

# THE GLOBALIZATION OF HEALTH AND SAFETY STANDARDS:

## DELEGATION OF REGULATORY AUTHORITY IN THE SPS AGREEMENT OF THE 1994 AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

TIM BÜTHE\*

### I

#### INTRODUCTION: THE GLOBALIZATION OF HEALTH AND SAFETY STANDARDS

Previous research has shown that international organizations do not necessarily operate or act as intended by the states that created them.<sup>1</sup> Why then would states delegate regulatory authority to international organizations? I examine this question theoretically, drawing on principal–agent (P-A) theory and conceptualizing international delegation as a particular form of institutionalized cooperation. Explaining international delegation thus requires an analytically prior explanation of international cooperation. Empirically, I focus on the delegation of standards-setting authority in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), which is an integral part of the founding treaty of the World Trade Organization

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\* 2007–2009 Robert Wood Johnson Foundation Scholar in Health Policy Research, University of California Berkeley; Assistant Professor, Department of Political Science, Duke University. E-mail: [buthet@duke.edu](mailto:buthet@duke.edu).

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1. E.g., Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699 (1999). See also, e.g., MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* (2004); DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins et al. eds., 2006).

(WTO), negotiated during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).<sup>2</sup>

States should be particularly hesitant to delegate standards-setting in the realm of SPS standards since these standards are often the technical basis for politically sensitive health and (food and consumer) safety regulations. Indeed, setting sanitary standards to protect human and animal health from risks arising from additives, toxins, diseases, and disease-carrying organisms and setting phytosanitary standards to protect plants from similar risks used to be predominantly a domestic issue. In recent years, however, we have witnessed what one might call the globalization of SPS standards and standards-setting. SPS standards-setting today takes place, in large part, in three international organizations—the Codex Alimentarius Commission (CAC), the International Office of Epizootics (OIE), and the International Plant Protection Convention (IPPC)—which have a global membership of 171, 169, and 161 countries, respectively. This change has occurred mostly as a consequence of the SPS Agreement, which delegates standards-setting functions to these three international organizations.<sup>3</sup>

This delegation of regulatory authority is the focus of this article. Since readers may not be familiar with the SPS Agreement, Part II provides a sketch of the main provisions and significance of the Agreement and an account of how it came about in the context of the Uruguay Round negotiations of the GATT. This empirical sketch leads to two analytical questions: Why did the contracting parties of the GATT decide to cooperate on SPS standards? And why did they select delegation as the means to achieve this objective? Parts III and IV analyze these questions theoretically and empirically. I derive possible answers from a political-economy approach in the liberal tradition of International Relations theory, which emphasizes cost-benefit analyses, diversity of interests within states, and issue-specific bargaining power to explain cooperation.<sup>4</sup> Based on this logic, the decision whether to delegate

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2. See discussion *infra* Part II. The successive multilateral international trade agreements, collectively referred to as “the GATT,” were negotiated in a series of multiyear negotiations known as “rounds.” See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 73–74 (2d ed. 1997) (providing an overview of the eight GATT rounds concluded to date). The Uruguay Round was the eighth such round. The SPS Agreement was accompanied by the Agreement on Technical Barriers to Trade (TBT Agreement), which covers all non-SPS regulations, but the focus here is only on the SPS Agreement, since the two agreements were negotiated separately and in part involved different interests.

3. In addition, many developing countries started well prior to the Uruguay Round to adopt SPS standards that had been developed domestically by the United States and other large developed countries. However, that change occurred primarily as a consequence of the globalization of product markets and constituted itself “merely” the internationalization of a few countries’ domestic standards. See *generally* INTERNATIONALIZATION AND DOMESTIC POLITICS (Robert O. Keohane & Helen V. Milner eds., 1996) (addressing the distinction between internationalization and globalization).

4. See *generally* ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); HELEN V. MILNER, *RESISTING PROTECTIONISM: GLOBAL INDUSTRIES AND THE POLITICS OF INTERNATIONAL TRADE* (1988) [hereinafter *RESISTING PROTECTIONISM*]; Helen V. Milner, *International Theories of Cooperation Among Nations: Strengths and Weaknesses*, 44 *WORLD POL.* 466 (1992).

should be a function of the costs and benefits of delegation, which leads me to build on P-A theory to explain international delegation. In Part III.C, I derive alternative (not necessarily strictly competing) hypotheses from the Realist and constructivist traditions in International Relations theory.

Part IV analyzes cooperation and delegation empirically. The foremost objective of the SPS Agreement was the liberalization of agricultural trade, which was particularly contentious between the United States and the European Community (EC) and had been a key demand of developing countries for the Uruguay Round.<sup>5</sup> The empirical analysis therefore focuses on the United States, the EC, and developing countries. Broad-based agreement on the desirability of international cooperation allowed for an early decision in favor of harmonization and the presumption of GATT/WTO compliance for “international [SPS] standards.”<sup>6</sup> This decision, in favor of cooperation in general, is well explained by a rationalist political-economy account but also appears to have been facilitated by the widespread belief in the legitimacy of international harmonization. P-A theory then proves very useful for understanding government preferences as to whether to delegate regulatory functions to specialized international bodies outside of the GATT/WTO structure. In addition, normative constraints arising from prior commitments on the part of the EC—and the arguably misguided development discourse among developing countries—help explain the outcome.

This article makes three main contributions. First, P-A theory has recently become very popular in the analysis of world politics.<sup>7</sup> That literature has developed largely independently of the broader theoretical debates in International Relations and generally treats the analytical decision to draw on P-A theory as independent of the core assumptions of the major schools of thought in International Relations.<sup>8</sup> I seek to increase the usefulness of P-A theory for the study of international relations by situating it more explicitly in the literature on international cooperation and by showing deductively how P-A theories of delegation are related to the broader schools of thought in International Relations. I demonstrate that much of P-A theory rests on assumptions that are consistent with the liberal tradition in International

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5. I use the acronym EC throughout this article to refer to the European (Economic) Community, which remains a legally distinctive part of today's European Union (which itself did not yet exist during most of the Uruguay Round negotiations).

6. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter SPS Agreement].

