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When the WTO Works, and How It Fails

Anu Bradford¹

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 when and why the WTO can facilitate agreement in some situations and not others. Comparing the successful conclusion of the TRIPs Agreement and the failed attempts to negotiate a WTO antitrust agreement reveal that international cooperation is likely to emerge when the interests of powerful states are closely aligned and when concentrated interest groups within those states actively support cooperation. They further suggest 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 situation underlying IP and antitrust cooperation are similar and that the conclusion of the TRIPs Agreement is a relevant precedent predicting a successful WTO negotiation on 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 and it is possible that—absent institutional reforms—the WTO’s recent expansion may well have met its limits.

INTRODUCTION

International efforts to seek regulatory convergence produce strikingly different results even in situations where economic implications of the regulatory regimes appear similar. For instance, the enforcement of antitrust laws and the protection of intellectual property rights (“IPRs”) across the jurisdictions have enormous implications for major economic powers and domestic constituencies within those powers, 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”) was a contentious matter with enormous distributional

¹ 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 the UCLA Law School. The author would like to thank Hanna Chung and Amanda Gomez for excellent research assistance.

consequences. Nevertheless, states agreed to incorporate IPRs into the WTO in 1995. In contrast, various attempts to launch WTO negotiations on antitrust have all failed.² 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.³

The successful incorporation of IPRs into the WTO cultivated a sense of false optimism on 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.⁴ Scholars have thus far 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.⁵ In the symposium, several prominent trade scholars sought to develop criteria that can be used to assess whether any given issue belongs to the trade institution or whether it should be regulated elsewhere.

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 fails to do 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 that should be brought into the WTO. Instead, it focuses on the *feasibility* of the WTO agreement, 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 are closely aligned and when concentrated and influential interest groups within those states support the agreement.

² See, e.g., PHILIP MARSDEN, *COMPETITION POLICY FOR THE WTO*, ch. 1 (Cameron May 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 ("July decision"). See Decision Adopted by the General Council on 1 August 2004, WT/L/579 (Aug. 2, 2004).

³ See, e.g., Oliver Budzinski, *The International Competition Network: Prospects and Limits on the Road towards International Competition Governance*, 8 *COMP. & CHANGE* 223, 223-42 (2004); Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 *STAN. J. INT'L L.* 207, 235-36 (2003); Frederic Jenny, *International cooperation on competition: myth, reality and perspective*, 48 *ANTITRUST BULL.* 973, 973-1003 (2003).

⁴ See Steve Charnovitz, *Triangulating the World Trade organization*, 96(1) *AM. J. INT'L L.* 28, 29 (2002).

⁵ See generally *Symposium: The Boundaries of the WTO*, 96(1) *AM. J. INT'L L.* (2002).

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. However, these factors fail to explain 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 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 also 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 in the presence of high net benefits from cooperation that 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. There are five fundamental differences between the strategic situations characterizing these two areas of cooperation. First, the great economic powers all supported the TRIPs Agreement but disagreed on the need to negotiate a WTO antitrust agreement. Second, influential interest groups within the great powers unequivocally endorsed the TRIPs Agreement, while there has been little, if any, interest-group support for the international antitrust agreement. Third, transfer payments in the form of issue-linkages were successfully employed 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. Fourth, defection from a prospective agreement was a concern underlying the TRIPs negotiations, rendering the WTO and its Dispute Settlement Mechanism (“DSM”) particularly attractive for the TRIPs Agreement. In contrast, 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. Finally, the benefits of cooperating and the opportunity costs of not cooperating in the WTO were significantly higher with respect to IPRs than they were in the case of antitrust, reinforcing the case for the TRIPs Agreement and making the case for a WTO antitrust agreement less compelling.

By unveiling the key differences between these two areas of cooperation, this Article challenges the widely held view that the strategic situation underlying IPR and antitrust cooperation would be very similar and that the TRIPs Agreement would therefore offer an instructive precedent for successful WTO antitrust negotiations.⁶ A closer examination of the two areas of cooperation reveals that the TRIPs negotiations

⁶ Andrew Guzman has developed a most detailed argument on why the TRIPs negotiations should be instructive to the antitrust negotiations. See, e.g., Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT’L L. 933, 935 (2003).

and the 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 IPRs, 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 environment or labor, 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 based on consensus, suggesting that any given agreement that is reached ought to be Pareto-improving for all the members of the organization. If an agreement were to make any state worse off, that state would use its veto rights to block the agreement.⁷ 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. However, the examination of the TRIPs and antitrust negotiations reveal that certain zero-sum agreements that leave some states worse off (such as TRIPs) do materialize within the WTO whereas win-win agreements that are widely considered to be Pareto-improving for all states (such as antitrust) can be unsuccessful.⁸ 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. However, this Article argues that it is exactly in the presence of these two conditions when a WTO agreement is most likely to emerge. Consequently, a more nuanced theory on cooperation within the WTO is needed.

The Article proceeds as follows. Section 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. Section II examines these predictors through a case study focusing 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 argues, 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 the WTO negotiations are likely to take place in the future.

I. A Theory of Cooperation in the WTO

The WTO is often hailed as the most effective international institution. 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

⁷ 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.

⁸ See Susan K. Sell, *Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice*, 49 INT'L ORG. 315, 315-50 (1995) (surmising that TRIPs should have been harder to agree as all states had something to gain from at least some minimum set of antitrust laws).

economic growth and increased prosperity across the global markets. While trade liberalization has its critics, few would suggest that the WTO has not accomplished its primary mission of reducing obstacles to international trade. Much of the WTO's success is attributed to its ability to enforce commitments through its dispute settlement mechanism. This sets the WTO apart from most other international institutions that lack means to hold states accountable for the breach of their obligations. Unlike much of international law, the WTO obligations constitute "hard law" that is backed by sanctions. This feature has also cultivated a perception of 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.⁹ 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. 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.¹⁰ 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 more solid positive foundation that includes a more nuanced understanding of the institutional capacity of the WTO. International relations literature has generated ambivalent and often contradictory insights on situations where international institutions can facilitate cooperation, offering only limited guidance on the circumstances in which agreements are likely to emerge in the WTO.¹¹ The discussion below seeks to fill that gap by disaggregating the most essential conditions that determine whether WTO agreements are likely to succeed or fail. Section A discusses when international cooperation in general is feasible. Section 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 such cooperation ultimately takes. First, *powerful states* must agree on the need and form of cooperation. Second, *powerful interest groups*

⁹ See references to this in John H. Jackson, *Afterword: the Linkage Problem—Comments on Five Texts*, 96 AM. J. INT'L L. 118, ### (2002).

¹⁰ *Id.*

¹¹ The three primary views on the role of institutions offer very different predictions on the WTO's ability to foster agreements among states. 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 Daniel Y. Kono, *Making Anarchy Work: International Legal Institutions and Trade Cooperation*, 69 J. POL. 746, 746 (2007).

within those states must support cooperation on the issue area. 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 WTO rule-making is based on de facto consensus among all states, in practice the legislative outcomes often reflect the underlying power structures of the member states.¹² In the WTO context, power refers to the relative market size of each state. A state with a large domestic market can offer more attractive access to its trading partner and thus extract more in return for agreeing to open its domestic market.¹³ Large economies generally benefit from greater internal trade opportunities. Small states are therefore more dependent on trade opportunities negotiated in the WTO and less able to exert pressure by threatening to close their markets. For instance, the prospect of being shut out of the Guatemalan market 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.¹⁴

The United States and the European Union (“EU”) are the unequivocal powers in the WTO system, based on the size of their domestic markets.¹⁵ While their relative economic dominance is gradually diminishing as emerging economies such as China and India continue to grow, the United States and the EU combined still account for one-third of all world imports in both manufactured goods and commercial services. In addition, the combined GDP of the United States and the EU still constitutes forty percent of the world’s total GDP.¹⁶

Great powers can take advantage of less powerful states’ dependence on them in several ways. In 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 country’s Generalized System of Preferences (“GSP”) status that allows it to benefit from more favorable tariff schemes). 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 World Bank or IMF. Economic assistance that great powers extend to developing

¹² See Steinberg, *supra* note 7.

¹³ Steinberg, *supra* note 7. 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.

¹⁴ *Id.*

¹⁵ Steinberg, *supra* note 7, at 348.

¹⁶ See WSDBHome, <http://stat.wto.org/Home/WSDBHome.aspx> (last visited Mar. 2, 2010). The United States’ share of total world imports was fifteen percent (merchandise goods) and twelve percent (commercial services). The EU’s shares were eighteen percent and twenty-three percent, respectively. The United States 2006 GDP was \$13.2 trillion and EU’s 2006 GDP \$12.6 trillion. The total world 2006 GDP was approximately \$65 trillion. Compare that in 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.*

countries is often conditional on the recipient country adopting progressive economic policies and carrying out certain institutional reforms. These tactics steer less powerful economies toward regulatory regimes preferred by great powers.

Even if the great powers agreed on the need to cooperate, they are likely to devote their limited resources to pursuing cooperation on issues that offer political gains for them.¹⁷ The prospect of producing concrete benefits to discrete and influential domestic interest groups maximizes their political rents from cooperation. Interest groups are likely to support an international agreement when expected benefits of the agreement are concentrated and costs diffuse.¹⁸ 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 opposing coalition against 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 challenging the agreement.¹⁹

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 framework²⁰ or within a single-issue organization.²¹ At other times states regard bilateral cooperation as sufficient. The discussion below examines the conditions under which the WTO can facilitate regulatory convergence and the conditions under which other regimes are preferred. 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 issue-areas to forge an agreement; second, when high *likelihood of defection* calls for provisions for monitoring and enforcement; and finally, when the availability of *high net benefits* exceed 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

¹⁷ Governments negotiating international agreements are assumed to be motivated by both *public welfare* and *public choice* considerations.

