldwide trade flows are slowing and protectionist sentiments and policies are on the rise. There are renewed doubts regarding not only the institutional credibility of the World Trade Organization (WTO) and the merits of an expanding map of preferential agreements, but the very purpose of the liberal trade project, including its legitimacy and ethical foundations.

Yet for all the common skepticism and pessimism, from Washington to Ouagadougou, there also exists new opportunities for analysis and reform. In a crisis, the old dust that covered existing political frameworks is often kicked up and, to extend the analogy, may temporarily obscure the sight of many participants. But when the eyes are dried, new or reengineered visions of politics can often enter the foreground, appearing sharper and more tangible.

All trading actors will play a role in rethinking the global agenda and recalibrating their stakes in the trading game, as illustrated by the rise of developing countries in the recent dynamics of the Doha Round. But it is always worth shining a particular

analytical spotlight on the interests of the historical trade hegemons, the US and the EU. We need to understand how the ideas and actions of these actors shape core norms and policy prescriptions. The US and the EU play different roles in the management of the WTO system, sometimes converging, often diverging. The meaning and practice of reform – considered in its broadest sense – is a very political business and many proposals bear the strong imprint of these powers. Our ultimate concern, however, is not with the US or the EU *per se* but with the global system of trade governance which they contribute in shaping. As argued elsewhere, assessing the conduct of agents in the global trade system in accordance with a political ethics of democracy offers considerable promise as a complementary approach to legitimacy through institutional reform.¹ The legitimacy of the WTO cannot be won by architectural reform alone. Indeed, while the Doha Round has put considerable strain on the governance of the trade system, it has also helped highlight what is wrong with it. But whatever happens with the Round at this stage, the core challenge for the WTO is to reflect the twin agenda of global justice/equity and sustainability in an era of unprecedented strains in global politics.

Such interlacing concerns have encouraged the development of a multidisciplinary research project, led by the University of Oxford (core institution: European Studies Centre) and the German Marshall Fund of the United States (GMF), to study how the global trade agenda can be conceptually and practically reanalysed at century's turn. At the heart of our initiative was a desire to link more systematically normative debates in political theory and ethics with more concrete institutional and policy discussions on the future of the global trade system, in its multilateral, regional and bilateral incarnations. We sought to conduct a critical examination of the discourses and actions of trade actors on the reform of the multilateral trading system, using normative concepts of justice, fairness and ethics as a backdrop. This is why the project brings together practitioner with scholars across disciplines – including political theory, international political economy economics, law, and international relations – in a collaborative project, with a view to becoming a 'network of networks'. The initiative aims to not artificially divorce theoretical frameworks from policy options but, rather, to bridge, and understand the relationships between, both bodies of knowledge. In turn, it is expected that the results of such enquiries will have enhanced policy relevance and value in the enlarged trade community. The work of the network began with a conceptualisation phase, before organising events that have brought high-level policymakers into engagements with academics on the future of trade reform, particularly focused on the WTO and emerging preferential arrangements in the course of 2007-2009. Such events have included informal meetings in Oxford with US Congressional Staff representatives and top EU DG Trade policymakers in order to facilitate debate on how some of the most important problems in trade politics are being concretely addressed.

¹ Robert Howse and Kalypto Nicolaidis, "Democracy without Sovereignty: The Global Vocation of Political Ethics", in *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Tomer Brode and Yuval Shany, eds., Hart Publishing, Oxford, 2008) at pp.163-191

This edited publication represents some of the new thinking from participants who are active in the project. In keeping with the aims of the initiative, it begins by initially examining how one can address certain larger questions of legitimacy in the trading system, including the WTO specifically (Eagleton Pierce). This initial conceptual context sets the scene for a discussion of major themes addressed by eight authors who each examine a particular concrete instance of trade politics. The issues examined include a focus on fairness and decision-making processes (Narlikar), the EU's management of globalisation through the WTO (Meunier), the Aid for Trade initiative (Page), the EU's promotion of intellectual property rules (Deere), the economic and political consequences of Northern agricultural subsidies on the South (Hemel), and the linkage between the trade and migration regimes under the GATS provision (Betts and Nicolaidis).

Rethinking Global Trade

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While it is clear that the WTO has developed a pattern of attracting a range of critics, understanding the sources, qualities, and strengths of the organisation's legitimacy remains an enduring analytical enquiry, one that has arguably grown more necessary over time.

i. The study of legitimacy

Legitimacy is an opaque, intangible and inherently contested concept that is understood and applied in different ways by alternative sets of professionals. The academic literature on legitimacy – engaging the social sciences, moral and political philosophy, and law – fully reflects this ambiguity, with scholars adopting a range of epistemological and methodological views. This part begins by highlighting some of these alternative approaches to the notion. Reflecting on these ideas, I then review how legitimacy has been treated in the WTO context, examining both 'input' and 'output' legitimacy, a classification drawn from democratic theory.

In attempting to unravel the complexities of explaining and understanding legitimacy, David Beetham's classic work *The Legitimation of Power* (1991) serves as a useful guide.² For Beetham, legitimacy is important because of its consequences for actions and for the quality of power relations. In his pursuit of a social-scientific conception of legitimacy – one distinct from the emphasis on *legal validity* by legal experts or *moral justifiability* by normative philosophers – Beetham argued that the social scientist should be concerned with how the character of legitimacy explains an actor's behaviour. In particular, he is keen to critique the Weberian definition of legitimacy as 'people's belief in legitimacy' by arguing that power is only legitimated when it is 'justified in terms of their beliefs', a point that I would echo.³ Accordingly, he argues that the emphasis should be on the study of the representation and 'degree of congruence, or lack of it, between a given system of power and the beliefs, values and expectations that provide its justification'.⁴ At the same time, Beetham was careful to claim that one should not become exclusively preoccupied with the notion of beliefs as the sole source of legitimacy, but instead scrutinise other components, such as legality and the building of cumulative consensual relations over time. Combined, the implementation of these components would likely lead to the maintenance and reproduction of legitimacy in a given social system.

² David Beetham, *The Legitimation of Power* (Houndsmills: Macmillan, 1991).

³ Beetham, 11.

⁴ Beetham, 11.

Among IR scholars, a revived interest in legitimacy has focused on the problem of how it can be theorised, constructed and enhanced 'beyond and above the state'. For Ian Hurd, IR scholars who have preferred to focus only on coercion and self-interest as modes of social control have unnecessarily neglected the complex workings of legitimacy.⁵ Taken together, these three mechanisms constitute the 'currencies of power' that Hurd uses to challenge the conventional IR assumption that the international system is necessarily 'anarchic', one without a belief among actors that 'authorities' should be obeyed. Other scholars, using constructivist frameworks, have chosen to study the relationships between power, norm dynamics and legitimacy,⁶ or analyse how the nature of bureaucracy and rationalism contributes to the cementing of legitimacy in international organisations.⁷ Meanwhile, in debates on the EU, the study of legitimacy has occupied a highly prominent academic and political place, giving rise to different accounts and taxonomies on the presumed 'legitimacy deficit', as well as examining the complex links with constitutionalism and the ideals of federalism.⁸ Finally, one can point to alternative understandings of legitimacy in political philosophy. For scholars of cosmopolitan democracy, such as David Held, legitimacy should be assessed from the perspective of both effectiveness and accountability, with the latter arguably receiving less attention.⁹ In sum, one can appreciate how legitimacy will always be a wide-ranging and ambiguous concept with an all-embracing definition or 'endpoint' extremely difficult to reach. The central point, to reiterate, is that certain agents are more capable than others in promoting specific classifications of legitimacy, and from at least a normative perspective, this may be troubling.

ii. The challenge of legitimacy within the WTO

Most international institutions face perennial challenges to their legitimate authority, but the WTO has developed a pattern of attracting a plurality of global critics. Many are keen to debate the sources, quality and strength of the organisation's legitimacy. The frequent claims from actors within the alter-globalisation movement that the WTO suffers from legitimacy weaknesses – in terms of both procedure and substance – or is either fundamental 'illegitimate' is just one

⁵ Ian Hurd, 'Legitimacy and Authority in International Politics', *International Organization*, 53 (1999), 2, 379-408.

⁶ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', *International Organization*, 52 (1998), 4, 887-917.

⁷ Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004).

⁸ For instance, see Anthony Amull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press, 2003); David Beetham and Christopher Lord, *Legitimacy and the European Union* (London: Longman, 1998); and Robert Howse and Kalypso Nicolaïdis, 'Introduction: The Federal Vision, Levels of Governance, and Legitimacy', in Robert Howse and Kalypso Nicolaïdis (eds) *The Federal Vision: Legitimacy and Levels of Governance in the United States and European Union* (Oxford: Oxford University Press, 2001).

⁹ See David Held and Mathais Koenig-Archibungi (eds), *Global Governance and Public Accountability* (Oxford: Blackwells, 2005), and David Held, *Democracy and the Global Order* (Stanford: Stanford University Press, 1995).

public manifestation of this status.¹⁰ If one measured legitimacy solely in terms of the intensity of vigorous argument within civil society, the WTO would be very healthy indeed.¹¹ While it would be wrong to oversimplify the wide-ranging conceptions of what makes the WTO legitimate, it is possible to delineate the parameters of these debates and identify the core reasons why the organisation faces recurring problems. Many of the issues are well known, but they bear repeating. A useful approach for categorisation is to distinguish between ‘input’ and ‘output’ legitimacy, although an attempt will be made to briefly explore the connections and interplay between both sides of the equation.

In the WTO context, discussion of input-legitimacy refers to the procedural conditions and scope for democratic voice within the organisation. Founded on the ideals of domestic democratic decision-making and human rights, core concerns relate to inclusiveness, transparency, agenda-setting processes, and representation. In this regard, one could argue that the WTO’s input-legitimacy challenges are concentrated around four major themes. First, it is useful to recall perhaps the ‘major and unsustainable discrepancy’ in the business of rule-making and decision-making at the WTO: the coupling of an automatic and binding system of laws under powerful surveillance with the informal, *ad hoc* practice of bargaining and negotiation.¹² The importance of informal political practices in establishing agendas and codes of conduct within the WTO is impossible to overstate, a legacy drawn from the ‘club’ atmosphere of the General Agreement on Tariffs and Trade (GATT). But when informality becomes the institutional *modus operandi*, weaker actors are always vulnerable to power-based manipulation where there is a lack of transparency.¹³ Second, the need to perform well in negotiating arenas is, of course, closely tied to the technical resources and competences of each Member State. In terms of legitimacy, specific concerns lie in several aspects of the negotiating processes, including: the use of Green Room forums for select Members, the core protocols on the negotiation of rules, the politicising of types of formula, issue linkages, and the role of the Secretariat.¹⁴ An additional important – yet overlooked – dimension of negotiation involves timing and pace: pressures applied to finalise a Round or reach consensus at a Ministerial Conference can often bear heaviest on those endowed with the fewest resources to fully realise the consequences of policy implementation. Third, the question of representation remains a core problem: is the WTO’s legitimacy sufficient on the basis of the ‘collective’ legitimacy of individual states (even when many may exhibit poor forms of domestic democracy and protest opportunities), or should the organisation welcome greater parliamentary and civil

¹⁰ Amongst many, see the critical literature and statements on the WTO by The Via Campesina network or The Third World Network.

¹¹ On this point, one could argue that the legitimacy of international institutions is in part derived from conflicts with external agents of change such as social movements. See Balakrishnan Rajagopal, ‘From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions’, *Harvard International Law Review*, 41 (2000), 2, 529-578.

¹² Amrita Narlikar, *The World Trade Organization: A Very Short Introduction* (Oxford: Oxford University Press, 2005), p.42.

¹³ Narlikar, p.45-51. Also, for a detailed analysis of political techniques used by developed countries, see Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations/Lessons of Cancún* (London: Zed Books, 2004).

¹⁴ Narlikar, p.51-55.

society oversight and engagement?¹⁵ Whether one conceptually views this search for legitimacy in terms of a focus on the ‘optimal allocation of powers’, or more broadly, in terms of the ‘processes of governance’ within the system is an important qualification.¹⁶ A fourth challenge – one more deeply structural – relates to the type of legal-economic knowledge required to participate effectively. As argued by others, the progressive expansion of legalisation and legal authority as a source of legitimacy in the WTO has not supplanted politics and does not automatically lead to beneficial outcomes for all Members.¹⁷ As Emanuel Adler and Steven Bernstein have expressed it in relation to developing countries and the trading regime, ‘Diplomacy is a game many developing countries have experience playing and is well institutionalized in international politics; legalism far less so’.¹⁸

Questions about the output-legitimacy of the WTO generally relate to the material conditions and practices generated by its policies and norms. Formally, the WTO Agreement stipulates that the institution should promote a number of fundamental principles and objectives, including encouraging sustainable development and economic reform.¹⁹ It is precisely the nature and scope of the regulatory reform process, and the sensitivity of the WTO to alternative development narratives, that has stimulated so much controversy. Those who adopt a utilitarian perspective and believe that the WTO is adequately legitimate, point to the economic gains accrued through the commitment to freer multilateral trade, non-discrimination, and the safeguards and flexibilities already in place to pursue national policies.²⁰ Other analysts would argue that this perspective is unsatisfactory if it fails to accurately specify where the major gains are allocated, including particular corporate interests. Rather, such critics would argue that the WTO’s output-legitimacy is dependent on how effectively trade policy is ‘balanced’ or linked with other ‘non-trade’ objectives, such as consumer welfare, the protection of social and labour rights, and environmental conservation. One can question, the extent to which this conceptual bracketing of ‘non-trade’ issues in the WTO is also inherently part of the problem: *not to discuss* the complex relations between labour standards and trade is a political decision on the part of most WTO Members, for instance.²¹ But the essence of the

¹⁵ See Gregory Shaffer, ‘Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contexts’, *Journal of International Economic Law*, 7 (2004), 3, 629-654. For an examination of Pascal Lamy’s call for ‘cosmopolitics’, including the value of integrating civil society actors into the process of WTO legitimisation, see Steve Charnovitz, ‘The WTO and Cosmopolitics’, *Journal of International Economic Law*, 7 (2004), 3, 675-682.

¹⁶ This point is drawn from Kalypso Nicolaïdis, ‘Conclusion: The Federal Vision Beyond the Federal State’, in Howse and Nicolaïdis (eds), *The Federal Vision*, p.446.

¹⁷ See particularly Joost Pauwelyn, ‘The Transformation of World Trade’, *Michigan Law Review*, 104 (2005), 1-66; J.H.H. Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’, Harvard Jean Monnet Working Paper No. 9/00 (2001); James Smith, ‘Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement’, *Review of International Political Economy*, 11 (2004), 3: 542-573.

¹⁸ Emanuel Adler and Steven Bernstein, ‘Knowledge in Power: The Epistemic Construction of Global Governance’, in Michael Barnett and Robert Duvall (eds) *Power in Global Governance* (Cambridge: Cambridge University Press, 2005). p.314.

¹⁹ Marrakesh Agreement Establishing the World Trade Organization, [hereinafter WTO Agreement].

²⁰ See Michael Moore, *A World Without Walls*, (Cambridge: Cambridge University Press, 2003).

²¹ See Joel Trachtman, ‘Institutional Linkage: Transcending “Trade and...”’, *American Journal of International Law*, 96 (2002), 1, 77-93; and Steve Charnovitz, ‘Triangulating the World Trade

charges are clear: output-legitimacy is intimately tied to distributive consequences, notions of fairness, and above all – particularly in the current period – to the meanings and outcomes ascribed to development.

The fact that ‘development’ – the idea, the process, the objective – has become so prominent in WTO lexicon in many ways reflects how the institution has attempted to rebuild its output-legitimacy in the face of widespread criticism. Yet one cannot discuss the utilisation of development within the WTO, and the current Doha Round specifically, without highlighting how the word is interpreted and carries such rhetorical force, at times embellishing certain positions and arguments. At least three significant conceptual orientations towards development by WTO Members can be suggested, although this certainly does not represent as exhaustive interpretation. The first and most common view is to compartmentalise the subject, to treat it as a distinct topic or dimension. Special and Differential Treatment (SDT) may be considered as one component of the implementation of an agreement, for instance.²² Within this, some Members may offer simplified and schematic models of how development is achieved, such as representing the opening of Southern markets to Northern producers in industrial goods as being inherently in the interests of poor countries. A second orientation is to interpret development in a dialectical relationship with the ‘business of trade’. Those who subscribe to this position may be more cautious on the extent to which the WTO can act as a quasi-‘development agency’, preferring to designate the World Bank or national regulators for such tasks. Therefore, in this framework, output-orientated criteria is determined equally by what the WTO is *not* capable of doing. A third orientation would interpret development in a more holistic manner, consisting of two faces: not only the external integration of a country into the world economy, but also the *internal articulation and embedding* of the domestic economy with society. Such a view is sensitive to domestic institutional upgrades, the value of some exemptions and safeguards, and a sense of history regarding how the West has achieved its present status.²³ This is not the space to explore these conceptualisations further, only to note that this latter orientation is probably the least well received in the WTO.

