

Columbia Law School

## Scholarship Archive

---

Faculty Scholarship

Faculty Publications

---

2010

### When the WTO Works, and How It Fails

Anu Bradford

*Columbia Law School*, [abradf@law.columbia.edu](mailto:abradf@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [Antitrust and Trade Regulation Commons](#), and the [International Trade Law Commons](#)

---

#### Recommended Citation

Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT'L L. 1 (2010).

Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/1963](https://scholarship.law.columbia.edu/faculty_scholarship/1963)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [scholarshiparchive@law.columbia.edu](mailto:scholarshiparchive@law.columbia.edu).

# When the WTO Works, and How It Fails

ANU BRADFORD\*

---

*This Article seeks to explain when an international legal framework like the WTO can facilitate international cooperation and when it fails to do so. Using an empirical inquiry into different agreements that the WTO has attempted to facilitate — specifically, intellectual property and antitrust regulation — it reveals more general principles about why the WTO can facilitate agreement in some situations and not in others. Comparing the successful conclusion of the TRIPS Agreement and the failed attempts to negotiate a WTO antitrust agreement indicates that international cooperation is likely to emerge when the interests of powerful states align and when concentrated interest groups within those states actively support cooperation. The comparison further suggests that the WTO provides an optimal forum for cooperation when states need to rely on cross-issue linkages to overcome existing distributional conflicts, when the underlying issue calls for an enforcement mechanism, or when both the net benefits of the agreement and the opportunity costs of non-agreement are high. Contrasting the key differences between IP and antitrust cooperation, this Article disputes the widely held view that the strategic situations underlying IP and antitrust cooperation are similar and that the conclusion of the TRIPS Agreement is a relevant precedent predicting a successful WTO negotiation of antitrust or a host of other new regulatory issues. Given the ongoing changes in the economic and political landscape, cooperation in the WTO is even more challenging today. It is possible that — absent institutional reforms — the WTO's recent expansion may well have met its limits.*

---

\* Assistant Professor, The University of Chicago Law School. Helpful comments were provided by Travis Bradford, William Burke-White, Katerina Linos, Jide Nzelibe, Eric Posner, and the workshop participants at the University of Chicago, Northwestern University Law School, and the ASIL International Economic Law Interest Group Research Colloquium at UCLA School of Law. The author thanks Hanna Chung and Amanda Gomez for excellent research assistance.

I.	A Theory of Cooperation in the WTO..	7
A.	When Is International Cooperation Feasible?	9
B.	When Does Cooperation Emerge in the WTO?	11
II.	Testing the Limits of the WTO: Explaining the Divergent Outcomes in IP and Antitrust Cooperation	15
A.	The Power-Politics Explanation: Does the “Great Power Consensus” Exist?	19
1.	The Great Power Consensus on the TRIPS Agreement	19
2.	The Great Power Divide on International Antitrust Cooperation	22
B.	The Political Economy Explanation: Do Strong Domestic Interest Groups Support the International Agreement?	25
1.	The Interest Groups’ Quest for the TRIPS Agreement	25
2.	The Agency-Driven Pursuit of International Antitrust Rules	28
C.	Linkage Explanation: Are Linkages Feasible and Will They Create or Destroy a Zone of an Agreement?	32
1.	Linkages Paving the Way for the TRIPS Agreement	32
2.	Distributional Uncertainty and the Infeasibility of Linkages to Facilitate the Antitrust Agreement	35
3.	Concluding Remarks on the Effects of a Linkage Strategy	37
D.	Enforcement Explanation: How Likely Is Opportunistic Behavior?	38
1.	The Incentives to Defect from the TRIPS Agreement	38
2.	The Self-Enforcing Nature of International Antitrust Cooperation	40
3.	Concluding Remarks on the Enforcement Explanation	45
E.	Cost-Benefit Explanation: Are the Net Benefits of Cooperation and the Opportunity Costs of Non- Cooperation High?	46
1.	The High Benefits of the TRIPS Agreement and the Absence of Alternatives	46
2.	The Low Net Benefits of the WTO Antitrust Agreement and the Existence of Alternatives	47
	Conclusion	51

## INTRODUCTION

International efforts to seek regulatory convergence produce strikingly different results even in situations where the economic implications of the regulatory regimes appear similar. For instance, the enforcement of antitrust laws and the protection of intellectual property (IP) rights across jurisdictions have enormous implications for major economic powers and their domestic constituencies, creating pressures for international cooperation. Yet the efforts to harmonize the two regulatory regimes have followed very different paths. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>1</sup> was a contentious matter with enormous distributional consequences.<sup>2</sup> Nevertheless, states agreed to incorporate IP rights into the World Trade Organization (WTO) in 1994.<sup>3</sup> In contrast, various attempts to launch WTO negotiations on antitrust have all failed.<sup>4</sup> Instead, states have sought to minimize negative externalities of decentralized antitrust enforcement by engaging in case-by-case enforcement cooperation and by developing recommendations and best practices to foster voluntary convergence of their respective antitrust regimes.<sup>5</sup>

---

1. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].

2. See, e.g., Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, *Note by the Secretariat: Meeting of Negotiating Group of 25 and 29 November 1991*, MTN.GNG/TRIPS/4 (Dec. 9, 1991) (reporting that there were still major disagreements about special treatment for developing countries); Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, *Note by the Secretariat: Meeting of the Negotiating Group of 22 November 1990*, MTN.GNG/NG11/28 (Nov. 29, 1990) (indicating that, years later, parties still had substantial disagreements about special treatment for developing countries, national commitments against discrimination, the availability of reservations, and the right scope of the agreement); Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, *Note by the Secretariat: Meeting of 25 March 1987*, MTN.GNG/NG11/1 (Apr. 10, 1987) (reporting the many diverse concerns relating to intellectual property rights expressed by the negotiating parties during the initial meeting).

3. See Marrakesh Agreement Establishing the World Trade Organization art. II(2), Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement] (binding WTO member states to all annexed legal agreements, including TRIPS).

4. See, e.g., PHILIP MARSDEN, A COMPETITION POLICY FOR THE WTO 45–66 (2003). Most recently, the WTO negotiations on antitrust were stalled in Cancun in 2003 due to the resistance of the developing countries. On August 1, 2004, the WTO General Council decided officially to drop antitrust policy from the Doha Round negotiation agenda. See World Trade Organization General Council, *Decision Adopted by the General Council on 1 August 2004*, WTL/579 (Aug. 2, 2004).

5. See, e.g., Oliver Budzinski, *The International Competition Network: Prospects and Limits on the Road Towards International Competition Governance*, 8 COMPETITION & CHANGE 223, 225–27 (2004); Frederic Jenny, *International Cooperation on Competition: Myth, Reality and Perspective*, 48 ANTITRUST BULL. 973 (2003); Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 235–36 (2003).

The successful incorporation of IP rights into the WTO cultivated a false sense of optimism regarding the inherently flexible boundaries of the WTO, fostering a belief that the trade regime is capable of accommodating a host of new issues, including antitrust, investment, corruption, labor, and environment, among others.<sup>6</sup> Thus far, scholars have concentrated on assessing the normative desirability of expanding the WTO's mandate to these new issue areas. The most cohesive attempt to do this took place when the *American Journal of International Law* published a symposium issue on the boundaries of the WTO.<sup>7</sup> In the symposium, several prominent trade scholars sought to develop criteria that WTO member states could use to assess whether any given issue belongs to the trade institution or whether some other entity should regulate it.

This Article examines the institutional boundaries of the WTO from a descriptive perspective. It seeks to identify conditions that explain and predict when an international legal framework like the WTO can advance international cooperation and when it is incapable of doing so. It departs from the existing scholarly debate on the substantive scope of the WTO, which focuses on the question of the normative *desirability* of expanding the boundaries of the WTO and the development of criteria in selecting issues for the WTO to address. Instead, this Article focuses on the *feasibility* of WTO agreements, seeking to understand when the WTO works and when it does not, given the characteristics of the underlying issue of cooperation, constraints that stem from power politics and domestic political economy, and the comparative institutional advantages of the WTO. Thus, the goal is to define the institutional scope of the WTO by isolating the predominant variables that determine when an agreement within this regime is likely to materialize and when states are likely to turn to alternative regulatory regimes instead.

The Article begins with a standard assumption that international cooperation is more likely to emerge when the interests of powerful states align and when concentrated and influential interest groups within those states support the agreement. These factors are often used to explain why international cooperation in a given instance has been successful. Without their presence, the prospects for a WTO agreement — or any other international treaty — are dim. These factors fail to explain, however, when powerful states choose to cooperate in the WTO as opposed to another international legal framework.

This Article asserts that the WTO offers the optimal legal framework for cooperation in the presence of three conditions. First, the WTO is a

---

6. See Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 29 (2002).

7. See generally Symposium: *The Boundaries of the WTO*, 96 AM. J. INT'L L. 1 (2002).

particularly useful vehicle for cooperation when states need to, and are able to, rely on “issue linkages” to overcome existing distributional conflicts. Second, the WTO is a preferred forum when the underlying issue is prone to defection and when sustainable cooperation therefore calls for an enforcement mechanism. Finally, states are more likely to pursue cooperation in the WTO when the high benefits of cooperation exceed the high costs of formal, institutionalized cooperation.

The Article then moves on to examine these predictors of successful cooperation in the context of two in-depth case studies — the successful conclusion of the TRIPS Agreement and the failed attempts to negotiate a WTO antitrust agreement. Five fundamental differences between the strategic situations characterize these two areas of cooperation. First, the great economic powers all supported the TRIPS Agreement, but they disagreed on the need to negotiate a WTO antitrust agreement.<sup>8</sup> Second, influential interest groups within these Great Powers<sup>9</sup> unequivocally endorsed the TRIPS Agreement, while there has been little, if any, interest-group support for the international antitrust agreement.<sup>10</sup> Third, the Great Powers successfully employed transfer payments in the form of issue linkages to address the unequal distributional consequences of the TRIPS Agreement. In contrast, ex ante uncertainty regarding the winners and losers under the prospective antitrust agreement obstructed states’ ability to devise these types of issue linkages and, as a result, compromised their ability to solve the distributional conflict.<sup>11</sup> Fourth,

---

8. See Sylvia Ostry, *Intellectual Property Protection in the WTO: Major Issues in the Millennium Round*, Address at the Fraser Institute Conference 3 (Apr. 19, 1999), available at <http://tinyurl.com/2ato8kr>; cf. Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT’L L.J. 383, 405–10 (2007) (explaining why the United States and the EU have different views on incorporating antitrust laws into the WTO).

9. As used in this Article, “Great Power” refers to a state that has the ability to exert its influence — military, economic, political, or cultural — on a global scale. In connection with international trade, a country’s status as a great power is predominantly determined by the extent of its economic influence over other states.

10. See, e.g., Sylvia Ostry, *Convergence and Sovereignty: Policy Scope for Compromise?*, in COPING WITH GLOBALIZATION 52, 55–57 (Aseem Prakash & Jeffrey A. Hart eds., 2000); INT’L CHAMBER OF COMMERCE & BUS. & INDUS. ADVISORY COMM. TO THE OECD, ICC/BIAC COMMENTS ON REPORT OF THE US INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE (ICPAC) 2, 6, 10 (June 5, 2000), <http://tinyurl.com/25xllhm> [hereinafter ICC/BIAC COMMENTS] (“ICC and BIAC agree the WTO is not an appropriate forum for the review of private restraints and that the WTO should not develop new competition laws under its framework at this time.”).

11. See Bradford, *supra* note 8, at 422–29; Christina L. Davis, *International Institutions and Issue Linkage: Building Support for Agricultural Trade Liberalization*, 98 AM. POL. SCI. REV. 153, 156, 165 (2004); cf. Raquel Fernandez & Dani Rodrik, *Resistance to Reform: Status Quo Bias in the Presence of Individual-Specific Uncertainty*, 81 AM. ECON. REV. 1146 (1991) (observing that interest groups are less likely to push hard for a reform when it is difficult to predict who will benefit from the outcome); Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT’L L. 933, 950–51 (2003) (postulating that an agreement on international antitrust will be difficult without an effective method for transfer

defection from a prospective agreement was a concern underlying the TRIPS negotiations, rendering the WTO and its Dispute Settlement Mechanism (DSM) particularly attractive. Conversely, the likelihood of defection and, hence, the need for an enforcement mechanism was a lesser concern in antitrust negotiations, diminishing the need to pursue cooperation within the WTO.<sup>12</sup> Finally, the benefits of cooperating in the WTO and the opportunity costs of not doing so were significantly higher with respect to IP rights than in the case of antitrust, thus reinforcing the case for the TRIPS Agreement and rendering the case for a WTO antitrust agreement less compelling.<sup>13</sup>

By unveiling the key differences between these two areas of cooperation, this Article challenges the widely held view that the strategic situations underlying IP and antitrust cooperation are very similar and that the TRIPS Agreement would, therefore, offer an instructive precedent for successful WTO antitrust negotiations.<sup>14</sup> A closer examination of the two areas of cooperation reveals that the TRIPS and antitrust negotiations have, in fact, very little in common. Given that the dynamics underlying antitrust cooperation would — at least intuitively — appear to be most similar to those underlying cooperation on IP rights, the two case studies also cast doubt on the ability of the TRIPS Agreement to provide a template in other proposed areas of cooperation, such as environmental protection or labor law, where the political economy conditions seem further removed from those underlying the TRIPS negotiations.

The two case studies also challenge certain standard assumptions on international cooperation. The WTO rules are the result of consensus, suggesting that any given agreement ought to be Pareto-improving<sup>15</sup> for all of the organization's members. If an agreement were to leave any state worse off, that state would use its veto rights to block that agreement.<sup>16</sup> This is consistent with any rational-choice model that assumes that states pursue international cooperation only when benefits from such cooperation exceed the costs involved. The examination of the TRIPS and antitrust negotiations, however, reveals that certain zero-sum

---

payments).

12. Bradford, *supra* note 8, at 434.

13. *Id.* at 434–35.

14. Andrew Guzman has developed a most detailed argument on why the TRIPS negotiations should be instructive to the antitrust negotiations. See Guzman, *supra* note 11.

15. An agreement that is Pareto-improving makes at least one party better off, but makes no party worse off. See ALAN V. DEARDORFF, *TERMS OF TRADE: GLOSSARY OF INTERNATIONAL ECONOMICS* 204 (2006).

16. Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 345 (2002). Similarly, a state might block agreements that resulted in positive-sum outcomes if such an agreement inequitably distributed the benefits among the trading partners. *Id.*

agreements that harm some states — such as TRIPS — do materialize within the WTO, whereas win-win agreements that many consider to be Pareto-improving for all states — such as antitrust — can be unsuccessful.<sup>17</sup> One of the goals of this Article is to explain why this happens. Similarly, conventional wisdom suggests that cooperation is less likely in the presence of stark distributional conflicts or incentives to defect. Yet, this Article argues that it is exactly in the presence of these two conditions that a WTO agreement is most likely to emerge. Consequently, a more nuanced theory on cooperation within the WTO is necessary.

The Article proceeds as follows: Part I discusses the institutional capacity of the WTO, laying out key predictors of when the WTO can advance international cooperation and when it fails to do so. Part II examines these predictors through a case study that focuses on two prominent WTO negotiations — the successful TRIPS negotiations and the failed antitrust negotiations — and identifies the key differences between the two areas of cooperation. These differences, the Article contends, capture the very conditions that allow us to predict whether cooperation in the WTO is feasible. The conclusion discusses the prospects of future cooperation in the WTO, applying the lessons from the case studies to the changing political and economic landscape in which WTO negotiations are likely to take place in the future.

## I. A THEORY OF COOPERATION IN THE WTO

Scholars often hail the WTO as the most effective of international institutions.<sup>18</sup> With a broad membership and an extensive set of internationally binding obligations, the WTO has ensured that states open their borders by lowering tariffs and removing various non-tariff barriers that restrict international trade. More open trade has secured worldwide economic growth and increased prosperity across the global markets. While trade liberalization has its critics,<sup>19</sup> few would

---

17. See Susan K. Sell, *Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice*, 49 INT'L ORG. 315 (1995) (surmising that TRIPS should have been harder to agree to than antitrust provisions as all states had something to gain from at least some minimum set of antitrust laws).

18. See, e.g., Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 321 (2004) ("The most effective dispute resolution procedures are found within the WTO."); Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1, 13 (2006) ("The most effective and important international institution today is the World Trade Organization . . ."); Carlos Manuel Vázquez, *Judicial Review in the United States and in the WTO: Some Similarities and Differences*, 36 GEO. WASH. INT'L L. REV. 587, 587 (2004) ("Among international organizations, the World Trade Organization (WTO) is widely credited with having the most effective dispute settlement system.").

19. See HA-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* (2007); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS*



suggest that the WTO has not accomplished its primary mission of reducing obstacles to international trade. Many attribute the WTO's success to its ability to enforce commitments through its DSM. This sets the WTO apart from most other international institutions, which lack the means to hold states accountable for the breach of their obligations. Unlike much of international law, WTO obligations constitute "hard law" enforced by sanctions. This feature has also cultivated a perception of the distinct effectiveness of WTO agreements, resulting in pressures to incorporate a number of new issues into the WTO.

The attempts to link various "nontrade" issues into the WTO have become a subject of extensive debate and controversy.<sup>20</sup> There is no shortage of advocates — whether diplomats or governments, scholars, private interests, or non-governmental organizations — arguing for or against the expansion of the traditional trade agenda to new areas of cooperation.<sup>21</sup> These disagreements have derailed ministerial meetings and collapsed negotiations, undermining the credibility of the WTO and, at times, calling into question the entire mission of the trade regime.<sup>22</sup> Unfortunately, the extensive debates have all failed to provide explicit criteria or a coherent analytical framework for assessing the optimal scope of the WTO.