¹⁸ Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 445 (1988).

¹⁹ James Q. Wilson, *The Politics of Regulation*, in THE POLITICAL ECONOMY: READINGS IN THE POLITICS AND ECONOMICS OF AMERICAN PUBLIC POLICY 86–87 (Thomas Ferguson & Joel Rogers eds., M.E. Sharpe 1984).

²⁰ 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”).

²¹ States also continue to cooperate on IPR 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”).

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.²² 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.²³

Issue linkages are particularly helpful in overcoming domestic resistance to an international agreement.²⁴ Broadening the negotiation agenda counteracts protectionist coalitions by mobilizing countervailing forces that support trade liberalization. When issues are added to the negotiation, new coalitions emerge to counter the protectionist sentiments, offering governments political rents that can exceed the costs that the protectionist coalition incurs.²⁵ 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 subsidize its farmers. But when agriculture is incorporated in a multi-issue WTO negotiation, the relative influence of the Ministry of Agriculture is diluted due to the involvement of other domestic ministries with interests that counterbalance one another.²⁶ However, linkages are not always feasible, in particular in the presence of *ex ante* uncertainty relating to distributional consequences of a prospective agreement. If states do not know who would win and who would lose under the agreement, their abilities to devise transfer payments are compromised. In addition, linkages can burden the negotiation agenda, unraveling compromises on issues which could successfully be negotiated in isolation.²⁷

While linkages within the WTO facilitate agreements that would not be feasible in the absence of the linkages, states always retain an incentive to defect on the package deals they have negotiated.²⁸ The WTO can help 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

²² R.D. Tollison & T.D. Willett, *An economic theory of mutually advantageous issue linkages in international organization*, 33 INT’L ORG. 425, 430-37 (1979).

²³ *See id.* *See also* James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT’L ORG. 281, 300 (1983). Linkage represents an effective way of overcoming a distributional conflict when direct transfer payments are not feasible.

²⁴ Christina Davis, *International Institutions and Issue Linkage: Building Support for Agricultural Trade Liberalization*, 98 AM. POL. SCI. REV. 153, 164 (2004). 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, “liberalization will be most likely when the linkage successfully counters the collective action problems and institutional biases at the domestic level that favor protection.”

²⁵ *Id.* at 158.

²⁶ *Id.* at 153.

²⁷ Sebenius, *supra* note 23, at 300.

²⁸ 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.

measures and hold states accountable through the DSM.²⁹ 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.³⁰ Binding international agreements with cautiously negotiated commitments are less susceptible to self-serving interpretation by states.³¹ Such agreements also deter cheating by raising the cost of non-compliance.³² Thus, binding agreements are particularly advantageous in Prisoners Dilemma (“PD”) situations where the potential for costly opportunism is high and cheating is difficult to detect.³³ 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 (“CG”) where the parties generally lack the incentives to deviate from the agreement once the focal point of coordination has been established.³⁴

Accordingly, if the cooperation problem that states face resembles a PD (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 CG (where agreements are largely self-enforcing), enforcement provisions are redundant and thus often not included. Barbara Koremenos’s recent empirical study on international agreements with dispute settlement provisions supports this argument. Koremenos finds that approximately half of all international agreements among states include dispute settlement provisions. She also found that states include dispute settlement provisions only when they are likely to be needed. 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.”³⁵ It follows that the likelihood of states negotiating agreements within the WTO should also positively correlate with the likelihood of the states’ incentives to behave opportunistically.

²⁹ Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT’L L.* 335, 358-59 (1989).

³⁰ Kal Raustiala, *Form and Substance in International Agreements*, 99 *AM. J. INT’L L.* 581, 593-94 (2005).

³¹ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT’L ORG.* 421, 426-27 (2000) (hereinafter Abbott & Snidal, *Hard and Soft Law*).

³² The costs of renegeing can manifest themselves both in the form of reputational costs or actual sanctions. *See id.* at 427.

³³ *Id.* at 429.

³⁴ Raustiala, *Form and Substance*, *supra* note 30, at 592-94. *See also* Abbott, *supra* note 29, 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., Columbia 1993).

³⁵ Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 *J. LEGAL STUD.* 189, 192, 209 (2007).

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 cost.³⁶ In addition to the WTO's key advantages—linkages and enforcement mechanism—states' willingness to pursue an agreement in the WTO turns on the availability of alternatives they have outside the WTO. The higher the opportunity costs of non-agreement in the WTO are, the more persistent states' efforts to include the issue in the WTO will be. In contrast, the more content the states are with the *status quo* or the more non-WTO alternatives they have, the lower the costs of forgoing the WTO negotiations are. Thus, the likelihood of the WTO agreement is often not only a function of costs and benefits of the WTO agreement, but also a function of the opportunity costs of a non-WTO agreement.³⁷

II. Testing the Limits of the WTO: Explaining the Divergent Outcomes in the IPR and Antitrust Cooperation

States' pursuit of international IPR and antitrust cooperation under the auspices of the WTO forms part of a broader goal to institutionalize deregulation and trade liberalization globally 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, states are projected to employ lax or strategic antitrust laws or offer inadequate protection of IPRs to hinder the free flow of goods and services into their markets.³⁸ Fears of new forms of protectionism have reinforced demands to expand the scope of the WTO to include rules on IPRs and antitrust, among other areas, to preserve the economic benefits of free trade.³⁹

IPRs were successfully brought under the auspices of the WTO in 1994 when the TRIPs Agreement was adopted as a part of the Final Act of the Uruguay Round. The Agreement established a global IPR regime with provisions to protect and enforce

³⁶ Davis, *supra* note 24, at 4.

³⁷ See, e.g., David Lax & James Sebenius, *The Power of Alternatives or the Limits to Negotiation*, in NEGOTIATION THEORY AND PRACTICE 97-114 (J. William Breslin & Jeffery Z. Rubin eds., Program on Negotiation at Harvard Law School 1991).

³⁸ 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., AEI Press 2004).

³⁹ 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 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., Robert O. Keohane, *International institutions: Two approaches*, 32 INT'L STUD. Q. 379, 389 (1988); Jose E. Alvarez, Symposium: *The Boundaries of the WTO: The WTO as Linkage Machine*, 96 AM. J. INT'L L. 146, 146-47 (2002).

patents, copyrights, trademarks and trade secrets. The TRIPs Agreement provides for minimum standards that all WTO members are bound by, coupled with a system to enforce those standards internationally. The initiative for the Agreement came from a small group of powerful U.S. corporations whose activities depend on strong IP protection. They mobilized the support of their counterparts in the EU and Japan. The United States, EU, and Japanese corporations subsequently lobbied their respective governments and ensured that their IP agenda remained a negotiating priority for the key states.

Initially, developed countries pushing for the agreement faced strong resistance from developing countries including India, Brazil and Korea. After eight years of trade talks, however, the TRIPs Agreement emerged as a part of a “grand bargain” consisting of multiple trade deals all incorporated in the Final Act of the newly established WTO. The TRIPs Agreement was the result of collaboration among some of the most powerful multinational corporations (“MNCs”) and some of the most powerful states in the global trading system. As the discussion below explains, the developing country resistance to the Agreement was suppressed with a mix of persuasion, pressure, threats, linkages, and other bargaining tactics.

For those who advocate expanding the scope of the WTO, TRIPs is used as 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. The TRIPs Agreement imposes positive obligations on states to undertake regulatory reforms, going well beyond the scope of issues traditionally addressed in the WTO. The TRIPs is also an oft-cited precedent for those who argue that the WTO is best suited to address issues with distributional consequences that create winners and losers. For instance, while developing countries would have been unlikely to sign onto a standalone agreement on IPRs, they conceded in the WTO framework where TRIPs was a part of broader package that ensured gains to each WTO member.

The success of the TRIPs Agreement has fostered a perception that antitrust commitments ought to be feasible to negotiate in the WTO 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 GATT/WTO talks. The IP case study offers a valuable lesson about how competition [antitrust] negotiations ought to proceed”.⁴⁰ However, as the recent history of WTO negotiations show, 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 Havana Charter in 1948.⁴¹ The EU, with the support of Canada and Japan, has been the primary proponent of the WTO antitrust agreement. The United States has consistently resisted attempts to

⁴⁰ Guzman, *supra* note 6, at 974.

⁴¹ See, e.g., Nataliya Yacheistova, *The International Competition Regulation – A Short Review of a Long Evolution*, 18 *WORLD COMPETITION, LAW AND ECON.* 99, 99–110, (1994). See also MARSDEN, *supra* note 2, at ch. 1.

incorporate antitrust in the trade regime. In 1996, at the request of the EU, the WTO Ministerial Conference established a Working Group on Competition. 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. In 2001, antitrust was included on the agenda of the Doha Round.⁴² At the 2003 Cancun Ministerial meeting, however, the WTO negotiations on antitrust were stalled due to the resistance of the developing countries. 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, 2004.⁴³ There is little to suggest that WTO antitrust negotiations will be revived anytime soon.

This Section explains why the TRIPs Agreement was successful, why antitrust negotiations were a failure, and why exactly the outcome of the two sets of issues was so different.⁴⁴ It first discusses the general preconditions for successful cooperation—the 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 the presence of these conditions in the case of TRIPs is generally recognized, the broad literature advocating a WTO international 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 the WTO antitrust agreement. The below discussion 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 have 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 the TRIPs Agreement was going to produce 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, antitrust negotiations have been impeded by substantial uncertainty regarding the prospective winners and

⁴² Antitrust 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. Being on a conditional negotiation track made it subject to an explicit decision on the scope and timeframe at the 2003 Cancun Ministerial Conference.