While the input/output categorisation of legitimacy provides a useful stylistic framework, it is clear that the relationship and interplay is more complex. For some, efficiency and human welfare are interconnected so that a higher quality of output will increase overall legitimacy despite potentially affecting democracy negatively. Others would reject this and argue that a high output necessitates a high input in order for governance to be perceived to be democratic. One can also identify major tensions, such as between the desirability or weariness of centralised governance

Organization’, *American Journal of International Law*, 96 (2002), 1, 28-55. On labour, there is currently no work programme operating at the WTO, following the 1996 Singapore Ministerial Conference which identified the International Labour Organization (ILO) as the competent body to deal with core standards.

²² Shelia Page and Peter Kleen, *Special and Differential Treatment of Developing Countries in the World Trade Organization* (Stockholm: EGDI, Ministry for Foreign Affairs, Sweden, 2004).

²³ See Wade; Dani Rodrik, *The Global Governance of Trade As If Development Really Mattered*, (New York: United Nations Development Programme, 2001); and Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002).

systems at the supranational level. As already alluded to, the concentration of rule-making power at the WTO may be entirely justified from utilitarian or constitutional perspectives: either to seal off the field of international trade from the vagaries of domestic politics, or to guard against economic abuses and failures by representative governments.²⁴ Such defenses often consist of a considerable emphasis on ‘consent’ as a fundamental source of legitimacy, that legality is ensured when all Members agree (through whatever political processes and forces) to bind themselves to WTO rules.²⁵ Yet from an input-legitimacy viewpoint, centralisation is always problematic, as Fritz Scharpf has rightly warned:

As external legal and economic constraints multiply under conditions of growing international interdependence, the role of experts and of specialized knowledge will increase to an extent that may render the role of authentic but untutored popular preferences and demands practically insignificant.²⁶

While appreciating the difficulties of linking the input and output sides, there are possible paths forward. One approach to consider is Jürgen Habermas’s idea of ‘deliberative democracy’ as a conceptual bridge.²⁷ As argued by Ilan Kapoor, this is worth exploring.²⁸ The Habermasian perspective – attentive to the relationships between power, legitimacy, and justice – could be utilised to stress the favourable connection between, on the one hand, an ideal form of communicative rationality without coercion, and on the other, the substantial results generated by adhering to such ethical norms. To follow such a framework, the WTO could, in Habermas’s words, ‘enjoy the presumption of being reasonable’.²⁹ Whether such a position sets too high a bar for progress can be debated, but it at least draws attention to: (1) the quality and manipulation of information, (2) the favourability of emphasising arguing (deliberative, truth-seeking behaviour) rather than ‘mere bargaining’ (exchange of demands, threats).³⁰ If one were to take Habermas’s framework, the search for the ‘ideal speech situation’ would not only be limited to Geneva, but extend deep into Capitals and other communities in order to build the ‘communicative competences’

²⁴ See for instance, John McGinnis and Mark Movsesian, ‘World Trade Constitution’, *Harvard Law Review*, 114 (2000), 2, 511-605; and the work of Ernst-Ulrich Petersmann, including an early articulation in *Constitutional Functions and Constitutional Problems of International Economic Law*, (Fribourg: Fribourg University Press, 1991), and ‘The WTO Constitution and Human Rights’, *Journal of International Economic Law*, 3 (2000), 19-25. For an evaluation of the debates surrounding constitutionalisation and the WTO, see Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System* (Oxford: Oxford University Press, 2005).

²⁵ For an examination of the notions of democratic consent in the WTO, see Robert Howse, ‘How to Begin to Think About the “Democratic Deficit” at the WTO’. Available at: <<http://faculty.law.umich.edu/rhowse>>.

²⁶ Fritz Scharpf, ‘Interdependence and Democratic Legitimation’, MPIfG Working Paper 98/2, September 1998 (Cologne: Max Planck Institute for the Study of Societies). p.11.

²⁷ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, W. Rehg (translation), (Cambridge: Cambridge University Press, 1996).

²⁸ Ilan Kapoor, ‘Deliberative Democracy and the WTO’, *Review of International Political Economy*, 11 (2004), 3, 522-541.

²⁹ Habermas, p.301.

³⁰ Kapoor, p.533-536.

necessary to politically critique the WTO system.³¹ In doing so, one moves away from a schematic distinction between input/output legitimacy to address the underlying political ethics, an order that arguably requires greater tolerance, transparency, and reason.

³¹ Jürgen Habermas, *Theory of Communicative Action*, Vol 1., T. McCarthy (translation), (Cambridge: Polity Press, 1984), p.137.

Moving Beyond Fairness: Improving the Legitimacy of the WTO

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The WTO that faced the debacle at Seattle in 1999 looks considerably different from the WTO that we see today. At the Seattle Ministerial Conference, the decision-making processes of the WTO had come under a resounding attack on grounds of fairness, and not from the turtle-teamster coalitions alone. Its own members accused the organization of having opaque decision-making procedures that were seen to result in the marginalization of developing countries. Simultaneously, the WTO also came under challenge from different groups of stakeholders, ranging from countries and citizen groups within them, who pointed to the inequities in outcome resulting from the “bum deal” of the Uruguay Round. In terms of fairness of both process and outcomes, the WTO was seen to be failing a large proportion of its membership.³²

Today, even a cursory glance at the organization reveals that the WTO has successfully addressed many of these problems, and has thereby emerged as a fairer institution. Internal reform measures, started in the aftermath of the Seattle Ministerial and further developed over the years, pay considerably greater attention to the internal transparency and inclusiveness of consensus-building small group meetings, and further seek to enhance the fairness of process by providing developing countries with technical assistance and capacity-building. Partly as a result of these changes and also due to their own initiatives, developing countries, singly and in coalitions, have acquired a louder voice in the organization. This is evidenced not only in their ability to hold up the negotiation process, but even more patently in the replacement of the old Quad (comprising Canada, EU, Japan and US) with the new core group of Brazil, India, the EU and the US. Further, recognizing the problem of outcomes that many members perceived as unfair, the new round of trade negotiations attaches special importance to issues of development as is evident in its very name of the “Doha Development Agenda.” And yet, these developments have not been accompanied by an improvement in the legitimacy of the WTO. Levels of political disengagement have reached unparalleled proportions, reflected not only in the recurrence of deadlock within the organization but also in the turn to regional and bilateral alternatives by developed and developing country members.

³² See for instance, www.gatt.org, and Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations*, Zed Books: London, 2003.

In this paper, I address the puzzle as to why greater attention to fairness in the WTO has not led to an increase in the legitimacy of the organization. The argument proceeds in three parts. In the first section, I unpack the concept of legitimacy into two key concepts: fairness and efficiency. In the second section, I analyze how the trade-offs between these sometimes divergent concepts were negotiated in the GATT, and why the bargain on legitimacy has unravelled in recent years in the WTO. The third and concluding section provides a set of recommendations for research and policy targeted towards the renegotiation of the legitimacy bargain.

i. Conceptualizing Legitimacy

Normative concerns about the WTO have, in recent years, focused on fairness.³³ And intuitively, numerous definitions of legitimacy suggest a link between the two concepts of fairness and legitimacy. For instance, Mark Suchman defines legitimacy as “a generalized perception or assumption that actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.”³⁴ We can safely assume that judging whether an action is seen as “desirable, proper, or appropriate” cannot be divorced from perceptions of fairness. But fairness and legitimacy do not equate with each other.³⁵

For the purposes of this paper, I accept the definition provided by Allen Buchanan and Robert Keohane for the legitimacy of global governance institutions as “the right to rule, understood to mean both that institutional agents are morally justified in making rules and attempting to secure compliance with them and that people subject to those rules have moral, content-independent reasons to follow them and/or to not interfere with others’ compliance with them.”³⁶ But Buchanan and Keohane then go on to provide a “Complex Standard” for judging the legitimacy of international institutions, which attaches considerable importance to the value of democracy. This principled standard also includes an important reference to justice: “It must not confuse legitimacy with justice but nonetheless must not allow that extremely unjust institutions are legitimate.”³⁷ On both these counts, this paper

³³ See for instance, Ethan Kapstein, Power and Fairness in the Global Economy, in Michael Barnett and Robert Duvall eds., *Power and Global Governance*, Cambridge: CUP, 2005; Cecilia Albin, Justice and Fairness in International Negotiations, Cambridge: CUP, 2001; Amrita Narlikar, Fairness in International Trade Negotiations, *The World Economy*, 29 (8), 2006, pp. 1005-1028.

³⁴ Marc Suchman, Managing Legitimacy: Strategic and Institutional Approaches, *Academy of Management Review*, 20 (3), 1995, p.574

³⁵ Note that this view differs from the one expressed by Thomas Franck, who identifies two components to fairness of which legitimacy is one: “... fairness is a composite of two independent variables: legitimacy and distributive justice. Fairness discourse is the process by which the law, and those who make law, seek to integrate those variables, recognizing the tension between the community’s desire for both order (legitimacy) and change (justice)...” On closer inspection, however, this distinction seems to reduce to a simpler and very important one between fairness conceptualized in terms of procedural matters versus fairness conceptualized in terms of equity in outcomes, see Thomas Franck, *Fairness in International Law and Institutions*, Oxford: Clarendon Press, 1995. This paper relies critically on Franck’s distinction between fairness of process and outcome, but uses a broader definition of legitimacy.

³⁶ Allen Buchanan and Robert Keohane, The Legitimacy of Global Governance Institutions, *Ethics and International Affairs*, 20 (4), 2006, p. 412.

³⁷ *Ibid*, p. 417.

offers an alternative conceptualization of the legitimacy standard. This conceptualization incorporates some of the criteria provided by Buchanan and Keohane, but also further simplifies them into the two minimal requirements that any institution must fulfil if it is seen to have the “right to rule”: fairness and efficiency.

The first component of legitimacy of any institution is that it is fair, and is seen to be fair, in terms of both process and outcomes.³⁸ Fairness of process refers to decision-making and negotiation within the organization. Fairness of outcomes refers to the provision of certain public goods, and takes the distribution of costs and benefits resulting from governance into account. There are various solutions to unfair process, depending on where one sits: greater transparency, greater accountability, greater direct participation or at least smaller chains of delegation and so forth. Unfair outcomes have historically proven more difficult to settle, and range from reparations to Special and Differential Treatment to voluntary measures such as greater aid.

The second, equally important, but usually overlooked component of legitimacy is efficiency. Even if an institution manages to acquire a reputation of ensuring fair process and fair outcomes, its members would find it very difficult to legitimize their commitment to it if the time and/or resources spent in reaching these goals are disproportional to the accrued benefits. So for instance, if the organization is supposed to deliver the good of trade liberalization, we would ask the question: has there been an overall reduction in barriers to trade? And has this goal been achieved in a resource-efficient and timely fashion? To address this question effectively, we would need to assess the costs and benefits of belonging to the organization, but also compare it to other institutions. If there are alternative forums which are better able to deliver the same good in a more cost-effective way, then the efficiency of the institution will be under challenge. Further, we would need to ask if the institution is able to deliver the good within reasonable time frames to keep various stakeholders – politicians, business groups, civil society – sufficiently committed to it and not turn to alternatives.

Fairness and efficiency can sometimes involve a trade-off. More voice to diverse stakeholders, for instance, can also make it more difficult to reach agreement, thereby fairer process coming at the cost of some efficiency. Also the different components of legitimacy find different constituencies to back them. Developed countries had traditionally supported the notion of fair process in the GATT, for instance, in the past, whereas developing countries had pushed for a fairer system that paid greater attention to outcomes and distributive justice. In recent years, developing countries have continued to espouse the notion of fairness in terms of outcomes, but have also incorporated an expanded notion of fair process firmly within their agenda. Hence for instance, their demands in recent years that the nominal participation conferred on them by the system of one-member-one-vote and consensus needs to be replaced by a system that allows them a real voice in key

³⁸ Franck, 1995, for this distinction.

decision-making processes. Efficiency-related demands, on the other hand, have come predominantly from the developed world. They manifest themselves in private interviews, public pronouncements of politicians and negotiators, and even more concretely in the disengagement of Western politicians from the WTO system and turn to regionalism. And indeed, the negotiating and balancing of such interests constitutes the basis of a “legitimate” system.

ii. The Unravelling Bargain: From the GATT to the WTO

The GATT provides us with a good model of the legitimacy bargain at work, which managed to successfully tread the delicate balance between fairness and efficiency. Admittedly, the GATT was often referred to as the “Rich Man’s Club” by developing countries. But it was a club that managed to bring about a dramatic reduction in tariff barriers, and one which developing countries continued to join by the hordes despite these pejorative references.

What constituted the bargain? Much of the agenda of the GATT was set by developed countries. Major decisions would be made in the Green Room, from which most developing countries were excluded. The principal supplier principle dominated the negotiations, which meant that only the major trading nations had agenda-setting power. That said, however, developing country members of the system were able to free-ride on the concessions exchanged by the major powers due to the MFN rule. Additionally, many countries in the days of import-substituting industrialization were quite happy to enjoy these concessions without having to play a central role in the GATT and liberalize their own markets on a comparable scale.³⁹ The system was inarguably efficient. It was also not completely unfair. Developing countries, though unable to exercise the power of large numbers, were not clamoring for a voice in the GATT at the time and were being allowed at least some free-riding. They were also reasonably successful in getting the GATT to pay some attention to fairer outcomes via the inclusion of Part IV on development, and Special and Differential treatment provisions. That both developed and developing countries accepted the legitimacy of the system was evidenced in the rising membership of the GATT as well as the eight successful trade rounds that were negotiated under its auspices.

The recurrent deadlock that we see in the WTO today, as well as the turn to alternative forums, is a result of the unraveling of this bargain. With the creation of the WTO, and particularly through certain features such as the Single Undertaking, its much stronger Dispute Settlement Mechanism, and its considerably expanded coverage, developing countries have been unwilling to sit on the periphery. Their demands for greater voice and more agenda-setting power have not been completely unsuccessful. Some of the developments demonstrating this success

³⁹ On key decision-making and negotiation processes in the GATT and the WTO, see Amrita Narlikar, *The World Trade Organization: A Very Short Introduction*, Oxford: OUP, 2005.

were highlighted in the introduction. Both Brazil and India are now at the high table of trade negotiations via the new Quad; even small countries have much more agency due to improved internal transparency within the organization and also their own efforts to work in coalitions; NGOs have managed to acquire greater voice than they enjoyed in the GATT. All these developments amount to a qualitative improvement in fairness of process in the institution. Simultaneously, the attention to fairness of outcomes has also meant that a bigger set of issues is up for negotiations, and many of these new issues explicitly incorporate the demands of developing countries.

These improvements in the fairness of the institution, however, have come at a significant cost to its efficiency. Consensus-based decision making, which worked reasonably efficiently in the GATT days, is less effective when a larger and more diverse set of players is involved. Not only have negotiation and decision-making processes become considerably more belabored, but the attempt to improve fairness of outcomes has also generated new costs. The success of developing countries in managing to bring development to the fore, sometimes at the expense of other issues prioritized by the developed countries (such as the Singapore issues), has created considerable apathy towards the WTO in the North. The private sector, which had so successfully created pressures on developed country governments to get a deal on the Uruguay Round, remains aloof from the Doha negotiations and has chosen to invest its energies elsewhere. The DDA was scheduled for completion in January 2005. In mid-2008, it is nowhere near completion. It is unsurprising that politicians are choosing to invest in regional alternatives and bilateral agreements, which offer better terms for them and can also be negotiated at a much faster pace.

It is only by re-negotiating the terms of fairness and efficiency that the legitimacy of the WTO can be re-established. Exactly how this might be achieved is not straightforward, given the diversity of interests that underlie the claims to these different norms. The concluding section suggests ways in which a start to such a re-negotiation might be made.

iii. Conclusion

This paper has demonstrated that it is not just the DDA that is up for negotiation; norms of efficiency and fairness are also negotiated and thereby impart legitimacy (or otherwise) to the WTO.