7. E.g., Erica R. Gould, *Money Talks: Supplementary Financiers and International Monetary Fund Conditionality*, 57 INT'L ORG. 551 (2003); DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 1; Mark A. Pollack, *Delegation, Agency, and Agenda Setting in the European Community*, 51 INT'L ORG. 99 (1997); Mark A. Pollack, *Learning from the Americanists (Again): Theory and Method in the Study of Delegation*, 25 W. EUR. POL. 200 (2002); Jonas Tallberg, *Delegation to Supranational Institutions: Why, How, and With What Consequences?*, 25 W. EUR. POL. 23 (2002).

8. *But cf.* Daniel L. Nielson & Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reform*, 57 INT'L ORG. 241, 243–45 (2003).

Relations theory, which takes domestic politics seriously; but P-A is incompatible with core assumptions of some of the other major approaches. Second, I provide an empirical analysis of an important case of delegation of regulatory authority in the international political economy, based on recently released documents from the Uruguay Round negotiations and interviews with most of the key negotiators of the SPS Agreement. This case study shows the usefulness and some limitations of the P-A approach for understanding the international delegation of regulatory authority. Third, I seek to contribute substantively to the literature on nontariff barriers (NTBs), which by many estimates now exceed tariffs in importance as restrictions on international trade. The WTO SPS Agreement is one of the most ambitious attempts to deal with NTBs through international cooperation; yet no history or thorough analysis of the SPS negotiations has been written.<sup>9</sup> Although a comprehensive history of the SPS Agreement is beyond the scope of this article, I provide a first analysis of the negotiations that led to those elements of the Agreement that involve international delegation.

## II

### NATURE AND SIGNIFICANCE OF THE SPS AGREEMENT

#### A. Globalization of Standards and Standards-Setting as a Solution to the Problem of Nontariff Barriers

As tariff levels have dropped during the post-WWII period, NTBs have become the most important manmade impediments to international trade.<sup>10</sup> Many of these NTBs are created by domestic regulations; where this effect is intentional, they constitute “regulatory protectionism.”<sup>11</sup> Cross-national differences in sanitary and phytosanitary (SPS) standards are among the most prominent sources of such NTBs since these standards are at the heart of health and safety regulations.<sup>12</sup>

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9. See generally JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* (2d ed. 1999); THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (Terence P. Stewart ed., 1993). Such general histories of the GATT Uruguay Round negotiations, however, tend to treat the SPS negotiations only very briefly.

10. See, e.g., FAIR TRADE AND HARMONIZATION (Jagdish Bhagwati & Robert E. Hudec eds., 1996); JAGDISH BHAGWATI, *PROTECTIONISM* (1988); Edward D. Mansfield & Marc L. Busch, *The Political Economy of Nontariff Barriers: A Cross-National Analysis*, 49 INT'L ORG 723 (1995); Edward John Ray, *Changing Patterns of Protectionism: The Fall of Tariffs and the Rise in Non-Tariff Barriers*, 8 NW. J. INT'L L. & BUS. 285 (1987).

11. Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 1 (1999).

12. Most SPS standards are product standards, which specify, usually in rather technical terms, characteristics of a product, “such as its size, shape, design, functions and performance, or the way it is labeled or packaged before it is put on sale.” WTO TBT Agreement, Annex 1, art. 2. See also ROSS E. CHEIT, *SETTING SAFETY STANDARDS: REGULATION IN THE PUBLIC AND PRIVATE SECTORS* (1990) (analyzing general characteristics of safety standards and standards-setting in the U.S.). A standard may also specify certain aspects of the process by which a good is produced. Standards as such are not mandatory, though regulations often reference or incorporate standards and oblige producers to

Recognizing the increasing importance of standards and regulations as NTBs, governments started in the 1970s to discuss ways of minimizing their trade-impeding effects through the GATT. Reaching an international agreement on these issues, however, was not easy since most standards and regulations fulfill multiple purposes, including non-trade-related and economically beneficial ones.<sup>13</sup> Simply lowering or abolishing these NTBs—or replacing them with tariffs through “tariffication”—is therefore unlikely to be economically optimal, and it would almost certainly be bad public policy.<sup>14</sup>

The SPS Agreement is one of the most ambitious attempts to deal with NTBs that arise from cross-national differences in technical standards without fundamentally impeding the ability of governments to attain legitimate public-policy objectives, such as protection against diseases and pests. It came into force when the WTO succeeded the GATT. It constitutes an integral part of the 1994 treaty known as the “Uruguay Round Final Act” (of the GATT) or “Agreement Establishing the World Trade Organization” (WTO Treaty). The provisions of the Agreement are therefore binding on all Members of the WTO, and compliance is enforceable through the WTO dispute-settlement mechanism, giving it “hard law” characteristics.<sup>15</sup>

## B. Main Provisions of the SPS Agreement

The SPS Agreement consists of fourteen articles and three appendices. It specifies “rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade.”<sup>16</sup> Article 2 affirms the right of member states of the

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comply. In addition, standards may elicit compliance through various market and non-market incentives, which are beyond the scope of this article. *See, e.g.*, TIM BÜTHE & JAN MARTIN WITTE, *PRODUCT STANDARDS IN TRANSATLANTIC TRADE AND INVESTMENT: DOMESTIC AND INTERNATIONAL PRACTICES AND INSTITUTIONS* (2004); Kelly Kollman & Aseem Prakash, *Green By Choice? Cross-National Variations in Firms’ Responses to EMS-Based Environmental Regimes*, 53 *WORLD POL.* 399 (2001). The political importance of food-safety and health standards is only beginning to be widely recognized. *See, e.g.*, Alan Beattie, *Food Safety Clash Gives Taste of Trade Battles Ahead: Non-Tariff Barriers, Including Product Standards, Are Frequently Used to Regulate Global Commerce*, *FIN. TIMES (U.S. EDITION)*, Aug. 1, 2007, at 2.

13. Standards are adopted, for instance, to ensure interoperability between products (such as computers and IT peripherals), to increase workplace safety or consumer protection, to protect the environment, or to provide means for quantitative assessment and comparison. *See* LAL C. VERMAN, *STANDARDIZATION: A NEW DISCIPLINE* (1973); DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* (1995); Joseph Farrell & Garth Saloner, *Competition, Compatibility and Standards: The Economics of Horses, Penguins and Lemmings*, in *PRODUCT STANDARDIZATION AND COMPETITIVE STRATEGY* 1–21 (H. Landis Gabel ed., 1987); Hendrik Spruyt, *The Supply and Demand of Governance in Standard-Setting: Insights from the Past*, 8 *J. EUR. PUB. POL’Y* 371 (2001).