⁴³ See Decision Adopted by the General Council on 1 August 2004, *supra* note 2.

⁴⁴ This Article highlights five primary reasons that explain the success of the TRIPs Agreement and the failure to conclude an antitrust agreement. 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. The 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 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 8, at 20.

losers under the Agreement, 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 the states' ability to predict the distributional consequences of the agreement.

The below discussion 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 a lesser concern in antitrust negotiations. This claim challenges the prevailing presumption that antitrust cooperation would also be impeded by incentives to defect from commitments. Finally, the net gains from the TRIPs Agreement to its proponents 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 IPRs 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 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 great powers was missing in the antitrust negotiations, contributing to the breakdown of the negotiations.

1. The Great Power Consensus on the TRIPs Agreement

The great powers are also the leading producers of IP products.⁴⁵ As unambiguous beneficiaries of stronger IP protection, they were ardent advocates of the TRIPs Agreement and pursued their goal as a unified front.⁴⁶ Stronger international IP protection was known to reinforce their IP exporters' position by enabling them to charge supra-competitive prices of their products abroad. Thus, the TRIPs Agreement was guaranteed to improve the terms of trade and the national income of the great powers.⁴⁷

⁴⁵ The benefits of IP protection are highly concentrated in a few economically powerful developed countries. According to WIPO, in 2000 the 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. Its net income from IP-related trade increased from \$1.1 billion in 1970 to \$14.3 billion in 2001. 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 from the United States, EU or Japan. The three powers also host over two-thirds of the total world production of pharmaceuticals and account for over ninety percent of the R&D expenditure in the field. See Meir Perez Pugatch, *THE INTERNATIONAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS* 51, 54 (Edward Elgar 2004).

⁴⁶ See, e.g., A. O. Adede, *The Political Economy of the TRIPs Agreement: Origins and History of Negotiations* 4, 12 (July 30, 2001) (unpublished manuscript, presented at the Eastern and Southern Africa Multi-Stakeholder Dialogue on Trade, Intellectual Property and Biological Resources, Nairobi, Kenya).

⁴⁷ Pugatch, *supra* note 45, 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.

Since the great powers all supported the TRIPs Agreement, the only true battle was to persuade the developing countries to sign onto the agreement. Developing countries had little to gain from the TRIPs Agreement: they are primarily consumers and copiers of IP-related products. 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 weak, distant, and uncertain.⁴⁸ In addition, given the extent of the domestic opposition of the Agreement, developing countries knew that signing onto the TRIPs was politically costly. Hence, the TRIPs Agreement seemed to offer no Pareto-gains for developing countries.

If developing countries knew that the TRIPs Agreement was going to reduce their economic welfare, why did they sign into it? In the WTO, all states have equal voting rights and the decisions are reached based on the consensus principle. These institutional safeguards ought to ensure that the great powers cannot impose undesirable agreements on developing countries. However, a closer examination of the dynamics of the WTO negotiations reveals that the formal equality of the states often yields to power based bargaining in practice.

Developing countries refrained from using their veto right for two primary reasons. First, developing countries already faced trade retaliation from the great powers, which resorted to coercive tactics in their bilateral relations with them. 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 enables certain countries to enjoy preferential treatment (such as lower tariffs) in their trade relations with the United States; and second, the employment of Section 301 of the 1974 Trade Act, which enables the United States to impose unilateral trade sanctions against countries that engage in “unfair competition”.⁴⁹ Thus, developing countries were confronted with the choice of 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 United States’ ability to unilaterally retaliate against them would be constrained by the WTO’s dispute settlement mechanism.

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.⁵⁰ In contrast to the previous trade negotiation rounds, which had allowed states to opt out of trade agreements that they did not want to be bound by, the single undertaking approach meant that the acceptance of the entire set of the

⁴⁸ *Id.* at 55 (citing Arvind Subramanian, *Putting Some Numbers on the TRIPs Pharmaceutical Debate*, 10 INT’L J. TECH. MGMT. 252, 252-53 (1995)). Several studies supported this perception. Subramanian, for instance, has calculated that annual welfare loss from grant of patents would amount to \$100-\$400 million in Argentina and \$341 million to \$1.26 billion in India.

⁴⁹ On several occasions, the United States issued specific threats—at times carrying out such threats—by coercing developing countries to agree to a higher level of IP protection. See Pugatch, *supra* note 45, at 67, 72 (noting the United States’ successful attempts to coerce Korea and Brazil). See also United States Tariff Act of 1930, 19 U.S.C. § 1337 (2006).

⁵⁰ Steinberg, *supra* note 7, at 360.

Uruguay Round agreements—including the TRIPs Agreement—was a precondition for any benefits negotiated in the GATT as well as the membership in the newly established WTO.⁵¹ 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 obligations and terminated their trade obligations vis-à-vis states that did not accept the Final Act. By doing this, the two trade powers presented developing countries with a new choice set from which the status quo was removed. Developing countries had to decide whether to sign the TRIPs Agreement or forgo all the benefits they had negotiated in the previous fifty years. Developing countries, obviously, could not afford to choose the latter.⁵²

The history of the TRIPs negotiations exposes the role that power plays in negotiations that are formally guided by the principle of equal rights and consensus among all states. That the great powers acted jointly 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 they used might not have amounted to overt coercion. However, by changing the opportunity set available for developing countries, developed countries effectively left developing countries with little choice but to sign onto the agreement that was not Pareto-improving to them. 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.⁵³

⁵¹ GATT refers to the “General Agreement on Tariffs and Trade” which was concluded in 1947. It is a predecessor of the WTO. Today, the WTO provides a treaty framework for various agreements, including GATT.

⁵² *Id.* The United States and European Union'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 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).

⁵³ *Id.* at 704. Daniel Drezner, *Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence*, 12 J. EUR. PUB. POL'Y 841 (2005). Pugatch, *supra* note 45, at 228.

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

In contrast to the great power consensus over the international IP regime, one of the primary obstacles to a binding international antitrust agreement has been a longstanding disagreement between the United States and the EU regarding the content and institutional form of the international antitrust cooperation. The United States has repeatedly stated its opposition to the WTO antitrust rules, while the EU has been their strongest advocate.⁵⁴

The United States and EU positions on how to protect IPRs are more closely aligned than their views on how to protect their markets from anti-competitive practices. Even as the United States and EU antitrust laws are gradually converging, disagreement on the optimal content of antitrust laws remains. This disagreement stems from a different belief on when and how a government should intervene when markets fail. In general, the EU is considered to be more interventionist and less tolerant of market power. Consequently, the EU is more likely to challenge mergers and pursue the conduct of a dominant corporation. The divergent outcomes in the *Microsoft* dominance case and the *GE/Honeywell* merger case are often cited as most prominent examples of the remaining transatlantic differences.⁵⁵

The U.S.-EU divergence has obstructed states' abilities to negotiate antitrust matters in the WTO. The initial proposal to incorporate antitrust in the WTO originated from the EU, which has remained the agreement's vocal proponent. The United States, in contrast, has systematically opposed any WTO antitrust agreement and supported bilateral cooperation agreements and voluntary multilateral cooperation within the International Competition Network ("ICN"), a voluntary network among worlds' antitrust agencies, instead.⁵⁶ The EU's support for formal WTO negotiations stems from a variety

⁵⁴ See, e.g., Douglas Melamed, 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); Mario Monti, European Commissioner for Competition Policy, A Global Competition Policy?, Address at the European Competition Day Conference (Sept. 17, 2002).

⁵⁵ On *Microsoft*, see, e.g., Commission Decision, *Microsoft*, COMP/C-3/37.792, 2004 O.J. (C 290), available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf> (imposing a fine after concluding that Microsoft had abused its dominant position in violation of Art. 82 EC); United States District Court for the District of Columbia, Memorandum Opinion with Findings of Fact and Final Judgment of November 1, 2002, *In re State of New York et al. v. Microsoft Corporation*, Civil Action No. 98-1233 (CKK); United States District Court for the District of Columbia, Memorandum Opinion with Findings of Fact and Final Judgment of November 1, 2002, *In re United States of America v. Microsoft Corporation*, Civil Action No. 98-1233 (CKK) (endorsing the settlement between the United States and Microsoft). On *GE/Honeywell*, see Press Release, U.S. Dept. of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), available at http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm (last visited Mar. 2, 2010); Commission Decision of 3 July 2001, *General Electric/Honeywell*, Case COMP/M.2220.

⁵⁶ See U.S. DEP'T JUSTICE, ANTITRUST DIV., INT'L COMPETITION ADVISORY COMM. TO THE ATT'Y GENERAL AND ASSISTANT ATT'Y GENERAL FOR ANTITRUST, FINAL REPORT 33 (2000) [hereinafter ICPAC Report], available at <http://www.usdoj.gov/atr/icpac/finalreport.htm> (last visited Mar. 2, 2010); William J. Kolasky, Global Competition: Prospects for Convergence and Cooperation, Address at the American Bar Association Fall Forum (Nov. 7, 2002), available at <http://www.usdoj.gov/atr/public/speeches/200446.htm> (last visited Mar. 2, 2010).

of factors, including its preference for multilateral, institutionalized rulemaking over less predictable, case-by-case cooperation among regulators. The EU is also willing to link antitrust more closely to trade policy, whereas the United States wants to keep the two issues separate. In addition, as more WTO members are moving towards 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 internationally.