Any normative discussion on the boundaries of the WTO needs a solid positive foundation that includes a nuanced understanding of the institutional capacity of the WTO. International relations literature has generated ambivalent and often contradictory insights into the situations that allow international institutions to facilitate cooperation.<sup>23</sup> This offers only limited guidance on the circumstances in which agreements

---

59 (2002).

20. See John H. Jackson, *Afterword: The Linkage Problem — Comments on Five Texts*, 96 AM. J. INT'L L. 118, 118 n.1 (2002) (referring to numerous instances where nontrade issues threatened to derail WTO-related negotiations). Jackson gives an overview of several scholars' perspectives on the proper place of nontrade issues in WTO negotiations, then gives his own take on where the boundaries should be. See generally *id.* at 118–25.

21. See *id.* at 118–20 (summarizing several authors' viewpoints on what is appropriate subject matter for trade negotiations); David W. Leebon, *The Boundaries of the WTO: Linkages*, 96 AM. J. INT'L L. 5, 5 (2002).

22. See Jackson, *supra* note 20, at 118.

23. See Daniel Y. Kono, *Making Anarchy Work: International Legal Institutions and Trade Cooperation*, 69 J. POL. 746, 746 (2007). The three primary views on the role of institutions offer very different predictions on the WTO's ability to foster agreements among states. See *id.* The most pessimistic views of international cooperation claim that institutions are irrelevant and unable to constrain states. More optimistic advocates of institutions claim that institutions exert independent influence on states, constraining states' self-interested behavior and subverting international anarchy that would otherwise prevail. The third view takes the middle road, claiming that institutions are constrained by the underlying structure of state interests but that they can still mitigate market failures that stem from the anarchic system of international relations. See *id.*

are likely to emerge in the WTO.<sup>24</sup> The discussion below seeks to fill that gap by identifying the most essential conditions that determine whether WTO agreements are likely to succeed or fail. Part I.A discusses when international cooperation is generally feasible. Part I.B focuses on when such cooperation is likely to take place in the WTO.

A. *When Is International Cooperation Feasible?*

Two preconditions must be present for any international cooperation to emerge, irrespective of the institutional form that such cooperation ultimately takes. First, *powerful states* must agree on the need for cooperation and the form that it will take. Second, *powerful interest groups* within those states must support this cooperation. While these conditions apply across the international institutional landscape, they also form a starting point for assessing the feasibility of a WTO agreement.

Even though a *de facto* consensus among all states forms the basis for WTO rule-making, in practice the legislative outcomes often reflect the underlying power structures of the member states.<sup>25</sup> In the WTO context, power refers to the relative market size of each state. A state with a large domestic market is a more attractive trading partner than a state with a smaller domestic market. It can, thus, extract more in return for agreeing to open its domestic market to new trading partners or for increasing market access commitments to its existing trading partners.<sup>26</sup> Large economies generally benefit from greater internal trade opportunities.<sup>27</sup> Small states are, therefore, more dependent on the WTO for trade opportunities and less able to exert pressure by threatening to close their markets. For instance, the prospect of Guatemala closing its market to the United States is far less damaging to the United States than the converse prospect of Guatemala losing the opportunity to export to the United States. This variance in the opportunity costs of market closure shifts the balance of power further toward the large economies.<sup>28</sup>

The United States and the European Union (EU) are the unequivocal powers in the WTO system, based on the size of their domestic markets.<sup>29</sup> While their relative economic dominance is gradually diminishing as emerging economies such as China and India continue to grow,

---

24. *See id.* at 746.

25. *See* Steinberg, *supra* note 16, at 346.

26. *See id.* at 347. Any given liberalization measure thus gives greater benefits to a smaller state, since it gains proportionately more foreign market access and thereby more welfare and net employment gains.

27. *See id.*

28. *See id.*

29. *Id.* at 348.

the United States and the EU together still account for one-third of all world imports in both manufactured goods and commercial services.<sup>30</sup> In addition, the combined GDP of the United States and the EU still constitutes forty percent of the world's total GDP.<sup>31</sup>

The Great Powers can take advantage of less powerful states' dependence in several ways. At one extreme, Great Powers can resort to coercive tactics. In the trade domain, coercion has typically consisted of economic sanctions — or threats thereof — or withdrawal of economic benefits, such as removal of a country's Generalized System of Preferences (GSP) status, which allows it to benefit from more favorable tariff schemes.<sup>32</sup> The Great Powers can also use selective incentives and conditional benefits to persuade less powerful countries to adopt their preferred trade policies. They can negotiate conditional trade agreements or use their economic leverage through international institutions such as the World Bank or International Monetary Fund.<sup>33</sup> The Great Powers often extend economic assistance to developing countries on the condition that those countries adopt progressive economic policies and carry out certain institutional reforms.<sup>34</sup> These tactics steer less powerful economies toward regulatory regimes that the Great Powers prefer.

---

30. See World Trade Organization, Trade Profiles for the EU and the U.S. (Mar. 2010), <http://tinyurl.com/36thnph>. The United States and the EU collectively accounted for 31.5% of merchandise imports and 33.8% of commercial services imports in 2008.

31. See World Bank, World Development Indicators Database, Gross Domestic Product 2008, <http://tinyurl.com/yg5fsj>. The United States' share of total world imports was 13.2% of merchandised goods and 10.3% of commercial services. World Trade Organization, *supra* note 30. The EU's shares were 18.4% and 23.5%, respectively. *Id.* In 2008, the United States' GDP was \$14.2 trillion and EU's 2008 GDP was \$18.3 trillion, in nominal terms. *Id.* The total world 2008 GDP was approximately \$60.5 trillion. See *id.* Compare that with 1994, when the Uruguay Round, including the TRIPS negotiations, was closed, the combined merchandise imports to the United States and the EU constituted forty percent of the world total merchandised imports and their combined GDP represented nearly fifty percent of the total world GDP. See *id.*

32. See Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 792–93 (2001) (characterizing the WTO's enforcement mechanisms as, in effect, trade sanctions); Jan Vandenberghe, *On Carrots and Sticks: The Social Dimension of EU Trade Policy*, 13 EUR. FOREIGN AFF. REV. 561, 570 (2008) (discussing the EU's use of its GSP system to incentivize and punish trading partners); see also Press Release, European Commission, Promoting Core Labour Standards: Commission Grants Additional Tariff Preferences to Sri Lanka and Initiates an Inquiry into Labour Rights Violations in Belarus 1 (Jan. 7, 2004), <http://tinyurl.com/2vxp37k> (noting that GSP benefits for Belarus may be temporarily withdrawn due to alleged violations of International Labour Organisation conventions).

33. See Ariel Buira, *An Analysis of IMF Conditionality*, in CHALLENGES TO THE WORLD BANK AND IMF: DEVELOPING COUNTRY PERSPECTIVES 55 (Ariel Buira ed., 2003), available at <http://tinyurl.com/25xd29b> (noting that the IMF imposes conditions on access to IMF funds and considering the impact of those conditions on developing countries); Sophie Meunier & Kalypso Nicolaidis, *The European Union as a Conflicted Trade Power*, 13 J. EUR. PUB. POL'Y 906, 913 (2006) (discussing the EU's frequent use of conditionality in accession negotiations with potential new EU member states).

34. See, e.g., Robert H. Edwards, Jr. et al., *International Investment, Development, and Privatization*, 33 INT'L LAW. 383, 384–85 (2001) (discussing the African Growth and Opportunity

Even if the Great Powers agree on the need to cooperate, they are likely to devote their limited resources to pursuing cooperation on issues that offer them political gains.<sup>35</sup> The prospect of producing concrete benefits for discrete and influential domestic interest groups maximizes political rents from cooperation for these nations' decision makers. Interest groups are likely to support an international agreement when expected benefits of the agreement are concentrated and costs are diffuse.<sup>36</sup> Concentrated benefits stimulate organized activity, as the beneficiaries of the agreement seek to institutionalize their expected gains. At the same time, when the costs of an agreement fall on a large number of stakeholders, their individual stake in opposing the agreement is not high enough to motivate the formation of an effective coalition opposing the agreement. Thus, the agreement is more likely to materialize in the presence of organized activity supporting the agreement and in the absence of a tight counter-coalition challenge.<sup>37</sup>

### B. *When Does Cooperation Emerge in the WTO?*

Even when the Great Powers and influential domestic interest groups within those powers support international cooperation, it is not evident that states find it rational to cooperate within the WTO. At times, states pursue cooperation in another multilateral, multi-issue framework<sup>38</sup> or within a single-issue organization.<sup>39</sup> At other times, states regard bilateral cooperation as sufficient.<sup>40</sup> The discussion below examines the

---

Act); Kim Reisman, *The World Bank and the IMF: At the Forefront of World Transformation*, 60 *FORDHAM L. REV.* S349, S392–93 (1992) (discussing the IMF and World Bank's work with developing countries); USAID History, USAID (2009), [http://www.usaid.gov/about\\_usaid/usaidthist.html](http://www.usaid.gov/about_usaid/usaidthist.html) (discussing American foreign aid policies in the twentieth century).

35. Governments negotiating international agreements are assumed to be motivated by both public welfare and public choice considerations. See generally Vincent Ostrom & Elinor Ostrom, *Public Choice: A Different Approach to the Study of Public Administration*, 31 *PUB. ADMIN. REV.* 203 (1971); Dani Rodrik, *Political Economy of Trade Policy*, in 3 *HANDBOOK OF INTERNATIONAL ECONOMICS* (Gene Grossman & Kenneth Rogoff eds., 2d ed. 1995).

36. James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 369 (James Q. Wilson ed., 1980).

37. See *id.*

38. Efforts to pursue international antitrust cooperation have also taken place, for instance, in the Organization of Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). See, e.g., Jenny, *supra* note 5, at 981 (noting cooperation on antitrust issues has been affected through both the OECD and UNCTAD); Piilola, *supra* note 5, at 235–37 (discussing the possibility of creating an international antitrust framework through the OECD).

39. States also continue to cooperate on IP issues in the World Intellectual Property Organization (WIPO). In the absence of progress in the WTO, states have pursued international antitrust cooperation in the International Competition Network (ICN). Budzinski, *supra* note 5, at 224.

40. See generally Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 *HARV. INT'L L.J.* 323 (2008).

conditions under which the WTO can facilitate regulatory convergence and the conditions under which states prefer other regimes. It argues that the WTO offers the most advantageous institutional setting for cooperation in the presence of three key attributes: first, when deep *distributional conflict* calls for strategic linkages across issues to forge an agreement; second, when a high *likelihood of defection* calls for monitoring and enforcement provisions; and, finally, when the availability of high *net benefits* exceeds the high costs of long and cumbersome WTO negotiations.

The WTO can facilitate the conclusion of international agreements by enabling states to negotiate transfer payments across different issues. If an agreement on a single-issue area, by itself, is not feasible, states can broaden the scope for a compromise by strategically linking a contested issue to other items on the trade agenda. Issue linkage constitutes a side payment where winning states compensate losing states to convince them to sign on to the agreement.<sup>41</sup> Extending the negotiation agenda increases the likelihood that all states can gain from an agreement that is part of the package. Thus, issue linkages provide an opportunity to mitigate distributional conflicts, opening up new possibilities for efficient agreements.<sup>42</sup>

Issue linkages are particularly helpful in overcoming domestic resistance to an international agreement.<sup>43</sup> Broadening the negotiation agenda counteracts protectionist coalitions by mobilizing countervailing forces that support trade liberalization. When negotiating additional issues, new coalitions emerge to counter the protectionist sentiments, offering governments political rents that can exceed the costs that the protectionist coalition incurs.<sup>44</sup> Grouping multiple issues in a single negotiation also constrains the ability of a single ministry to block negotiations. For instance, the Ministry of Agriculture in France would at all times resist an international agreement that curtailed France's ability to

---

41. See Robert D. Tollison & Thomas D. Willett, *An Economic Theory of Mutually Advantageous Issue Linkages in International Negotiations*, 33 INT'L ORG. 425, 430-37 (1979) (discussing an economic model of issue linkages).

42. See *id.*; see also James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT'L ORG. 281, 300 (1983) (noting "cases in which adding issues may be mutually beneficial" to negotiating parties). Linkage represents an effective way of overcoming a distributional conflict when direct transfer payments are not feasible.

43. Davis, *supra* note 11, at 163-65. Contrary to several studies contending that economic interests, market power, or lobbying activities explain when trade liberalization occurs, Davis shows that institutional cross-issue linkages are more relevant in determining trade patterns. Issue linkage has forged an agreement when powerful lobby groups have opposed cooperation. Linkage alters the interest group dynamics by mobilizing coalitions to counter parochial pressures. Thus, "[l]iberalization depends on overcoming the collective action problems and institutional biases at the domestic level that favor protection. . . . Using issue linkage to mobilize industry groups helps . . . to counter both problems." *Id.* at 157.

44. *Id.* at 158.

subsidize its farmers, but when a multi-issue WTO negotiation incorporates agriculture, the involvement of other domestic ministries with interests that counterbalance one another dilutes the relative influence of the Ministry of Agriculture.<sup>45</sup> Linkages are not always feasible, however, particularly in the presence of *ex ante* uncertainty relating to the distributional consequences of a prospective agreement. The ambiguity as to which states would win and which would lose under the agreement compromises negotiators' abilities to devise transfer payments. In addition, linkages can burden the negotiation agenda, unraveling compromises on issues that could succeed in isolation.<sup>46</sup>

While linkages within the WTO facilitate agreements that would not be feasible in their absence, states always retain an incentive to defect on the package deals that they have negotiated.<sup>47</sup> The WTO can reduce this temptation by helping states solidify issue linkages and reduce their incentives for defection. The WTO agreements are legally binding on all member states. If a WTO member violates its obligations, the WTO can authorize trade retaliation measures and hold states accountable through the DSM.<sup>48</sup> The enforceability of WTO agreements challenges the common view that international law is always "soft" and compliance with it voluntary. Thus, the WTO serves two related purposes: It facilitates the formation of linkages at the treaty-making stage and helps to sustain these linkages by raising the costs of defection at the compliance stage.

The need for enforcement is more germane in some areas of international cooperation than in others. When states choose between binding, enforceable agreements and non-binding agreements with no enforcement provisions, the key causal variable is the risk of opportunism.<sup>49</sup> Binding international agreements with cautiously negotiated commitments are less susceptible to self-serving interpretation by states.<sup>50</sup> Such agreements also deter cheating by raising the cost of non-compliance.<sup>51</sup>

---

45. *See id.* at 153 (noting generally the role issue linkages have played in the "hard case" of agriculture trade negotiations); *id.* at 157, 165 (offering issue expansion as a way to dilute the influence of entrenched agricultural interests and looking at French agricultural interests in particular).

46. Sebenius, *supra* note 42, at 300.

47. As long as states are able to enhance their individual payoff by defecting from the linkage equilibrium, the temptation to defect from agreed transfer payments exists.

48. *See* Marrakesh Agreement, *supra* note 3, Annex 2; Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT'L L.* 335, 358–59 (1989) (discussing use of the Prisoner's Dilemma in international relations theory).

49. Kal Raustiala, *Form and Substance in International Agreements*, 99 *AM. J. INT'L L.* 581, 593–94 (2005).

50. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT'L ORG.* 421, 426–27 (2000).

51. The costs of renegeing can manifest themselves both in the form of reputational costs or actual sanctions. *See id.* at 427.

Binding agreements are, consequently, particularly advantageous in Prisoner's Dilemma situations where the potential for costly opportunism is high and cheating is difficult to detect.<sup>52</sup> In contrast, when the incentives to defect from the agreed commitments are low, a binding agreement with enforceable commitments is less valuable. This is the case predominantly in coordination games where the parties generally lack incentives to deviate from the agreement once they establish the focal point of coordination.<sup>53</sup>

Accordingly, if the cooperation problem that states face resembles a Prisoner's Dilemma — which acknowledges an intrinsic incentive for the players to cheat — states are more likely to negotiate a binding agreement with enforcement provisions. In contrast, if the cooperation problem resembles a coordination game — where agreements are largely self-enforcing — enforcement provisions are redundant and, thus, often not included. Barbara Koremenos's recent empirical study on dispute settlement provisions in international agreements supports this argument. Koremenos found that approximately half of all international agreements among states include dispute settlement provisions.<sup>54</sup> She also found that states include dispute settlement provisions only when they are likely to be necessary.<sup>55</sup> In other words, the inclusion of the dispute settlement provision correlates positively with the likelihood of non-compliance or "the strength of individual actors' incentives to cheat."<sup>56</sup> It follows that the likelihood that states will negotiate agreements within the WTO should also positively correlate with the states' incentives to behave opportunistically.

Finally, states' choice of venue for negotiating international agreements reflects their perception of which institution allows them to obtain the best possible outcome at the lowest possible cost.<sup>57</sup> In addition to the WTO's key advantages — linkages and an enforcement mechanism — states' willingness to pursue an agreement in the WTO turns on

---

52. *Id.* at 429.

53. Raustiala, *supra* note 49, at 592–94; *see also* Abbott, *supra* note 48, at 358–59, 363–74. While the possibility of defection is not entirely absent in coordination situations, any surreptitious cheating, at least, is unlikely. *See* Lisa L. Martin, *The Rational State Choice of Multilateralism*, in *MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM* 91, 102 (John Gerard Ruggie ed., 1993).

54. Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 *J. LEGAL STUD.* 189, 190 (2007).

55. *Id.* at 209–10.

56. Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 *INT'L ORG.* 761, 776 (2001).