14. “Tariffication” refers to calculating the import-reducing effect of a non-tariff barrier and then replacing that barrier with a tariff that would result in an import reduction of equal magnitude. Trade negotiations can then focus on tariff levels as the sole barrier to trade. The practice was a prominent part of the Tokyo Round of the GATT and other trade negotiations. JACKSON, *supra* note 2, at 154.

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

16. SPS Agreement.

WTO to enact SPS measures “for the protection of human, animal or plant life or health” but circumscribes that right by requiring that such measures not be inconsistent with the provisions in the Agreement.<sup>17</sup> It requires that such measures be based on “scientific principles,” forbids the use of SPS measures as “disguised restrictions” on international trade, and extends the principle of most-favored-nation (MFN) treatment to SPS measures provided that “identical or similar conditions prevail.”<sup>18</sup> It also establishes that SPS measures that conform to the provisions of the Agreement will be deemed enacted in accordance with Article XX(b) of the GATT 1994 treaty.<sup>19</sup>

Article 3 provides guidelines for the international harmonization of SPS measures. It calls on Members to base their SPS measures on “international standards, guidelines or recommendation, where they exist” and specifically establishes that *SPS measures “conform[ing] to” such international standards will be presumed to be consistent with the implementing country’s obligations under GATT 1994.*<sup>20</sup> That is, they are safe from a challenge under the new GATT/WTO dispute-settlement mechanism.<sup>21</sup> At the same time, the article allows member states to seek higher levels of SPS protection than existing international standards provide, but any SPS measure that diverges from international standards to achieve those higher levels of SPS protection must be based on scientific principles and must not be maintained without scientific evidence.<sup>22</sup> The Agreement also obliges Members to use “risk assessment techniques developed by the relevant international organizations” and to provide, upon request, an explanation for any measure that is not based on international standards.<sup>23</sup>

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17. SPS Agreement art. 2.

18. *Id.*; see also Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, in *INTERNATIONAL REGIMES* 273–314, esp. at 278 et seq. (Stephen D. Krasner ed., 1983) (discussing national treatment and the MFN).

19. SPS Agreement art. 2. “GATT 1994” is the first part of Annex 1 to the WTO Treaty, which revises the provisions of the original 1947 General Agreement on Tariffs and Trade. Its Article XX specifies permissible restrictions to free trade. See *infra* note 37 and accompanying text.

20. SPS Agreement art. 3.2 (emphasis added).

21. Article 3 also calls on all Members to participate in the standardization activities of the relevant international SDOs.

22. SPS Agreement art. 5.

23. SPS Agreement art. 5.1, 5.8. The remaining articles of the SPS Agreement allow for adaptation of trade-related SPS measures to the SPS characteristics of the geographic area from which the product originates or for which it is destined (art. 6); oblige Members to notify changes in SPS measures via the WTO if the new or changed measure diverges from international standards and otherwise via a single national “enquiry point,” which also must provide information about all existing SPS measures (art. 7, Annex B). In addition, Article 4 extends the principle of mutual recognition to SPS standards: Members must accept SPS measures (and certifications based on such measures) even if they differ from their own, as long as they provide for the same level of SPS protection. The Agreement also makes provisions for control, inspection, and approval procedures, which allow for review of, but do not render void, preexisting regulations not currently based on either international standards or scientific risk assessments (art. 8, Annex C). It calls on Members to provide technical assistance to each other and especially to developing countries, who may be given specific exceptions or longer transition periods to comply (art. 9, 14), and sets up a Committee on Sanitary and Phytosanitary Measures, comprised of the member states with a permanent staff from the WTO secretariat, to which the

Crucially, if regulations are not based on international standards and if they restrict trade, they are open to challenge through the WTO dispute-settlement mechanism.<sup>24</sup> The burden of proof then rests with the country imposing the restriction: it must provide scientific evidence that it was necessary to impose standards that diverge from the international ones in order to achieve the desired level of SPS protection. Moreover, documents from the negotiations of the SPS Agreement show clearly that the negotiators were fully aware of the implications of the agreement for the burden of proof in the case of disputes.<sup>25</sup> In short, the rights and obligations created by the SPS Agreement turn in large part on what counts as an “international [SPS] standard.”

This is where delegation comes into play. The SPS Agreement does not just abstractly refer to international standards. Instead, it specifically identifies three organizations as sources of international SPS standards for purposes of the Agreement: the Codex Alimentarius Commission (CAC or simply “Codex”) for standards related to food safety; the International Office of Epizootics (OIE, now the World Organization for Animal Health) for standards related to animal health and zoonoses; and the International Plant Protection Convention (IPPC, and the organizations operating within that framework) for standards related to plant health.<sup>26</sup> Documents from the negotiations show that the references to the CAC, OIE, and IPPC were clearly understood at the time as acts of delegation. The provisions do not just retrospectively endorse standards already developed by these organizations, but they delegate ongoing governance functions for the international trading system in that any SPS standard adopted by these organizations in their respective realms in the future would be automatically recognized as an international standard for purposes of the SPS Agreement.<sup>27</sup> This is a case of delegation of regulatory authority from sovereign states to international or global organizations in that the SPS

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Agreement delegates monitoring functions (art. 12, especially 12.4). It is authorized to re-delegate some of the monitoring tasks to “relevant international organizations” (art. 12.5).

24. The WTO dispute-settlement mechanism provides for the establishment of case-specific dispute panels to settle quarrels about compliance with WTO provisions and allows for the appeal of dispute-panel decisions to the WTO “Appellate Body” for a final, binding ruling (technically only a “recommendations” to the collectivity of the WTO Members, sitting as the “Dispute Settlement Body,” but unlike under GATT, these recommendations become binding unless overturned *unanimously* by the Members). *See, e.g.*, JACKSON, *supra* note 2; Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate?: Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 LAW & CONTEMP. PROBS. *passim* (Winter 2008).

25. *See, e.g.*, GATT Secretariat, *Negotiating Group on Agriculture*, MTN.GNG/NG5/W/131, at 8f (Dec. 6, 1989); GATT Secretariat, *Summary of the Main Points Raised at the Fifth Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers*, MTN.GNG/NG5/WGSP/W/13, at 3 (Mar. 19, 1990); GATT Secretariat, *Summary of the Main Points Raised at the Sixth Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers*, MTN.GNG/NG5/WGSP/W/18 (May 4, 1990); GATT Secretariat, *Summary of the Main Points Raised at the Seventh Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers*, MTN.GNG/NG5/WGSP/W/22 (May 31, 1990).