International cooperation is more likely to fail when great powers are divided. However, antitrust negotiations were not obstructed only because of the United States opposition: at the 2003 Cancun Ministerial meeting, the negotiations were blocked by the coalition of developing countries. 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 the agreement. Without adequate resources or legal and economic expertise to enforce antitrust laws, the developing countries concluded that they were not ready to negotiate the WTO antitrust agreement.⁵⁷

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 and thereby compromise the leverage that the great powers have over outcomes.⁵⁸ Resource pooling helps weaker states gain more diplomatic clout, since their combined market size translates directly into more bargaining power.⁵⁹ In particular, when the interests of the great powers are divided, 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.⁶⁰ When the United States and the EU have not acted in concert, developing countries have taken advantage of the great power divide and obstructed the negotiations, despite the

⁵⁷ 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. Developing countries also 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 also* Editorial, *The Real Lesson of the Cancun Failure*, FINANCIAL TIMES, Sept. 23, 2003, at 16.

⁵⁸ 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, demanded by the United States, and environmental issues, endorsed by the European Union. Developing countries also prevailed in demanding for a declaration on TRIPs and public health despite strong objections of the United States.

⁵⁹ Manfred Elsig, *Different Facets of Power in Decision-Making in the WTO* 25-28 (Sept. 2006) (unpublished manuscript, available at <<http://ssrn.com/abstract=1090146>>). Reliance on coalitions also mitigate 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.

⁶⁰ *Id.*

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 could be Pareto-improving to all.⁶¹

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

The TRIPs Agreement emerged following an unprecedented interest group pressure as influential MNCs promoted the inclusion of the IPRs into the WTO agenda.⁶² In contrast, few corporations, industry organizations or consumer groups have actively endorsed a WTO antitrust agreement. Instead, the demand for international antitrust rules has stemmed from a small number of prominent antitrust agencies while individual corporations have focused their lobbying efforts on domestic antitrust agencies in cases where their interests have been directly and individually at stake.⁶³

1. The Interest Groups' Quest for the TRIPs Agreement

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, those gains were going to be captured by a distinctly defined group of producers whose commercial success relies on vigorous IP protection. These producers became the primary norm entrepreneurs of the TRIPs Agreement. They formed a transnational coalition and engaged in an unprecedented lobbying effort to establish a global IP regime.⁶⁴

The support of powerful MNCs does not, as such, guarantee that those private interests are translated into government policies and ultimately into public international law. While private interests prevailed in the TRIPs negotiations, the triumph of the MNCs in devising the global trade order has not stretched across all issue areas. The General Agreement on Trade in Services (“GATS”) and the Agreement on Trade-Related Investment Measures (“TRIMS”), for instance, which were supported by many of the same interests groups and which took place at the same time with the TRIPs negotiations

⁶¹ Accordingly, power politics interferes with the notion of Pareto-optimality by causing some Pareto-improving agreements to fail (antitrust) and causing some agreements to materialize that fail to deliver gains to all (TRIPs).

⁶² See Sylvia Ostry, *Convergence and Sovereignty: Policy Scope for Compromise?*, in COPING WITH GLOBALIZATION 52, 55-57 (Aseem Prakash & Jeffrey A. Hart eds., Routledge 2000).

⁶³ See, e.g., COMMENTS BY INTERNATIONAL CHAMBER OF COMMERCE AND BUSINESS & INDUSTRY ADVISORY COMMITTEE TO THE OECD ON THE REPORT OF THE U.S. INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE 2, 6, 10 (June 5, 2000), available at <http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/Statements/ICC_BIAC_Comments_Intl%20ComityAMC.pdf> (last visited Mar. 2, 2010).

⁶⁴ 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 pressure for the agreement (most notably, note UNICE in the EU and Keidanen in Japan).

in the same institutional framework fell short of the demands of the private sector.⁶⁵ Accordingly, it appears that the TRIPs Agreement was a product of a distinct set of circumstances that made the Agreement particularly susceptible for a high level of lobbying activity.

Interest groups assumed a prominent role in the TRIPs talks because of particularly high benefits that they expected to receive from their lobbying activity. The pharmaceutical industry, for instance, is highly dependent on effective patent protection. According to some estimates, average costs for developing a new drug are \$500–\$800 million. Only three out of ten marketable drugs produce profits that exceed the average costs of their research and development. It is also estimated that 60–65 percent of drugs would have never been developed in the absence of IP protection.⁶⁶ Thus, the high stakes involved in securing enhanced IP protection increased the expected utility available from the lobbying activity.

Second, the lobbying was particularly attractive since the benefits were to fall on a small and coherent interest group.⁶⁷ Lobby groups are most effective when they have homogeneous interests.⁶⁸ Corporations supporting the TRIPs Agreement came from highly concentrated business sectors, allowing them to construct a unified cross-industry position.⁶⁹ The limited number of members and a clear sectoral definition of the industry lobby diminished the danger of conflicting interests and kept the lobbying coalition cohesive in its mission and in the strategies pursued.⁷⁰ The need to secure global IP protection provided a powerful common denominator 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.⁷¹

⁶⁵ Sell, *supra* note 8, at 4. The private interests supporting the GATS Agreement, for instance, consisted of a more diverse group of corporate actors including representatives of banking industry, legal services, and travel industry. Thus, overcoming collective action problems was more challenging in the presence of a more heterogeneous interest group. *See id.* at 172.

⁶⁶ Pugatch, *supra* note 45, at 89.

⁶⁷ The small membership of the lobbying coalition also ensured that the *per-person* stakes were going to be 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 MNCs and other IP-driven corporations exploited this informational advantage by lending their expertise to the governments. The 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 IPC's IP agenda when it was presented as crucial for the United States' competitiveness and a solution for the United States' increasing trade deficit. Sell, *supra* note 8, at 2.

⁶⁸ The members of the TRIPs coalition also had much to gain from pooling their resources when engaging in their costly lobbying activities and incurring costs such as costs of organizing a coalition, collecting and disseminating information, preparing policy briefs and presenting them to the government negotiators. GENE M. GROSSMAN & ELHANAN HELPMAN, SPECIAL INTEREST POLITICS 143 (2001).

⁶⁹ Pugatch, *supra* note 45, at 93, 115. The pharmaceutical industry, for instance, consists of thirty to fifty MNCs producing approximately two-thirds of world pharmaceutical output.

⁷⁰ *Id.* at 3.

⁷¹ *Id.* at 5-6.

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 since the industry benefits from high marginal profits. 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 sectorally defined.⁷² Such a homogeneous group with limited membership is better able to mitigate collective action problems involved in lobbying, reducing the costs, increasing the utility, and thus enhancing the overall attractiveness of lobbying.

The effectiveness of the TRIPs lobby and, consequently, the extent of political rents available from the TRIPs Agreement provided the governments of the most powerful trading nations an apparent domestic political economy rationale for the Agreement.⁷³ In the end, the transnational coalition lobbying for the TRIPs Agreement was successful beyond its initial goals. The comprehensiveness of the TRIPs Agreement superseded even the initial expectations of the MNCs supporting the Agreement, setting the TRIPs lobby apart from most other instances where private corporations have been actively lobbying for international regimes.

Consequently, the emergence of the TRIPs Agreement can be explained as a manifestation of some of the world's most powerful corporations acting in concert with the world's most powerful economies.⁷⁴ The views presented by the leading powers in the WTO mirrored closely the views advanced by their domestic industries.⁷⁵ The governments became agents of the domestic IPR lobby, which not only devised the global IPR 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.

⁷² Some risk of free-riding persists, as a corporation may always elect not to participate in the lobbying knowing that it would still reap benefits of a successful TRIPs Agreement that the lobbying coalition would secure (IP protection 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).

⁷³ This was also true given that the counter-lobby opposing the TRIPs Agreement consisted of a much less organized and considerably less resourceful set of corporations that are copying or consuming IP-related products, including manufacturers of generic pharmaceuticals.

⁷⁴ Sell, *supra* note 8, at 3.

⁷⁵ Pugatch, *supra* note 45, at 173. 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.* (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.").

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.⁷⁶ The international antitrust regime does not seem to have a clear constituency that would unequivocally benefit from the WTO antitrust rules and therefore, there is no equivalent stakeholder to assume the role played by the IP industry in its pursuit for the TRIPs Agreement. 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.

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 antitrust laws in most jurisdictions are enacted to maximize consumer welfare. However, consumers as beneficiaries of antitrust regulation 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, focusing their lobbying activities on less “technocratic” areas of cooperation instead.⁷⁷

What explains then the relative passiveness of corporations in the antitrust domain? The stakes in international antitrust cases would seem high. The costs involved in EU Commission’s prohibition of the proposed *GE/Honeywell* merger between two U.S. corporations, for instance, were extremely high, as have been the litigation costs and remedies *Microsoft* has faced in Europe even when the U.S. antitrust agencies have cleared these corporations’ transactions and conduct as pro-competitive. Negotiating an international agreement to mitigate the costs associated with inconsistent domestic antitrust laws would thus be expected to confer high benefits for at least some powerful corporations that seek consolidation or frequently face investigations by multiple antitrust agencies. However, no coherent coalition has emerged to support a WTO antitrust agreement.⁷⁸

The inactivity of interest groups in the antitrust domain can be explained by the diffuse, case-specific, and often unpredictable nature of the costs and the benefits that a WTO antitrust agreement would confer. For instance, vigorous antitrust enforcement is

⁷⁶ See, e.g., Comments by ICC and BIAC on the Report of the U.S. ICPAC, *supra* note 63 (while ICC and BIAC support some degree of substantive and some procedural harmonization and convergence of domestic merger regimes, “ICC and BIAC agree that the WTO is not an appropriate forum for review of private restraints and that the WTO should not develop new competition laws under its framework at this time”).

⁷⁷ See Raustiala, *supra* note 30, 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 their content as their conclusion generally requires 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.