Not all the reform measures to redress the balance between fairness and efficiency involve a trade-off. For instance, provisions such as technical assistance, capacity-building, and Aid for Trade programs will enhance the perception of fairness of the institution by empowering developing countries, and is also likely to improve efficiency by facilitating a move beyond reliance on rhetoric and negotiation based on better information. But there are several issues that do require scholars and practitioners to successfully manage the trade-offs between the two components of legitimacy, and further ensure that the divergent interests backing these different norms are persuaded to remain on board the multilateral process.

Amongst the questions involving trade-offs and distributive consequences, two are critical if the problems facing the multilateral trading system are to be overcome. First, while the attempt to improve the fairness of the WTO has come at the cost of efficiency, scaling back on this front would entail a huge cost in the form of further disengagement of the developing world from the organization. But even without reneging on the commitment to development and whilst paying the necessary attention to fairness of outcomes, negotiators could still reframe the agenda in terms of reciprocity rather than charity. This would help win back some of the commitment of the developed world to an organization which they have increasingly begun to see as having few stakes for them.

Second, there is no alternative to improving the efficiency of the organization. In part, this relates to the ever-expanding scope of its rules. To avoid mission creep akin to the World Bank,⁴⁰ and to ensure that the WTO does not end up carrying the blame for failing on tasks that it was never equipped to take on, some clear and principled guidelines on the expansion of its negotiated agenda are necessary. Simultaneously, more research needs to go into the issue of retaining the achievements of the system on fairer process, while also improving its ability to deliver the promised public goods in a timely and resource-efficient fashion. These would involve possible changes in the decision-making process with a move away from straightforward consensus-based diplomacy,⁴¹ and possibly an expansion in the capacity and mandate of the Secretariat to allow a greater role for the staff of an organization that has traditionally been member-driven. Should reform be taken on in this direction, it will be vital that the Secretariat's composition be so constituted that all members regard it as representative of their interests. Not all measures at improving the efficiency of the organization need be based on institutional reform. The members themselves can contribute to the efficiency of the organization by using more integrative strategies, reducing the problem of very large numbers by operating in coalitions, and further improving information provision to deter unnecessary deadlocks through signalling.

Finally, one of the key findings of this paper is that while the recent writings on fairness present important contributions to the field, debates on fairness cannot be conducted in a vacuum. Indeed, a policy and research focus primarily on fairness, accompanied by an insufficient focus on efficiency, is likely to work at cross-purposes with the legitimacy of the institution. A fruitful agenda for future research would refocus the fairness debate in terms of the bigger questions of legitimacy.

⁴⁰ See Jessica Einhorn, *The World Bank and Mission Creep*, *Foreign Affairs*, September/October, 2001, pp. 22-35

⁴¹ The Warwick Commission, *The Multilateral Trade Regime: Which way forward?*, December 2007, offers some useful recommendations on a critical mass formula that could help overcome some of the problems of consensus-based decision-making; see <http://www2.warwick.ac.uk/research/warwickcommission/report/>, accessed on 14 May 2008.

Can the EU Manage Globalization?

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For several years in the Doha negotiations, the EU's mantra was that this was to be a development round. But the true doctrine underlying the EU efforts in trade policy is not that of development but that of "managed globalization." When Pascal Lamy became the trade commissioner for the European Union (EU) in 1999, he stated that one of his central objectives would be to ensure that globalization be "maîtrisée" – a term alternatively translated as managed, controlled, tamed, or harnessed (Lamy 1999). The years that ensued saw indeed real efforts by the EU to shape and fashion globalization in its image (Meunier 2007). In trade, this strategy was only partly successful, however, and by 2006 it seemed that the EU had shifted towards a more classic, market-opening strategy with "Global Europe."

Yet the idea that globalization can actually be managed is still very powerful and motivates many policies, both domestic and international. This raises several questions which will be briefly explored in this essay. Why is managed globalization an important matter of intellectual concern? At what level of political governance is globalization managed? Can the WTO be the primary driver of such management? Finally, has the EU been successful in its efforts to manage globalization?

i. The importance of managed globalization

The idea of managing globalization has been popularized in the late 1990s, early 2000s in Europe. Pascal Lamy, one of its main advocates, made it into a quasi official doctrine of the EU's trade policy during his tenure as trade commissioner. "Managing" means altering the existing course of things and reorganizing them for a purpose. "Managing globalization" suggests that the waves of disruption brought about by globalization are not a fatality. Instead, policy-makers can guide them by, externally, shaping the rules governing the free movement of goods, services, people, and information, and, domestically, by compensating the losers from the adjustment process (Jacoby and Meunier, 2008). Today, "managed globalization", also known by its semantic variant of "harnessed globalization" among others, has also become a central idea in the WTO.

Managed globalization is not a novel idea in deeds, however, even if it is a novel idea in rhetoric. After the end of World War II, under benevolent American leadership, the world embarked on an experiment to manage the vagaries of the international economy, which had given rise to the unrest of the 1930s and ultimately the global conflict, by constraining economic and monetary flows by a series of international rules and institutions --such as the GATT, Bretton Woods, the IMF, etc.

Nor is the idea of managed globalization particularly European. Japan, for instance, has been struggling in the past two decades with reaping the benefits of economic globalization while controlling the speed and reach with which global rules and markets affect domestic players (Schaede and Grimes, 2003). China and India are two other recent examples of countries that owe their renewed economic strength to globalization but at the same time fear the impact of economic reforms and global rules on their domestic societies.

Yet there is something distinctive about the current European attempts to implement this idea of managed globalization. Left to their own devices, the free market forces of globalization seem particularly threatening to European countries who have carefully built generous social protections and welfare systems over the past fifty years. On the surface, Europe seems to have more to lose than to gain from contemporary globalization. But Europe is also particularly well placed to shape the rules and the institutions that enable the flow of goods, services, people, and information. The institutional experiments of the EU over the past five decades give it a legitimacy and a know-how that can shift the playing field and build a global world more in its own image. Managing globalization is not only about protecting; it is also about being proactive.

ii. The politics of managed globalization

In Europe, managed globalization is not only rhetoric used by politicians to appease wary publics and assuage their fears by showing that they can still be in control. It is a clear policy that has been implemented by a multitude of actors at different levels of governance: domestic, European, international.

The domestic level has traditionally be the locus of choice for protective, compensatory politics designed to smooth out the insecurities and risks brought about by the free market (Burgoon, 2008). This defensive management of globalization happens downstream, with the negative effects of globalization being handled through national redistributive and compensatory mechanisms (Jacoby and Meunier, 2008).

The management of globalization also occurs at the European level, both in its offensive and defensive form. The EU is already a form of globalization, albeit on a smaller scale. Offensively, it manages globalization by setting the terms and levels of openness and forcing its own standards and regulations onto the rest of the world, thereby making globalization look more European –whether with respect to trade, monetary policy, or accounting norms, for instance. The EU is very active in pushing to extend its model and rules onto other regional entities or international organizations, believing in the old sports adage that offense is the best defense. More recently, the EU has also started to manage globalization by enacting some redistributive policies to compensate for economic openness. The European Globalization Adjustment Fund, started in January 2007, is designed to help train and relocate about 50,000 workers a year throughout Europe when their jobs are lost to

the dynamics of global trade. Its means are modest (about 50 million Euros a year) but explicitly designed to manage the adjustments required by globalization.

The third, most upstream level where management of globalization occurs is international. It is in international institutions and agreements that the architecture of globalization is designed. Globalization has been allowed to happen because rules governing the extent and intensity of economic openness have been made. How much protection is allowed, whether scientific concerns can limit the free flow of goods, whether countries can give preferential economic treatment to particular countries-- all of these questions, which are constantly asked and answered in international organizations, show the extent to which globalization is politically managed, instead of being this irresistible drive unleashed either by natural forces or by a vast conspiracy of planetary capitalists.

iii. Managing globalization through the WTO

For the EU, the WTO represents one of the best instruments available to attempt this management of globalization. First, because in the WTO the EU negotiates as a whole, on behalf of the member states (Meunier and Nicolaidis, 1999; Meunier, 2005). Second, because the membership of the WTO is so vast and its rules so constraining that it encompasses a large part of commercial globalization. Over the past decade, the EU has adopted three WTO-related strategies in order to attempt to manage globalization (Meunier, 2007).

First, the EU has sought to build a set of constraining rules in the WTO and an institutional architecture to monitor those rules. The EU strongly supported the creation of clear rules of the game for settling trade-related disputes in the WTO. This meant making a codified set of rules for reporting violations, adjudicating disputes, and implementing resolutions in order to facilitate trade liberalization in the world. This strategy was initially not without controversy in Europe, both from people concerned about national sovereignty and from anti-globalization protesters. To add insult to injury, the first two disputes in which the EU was implicated, the bananas case and the beef hormones case, were ruled in favor of the plaintiff, the United States. Yet the Europeans stuck with this strategy, and the norm of collective trading rules enforced by independent judges is now well established.

Second, in order for these constraining rules to apply to the largest possible number of countries, the EU has insisted on expanding the number of members in an inclusive WTO as part of its policy of managed globalization. The more members, the more countries subjected to the rules, and therefore the less anarchy in the global trading system. A related, more controversial decision has been to prioritize multilateralism. Under Lamy's tenure, the EU informally imposed a moratorium on new bilateral free trade agreements until the end of the Doha Round (rescinded since). This was a strong signal to the rest of the world that the EU was really committed to making multilateralism work, unlike the Americans and their policy of "competitive liberalization."

The third piece of the EU strategy to manage globalization through the WTO was the widening of trade issues subject to rule-making. Since world trade is regulated by a powerful international institution whose rules apply to a very large number of countries, the more issue-areas fall under the aegis of the WTO, the more “managed” globalization will become. The EU therefore tried to bring as many issues as possible into the fold of the WTO and launched this agenda of “trade and” issues in the mid-1990s, with a specific focus on trade and trading conditions, trade and environment, trade and labor laws, and trade and culture (Howse and Nicolaidis 2003). The EU championed in particular the “Singapore issues,” addressing and establishing rules for the conditions under which trading takes place, but it failed in imposing its viewpoint upon the other WTO members.

iv. Has Europe been successful at managing globalization through trade?

Has the EU been successful at managing globalization through the WTO? How can such success be measured? Surely globalization is not an out-of-control process or “deregulation gone wild.” The levees through which goods, services, and people flow freely have been built and adjusted by the architects of the international system –of which the EU was a major contributor. The opening of the floodgates has not led to a convergence of global standards towards the bottom, as often feared. Yet the adjustment is difficult for European countries, and that is why the management of globalization involves defensive measures to ease the process of transition in addition to offensive measures designed to share the European experience with the rest of the world.

Managing globalization through trade policy has only been a partially successful strategy. Sure, trade has been framed with coercive rules and is subject to more “fair play” and transparency; but these rules also enabled globalization to progress even further, as they tore down barriers to trade not respecting the new rules of the game and thereby created more liberalization. In fact, a central paradox is that the same global institutions the EU often seeks to strengthen have come under fierce criticism for accelerating globalization in addition to managing it (Abdelal and Meunier, 2006). Sure, membership in the WTO has expanded, which has broadened the reach of globalization covered by international rules; but this has come at a cost to the EU, since it contributed to diluting the EU’s own influence over the outcomes of international trade negotiations. Sure, the EU promoted multilateralism for a while, but this emphasized the EU’s internal contradictions, such as on agricultural trade, while leaving the EU with no other outside option. Sure, the EU pushed hard for the inclusion of “trade and” issues in the negotiations, but it did not manage to convince its trade partners that this was indeed the way to go.

In October 2006, the Commission’s Trade Directorate and the new trade commissioner, Peter Mandelson, reassessed the direction of the EU trade policy in the communication “Global Europe: Competing in the World” (European Commission 2006). The central point of “Global Europe” is that in order to benefit from globalization, Europe must become more competitive. The opening of markets abroad is an essential contributor to such competitiveness, and thus to growth and

jobs in the EU. The immediate and primary goal of EU trade policy is therefore now to concentrate on creating markets abroad for European companies. This includes initiatives designed to treat trade with China separately; protect intellectual property rights more aggressively; improve market access for European goods and services in the rest of the world; open up more public procurement markets abroad; and improve the EU's trade defense instruments. With respect to international trade negotiations, "Global Europe" still affirms the primacy of multilateralism. But it insists on "primacy", not exclusivity, thereby ending the moratorium on bilateral trade agreements. Therefore, the EU has now launched bilateral and regional trade negotiations.

Overall, "Global Europe" represents a more offensive, and a more traditional, package of measures than the ones previously dictated by the doctrine of managed globalization. But although it may seem like a doctrinal shift, one can argue that it still seeks to manage globalization, although through different tools. Opening markets abroad is a proactive policy designed to level the playing field and make sure that globalization does not happen in an unfair, unbalanced manner (even if it does not correct the existing power imbalances), so in that way it is another facet of managed globalization.

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Aid for Trade and the WTO

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i. Why Aid for Trade is in the WTO

Aid for Trade (AfT) was added to the Doha Negotiating Round in December 2005, four years after the agenda had been agreed, and after all countries had set their negotiating mandates, a breach of normal WTO procedure. It was designed to protect the weakest members and those with least stake in the liberalising function of the WTO: Least Developed Countries (LDCs) and others depending on preferential rather than Most Favoured Nation (MFN) access to developed countries, a challenge to normal analyses of power within the WTO. It committed the WTO to having a monitoring role in aid, an intrusion of a trade organisation into a non-trade area and of a multilateral organisation into a subject normally regarded as entirely of national competence. It gave the WTO a welfare-orientated responsibility, not one based on bargaining among national interests, contrary to its normal way of working.

Describing and analysing how AfT got into the WTO helps us to understand how the WTO works, and what influences how far the WTO can move into other, non-trade areas. In this case, the WTO has tried to solve a trade problem (preference erosion presents an obstacle to trade liberalisation) by obtaining agreement that another type of inter-country intervention (aid) can be modified to replace a trade instrument (preferences).

ii. Evolution of support for Aid for Trade in the WTO negotiations

Increasing pressure on preferences

Preferences depended on acceptance that trade rules could be informal and that developed countries could decide whom to prefer. The exclusion of agriculture from GATT rules until the Uruguay Round had allowed arrangements like the sugar and banana regimes which gave preferred access and favourable prices to particular classes of countries for specific commodities. Even if any of these 'special and differential' treatments had been considered contrary to GATT rules, the GATT dispute mechanism had no teeth.

Throughout GATT's history, the scope of GATT/WTO rules increased and flexibility diminished because countries, both developed and developing, found they were at risk of damage from the unregulated actions of others. Even the Enabling Clause

(GATT 1979) which originally authorised preferences foresaw the risk of ‘undue difficulties’ for other countries, and as developing countries have become economically larger, the potential for measures favouring all or some of these to cause ‘difficulties’ has increased. And as they have become more politically and legally powerful, their ability to defend themselves from ‘difficulties’ caused by others, even other developing countries, has grown. The ‘space’ for S&DT which is both significant in development terms for the country benefiting from it and small enough in economic terms not to damage others has shrunk, and the WTO dispute mechanism works.

In the Doha Round

There was no mention of AfT in the 2001 Doha Declaration. It mentioned the need for technical assistance for countries to comply with new rules, and stated that ‘technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system’ (WTO 2001), but there was no suggestion that this should be a negotiated part of the Round. It did not envisage the possibility of losses from trade liberalization. The concept of a ‘development round’ was based on the explicit belief by many commentators that liberalising trade would provide significant benefits for all developing countries and an assumption that it could not be harmful.¹

As countries began to analyse their prospects in the Round and prepare their positions, it became clear that the optimistic view that a successful liberalising round would have major positive development effects for all was over-optimistic, and some began to fear that the effects might be negative. In July 2002 (WTO 2002, p3), the LDCs suggested that there was a need to ‘Provide temporary financial compensation for fall in export earnings resulting from a reduction of MFN tariff rates in the case of products whose share in the total export earnings of an LDC exceeds 50 per cent’, the first explicit proposals on obligatory aid for preference erosion.

Then, in 2003, the IMF (IMF 2003a) in an official submission to the WTO accepted the argument that preference erosion would have significant costs, and explicitly criticised the methodology of studies which had failed to find losses. It found that Malawi faced a loss of 11% of its exports and four other countries faced losses exceeding five per cent of exports. A study at the same time for the African Union (ILEAP 2003) reached similar results. It was probably these two studies (which were communicated to the African group, and to Malawi in particular, during the summer of 2003, before the Cancún Ministerial Conference) which helped to convince a large

¹ Most analyses of ‘the results of the Uruguay Round’ had ignored the existence of preferences in calculating the potential export gains for developing countries (e.g. during the Round: GATT 1993; after it: Martin, Winters, 1999). GTAP, the most commonly used general equilibrium model for calculating the effects of changes in trade policy, did not include these until 2003, although some unofficial analyses of the Uruguay Round (e.g. Page, Davenport, 1994) had found negative effects for preference-receiving countries. In the late 1990s countries like Mauritius, Bangladesh, and Sri Lanka began to express concern that the end of controls on textiles and clothing exports by India and China (at the end of 2004) would damage them.

number of LDCs and African countries that they had little to gain and (for some) much to lose in the Doha negotiations unless they received financial compensation.