26. SPS Agreement Annex A.3.

27. Nothing keeps the member states from affirmatively taking action against a future standard by agreeing on an amendment to the SPS Agreement, but this would require negotiated agreement to deviate from the new status quo created by the SPS Agreement.

Agreement delegates to these organizations the authority to interpret existing obligations and to specify rules for the implementation of those obligations.<sup>28</sup>

Delegation to these three organizations as the relevant standards-developing organizations (SDOs) is non-exclusive insofar as most references to them refer to “international organizations including” or “in particular” or “especially.”<sup>29</sup> However, Annex A, Article 3 explicitly recognizes only these three SDOs as the international standards-setters for food safety, animal health and zoonoses, and plant health standards, respectively. To be sure, Annex A, Article 3(d) allows for the possibility that, “for matters not covered by the above organizations,”<sup>30</sup> standards “promulgated by other relevant international organizations open for membership to all Members” might be recognized explicitly as “international standards” for the purposes of the SPS Agreement.<sup>31</sup> But the power to raise other organizations to equal status with the OIE, CAC, and IPPC was delegated to the new WTO Committee on SPS Measures (created by Article 12 of the SPS Agreement), which has never even yet received a proposal to do so.<sup>32</sup>

In sum, the SPS Agreement obliges governments to use *international* standards (and risk- and compliance-assessment procedures) as the technical basis for health and safety regulations, whenever such standards are available, subject to some specified exceptions. And it defines “international standards” for purposes of the SPS Agreement as the standards developed by three specific international organizations: the CAC, the OIE, and the IPPC.<sup>33</sup> The SPS Agreement thus commits the contracting parties to cooperate in the development of SPS standards via these three international (governmental) organizations, to which it delegates regulatory authority for standards-setting.<sup>34</sup>

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28. See Bradley and Kelley’s typology of delegation. Curtis A. Bradley & Judith Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1, 14 (Winter 2008). Secondly and derivative of the delegation of regulatory authority, the SPS Agreement also delegates what Bradley and Kelley call agenda-setting authority insofar as the CAC, OIE, and IPPC organizations retain the power to decide what should get standardized at the international level (the attempts of some GATT Members during the SPS negotiations to oblige the OIE to take up a specific work item in its standards-setting committees brought, at least initially, a sharp rebuke, see GATT Secretariat, *Comments by the International Office Epizootics (OIE)*, MTN.GNG/NG5/WGSP/W/19 (May 4, 1990). The SPS agreement also grants, at least implicitly, authority to re-delegate in that each of the SDOs assigns most practical standards-setting work to specialized committees with variable representation (a longstanding practice that was known at the time of the negotiations).

29. SPS Agreement.

30. “Above organizations” refers to the CAC, the OIE, and the IPPC.

31. SPS Agreement Annex A.3(d).

32. Not-for-attribution interview (June 19, 2007).

33. SPS Agreement Annex A.3.

34. E.g., Gabrielle Marceau & Joel P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36 J. WORLD TRADE 811, 838ff (2002).



### C. Significance of the Delegation to the CAC, OIE, and IPPC in the SPS Agreement

From a governance perspective, the SPS Agreement of the WTO Treaty is a major departure. The near-exclusive focus on tariff reductions in successive rounds of multilateral negotiations, from the initial signing of the GATT in 1947 until at least the beginning of the Tokyo Round in the 1970s,<sup>35</sup> was not an accident. Rather, it was a consequence of the recognition that achieving a consensus on liberalizing international trade required safeguarding the prerogative of sovereign states in regulating their domestic economies—inter alia through technical, health, and safety standards.<sup>36</sup> This recognition of a national-level public-policy prerogative was reflected in Articles XI and XX of the 1947 GATT, which allowed import and export prohibitions or restrictions if “necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade”<sup>37</sup> and exempted from other provisions of the Agreement measures for the protection of “public morals,” “human, animal or plant life or health,” and other objectives of public policy.<sup>38</sup> Setting SPS standards at the national level has long been a key element of achieving these policy objectives.

SPS standards are product standards (or sometimes process standards), which define certain characteristics of a traded “good” (including live animals or raw produce), specify how it may be produced, and, when pertinent, stipulate how to measure those characteristics. They are often developed for use as the technical basis of health and safety regulations, though they might also be established as purely voluntary guidelines. Given the increased economic and political prominence of health and safety regulations in recent decades—especially, but not only, in advanced capitalist democracies<sup>39</sup>—it seems remarkable that governments would accept binding constraints on their power to autonomously set such standards.<sup>40</sup> It is even more remarkable that they would delegate such authority to international organizations.<sup>41</sup>

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35. Antidumping measures had been addressed already during the Kennedy Round in the 1960s. CROOME, *supra* note 9, at 32.

36. Judith Goldstein, *Creating the GATT Rules: Politics, Institutions, and American Policy*, in MULTILATERALISM MATTERS 201–32 (John Gerard Ruggie ed., 1993). See also RENÉE MARLIN-BENNETT, FOOD FIGHTS: INTERNATIONAL REGIMES AND THE POLITICS OF AGRICULTURAL TRADE DISPUTES (1993) (observing the same reason for focus on tariff reductions in these rounds of multilateral negotiations); John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, in INTERNATIONAL REGIMES, *supra* note 18, at 195–231 (arguing that retaining domestic control over market regulation was essential for making the post–World War II “liberal” economic order politically viable).

37. General Agreement on Tariffs and Trade art. 11.2(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

38. GATT 1947 art. 20.

39. E.g., RONALD INGLEHART, CULTURE SHIFT IN ADVANCED INDUSTRIALIZED SOCIETY (1990); VOGEL, *supra* note 13; David Vogel, *The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe*, 33 BRIT. J. POL. SCI. 557 (2003).