⁷⁸ Similarly, one may wonder why developing country corporations would not lobby for international antitrust rules that would more effectively discipline MNCs that conduct business on their domestic markets.

likely to be in the interest of a corporation, as long as the authorities across jurisdictions are targeting its competitors. However, when any given corporation itself becomes a target of an antitrust investigation, its position toward international antitrust cooperation is likely to reverse.⁷⁹ This leads most corporations to be of two minds about increased international antitrust regulation, depending on which side of the dispute they stand in each individual case.⁸⁰ Thus, the benefit that any all-encompassing WTO antitrust agreement would confer is uncertain for a corporation contemplating political action. More specifically, the benefit would seem to vary from case to case, sometimes being even negative. 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 pursued by an entire industry.⁸¹ 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 case-by-case the issues and instances in which they want antitrust agencies to cooperate. They employ their political strength vis-à-vis antitrust authorities when their interests are directly at stake.⁸² This type of political action is rational given the higher expected utility available from lobbying in an individual case. When lobbying is considered a private good, there are no (or at most few) other firms engaged in political activity.⁸³ While all the costs of political action fall

⁷⁹ 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 ASSOC., A TAX ON MERGERS?: SURVEYING THE TIME AND COSTS TO BUSINESS OF MULTI-JURISDICTIONAL MERGER REVIEWS 5 (June 2003) (hereinafter *Multi-Jurisdictional Merger Survey*) (noting that fifty-six percent of the businesses see scope for improving and harmonizing merger notification processes); *see also* Comments by ICC and BIAC on the Report of the U.S. ICPAC, *supra* note 63.

⁸⁰ Of course, a group of corporations that hold a dominant market position or even monopoly power can be assumed to know *ex ante* in most cases which side of the dispute they stand in an antitrust investigation. While Microsoft was, for instance, recently lobbying the EU Commission to block Google's acquisition of Double Click and was hence advocating more stringent antitrust scrutiny, in most cases Microsoft knows that it would in general benefit from lenient antitrust laws. 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. However, this has not happened and the antitrust lobbying has remained centered in domestic agencies.

⁸¹ Michael J. Gilligan, *Lobbying as a Private Good in Intra-Industry Trade*, 41 INTER. STUD. Q. 455 (1997).

⁸² 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 more likely to lead to stricter antitrust scrutiny and greater receptiveness of their arguments.

⁸³ There are firms that might still benefit from a corporation lobbying an agency directly—there is some coalition formation when for instance a group of small IT corporations collectively lobbied the U.S. and EU antitrust agencies to bring a case against Microsoft.

on a single firm, there is less free riding that could add to the costs of collective action.⁸⁴ Also, 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 benefit from lobbying is also expected to 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 still 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 constituency does not demand the agreement and when the prospects of reaching an agreement are slim. Interestingly, while the norm entrepreneurs behind the TRIPs Agreement were MNCs, the driving forces behind the antitrust negotiations have been a few domestic antitrust agencies, supported by the broader trade community. Most prominently, the demand for WTO antitrust rules stems from the EU Commission and its antitrust enforcers. The trade officials at U.S. Trade Representative and the EU's Directorate General for Trade have equally supported the inclusion of antitrust within the WTO. Incorporating antitrust in the WTO would enhance trade officials' powers as antitrust would become a "trade matter," giving them the opportunity to ensure that antitrust laws are not employed so as to offset the liberalization commitments 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. Instead, the agency-driven antitrust cooperation suggests that states can be autonomous actors that develop preferences on their own and that pursue policy goals which do not necessarily reflect the demands of interest groups.⁸⁵

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 R&D takes place, were going to be the beneficiaries of the agreement and

⁸⁴ 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 each other's investigations. Developing countries, for instance, benefit if the United States or the EU blocks a merger that also impedes competition on that developing country market.

⁸⁵ Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in *BRINGING THE STATE BACK IN* (Peter B. Evans, Dietrich Rueschmeyer & Theda Skocpol eds., Cambridge 1985).

that the developing countries, where IP-protected products are mainly consumed or copied, were going to lose under the agreement.⁸⁶ Thus, the main challenge in the TRIPs negotiations was to overcome the distributional conflict and win the support of the developing countries which had little to gain and much to lose under the TRIPs Agreement.

Developing countries were eventually brought into the agreement by linking the TRIPs negotiations to concessions in other areas.⁸⁷ As a transfer payment, developed countries agreed to cut down subsidies to their own farmers and lower their tariffs on agricultural products and textiles that the developing countries imported.⁸⁸ This strategic linkage of two unrelated issues converted the “win-lose” bargaining game to a “win-win” game where developed and developing countries exchanged balanced concessions in the spirit of reciprocity.⁸⁹

This situation resembles a classic Prisoners’ Dilemma situation. Developing countries face a choice of either offering or refusing IP protection. Developed countries face 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 not enacting IP regulation yet 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 given that the combined payoff of the parties is higher than the payoff resulting from any other strategy. However, both parties 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.⁹⁰ Thus, 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.

⁸⁶ See Adede, *supra* note 46, at 4.

⁸⁷ Within the IP domain, 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.

⁸⁸ Guzman, *supra* note 6, at 950-51. See Davis, *supra* note 24, at 9, 32.

⁸⁹ 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 the institution such as the WIPO, 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.

⁹⁰ Abbott, *supra* note 29, at 362.

Since both parties prefer an alternative equilibrium, either player can promise to eschew its dominant strategy if the other player reciprocates. 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 which offers both parties their second-best outcome. However, the new equilibrium is difficult to sustain, since 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.⁹¹ 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 from an agreement prior to its conclusion and have some sense of the magnitude of the gains and the losses that the agreement is expected to generate.⁹²

The distributional consequences of the TRIPs Agreement were sufficiently clear and quantifiable *ex ante*. For instance, the 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. The EU estimated that counterfeiting comprises 5–7 % of the world trade and accounts for the loss of 100,000 jobs annually in the EU.⁹³ While these estimates have been contested and the exact effect of the TRIPs Agreement and its ability to remove or mitigate 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 whereas the majority of the TRIPs losers resided in the developing countries. As discussed above, 90% of new pharmaceutical products originate from the U.S., EU, or Japan, as do most other IP-driven products. These countries were known to be 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 the Agreement's distributional consequences paved the way for the linkages, which again paved the way for the conclusion of the Agreement.

⁹¹ Arthur Stein, *The Politics of Linkage*, 33 *WORLD POL.* 77-79 (1980).

⁹² 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 area quantifiable and firm- or sector-specific), it is more complicated to try to predict winners and losers under any prospective international antitrust agreement.

⁹³ Pugatch, *supra* note 45, at 58.

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

Not unlike the TRIPs negotiations, antitrust cooperation has been marked by distributional tensions between the United States and the EU on one hand and between the developed and the developing countries on the other. Thus, unsurprisingly, linkages in the WTO have been proposed as a solution to overcome the distributional tensions in the antitrust domain. Proponents of the WTO antitrust agreement claim that existing distributional conflicts could be solved by compensating the losing states in another area of cooperation.⁹⁴

However, linkages are particularly difficult to devise in the antitrust context.⁹⁵ 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 would be the targets of international antitrust regulation are ambiguous. The costs and benefits arising from an international antitrust agreement for its primary stakeholders are thus likely to be diffuse, issue- and case-specific and, in most cases, unpredictable. This type of distributional uncertainty obstructs states' ability to exchange reciprocal concessions and form issue linkages.

When corporations cannot predict which general policy will favor them more in the long run, they are less likely to support any all-embracing policy proposal.⁹⁶ For the same reason that uncertainty relating to the distributional consequences inhibited the formation of a cohesive coalition to support the antitrust agreement, the uncertainty relating to the winners and the losers of the agreement has prevented the formation of issue linkages. If states do not know in advance who will ultimately win and who will lose from the agreement, it is impossible for them to assess the extent and the direction of any transfer payments to address those unknown distributional effects.

In addition to showing how underlying distributional uncertainty can temper the usefulness of linkages, the failed antitrust negotiations highlight another challenge of the linkage strategy. Multi-issue negotiations are always more costly and cumbersome than single-issue negotiations. To devise linkages in the presence of such complexity is no small task.⁹⁷ States need more information to assess the costs and benefits of various agreements. Adding new issues to the negotiation increases the bureaucracy involved as

⁹⁴ Guzman, *supra* note 6.

⁹⁵ Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383, 418-22 (2007). Domestic corporations have difficulties in *ex ante* determining 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 a 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 which could be translated into a coherent state policy on the issue.

⁹⁶ *Id.*, at 542-43.

⁹⁷ Sebenius, *supra* note 23, at 305.

new government agencies are brought to the bargaining table.⁹⁸ Linkages are always counter-productive if the benefits generated by the linkage do not exceed the costs involved in bringing additional issues into the bargaining process.⁹⁹

Conventional political economy models often assume that negotiations do not have transaction costs. As long as losing parties can at least theoretically be compensated with the help of transfer payments, efficient agreements are expected to materialize. Linkages should therefore only facilitate negotiations. However, when transaction costs involved in issue linkages are introduced in the analysis, the contracting costs involved in negotiating multi-issue deals rise and prospect of reaching an agreement diminish.

At worst, linkages can transform a simple bargaining situation into a complex, unsolvable one.¹⁰⁰ While linkages are able to foster agreements which would otherwise fail due to distributional divisions, linkages can have the opposite effect of collapsing the entire negotiation, in particular when non-negotiable issues are brought to the negotiation table.¹⁰¹ New issues mobilize novel domestic interest groups with additional demands that can complicate negotiations. For instance, 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 interest groups in State C are also affected by *y* and 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 transfer payments required for their joint solution, inevitably rendering the negotiations more difficult to manage.