57. On state forum shopping, *see generally* Davis, *supra* note 11, at 154–55; Daniel Drezner, *Who Rules? The Regulation of Globalization* (Aug. 28, 2002) (unpublished paper presented at the annual meeting of the American Political Science Association) (transcript available at <http://www.danieldrezner.com/research/whorules.pdf>).

the availability of alternatives outside the WTO. As the opportunity costs of non-agreement in the WTO increase, so do the states' efforts to include the issue in the WTO. In contrast, the more content states are with the status quo or the more alternatives they have outside of the WTO, the lower costs are to forgo WTO negotiations. Thus, the likelihood of a WTO agreement is often not only a function of costs and benefits of that agreement, but also a function of the opportunity costs of a non-WTO agreement.<sup>58</sup>

## II. TESTING THE LIMITS OF THE WTO: EXPLAINING THE DIVERGENT OUTCOMES IN IP AND ANTITRUST COOPERATION

States' pursuit of international IP and antitrust cooperation under the auspices of the WTO forms part of a broader goal to globally institutionalize deregulation and trade liberalization and to further expand the liberalization trend to the sphere of domestic regulation. Following significant gains in reducing tariff barriers on goods and services, the focus of trade talks has moved from the removal of conventional trade barriers to identifying and addressing new trade barriers that states erect to protect their domestic markets. For instance, some observers project that states will employ lax or strategic antitrust laws or offer inadequate protection of IP rights to hinder the free flow of goods and services into their markets.<sup>59</sup> Fear of these new forms of protectionism has reinforced demands to expand the scope of the WTO to include rules regarding IP rights and antitrust, among other areas, in order to preserve the economic benefits of free trade.<sup>60</sup>

In 1994, the TRIPS Agreement — adopted as a part of the Final Act of the Uruguay Round — successfully brought IP rights under the aus-

---

58. See, e.g., David A. Lax & James K. Sebenius, *The Power of Alternatives or the Limits to Negotiation*, in NEGOTIATION THEORY AND PRACTICE 97, 97–114 (J. William Breslin & Jeffrey Z. Rubin eds., 1991).

59. See Andrew T. Guzman, *The Case for International Antitrust*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 99, 101, 108–09 (Richard A. Epstein & Michael S. Greve eds., 2004).

60. The growing trend to broaden the WTO's negotiation agenda can also be explained by the WTO's successful historical track record in embracing a variety of more or less trade-related areas. The undeniable substantive links that trade policy has with other policy domains has further contributed to the perception that the WTO is a natural forum in which to pursue regulatory reforms in any area of economy. In addition, the WTO has been a particularly attractive forum for pursuing further trade liberalization due to the broad membership and the enforcement mechanism that the institution offers. Various interest groups demanding greater global regulation therefore often consider WTO to be the most effective forum for them to advance their goals. The WTO's perceived effectiveness has further reinforced path dependency and regime persistence. See, e.g., José E. Alvarez, *The WTO As Linkage Machine*, 96 AM. J. INT'L L. 146, 146–47 (2002); Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379, 389 (1988).



pices of the WTO.<sup>61</sup> The Agreement established a global IP regime with provisions to protect and enforce patents, copyrights, trademarks, and trade secrets.<sup>62</sup> It provides for minimum standards that bind all WTO members, coupled with a system of international enforcement.<sup>63</sup> The initiative for the Agreement came from a small group of powerful U.S. corporations whose activities depend on strong IP protection.<sup>64</sup> This group mobilized the support of their counterparts in the EU and Japan. These private interest groups subsequently lobbied their respective governments and ensured that their IP agenda remained a negotiating priority for these three key entities.<sup>65</sup>

Initially, developing countries — including India, Brazil, and South Korea — strongly resisted the developed countries' push for an agreement.<sup>66</sup> After eight years of trade talks, however, the TRIPS Agreement emerged as a part of a “grand bargain” consisting of multiple trade deals, all of which were incorporated in the Final Act of the newly established WTO.<sup>67</sup> The TRIPS Agreement was the result of collaboration among some of the most powerful multinational corporations and states in the global trading system. As the discussion below explains, these states used a mix of persuasion, pressure, threats, linkages, and other bargaining tactics to suppress the developing countries' resistance to the Agreement.

For those who advocate expanding the scope of the WTO, TRIPS is an important precedent showing that the WTO can accommodate new issues that fall outside of the traditional non-discrimination regime and encroach into the realm of domestic regulation.<sup>68</sup> The TRIPS Agreement imposes positive obligations on states to undertake regulatory reforms, going well beyond the scope of issues that the WTO traditionally addresses.<sup>69</sup> TRIPS is also an oft-cited precedent for those who argue

---

61. Marrakesh Agreement, *supra* note 3, art. II(2).

62. TRIPS, *supra* note 1, arts. 9–14 (recognizing copyrights), 15–21 (recognizing trademarks), 27–34 (recognizing patents), 39 (recognizing trade secrets under “undisclosed information”).

63. *Id.* arts. 1(1), 3, 8 (describing the scope of obligations and the basic principle of national treatment); *id.* arts. 63–64, 68–73 (describing the dispute settlement mechanism).

64. Ostry, *supra* note 10, at 55–57.

65. *Id.*

66. MEIR PEREZ PUGATCH, THE INTERNATIONAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS 51, 67 (2004) (relating instances where the United States clashed with South Korea and Brazil over the proper level of intellectual property protection).

67. See William A. Lovett, *Bargaining Challenges and Conflicting Interests: Implementing the Doha Round*, 17 AM. U. INT'L L. REV. 951, 951–56 (2002) (giving an overview of the “grand bargain” in international trade that emerged in the 1990s and the uneven sharing of benefits in the years that followed).

68. See Charnovitz, *supra* note 6.

69. See WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 39–43 (2007), available at <http://tinyurl.com/2vzq6> (outlining the Uruguay Round's achievements in imposing new

that the WTO is best suited to address issues with distributional consequences that create winners and losers.<sup>70</sup> For instance, while developing countries would have been unlikely to sign on to a standalone agreement regarding IP rights, they conceded when the WTO framework included TRIPS as a part of a broader package that ensured gains to each WTO member.<sup>71</sup>

The success of the TRIPS Agreement has fostered a perception that the negotiation of antitrust commitments in the WTO ought to be feasible as well. Andrew Guzman, for instance, claims that “a very similar strategic relationship among countries existed in IP until an agreement was reached during the Uruguay Round of GATT/WTO talks. The IP case study offers a valuable lesson about how competition [antitrust] policy negotiations should proceed.”<sup>72</sup> As the recent history of WTO negotiations shows, however, the efforts to negotiate an antitrust agreement under the auspices of the WTO have failed, and cooperation has followed a very different path.

States have pursued antitrust cooperation since the adoption of the Havana Charter in 1948.<sup>73</sup> The EU, with the support of Canada and Japan, has been the primary proponent of the WTO antitrust agreement. The United States, on the other hand, has consistently resisted attempts to incorporate antitrust into the trade regime.<sup>74</sup> In 1996, at the request of the EU, the WTO Ministerial Conference established a Working Group on Competition.<sup>75</sup> The task of the Working Group was to examine the linkages between trade and antitrust issues and identify issues that the WTO should potentially address in this regard.<sup>76</sup> The Doha Round, launched in 2001, initially included antitrust on its negotiating agenda.<sup>77</sup>

---

intellectual property obligations).

70. See Guzman, *supra* note 11, at 950–51.

71. WORLD TRADE ORGANIZATION, *supra* note 69, at 18–19 (giving an overview of the major conflicts in the Uruguay Round and describing some of the concessions made to forge consensus); *id.* at 93–99 (describing special provisions designed to benefit developing countries).

72. Guzman, *supra* note 11, at 974.

73. See, e.g., Nataliya Yacheistova, *The International Competition Regulation: A Short Review of a Long Evolution*, 18 WORLD COMPETITION 99, 99–110, (1994); see also MARSDEN, *supra* note 4, at 45–66.

74. See, e.g., A. Douglas Melamed, Principal Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Antitrust Enforcement in a Global Economy, Address at the Fordham Corporate Law Institute 25th Annual Conference on International Antitrust Law and Policy (Oct. 22, 1998), available at <http://tinyurl.com/2ebkpzu>.

75. See World Trade Organization, Ministerial Declaration of 18 December 1996, WT/MIN(96)/DEC [hereinafter Singapore Ministerial Declaration].

76. *Id.*

77. Antitrust, or “competition policy,” was one of the so-called “Singapore issues,” together with investment, trade facilitation, and transparency in government procurement, that were placed on a conditional negotiation track. See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002); see also *infra* note 162. Being on a conditional negotiation track made it subject to an explicit decision on the scope and timeframe of

At the 2003 Cancun Ministerial Meeting, however, resistance from developing countries stalled the negotiations. Following the collapse of the negotiations in Cancun, the WTO General Council decided to officially drop antitrust policy from the Doha Round negotiation agenda on August 1, 2004.<sup>78</sup> Little suggests that the WTO antitrust negotiations will be revived soon.

This Part explains why the TRIPS Agreement was successful, why antitrust negotiations were a failure, and why exactly the two outcomes were so divergent.<sup>79</sup> It first discusses the general preconditions for successful cooperation — Great Power consensus and the support of influential interest groups — and shows how these attributes were present in the case of the TRIPS negotiations but were missing in the case of antitrust negotiations. While most recognize the presence of these conditions in the case of TRIPS, the broad literature advocating a WTO antitrust agreement has been surprisingly ignorant of the absence of coherent Great Power and interest group support, cultivating unfounded optimism about the prospect of harnessing the necessary political backing for any such agreement. The discussion below seeks to explain why no coherent interest group coalition has emerged to support a WTO antitrust agreement and — maybe even more surprisingly — why powerful states have repeatedly put antitrust on the WTO's negotiation agenda even when none of the influential interest groups has urged them to do so.

The discussion then moves on to examine the WTO-specific preconditions for successful cooperation in the two areas. It argues that the gains and losses that would result from the TRIPS Agreement were relatively unambiguous prior to the conclusion of the Agreement, enabling states to design issue linkages that compensated developing countries that expected to lose from the Agreement. In contrast, the substantial uncertainty regarding prospective winners and losers has impeded anti-

---

negotiations at the 2003 Cancun Ministerial Conference.

78. See World Trade Organization General Council, *supra* note 4.

79. This Article highlights five primary reasons that explain the success of the TRIPS Agreement and the failure to reach an agreement on antitrust. There are, however, other explanations for why the TRIPS Agreement was successful. For instance, the political and ideological climate was particularly favorable to the TRIPS Agreement at the time the negotiations were launched. Neo-classical economic liberalism dominated the thinking of the international community and the major international institutions in 1980s. Ronald Reagan's United States and Margaret Thatcher's United Kingdom embraced a free-market agenda that sought to institutionalize deregulation and trade liberalization globally. The General Agreement on Tariffs and Trade (GATT) Secretariat endorsed the liberal trade order and sought to regain its relevance in the eyes of the developed countries, which had begun to bypass the GATT in their economic policymaking after the GATT became preoccupied with the developing country concerns in early 1980s. This led the GATT Secretariat to endorse the developed country agenda, including the TRIPS Agreement. See Sell, *supra* note 17, at 315–20 (discussing the international climate ahead of negotiations on TRIPS).

trust negotiations, obstructing states' ability to form issue linkages. Thus, the existing literature has overestimated the WTO's ability to resort to linkages, overlooking that the linkage strategy is contingent on states' ability to predict the distributional consequences of the agreement.

The discussion below also asserts that defection from a prospective agreement was a concern underlying the TRIPS negotiations, whereas the likelihood of cheating — and hence the need for WTO's enforcement mechanism — is of lesser concern in antitrust negotiations. This claim challenges the prevailing presumption that incentives to defect from commitments would also impede antitrust cooperation. Finally, the net gains to the proponents of the TRIPS Agreement were much higher and more certain than the prospective gains for any state supporting a WTO antitrust agreement. Similarly, the opportunity costs of not cooperating with respect to IP rights in the WTO were significantly higher than they were in the case of antitrust, where various alternatives for pursuing regulatory convergence existed.

A. *The Power-Politics Explanation: Does the "Great Power Consensus" Exist?*

A consensus among the Great Powers regarding the necessity and the content of the TRIPS Agreement was a defining factor that led to the successful conclusion of the Agreement. In contrast, an accord among the Great Powers was lacking on the antitrust issue, contributing to the breakdown of those negotiations.

1. *The Great Power Consensus on the TRIPS Agreement*

The Great Powers are also the world's leading producers of IP products.<sup>80</sup> As unambiguous beneficiaries of stronger IP protection, they were ardent advocates of the TRIPS Agreement and pursued their goal as a unified front.<sup>81</sup> Stronger international IP protection would reinforce

---

80. The benefits of IP protection are highly concentrated in a few economically powerful developed countries. According to WIPO, in 2000, nationals of developed countries owned ninety-three percent of all patents granted to foreigners. Five countries — the United States, Germany, France, the United Kingdom, and Switzerland — owned seventy-six percent of them, the United States' share being twenty-six percent. The United States is the primary beneficiary of IP-related trade. PUGATCH, *supra* note 66, at 51. The United States' net income from IP-related trade increased from \$1.1 billion in 1970 to \$14.3 billion in 2001. *Id.* at 54. The pharmaceutical industry is illustrative of how concentrated the benefits from the TRIPS Agreement were going to be: Ninety percent of new pharmaceutical products originate in the ten leading countries, which also host over two-thirds of the total world production of pharmaceuticals. The United States, EU, and Japan account for over ninety percent of research and development expenditure in the field. *Id.* at 82.

81. See, e.g., A.O. Adede, *The Political Economy of the TRIPS Agreement: Origins and His-*

their position as IP exporters by enabling them to charge supra-competitive prices for their products abroad. Thus, the TRIPS Agreement guaranteed an improvement to the Great Powers' terms of trade and national income.<sup>82</sup>

Since the Great Powers unanimously supported the TRIPS Agreement, the only true battle was to persuade the developing countries to sign on to the Agreement. As consumers and copiers of IP-related products, rather than producers, developing countries had little to gain from the TRIPS Agreement.<sup>83</sup> While developed countries argued that the TRIPS Agreement would benefit developing countries by stimulating innovation and attracting foreign direct investment, developing countries found such benefits to be weak, distant, and uncertain.<sup>84</sup> In addition, given the extent of the domestic opposition to the Agreement, developing countries knew that signing on would be politically costly. Hence, the TRIPS Agreement seemed to offer no Pareto-gains for developing countries.

If developing countries knew that the TRIPS Agreement would reduce their economic welfare, why did they sign on to it? In the WTO, all states have equal voting rights, and the consensus principle guides the decision-making process.<sup>85</sup> These institutional safeguards ought to ensure that the Great Powers cannot impose undesirable agreements on developing countries. A closer examination of the dynamics of the WTO negotiations, however, reveals that the formal equality of the states often yields to power-based bargaining in practice.

Developing countries refrained from using their veto rights for two primary reasons. First, developing countries already faced trade retaliation from the Great Powers, which had previously resorted to coercive tactics in their bilateral relations with less powerful trading partners. Prior to TRIPS, the United States relied primarily on two instruments in pressuring developing countries to adopt stronger domestic IP laws: first, the denial or withdrawal of the GSP benefits, which enable certain countries to enjoy preferential treatment such as lower tariffs in their trade relations with the United States; and second, the employment of

---

tory of Negotiations 4, 12 (July 30, 2001) available at <http://tinyurl.com/325a9vs> (unpublished manuscript, presented at the Eastern and Southern Africa Multi-Stakeholder Dialogue on Trade, Intellectual Property, and Biological Resources, Nairobi, Kenya).

82. PUGATCH, *supra* note 66, at 49. While some substantive disagreements among the Great Powers existed, the magnitude of absolute gains available from the TRIPS Agreement superseded any concerns the Great Powers harbored about relative gains under the final agreement.

83. See *supra* note 80; PUGATCH, *supra* note 66, at 51; see also Sell, *supra* note 17, at 318 (noting that, prior to TRIPS, many developing countries did not provide IP protection to foreigners).

84. PUGATCH, *supra* note 66, at 54–55.

85. Marrakesh Agreement, *supra* note 3, art. IX(1).

Section 301 of the 1974 Trade Act (19 U.S.C. § 2411), which enables the United States to impose unilateral trade sanctions against countries that engage in “unfair competition.”<sup>86</sup> Thus, developing countries faced the choice of either enduring continuing unilateral trade retaliation from the United States — and to a lesser degree, from the EU — or accepting a multilateral IP regime where the WTO’s dispute settlement mechanism would constrain the United States’ ability to unilaterally retaliate against them.<sup>87</sup>

Second, developing countries had no choice but to accept the TRIPS Agreement because of a “single undertaking” approach that the Great Powers successfully pursued to close the Uruguay Round.<sup>88</sup> Unlike the previous trade negotiation rounds, which had allowed states to opt out of trade agreements by which they did not want to be bound, the single undertaking approach meant that the acceptance of the entire set of the Uruguay Round agreements — including the TRIPS Agreement — was a precondition to receiving any benefits provided by the General Agreement on Tariffs and Trade (GATT)<sup>89</sup> as well as to membership in the newly established WTO.<sup>90</sup> To compel all states to accept the Final Act of the Uruguay Round and join the WTO, the United States and the EU withdrew from their 1947 GATT responsibilities and terminated their trade obligations vis-à-vis states that did not accept the Final Act.<sup>91</sup> In doing so, the two trade powers removed the status quo and thereby presented developing countries with a reduced set of choices. Developing countries had to decide whether to sign the TRIPS Agreement or forgo all of the benefits that they had negotiated in the previous fifty years. Obviously, they could not afford to choose the latter.<sup>92</sup>

---

86. On several occasions, the United States issued specific threats — at times carrying out such threats — to coerce developing countries to agree to a higher level of IP protection. See PUGATCH, *supra* note 66, at 67–68, 72 (noting the United States’ successful attempts to coerce South Korea and Brazil); see also United States Tariff Act of 1930, 19 U.S.C. § 1337 (2006).