40. The 1979 Tokyo Round “Standards Code” or “Agreement on Technical Barriers to Trade” imposed some constraints. Given the diversity of interests, however, the 1979 Standards Code could

There are three reasons why delegation might seem less radical than the preceding discussion suggests, but none of them makes it less puzzling why governments have delegated regulatory authority. First, as described above, the SPS Agreement explicitly acknowledges that it is up to each member state to decide the “level of [SPS] protection” it seeks to establish through regulations (that is, the acceptable risks for human, animal, and plant health). If the desired risk level requires more stringent standards than existing international standards, governments are free to require compliance with standards more stringent than those developed by the CAC, OIE, and IPP.<sup>42</sup> Due to these provisions, some have interpreted the SPS Agreement as hardly constraining WTO member governments that strive for greater stringency.<sup>43</sup> Yet the freedom to adopt more stringent standards is subject to more, not fewer constraints. The desired risk level, for instance, must be applied consistently, so that maximum pesticides-residue levels for imported produce, for instance, cannot be lower than maximum levels permitted for otherwise identical, domestically grown

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only be agreed upon through vague compromise language on many critical issues, reflecting a strong preference by key participants in the negotiations to retain national autonomy, and had little “bite” given the weakness of the dispute-settlement mechanism. Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT’L L.J. 146 (1980). For further discussion of this point, see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 94–98 (1st ed. 1989); Charles Lipson, *The Transformation of Trade: The Sources and Effects of Regime Change*, in *INTERNATIONAL REGIMES* 233, 249–53 (Stephen Krasner ed., 1983). Moreover, “technically a stand-alone treaty,” the 1979 Agreement was signed by only a minority of GATT member states. JACKSON, *supra* note 2, at 43. The result was a weak international institution with a mixed record of eliciting compliance and furthering cooperation, especially when U.S.–European conflicts of interest were involved. See JOSEPH M. GRIECO, *COOPERATION AMONG NATIONS: EUROPE, AMERICA, AND NON-TARIFF BARRIERS TO TRADE* (1990). For more detailed discussion of the Tokyo Round negotiations, see Stephen D. Krasner, *The Tokyo Round: Particularistic Interests and Prospects for Stability in the Global Trading System*, 23 INT’L STUD. Q. 491 (1979). Further detail is also provided in GILBERT R. WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION* (1986).

41. Delegating some standards-setting authority to specialist expert bodies has become quite common at the domestic level. LIORA SALTER, *MANDATED SCIENCE: SCIENCE AND SCIENTISTS IN THE MAKING OF STANDARDS* (1988). It is less common at the international level, though recent research shows that international delegation of standards-setting in general—even to private or hybrid, public–private organizations—is not unprecedented. *E.g.*, MICHELLE P. EGAN, *CONSTRUCTING A EUROPEAN MARKET: STANDARDS, REGULATION, AND GOVERNANCE* (2001); Walter Mattli & Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 WORLD POL. 1 (2003); Abraham L. Newman & David Bach, *Self-Regulatory Trajectories in the Shadow of Public Power: Resolving Digital Dilemmas in Europe and the United States*, 17 GOVERNANCE 387 (2004). Standards for health and safety regulations, however, tend to be particularly politically sensitive.

42. Using quantitative comparative qualifiers (such as higher or lower) with respect to standards can be misleading as, for instance, allowing higher levels of pharmaceutical or pesticide residues in meat or produce creates a less-demanding (and in that sense “lower”) standard. I therefore will speak only of more or less “stringent” standards, which I hope will prevent any confusion.

43. *E.g.*, David G. Victor, *WTO Efforts to Manage Differences in National Sanitary and Phytosanitary Policies*, in *DYNAMICS OF REGULATORY CHANGE* 227–68 (David Vogel & Robert A. Kagan eds., 2004); not-for-attribution interview with representative of U.S. regulatory agency (July 17, 2007).

produce.<sup>44</sup> Moreover, the standards that a country requires for achieving these levels of protection must be based on scientific evidence that can stand up to international scrutiny if challenged. SPS core negotiators realized that SPS regulatory decisions are as much political decisions as technical-scientific ones—not least because “science is not monolithic.”<sup>45</sup> Even “just” delegating to international SDOs the authority to shift the burden of proof (by elevating some standards to the status of “international” standards) therefore must have been recognized by negotiators as a significant change and real delegation of regulatory authority. And decisions by the WTO dispute panels and Appellate Body in cases such as Beef Hormones<sup>46</sup> suggest that the resulting constraints on policy autonomy are real.<sup>47</sup>

Second, the same states that negotiated the WTO Treaty and, more specifically, the SPS Agreement, were members and active participants in many international standards-setting organizations. If power is highly fungible, it should make little difference whether countries are negotiating in one forum or another,<sup>48</sup> and to the extent that even the same individuals represented a given country in both contexts (as was the case in some instances), it might have seemed hardly like delegation at all.<sup>49</sup> Yet, when a country was represented by different individuals in the international organizations and in the SPS negotiations, bureaucratic politics often meant that maintaining a single, coherent position at the international level—if even possible—required negotiations among a country’s specialized agencies, which one negotiator described as “at least as difficult” as any at the international level.<sup>50</sup> Moreover, decisionmaking rules differed across the institutional contexts, calling into question the assumption that the same states would arrive at the same results when negotiating an SPS standard in the GATT/WTO as when negotiating it in the CAC, OIE, or IPPC. And years of principal–agent analyses in varied contexts have shown that when a government sends its officials to any collective body and grants those officials autonomous decisionmaking authority, the government (that is, the principal) assumes the unaltered pursuit of its interests

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44. This, in retrospect, very important specific safeguard against regulatory protectionism was proposed relatively late during the negotiations. See GATT Secretariat, *Framework Agreement on Agriculture Reform Programme*, MTN.GNG/NG5/W/170 (July 11, 1990).

45. Not-for-attribution interview (Aug. 2, 2007).

46. WT/DS26, WT/DS48, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*.

47. As discussed in greater detail in the empirical analysis below, documents and interviews suggest that negotiators expected as much. See also Alasdair R. Young & Peter Holmes, *Protection or Protectionism? EU Food Safety and the WTO, in WHAT’S THE BEEF? THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY 218* (Christopher Ansell & David Vogel eds., 2006).

48. See also DANIEL W. DREZNER, *ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES* (2007).

49. See also GATT Secretariat, *Summary of the Main Points Raised at the Fifth Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers 3*, MTN.GNG/NG5/WGSP/W/13 (Mar. 19, 1990).

50. *Infra* note 96 and accompanying text.

at its own peril—arguably even more so when delegating to an international body.<sup>51</sup>

Finally, third, since the SPS Agreement delegates to international scientific bodies the authority to develop technical standards, one might think that delegation would be unproblematic: technical standards should be all about science, not politics. And indeed, the websites of all three organizations consciously foster this view.<sup>52</sup> Yet, whereas professional norms of scientific organizations might seriously constrain the terms of debate, they hardly render the decisionmaking processes apolitical.<sup>53</sup>

In sum, the SPS Agreement is a real departure from the prior status quo in international law and practice.<sup>54</sup> It imposes real costs in the form of constraints on policy autonomy. How did it come about?