Linking antitrust negotiations to other “Singapore issues,” including trade facilitation, investment protection, and transparency in government procurement in addition to antitrust policy, contributed to the failure to launch negotiations on antitrust.¹⁰² In addition to antitrust, developing countries objected an agreement on investment and government procurement. However, developed countries, in particular the EU, refused to unpack the single undertaking and separate the Singapore Issues from one another, misestimating their ability to get developing countries on board to all the areas of contention.¹⁰³ While antitrust negotiations had little chance of being saved at this point, the EU’s insistence in the package deal sealed the inevitable collapse of the negotiations.

⁹⁸ T. Clifton Morgan, *Issue Linkages in International Crisis Bargaining*, 34 AM. J. POL. SCI. 311, 320 (1990).

⁹⁹ *Id.* at 321.

¹⁰⁰ Sebenius, *supra* note 23. Davis, *supra* note 24.

¹⁰¹ Davis, *supra* note 24, at 11. 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 individual negotiation the WTO, it is difficult to credibly convince the states that conditionality holds in subsequent rounds. *See also* James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 INT’L ORG. 387 (1994).

¹⁰² *See, e.g.*, Taimoon Stewart, *The Fate of Competition Policy in Cancun: Politics or Substance?*, 31 LEGAL ISSUES OF ECON. INTEGRATION 7, 7-11 (2004).

¹⁰³ *Id.*

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

Both antitrust and TRIPs negotiations were marked by deep distributional conflicts. While linkages were successfully employed 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, less controversial issues that do not present distributional conflicts are more likely to be resolved as a single issue in a bilateral context.¹⁰⁴

Linkages are not, however, always available to help states forge 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 an agreement is expected to generate. Thus, the WTO can only forge 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, sheer complexity introduced by issue linkages can sometimes offset the potential benefits of issue linkages. Multiple issues can obstruct progress on issues that could have been solved in isolation. At worst, too broad of a negotiation agenda can bring down an entire round, transforming a prospect of a grand bargain into a grand failure.¹⁰⁵

D. Enforcement Explanation: How Likely is Opportunistic Behavior?

The likelihood of opportunistic behavior is another key variable distinguishing international IP cooperation from international antitrust cooperation. When negotiating the TRIPs Agreement, the WTO dispute settlement mechanism was seen as crucial in ensuring that no state would defect from their international commitments.¹⁰⁶ In contrast, I have elsewhere argued that the likelihood of cheating from international antitrust rules would be low.¹⁰⁷ Consequently, the WTO's enforcement powers were more germane in the context of international IP protection than they were 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.

¹⁰⁴ Davis, *supra* note 24, at 9.

¹⁰⁵ Sebenius, *supra* note 23, at 298.

¹⁰⁶ Sylvia Ostry, Intellectual Property Protection in the WTO: Major issues in the Millennium Round, Address at the Fraser Institute Conference in Santiago, Chile 2 (Apr. 19, 1999).

¹⁰⁷ See Piilola, *supra* note 3.

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

The WTO, and in particular its DSM, constitutes the most attractive venue for cooperation in PD situations when states are concerned about the prospect of cheating once the agreement is concluded. In a PD 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.

Many international trade issues can be modeled as PDs.¹⁰⁸ 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 all states would raise their tariffs, rendering 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, the World Intellectual Property Organization ("WIPO") provided a forum for negotiating international IPR rules.¹⁰⁹ However, the WIPO failed to provide adequately strong substantive rules or a mechanism for their enforcement,¹¹⁰ which was the primary reason developed countries sought to move much of the international IP rulemaking from the WIPO to the WTO framework.

Had states not linked the TRIPs Agreement to the other items on the trade agenda, the negotiations over IP would most likely have resembled a one-sided PD 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 cheat from their IP commitments, the developed countries would have only defected defensively by resorting to trade sanctions in response to developing countries' defection.¹¹¹ However, when the TRIPs negotiations were explicitly linked to negotiations on agricultural trade and trade in textiles, the one-sided PD was converted to a more classical symmetrical PD 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

¹⁰⁸ See, e.g., JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* 263 (1994).

¹⁰⁹ WIPO is a Specialized Agency of the United Nations.

¹¹⁰ Frederick M Abbott, *The Future of Multilateral Trading System in the Context of TRIPs*, 20 *HASTINGS INT'L & COMP. L. REV.* 661, 664 (1996).

¹¹¹ The developing countries opposed enhanced IP protection and would have had the incentive to defect from agreement if it was concluded. The developed countries, in contrast, had nothing to gain by defecting from the agreement themselves. Thus, while in a conventional PD both players would gain the highest individual payoff by defecting as long as the other player cooperated, in a one-sided PD developed countries' best strategy is for both players to cooperate. Still, developing countries incentive to defect alone made DSM crucial, adding pressure to reach an agreement in the WTO framework.

agricultural subsidies. Similarly, developing countries would have obtained the highest individual payoff by defecting from their IP commitments. Thus, from the outset, the pursuit of the TRIPs Agreement within the WTO was motivated by the states' ability to resort to the DSM to contain the other states' incentives to defect from the agreement.

When opportunistic behavior is likely and the availability of sanctions therefore 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 have two downsides for the great powers: they were forced to offer transfer payments to the developing countries in return for extracting IPR commitments from them and, by subjecting themselves to the WTO's DSM, the great powers curtailed their ability to unilaterally retaliate.

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. Similarly, the United States could have threatened to further withdraw developing countries' GSP privileges, which grants developing countries lower tariff rates if they import into developed countries.

However, it is unclear whether unilateral threats (with the possibility of unilateral sanctions) are a better strategy for the United States or the EU than linkages backed by the WTO's DSM. While there are examples of states offering higher levels of IP protection under unilateral great power pressure, such threats and sanctions have not been that effective overall. Developing countries' record of complying with threats in the IP domain is mixed, reducing the United States and 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.¹¹²

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

¹¹² 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). *See also* Steinberg, *supra* note 7, at 342. 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 great powers that can use the information to formulate proposals that reflect the interests of powerful states yet are acceptable by all members and, in the end, considered legitimate by them.

characteristics of a PD.¹¹³ Andrew Guzman, for instance, argues that in setting their domestic antitrust laws, states “externalize the costs and internalize the benefits of the exercise of market power across borders” to maximize their national interest.¹¹⁴ Guzman expects net-importer countries to employ stricter-than-optimal antitrust standards, since they decline to internalize costs that are borne by foreign producers that the strict antitrust laws target.¹¹⁵ Conversely, net-exporter countries enact laxer-than-optimal antitrust laws, since the costs of the lax enforcement fall on foreign consumers. The alleged existence of this type of “trade flow bias” leads Guzman to conclude that a WTO antitrust agreement is needed to overcome these sub-optimal domestic antitrust laws. Guzman also maintains that domestic antitrust enforcement is characterized by exemptions for domestic corporations (statutory bias) and discriminatory enforcement practices vis-à-vis foreign corporations (enforcement bias).

I have elsewhere developed a detailed argument for why antitrust enforcement is not driven by trade flow bias, statutory bias, or a notable enforcement bias, and for why states are therefore less likely to behave opportunistically when enforcing their domestic antitrust laws.¹¹⁶ 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 an exclusive jurisdiction to in antitrust cases.¹¹⁷ Regardless of the nationality or location of a corporation, every state with an antitrust law is entitled to establish antitrust jurisdiction on a corporation, as long as the anti-competitive conduct of that corporation has an “effect” in the domestic market of that particular country.¹¹⁸ Thus, a net-exporter’s ability to strategically enact overly lax antitrust laws that give a free pass on its exporters is compromised by the concurrent jurisdiction of the importing country.

¹¹³ While not applying game theoretic models in constructing his argument, Guzman implies that international antitrust cooperation would resemble a PD. *See* Guzman, *supra* note 38, at 101. *See also* Wolfgang Kerber & Oliver Budzinski, *Competition of Competition Laws: Mission Impossible?*, in *COMPETITION LAWS IN CONFLICT*, *supra* note 38, at 31,44 (making a brief reference to the PD when discussing the current decentralized antitrust regime); Oliver Budzinski, *Toward an International Governance of Transborder Mergers? Competing Networks and Institutions between Centralism 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).

¹¹⁴ Andrew T. Guzman, *supra* note 38, at 101.

¹¹⁵ “Optimal” antitrust laws would be globally efficient as no state would engage in over- or under-enforcement but would choose same antitrust laws as they would absent trade flows.

¹¹⁶ Bradford, *supra* note 95, at 389-97.

¹¹⁷ Antitrust can in this respect be contrasted with *e.g.*, corporate law, where the internal affairs of the corporation are regulated exclusively by the laws of the state where the corporation was established. This creates a very different dynamic and incentives for regulatory competition.

¹¹⁸ 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 market. *See, e.g., United States v. Alcoa*, 148 F.2d 416, 443-44 (2d Cir. 1945); T-102/96, *Gencor Ltd v Commission*, 25 March 1999, [1999] ECR II-0753, ¶¶ 89-92 (CFI). However, also 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 jurisdiction. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 415 reporters’ note 9 (1987).

The arguments about alleged statutory bias seem more plausible, but a closer examination of domestic antitrust statutes shows this type of bias to be rare in practice. Domestic antitrust statutes do not explicitly favor local firms over foreign ones. However, several jurisdictions do exempt export cartels¹¹⁹ from their antitrust laws, which could amount to an example of a statutory bias. The opportunistic antitrust policies embedded in the export cartel exemptions are nonetheless mitigated, since the importing country can always target the export cartel under its own antitrust laws if competition on the importing country's domestic market is adversely affected.¹²⁰ 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.¹²¹ Consequently, the PD incentives associated with export cartels hinder international antitrust cooperation marginally, at best.