87. See PUGATCH, *supra* note 66, at 67–68, 72 (noting the United States’ and the European Community’s successful efforts to force South Korea to extend greater IP protection in pharmaceutical area).

88. Steinberg, *supra* note 16, at 360.

89. GATT, a predecessor of the WTO, was executed in 1938. Today, the WTO provides a treaty framework for various agreements, including GATT. See generally WORLD TRADE ORGANIZATION, *supra* note 69, at 12–13.

90. Steinberg, *supra* note 16, at 360 (describing the United States’ and the European Community’s “single undertaking” approach, where they frame the trade negotiations as an all-or-nothing package deal).

91. *Id.*

92. *Id.* The United States and European Community’s exit strategy resembles Lloyd Gruber’s theory of “go-it-alone” power. Gruber contests the positive-sum models of international cooperation and explains why states join institutions that are not Pareto-improving for them. He argues that states that stand to lose from cooperative arrangements know that winners often can proceed without them. Thus, the winners can “go-it-alone” and the new arrangement will materialize irrespective of the losing states’ support, changing the institutional landscape in which the losing

Although the principle of equal rights and consensus among all states formally guides WTO negotiations, the history of the TRIPS Agreement exposes the role that economic power plays in WTO negotiations. The Great Powers' joint action in pursuit of a commonly defined goal paved the way for the TRIPS Agreement and allowed them to overcome the developing countries' initial resistance. The tactics that they used might not have amounted to overt coercion, but, by changing the opportunity set available to developing countries, these Great Powers effectively left developing countries with little choice but to sign on to an agreement that was not Pareto-improving to them. The Great Powers are still able to dictate the negotiation agenda, the bargaining process, and the final outcome, challenging the institutionalist paradigm that assumes that international institutions are Pareto-improving and facilitate mutual gains for all states.<sup>93</sup>

## 2. *The Great Power Divide on International Antitrust Cooperation*

One of the primary obstacles to a binding international antitrust agreement has been a longstanding dispute between the United States and the EU regarding the content and institutional form of such an international antitrust collaboration, in stark contrast to the Great Power consensus on IP issues. Even as U.S. and EU antitrust laws are gradually converging, disagreement on the optimal content of antitrust laws remains. This disagreement is the result of different beliefs on when and how a government should intervene when markets fail. In general, the EU tends to be more interventionist and less tolerant of market power.<sup>94</sup> Consequently, the EU is more likely to challenge mergers and pursue the conduct of a dominant corporation. Commentators often cite the divergent outcomes in the Microsoft monopoly case and the

---

states operate. This changes the losing states' interest calculation and causes them to join the new institution even though they would have preferred that such an institution never materialized in the first place. Thus, while the TRIPS Agreement did not offer any Pareto-gains for developing countries, it was strategically better for developing countries to join the WTO which incorporated the TRIPS Agreement than for them to give up all their hard-earned trade benefits. *See generally* LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (2000).

93. *See* PUGATCH, *supra* note 66, at 228; Daniel W. Drezner, *Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence*, 12 J. EUR. PUB. POL'Y 841 (2005). *See generally* GRUBER, *supra* note 92; Steinberg, *supra* note 16.

94. Gunnar Niels & Adriaan ten Kate, *Introduction: Antitrust in the U.S. and the EU — Converging or Diverging Paths?*, 49 ANTITRUST BULL. 1, 15 (2004); *see also* Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555, 1579 (2008); Andreas Kirsch & William Weesner, *Can Antitrust Law Control E-Commerce? A Comparative Analysis in Light of U.S. and E.U. Antitrust Law*, 12 U.C. DAVIS J. INT'L L. & POL'Y 297, 308 (2006).

GE/Honeywell merger as the most prominent examples of the remaining transatlantic differences.<sup>95</sup>

The EU initially proposed the WTO antitrust rules and has remained the antitrust agreement's strongest advocate,<sup>96</sup> while the United States has repeatedly stated its opposition to the WTO antitrust rules.<sup>97</sup> The United States has, instead, supported bilateral cooperation agreements and voluntary multilateral cooperation within the International Competition Network (ICN) — a network of the world's antitrust agencies.<sup>98</sup>

The EU's support of formal WTO negotiations stems from a variety of factors, including its preference for multilateral, institutionalized rulemaking over less predictable, case-by-case cooperation among regulators.<sup>99</sup> The EU is also willing to link antitrust more closely to trade policy, whereas the United States wants to keep the two issues separate.<sup>100</sup> In addition, as more WTO members are moving toward adopting EU-style — as opposed to U.S.-style — antitrust laws, the EU perceives the antitrust cooperation within the WTO as an opportunity to institutionalize its own preferred regulatory regime globally.<sup>101</sup>

International cooperation is more likely to fail when the Great Powers are divided, so it is no surprise that the United States-EU divergence has obstructed states' abilities to negotiate antitrust matters in the WTO. The United States' opposition has not, however, been the only obstacle

---

95. On the Microsoft market dominance issue, compare *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002), and *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002) (endorsing the settlement between the United States and Microsoft), with Commission Decision of 24 March 2004, COMP/C-3/37.792 Microsoft, 2007 O.J. (L 32) 23 [hereinafter Microsoft Commission Decision] (imposing a fine after concluding that Microsoft had abused its dominant position in violation of Art. 82 EC). On the GE/Honeywell merger, compare Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), available at <http://tinyurl.com/29by88h> [hereinafter Dep't of Justice Press Release] (approving the merger subject to limited divestitures), with Commission Decision of 3 July 2001, COMP/M.2220 General Electric/Honeywell, 2004 O.J. (L 48) 1 [hereinafter General Electric/Honeywell Commission Decision] (declaring the merger "to be incompatible with the common market").

96. See Mario Monti, European Comm'r for Competition Policy, A Global Competition Policy?, Address at the European Competition Day Conference (Sept. 17, 2002), available at <http://tinyurl.com/36cbzqc>. See generally Working Group on the Interaction Between Trade and Competition Policy, *Communication from the European Community and Its Member States*, WT/WGTCP/W/115 (May 25, 1999).

97. See, e.g., Melamed, *supra* note 74.

98. See U.S. Dep't of Justice, Antitrust Div., Int'l Competition Advisory Comm. to the Att'y Gen. and Assistant Att'y Gen. for Antitrust, Final Report 33 (2000) [hereinafter ICPAC Report], available at <http://tinyurl.com/2fyn4nk>; William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Global Competition: Prospects for Convergence and Cooperation, Address at the American Bar Association Fall Forum (Nov. 7, 2002), available at <http://tinyurl.com/25fr7vy>.

99. Bradford, *supra* note 8, at 407.

100. *Id.*

101. *Id.* at 408.



for antitrust negotiations. At the 2003 Cancun Ministerial meeting, a coalition of developing countries blocked the negotiations.<sup>102</sup> While developing countries would arguably have been the greatest beneficiaries of the international antitrust agreement, the regulatory burden and resulting compliance costs turned developing countries against it. Without adequate resources or legal and economic expertise to enforce antitrust laws, many developing countries concluded that they were not ready to negotiate the WTO antitrust agreement.<sup>103</sup>

The Cancun failure shows that developing countries can sometimes successfully offset some of the Great Powers' bargaining advantage by forming coalitions that veto specific proposals, thereby compromising the leverage that the Great Powers have over outcomes.<sup>104</sup> Resource pooling helps weaker states gain more diplomatic clout, since their combined market size translates directly into more bargaining power.<sup>105</sup> In particular, when the interests of the Great Powers diverge, developing countries can more effectively counter the pressure that a fragmented Great Power coalition exercises.

In the ongoing Doha Round, the United States and the EU have been unable to dominate the negotiations. They have often found themselves in opposing alliances.<sup>106</sup> When the United States and the EU have not acted in concert, developing countries have taken advantage of the

---

102. See, e.g., Taimoon Stewart, *The Fate of Competition Policy in Cancun: Politics or Substance?*, 31 LEGAL ISSUES ECON. INTEGRATION 7 (2004); World Trade Organization, Day 5: Conference Ends Without Consensus (Sept. 14, 2003), <http://tinyurl.com/2wvppod>.

103. Developing countries also expected to incur political costs from the agreement, since import-competing industries or former state monopolies were likely to resist strict antitrust laws removing their existing government protection. Additionally, developing countries failed to see the agreement on antitrust as a development priority in light of more pressing socio-economic problems that would need to be addressed. See Editorial, *The Real Lesson of the Cancun Failure: The Answer is New Negotiating Geometries, Not WTO Reform*, FIN. TIMES, Sept. 23, 2003, at 16.

104. The "G20," a coalition of developing countries (not to be confused with the G20 that refers to the Group of Twenty Finance Ministers and Central Bank Governors), was a major force in blocking the antitrust negotiations in Cancun. Developing countries have also kept off the table issues including labor rights, which the United States has demanded, and environmental issues, which the European Union has endorsed. Furthermore, developing countries prevailed in demanding a declaration on TRIPS and public health, despite strong objections from the United States. See, e.g., John S. Odell & Susan K. Sell, *Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health, 2001*, in NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 85 (John S. Odell ed., 2006).

105. Manfred Elsig, *Different Facets of Power in Decision-Making in the WTO 25-28* (NCCR Trade Regulation, Working Paper No. 2006/23), available at <http://ssrn.com/abstract=1090146>. Reliance on coalitions also mitigates the information gap and deficient resources. However, the larger the coalitions are, the less cohesive and thereby less effective they become (for example, African states and other developing countries do not always have shared interests on issues regarding South-South trade). The relative influence and ability to extract commitments diminishes as compromises need to be negotiated within the coalition. *Id.* at 27.

106. *Id.* at 24.

Great Power divide and obstructed the negotiations, despite the significant opportunity costs that the failure of the Doha Round — antitrust agreement included — presents to them. Ironically, it seems that the power divide in antitrust has prevented states from signing an agreement that is potentially welfare-enhancing for all states. Accordingly, power politics interferes with the notion of Pareto-optimality by causing some Pareto-improving agreements — including the WTO antitrust agreement — to fail while allowing other agreements — including the TRIPS Agreement — to materialize, despite these agreements' failure to deliver gains to all WTO members.

*B. The Political Economy Explanation: Do Strong Domestic Interest Groups Support the International Agreement?*

The TRIPS Agreement emerged following unprecedented pressure from interest groups as influential multinational corporations promoted the inclusion of the IP rights into the WTO agenda.<sup>107</sup> In contrast, few corporations, industry organizations, or consumer groups have actively endorsed a WTO antitrust agreement. Instead, a small number of prominent antitrust agencies have spurred the demand for international antitrust rules, while individual corporations have focused their lobbying efforts on domestic antitrust agencies if the companies' interests have been directly and individually at stake.<sup>108</sup>

*1. The Interest Groups' Quest for the TRIPS Agreement*

As argued above,<sup>109</sup> the TRIPS Agreement was going to improve the terms of trade for the Great Powers that were, and continue to be, the major exporters of IP products. In addition, within those countries, a distinctly defined group of producers whose commercial success relies on vigorous IP protection was going to capture those gains. These producers became the primary advocates of the TRIPS Agreement.<sup>110</sup> They formed a transnational coalition and engaged in an unprecedented lobbying effort to establish a global IP regime.<sup>111</sup>

---

107. See Ostry, *supra* note 10, at 55–57.

108. See, e.g., ICC/BIAC COMMENTS, *supra* note 10.

109. See *supra* text accompanying notes 80–82.

110. The efforts to create a global IP regime were led by the Intellectual Property Committee (IPC), an ad hoc interest group consisting of twelve chief executives representing pharmaceutical, movie, and software industries. The IPC reached out to their counterparts in Europe and Japan to mobilize a transnational coalition to press for the agreement (most notably, UNICE in the EU, and Keidanren in Japan). For a discussion on the emergence of the IPC as a key norm entrepreneur behind the TRIPS Agreement, see SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 100–08 (2003).

111. *Id.*

The support of powerful multinational corporations does not, as such, guarantee that those private interests will translate into government policies and, ultimately, into public international law. While private interests prevailed in the TRIPS negotiations, the triumph of the multinational corporations in devising the global trade order has not stretched across all issue areas. For instance, the General Agreement on Trade in Services (GATS)<sup>112</sup> and the Agreement on Trade-Related Investment Measures (TRIMS),<sup>113</sup> which many of the same interest groups supported and which took place at the same time and within the same framework as the TRIPS negotiations, fell short of the demands of the private-sector activists.<sup>114</sup> Accordingly, it appears that the TRIPS Agreement was a product of a distinct set of circumstances that made it particularly susceptible to intense lobbying.

Interest groups assumed a prominent role in the TRIPS talks because of the particularly high benefits that they expected to receive from their lobbying efforts. The pharmaceutical industry, for one, is highly dependent on effective patent protection. According to some estimates, the average costs for developing a new drug are \$500–\$800 million.<sup>115</sup> Only three out of ten marketable drugs produce profits that exceed the average costs of their research and development.<sup>116</sup> Approximately sixty percent of drugs produced by the pharmaceutical industry may have never been developed in the absence IP protection, according to some estimates.<sup>117</sup> Thus, the high stakes involved in securing enhanced IP protection increased the expected utility of the industry's lobbying activities.

Second, the lobbying was particularly attractive to corporations because they knew that its benefits would fall on a small and coherent interest group.<sup>118</sup> Lobby groups are most effective when they have homo-

---

112. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.

113. General Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186.

114. SELL, *supra* note 110 at 4. The private interests supporting the GATS Agreement, for instance, consisted of a more diverse group of corporate actors including representatives of the banking industry, legal services, and the travel industry. Thus, overcoming collective action problems was more challenging in the presence of a more heterogeneous interest group. *See id.* at 172.

115. PUGATCH, *supra* note 66, at 89.

116. *Id.*

117. *See* Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 MGMT. SCI. 173, 175 (1986).

118. The small membership of the lobbying coalition also ensured that the *per-person* stakes were higher. Small membership in a lobbying group increases the probability that any single member of the coalition can affect the outcome. Lobbying was also successful because of the technological know-how advantage the coalition possessed over the government negotiators regarding the IP agenda. Pharmaceutical multinational corporations and other IP-driven corporations exploited this informational advantage by lending their expertise to the governments. The

geneous interests.<sup>119</sup> Corporations supporting the TRIPS Agreement came from highly concentrated business sectors, allowing them to construct a unified cross-industry position.<sup>120</sup> The lobby's limited number of members and clear sectoral definition diminished the danger of conflicting interests, allowing the coalition to pursue a cohesive mission through unified strategies.<sup>121</sup> In other words, the need to secure global IP protection provided a powerful common interest for the industry and a solid basis for cooperation. The joint gains available to the industry from the TRIPS Agreement superseded any relative gains that the corporations were hoping to secure as each other's competitors.<sup>122</sup>

Finally, the costs of collective action, which can at times undermine interest groups' ability to pursue their interests, never became a major obstacle for the TRIPS lobby. The TRIPS lobby consisted of a particularly resourceful group of corporations that were able to sustain high lobbying costs through high marginal profits within their respective industries.<sup>123</sup> Also, the prospect of free riding, which is one of the primary costs of collective action for interest groups, was diminished because the interest group was small, coherent, and restricted to a few industries.<sup>124</sup> Such a homogeneous group with limited membership is better able to mitigate the collective action problems inherent to lobbying, which both reduces the costs and increases the benefits of lobbying.

The extent of political rents available from the TRIPS Agreement provided the governments of the most powerful trading nations a strong

---

framing skills of the lobbying coalition also increased their prospects of successfully influencing the governments' negotiations positions. The IPC, for instance, framed the issue to the U.S. government as a "trade problem" as much as an "IP problem." The U.S. government was particularly responsive to the IPC's IP agenda when it was presented as crucial for the United States' competitiveness and a solution to the United States' increasing trade deficit. SELL, *supra* note 110, at 2, 105.

119. The members of the TRIPS coalition also had much to gain from pooling their resources when engaging in their costly lobbying activities and incurring the costs of organizing a coalition, collecting and disseminating information, preparing policy briefs, and presenting them to the government negotiators. See GENE M. GROSSMAN & ELHANAN HELPMAN, *SPECIAL INTEREST POLITICS* 143 (2001).

120. PUGATCH, *supra* note 66, at 93, 115. The pharmaceutical industry, for instance, consists of thirty to fifty multinational corporations producing approximately two-thirds of world pharmaceutical output. *Id.* at 93.

121. *Id.* at 3.

122. *Id.* at 5–6.

123. See *Top Industries: Most Profitable*, FORTUNE MAGAZINE, May 4, 2009, <http://tinyurl.com/2542mhm> (listing the pharmaceutical industry as the third most profitable industry among Fortune 500 companies on both a return on revenues and a return on assets basis).

124. Note, however, that some risk of free-riding persists, as a corporation may always elect not to participate in lobbying efforts, knowing that it would reap benefits of any agreement the lobbying coalition could secure. IP protection, in particular, would be akin to a non-excludable and non-rival public good whereby one member cannot reasonably prevent another from consuming the good and where one member's consumption of the good does not affect that of another.

political economy rationale to support the Agreement. The counter-lobby opposing the TRIPS Agreement consisted of a much less organized and considerably less resourceful set of corporations that copy or consume IP-related products, including manufacturers of generic pharmaceuticals. In the end, the transnational coalition that lobbied for the TRIPS Agreement was successful beyond its initial goals. The comprehensiveness of the TRIPS Agreement superseded even the initial expectations of the multinational corporations supporting the Agreement,<sup>125</sup> setting the TRIPS lobby apart from most other instances where private corporations have been actively lobbying for international regimes.