#### D. From History to Analytical Questions

The remainder of this article addresses this issue by asking two more specific, analytical questions. As I argued in the Introduction, delegation requires a logically prior agreement to institutionalize cooperation. In this context, such cooperation was understood to entail harmonizing international SPS standards. Attempts to agree on such institutionalized cooperation had failed previously—for instance, during the Tokyo Round negotiations; the 1979 TBT Standards Code, therefore, promulgated only general principles. Reaching agreement might well have failed again during the Uruguay Round, given the political sensitivity of health and safety regulations. I therefore ask, first, *why did the GATT contracting parties agree on thus institutionalizing international cooperation?*

Once negotiators had agreed that “international” SPS standards and the privileging of those standards through the legal presumption of GATT/WTO compliance should be the means to institutionalize cooperation, they still had to decide which standards constituted those “international standards” for purposes of the SPS Agreement. Here negotiators faced a basic choice: They could, as part of the negotiations in the Working Group on Sanitary and Phytosanitary

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51. See DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 1. See also Tim Büthe, *Review of Delegation and Agency in International Organizations*, 5 PERSP. ON POL. 861–62 (2007). Interestingly, social constructivism leads to the same expectation. See Jeffrey Lewis, *The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union*, 59 INT’L ORG. 937 (2005).

52. See, e.g., Codex Alimentarius, FAO/WHO Food Standards, <http://www.codexalimentarius.net> (last visited Jan. 20, 2008); World Organization for Animal Health, About Us, [http://www.oie.int/eng/OIE/en\\_about.htm](http://www.oie.int/eng/OIE/en_about.htm) (last visited Jan. 20, 2008); International Phytosanitary Portal, Home, <https://www.ippc.int/IPP/En/default.jsp> (last visited Jan. 20, 2008).

53. See, e.g., Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336 (1991); Mattli & Büthe, *supra* note 41.

54. It is so despite being grounded in the 1979 TBT Agreement Standards Code and occasional discussions in the early- to mid-1980s. See, e.g., GATT Secretariat, *Sanitary and Phytosanitary Regulations Affecting Trade in Agriculture: Background Note by the Secretariat*, MTN.GNG/NG5/W/41 (Feb. 2, 1988).

Regulations and Barriers (WGSP), draw up a list of specific existing standards, for which all GATT negotiating parties agreed that they should benefit from the presumption of WTO compliance.<sup>55</sup> Alternatively, they could delegate regulatory authority to international standards-setting organizations. I therefore ask, second, *why did the GATT contracting parties decide to delegate SPS standards-setting instead of keeping direct control over the cooperative outcome in the intergovernmental, unanimity-requiring GATT/WTO?* I address these questions theoretically in Part III and empirically in Part IV.

### III

#### THEORY OF INTERNATIONAL DELEGATION

##### A. Explaining Cooperation

Some twenty years ago, scholars of International Relations explicitly identified cooperation in world politics as a phenomenon that needed to be explained rather than assumed (with only the failure of cooperation to be explained).<sup>56</sup> Since then, a large and varied literature has addressed this issue theoretically and empirically. None of that work has explicitly addressed international cooperation on (or delegation of) SPS standards-setting. Yet, it suggests a number of alternative—though not necessarily strictly competing—answers to the question why states might decide to harmonize and more generally cooperate on SPS standards at the international level. I focus here on theoretical arguments derived from the liberal tradition in International Relations theory, then discuss alternative explanations in Part III.C.

A political-economy approach to international cooperation in the liberal tradition of International Relations theory starts from the material interests of individuals and groups within states.<sup>57</sup> Their preferences (including “preferences” in the loose sense of a rank-ordering of alternative means to achieve a more general goal, such as greater income or wealth) are assumed to be a function of cost-benefit analyses and therefore may differ across individuals (and over time). Domestic political institutions aggregate these diverse individual preferences within each country and therefore play a key role

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55. That approach was followed, for instance, in the parallel (Uruguay Round) TRIPS agreement negotiations. Marceau & Trachtman, *supra* note 34, at 838. It was understood that such a list would then have to be updated in regular, subsequent negotiations in the WTO.

56. *E.g.*, ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); *COOPERATION UNDER ANARCHY* (Kenneth A. Oye ed., 1986); Robert Jervis, *Cooperation Under the Security Dilemma*, 30 *WORLD POL.* 167 (1978); KEOHANE, *supra* note 4.

57. Many scholars in this tradition assume that actors have nonmaterial as well as material interests. No part of liberal International Relations theory depends upon actors pursuing only material interests, but insofar as the liberal tradition makes a distinctive set of assumptions about preferences rather than just provide a theory of how actors pursue some given set of preferences, it starts from the assumption that individuals seek to maximize their own economic welfare. Otherwise, International Relations liberalism must be supplemented by a separate theory of preferences. *See also* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*. 51 *INT’L ORG.* 513 (1997).

in defining any “national interest” that governments might pursue at the international level.<sup>58</sup> Specific domestic political institutions weigh domestic interests differently and may render some subset of domestic interests temporarily or permanently irrelevant, depending on the distribution of preferences and the particular institutional structure. Rather than determine international outcomes, though, domestic preferences and institutions constrain the range of international outcomes that will be a net political gain (in the “win-set”) for the country’s leader—who might well have a distinct set of preferences of his or her own.<sup>59</sup> Given these national preferences, the international outcome should then be a function of issue-specific bargaining strength and possibly also issue linkage.<sup>60</sup>

An application of this logic to the realm of SPS standards would start with an analysis of the costs and benefits experienced or expected by the different interested groups within a country. Here, the above logic suggests that competitive export-oriented farmers and food industries will, *ceteris paribus*, favor international cooperation in general and international harmonization of standards in particular as a means of improving market access for their products. Import-competing farmers and industries should, by contrast, oppose international harmonization (supporting it only under the unlikely condition that they expect it to provide them with more protection, given the structure of the market). A given country’s national preference in the negotiations should then reflect the cost-benefit analyses of the groups with the greatest political influence, given domestic political institutions. One implication of this theoretical logic is that changes of political majorities due to elections can change government preferences regarding international cooperation on SPS standards and regulations if the changes strengthen or weaken the political clout of one domestic group or another. Finally, governments may be expected to have a positive predisposition towards international cooperation, given that shifting decisionmaking from the level of national political institutions to intergovernmental bargaining strengthens the executive relative to other domestic interests that might otherwise constrain it.<sup>61</sup> At the international level, cooperation—and here specifically the privileging of international standards—should result if, after cost-benefit analyses of this and other possible courses of

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58. MILNER, RESISTING PROTECTIONISM, *supra* note 4. See also LISA MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION (2000).

59. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988). Any room for a distinctive position of the government or negotiator might also be conceptualized as agency slack (with voters or citizens as the principal), but such an analysis is beyond the scope of this article.

60. See, e.g., Christina L. Davis, *International Institutions and Issue Linkage: Building Support for Agricultural Trade Liberalization*, 98 AM. POL. SCI. REV. 153 (2004). A functionalistic neoliberal-institutionalist perspective (such as KEOHANE, *supra* note 4), would yield similar expectations, but retaining Realism’s analytical assumption of states as unitary actors, it would focus on aggregate costs and benefits for the country; domestic politics might be ignored.

61. Karl Kaiser, *Transnational Relations as a Threat to the Democratic Process*, in TRANSNATIONAL RELATIONS AND WORLD POLITICS 356 (Robert O. Keohane & Joseph S. Nye, Jr. eds., 1972).

action and taking into account bargaining strength, it emerges as the best solution to the problem of trade-inhibiting SPS measures.

## B. Explaining Delegation of Regulatory Authority

An agreement to establish or increase cooperation on regulatory issues does not necessarily lead to the delegation of regulatory authority. In many areas of international market regulation, international cooperation has taken the form of institutionalizing transgovernmental exchanges. Such transgovernmental cooperation has been institutionalized, for instance, by setting up regular meetings or communications of regulators with equivalent regulatory functions for their respective domestic markets, without creating (or delegating to existing) international organizations capable of becoming actors in their own rights.<sup>62</sup>

Having agreed to privilege international standards, the contracting parties in the SPS negotiations faced two main possibilities. First, governments could, as part of the Uruguay Round SPS negotiations, draw up a list of standards that would explicitly be recognized as “international standards” for purposes of the agreement and establish some institutional mechanism for extending or revising that list to allow for an up-to-date list of all SPS standards that have broad or even unanimous approval by WTO Members. As a practical matter, the initial list would probably have to have consisted of existing standards, developed by standards-developing organizations (SDOs) outside the GATT framework; additions to that list could then have been developed within the institutions of the GATT/WTO or there could have been case-by-case negotiations over whether any specific standard developed outside the GATT/WTO may be added to the list. This arrangement might have entailed the retrospective endorsement of standardization work by other organizations, but it would not have entailed delegation in the sense of a prospective grant of authority. Alternatively, governments could delegate authority for standards-setting to international SDOs. As described above,<sup>63</sup> the actual SPS Agreement provides for the latter: comprehensive delegation in the sense that three organizations were recognized without reservations as the sources of international SPS standards, retrospectively and prospectively.

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62. See, e.g., JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); David Andrew Singer, *Capital Rules: The Domestic Politics of International Regulatory Harmonization*, 58 INT'L ORG. 531 (2004). Transgovernmental networks of specialists (a particular form of epistemic community) might also develop distinct interests, but they usually must exercise influence (if any) via domestic political institutions; they exhibit far fewer of the characteristics of an “actor” in world politics than international organizations. See Tim Büthe, *Governance Through Private Authority? Non-State Actors in World Politics*, 58 J. INT'L AFF. (NEW YORK) 281 (2004); Frederick W. Frey, *The Problem of Actor Designation in Political Analysis*, 17 COMP. POL. 127 (1985).

63. See *supra* Part II.B.

Why did governments decide to delegate? Principal-agent theory is a natural starting point for answering this question.<sup>64</sup> Adopting a P-A perspective, however, is not a neutral decision with respect to one's position in the broader theoretical debates in International Relations. One of the core assumptions of P-A theory is that the decision to delegate is a rational, strategic calculation; P-A theory also assumes that the subsequent behavior of both principal and agent is driven by the logic of instrumental rationality. This renders P-A theory inconsistent with theoretical perspectives that assume primacy for the logic of appropriateness. Moreover, when P-A theory is applied to international relations, some of the benefits of delegation that it identifies require the ability to distinguish between the government of a state and socio-political groups within that state—that is, actors at the subnational level. This renders parts of P-A theory incompatible with theoretical traditions that assume unitary states as the smallest analytical units. A brief discussion of the key reasons for delegating authority, according to P-A theory, will illustrate this point.

The P-A literature has identified a number of reasons for delegating authority, focused on the benefits of delegation. Most pertinent for the delegation of regulatory authority are three of these benefits. First, comprehensive delegation to an SDO offers the opportunity to continuously benefit from the specialized technical expertise at the SDO. In the context of the SPS Agreement, this arrangement ensures efficient updating of the set of SPS standards recognized as “international” for purposes of the Agreement. The alternative arrangement, which would have incorporated into the treaty a list of specific, existing SPS standards (possibly developed by the same organizations) would have required frequent, renewed trade negotiations to recognize new or revised SPS standards.<sup>65</sup> Second, comprehensive delegation “locks in” the policy of deference to international standards. It therefore should make the commitment not to use SPS measures as nontariff barriers to trade more credible than the alternative arrangement, wherein the continued effectiveness of the SPS Agreement would depend upon periodically renewed political negotiations to update the list of recognized international standards (assuming that new SPS concerns occasionally arise and would solicit cross-

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64. For detailed reviews, categorizations, and discussions, see DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999); DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 1; JOHN HUBER & CHARLES SHIPAN, *DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* (2002); Jonathan Bendor, Amihai Glazer & Thomas Hammond, *Theories of Delegation*, 4 ANN. REV. POL. SCI. 235 (2001); Bradley & Kelley, *supra* note 28, at 3–9; Tim Büthe, *The Dynamics of Principals and Agents: Institutional Change and Persistence in Setting U.S. Accounting Standards*, Mimeo (Duke Univ., 2004–2006).