Also in 2003, four West African countries, citing the cost to them of subsidies to cotton, notably by the US, placed this on the Cancún agenda. They requested not only an immediate reduction in subsidies, but, until all subsidies ended, compensation based on the estimated losses suffered (WTO 2003b, WTO 2003c). The sugar quota countries had also recognised the problem by 2003 (Mauritius 2003).

There were three approaches to dealing with this problem. The first (e.g. WTO 2003a) assumed that delaying liberalization or offering more preferences would work. The new calculations showed that this was not possible and preferences were no longer easy to agree. This left creating some mechanism to deliver aid within the WTO or leaving it to the normal processes of aid. Broadly speaking, those from the trade community favoured the first, while those from donors, including the World Bank and the IMF, favoured the second.

The IMF realised that the existing facilities were not appropriate for the problem. Immediately before Cancún, the IMF and World Bank offered assistance to 'developing countries with trade-related adjustment needs in the Doha Round' (IMF 2003b). Following the collapse at Cancún, which was attributable in part to the fears of preference erosion, there was more pressure on both developed and developing countries to find new solutions. In 2004, the IMF extended its initial analysis of LDCs to Middle Income countries (Alexandraki, Lankes, 2004), and created the promised new facility, the Trade Integration Mechanism, TIM (IMF 2004) for balance of payments problems arising from trade liberalization.

On one point, the cost of implementing new WTO rules, there was clear progress in 2004. Developing countries had requested a binding commitment to provide additional funding required to meet rule changes. This was not accepted, but the July 2004 framework for WTO negotiations (WTO 2004) moved in that direction. In the one new area included, Trade Facilitation, there was for the first time in a WTO agreement an acceptance that 'in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required.'

EU support and developing country mobilisation

In the UK, the International Development Committee of the House of Commons (IDC 2003) recognised 'moral, historical, and legal responsibilities' of the EU to the ACP countries that have received preferences or benefited from subsidies, and drew the analogy of compensation for expansion of the EU (p. 36). In 2004, a study for the Swedish Government to find new forms of special and differential treatment that could offer developing countries real gains in trade (Kleen, Page 2005) concluded that (pp. 100-1): 'some countries will have a measurable negative outcome from

any significant liberalisation of trade because their losses from preference erosion will be greater than their gains from other parts of the agreements, so that only financial assistance can give them a positive outcome.'

Also in 2004, the UK government commissioned studies to estimate the costs to sugar and banana exporters of changes in the preference regimes for these (Gillson et al 2004), which helped to motivate action by the EC. Its Action Plan (EC 2005) would be widely seen as a possible precedent for AfT in the WTO. It recognised the principle that countries which had benefited from preferential trade because of EU policies on sugar should be 'supported' to adjust to changes in these. In proposing that the assistance be used to improve the competitiveness of countries' sugar sectors, to promote diversification away from sugar, and to assist adjustment more generally, it directly substituted development assistance for preferences.

From the end of 2004 to the first half of 2005, a group of aid officials and experts chaired by Ernesto Zedillo examined what developing countries could gain from the Round, and concluded that AfT was an essential part of a package to rescue the Round and ensure that developing countries gained (Zedillo 2005). (See also Njinkeu, Cameron 2007.)

Using WTO procedures

At the April 2005 meetings of the IMF and the World Bank (World Bank, IMF, 2005a), these organisations asked two ambassadors to the WTO, from Sweden and Rwanda, to consult the ambassadors there on 'the need for aid for trade'. Ambassadors Mia Horn af Rantzien (who had organised a meeting on the report to the Swedish Government on special and differential treatment and who would later chair the WTO Task Force on Aid for Trade) and Valentine Rugwabiza (who would, as Deputy Director General of the WTO, lead the drafting process to put AfT on the Hong Kong agenda) identified 'three pillars' for Aid for Trade (World Bank, IMF, 2005b):

- 'enhancing the in-country trade development agenda (in broadest sense) via the IF approach
- creating a multilateral fund with the aim of providing more predictable and credible financing to respond to the prioritised trade-related needs assessment and
- a separate "window" for specific adjustment issues affecting certain countries arising from MFN liberalisation (notably on preference erosion, but also other issues could be considered, including loss of fiscal revenues).'

The IMF and World rejected the proposals for a separate fund and a separate window for adjustment. In Geneva, however, there was still support among negotiators from developed and developing countries for a separate fund for AfT. Zambia (the country which would lead the LDCs at the Hong Kong Ministerial) made detailed proposals on how to identify productive and infrastructure needs and the

adjustment financing required (Patel 2005). In the final stages of preparation for the Hong Kong Ministerial, the WTO convened an informal group of ambassadors to make a proposal for Hong Kong.

The Hong Kong declaration (WTO 2005) strengthened their proposal, and gave a clear process: a Task Force to prepare a report to the General Council on 'operationalizing' AfT and instructions to the Director General to identify what donors could do, before a discussion in the General Council.

The Task Force

Following the Hong Kong conference, a Task Force was appointed by the Director General. From a WTO governance point of view, it is interesting to note that the members were chosen to include the major countries, developed and developing, plus the chairs or representatives of the various informal groups of developing countries (Africa, LDC, i.e. Zambia, ACP, SVE). The risk of this system is that countries which are not members of prominent groups are neglected. Following protests in the General Council, two additional members were added, Colombia and Thailand, middle income countries which, although not normal aid recipients, might expect to be included in a trade-related facility. Colombia had been a member of the pre-Hong Kong drafting group; the current ambassador was also chair of the Trade Policy Review Mechanism committee. The composition of the Task Force meant that it had wide expertise and its own opinions on AfT. It took the Hong Kong paragraph as its Terms of Reference, rejecting a concept paper drafted by the WTO secretariat.

The Task Force faced a range of different views (WTO 2006a). The EU and US disagreed. The EU supported AfT in principle. Its Action Plan for sugar had many of the elements proposed for AfT and internally the EU has accepted the need for 'cohesion funds' and for transfers from those who gain from integration to those who lose. The US was anxious to avoid any transfer of the costs of erosion of EU preferences to international funding.

The Task Force defined the scope of what could be funded under AfT as 'activities ... identified as trade-related development priorities in the recipient country's national development strategies.' It listed those that it thought would qualify (WTO 2006e):

- Trade policy and regulations
- Trade development
- Trade-related infrastructure
- Building productive capacity
- Trade-related adjustment
- Other trade-related needs.

The 'adjustment' category could include adjustment to preference erosion, higher food prices, and loss of tariff revenue. The Task Force followed the Hong Kong declaration in specifying that AfT is for 'developing countries, particularly LDCs'. It did not explicitly mention the problem that some of the needs closely related to

WTO agreements (for example the costs of implementing trade facilitation requirements) or some adjustment costs might not fit the mandates of aid donors, because their immediate purpose would be to meet international obligations, not to promote a country's development in accordance with a nationally adopted plan. It dealt with this by implication by providing for 'clearing house functions' to meet unfunded needs.

It did not recommend a new agency to administer AfT, but made clear its dissatisfaction with the existing mechanisms. It criticised donors for neglecting trade and failing to understand its needs, leading to inadequate support for infrastructure and meeting the costs of adjustment, and for inadequate attention to regional needs. It recommended better coordination mechanisms at country, regional, and multinational level. The principal role for the WTO would be to monitor the overall and country performance of other agencies.

Aid for Trade separates from the Doha Round

The Hong Kong mandate implied a strong link between AfT and the Doha Round: it was to 'contribute to the development dimension of the DDA' and be complementary to trade changes. But it also argued that AfT should aim to help developing countries 'more broadly to expand their trade'. By the time the Task Force reported in July 2006, it was clear that negotiations might stall, so while it repeated the slogan that AfT should be complementary to the Round, not a substitute for it, it also stretched the ordinary meaning of words to produce a variant on this: 'Aid for Trade is a complement to the Doha Round, but it is not conditional upon its success.' It urged that it begin 'as soon as possible'.

In October 2006, the WTO General Council accepted the Task Force's report. The WTO Director General emphasised the WTO's role in 'promoting coherence' (WTO, 2006c, 2006d) through monitoring AfT. This would largely use the existing OECD/WTO data base, but the WTO could also use direct reports to the Committee on Trade and Development by development agencies and country-based monitoring. There was an intention to include assessments of AfT for donors and recipients in Trade Policy Reviews and to hold an annual debate in the General Council starting autumn 2007, following up two of the Task Force recommendations, and to establish a committee of donor agencies.

During 2007, the Inter-American, African and Asian Development Banks held meetings to introduce AfT to countries in each region, leading to a WTO Global Review in November 2007. These identified existing programmes relevant to AfT. The OECD took responsibility for defining and compiling data on AfT. The plan for 2008 was to have more targeted meetings in countries or regions to identify 'concrete national and sub-regional strategies' (WTO 2008) and to improve monitoring and evaluation. The WTO would examine how Trade Policy Reviews could be used and consult the Committee on Trade and Development. It postponed the next Global Review to 2009.

iii. Other issues which have joined the GATT/WTO agenda

The most obvious reason for new issues to emerge is structural changes. The growing importance of services trade explains GATS. The emergence of new ways of copying technology and new suppliers of high technology goods helps to explain TRIPs. Further back, the emergence of a large number of independent developing countries as GATT members led to demands for special and differential treatment.

But there are other reasons. Trade in agriculture was not new in the 1980s. Its emergence in the Uruguay Round illustrates the importance of changes in power and in the effective use of power. The declining relative importance of the US and EU meant that the Cairns Group could put agriculture on the agenda. Then in the Doha Round the growing importance of large developing countries meant that the G20 could establish a dominant position in the agriculture negotiations. As a slightly different group, the NAMA 11, it also became one of the major players in non-agriculture negotiations.

Even countries without major economic weight have been able to put issues on the table by using the power which the WTO procedures and the desire of all countries to be seen to be good members give to them. No country wants to destroy the legitimacy of WTO by challenging the right of all members to participate, and no one wants to take too blatant an anti-trade position (well, maybe on agriculture). In the Uruguay Round, the clothing producers exploited the power which this gives to a well-organised reform group to secure reform of the Multi-Fibre Arrangement (Page 2004). In the Doha Round, even the G33, a group of middle-level developing countries have secured a voice in the agriculture negotiations. In this context, the success of the preference-losing countries in gaining something on AfT is not exceptional.

These examples illustrate that new issues are not just those that the US and EU want. Services and TRIPs did come from them. But agriculture and reform of the MFA did not. And not all issues that they want are successful. Investment, competition policy, and government procurement did not get on the agenda, partly because the US did not support the EU, and partly because other countries also opposed them. At present, the US finds itself similarly isolated on including zeroing in anti-dumping.

All issues which are proposed for the WTO agenda are of course presented as 'trade related', but this is not a useful definition. In an open economy, all issues are trade-related. The issues that have succeeded suggest that a new area has to have a reasonable degree of importance in world economy. (Some current borderline issues are borderline partly for this reason, for example GIs and patenting of life forms.) It needs to have either a powerful advocate or a group which can both use the consensus rules and claim a trade legitimacy (power: US for TRIPs; EU/US for services; legitimacy: for clothing producers, preference losers, and G33).

There is also a different type of criterion for appropriateness to the WTO. The way in which the WTO works is through mercantilist bargaining. The theory behind this is that if each country tries to promote its producers' interests through demanding that others liberalise (or adopt rules that help trade), then this will promote world welfare, in a way very roughly analogous to the invisible hand in markets. But, as in markets, combination (collusion) to promote a common interest will prevent this process from functioning properly.

Services clearly could be dealt with in the same way as goods. TRIPS might seem not appropriate if the argument is that protecting private rights in innovation is 'for the good of all' because it rewards inventors, but in practice it fit the bargaining model because of the way it emerged in the Uruguay Round negotiations. There was a conflict of interest between inventors (largely, although not exclusively, in the developed countries) and users and copiers of inventions (more in the developing countries), so intellectual property rights could be included in the trade-offs.

This suggests that for areas like investment and competition policy to fit into the WTO, it would be better to accept that there will be different interests. Trade facilitation may seem an exception to this rule, but because it deals with the methods of trading it acquires a different type of legitimacy.

iv. How Aid for Trade succeeded

It solved a trade problem

Introducing AfT met a real problem for the working of the WTO, and met it in a way that increased the probability of trade liberalisation, so it was a reform in line with the ethos of the WTO. The real risk of preference erosion meant that countries opposed liberalisation because some would, and many more feared that they might, lose from liberalisation. This was not in itself new. It had always been accepted that countries with preferences might attempt to preserve these by obstructing liberalisation. But for most countries, dependent on preferences for some exports, but on the general trade regime for others, this was unlikely to happen. It was the increasing concentration of preferences on a few countries and a few products which brought the risk to the fore in the Doha Round. Then, AfT could be justified as an addition to the negotiating mandate as an essential condition to avoid damaging developing countries in what had been labeled a 'development' round.

Developing countries have influence and have learned to use it

The 'single undertaking' of the Uruguay Round meant that every WTO member was directly affected by the outcome, in contrast to previous Rounds. Promotion of developing country participation in the WTO which began immediately following the end of that Round had made more countries aware of actual and potential effects, while the increased resources devoted to calculating these effects greatly improved the analysis and highlighted the risk of loss. But it was then the consensus principle of the WTO that required both the developed countries and the non-preference

dependent developing countries to take account of these interests. The shift of first the EU and then the G20 to accepting that preference erosion was a problem that needed a non-trade solution was a major shift from the assumptions up to 2003. It was brought about partly by evidence, but also by adroit bargaining by the LDCs and other preference receivers. The new element (compared to GATT) of the ministerial meetings under the WTO meant that there was a forum for member countries to add cotton to the mandate in 2003 and AfT in 2005. Their amendment of the proposed Hong Kong text to provide a clear process meant that AfT was the only part of the text to reach implementation.

It solved aid and development problems

These countries now had the opportunity and a greater chance of getting their interests on the table. Another reason for their success was that their chosen issue affected two areas which clearly needed reform, preferences and aid.

The original theory behind preferences was that they would help developing countries to cross barriers to entry, into new products and new markets. By the beginning of Doha, this was less useful and fewer preferences followed this model.

Preferences are of more limited usefulness than in the past. The more multilateral barriers are reduced, the less valuable are preferences. They are less useful for the Least Developed Countries, on which preferences are now targeted, than for other countries. Rules of origin which require a high level of vertical integration of industry always create obstacles for small countries with limited industrial capacity, and these rules are becoming more restrictive. Most current exports by LDCs to developed countries are primary commodities which would enter duty free or at low tariffs even if they were on MFN terms. Supply factors are an increasingly well-recognised barrier to using preferences. And LDCs are precisely the countries where the supply constraints on using preferences may be most serious.

There were clear moves away from the original model. As preferences are increasingly targeted at only some developing countries, they now redistribute income among developing countries, not from developed to developing. In many cases, developed countries have transferred the 'cost' (in protectionist terms) of liberalising their trade with the favoured developing countries to the less favoured by liberalising those imports which compete with other developing countries, rather than those that compete with developed countries' own production. Most of the value of current preferences comes from the schemes for sugar and bananas, so preferences are preserving access in old products and providing economic rents, not incentives to develop.

As giving developing countries extra opportunities to trade had helped some of them to develop, it was not possible for the WTO (especially if it claims a development obligation) simply to reject preferences as no longer useful and unfair without offering an alternative. The obvious way to target assistance was aid.

Aid had become increasingly focused on poverty and social spending in the decade to 2005, and both economic analysis of what is needed for sustainable development and the regular need to find a new fashion in aid spending were leading to a new focus on production and infrastructure. While aid analysis continues to oppose any earmarking of funds for particular purposes, the growth of special funds for health and environmental purposes had weakened this position and made it harder to sustain the view that aid priorities should be purely determined by the donor (sometimes presented as 'country-led' aid, but the dominant position of the country with money means that this means donor-led). Although there remains resistance to any mandating of funds for trade or to a new multilateral fund, donors were more willing to accept trade as a new priority than they might have been in the past. The AfT Task Force drew on dissatisfaction with aid priorities. The massive increase in aid pledges in 2005 made it easier for aid agencies to accept a new responsibility.