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 in 2001 prohibited a proposed acquisition involving two U.S.-based companies, Honeywell and General Electric, after the U.S. authorities had already approved the acquisition. The EU's decision added force to accusations that the EU antitrust enforcement protected European interests and was hostile toward U.S. corporations.¹²² 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 of the merger notifications the EU Commission received in 1995-2005 involved at least one U.S.-based company, only twelve percent of the prohibited mergers involved a U.S. corporation. 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 initiated phase II investigations ("second request") involved a U.S. corporation, and twenty-seven percent of the conditional clearances were granted in cases that involved a U.S. company. These numbers suggest that any enforcement bias would be limited to a small number of individual cases, or that enforcement bias may not even exist.

¹¹⁹ 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 to a normal cartel is that the collusive behavior is restricted to goods or services that are exported to foreign markets.

¹²⁰ EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 1101 (Foundation 2007). This argument, however, assumes that the importing country is vested with adequate enforcement capacity and can hence be problematic if the prosecution of the export cartel requires evidence that is located in the exporting jurisdiction or if the importing jurisdiction cannot impose effective remedies.

¹²¹ See Margaret C. Levenstein & Valerie Y. Suslow, *The Changing International Status of Export Cartel Exemptions*, 20 AM. U. INT'L L. REV. 785, 793,796 (2005). Levenstein and Suslow note that over the last three decades, the number of export cartels exemptions have declined from 180 to zero in Japan, from sixty-nine to four in Australia, from 227 to zero in Germany. The only country that continues to provide a large number of exemptions is the United States.

¹²² See 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://www.usdoj.gov/atr/public/press_releases/2001/8140.htm (last visited Mar. 2, 2010); Commission decision of 3 July 2001, *General Electric/Honeywell*, Case COMP/M.2220.

In the absence of strong incentives for opportunistic behavior, I have argued that international antitrust cooperation has been obstructed by the existence of a distributional problem as opposed to a defection problem. The distributional problem arises when the costs and the benefits of an international antitrust agreement would be unevenly distributed among states. In this coordination game (“CG”) setting states expect to benefit from a coordinated global antitrust regime but fail to agree on the type of regime that ought to be adopted. 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 countries 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 lead to transaction cost savings, diminish delays, and improve legal certainty, since corporations would not face multiple jurisdictions with different substantive and procedural antitrust regimes. Thus, international coordination is assumed to generate aggregate and individual benefits for both the United States and the EU. The two antitrust powers, however, disagree as to the precise content and the form of the international agreement.¹²³ While the United States would like all countries to converge to the U.S. model of antitrust laws, the EU prefers convergence to its own antitrust laws. This is the distributional problem that undermines their ability to pursue coordination despite the gains coordination is expected to produce. Thus, international antitrust cooperation resembles a coordination game with distributional consequences (“CG”) rather than a PD.¹²⁴

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 MNCs and the need to shield their local corporations from international competition.¹²⁵ Thus, the coordination game between

¹²³ The EU has been the strongest advocate of WTO antitrust rules whereas the United States has endorsed voluntary antitrust cooperation within the ICN. See Mario Monti, A Global Competition Policy?, Address at the European Competition Day Conference (Sept. 17, 2002), available at http://ec.europa.eu/comm/competition/speeches/index_speeches_by_the_commissioner.html (last visited Mar. 2, 2010); Working Group on the Interaction between Trade and Competition Policy, *Communication from the European Community and Its Member States*, WTO Doc. W/WGTCP/W/115 (May 25, 1999); See ICPAC Report, *supra* note 56, at 33; William J. Kolasky, Global Competition: Prospects for Convergence and Cooperation, Address at the American Bar Association Fall Forum (Nov. 7, 2002), available at <http://www.usdoj.gov/atr/public/speeches/200446.htm> (last visited Mar. 2, 2010).

¹²⁴ Bradford, *supra* note 95, at 514. (discussing the likelihood of discriminatory decisions by domestic antitrust authorities and noting that the inquiry into the EU Commission’s merger control practices does not support the claim that there would be a general bias against foreign corporations).

¹²⁵ 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., Palgrave Macmillan 2006); Ajit Singh & Rahule Dhumale, *Competition Policy, Development, and Developing Countries*, in *WHAT GLOBAL*

developed countries and developing countries could be formalized similarly to the game between the United States and the EU, likewise resulting in two possible equilibria.

Unlike in a PD situation, where a state can obtain a higher individual payoff by deviating from agreed commitments, an agreement that has been attained in a CG setting is largely self-enforcing, since neither party has an incentive to renege on its commitments. Once the agreement is reached, sustaining cooperation in a CG is easier than in a PD 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 CG rather than a PD, the WTO's DSM is expected to be of limited relevance for antitrust negotiations. Thus, it is not surprising that states let the WTO antitrust negotiations fail and focused their efforts to pursue non-binding antitrust cooperation outside of the WTO framework instead.

Two caveats are in order. First, while deliberate cheating is likely rare, developing countries' capacity constraints, including a lack of enforcement institutions and antitrust expertise, might lead to an occasional *unintentional* defection from international antitrust commitments. However, to the extent that states' defection can be traced to capacity constraints rather than to 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.¹²⁶ Second, occasional *intentional* defection can occur in CG if a state wants to shift the point of coordination to its preferred equilibrium.¹²⁷ However, this type of defection from the established equilibrium can be distinguished from cheating in a PD situation for the defecting state in a CG setting would need to make the defection public in order to force other states 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 opportunistic behavior is expected to be limited, states consider non-binding agreements adequate, especially since such agreements are often faster and cheaper to negotiate.

3. *Concluding Remarks on the Enforcement Explanation*

ECONOMIC CRISIS? 122, 127 (Philip Arestis, Michelle Baddeley & John McCombie eds., Palgrave Macmillan 2001).

¹²⁶ Abraham Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 197-204 (1993). The Chayes & Chayes' 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.

¹²⁷ 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 move to the new equilibrium).

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 PD. Absent the ability to exchange credible and enforceable commitments, states would pursue sub-optimal policies in a PD 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 social welfare. In contrast, the WTO does not add similar value to the pursuit of antitrust convergence in a CG setting where states always have the incentive to pursue a strategy that maximizes social welfare. Either focal point in the CG constitutes a Pareto-optimal outcome. While the WTO might help states choose between the two focal points, the greatest institutional advantage of the WTO—its ability to enforce compliance—is not called for by the strategic structure of the CG.

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

As shown above, the benefits of a TRIPs Agreement were perceived as extremely high for the developed countries that were 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 TRIPs negotiations, stakes were high and alternatives few. It is virtually impossible for states to rely on their domestic IP laws to curtail abuses of IPRs that take place abroad. Multilateral solutions were therefore indispensable. At the same time, existing multilateral venues prior to the TRIPs had proved inadequate. Indeed, it was their dissatisfaction with WIPO that led powerful states and their domestic interest groups to demand for an alternative regime. Most importantly, the WIPO lacked the tools for effective enforcement, which increased the relative attractiveness of negotiating the TRIPs Agreement in the WTO.

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 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.¹²⁸ Her model assumes that there is a “dominant center,” which is often a great power that is a primary regulator in the field. 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 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 domestic regulatory framework with little, if any, institutionalized pressure. A chosen strategy hinges on the other countries’ incentives to emulate their regulation; with a high incentive to emulate, institutions are not necessary whereas 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 high IP protection would impose costs and offer no benefits to them. Efforts to achieve IP converge therefore forms a prime example of regulatory convergence that is driven through 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 they did in the case of IP cooperation. I have elsewhere argued that one of the reasons antitrust negotiations have failed in the WTO is that the agreement was perceived to generate low net benefits.¹²⁹ Compared to the TRIPs Agreement, which was considered a high-stakes agreement for its proponents, the enthusiasm for the antitrust agreement was tempered by the agreement’s low (and in any event more uncertain) expected benefits relative to the costs of negotiating the agreement in the WTO.

A WTO agreement is more likely if it provides states with large net 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 generally presumed. Second, adjustment costs under a binding international agreement are likely to be high, in particular when compared to the uncertain benefits stemming from cooperation. Third, the opportunity costs of non-cooperation are relatively low, particularly for the key states with strong, existing 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

¹²⁸ Beth Simmons, *The International Politics of Harmonization: the Case of Capital Market Regulation*, 55 INT’L ORG 589-620 (2001).

¹²⁹ See discussion on a deadlock as a reason for the collapse of negotiations in Bradford, *supra* note 95.

significant transaction-cost savings. These presumptions are intuitively appealing but have not been demonstrated empirically.¹³⁰ While it is difficult, if not impossible, to quantify the inefficiencies embedded in the current regime, some recent research suggests that at least some costs in this regard might 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.¹³¹ Another study suggests that anti-competitive practices may not constitute significant strategic non-tariff barriers as commonly believed.¹³² And while few high profile cases, including the prohibited acquisition involving *GE* and *Honeywell*¹³³ or the contested merger between *Boeing* and *McDonnell-Douglas*,¹³⁴ have heightened fears of inconsistent decisions by different antitrust authorities, enforcement conflicts appear rare in practice.¹³⁵ Finally, the benefits of the WTO antitrust agreement are further diminished if national bias in domestic antitrust enforcement is likely to be less prevalent than often presumed, as claimed above in Part D.¹³⁶

¹³⁰ SIMON J. EVENETT & ALEXANDER HIJZEN, CONFORMITY WITH INTERNATIONAL RECOMMENDATIONS ON MERGER REVIEWS: AN ECONOMIC PERSPECTIVE ON “SOFT LAW” 25. (University of Nottingham Research Paper No. 2006/04,2006) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893034 (last visited Mar. 2, 2010).