Consequently, one can explain the emergence of the TRIPS Agreement as a manifestation of some of the world's most powerful corporations acting in concert with the world's most powerful economies.<sup>126</sup> The views presented by the Great Powers in the WTO closely mirrored the views that their domestic industries advanced.<sup>127</sup> The governments became agents of the domestic IP lobby, which not only devised the global IP agenda and developed a strategy to realize it, but also steered governments through the negotiation process toward an outcome that closely aligned with the interests of the IP industry.

## 2. *The Agency-Driven Pursuit of International Antitrust Rules*

In contrast to the TRIPS negotiations, private interests have been largely absent from the quest for WTO antitrust rules. Few corporations, industry organizations, or consumer groups have endorsed the agreement.<sup>128</sup> The international antitrust regime does not seem to have a clear constituency that would unequivocally benefit from the WTO antitrust rules, and so there is no equivalent stakeholder to assume the role the IP industry played in the TRIPS negotiations. In the absence of strong domestic interest group support, governments have not invested their political capital in negotiating an agreement that would confer limited, if any, political rents to them.

---

125. SELL, *supra* note 110, at 40 (“The IPC itself was surprised by how much it achieved; the TRIPS accord far surpassed the IPC’s initial expectations.”).

126. *Id.* at 3.

127. PUGATCH, *supra* note 66, at 172–73. The EU Commission, for instance, explicitly acknowledged that its pursuit of a global IP regime stems from the interests of the European IP industry. *See id.* at 173 (noting that the commission has argued that its “prolific activity is due to the need, clearly felt nowadays, to provide European firms doing business in non-Community countries with an adequate legal framework within which to enjoy effective, genuine protection of know-how and innovation”).

128. *See, e.g.*, ICC/BIAC COMMENTS, *supra* note 10. While the ICC and BIAC support some degree of substantive and procedural harmonization and convergence of domestic merger regimes, “ICC and BIAC agree the WTO is not an appropriate forum for the review of private restraints and that the WTO should not develop new competition laws under its framework at this time.” *Id.* at 10.

As a constituency, consumers seem to be the only group that would benefit from antitrust action in most, if not all, cases. This is because lawmakers in most jurisdictions enact antitrust laws to maximize consumer welfare.<sup>129</sup> Consumers, however, form a fragmented interest group. Consumer organizations representing the interests of individual consumers have also assumed a passive role in the debate on international antitrust rules, instead focusing their lobbying activities on less “technocratic” areas of cooperation.<sup>130</sup>

What explains the relative passiveness of corporations in the antitrust domain? The stakes in international antitrust cases appear high. The costs involved in the EU Commission’s prohibition of the proposed GE/Honeywell merger — a merger between two U.S. corporations — were extremely high, as were the litigation costs and remedies Microsoft faced in Europe.<sup>131</sup> Microsoft, GE, and Honeywell were forced to bear these costs despite receiving clearance of the transactions and conduct in question from U.S. antitrust agencies.<sup>132</sup> Thus, one could expect an international agreement mitigating the costs associated with inconsistent domestic antitrust laws to confer high benefits on at least some powerful corporations that seek growth through mergers or frequently face multi-jurisdictional antitrust investigations. Yet no coherent coalition has emerged to support a WTO antitrust agreement. Similarly, one may wonder why developing country corporations would not lobby for international antitrust rules that would more effectively discipline multinational corporations that operate in their domestic markets.

The diffuse, case-specific, and often unpredictable nature of the costs and benefits that a WTO antitrust agreement would bring explains the

---

129. See, e.g., 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 651(b) (3d ed. 2008) (making the economic case for the consumer welfare standard generally); Albert H. Kritzer et al., 2 *INTERNATIONAL CONTRACT MANUAL* § 44A (2010) (“The fundamental aim of competition rules is to prevent companies with market power from harming consumer welfare . . . .”); K.J. Cseres, *The Controversies of the Consumer Welfare Standard*, 3 *COMPETITION L. REV.* 121 (“[T]he consumer welfare standard is . . . today, a commonly proclaimed goal of competition policy and an often applied benchmark of competition law enforcement.”).

130. See Raustiala, *supra* note 49, at 600. Raustiala argues that interest groups that favor international cooperation in a given issue generally support binding agreements because of their perceived effectiveness. Binding agreements also offer the domestic constituency more opportunities to influence the agreements’ content as their conclusions generally require more domestic legislative involvement. In contrast, informal cooperation mechanisms emerge in the areas of “technocratic cooperation,” including antitrust, where domestic interest groups are less active.

131. General Electric/Honeywell Commission Decision, *supra* note 95; Commission Decision of 28 June 2000, COMP/M.1741 – MCI WorldCom/Sprint, 2003 O.J. (L 300) 1; see also Microsoft Commission Decision, *supra* note 95.

132. See *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (endorsing the settlement between the United States and Microsoft); *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76; Dep’t of Justice Press Release, *supra* note 95 (generally allowing the GE/Honeywell merger).

inactivity of interest groups in the antitrust domain. For instance, vigorous antitrust enforcement is likely to be in the interest of a corporation, as long as the authorities across multiple jurisdictions are targeting its competitors. But, when any given corporation becomes the target of an antitrust investigation, its position toward international antitrust cooperation is likely to reverse.<sup>133</sup> This leads most corporations to be of two minds about increased international antitrust regulation, depending on which side of the dispute they stand on in each individual case.<sup>134</sup> Thus, the benefit that any all-encompassing WTO antitrust agreement would confer is uncertain for a corporation that is contemplating political action. More specifically, the benefit would seem to vary from case to case, sometimes conferring no benefit at all. When a corporation cannot determine *ex ante* whether and how much it would benefit from an agreement, it is less likely to engage in lobbying activity.

From the point of view of interest groups, the key difference between the TRIPS and the antitrust negotiations is that, in the case of antitrust, the costs and the benefits of cross-border antitrust disputes fall on a *single firm*, not on a single industry. Lobbying for or against antitrust regulation, thus, becomes a *private good*, rather than a policy that an entire industry pursues.<sup>135</sup> This leads to the absence of industry-wide coalitions and moves the lobbying activity to the sphere of domestic agencies' investigations in individual cases.

Accordingly, corporations are likely to choose the issues and instances in which they want antitrust agencies to cooperate on a case-by-case basis. They employ their political strength vis-à-vis antitrust authorities

---

133. In general, while corporations tend to define their interests case-by-case, they are expected to be more supportive of cooperation in the case of merger reviews, as this would reduce transaction costs and uncertainty. In contrast, corporations are expected to often resist rules that facilitate cooperation in cartel cases in the fear of one day being the target of a cartel investigation. See ABA & INT'L BAR ASS'N, A TAX ON MERGERS?: SURVEYING THE TIME AND COSTS TO BUSINESS OF MULTI-JURISDICTIONAL MERGER REVIEWS 5 (June 2003), available at <http://tinyurl.com/37snwk7> [hereinafter MULTI-JURISDICTIONAL MERGER SURVEY] (noting that fifty-six percent of the businesses surveyed see scope for improving and harmonizing merger notification processes); see also ICC/BIAC COMMENTS, *supra* note 10.

134. Of course, a corporation that holds a dominant market position or even monopoly power can be assumed to usually know *ex ante* on which side of the dispute it stands in an antitrust investigation. While Microsoft was, for instance, recently lobbying the EU Commission to block Google's acquisition of DoubleClick and was, hence, advocating more stringent antitrust scrutiny, in most cases, Microsoft knows that it would benefit from lenient antitrust laws. See Steve Lohr, *Microsoft Urges Review of Google-DoubleClick Deal*, N.Y. TIMES, April 16, 2007, at A14. It could potentially find a common standing with other powerful corporations holding monopoly positions that would enable them to form a coalition that would lobby for an overall lenient global antitrust regime. This has not happened, however, and the antitrust lobbying has remained centered in domestic agencies.

135. Michael J. Gilligan, *Lobbying as a Private Good in Intra-Industry Trade*, 41 INT'L STUD. Q. 455, 456 (1997).

when their interests are directly at stake.<sup>136</sup> This type of political action is rational, given the higher expected utility available from lobbying in an individual case. When lobbying is a private good, there are no — or, at most, few — other firms engaged in political activity.<sup>137</sup> While all the costs of political action fall on a single firm, there is less free riding that would add to the costs of collective action.<sup>138</sup> In addition, the benefits of lobbying are likely to be higher. A corporation is better able to determine the extent of its benefits on a case-by-case basis and adjust the level of its optimal lobbying activity accordingly in each case. The expected benefit from lobbying would be higher, given that the likelihood of a single firm determining an outcome is greater in the absence of multiple, competing interests within a coalition. Finally, and perhaps most importantly, a single firm can accumulate all of the benefits when an agency decides in its favor.

In the absence of interest groups supporting the WTO antitrust agreement, it remains unclear why there have been attempts to negotiate international antitrust rules. It is puzzling that powerful countries place certain regulatory issues continuously on the WTO negotiation agenda, even when the key domestic constituencies do not demand the agreement and when the prospects of reaching such an agreement are slim. Interestingly, while the primary supporters of the TRIPS Agreement were multinational corporations, the driving forces behind the antitrust negotiations have been a few domestic antitrust agencies that have had the support of the broader trade community. Most prominently, the demand for WTO antitrust rules stems from the EU Commission and its antitrust enforcers.<sup>139</sup> The trade officials at the U.S. Trade Representative and the EU's Directorate General for Trade have equally supported

---

136. For instance, considerable lobbying against undesired mergers takes place in the European Union, as corporations believe that the more aggressive enforcement practices of the European Union are likely to lead to stricter antitrust scrutiny and greater receptiveness to their arguments.

137. Consider, however, instances when it is beneficial to form a lobbying coalition aimed at influencing an agency directly in an individual case. For instance, a group of IT corporations collectively lobbied the U.S. and EU antitrust agencies to bring a case against Microsoft. Gregg Keizer, *IBM, Adobe, Oracle Join EU Antitrust Case Against Microsoft*, COMPUTERWORLD, Apr. 15, 2009, <http://tinyurl.com/3ygvfd9> (discussing the ECIS interest group, formed to encourage an EU antitrust investigation of Microsoft).

138. Free riding is not an option for a corporation whose interests are directly and individually at stake at a given investigation, as no other corporation has the interest of lobbying on its behalf. Note, however, that antitrust agencies can at times free ride on one another's investigations. Developing countries, for instance, benefit if the United States or the EU blocks a merger that also impedes competition on the developing countries' markets.

139. See, e.g., Monti, *supra* note 96; Karel Van Miert, Vice Chairman of Competition Policy, European Commission, *International Cooperation in the Field of Competition: A View from the EC*, Fordham Corporate Law Institute, 24th Annual Conference on International Antitrust Law and Policy (Oct. 16, 1997), available at <http://tinyurl.com/296bnv6>.



the inclusion of antitrust within the WTO.<sup>140</sup> Incorporating antitrust would enhance trade officials' powers because antitrust would become a "trade matter," giving trade officials the opportunity to ensure that antitrust laws do not offset the liberalization commitments that they have negotiated in the trade domain. Thus, the pursuit for antitrust cooperation has been agency-driven, as opposed to interest-group-driven.

That agencies pursue regulatory cooperation contrary to the preferences of domestic interest groups departs from the standard political economy models, which assume that states are neutral aggregators of interest group preferences.<sup>141</sup> Instead, the agency-driven antitrust cooperation suggests that states can be autonomous actors that develop preferences on their own and pursue policy goals that do not necessarily reflect the demands of interest groups.<sup>142</sup>

C. *Linkage Explanation: Are Linkages Feasible and Will They Create or Destroy a Zone of an Agreement?*

1. *Linkages Paving the Way for the TRIPS Agreement*

In the TRIPS negotiations, it was evident that the developed countries, where the majority of the research and development takes place, were going to be the beneficiaries of the agreement and that the developing countries, mainly consumers or copiers of IP-protected products, were going to lose under the agreement.<sup>143</sup> Thus, the main challenge in the TRIPS negotiations was to overcome the distributional conflict and win the support of the developing countries that had little to gain and much to lose under the TRIPS Agreement.

The linkage of the TRIPS negotiations to concessions in other areas eventually brought developing countries into the Agreement.<sup>144</sup> As a transfer payment, developed countries agreed to cut down subsidies to their own farmers and lower their tariffs on agricultural products and

---

140. Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 CARDOZO L. REV. 1111, 1122–24 (1996) (noting that while the DOJ opposes the WTO agreement on antitrust, the USTR supports it).

141. See, e.g., Rodrik, *supra* note 35.

142. See generally Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in BRINGING THE STATE BACK IN 3–38 (Peter B. Evans, Dietrich Rueschmeyer & Theda Skocpol eds., 1985).

143. See Adede, *supra* note 81, at 4–5.

144. Guzman, *supra* note 11, at 950–51; see also Davis, *supra* note 11, at 156, 165. Within the IP domain, a few additional concessions were also given to the developing countries, including promises of technology transfer and transition periods that allow them to delay implementation of the TRIPS Agreement.

textiles that the developing countries imported.<sup>145</sup> This strategic linkage of two unrelated issues converted the “win-lose” bargaining game into a “win-win” game where developed and developing countries exchanged balanced concessions in the spirit of reciprocity.<sup>146</sup> The successful conclusion of the TRIPS Agreement manifested the advantage of multi-issue negotiations and the strategic use of linkages. The agreement would not have been feasible in an institution such as the World Intellectual Property Organization (WIPO),<sup>147</sup> which would have restricted the negotiations exclusively to the IP domain. The linkage ensured that the final negotiation package offered some Pareto-gains for all states.

This situation resembles a classic Prisoner’s Dilemma situation. Developing countries faced a choice of either offering or refusing IP protection. Developed countries faced a choice of either retaining the current level of their existing agricultural subsidies or reducing them. Developed countries could individually obtain the highest payoff by retaining their agricultural subsidies, if developing countries unilaterally agreed to a higher level of IP protection. In contrast, the developing countries would individually obtain the highest payoff by refusing to enact IP regulation while having developed countries unilaterally cut their subsidies. Both parties’ best individual strategies, however, leave the other party with the lowest possible payoff.

In this setting, both sets of countries prefer a mutual linkage — where the developed countries cut subsidies and developing countries provide IP protection — to a situation where developed countries maintain their subsidies and developing countries fail to provide IP protection. The mutual linkage also leads to the maximization of social welfare, as the combined payoff of the parties is higher than the payoff resulting from any other strategy. Both parties, however, retain an offensive and defensive incentive to defect from the linkage equilibrium in an effort to exploit the other party and increase their individual payoffs. Thus, the fear of the other party’s defection pulls both parties toward non-cooperative strategies.<sup>148</sup> Absent an agreement, the parties end up in a Pareto-deficient equilibrium where the developed countries retain their agricultural subsidies and developing countries fail to offer IP protection.

Since both parties prefer an alternative equilibrium, either player can promise to eschew its dominant strategy if the other player reciprocates.

---

145. Guzman, *supra* note 11, at 950–51; *see also* Davis, *supra* note 11, at 156, 165.

146. Developing countries gained an important advantage in this linkage: developed countries offered transfer payments. Moreover, developed countries could not unilaterally retaliate as long as they subjected themselves to the WTO’s DSM. *See* Part II.D.1, *infra*.

147. WIPO is a specialized agency of the United Nations. World Intellectual Property Organization, WIPO Treaties — General Information, <http://tinyurl.com/23gnym7> (last visited Aug. 20, 2010).

148. Abbott, *supra* note 48, at 362.

Thus, developed countries can promise to cut down their agricultural subsidies if developing countries agree to offer IP protection. This mutually beneficial linkage allows both players to move from a Pareto-deficient equilibrium to one that offers both parties their second-best outcome. The new equilibrium is difficult to sustain, however, because both parties retain an incentive to defect from the agreement. Therefore, parties are likely to seek binding commitments and institutionalized rules to enforce the linkage in the event of a unilateral defection.<sup>149</sup> This need for credible, enforceable linkage commitments explains the relative attractiveness of the WTO in this particular strategic situation.

While a strategic linkage in an institutionalized setting such as the WTO can be a powerful tool to solve a distributional conflict, the linkage strategy is not always feasible. The presence of *ex ante* transparency regarding the distributional consequences of the agreement forms an important precondition for the successful use of strategic linkages. To exchange reciprocal concessions and form issue linkages, states must know which state ought to compensate the other and by how much. Thus, states must be able to identify the winners and losers of an agreement prior to its conclusion and have some sense of the magnitude of the gains and losses that they expect the agreement to generate.

The distributional consequences of the TRIPS Agreement were sufficiently clear and quantifiable *ex ante*. For instance, the U.S. International Trade Commission estimated that the losses of 193 U.S.-based firms from piracy amounted to \$23.8 billion in 1986, the year the Uruguay Round was launched.<sup>150</sup> The European Commission estimates that as many as 100,000 EU job losses and as much as seven percent of world trade are attributable to counterfeiting.<sup>151</sup> Although some contested these estimates, and the TRIPS Agreement's exact effect on these trends was debatable, a high degree of certainty remained regarding the magnitude of the benefits and losses that the TRIPS Agreement would bring about. Even more certain was the direction to which any compensation ought to flow. Information regarding the identities and the nationalities of all patent holders is transparent. Nobody disputed that the majority of the TRIPS beneficiaries resided in the developed countries while the majority of the TRIPS losers resided in the developing countries.<sup>152</sup> Developed countries were the unambiguous winners of the TRIPS Agreement, and thus expected to offer transfer payments to balance the concessions extracted from developing countries. Thus, the predictability of

---

149. Arthur A. Stein, *The Politics of Linkage*, 33 *WORLD POL.* 77-79 (1980).

150. PUGATCH, *supra* note 66, at 58.

151. *Id.*

152. *See id.* at 54 (noting that the United States, United Kingdom, and France are the major exporters of IP-related products).

the Agreement's distributional consequences paved the way for the linkages and, in turn, for the conclusion of the Agreement as a whole.