Its success created new risks

It remains difficult to reconcile the WTO approach of member countries and equal voice with an area where there are 'donors' and 'recipients' (Page 2006). Helping developing countries follows either the theoretical aid approach of all countries coming together to plan what is best or the actual aid approach of donors deciding what is best for recipients. Both are inconsistent with the WTO approach of bargaining among equals, with each country responsible for defining and defending its own interests. A WTO of givers and beggars would be a different and less legitimate organisation.

The shifting of some of the responsibility for implementation to the development banks and for analysis to the OECD, with the WTO retaining a monitoring role, is the current solution to the conflict. If the Doha negotiations continue (or succeed), then the fact that AfT is an essential condition for some countries will ensure that there is some leverage for the 'recipients', in contrast to other aid relationships. If the Doha Round fails (and if, as seems likely, aid flows are more restricted than they were expected to be at the time of Hong Kong), then any pressure to increase aid for trade purposes is likely to disappear. The delay to the next Review is not a good sign.

Within the WTO, it will be important not to allow the language of 'donors' and 'recipients' to affect the relative positions of member countries. On this, the insistence of some developing countries that AfT should not be regarded as part of the negotiations is probably misguided. It should be treated as an obligation (even if one that is being implemented outside the WTO), not unrelated benevolence on the part of the donors.

The EU and Intellectual Property Protection: A Conflicted Proponent of Multilateralism and Fairer Global Rules

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With the launch of the World Trade Organization (WTO) in 1995, its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) emerged as a symbol of coercion in international economic relations. In the decade that followed, intellectual property became one of the most contentious topics of global policy debate, particularly as developed countries have sought to further augment international IP agreements and strengthen IP laws and protection at the national level. While much of the critical attention in the past decade has focused on coercive pressures from the United States, the European Union has been an active proponent of strengthened IP protection. In so doing, it has sought to use and enhance commitments and mechanisms available at the multilateral level in the WTO context. It has also sought to supplement WTO mechanisms with new rules in other multilateral fora, such as WIPO, in several cases securing new multilateral rules. In addition, the European has been an active player at the bilateral and regional level in pushing for TRIPS-plus IP protection. In addition to efforts to link IP protection to trade benefits, the EU has also used capacity building and training as tools to promote a pro-IP political climate and further IP reforms in developing countries.

Together, this practice challenges the discourse of the EU as a global power in favour a rule-based multilateral system and also one that is more sympathetic than the United States to developing country calls for greater fairness and consideration of their social and public health challenges. In fact, the EU pursues a determined agenda to push developing countries to accept stronger international IP rules often considered against the economic and social interests of countries. Even in the case of global debates on the relationship between IP and public health, the European Union, through its Commission, has actively used diplomatic channels, and threats related to aid and trade, to push countries not, for example, to take advantage of TRIPS flexibilities with respect to compulsory licensing. Most recently, EC pressures on Thailand to desist from efforts to issue compulsory licenses resulted in a formal censure from the European Parliament of Commission Mandelson for violating the spirit of the Doha Declaration on TRIPS and Public Health.

This short analysis reviews the history of the EU's involvement in the TRIPS negotiations, and details the series of ways in which the EU has been acting, post-TRIPS, to advance a TRIPS-plus agenda that put in question the strength of its purported commitment to multilateralism in trade and to promoting sustainable development through its external relations.

i. The EU, Developing Countries and the TRIPS negotiations

In the early 1980s, the United States and European Union equipped themselves with new unilateral tools to push for stronger IP protection in developing countries, including tools to link IP protection to trade benefits.¹ A combination of both sticks (unilateral threats) and carrots (promises of new market access for products of interest to developing countries) were deployed. Simultaneously, these tools were harnessed to pressure developing countries to accept the inclusion of IP rules in the GATT regime. While there has been much emphasis on U.S. pressure on developing countries in this respect, the European Union's approach was more subtle but still very important.

Throughout the TRIPS negotiations, observes Peter Drahos, the European Commission was a 'quiet free-rider' on U.S. initiatives, 'sometimes sending in negotiators to conclude a bilateral agreement on intellectual property with a developing country after U.S. negotiators had brought that country to the negotiating table using the 301 process.'² In 1984, for instance, a Council Regulation empowered the European Commission to engage in trade retaliation against 'illicit commercial practices' (defined as violations of 'international law or generally accepted rules') by non-EU countries that affected EU economic interests.³ In contrast to U.S. practice, the European instrument focused primarily on violations of obligations in international treaties, such as the Berne and Paris Conventions. The Regulation was rarely used, however, in part because the European Commission was unable to build consensus among members for its deployment.⁴ The Commission did nonetheless take some bilateral action on IP issues, including the suspension of its GSP concessions to Korea.⁵

Alongside the United States, the European Union joined the push to strengthen multilateral IP regulation. To advance this goal, they embarked on a deliberate effort to shift IP discussions from WIPO to the GATT where U.S. strategists assessed that the prospects for obtaining stronger international IP standards were highest. Compared to WIPO and other UN fora, developing countries were poorly organized in the GATT context. The GATT negotiation process would also give the US and EU

¹ In 1974, the United States had already augmented Section 337 (Unfair Trade Practices and Intellectual Property Rights) of its trade law to allow for unilateral action against foreign products produced in ways that violated the IP rights that U.S. individuals or firms hold under U.S. law.

² For an overview of EU strategy and agreements forged in the pre-TRIPS era, see Panagariya (2002) and Santa Cruz (2006).

³ The Regulation does not, however, appear to explicitly specify the nature or level of the retaliation contemplated. See Bourgeois and Laurent (1985) and EC (1988).

⁴ Drahos (2002b: 15).

⁵ Brueckmann (1990), and Trebilcock and Howse (2001: 319).

the possibility to leverage progress on their international IP agenda in exchange for movement on developing country market access priorities. Further, the inclusion of a multilateral IP agreement in the GATT system would enable developed countries to use trade remedies to push for stronger IP enforcement.⁶ In Geneva, the United States and the European Union insisted that the inclusion of IP on the Uruguay Round agenda was a necessary concession for launching new trade negotiations. After several years of negotiations, the developed countries prevailed.

ii. **Multilateral and Bilateral Pressures on Developing Countries post-TRIPS: The EU Role**

When TRIPS came into force in January 1995, debate on its provisions was far from over. Even as the TRIPS negotiations drew to a close, industry lobbyists in developed countries argued the Agreement was too weak and too easily circumventable.⁷ They complained that the Agreement's transition periods for developing countries were too long and that TRIPS offered inadequate protections for some products.

From 1995, representatives of leading multinational pharmaceutical, agro-chemical, seed, entertainment, manufacturing and software companies urged their respective governments in the United States, European Union and Japan to ensure swift and full implementation of TRIPS, to eliminate the loopholes and ambiguities in the Agreement and to ensure that its interpretation by developing countries protected their interests. Industry representatives worried that actions in one developing country might influence others. The major economic powers shared many objectives. Both the United States and the European Union wanted to extend TRIPS patent protections to plant biotechnology, plants and animals. But the major powers also had some particular objectives. Whereas the European Union favoured the extension of protection for geographical indications beyond wines and spirits, the United States and Australia opposed this agenda.⁸ Further, Canada, which like developing countries was a net-importer of IP, was the only developed country which actively intervened to defend particular TRIPS flexibilities (i.e., the moratorium on non-violation complaints in TRIPS).⁹

TRIPS-plus standards

At the behest of particular industry groups, the major powers also pushed for TRIPS-plus rules. In both Europe and the United States, well-financed and consistent lobbying efforts in major capitals and direct financial support for key politicians enhanced the influence of individual companies and industry groups.¹⁰ As the scope of industry's agenda for strengthened international IP regulation expanded so too did the range of their respective government's demands on developing countries.

⁶ Abbott (1989), and Braithwaite and Drahos (2000: 61-64).

⁷ See The Economist (1994), Hill (1990; 1994), and Schott (1994) and Umoren, R (1995).

⁸ For a summary of discussions related to the extension of the protection of geographical indications, see WTO document WT/GC/W/546.

⁹ Abbott (2003b).

¹⁰ Mayne (2002).

The direct access of many of industry groups to relevant government officials amplified their influence. In both the United States and the European Union, trade officials were mandated by their respective legislatures to consult with industry advisory committees on trade policy generally and IP policy specifically.

Coordination among the EU and other developed countries

Throughout global IP debates, the IP offices of developed countries were particularly important, as was the coordination among them. Formal collaboration among the IP offices of the United States, Japan and the European Union began in the 1980s and included the launching of a formal collaboration called 'Trilateral Cooperation.'¹¹ An example of the activities spawned by the trilateral group was the submission of a joint proposal to WIPO's Standing Committee on the Law of Patents (SCP) in April 2004.¹²

Forum-shifting and the push for new multilateral rules

Both developed and developing country governments (and their non-state supporters) used 'forum-shifting' techniques.¹³ In response to the growing effectiveness of developing country opposition to their efforts to strengthen TRIPS, the United States and Europe calculated that their push for stronger international IP regulation and enforcement would succeed most swiftly where the potential for collective action among developing countries was weakest. The United States, the European Union, Japan and the countries of the European Free Trade Area (EFTA) (Iceland, Lichtenstein, Norway, and Switzerland) turned to bilateral and regional trade, investment, and IP agreements with developing countries, with the goal of supplementing their existing commitments in TRIPS and other international IP treaties. For example, a growing number of developing countries signed new bilateral trade agreements with the European Union and United States through which they committed to TRIPS-plus standards in exchange for greater access to developed country markets.¹⁴

Developed countries also pushed their agenda in multilateral organisations. The United States led the push for the 1994 WIPO Internet Treaties, which aim to improve the protection of copyrighted works, performances, and sound recordings in the digital environment.¹⁵ The U.S. government then encouraged developing

¹¹ See <http://www.trilateral.net>.

¹² This proposal emerged from a meeting of the Trilateral Offices in November of 2003. For a summary of the 21st Trilateral Conference, Tokyo, see <http://www.trilateral.net>. The origins of the proposal can be traced to an October 2003 meeting of the Executive Committee of the International Association for the Protection of Intellectual Property (AIPPI) in Lucerne in October of 2003. See AIPPI's Resolution to Question 170 at <http://www.aippi.org>.

¹³ On forum-shifting in international IP negotiations, see Braithwaite and Drahos (2000), Drahos (2002a), and Helfer (2004).

¹⁴ For an overview of the impacts of these Agreements on the options of developing countries with respect to TRIPS flexibilities, see Musungu and Dutfield (2003), Fink and Reichenmiller (2005), Oliva (2003), Roffe (2004), Santa Cruz and Roffe (2006), and Vivas-Eugui (2003).

¹⁵ The two treaties are the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). For the text of each treaty, see <http://www.wipo.int/treaties/en>.

countries to sign, ratify, and implement these treaties using trade negotiations, speeches, WIPO meetings, the Special 301 process, TRIPS Council discussions, and the activities of U.S. embassies in host countries.¹⁶ Developed countries (which work together as Group B in the WIPO context) also worked with the WIPO Secretariat to advance what became known as the WIPO Patent Agenda in 2001. This Agenda had three components, namely promoting the ratification of the Patent Law Treaty (PLT), reform of the Patent Cooperation Treaty (PCT), and negotiations on a new Substantive Patent Law Treaty (SPLT) to supplement the substantive obligations contained in TRIPS.¹⁷

The U.S, European and Japanese patent offices intensified their trilateral effort toward substantive harmonization (to serve as a default option if the multilateral track failed).¹⁸ In 2005 and 2006, they also worked with WIPO to reassert their agenda by going directly to developing country capitals. The effort to bypass more politically-informed and better-coordinated developing country representatives in Geneva provoked charges from critics that multilateral approaches to IP policymaking were under threat.¹⁹ The Group B countries were accused of co-opting influential developing country experts and institutes to advance their cause.²⁰ The choice of a former Indian government official and leading figure to chair a controversial informal meeting in Casablanca on matters related to the SPLT and the Development Agenda prompted India and Brazil each to formally dissociate themselves from the outcomes and to issue formal objections to WIPO.²¹ Developed countries also shifted to the World Customs Organisation to promote stronger enforcement of international IP rights.²² By late 2007, developed countries had pushed the WCO regarding the preparation of a voluntary 'model law' to provide guidance on the enforcement of IP rights by customs authorities at borders, including for standards for customs authorities that go beyond TRIPS requirements.²³

Bilateral EU trade initiatives and IP pressures

Bilateral trade agreements were a forceful form of economic pressure used by developed countries to influence TRIPS implementation and played a key role in shaping a compliance-oriented and TRIPS-plus political environment.²⁴ These agreements often included specific TRIPS-'plus' obligations to extend patents to new subject matter, elimination of certain exceptions, increased copyright requirements,

¹⁶ Dickinson (1999).

¹⁷ For critical reviews of the WIPO Patent Agenda and the proposed SPLT, see Correa and Musungu (2002).

¹⁸ New (2006a).

¹⁹ Ibid.

²⁰ New (2005c).

²¹ Ibid.

²² For an overview of the evolving governance of international IP enforcement, see Biadgleng and Tellez (2008).

²³ New (2008b).

²⁴ See Chapter 1, footnote 71. Also see Fink and Reichenmiller (2005), Krikorian and Szymkowiak (2007), Oh (2008), Wunsch-Vincent (2003).

accession to particular international conventions,²⁵ and adoption of the highest international standards in certain areas (see Table 5.1.).

Alongside the United States, the European Union also used bilateral trade agreements to secure not only faster TRIPS implementation and enforcement but also TRIPS-plus standards of IP protection in South Africa, India, a series of Mediterranean countries, and in Eastern Europe.²⁶ Whereas the U.S. FTAs all included specific chapters with substantive IP provisions, the European approach to IP varied according to the trading partner in question.²⁷ Countries in Eastern Europe and some former Soviet countries were required to adopt standards identical to those in the European Union.²⁸ The European Union also has several bilateral agreements related to the protection of geographical indications (e.g. with Mexico).

In other cases, provisions in EU agreements were more general but still represented TRIPS-plus commitments. In its Partnership Agreement with the European Union, Jordan is required provide patent protection for chemicals and pharmaceutical products two years earlier than TRIPS.²⁹ In 2000, seventy-six African, Caribbean and Pacific (ACP) countries signed the Cotonou Agreement with the European Union whereby they committed to including IP issues in their subsequent negotiations of bilateral Economic Partnership Agreements (EPAs).³⁰ While the Cotonou Agreement notes the need to take into account different levels of development, it has several TRIPS-plus aspects, including recognition of the need to accede to all relevant international conventions on IP (TRIPS does not call on countries to accede to any additional international IP conventions), for patent protection of biotechnological inventions and for legal protection of non-original databases (also not required by TRIPS). Even though the provisions are non-binding, they nonetheless formed the baseline conditions for the EPA negotiations that followed.³¹ The motivation for the EPA negotiations was to address the WTO-inconsistencies of prior EU preferential

²⁵ Such requirements are found, for example, in the U.S.–Jordan FTA, the EU–Jordan Partnership Agreement, the U.S.–Morocco FTA, the U.S.–Bahrain FTA, and the EU–Egypt Association Agreement.

²⁶ The European Union has TRIPS-plus trade agreements with Algeria (2002), Bangladesh (2001), Egypt (2001), Lebanon (2002), Mexico (2000), Morocco (2000), the Palestinian Authority (1997), South Africa (1999), Sri Lanka (1995), and Tunisia (1998). For copies of each of these agreements, see <http://europa.eu.int/eur-lex/en>. For further background on the European Union’s bilateral trade relations website, see http://europa.eu.int/comm/trade/bilateral/index_en.htm.

²⁷ For an overview of IP provisions in EU trade agreements, see Santa Cruz (2006).

²⁸ For its accession countries, the European Union required harmonization with its own regional laws, such as its seven Copyright Directives. Over fifty countries have copyright standards equivalent to those set out by these EU Directives. See Suthersanen (2005).

²⁹ The Partnership Agreement called for such protection either within three years of the Agreement coming into force or Jordan’s accession to the WTO, whichever came earliest.

³⁰ The Cotonou Agreement replaced the Lomé Convention and provides a framework for privileged relations between the European Union and the ACP countries on matters of market access, technical assistance and other issues until 2020. See <http://www.acpsec.org/>.