¹³¹ See *Multi-Jurisdictional Merger Survey*, *supra* note 79. 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 on average seven months to complete.” While the survey confirmed that the multiple merger review process imposes additional transaction costs on merging parties, those costs do not seem significant when compared to the overall value of the transaction. In fact, the average (external) transaction costs attributable to the merger review were found to constitute merely 0.11 percent of the total costs of the deal. Transaction costs of this magnitude are unlikely to have a significant impact on the decision whether to proceed with a transaction.

¹³² See 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 41–50 (Philippa Dee & Michael Ferrantino eds., World Scientific 2005). (discussing the data collected by the U.S. International Trade Commission on the relative harmfulness of various NTBs that are expected to impede the free flow of goods and services. The data 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).

¹³³ See Justice Department Requires Divestitures in Merger Between General Electric and Honeywell, *supra* note 55.

¹³⁴ See Commission Decision 97/816 of 30 July 1997, *Boeing/McDonnell-Douglas*, Case No. IV/M.877, 1997 O.J. (L 336) 16; *Boeing Co., et al.*, Joint Statement Closing Investigation of the Proposed Merger, 5 Trade Reg. Rep. (CCH) ¶ 24,295 (July 9, 1997).

¹³⁵ The *GE/Honeywell* decision remains the only merger case in which the U.S. 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. (See Commission Decision of 2 October 1991, *Aerospatiale-Alenia/de Havilland*, Case No. IV/M.053. 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 exiting prospect—no matter how unlikely in practice—that any given merger indeed has a higher risk of being prohibited as a result of multiple regulatory reviews.

¹³⁶ Bradford, *supra* note 95, at 514. (referring to statistics on the EU merger control practices and arguing that they do not show national bias against U.S. corporations).

Negotiating and implementing a binding WTO antitrust agreement would also be costly, reducing the net benefits from its success. Contracting costs involved in the pursuit of a binding agreement under the auspices of the WTO would be significant due to numerous parties, multiple negotiation rounds and extensive multi-issue bargaining.¹³⁷ In addition, compliance costs associated with 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. However, in the case of TRIPs, the high costs were more than offset by yet much higher benefits for the key parties to the negotiations.

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, 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 required to cover the range of issues and parties that a potential WTO agreement could embrace would be high. These multiple non-binding instruments among different parties, taken together, could be costlier 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' *ex ante* risk-adjusted perception of the costs of a multi-issue negotiations is significantly higher. This is true in particular given the greater likelihood of failure in such negotiations and 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.¹³⁸ Both the United States and the EU have resorted to extraterritorial enforcement on several occasions.¹³⁹ 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 a significant proliferation of antitrust

¹³⁷ Abbott & Snidal, *supra* note 31, at 434. See also discussion *infra* at III.A.1.

¹³⁸ See, e.g., *Hartford Fire Insurance v. California*, 509 U.S. 764, 796 (1993); Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlstrom Osakeyhtiö and others v. Commission* (“Wood Pulp”), Sept 27, 1988, [1988] ECR 5193 (ECJ).

¹³⁹ See, e.g., *Hartford Fire Insurance v. California*, 509 U.S. 764, 796 (1993); *Wood Pulp*, [1988] ECR at ###. Obviously, the status quo option entails some transaction costs (including the possibility of enforcement conflicts akin to the *GE/Honeywell* case).

regimes around the world. 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 negative externalities generated by decentralized antitrust regimes is uncertain and in any event likely to be lower than they were 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 country 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. In some areas of antitrust, where there seem to be more obvious negative externalities, states complement market-based harmonization with “softer” institutional assistance such as developing non-binding guidelines and best practices within institutions like the ICN. 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 be expected to 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, and preferred other paths when seeking international antitrust convergence.

CONCLUSION

This Article has sought 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 more nuanced understanding on the limits of the WTO’s expansionism 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 the antitrust negotiations reveals that the two areas of cooperation have little in common.

The strategic situations characterizing international antitrust and IP cooperation differ in several ways. First, the general preconditions that underlie all successful efforts to cooperate internationally were met in the case of the TRIPs negotiations, but not in the case of antitrust negotiations. While the great powers unanimously supported the TRIPs Agreement, comparable consensus was missing 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 could be captured by major trading powers, the likelihood of reaching an antitrust agreement was dim.

In addition, the WTO's institutional advantages were directly relevant for the TRIPs Agreement, but did little to solve the problems underlying international antitrust cooperation. In particular, the unequal distributional consequences of the TRIPs Agreement were solvable through issue linkages. However, similar linkages could not solve the antitrust negotiations, since there was *ex ante* uncertainty regarding the winners and losers under the prospective antitrust agreement. In addition, the risk of opportunism and the consequent need for an enforcement mechanism was prevalent in the case of TRIPs, but trivial in the case of antitrust. This rendered the WTO's dispute settlement mechanism germane for the TRIPs negotiations but only marginally useful for 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. The dynamics underlying antitrust cooperation have been presumed to be most similar to those underlying IP cooperation, making antitrust the most obvious next issue that the WTO can incorporate within 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 environment would be required before one can assume that other issues can be incorporated into the WTO following the example set by the TRIPs Agreement. Rather than providing a template for future negotiations, the TRIPs Agreement may be more appropriately viewed as a product of an idiosyncratic set of conditions which 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 cooperation in the WTO. 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 growing into an increasingly complex one, undermining the conditions which made WTO agreements feasible in the past. This applies across the key variables to WTO's success identified above.

For instance, great power consensus is becoming increasingly difficult to establish and sustain today. The formerly tight U.S.-EU alliance has gradually weakened following the end of the Cold War.¹⁴⁰ This has had an impact on all areas of cooperation, including trade.¹⁴¹ The United States and EU's capacity to exercise leadership has also declined due to a growing domestic resistance to the WTO's agenda in both countries. Consequently, the United States and EU's increasingly limited abilities to secure domestic ratification

¹⁴⁰ Daniel K. Tarullo, *The End of the Big Trade Deal*, 46 INT'L ECON. 46, 48 (2006).

¹⁴¹ *Id.*

for WTO agreements have forced them to retract from their active roles as drivers of WTO cooperation.¹⁴²

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 possibly not sufficient, precondition for a WTO agreement. Instead, a consensus must be sought among a greater number of increasingly heterogeneous states as the emerging trade powers weigh in more forcefully when setting the negotiation agenda and when 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 genuine leadership role in moving the WTO negotiations forward.¹⁴³

Future negotiations within the WTO may face an additional challenge if powerful interest groups benefiting 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 that the WTO is 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. In the past seven years while the Doha negotiations have been hobbling along fruitlessly, bilateral and regional trade agreements have continued to proliferate.¹⁴⁴ 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 for United States and EU multinationals' vanishing support for the WTO process is that these companies have already managed to reap the most important benefits of trade liberalization. The past success of the WTO has delivered essentially all the market opening they need.¹⁴⁵ These stakeholders used to be 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 inroads the WTO has made in intervening with domestic regulatory policies such as IP protection and health measures.¹⁴⁶

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Approximately two hundred bilateral and regional trade agreements have been negotiated since the conclusion of the Uruguay round.

¹⁴⁵ Tarullo, *supra* note 140, at 48.

¹⁴⁶ 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 TRIPs and Public Health was adopted. This presented an important setback for the TRIPs agenda earlier advanced by the great powers and the MNCs within those powers.

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

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 altogether vanish. However, a compelling argument can be made that cooperation dilemmas underlying international trade issues rarely resemble a PD today. For instance, it is no longer unambiguous whether imposing antidumping duties on Chinese products only hurts the Chinese and improves the United States’ terms of trade. 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,¹⁴⁷ 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 chain has changed many states’ and interest groups’ perception that opportunistic behavior and protectionism serves their interests.¹⁴⁸ It has also paved the way for unilateral trade liberalization, challenging the conventional assumption that international trade is always impeded by protectionist impulses and that such impulses need to be curtailed through hard law and threats of sanctions.

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 with satisfactory net gains for all parties. The Doha negotiation agenda is now stripped of much of its initial ambition since states have narrowed the agenda to save the failing round. Thus, where the net benefits available from a WTO round are perceived as inadequate, states are likely to abandon the WTO and pursue more substantial commitments with a smaller group of like-minded trading partners.

Where does this leave the prospect of cooperation within the WTO, going forward? One scenario on the future limits of the WTO 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 to agree upon among

¹⁴⁷ 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 between its subsidiaries.

¹⁴⁸ Joost Pauwelyn, *New Trade Policies for the 21st Century*, 11 J. INT’L ECON. L. 559, 562-63, 567-68 (2008).

distinctly heterogonous trade powers. This 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.¹⁴⁹ This scenario suggests that the WTO may well have met its limits and that we are unlikely to see new agreements incorporated within its framework.

Another scenario is that the gains available through bilateral and regional trade agreements do not make the WTO obsolete. Under this scenario, it is assumed that protectionism resurges and continues to span across global markets. New trade barriers are erected. Eliminating them creates losers and causes resistance, which can only be overcome through transfer payments that the WTO can facilitate. Opportunistic behavior continues to characterize many areas of cooperation. In these areas, the WTO is likely to remain as a useful forum in which to negotiate enforceable commitments among many states. In this respect, 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. However, if states continue to seek trade liberalization through the WTO, they need to carefully weigh the costs and the benefits of its current decision-making structures, including its insistence on the single undertaking and its requirement that all states need to sign onto all agreements.

Under either scenario, the WTO's recent inability in furthering 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. At best, the above discussion not only helps shed light to 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.

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¹⁴⁹ *Id.* at 565.

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