## 2. *Distributional Uncertainty and the Infeasibility of Linkages to Facilitate the Antitrust Agreement*

Not unlike the TRIPS negotiations, distributional tensions between the United States and the EU on one hand and the developed and the developing countries on the other have marked antitrust cooperation. Unsurprisingly, proponents of the antitrust agreement have offered linkages in the WTO as a solution to the existing distributional conflict.<sup>153</sup>

However, it is particularly difficult to devise linkages in the antitrust context.<sup>154</sup> Unlike in the case of TRIPS, where IP producers comprised a clear group of winners and IP consumers comprised an equally unambiguous group of losers, the gains and losses available to the corporations that international antitrust regulation would target are ambiguous. An international antitrust agreement's costs and benefits are likely to be diffuse, issue- and case-specific, and, in most cases, unpredictable.<sup>155</sup> This type of distributional uncertainty obstructs states' ability to exchange reciprocal concessions and form issue linkages.

When corporations cannot predict which general policy will ultimately be the most favorable, they are less likely to support any all-embracing policy proposal.<sup>156</sup> For the same reason that uncertainty relating to the distributional consequences has inhibited the formation of a cohesive coalition to support the antitrust agreement, the uncertainty relating to the winners and losers of the agreement has prevented the formation of issue linkages. If states do not know in advance who will ultimately win and lose from the agreement, it is impossible for them to assess the extent and direction of any transfer payments that would address the distributional effects.

In addition to showing how underlying distributional uncertainty can temper the usefulness of linkages, the failed antitrust negotiations high-

---

153. See PUGATCH, *supra* note 66, at 70.

154. See Bradford, *supra* note 8, at 426–29. Domestic corporations have difficulties determining *ex ante* whether they would benefit from a multilateral antitrust agreement. Any given corporation's support for enhanced cooperation in merger or cartel enforcement, for instance, is likely to depend on whether they or their competitors are merging or, alternatively, are alleged to be participating in collusive behavior. As firms cannot easily predict which general policy will favor them more in the long run, *ex ante* lobbying for any given all-encompassing policy proposal is difficult. States are therefore not receiving any consistent domestic signals that could be translated into a coherent state policy on the issue. *Id.*

155. For instance, while a state can accurately calculate the distributional consequences of a tariff reduction (which is a quantifiable, sector-specific measure) or a removal of an export subsidy (both of which are quantifiable and firm- or sector-specific), it is more complicated to try to predict winners and losers under any prospective international antitrust agreement.

156. Bradford, *supra* note 8, at 428.

light another challenge of the linkage strategy. Multi-issue negotiations are always more costly and cumbersome than single-issue negotiations. Devising linkages in the presence of such complexity is no small task.<sup>157</sup> States need more information to assess the costs and benefits of various agreements. Adding new issues to the negotiation increases the bureaucracy involved as members bring new government agencies to the bargaining table.<sup>158</sup> Linkages are always counter-productive if their benefits do not exceed the costs of bringing additional issues into the bargaining process.<sup>159</sup>

Conventional political economy models often assume that negotiations do not have transaction costs. These models expect efficient agreements to materialize, so long as transfer payments can — at least theoretically — compensate losing parties. Linkages should therefore only facilitate negotiations. Yet when one introduces the transaction costs that are inherent to issue linkages, the contracting costs of negotiating multi-issue deals rise, and the prospects of reaching an agreement diminish.

In a worst-case scenario, linkages can add layers of complexity to deal making, converting a simple bargain into an intractable negotiation.<sup>160</sup> While linkages can foster agreements that would otherwise fail due to distributional divisions, they can also have the opposite effect of collapsing the entire negotiation, particularly when members bring non-negotiable issues to the negotiation table.<sup>161</sup> For example, new issues can mobilize novel domestic interest groups with their own demands, further complicating negotiations. An initial decision between States A and B to link issues *x* and *y* to overcome their distributional conflict can create the need for additional transfer payments if *y* also affects interest groups in State C, which demand the linking of issue *z* as a condition for accepting the agreement on issues *x* and *y*. The increase in the number of issues adds to the complexity of the required transfer payments, inevitably rendering the negotiations more difficult to manage.

---

157. See Sebenius, *supra* note 42, at 305.

158. T. Clifton Morgan, *Issue Linkages in International Crisis Bargaining*, 34 AM. J. POL. SCI. 311, 320 (1990).

159. *Id.* at 320–21.

160. Sebenius, *supra* note 42, at 306. The failure of antitrust negotiations when linked with other Singapore issues, *see infra* note 162, is indeed a classic example of this.

161. Davis, *supra* note 11, at 156. The other challenge is the difficulty of convincing all states that an agreement on issue A is conditional to reaching an agreement on issue B. If the single undertaking approach is relaxed in one negotiation, it is difficult to credibly convince the states that conditionality holds in subsequent rounds. *See generally* James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 INT'L ORG. 387 (1994) (discussing the role of distributional and informational imbalances in developing a framework for an agreement).

Linking antitrust negotiations to other “Singapore issues”<sup>162</sup> — including trade facilitation, investment protection, and transparency in government procurement — contributed to the failure to launch antitrust negotiations.<sup>163</sup> Developing countries rejected not only antitrust, but also the investment and procurement issues. Nevertheless, developed countries, particularly the EU member states, refused to unpack the single undertaking and separate the Singapore issues from one another, overestimating their ability to coerce developing countries into accepting the entire agreement.<sup>164</sup> While antitrust negotiations had little chance of salvation at this point, the EU’s insistence on the package deal ensured the ultimate collapse of the negotiations.

### 3. *Concluding Remarks on the Effects of a Linkage Strategy*

Deep distributional conflicts marked both antitrust and TRIPS negotiations. While WTO members successfully employed linkages to resolve the distributional conflict in the case of TRIPS, they were unsuccessful in the case of antitrust. Linkages can be a powerful tool to overcome a distributional conflict and forge an agreement when a consensus within a single-issue area is not feasible. Many linked issues can promote cooperation, since there are more opportunities for mutual gains. Thus, the more palpable the distributional consequences underlying the issue, the more likely the states are to pursue its solution in the WTO through an issue linkage. In contrast, states are more likely to resolve less controversial issues that do not present distributional conflicts as single issues in a bilateral context.<sup>165</sup>

Linkages are not, however, always available to help states fashion an agreement. When considerable uncertainty marks the negotiations, forming linkages is difficult, if not impossible. Preconditions for effective linkage bargains include predictability relating to the identity of winners and losers, as well as some understanding of the magnitude of positive or negative consequences that negotiating states expect an agreement to generate. Thus, the WTO can only create an agreement with the help of the linkage strategy when there is little uncertainty regarding the gains and losses that the agreement would generate. In addition to the problem of distributional uncertainty, the sheer complexity

---

162. “Singapore issues” refer to the four issues raised during the 1996 Singapore Ministerial Conference: trade and investment, competition policy, transparency in government procurement, and trade facilitation (that is, simplifying trade procedures). Singapore Ministerial Declaration, *supra* note 75; see also WORLD TRADE ORGANIZATION, *supra* note 69, at 72 (listing the four topics known as the “Singapore issues”).

163. See, e.g., Stewart, *supra* note 102, at 7–9.

164. *Id.*

165. See Davis, *supra* note 11, at 155–56.

that issue linkages can introduce may offset their potential benefits. Multi-issue negotiations can obstruct progress on issues that could have been resolved easily in isolation. At worst, too broad of a negotiation agenda can bring down an entire round, transforming the prospect of a grand bargain into a grand failure.<sup>166</sup>

*D. Enforcement Explanation: How Likely Is Opportunistic Behavior?*

The likelihood of opportunistic behavior is another key variable that distinguishes international IP cooperation from international antitrust cooperation. When negotiating the TRIPS Agreement, the WTO dispute settlement mechanism was crucial in ensuring that no state would defect from its commitments.<sup>167</sup> In contrast, I have elsewhere argued that the likelihood of eluding international antitrust rules would be low.<sup>168</sup> Consequently, the WTO's enforcement powers were more germane in the context of international IP protection than in the case of international antitrust cooperation, further explaining why the TRIPS Agreement materialized in the WTO but the negotiations on WTO antitrust agreement stalled early in the process.

*1. The Incentives to Defect from the TRIPS Agreement*

Because of its DSM, the WTO constitutes the most attractive venue for cooperation in Prisoner's Dilemma situations when states are concerned about the prospect of cheating once they have concluded the agreement. In a Prisoner's Dilemma situation, each state has the incentive to defect from the agreement since it can increase its individual payoff by taking advantage of the other party's cooperation while refusing to cooperate itself.

It is possible to model many international trade issues as Prisoner's Dilemmas.<sup>169</sup> Consider, for example, the regulation of tariffs that states can employ at their borders. While all states would be better off under free trade, a state can shift the terms of trade in its favor by raising its tariffs while still benefiting from the low tariffs of its trading partner. In the absence of an international agreement proscribing such conduct — and an enforcement mechanism to guarantee states' adherence to the agreement — states' incentives to maximize individual payoffs at the expense of jointly optimal policies would lead to an equilibrium where

---

166. See generally Sebenius, *supra* note 42, at 300–03.

167. Ostry, *supra* note 8, at 2.

168. See generally Piilola, *supra* note 5.

169. See, e.g., JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* 263 (1994).

all states would raise their tariffs. This outcome would render every state worse off.

The fear of defection was an important aspect of the strategic situation characterizing the TRIPS negotiations, leading developed countries to pursue legally binding, enforceable commitments within the WTO. Prior to the TRIPS Agreement, WIPO provided a forum for negotiating international IP rules. WIPO failed, however, to provide adequately strong substantive rules or a mechanism for their enforcement,<sup>170</sup> which was the primary reason developed countries sought to move much of international IP rulemaking from WIPO to the WTO.

Had states refrained from linking the TRIPS Agreement to the other items on the trade agenda, the negotiations over IP most likely would have resembled a one-sided Prisoner's Dilemma, where developed countries and developing countries would have had different strategy sets and asymmetric payoffs. While the developing countries would have had both offensive and defensive incentives to shirk their IP commitments, the developed countries would have only defected defensively by resorting to trade sanctions in response to developing countries' defection.<sup>171</sup> When states explicitly linked the TRIPS negotiations to negotiations on agricultural and textile trade, they converted the one-sided Prisoner's Dilemma to a more classical symmetrical Prisoner's Dilemma, where the incentive to defect existed for both parties. Assuming the other party's continuing cooperation, developed countries would have obtained the highest individual payoff by defecting from their commitment to cut down agricultural subsidies. Similarly, developing countries would have obtained the highest individual payoff by defecting from their IP commitments. Thus, from the outset, states' ability to resort to the DSM to contain other states' incentives to defect motivated the negotiation of the TRIPS agreement within the WTO.

Even when opportunistic behavior is likely — and, therefore, the availability of sanctions is relevant — it is still unclear why a powerful country would choose to pursue cooperation in the WTO instead of resorting to unilateral retaliation. If the United States and the EU could have pressured developing countries into adopting IP laws without offering any trade concessions in return, why did they turn to the WTO? Pursuing an agreement within the WTO seemed to create two disad-

---

170. Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of TRIPS*, 20 HASTINGS INT'L & COMP. L. REV. 661, 664 (1996).

171. The developing countries opposed enhanced IP protection and would have had the incentive to defect from the agreement if it was concluded without linkages to the trade agenda. The developed countries, in contrast, had nothing to gain by defecting from the agreement. Thus, while in a conventional Prisoner's Dilemma both players would gain the highest individual payoffs by defecting (as long as the other player cooperated), in a one-sided Prisoner's Dilemma, the developed countries' best strategy is for both players to cooperate.



vantages for the Great Powers: It forced them to offer transfer payments to the developing countries in return for extracting IP commitments from them, and it curtailed the Great Powers' ability to unilaterally retaliate by subjecting them to the WTO's DSM.

For instance, instead of forming linkages in the WTO, the United States could have continued its previous practice of threatening developing countries with unilateral trade sanctions based on Section 301 of the United States Trade Act of 1974.<sup>172</sup> Similarly, the United States could have threatened to withdraw developing countries' GSP privileges.

Whether unilateral threats and sanctions are a better strategy than linkages backed by the WTO's DSM for the United States or the EU remains unclear. While there are examples of states offering higher levels of IP protection under unilateral pressure from the Great Powers, such threats and sanctions have not always been effective. Developing countries have a mixed record of complying with threats in the IP domain, reducing the United States' and the EU's confidence that a mere threat would be sufficient to bring about desired regulatory changes. Meanwhile, aggressive unilateralism is also a costlier strategy to sustain in the long run.<sup>173</sup>

## 2. *The Self-Enforcing Nature of International Antitrust Cooperation*

Those who support a WTO antitrust agreement cite defection as an important reason to pursue a binding agreement. The existing literature seems to suggest that the strategic setting underlying international antitrust cooperation would have the characteristics of a Prisoner's Dilemma.<sup>174</sup> Andrew Guzman, for instance, argues that in setting their domes-

---

172. See 19 U.S.C. § 2411 (2006) (granting the United States the authority to impose trade sanctions against foreign countries that violate the United States' rights or benefits under trade agreements or that engage in unjustifiable trade practices that burden or restrict U.S. commerce).

173. Other accounts have also been offered to explain why the Great Powers might forgo unilateralism in favor of WTO dispute settlement. Rachel Brewster, for instance, argues that the United States' decision to forgo unilateral sanctions is explained by the President's efforts to gain greater control vis-à-vis Congress over the content of U.S. trade policy. See generally Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251 (2006). Richard Steinberg has argued that Great Powers, including the United States and the EU, support the consensus-based decision-making structures in the WTO, even though those structures yield more power for the weaker countries. According to him, current WTO rules create incentives for all states to reveal their preferences honestly. This gain creates a valuable information flow to the Great Powers, which can use the information to formulate proposals that reflect the interests of powerful states yet are acceptable and ultimately considered legitimate by all members. Steinberg, *supra* note 16, at 342.

174. See Guzman, *supra* note 59, at 101 (implying that international antitrust cooperation would resemble a Prisoner's Dilemma); see also Oliver Budzinski, *Toward an International Governance of Transborder Mergers? Competition Networks and Institutions Between Centralism*

tic antitrust laws, states “externalize the costs and internalize the benefits of the exercise of market power across borders” to maximize their national interest.<sup>175</sup> Guzman expects net-importer countries to employ stricter-than-optimal antitrust standards, since these countries decline to internalize costs that foreign producers bear as the target of strict antitrust laws.<sup>176</sup> Conversely, net-exporter countries enact laxer-than-optimal antitrust laws, since the costs of the lax enforcement fall on foreign consumers.<sup>177</sup> The alleged existence of this type of “trade flow bias” leads Guzman to conclude that a WTO antitrust agreement is necessary to overcome these sub-optimal domestic antitrust laws.<sup>178</sup> Guzman also maintains that exemptions for domestic corporations (statutory bias) and discriminatory enforcement practices vis-à-vis foreign corporations (enforcement bias) characterize domestic antitrust enforcement.<sup>179</sup>

I have elsewhere developed a detailed argument for why trade flow bias, statutory bias, or a notable enforcement bias do not drive antitrust enforcement, and why states are, therefore, less likely to behave opportunistically when enforcing their domestic antitrust laws.<sup>180</sup> The argument on the alleged trade flow bias appears least convincing. The existence of “effects doctrine” as a basis for antitrust jurisdiction limits states’ ability to engage in such a bias. No state enjoys exclusive jurisdiction over an antitrust case.<sup>181</sup> Regardless of the nationality or location of a corporation, every state with an antitrust law may establish antitrust jurisdiction on a corporation, so long as the anti-competitive conduct of that corporation has an “effect” in the domestic market of that particular country.<sup>182</sup> Thus, the concurrent jurisdiction of the importing country

---

*and Decentralism*, 36 N.Y.U. J. INT’L L. & POL. 1, 6–8 (2004) (arguing that a non-coordinated merger control regime can be characterized as a Prisoner’s Dilemma); Wolfgang Kerber & Oliver Budzinski, *Competition of Competition Laws: Mission Impossible?*, in *COMPETITION LAWS IN CONFLICT*, *supra* note 59, at 31, 44 (making a brief reference to the Prisoner’s Dilemma when discussing the current decentralized antitrust regime).

175. Guzman, *supra* note 59, at 101.

176. *Id.* at 108–09. “Optimal” antitrust laws would be globally efficient, in that no state would engage in over- or under-enforcement, but would choose the same antitrust laws as they would absent trade flows.

177. *Id.*

178. *Id.* at 117–20.

179. *Id.* at 100.

180. Bradford, *supra* note 8, at 389–97.

181. Antitrust can, in this respect, be contrasted with, for example, corporate law, where the internal affairs of the corporation are regulated exclusively by the laws of the state where the corporation was established.

182. The United States and the EU in particular have applied their antitrust laws to the conduct of foreign corporations as long the conduct has had an “effect” on their domestic markets. *See, e.g.*, *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443–44 (2d Cir. 1945); *Case T-102/96, Gencor Ltd. v. Comm’n*, 1999 E.C.R. II-753, ¶¶ 89–92. However, many other nations today recognize the legitimacy of applying their antitrust laws to the conduct of foreign firms as long as some anti-competitive effect is felt on the market of the country willing to exercise juris-

compromises a net-exporting country's ability to strategically enact overly lax antitrust laws that give a free pass to its exporters.