³¹ The Cotonou Agreement also commits countries to cooperation regarding the ‘preparation of laws and regulations for the protection and enforcement of IP; the prevention of the abuse of such rights by right holders and the infringement of such rights by competitors; the establishment and reinforcement of domestic and regional offices and other agencies including support for regional intellectual property organizations involved in enforcement and protection, including the training of personnel’ (Article 46).

trading arrangements with ACP countries. Notably, WTO-consistency does not require any bilateral negotiations between the EU and ACP countries on IP issues.³²

As the deadlines for EPA negotiations approached in late 2007, intense debate about their terms and the pressures to include IP provisions, many countries instead signed interim agreements.³³ Only the Caribbean signed an EPA in early 2008.³⁴ The European Union also included TRIPS-plus obligations in the Action Plans for countries covered by its European Neighbourhood Policy (ENP) (which applies to the EU's immediate neighbours by land or sea).³⁵ In October 2006, the European Union announced that it would launch, for the first time in five years, a new generation of bilateral free trade agreements with key partners that can also be expected to include TRIPS-plus IP provisions.³⁶

Unilateral and multilateral monitoring as EU pressure tools

The European Commission also actively monitors developing countries. Sometimes pressures from the EU and the U.S. converged on a country. Since 1988, Argentina has been listed several times on the USTR Priority Watch list, and was investigated under Special 301. In January 1997, after a Special 301 out-of-cycle review, the U.S. announced the suspension of tariff benefits on 50 per cent of the tariff lines covered by GSP because of the alleged lack of adequate protection for pharmaceutical products. According to the Chamber of Argentine Exporters (WTO, TPR Argentina, 1998), the sanctions-affected items representing estimated annual exports of US\$270 million. In July 1997, the EU also expressed concern over the Argentine patent legislation, citing a lack of protection for the European pharmaceutical industry. In 2003, the European Union published a survey of IP enforcement around the world and in 2004 announced an upgraded monitoring initiative focused on enforcement.³⁷ Upon announcing its new initiative, the EU stated that it does not intend to 'impose unilateral solutions' to enforcement problems or to 'propose a one-size-fits-all approach.'³⁸ The European Union did, however, propose to revisit the IP chapters in bilateral agreements with a view to strengthening their enforcement clauses.³⁹ To date, no sanctions or threats of sanctions have been announced.⁴⁰

³² ICTSD (2008) and CIEL (2007).

³³ Ibid.

³⁴ For reports that trace the evolution of the negotiations see *Trade Negotiations Insights* available at <http://www.ecpdm.org> and <http://www.ictsd.org>.

³⁵ The developing countries in this group are Algeria, Egypt, Jordan, Lebanon, Libya, Morocco, the Palestinian Authority, Syria and Tunisia. The central element of the ENP is the development of bilateral Action Plans agreed between the European Union and each partner which form the basis for a future European Neighbourhood Agreement. See EC (2004a; 2004b) and http://ec.europa.eu/world/enp/policy_en.htm.

³⁶ The European Union also continues to pursue trade negotiations with Mercosur and the Arab Gulf Cooperation Council (GCC), ASEAN, the Andean region, the Central American region and India. See Mandelson (2005) and EC (2006).

³⁷ EC (2003, 2004c).

³⁸ EC (2004c).

³⁹ EC (2004c: 2-3).

⁴⁰ EC (2006).

The European Union, along with the United States, Japan and Switzerland, also took advantage of the various WTO process (i.e., the trade policy review (TPR) process, the TRIPS Reviews, and TRIPS Council meetings) to put public pressure on developing countries for improved TRIPS implementation and to convey their views regarding what countries ought to do. In all but three of sixty eight TRIPS Council Reviews of Legislation in developing countries by December 2008, at least one developed country posed a lengthy list of questions about TRIPS implementation.⁴¹ The member state under review had then to respond in writing (a task which frequently resulted in a response of over twenty pages). At the meeting themselves, further oral questions frequently emerged.⁴² In both instances, questions were posed in ways that misrepresented or reflected narrowly interpretations of TRIPS obligations.⁴³ In most cases, countries faced detailed scrutiny from more than one country. In general, they received distinct sets of multiple questions from the United States, the European Commission, and Japan as well as Switzerland and Canada. Sometimes they were faced with a second round of questioning.

Similarly, in the TPR process, developed countries were active in asking pointed questions of developing countries on the status of TRIPS implementation. A review of the records of all of the TPR meetings reveals that each country was asked oral questions by at least one developed country regarding IP protection. The United States and European Union were the most active actors in posing questions to developing countries.

Enforcement

Once the 2000 TRIPS deadlines passed, dissatisfaction with IP enforcement, pro-IP companies pushed for strengthened IP enforcement in developing countries.⁴⁴ In 2004, the U.S. announced a new STOP! Initiative to fight global piracy by 'systematically dismantling piracy networks, blocking counterfeits at our borders, helping American businesses secure and enforce their rights around the world, and collaborating with our trading partners to ensure the fight against fakes is global.'⁴⁵ In 2005, the EU announced a new strategy for stronger enforcement.⁴⁶ The same year, the European Union, supported by the United States, Switzerland and Japan among others called for greater attention to enforcement at the TRIPS Council.⁴⁷ In June 2006, a EU-US Joint Action Strategy for Enforcement was launched.⁴⁸ Later that year, the European Union submitted a follow-up proposal to the TRIPS Council for an-depth discussion on the application of border measures to all types of IP, with

⁴¹ The three exceptions were Ghana, Mauritius, and Swaziland.

⁴² These reviews provided for written questions prior to the review meeting, with follow up questions and responses during the course of the meeting. At subsequent meetings of the TRIPS Council, delegations could follow up on points that emerged in the review session. For the record of the introductory statements made by delegations, the questions put to them, and their responses, see the WTO's on-line document database at http://www.wto.org/english/docs_e/docs_e.htm.

⁴³ Reichman (1998a).

⁴⁴ Biadgleng and Tellez (2008) and Drahos (2004a).

⁴⁵ USTR (2007b).

⁴⁶ EC (2003; 2004c; 2006).

⁴⁷ See WTO document IP/C/W/448.

⁴⁸ USPTO (2006).

respect to export and in transit goods.⁴⁹ (The TRIPS rules on border measures currently apply only to trademarked and copyrighted goods, and only with respect to the importation of those goods.) Several related EU documents put forward the possibility of amending TRIP to this effect.⁵⁰ Meanwhile, developed countries advanced IP enforcement issues as a priority item for discussion at the World Customs Organization (WCO), Interpol, WIPO and at the annual G8 summit.⁵¹ In 2007, the major developed countries, joined by Korea and Mexico, announced a new Anti-Counterfeiting Trade Agreement (ACTA) to further boost the fight against counterfeiting and piracy.⁵² The U.S. government described the initiative as a 'complement the Administration's work to encourage other countries to meet TRIPS enforcement standards.⁵³ In lieu of seeking changes to TRIPS, the stated goal of the initiative was to set a new, higher benchmark for enforcement that countries can join on a voluntary basis (rather than to negotiate a treaty through an international organization).⁵⁴

Internal politics within the EU as the key to reform?

Internal politics within the EU played an important role in global IP debates. From 1995-2007, the global IP system became increasingly complex. This complexity arose in part as a result of the efforts of various stakeholders to harness particular IOs and agreements which they assessed might help them achieve their competing objectives of strengthening or balancing the IP commitments found in TRIPS. One result has been internal debates within the European Commission and the European Parliament, and between them, and also among EU members about the appropriate EU perspective on global IP debates and IP protection in developing countries. European NGOs also put pressure on national and European policymakers to desist from pushing TRIPS-'plus' reforms in developing countries.⁵⁵

⁴⁹ Japan, Switzerland and the United States also supported the inclusion of enforcement on the TRIPS Council agenda. See WTO document IP/C/W/471, Gerhardsen (2006a), and Santa Cruz (2006).

⁵⁰ EC (2004c).

⁵¹ Biadgleng and Tellez (2008).

⁵² USTR (2007a).

⁵³ Ibid.

⁵⁴ USTR (2007a) and New (2007d).

⁵⁵ The Greens in the European Parliament worked, for instance, to remove provisions from the EU's negotiating proposals for agreements with ACP countries that they argued would have facilitated biopiracy. See GRAIN (2000b).

Scottish beef calves and starving children

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i. The True Cost of First-World Farm Subsidies

The Scottish Beef Calf Scheme grants farmers annual payments of approximately £79 per animal.⁹⁸ To put that in perspective, the cost of a World Food Programme school meal is roughly 12p; for the price of one Scottish beef calf subsidy, the UK government could feed a full meal to a child in the developing world each day for one year, nine months, and three weeks.⁹⁹ This statistic only begins to speak to the magnitude of the European Union's Common Agricultural Policy (CAP) expenditures. The 2008 EU budget allocated €53.7 billion to support farmers.¹⁰⁰ That is more than the total amount that the EU and its member-states spend annually on aid to the developing world.¹⁰¹ While United States farm subsidies are tiny by comparison, the US will still spend \$7 billion a year over the next half decade on agricultural commodity programs that pad domestic farmers' income.¹⁰² That is more than the US spends each year to fight the global AIDS pandemic.¹⁰³

This short analysis considers the costs of industrialized-world agricultural subsidies in economic and political terms. I will argue that standard economic analyses underestimate the total costs of farm subsidies because they do not factor in the *political* ramifications of industrialized nations' domestic agricultural policies. First-world farm subsidies are a major roadblock to progress in global trade negotiations. While the political impact of these

⁹⁸ This estimate is based upon payouts in past years. Payments vary year-to-year based on the total number of claimants. The £79 rate refers to farms with fewer than ten calves; payments for each additional calf beyond ten are reduced by 50%. Tom Edwards, "A Healthy CAP? The Health Check of the Common Agricultural Policy," Scottish Parliament Information Center, 21 December 2007.

<<http://www.scottish.parliament.uk/business/research/briefings-07/SB07-68.pdf>>.

⁹⁹ John M. Powell, "Horizon of Hope," Presentation to the USDA and USAID International Food Aid Conference VIII, Kansas City, 26 April 2006. <http://www.fsa.usda.gov/Internet/FSA_File/john_powell.pdf>. The WFP's reported cost (19 cents) is approximately equal to 12p at current exchange rates.

¹⁰⁰ "Title 05 – Agriculture and Rural Development," 2008 European Union General Budget. <http://eur-lex.europa.eu/budget/data/D2008_VOL4/EN/nmc-titleN123A5/index.html>.

¹⁰¹ The EU and its member-states spent a combined €47 billion on aid to developing nations in 2006, the most recent year for which the EU has released aggregate statistics. "Developing: Helping others to help themselves," European Union, March 2008. <http://europa.eu/pol/dev/overview_en.htm>.

¹⁰² Peter R. Orszag, Memo to Hon. Tom Harkin/Committee on Agriculture, Nutrition, and Forestry, US Senate (Washington, D.C.: Congressional Budget Office, 13 May 2008).

<<http://www.cbo.gov/ftpdocs/92xx/doc9230/hr2419conf.pdf>>.

¹⁰³ The FY 2009 budget contains \$5.9 billion for global HIV/AIDS activities. (This does not include the \$18.2 billion for US domestic HIV/AIDS programs.) Jennifer Kates, "U.S. Federal Funding for HIV/AIDS: The FY 2009 Budget Request," Henry J. Kaiser Family Foundation, Menlo Park, Calif., April 2008.

<<http://www.kff.org/hivaids/upload/7029-041.pdf>>.

subsidies cannot be calculated precisely, political economists *can* calculate the aggregate welfare losses from trade negotiation failures. Without a crystal ball, we cannot know whether the elimination of first-world farm subsidies would necessarily lead to progress in post-Doha trade negotiations; however, we *do* know that the aggregate welfare losses from trade negotiation failures – in monetary terms – are many orders of magnitude greater than the direct economic costs of subsidies. If we limited our analysis to the direct impacts of subsidies (as many economists have done), we would blind ourselves to the total cost – and true tragedy – of first-world farm subsidies.

As we try to imagine a future for WTO negotiations, a key question is whether leaders in industrialized economies – especially the US and EU – can muster the political will and political capital necessary to overcome entrenched agricultural interests on the domestic front. (I distinguish between political *will* and political *capital* because some industrialized-world leaders – most recently, US President George W. Bush – have shown their *willingness* to fight for subsidy reductions but have lacked the domestic political *capital* to achieve their objectives.) For opponents of agricultural protection, the passage of the 2008 US Farm Bill and the extension of the EU CAP until 2013 were not heartening signs. However, this essay concludes that changes in the *character* of domestic agricultural support programs in industrialized nations have made these programs less palatable politically. Ironically, these changes have also reduced the social *cost* – in conventional economic terms – of agricultural support. In sum, as farm subsidies have become more efficient from a neoclassical economic perspective, they are becoming less viable from a political perspective. This dynamic may enable leaders in US, the EU, and other industrialized economies to roll back domestic agricultural support programs in the coming years, thus facilitating future progress in global trade talks.

ii. The Economic Cost of Subsidies

Agricultural subsidies impose three classes of costs that can be quantified using the tools of standard economic analysis. The first and simplest, the *budgetary* cost, is equal to total expenditures on subsidies. Farm support programs consume approximately 40% of the annual EU budget (though farmers compose a mere 3% of the EU population).¹⁰⁴ The cost amounts to approximately €109 per EU resident per year. By contrast, in the US, farm support accounts for just 0.2% of all federal spending and amounts to \$23 (€17) per resident per year. The second class, the *external* cost, is borne by farmers in other countries – primarily developing nations and LDCs. First-world subsidies affect these developing-nation and LDC farmers on two fronts. On the home front, these farmers compete with imported goods produced by heavily-subsidized industrialized-world agribusinesses.¹⁰⁵ (Farmers in most developing nations and LDCs receive much smaller subsidies – if they receive any subsidies at all.) At the same time, these farmers seek to sell their products on overseas

¹⁰⁴ “EU farm ministers mull subsidy reforms,” *Associated Press*, 19 November 2008.

<http://seattletimes.nwsourc.com/html/business/technology/2008409975_apeueufarm.html>.

¹⁰⁵ Products that are subsidized or otherwise supported by WTO members account for 9% of LDC imports and 4% of developing-nation imports. Bernard Hoekman, Francis Ng, and Marcelo Olarreaga, “Reducing Agricultural Tariffs versus Domestic Support: What’s More Important for Developing Countries,” World Bank Policy Research Working Paper 2918 (Washington, D.C.: World Bank, October 2002), see Table 5. <<http://www.acp-eu-trade.org/library/files/Hoekman%20et%20al%20WP2918%2010-02%20Reducing%20Agriculture%20Tariffs%20Versus%20Domest1.pdf>>.

markets, to which they often enjoy duty-free access. However, heavily-subsidized industrialized-world agribusinesses dominate these markets because they can sell their goods at or below cost, pricing their developing-world competitors out of the game.¹⁰⁶

For developing-nation and LDC *farmers*, the effects of first-world agricultural subsidies are *almost*¹⁰⁷ uniformly negative. However, the external costs of first-world farm subsidies are partially (and in some cases completely) offset by the external *benefits* to urban consumers in developing nations and LDCs. By lowering the price of agricultural goods, first-world farm subsidies reduce food costs across the globe. Indeed, the World Bank estimates that a 50% cut in industrialized-world domestic agricultural support programs would have a *negative* effect on the overall welfare of developing countries (as distinguished from LDCs). The welfare losses from rising urban food prices would outweigh the welfare gains from increased agricultural exports (though only slightly). The overall welfare losses would be \$273 million per year – a modest figure, but the reverse of what anti-subsidy campaigners might expect. For LDCs, in which the agricultural sector employs a larger share of the population, the welfare gains for farmers would outweigh the welfare losses for urban consumers (but not by much). The World Bank estimates that total welfare gains for LDCs from a 50% cut in industrialized-nation agricultural subsidies would be \$36 million per year – or just 8 cents per LDC citizen.¹⁰⁸

The third class of costs – *deadweight loss* – arises from the economic inefficiency of farm subsidies. In the absence of subsidies, the quantity of agricultural output would stabilize at the equilibrium point where supply and demand curves intersect. However, subsidies incentivize farmers to produce more (and incentive consumers to buy more) agricultural goods than they otherwise would. The overproduction of agricultural goods diverts resources from other sectors of the economy where those resources could be utilized more efficiently. Tariffs raise rather than lower market prices, but – like subsidies – they generate deadweight losses as well: tariffs lead to the *under*-consumption of agricultural goods (relative to the socially-optimal level) and sustain inefficient agricultural enterprises in protected economies.