The arguments regarding alleged statutory bias seem more plausible, but a closer examination of domestic antitrust statutes illustrates that this type of bias is rare in practice. Domestic antitrust statutes do not explicitly favor local firms over foreign ones. Several jurisdictions do, however, exempt export cartels from their antitrust laws,<sup>183</sup> which could amount to an example of a statutory bias.<sup>184</sup> An importing country can, nonetheless, mitigate the opportunistic antitrust policies of export cartel exemptions. If the cartel adversely affects competition in the importer's domestic market, the importing country can always target the export cartel under its own antitrust laws.<sup>185</sup> The country exempting export cartels from its jurisdiction cannot, therefore, effectively shield its cartel from another country's antitrust investigation. Moreover, since export cartel exemptions are increasingly rare today, they are unlikely to significantly impede competition and international trade.<sup>186</sup> Consequently, any Prisoner's Dilemma incentives of export cartels hinder international antitrust cooperation marginally, at most.

It seems conceivable that antitrust enforcers might deliberately overlook the anti-competitive conduct of domestic corporations in individual instances while disproportionately targeting foreign corporations. Suspicions in this regard were reinforced when the EU prohibited a proposed acquisition involving two U.S.-based companies, Honeywell and General Electric, after U.S. authorities had already approved the acqui-

---

dition. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 reporters' note 9 (1987).

183. Export cartel refers to an agreement or other arrangement between two or more firms to charge a specified export price or to divide export markets among them. The difference from a normal cartel is that the collusive behavior is restricted to goods or services that are exported to foreign markets.

184. See Margaret C. Levenstein & Valerie Y. Suslow, *The Changing International Status of Export Cartel Exemptions*, 20 AM. U. INT'L L. REV. 785, 800–06 (2005) (examining export cartel exemptions in fifty-five countries and finding that seventeen of them, including the United States, had explicit exemptions; thirty-four, including almost all members of the EU, had implicit exemptions; and only four, including Russia, had no exemptions).

185. EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 1101 (2007). This argument, however, makes the assumption that the importing country is vested with adequate enforcement capacity, an assumption that may be problematic if evidence required to prosecute the export cartel is located in the exporting jurisdiction or if the importing jurisdiction cannot impose effective remedies.

186. See Levenstein & Suslow, *supra* note 184, at 793. Levenstein and Suslow note that over the last three decades, the number of export cartel exemptions has declined from 180 to zero in Japan, from sixty-nine to four in Australia, and from 227 to zero in Germany. *Id.* at 816–18. The only country that continues to provide a large number of exemptions is the United States. See Webb-Pomerene Act, 15 U.S.C. §§ 61–66 (2006); Export Trading Company Act of 1982, 15 U.S.C. §§ 4001–21 (2006).

sition in 2001.<sup>187</sup> The EU's decision reinforced accusations that the EU antitrust enforcement protected European interests and was hostile toward U.S. corporations. A broader inquiry into the EU antitrust authorities' merger decisions, however, does not reveal any systematic bias against U.S. corporations. In fact, while twenty-five percent of the merger notifications that the EU Commission received from 1995 to 2005 involved at least one U.S.-based company, only twelve percent of the prohibited mergers involved a U.S. corporation.<sup>188</sup> Similarly, only seventeen percent of the mergers that were withdrawn after the notification involved a U.S. corporation, twenty-six percent of the Commission's phase II investigations (second requests) involved a U.S. corporation, and twenty-seven percent of the conditional clearances were granted in cases that involved a U.S. company.<sup>189</sup> These numbers suggest that any enforcement bias would be limited to a small number of individual cases, or even that enforcement bias may not exist.

In the absence of strong incentives for opportunistic behavior, the existence of a distributional problem, as opposed to a defection problem, has obstructed international antitrust cooperation.<sup>190</sup> The distributional problem arises when an international antitrust agreement would unevenly distribute the costs and benefits among states. In this coordination game setting, states expect to benefit from a coordinated global antitrust regime but fail to agree on the type of regime they ought to adopt. This conflict over the focal point of coordination makes an agreement difficult to reach.

For instance, both the United States and the EU acknowledge that a more harmonized international antitrust regime could reduce transaction costs and increase economic efficiency and legal certainty. Both powers expect to benefit from a more effective pursuit of international cartels and dominant companies whose conduct span across several markets. Similarly, harmonized merger control procedures would decrease transaction costs, diminish delays, and improve legal certainty, since corporations would not face multiple jurisdictions with different substantive and procedural antitrust regimes. Thus, one assumes that international coordination generates aggregate and individual benefits for both the United States and the EU. The two antitrust powers, however, disagree as to the precise content and form of the international agreement.<sup>191</sup>

---

187. See Dep't of Justice Press Release, *supra* note 95; General Electric/Honeywell Commission Decision, *supra* note 95.

188. See Bradford, *supra* note 8, at 397.

189. *Id.*

190. *Id.* at 385, 399, 414–22.

191. The EU has been the strongest advocate of WTO antitrust rules, whereas the United States has endorsed voluntary antitrust cooperation within the ICN. See ICPAC Report, *supra* note 98, at 33–34; Working Group on the Interaction Between Trade and Competition Policy;

While the United States would like all countries to converge to the U.S. antitrust laws, the EU prefers convergence to its own antitrust laws. This distributional problem undermines their ability to pursue coordination, despite the gains that coordination is expected to produce. Thus, international antitrust cooperation resembles a coordination game with distributional consequences rather than a Prisoner's Dilemma.<sup>192</sup>

The distributional conflict between developed countries and developing countries similarly stems from the disagreement over the content of the contemplated international antitrust agreement. While developed countries call for a reduction of transaction costs and enhanced market access, developing countries are concerned about their inability to control the anti-competitive practices of multinational corporations and the need to shield their local corporations from international competition.<sup>193</sup> Thus, the coordination game between developed countries and developing countries can be formalized in a manner similar to the game between the United States and the EU, each game resulting in two possible equilibria.

Unlike in a Prisoner's Dilemma situation, where a state can obtain a higher individual payoff by deviating from agreed commitments, an agreement that states have attained in a coordination game setting is largely self-enforcing, since neither party has an incentive to renege on its commitments. Once states reach an agreement, sustaining cooperation in a coordination game is easier than in a Prisoner's Dilemma due to the absence of incentives to cheat. The low likelihood of opportunistic behavior also renders any formal enforcement mechanism less useful. Assuming that international antitrust cooperation indeed predominantly resembles a coordination game rather than a Prisoner's Dilemma, the WTO's DSM should be of limited relevance for antitrust negotiations. Thus, it is not surprising that states allowed the WTO antitrust negotiations to fail and instead focused their efforts on the pursuit of non-binding antitrust cooperation outside of the WTO framework.

Two caveats are in order. First, while deliberate cheating is likely to be rare, developing countries' capacity constraints, including a lack of

---

*supra* note 96; Kolasky, *supra* note 98; Monti, *supra* note 96.

192. Bradford, *supra* note 8, at 385, 399, 414–22. For a potential solution to international antitrust enforcement that avoids this coordination problem by judicial reliance on foreign judicial factual findings of cartels, see generally Michal S. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance*, 51 VA. J. INT'L L. 57 (2010).

193. Bernard M. Hoekman & Kamal Saggi, *International Cooperation on Domestic Policies: Lessons from the WTO Competition Policy Debate*, in *ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION* 439, 446 (Simon J. Evenett & Bernard M. Hoekman eds., 2006); Ajit Singh & Rahule Dhumale, *Competition Policy, Development, and Developing Countries*, in *WHAT GLOBAL ECONOMIC CRISIS?* 122, 127 (Philip Arestis, Michelle Baddeley & John McCombie eds., 2001).

enforcement institutions and antitrust expertise, might lead to an occasional *unintentional* defection from international antitrust commitments. Nevertheless, to the extent that defection can be traced to capacity constraints rather than intentional violation of the agreement, a binding agreement with enforcement provisions would be unlikely to bring greater compliance. Capacity building in the form of technical assistance is likely to yield better results vis-à-vis developing countries whose inadequate regulatory capacities renders compliance with the contemplated agreement difficult.<sup>194</sup> Second, occasional *intentional* defection can occur in a coordination game if a state wants to shift the point of coordination to its preferred equilibrium.<sup>195</sup> One can distinguish this type of defection from cheating in a Prisoner's Dilemma situation, however, as the defecting state in a coordination game setting deliberately makes its defection public in an effort to force other states to move to the new equilibrium.

Accordingly, in the case of antitrust cooperation, the primary concern was and remains how to overcome the distributional conflict in the first place, not how to deter defection and sustain the focal point of coordination once states have settled on one. This provided states with a rationale for steering away from the WTO and its DSM. When the strategic situation will likely limit opportunistic behavior, states consider non-binding agreements adequate, especially since such agreements are often faster and less expensive to negotiate.

### 3. *Concluding Remarks on the Enforcement Explanation*

The negotiation history of the TRIPS Agreement illustrates the intrinsic value that the WTO can add to the process of negotiating international agreements. The primary advantage of negotiating an agreement under the auspices of the WTO lies in the institution's ability to solve a Prisoner's Dilemma. Absent the ability to exchange credible and enforceable commitments, states would pursue sub-optimal policies in a Prisoner's Dilemma setting. Thus, negotiating the TRIPS Agreement within the WTO gave states the necessary guarantees on other states' future behavior, leading all states to abandon their dominant, non-cooperative strategies and move toward an equilibrium that maximized

---

194. See Abraham Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 194 (1993). The authors' argument for a "managerial model of compliance," which rests on transparency, capacity building, and persuasion rather than on enforcement and sanctions, seems particularly suitable for ratcheting up antitrust standards in developing countries.

195. See Lisa L. Martin, *Interests, Power, and Multilateralism*, 46 INT'L ORG. 765, 776 (1992) (distinguishing this type of departure from the established equilibrium from cheating, as the defecting state would need to make the defection public in order to force other states to move towards the new equilibrium).

social welfare. In contrast, the WTO does not add similar value to the pursuit of antitrust convergence in a coordination game setting where states always have the incentive to pursue a strategy that maximizes social welfare. Either focal point in the coordination game constitutes a Pareto-optimal outcome. While the WTO might help states choose between the two focal points, the strategic structure of the coordination game does not utilize the greatest institutional advantage of the WTO — its ability to enforce compliance.

*E. Cost-Benefit Explanation: Are the Net Benefits of Cooperation and the Opportunity Costs of Non-Cooperation High?*

As shown above, the benefits of the TRIPS Agreement were extremely high for the developed countries, which were the unambiguous beneficiaries of the Agreement. Similarly, the discussion below reveals that the opportunity costs of not cooperating in the intellectual property domain in the WTO were much higher than the costs of maintaining a decentralized antitrust regime. Thus, the difference in the net benefits of WTO cooperation and the opportunity costs of forgoing WTO negotiations further explains the successful conclusion of the TRIPS Agreement and the failure to reach a WTO antitrust agreement.

*1. The High Benefits of the TRIPS Agreement and the Absence of Alternatives*

In the case of the TRIPS negotiations, the stakes were high and the alternatives were few. It is virtually impossible for states to rely on their domestic IP laws to curtail abuses of IP rights that take place outside of their jurisdictions. Multilateral solutions were therefore indispensable. At the same time, multilateral venues prior to the TRIPS Agreement proved inadequate.<sup>196</sup> Indeed, it was their dissatisfaction with WIPO that led the Great Powers and their domestic interest groups to demand an alternative regime.<sup>197</sup> Most importantly, WIPO lacked the tools for effective enforcement, which increased the relative attractiveness of negotiating the TRIPS Agreement in the WTO.<sup>198</sup>

At times, international institutions are not necessary for achieving greater convergence. Some areas of cooperation are conducive to “market-based harmonization” whereby states’ regulatory regimes converge

---

196. See Tai-Heng Cheng, *Power, Norms, and International Intellectual Property Law*, 28 MICH. J. INT’L L. 109, 129 (2006).

197. See Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 356–365 (2004).

198. See Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond*, 46 HOUS. L. REV. 1187, 1204–05 (2009).

even if there is no international agreement that calls for such convergence. Beth Simmons has demonstrated how the interplay between two variables — the *extent of negative externalities* and the countries' *incentives to emulate* — determine whether formal legal institutions are necessary for achieving convergence.<sup>199</sup> Her model assumes that there is a “dominant center,” which is often a Great Power that is a primary regulator in the field.<sup>200</sup> In the case of IP regulation, the dominant center consists of the United States and the EU. If the decentralized regulatory framework creates negative externalities, the United States and the EU are expected to want the other countries to converge to the regulatory model that they embrace. If the United States and the EU seek harmonization, they have the choice of pursuing cooperation within an international institution, such as the WTO, or waiting for other countries to adjust to the U.S.-EU regulatory framework with little, if any, institutional pressure. A chosen strategy hinges on the other countries' incentives to emulate the dominant powers' regulation. With a high incentive to emulate, institutions are not necessary. But, with a low incentive to emulate, institutions are central in bringing about the desired convergence.

In the case of TRIPS, the extent of negative externalities stemming from developing countries' inadequate IP protection was extremely high. At the same time, developing countries had very low incentives to emulate the United States and the EU, given that strong IP protection would impose costs and offer no benefits to the developing countries. Efforts to achieve IP convergence therefore demonstrate a prime example of regulatory convergence that is driven though institutions — here, through centralized pressure at the WTO.

## 2. *The Low Net Benefits of the WTO Antitrust Agreement and the Existence of Alternatives*

States had a much higher tolerance for the *status quo* in the case of antitrust than in the case of IP cooperation. I have elsewhere argued that one of the reasons that antitrust negotiations have failed in the WTO is that states perceived the agreement to generate low net benefits.<sup>201</sup> Compared to the TRIPS Agreement, which many considered a high-stakes agreement for its proponents, the antitrust agreement's low — and in any event, more uncertain — expected benefits relative to the costs of negotiating the agreement in the WTO tempered enthusiasm for it.

---

199. Beth Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589 (2001).

200. *See id.* at 591–92.

201. *See generally* Bradford, *supra* note 8, at 401–05 (discussing deadlock as a reason for the collapse of negotiations).



A WTO agreement is more likely if it provides states with large benefits at a relatively low cost. The reason states may have concluded that the pursuit of international antitrust cooperation in the WTO would not render high net benefits comes from three factors. First, the extent of aggregate benefits available from cooperation is uncertain and possibly not as great as many commentators presume. Second, adjustment costs under a binding international agreement are likely to be high, particularly in comparison to the uncertain benefits stemming from cooperation. Third, the opportunity costs of non-cooperation are relatively low, particularly for the key states with strong domestic antitrust laws.

With respect to the aggregate benefits from cooperation, many commentators advocating binding international antitrust rules presume that such rules would lead to significant transaction-cost savings.<sup>202</sup> Although intuitively appealing, studies have yet to demonstrate this presumption empirically. While it is difficult, if not impossible, to quantify the current regime's inefficiencies, recent research suggests that at least some of these costs may have been exaggerated. For example, a recent survey of international mergers calls into question the commonly held view that the multi-jurisdictional merger review would lead to significant transaction costs.<sup>203</sup> Another study suggests that anti-competitive practices may not constitute significant strategic non-tariff barriers, despite common beliefs to the contrary.<sup>204</sup> Furthermore, while a few high-profile cases, including the prohibited acquisition involving GE and

---

202. See Guzman, *supra* note 59, at 100–01; Charles A. James, *U.S. Enforcement Agency Perspectives on the International Competition Network*, 16 ANTITRUST 36, 36 (2001); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 482, 504 (2000); Monti, *supra* note 96; Konrad von Finckenstein, Comm'r of Competition, Canadian Competition Bureau, *International Antitrust Cooperation: Bilateralism or Multilateralism?*, Address to Joint Meeting of the American Bar Association Section of Antitrust Law and Canadian Bar Association National Competition Law Section (May 31, 2001), available at <http://tinyurl.com/28wyh6m>. See generally ICPAC REPORT, *supra* note 98, at 91; NOTIFICATION AND PROCEDURES SUBGROUP, INTERNATIONAL COMPETITION NETWORK, REPORT ON THE COSTS AND BURDENS OF MULTIJURISDICTIONAL MERGER REVIEW 10–12 (2004), <http://tinyurl.com/2buondh>.

203. See generally MULTI-JURISDICTIONAL MERGER SURVEY, *supra* note 133. The survey of over sixty international M&A deals in 2003 found that “a typical international merger is worth €3.9 [~\$5.1] billion, requires six filings with a merger review authority and generates on average €3.3. [~\$4.3] million in external merger review costs — it takes an average of seven months to complete.” Int'l Bar Ass'n, IBA/ABA Survey Identifies Costs to Business of Competition Referrals on Cross-Border M&A Deals (June 23, 2003), <http://tinyurl.com/25ef4e2>.

204. See generally Diane Manifold & William Donnelly, *A Compilation from Multiple Sources of Reported Measures Which May Affect Trade*, in QUANTITATIVE METHODS FOR ASSESSING THE EFFECTS OF NON-TARIFF MEASURES AND TRADE FACILITATION 41 (Philippa Dee & Michael Ferrantino eds., 2005) (discussing data collected by the U.S. International Trade Commission on the relative harmfulness of various non-tariff barriers (NTBs) that are expected to impede the free flow of goods and services, which implies that government-tolerated anti-competitive practices do not constitute a major market access barrier, at least relative to other NTBs that governments have at their disposal to deter entry).

Honeywell<sup>205</sup> or the contested merger between Boeing and McDonnell-Douglas,<sup>206</sup> have heightened fears of inconsistent decisions by different antitrust authorities, enforcement conflicts rarely appear in practice.<sup>207</sup> Finally, the low prevalence of national bias in domestic antitrust enforcement, as Part II.D claims above, further diminishes the benefits of a WTO antitrust agreement.<sup>208</sup>

Negotiating and implementing a binding WTO antitrust agreement would also be costly, thus reducing the net benefits from its success. The contracting costs of pursuing a binding agreement under the auspices of the WTO would be significant due to the numerous parties, multiple negotiation rounds, and extensive multi-issue bargaining that would likely be required.<sup>209</sup> In addition, the compliance costs of implementing and enforcing international antitrust rules would be high, in particular for developing countries that lack the institutional capacity, technical expertise, and financial resources to establish sophisticated antitrust regimes. Similar costs were also present in the TRIPS negotiations. In the case of TRIPS, however, higher benefits for the key parties of the negotiations more than offset these costs.

Despite the high costs of negotiating a WTO antitrust agreement, one might argue that the costs of pursuing cooperation outside of the WTO could be even higher. Non-binding antitrust cooperation today consists of a myriad of different bilateral, plurilateral, and multilateral governance instruments,<sup>210</sup> all typically focusing only on some subset of substantive or procedural antitrust matters. While various non-binding agreements may involve relatively low contracting costs individually, the number of different non-binding agreements that would be necessary to cover the range of issues and parties that a potential WTO agreement could embrace would be high. These multiple non-binding

---

205. See Dep't of Justice Press Release, *supra* note 95.

206. Commission Decision of 30 July 1997, 97/816/EC, 1997 O.J. (L 336) 16; Joint Statement Closing Investigation of the Proposed Merger, 5 Trade Reg. Rep. (CCH) ¶ 24,295 (July 1, 1997).

207. The GE/Honeywell decision remains the only merger case in which the United States and EU authorities reached a conflicting decision. The EU also prohibited a proposed merger between DeHavilland and ATR, which was approved by the Canadian authorities. Commission Decision of 2 Oct. 1991, 91/619/EEC, 1991 O.J. (L 334) 42. Legal uncertainty resulting from multi-jurisdictional merger review is thus unlikely to form as significant negative externality as the theoretical possibility of enforcement conflicts would suggest. It is, however, difficult to evaluate the costs of the existing prospect — no matter how unlikely in practice — that any given merger has a higher risk of being prohibited as a result of multiple regulatory reviews.

208. Bradford, *supra* note 8, at 397 (referring to statistics on EU merger control practices and arguing that they do not show national bias against U.S. corporations); see *supra* Part II.D.

209. See Abbott & Snidal, *supra* note 50, at 434; see also discussion *supra* Part II.C.2.

210. Plurilateral agreements are between a limited number of states, but more than two, whereas multilateral agreements are between a great number of states. See DEARDORFF, *supra* note 15, at 210.

instruments among different parties, taken together, could be more costly than a single binding international antitrust agreement, assuming such an agreement was feasible to negotiate. At the same time, while the ex post costs of a single, all-embracing, and successfully concluded WTO grand bargain could be lower than a myriad of separate single-issue agreements, states perceive the ex ante risk-adjusted costs of multi-issue negotiations to be significantly higher. This is particularly true given the greater likelihood of failure in such negotiations and the costs involved in the collapse of a large-scale negotiation agenda.

Finally, the opportunity costs in the absence of a WTO antitrust agreement are distinctly low due to the variety of other solutions available for states. States with existing, well-functioning antitrust regimes are often able to exercise jurisdiction vis-à-vis foreign corporations as long as the allegedly anti-competitive conduct of the corporations has an effect on their domestic market.<sup>211</sup> Both the United States and the EU have resorted to extraterritorial enforcement on several occasions.<sup>212</sup> This ability to engage in extraterritorial enforcement makes the case for an international agreement less compelling. States can also solve many of the collective action problems through bilateral cooperation agreements and existing informal cooperation mechanisms. These alternative forms of antitrust cooperation have enhanced international cooperation, aligned domestic antitrust laws, and contributed to the significant proliferation of antitrust regimes around the world.<sup>213</sup> At the same time, these alternative regimes have further reduced the need for a binding international antitrust regime.

Thus, antitrust cooperation is an issue area that is conducive to market-based harmonization. The extent of the negative externalities that decentralized antitrust regimes generate is uncertain and, in any event, likely to be lower than it was in the case of the decentralized IP regime. In addition, developing countries and emerging markets have an incentive to emulate more established antitrust regimes. They have actively sought to copy developed countries' antitrust laws in order to strengthen the operation of their domestic markets and to curtail anti-competitive conduct of multinational corporations that conduct business in their markets.<sup>214</sup> In some areas of antitrust, where there seem to be more obvious negative externalities, states complement market-based harmoni-

---

211. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *Joined Cases 89, 104, 114, 116, 117, and 125 to 129/85, A. Åhlström Osakeyhtiö and Others v. Comm'n*, 1988 E.C.R. 5193.

212. See, e.g., *Hartford*, 509 U.S. at 796; *Åhlström*, 1988 E.C.R. ¶ 3. Obviously, the status quo option entails some transaction costs (including the possibility of enforcement conflicts akin to the GE/Honeywell case).

213. See Bradford, *supra* note 8, at 404–05; Budzinski, *supra* note 5; Jenny, *supra* note 5.

214. See Sell, *supra* note 17, at 318–19.

zation with “softer” institutional assistance, such as developing non-binding guidelines and best practices within institutions like the International Competition Network. In either case, antitrust cooperation does not seem to call for strong, centralized cooperation in the WTO.

Consequently, while a binding international antitrust agreement would likely create benefits in the form of transactional efficiencies, the high costs of WTO cooperation — together with limited expected gains and the availability of alternatives — explain why states have chosen to pursue other regulatory priorities in the WTO while preferring other paths when seeking international antitrust convergence.

### CONCLUSION

This Article has attempted to explain when an international legal framework like the WTO can facilitate international cooperation. Through an empirical enquiry into IP and antitrust cooperation, it has endeavored to provide a nuanced understanding of the limits of the WTO’s expansion to new areas of regulatory cooperation.

By contrasting the successfully concluded TRIPS Agreement with the failed antitrust negotiations, this Article has challenged the prevailing view that the TRIPS Agreement offers an instructive precedent for antitrust negotiations in the WTO. A closer examination of the strategic situation underlying the TRIPS and antitrust negotiations reveals that the two areas of cooperation have little in common.

The strategic situations that characterize IP and international antitrust cooperation differ in several ways. First, the general preconditions that underlie all successful efforts to cooperate internationally were present in the TRIPS negotiations, but not in the antitrust negotiations. While the Great Powers unanimously supported the TRIPS Agreement, a comparable consensus was lacking in the case of antitrust. Similarly, influential interest groups within the Great Powers supported the TRIPS Agreement but showed little enthusiasm for the antitrust agreement. In the absence of political rents that major trading powers could capture, the likelihood of reaching an antitrust agreement was dim.

In addition, the WTO’s institutional advantages were directly relevant to the TRIPS Agreement, but these strengths did little to solve the problems underlying international antitrust cooperation. In particular, issue linkages could rectify the unequal distributional consequences of the TRIPS Agreement. Similar linkages could not solve the antitrust negotiations because of *ex ante* uncertainty regarding the winners and losers under the prospective antitrust agreement. Additionally, the risk of opportunism and the consequent need for an enforcement mechanism was prevalent in the case of TRIPS, but it was trivial in the case of anti-

trust. The WTO's dispute settlement mechanism was, therefore, germane to the TRIPS negotiations but only marginally useful to the antitrust negotiations. Finally, in the case of TRIPS, both the net benefits of cooperation and the opportunity costs of non-cooperation within the WTO were high because there were few alternative regulatory regimes, while the opposite was true for the antitrust agreement. Taken together, these reasons contributed to the successful conclusion of the TRIPS Agreement and the failure of antitrust negotiations in the WTO.

The inquiry into the differences between IP and antitrust cooperation also calls into question the conventional wisdom that the TRIPS Agreement provides a useful template for WTO negotiations in other areas of regulatory cooperation. Many have presumed that the dynamics underlying antitrust cooperation are most similar to those underlying IP cooperation, making antitrust the most obvious next issue for the WTO to incorporate into its framework. Yet, despite the similarity of antitrust to trade, efforts to coordinate antitrust policy through the WTO have failed. This suggests that a careful inquiry into the strategic situation characterizing the regulation of corruption, investment, labor, or the environment is necessary before one can assume that the WTO can incorporate these other issues by following the example set by the TRIPS Agreement. Rather than providing a template for future negotiations, it may be more appropriate to view the TRIPS Agreement as a product of an idiosyncratic set of conditions that are unlikely to be replicated in other areas of cooperation.

Disaggregating the conditions that make cooperation in the WTO feasible is also helpful when looking at the future prospects of such cooperation. States' ability to cooperate within the WTO is likely to become increasingly difficult in the future, suggesting that the failed antitrust negotiations may be more predictive than the TRIPS negotiations on the future boundaries of the WTO. The political economy landscape underlying WTO negotiations is becoming increasingly complex, undermining the conditions that made WTO agreements feasible in the past. This complexity influences each of the key variables of the WTO's success that are identified above.

For instance, Great Power consensus is becoming increasingly difficult to establish and sustain. The formerly tight U.S.-EU alliance has gradually weakened since the end of the Cold War.<sup>215</sup> This has had an impact on all areas of cooperation, including trade.<sup>216</sup> The United States' and the EU's capacity to exercise leadership has also declined due to a growing domestic resistance to the WTO's agenda in both

---

215. See Daniel K. Tarullo, *The End of the Big Trade Deal: Why Doha Will Be the Last of the Grand Multilateral Trade Negotiations*, INT'L ECON., Summer 2006, at 46, 48.

216. See *id.*

countries. Consequently, the United States' and the EU's increasingly limited abilities to secure domestic ratification for WTO agreements have forced them to retract from their active roles as drivers of WTO cooperation.<sup>217</sup>

Achieving consensus among the Great Powers has also become more complicated, as China and other emerging economies have begun to challenge the United States' and the EU's economic dominance. A U.S.-EU accord is likely to remain a necessary, but no longer sufficient, precondition for a WTO agreement. Instead, a greater number of increasingly heterogeneous states must reach a consensus as the emerging trade powers weigh in more forcefully when setting the negotiation agenda and bargaining over the terms of the specific agreements. China and India, for instance, have already been able to block progress in WTO negotiations where proposed agreements fail to incorporate their interests and priorities. At the same time, they have shown little willingness to step in and assume a genuine leadership role in moving WTO negotiations forward.<sup>218</sup>

Future negotiations within the WTO may face an additional challenge if powerful interest groups that benefit from trade liberalization shift their lobbying activity to other venues. Given the recent difficulties in moving forward with the Doha Round of trade talks, pressure groups might increasingly perceive the WTO as no longer apt to open global markets. Instead, they may urge their governments to negotiate bilateral and regional agreements, which are faster, more certain, and more manageable to negotiate. During the past eight years — while the Doha negotiations have been hobbling along fruitlessly — bilateral and regional trade agreements have continued to proliferate.<sup>219</sup> These agreements have further lowered the opportunity costs of non-WTO agreements, reinforcing the shift from global trade deals to regional and bilateral ones.

Another reason behind United States and EU multinational corporations' vanishing support for the WTO process is that these companies

---

217. *See id.*

218. *See* John W. Miller, *Global Trade Talks Fail As New Giants Flex Muscle*, WALL ST. J., July 30, 2008, at A1; Andrew L. Stoler, *China's Role in the World Trade Organization and the Doha Round of Multilateral Trade Negotiations*, Institute for International Trade, Second World Forum on China Studies 9–12 (Sept. 21–22, 2006), available at <http://tinyurl.com/2f696so>.

219. Over three hundred bilateral and regional trade agreements have been negotiated by members of the WTO. *See* WORLD TRADE ORGANIZATION, *supra* note 69, at 63; World Trade Organization, *Regional Trade Agreements*, <http://tinyurl.com/2frke46> (listing all regional trade agreements that have been notified to the World Trade Organization); Pascal Lamy, Director-General, World Trade Org., *Regional Agreements: The "Pepper" in the Multilateral "Curry,"* Speech Before the Confederation of Indian Industries (Jan. 17, 2007), available at <http://tinyurl.com/28mx3e7> (recognizing that regional trade agreements have a role to play, but insisting that members report all such agreements to the WTO and comply with certain rules to ensure consistency with WTO principles).

have already managed to reap the most important benefits of trade liberalization. The past success of the WTO has delivered essentially all of the market opening that these powers need.<sup>220</sup> These stakeholders were once the most vocal supporters of the WTO's agenda; today, the loudest domestic voices are exercised by consumers and interest groups critical of the recent advances the WTO has made in intervening with domestic regulatory policies such as IP protection and public health.<sup>221</sup>

Issue linkages are also likely to become riskier and more difficult in the subsequent WTO rounds. The "single undertaking" approach to WTO negotiations with multiple issue linkages has been a creative and, at times, effective way of bringing controversial issues within the WTO. Insistence on package deals has ensured that states have signed on to agreements that fail to deliver direct benefits for them so long as they have been compensated in another area. As the number of players and complexity of negotiation agendas increases, however, so does the possibility of compromises unraveling. Thus, as an even greater number of increasingly heterogeneous players seek compromises, the single undertaking approach is becoming a questionable strategy for success.

The best argument for the continuing relevance of the WTO stems from its internationally unique ability to enforce legally binding commitments. Opportunistic behavior continues to characterize many areas of cooperation, and it is unlikely that protectionist tendencies will ever vanish altogether. A compelling argument, however, can be made that the cooperation dilemmas underlying international trade issues today rarely resemble a Prisoner's Dilemma. For instance, the question of whether imposing antidumping duties on Chinese products only hurts the Chinese and improves the United States' terms of trade is no longer unambiguous. Such duties also hurt the U.S. companies in China that export their products back to the United States. Similarly, given the rapid increase in trade in intermediate goods,<sup>222</sup> duties on Chinese inputs also hurt the U.S. companies that buy and incorporate those Chinese inputs into their final products. Thus, the "unbundling" of the production

---

220. Tarullo, *supra* note 215, at 48.

221. For instance, the previously staunch coalition supporting the TRIPS Agreement has faced an emergence of a powerful counter-coalition that opposes the Agreement. As the magnitude of the HIV epidemic became more evident and, consequently, the question of access to affordable medicine more urgent, new interest groups demanding changes to the TRIPS Agreement were mobilized to counter the impact of the powerful IP lobby. As a result, the Doha Declaration on the TRIPS Agreement and Public Health was adopted. These groups may present setbacks for the TRIPS agenda earlier advanced by the Great Powers and the multinational corporations within those powers. See World Trade Organization, Ministerial Declaration on the TRIPS Agreement and Public Health of 14 November 2001, WT/MIN(01)/DEC/W/2, 41 I.L.M. 755 (2002).

222. This includes intra-industry and intra-firm trade. For instance, both the United States and the EU may be producing the same product and trading among themselves within the same sector. Intra-firm trade refers to a firm that is trading products and components among its subsidiaries.

chain has challenged the perception of many states and interest groups that opportunistic behavior and protectionism serve their interests.<sup>223</sup> It has also paved the way for unilateral trade liberalization, challenging the conventional assumption that protectionist impulses always impede international trade and that hard law and threats of sanctions are required to curtail such impulses.

Finally, while some attempts to conclude the Doha Round have failed because there were too many controversial issues, more recent rounds have failed partly because of the lack of inclusion of issues that would provide satisfactory net gains to all parties. The Doha negotiation agenda has now been stripped of much of its initial ambition, as states have narrowed the agenda in an effort to save the failing round. Thus, when states perceive the net benefits of a WTO round as inadequate, they are likely to abandon the WTO and pursue more substantial commitments with a smaller group of like-minded trading partners.

Going forward, where does this leave the prospect of cooperation within the WTO? One possibility is that governments have already picked the low-hanging fruit and thereby satisfied the most salient needs of their powerful interest groups, leaving a dwindling pool of uncertain and contested benefits for states to negotiate. These remaining benefits are also more difficult for distinctly heterogenous trade powers to agree upon. This situation would marginalize the WTO's role with respect to future liberalization commitments and leave the institution in the role of adjudicating disputes stemming from existing agreements.<sup>224</sup> This scenario suggests that the WTO may well have met its limits and that we are unlikely to see states incorporate new agreements into its framework.

Another scenario is that the gains available through bilateral and regional trade agreements do not make the WTO obsolete. Under this scenario, one assumes that protectionism resurges and continues to span across global markets. States erect new trade barriers. Eliminating them creates losers and causes resistance, which only the WTO's facilitation of transfer payments can overcome. Opportunistic behavior continues to characterize many areas of cooperation. In these areas, the WTO is likely to remain a useful forum in which to negotiate enforceable commitments among many states. Indeed, states have few alternatives to the WTO. This view predicts that the WTO will remain the central pillar of the world trade system and continue to attract the negotiation of new issues under its umbrella. If states continue to seek trade liberalization through the WTO, however, they need to carefully weigh the costs and

---

223. See Joost Pauwelyn, *New Trade Politics for the 21st Century*, 11 J. INT'L ECON. L. 559, 562–63, 567–68 (2008).

224. *Id.* at 565.



benefits of its current decision-making structures, including its insistence on the single undertaking and its requirement that all states need to sign on to all agreements.

Under either scenario, the WTO's recent inability to further its liberalization agenda highlights the need for a more focused debate on the institution's capabilities, goals, and priorities. The future prospects for cooperation within the WTO continue to hinge on the WTO's perceived relevance in maintaining and strengthening free trade. The discussion above not only helps shed light on the WTO's ability to foster international agreements thus far, but it may also provide a starting point for a discussion on whether and how the institution might serve states' future needs in an increasingly complex economic and political landscape.