EU and US farm support programs seek to minimize deadweight loss by providing farmers with income enhancements that are “decoupled” from specific production targets. In *theory*, the EU and US policies should be *more* efficient than alternative methods of supporting domestic agriculture such as production-linked subsidies and tariffs. Since payments are not related to production levels, they should not distort decisions regarding resource allocation. In practice, these programs do generate inefficiencies – although the deadweight losses from direct payments are probably smaller than those generated by production-linked subsidies and tariffs.¹⁰⁹

¹⁰⁶ Approximately 18% of LDC exports and 4% of developing-nation exports compete with products that are subsidized or otherwise supported by WTO members. Ibid.

¹⁰⁷ *Almost* rather than *entirely* because some first-world farm subsidies *discourage* production and thus raise world prices for certain agricultural goods. See Note 12.

¹⁰⁸ Ibid, see Table 8.

¹⁰⁹ Under CAP, farmers must hold some of their land *out* of production; thus, CAP payments may incentive *under*production rather than *over*production of agricultural goods. In the US, direct payment recipients must keep their land in agricultural uses but may *not* shift to the cultivation of fruits or vegetables. This policy may lead to an inefficient allocation of land. John Baffes and Jacob Meerman, “From Prices to Incomes: Agricultural

iii. The Political Cost of Subsidies

However, these economic calculations of subsidy costs ignore the *political* ramifications of industrialized-world agricultural support programs. The agricultural sector accounts for only 9% of international merchandise trade, but it plays a disproportionate role in international trade talks. Leaders of developing nations and LDCs are unwilling to open their own markets for fear of exposing domestic farmers to competition from heavily-subsidized industrialized-world agribusinesses. As first-world farm subsidies rise, so too does developing-world resistance to trade liberalization. This dynamic was on display in the final months of the Doha Round. In June 2008, the US Congress overrode President Bush's veto to pass the most expensive farm bill in the nation's history. A group of 20 developing countries (including India, Brazil, China, Mexico, and Argentina) responded with a statement saying that the bill would lead to "unfair competition."¹¹⁰ The WTO's director-general, Pascal Lamy, said the bill signaled that US lawmakers were "not serious about reducing their subsidies."¹¹¹ European Union trade commissioner Peter Mandelson added that the "reactionary" farm bill cast a shadow over the last weeks of Doha talks.¹¹²

The impact of the US farm bill may have been more *symbolic* than economic.¹¹³ After all, the farm bill's annual allocations for direct payments to farmers are still just 10% of the EU's budget for direct payments under CAP.¹¹⁴ Yet even if the direct economic impact of industrialized-world agricultural subsidies on developing nations and LDCs is minimal, the indirect *political* impact is enormous. The World Bank estimates that the complete elimination of tariffs and agricultural subsidies would lead to global welfare gains of \$278 billion per annum by 2015 (or 0.7% of global income). Nearly a third of this welfare gain would be reaped by developing nations and LDCs.¹¹⁵ The complete elimination of tariffs and subsidies was *never* a likely outcome of the Doha Round (although President Bush did call for a zero-tariff, zero-subsidy agreement in 2005); thus the \$278 billion should be viewed as an *upper bound* for the true cost of first-world farm subsidies, not a final figure.¹¹⁶ However, even a small step toward the reduction of tariffs and subsidies could lead to welfare gains that quickly swamp the direct economic effects of agricultural subsidies.

iv. 'Decoupling' Political and Economic Costs

Subsidization Without Protection?" World Bank, Washington, D.C., June 1997.

<[http://www.worldbank.org.ezp-](http://www.worldbank.org.ezp-prod1.hul.harvard.edu/html/dec/Publications/Workpapers/WPS1700series/wps1776/wps1776.pdf)

[prod1.hul.harvard.edu/html/dec/Publications/Workpapers/WPS1700series/wps1776/wps1776.pdf](http://www.worldbank.org.ezp-prod1.hul.harvard.edu/html/dec/Publications/Workpapers/WPS1700series/wps1776/wps1776.pdf)>.

¹¹⁰ "Developing nations slam US farm bill at WTO," *The Times of India*, 4 June 2008.

¹¹¹ Forrest Laws, "WTO's Lamy laments 'bad' farm bill," *Delta Farm Press*, 16 June 2008.

¹¹² Allan Beattie, "Doha trade talks collapse," *Financial Times*, 29 July 2008.

¹¹³ Which is not to say that the *symbolic* element of the subsidies dispute renders it any less important to understanding the outcome of Doha. On symbolic power and the WTO, see, e.g., Matthew Eagleton-Price, "The Competing Kings of Cotton," Paper Presented at the International Studies Association 49th Annual Convention, San Francisco, Calif., 26-29 March 2008.

¹¹⁴ The US budget of \$5.2 billion per year for direct payments is equal to €3.8 billion at current exchange rates – or 10.3% of the CAP direct payment allocation. (Only \$26 billion of the \$35 billion will go to direct payments; the other \$9 billion are allocated to other farm support programs.)

¹¹⁵ Kym Anderson and Will Martin, "Market and welfare effects of Doha reform scenarios: implications for Southeast Asia," Development Research Group, The World Bank, Washington, D.C., February 2005.

¹¹⁶ "Bush call to end trade barriers," *BBC News*, 14 September 2005.

<<http://news.bbc.co.uk/1/hi/business/4246628.stm>>.

Interestingly, political opposition to agricultural protection has no correlation (or perhaps even a negative correlation) to direct economic costs. The developing countries that led the protests *against* first-world farm subsidies during the Doha Round are the very nations that – according to World Bank figures – *benefit* from these subsidies via lower urban food prices. Likewise, the shift from production-linked subsidies to direct payments may reduce popular support for farm policies in the industrialized world – even if direct payments are more efficient economically.

The 1995 Farm Bill inaugurated a shift toward direct payment in the US; the EU adopted its direct payment scheme in 2003 (although some production-linked elements, such as the Scottish Beef Calf Scheme, remain). The 1994 Uruguay Round Agreement on Agriculture was one – though not the only – impetus for these reforms. The agreement required industrialized nations to reduce tariffs on agricultural imports by 36% and placed limits on so-called “amber box” (i.e. production-linked) subsidies. However, the Uruguay accord placed no caps on “green box” policies (i.e. farm support payments that are “decoupled” from current production). Thus, in the aftermath of the Uruguay Round, industrialized nations had fewer tools (aside from “green box” direct payments) to support farmers. Whether or not the Uruguay accord was the *impetus* for domestic agricultural reform (and Robert Paarlberg argues forcefully that it was *not*¹¹⁷), the accord certainly has *locked* these policies into place.

As mentioned above, direct payment policies are more efficient economically than either tariffs or production-linked subsidies. However, this does *not* mean that direct payment policies are more palatable politically. Tariffs impose an *invisible* cost on consumers; commodity prices rise, but most consumers do not know why. By contrast, direct payments constitute a visible line item in the government budget. Production-linked subsidies are also a line-item expense (although the cost usually varies year-to-year based on prices and output levels). Yet as Fred Sanderson wrote *prior* to the passage of the 1995 US Farm Bill, “a shift to income payments not linked to production would make the ‘welfare’ character of the transfers more transparent...”¹¹⁸ Green-box subsidies have led to well-publicized examples of *non*-farmers receiving federal checks because they own land in rural areas. *New York Times* columnist Nicholas Kristof – an outspoken opponent of domestic agricultural support – regularly cites the fact that *he* receives \$588 in federal money each year because owns a small plot of land in Oregon. Perhaps most embarrassingly, the US Government Accountability Office reported in July 2007 that the federal government had doled out \$1.1 billion to *dead* farmers.¹¹⁹ These individual examples of waste do not mean that green-box policies are – on the whole – more wasteful than tariffs and amber-box subsidies. (They are not.) However, the wastefulness of green-box subsidies is more *apparent* to ordinary voters than the deadweight losses from amber-box subsidies and tariffs.

¹¹⁷ Robert Paarlberg, “Agricultural Policy Reform in the Uruguay Round: Synergistic Linkage in a Two-Level Game?” *International Organization*, vol. 51, no. 3 (Summer 1997), pp. 413-444.

¹¹⁸ Fred H. Sanderson, ed., *Agricultural Protectionism in the Industrialized World* (Washington, D.C.: Resources for the Future, 1990), p. 4.

¹¹⁹ Nicholas Kristof, “Farm Subsidies That Kill,” *New York Times*, 5 July 2002; “I’m Ripping You Off,” *New York Times*, 2 August 2007.

v. A Way Forward?

The future of green-box subsidies in the first world may depend on the duration of the current economic crisis. Although the 2008 CAP “health check” preserved most of the policy in place, the European Commission is planning to move €5 billion from the agricultural budget to programs that will improve energy security and economic competitiveness.¹²⁰ Across the Atlantic, US President-elect Barack Obama has already cited the direct payment program as a “prime example of waste” because it has resulted in income support payments for “millionaire farmers.”¹²¹ (This remark came just three weeks after a presidential campaign in which Obama said he *supported* the 2008 Farm Bill, which his rival, Senator John McCain, voted against.¹²²)

The US Farm Bill does not come up for renewal until 2013, which is – incidentally – the same year that the current CAP budget expires. The EU balanced budget rule requires that revenues match expenditures annually; this rule has constrained CAP growth in the past¹²³ and could do so again if member-state governments do not see their tax receipts rebound in the coming years. US lawmakers historically have been less concerned about budget deficits than their European counterparts, but it is unclear whether this nonchalance can persist in the face of a \$10.6 trillion national debt.¹²⁴

So far, economists and political scientists have speculated that the 2008 credit crisis will lead to a “trade backlash” as countries return to the protectionist policies of the Great Depression era.¹²⁵ However, if cash-strapped first-world governments find themselves unwilling or unable to sustain the budgetary costs of green-box subsidies, the economic crisis could have the opposite effect. The elimination or reduction of agricultural subsidies in the industrialized world would – ultimately, if not immediately – pave the way for progress in post-Doha trade negotiations. Even though the budgetary costs of first-world farm subsidies represent a small slice of the total costs (economic and political) of these programs, it is these budgetary costs that ultimately may motivate agricultural reform in the industrialized world. Beef calves in the Scottish Highlands may continue to earn their owners £79 for the moment. But green-box subsidies may prove to be a luxury that even the richest nations cannot afford.

¹²⁰ The move will not have an immediate effect on farm subsidies because the €5 billion comes from funds that were unspent; however, the move may represent a shift in budgetary *priorities* as the economic slowdown trumps other policy concerns. See “Europe to move euro5B from farm subsidies to help economy,” *Associated Press*, 10 December 2008.

¹²¹ Frank Ahrens, “Obama Goes After Farm Subsidies,” *WashingtonPost.com*, 25 November 2008. <http://voices.washingtonpost.com/economy-watch/2008/11/obama_goes_after_farm_subsidie.html>.

¹²² Michael Doyle, “Agriculture: McCain would wield veto pen for farm subsidies,” *McClatchy Newspapers*, 18 September 2008.

<<http://www.mcclatchydc.com/100/story/52728.html>>.

¹²³ Robert Ackrill, “The European Union Budget, the Balanced Budget Rule and the Development of Common European Policies,” *Journal of Public Policy*, vol. 20, no. 1 (2000), pp. 1-19.

¹²⁴ National Debt Clock, The Concord Coalition, Arlington, Va., 9 January 2009.

<<http://www.concordcoalition.org/learn/debt/national-debt>>.

¹²⁵ Barry Eichengreen, “Should We Fear a Trade Backlash?” *Guardian.co.uk*, 31 December 2008.

<<http://www.guardian.co.uk/commentisfree/2008/dec/31/trade-policy-tariffs-us-uk>>.

The Trade-Migration Linkage: GATS Mode IV

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“Mode IV” is a technical term but one which evokes big issues: the freedom of global movement of people to match the free movement of capital across borders. In other words, an issue especially dear to countries in the “South” whose citizens often, too often, see their salvation in going to work in the “North.” More specifically, these people come to be referred to as “service providers” which therefore makes them part of the multilateral trade agenda. In the strike of a pen, they are freed from the legal ghetto of migration ministries and the ILO and brought under the spotlight of the global economic arena!

Formally, Mode IV is part of the General Agreement on Trade in Services (GATS) of the WTO, which attempts to ensure non-discrimination against service providers on the basis of their country of origin. Mode IV is unique in that it relates to the movement of individual service providers across borders and so implies a binding obligation on states to admit non-nationals on to their territory. Mode IV is so far very limited in scope, applying only to a narrow group of people – temporary, skilled, contractual service providers engaged in intra-firm movement - and will be limited to the specific visa commitments that individual states are prepared to make in the context of broader WTO negotiations.¹²⁶ This realm is sometimes referred to as ‘circular migration’, that is when someone travels temporarily across borders to work in another country but with the aim of coming back to their country of origin.

Nevertheless, Mode IV has potentially significant implications for human mobility and sovereign states’ ability to control access to their territory. Although it is impossible to fully assess its impact on human mobility, this memo provides a starting point for analysing the broader question of by attempting to unpack some of the political implications of Mode IV. In particular, it explores the implications of the migration-trade linkage inherent to Mode IV for the international politics of both trade and migration, and what conceptual tools might be useful for analysing these issues in greater depth.

One first way to tackle this question is to ask how such a trade-migration nexus will likely affect the likelihood of cooperation between states in both, and as a result patterns of liberalisation of movement of people as services providers. At first glance, one might imagine that institutionally linking trade and migration would have cooperation-enhancing consequences for both issue-areas. One might imagine that increased issue-linkage or issue-density would lead to increased opportunity for side-payments and so create incentives for cooperation (Keohane 1982; Haas 1980; Aggarwal 1998). For example, the migration-trade linkage might facilitate North-South cooperation through exchanging Northern visas for Southern market access. Indeed, the explicit linkage made at the origins was between Mode IV and the establishment facilitating provisions of the GATS: you take our American express offices and we will take your construction workers. On the other hand, however, when one moves beyond the unitary state to disaggregate interest groups at the domestic level

¹²⁶ Interview with Alejandro Jara, Deputy Director of the WTO, July 2008; Interview with Antonia Carzaniga, WTO employee responsible for GATS Mode IV negotiations, July 2008.

(Moravcsik 1997; Milner 1992; Drezner 2007), a set of counter-veiling and possibly cooperation-diminishing implications arise. Because Mode IV implies the movement of people across borders and the abrogation of state discretion in controlling access to its territory it has social consequences that are less prevalent in the case of the movement of goods, services and capital than for human mobility. What people perceive in the host country is what we could call “face-to-face social dumping” (Nicolaidis and Schmidt, 2007) which in turn engenders a degree of resistance often stronger than in the context of long distance social dumping, where at least employees or workers do not feel undermined at their doorstep. As a result of the social implications inherent to human mobility, Mode IV potentially creates a series of tensions in domestic politics that may draw new interest groups and veto players into the international politics of both issue-areas. We then need to ask, how and to what extent national politicians, interior ministries and bureaucracies will reflect and amplify or control and dampen such social reactions.

Taking into account the domestic level therefore makes it questionable whether the cooperation-enhancing consequences of linkage will be outweighed by the cooperation-diminishing consequences of introducing new veto players. This memo provides a first cut at exploring how the possible domestic tensions created by Mode IV are likely to play out at the multilateral level in both the international politics of trade and migration. It explores the factors that may arbitrate whether the migration-trade linkage inherent to Mode IV leads to more or less multilateral cooperation in the two issue-areas.

i. Domestic Tensions

GATS Mode IV remains embryonic. Its scope and implementation rely upon reciprocal agreements that have not yet taken place on any meaningful scale. Furthermore, Mode IV is limited to certain narrow categories of temporary service providers. It nevertheless represents a potential paradigm shift in human mobility insofar as, once agreed, obligations under Mode IV represent a binding and enforceable obligation to admit foreign nationals on a state’s territory as service providers. If fully implemented, it would seriously constrain the discretion of a state to discriminate against temporary service providers coming from another WTO member state.

This paradigm already exists of course in the regional context of the EU. Indeed, stemming from the logic of facilitating the free movement of goods, services and factors of production, the EU presided over the free movement of goods, services and capital to labour. Formally therefore member states are prevented from discriminating against workers from other EU countries. But of course, the application of this general principle has been fraught with conflict. Above all, member states have had to negotiate regarding which law is applicable to workers and their firms operating across borders (Nicolaidis and Schmidt, 2007; Nicolaidis 2004). What does it mean to apply host state rules when the only existing rules in the host state are those negotiated by trade unions under collective agreements? The case law of the European court of Justice remains in flux.

In spite of the limitations observed of the EU case, GATS Mode IV does not go nearly as far as the EU model of free movement of labour but is a step in the direction of the EU. However, this shift to a market-based logic governing human mobility engenders a number of potential tensions. The movement of people across borders – whether as labour or as service providers – has face-to-face social implications in a way that the movement of goods or capital, for example, do not. The crisis in Europe around the “no to the Polish plumber” testifies to the fact that when more efficient workers or service providers arrive from abroad

and undercut domestic labour or service provision, this is often unwelcome among a range of interest groups whose livelihoods may be threatened. In certain cases, labour or service provision may be offered at prices lower than their market rate. As mentioned above, when this occurs, it might be conceived as a form of ‘dumping’, which can lead to social tensions. The current economic crisis can only exacerbate this situation.

Although the availability of cheaper, more efficient labour or service providers should represent a net welfare gain, it has redistributive consequences. Employers or service contractors are likely to benefit. In contrast, domestic labour and service providers are likely to lose. This differential impact will create competing and counter-veiling interest groups at the domestic level. Which interest groups prevail and how these conflicts are reconciled at the domestic level will depend on a range of factors. A society’s threshold of tolerance for domestic service providers being out-competed by service providers from abroad may, for example, relate to the country’s overall economic position, its social safety net, and social mores connected to the place on non nationals in the social fabric. In the context of the current global recession, British workers have protested and rioted against the loss of jobs to other European workers under the slogan of ‘British jobs for British workers’. Yet the British Government has been constrained by EU trade rules.

The threshold of tolerance that a given society has for the face-to-face social impacts of market liberalisation will therefore vary and will be shaped by a range of temporal/cyclical as well as structural factors on an economic, social and political level. However, it seems likely that since these impacts are mediated, the redistributive consequences of Mode IV will bring different interest groups into play in a range of ways.

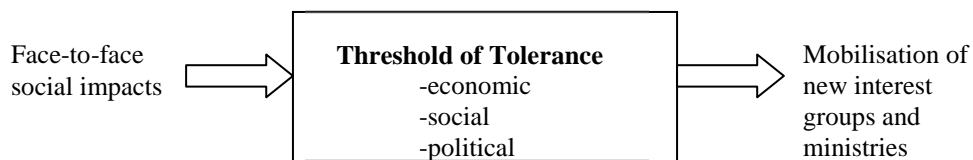


Figure 1: thresholds of tolerance mediate the domestic political impact of delegating authority for human mobility to a supranational body.

An interesting question, then, is: how might these tensions at the domestic level play out and feed into the multilateral level? And, furthermore, what analytical tools can be used to understand the impact of these domestic tensions at the international level?

ii. Impact on the International Politics of Trade

The multilateral negotiations on Mode IV involve Northern countries providing additional visas for categories or service providers from the South. In practice, the concessions in this area are largely by North to South since Northern service providers (e.g. managers and consultants) face few restrictions entering most Southern states. The potential gains for Northern states from making Mode IV concessions are two-fold. First, from an economic perspective, the concessions themselves should be win-win. They allow Northern businesses and consumers access to the most efficient service providers. Secondly, the concessions can be used to leverage concessions on market access in other areas of the negotiations – notably in agrinama and the other GATS modes.

For Robert Zoellick in 2003 and for successive US Trade Representatives since, Mode IV is a trade issue. However, for a range of other actors, Mode IV has been an immigration issue and has therefore constitutionally required the approval of Congress (which has the power to establish a uniform rule of naturalization).¹²⁷ Even though Mode IV explicitly allows derogation in situations related to national security, it was argued that Mode IV might provide routes into the US for terrorists. In practice, though, a significant part of the USTR versus Congress dispute has been attributed to personality disputes and turf wars relating to mandates. However, USTR has subsequently been blocked by Congress in making additional visa concessions under Mode IV. The human mobility implications of Mode IV thereby drew in an additional set of interest groups – not only Congress but also labour unions such as AFL-CIO, and advocates of reduced immigration such as the Federation for American Immigration Reform (FAIR).¹²⁸

The contestation over bureaucratic authority to approve Mode IV agreements highlights how the trade-migration linkage has brought in additional veto players to the negotiations. This situation is replicated to some extent in the South, where countries like India and the Philippines has special ministries established to represent the interests of labour and service providers overseas. These ministries as well as a range of additional private interests have been drawn into domestic debates on the trade negotiations. For India and the Philippines, Northern concessions in Mode IV therefore became far more important than they would previously have been because of the presence of new interest groups and government ministries shaping the national bargaining strategy.¹²⁹

These additional migration-related interest groups and government ministries have fed back into the multilateral bargaining process in ways that may have exacerbated the impasse in the Doha Round. At the multilateral level, the significance of Mode IV in the overall negotiations should not be overstated. The lack of agreements in agrinama remains at the inter-ministerial agreements, before negotiators come to services, and even within service, the first three modes take precedence over Mode IV. Nevertheless, Mode IV is clearly linked to the negotiation of all other parts of the trade round. Mode IV is driven by the overall balance of WTO negotiations. Agrinama drives GATS and when agrinama expectations decline, GATS expectations decline. ‘Offers’ are made across the board through the process of states ‘signalling’ their intentions in terms of i) employment categories for visas and ii) countries to which they will apply. States partly base the offers they make in a given area of negotiations on the offers that other states make across the board within the development of a framework agreement.¹³⁰

For a country like India, which has taken the lead on behalf of the coalition of developing countries in the Doha Round, Mode IV concessions – especially by the US – were seen as crucial. India is the major services exporter across GATS. It is goading other developing countries to make concessions across the board in the hope of attracting concessions in Mode

¹²⁷ Interview with Paul Malar, Economic Counselor of the Australian Permanent Mission to the WTO, July 2008.

¹²⁸ For an analysis of the US domestic interest groups affected by Mode IV, see, for example, Sarah Anderson, ‘U.S. Immigration Policy on the Table at the WTO’, Global Politician, www.globalpolitician.com/21446-immigration

¹²⁹ Interview with Johannes Bernabe of ICTSD, former negotiator for the Philippines on GATS, July 2008; interview with Shaista Sohail, Economic Counselor Permanent Mission of Pakistan to WTO, July 2008.

¹³⁰ Interview with Johannes Bernabe of ICTSD, former negotiator for the Philippines on GATS, July 2008.

IV. In the Geneva negotiations it is trying to lobby Congress for 250,000 US India bilateral H-1 B visas (directly through Congress rather than USTR).¹³¹ India may be on a path that is significantly different from other developing countries but it remains the figurehead and is trying to speak on behalf of the developing world as a whole. Other developing countries are not doing research on demand and supply to know what they would benefit from.

Access to visas for service providers was one of the few tangible ways in which India, the Philippines, Pakistan, and Bangladesh, for example, could envisage gaining during Doha Round negotiations.¹³² The entry of US veto players concerned with immigration control therefore had a significant impact on their prospect for deriving sufficient benefits from the negotiations to justify wider market access concessions.

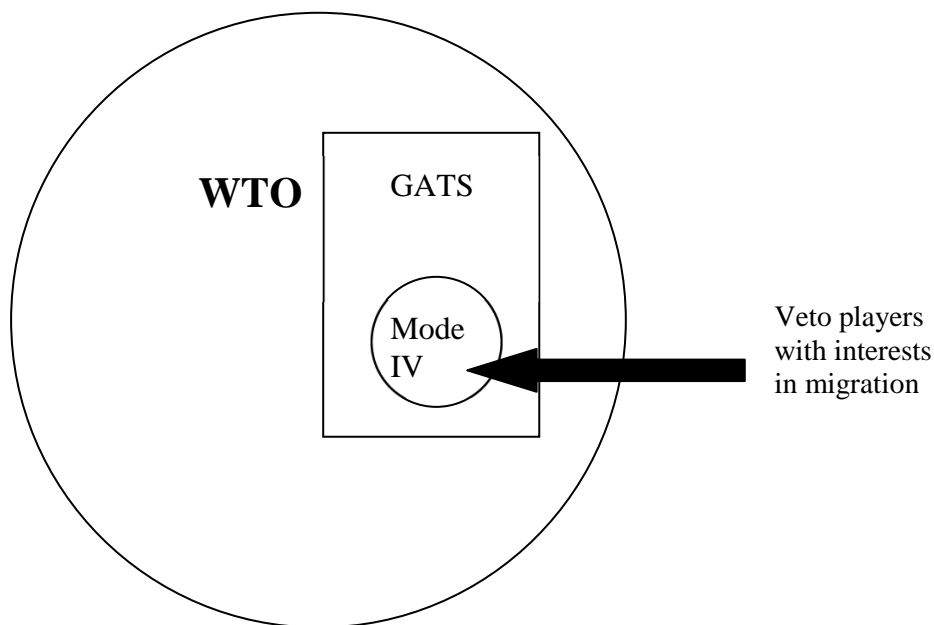


Figure 2: The nesting of Mode IV within the WTO draws in additional veto players to the negotiations.

iii. Impact on the International Politics of Migration

Mode IV potentially has redistributive implications within a given state. In a Northern 'receiving' state, service contractors will benefit from access to cheaper and more efficient services while inefficient domestic service providers and workers will lose contracts. Meanwhile, socially and politically, the state will have to adjust to the presence of a greater number of non-nationals working within the economy. Different interests groups will therefore gain and lose in different ways. The economist Phil Martin has characterised part of this as a 'rights v numbers' normative divide. On the one hand, large businesses aspire to attract large numbers of efficient workers; on the other hand, trade unions, workers and social democratic constituencies often aspire to preserve rights, even at the expense of efficiency.

¹³¹ Ibid.

¹³² Interview with, First Secretary to the Philippines Permanent Mission to the WTO, July 2008.

In most countries, there is no 'migration ministry'. 'Migration' does not exist as a single, coherent policy field and responsibility for different aspects of human mobility is dispersed across different government ministries. There is rarely 'joined-up government' across ministries in the area of migration. Labour ministries, state departments (foreign affairs), homeland security (justice and home affairs), overseas development, commerce departments (trade and industry), and national treasuries, for example, all have some role in the formulation of policies relating to human mobility.

This means that different access points are available to different sets of interest groups wishing to influence the politics of migration. Indeed, different interest groups tend to lobby different ministries. Businesses aspiring to attract cheaper labour generally work through departments of trade and commerce. Trade unions attempting to support labour rights frequently work through labour ministries. Those with concerns relating to security and social cohesion are more likely to lobby departments of state and homeland security.

So how does this contestation play out at the international level? At the level of international institutions, Mode IV has led to even greater regime complexity in the area of migration (Alter and Meunier 2009; Snidal et al 2008; Raustiala and Victor 2004). WTO, ILO and IOM all have mandates that in some way relate to circular migration. The WTO has a role in facilitating the elimination of barriers to the movement of service providers; the ILO has responsibility for upholding norms relating to migrant workers including service providers; IOM is engaged in a range of projects relating to facilitating circular migration. Crudely speaking, these different multilateral regimes are driven by different normative concerns which in turn dictate different specific rules. WTO has a normative concern with free movement; the ILO with rights, and IOM with efficiency, in other words has no normative agenda other than to provide services to states that are prepared to pay for those services.

This begs the question of how states choose between different competing institutional frameworks to engage in the politics of circular migration? Unsurprisingly, we find that in the absence of coherent 'joined-up' government, different ministries work through different 'preferred' international organizations and institutional frameworks depending on how their ministerial mandates (and constituencies) align with the normative agenda of the given IO. In other words, it is not so much unitary states that engage in 'forum-shopping' as individual government ministries, each of which has its own reasons for working primarily through a given institutional framework. Different ministries even have different diplomatic routes to the international level. For example, in Geneva, most states have a Permanent Mission to the WTO and a Permanent Mission to the UN. In most cases, these Missions are not in direct contact with one another and are instead accountable to separate government departments in the capital, which often convey very different messages on behalf of different constituencies.

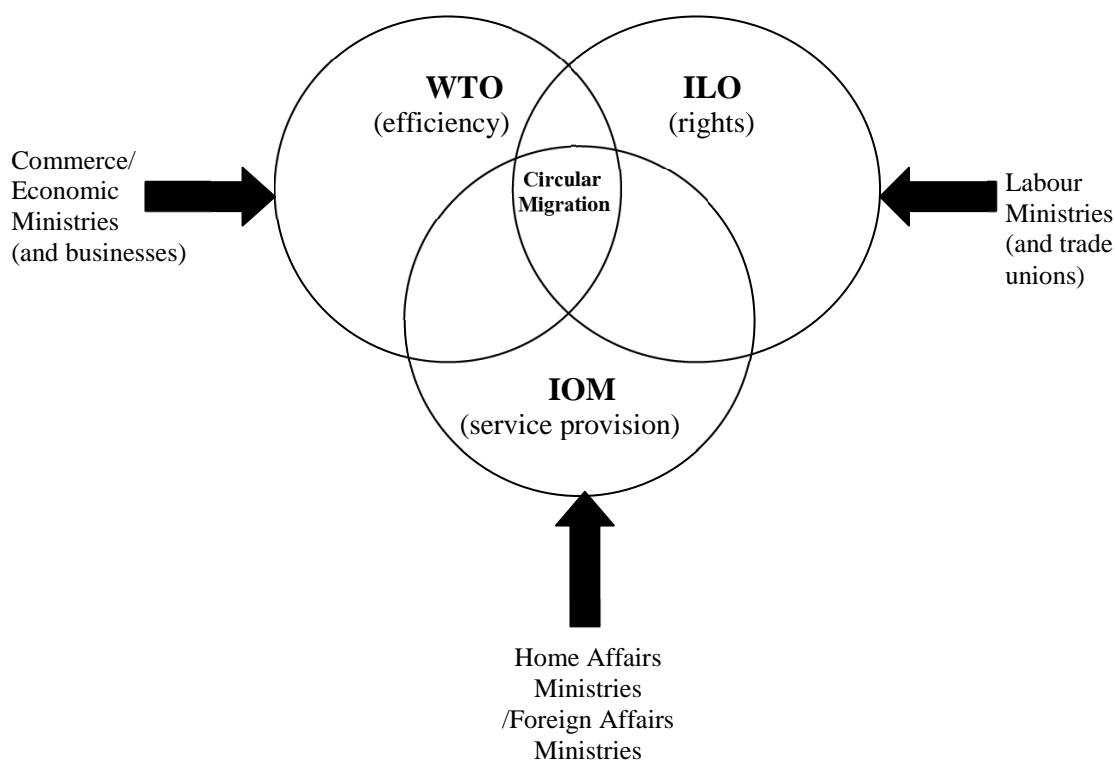


Figure 3: how mandate overlap between the WTO, ILO and IOM on circular migration creates opportunities for ministerial forum-shopping.

In other words, rather than unitary states engaging in forum-shopping in the area of circular migration, different government ministries forum-shop on the basis of the normative agendas and constituencies that they represent. This contributes to incoherence and a lack of a basis for cooperation at the multilateral level in the area of migration. Impasses arise at the multilateral level because the unitary state simply does not turn up at multilateral debates in Geneva. Instead, the narrow interests of particular ministries are represented in different fora and little progress is made when provisional decisions are returned to state capitals. In the absence of coherence and progress at the inclusive multilateral level, states increasingly bypass and circumvent the UN system entirely in the area of migration, choosing to work through informal dialogues (such as so-called Regional Consultative Processes) and bilateral agreements.

Tentative Conclusions

- Mode IV affects both the international politics of trade and migration. It therefore falls under the broad category of “trade and...” issues.
- In order to understand the impact on the multilateral level, it is necessary to look at how Mode IV is mediated by domestic and bureaucratic politics.
- The degree to which Mode IV mobilises new actors will depend partly upon certain domestic ‘thresholds of tolerance’ through which the social impacts of market liberalisation are mediated.

·Mode IV affects the politics of trade by drawing in a range of interests groups and government departments with interests in migration. This leads to the emergence of new *veto players* at the multilateral level.

·Mode IV affects the politics of migration because its social consequences draw in different government ministries. This leads different ministries to engage in different strategies of *ministerial forum-shopping* and institutional choice at the multilateral level.

·Because of its domestic and bureaucratic implications the migration-trade linkage inherent to Mode IV appears to be cooperation-diminishing rather than cooperation-enhancing for both issue-areas.

·On a theoretical level, the analysis highlights interesting elements of the relationship between regime complexity and domestic politics:

- 1) Whether or not complexity is cooperation-enhancing or cooperation-diminishing will be mediated by conditions at the domestic level.
- 2) In the context of complexity, it is not only unitary states that engage in forum shopping and cross-institutional strategies but also different government ministries pursuing specific agendas and normative goals.

· So the analytical challenge before us is to assess how the different veto players at the domestic and multilateral level will interact with trade circles and what factors will affect outcomes at different moments in time to

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