65. Büthe, *supra* note 64; Walter Mattli & Tim Büthe, *Accountability in Accounting? The Politics of Private Rule-Making in the Public Interest*, 18 GOVERNANCE 399 (2005); Walter Mattli & Tim Büthe, *Global Private Governance: Lessons From a National Model of Setting Standards in Accounting*, 68 LAW & CONTEMP. PROBS. 225 (Summer/Autumn 2005). Bradley and Kelley identify delegation as one way to reduce the transaction costs of international cooperation as the agent makes “running policy decisions so that states do not have to continually renegotiate.” Bradley & Kelley, *supra* note 28, at 26.



nationally variable regulatory responses).<sup>66</sup> Third, delegating standards-setting to recognized technical experts in a relatively insulated, transnational, or transgovernmental agency protects the trade negotiators (and the leading politicians who are their political masters) from possible blame if a particular set of standards subsequently turns out to be politically contentious or unpopular within a country. International delegation thus offers the opportunity for “shifting responsibility” or “blame avoidance.”<sup>67</sup>

The first of these benefits (efficiency gain due to agent expertise) is entirely consistent with all rationalist theories of world politics, including International Relations Realism. Making a strong unitary-state assumption, Realists must expect an agent to be faithful to its principal’s preferences; any agent acting otherwise would be replaced. It follows that, if a group of states delegates power to an agent, Realists would expect the agent to act on the preferences of those states, weighted somehow by the distribution of power within the group. Delegation should therefore create few concerns beyond those that already arise from the international distribution of power (agent-shirking is assumed away by the Realist postulate that international institutions have no independent effect). Consequently, from a Realist perspective, the efficiency gains that can be obtained thanks to the agent’s specialized expertise should be welcomed by states—and constitute the only reason for delegation.

Scholars in the liberal tradition of International Relations theory, which recognizes international institutions as a constraint, would also acknowledge the first benefit (expertise and efficiency gain) but emphasize the second (delegation creating a more credible commitment to continued cooperation).<sup>68</sup> A liberal political-economy perspective, which does not assume unitary states, would also recognize the third benefit of delegation (responsibility shifting, or blame avoidance).<sup>69</sup> Especially in democratic polities, governments have this incentive to delegate when the risk of suffering political costs from regulatory outcomes exceeds the likely political benefit from having direct control over the regulator (assuming that regulation itself is considered necessary or politically desirable). Countries should support delegation of SPS regulatory authority proportional to the extent to which they anticipate experiencing these benefits.

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66. See Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213 (1990) (SPECIAL ISSUE); Terry M. Moe, *Power and Political Institutions*, 3 PERSP. POL. 215 (2005); see also Tim Büthe & Helen Milner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI Through Trade Agreements?*, 52 AM. J. POL. SCI. (forthcoming 2008); Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000).

67. See Büthe, *supra* note 64; Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982); Walter Mattli & Tim Büthe, *Global Private Governance: Lessons From a National Model of Setting Standards in Accounting*, 68 LAW & CONTEMP. PROBS. 225 (Summer/Autumn 2005).

68. See also Nielson & Tierney, *supra* note 8, at 244.

69. High risk aversion would reduce the benefit of open-ended delegation vis-à-vis the adoption of known standards developed by the same SDO, but variation in risk aversion is beyond the scope of this analysis.

Delegation, however, is not all gain, and a political-economy perspective explicitly stipulates that preferences are a function of both (expected) costs and benefits. Particularly important for the delegation of regulatory authority should be autonomy costs, that is, losses of policymaking autonomy anticipated as a consequence of delegating authority of a particular kind. These costs of delegation may differ across countries as a function of countries' differential ability to exert influence in international bodies. Costs may also differ across agents as a function of characteristics of the specific international body to whom standards-setting authority might be delegated, such as its organizational structure or decision-making rules and practices. A proper analysis of the possible agents is beyond the scope of this article, but liberal International Relations theory—by appreciating the autonomy costs of delegation—leads us to expect that a decision to delegate is tied to the decision on agent selection.

### C. Alternative Explanations

A first set of alternative hypotheses can be derived from the Realist tradition in International Relations. Although Realism is by no means monolithic,<sup>70</sup> the emphasis on the international distribution of power and the common assumption that power is highly fungible tend to lead Realists to expect that the most powerful states dominate international negotiations and, most importantly, that international standards will reflect the preferences of those states.<sup>71</sup> Harmonization on the basis of “international” standards thus might simply be a way for the most powerful states to force their own standards (and the adjustment costs of harmonization) onto weaker countries. Realism thus leads us to expect that the most powerful countries would push for harmonization against the preferences of weaker states.<sup>72</sup>

A corollary of this logic is that cooperation can arise if it is sought by a single predominant state. Alternatively, if there are two or more very powerful states, cooperation requires only that a sufficiently large subset of these states prefers the cooperative outcome to the status quo; others might then participate to avoid any negative externalities of being left out.<sup>73</sup> Unfortunately, Realism does not provide us with a clear deductive logic for identifying the number or names of such powerful states *ex ante*—and the GATT's usual “principal supplier” rule for negotiating tariff reductions did not apply to the negotiations

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70. See Stephen G. Brooks, *Dueling Realisms*, 51 INT'L ORG. 445 (1997).

71. See Krasner, *supra* note 53. See, e.g., DREZNER, *supra* note 48; Joanne Gowa & Soo Yeon Kim, *An Exclusive Country Club: The Effects of the GATT on Trade, 1950–94*, 57 WORLD POL. 453 (2005). See also David Baldwin, *Introduction*, in NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE (David Baldwin ed., 1993) (on the assumption of fungibility of power).

72. Hegemonic stability theory leads to the same expectation, though HST scholars might emphasize the public-goods component of standards, which would be undersupplied, especially at the international level, without a hegemon. Charles P. Kindleberger, *Standards as Public, Collective and Private Goods*, 36 KYKLOS 377 (1983).

73. See LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (2000).

leading up to the SPS Agreement. But presumably Realists would look to (at least) the United States and the EC (maybe also Australia as the leader of the Cairns Group of agricultural exporting countries) to ascertain the potential for cooperation.

By the logic of Realism, those same powerful states should dominate any negotiations over specific SPS standards, in accordance with the international distribution of power—regardless of whether those negotiations are part of the GATT negotiation or take place by proxy in international organizations.<sup>74</sup> Realism therefore has little to say about whether powerful states will seek to achieve the internationalization of their preferred standards via the delegation of standards-setting authority. It is of little significance for Realists, except that delegation might be preferred if it yields efficiency gains for powerful states (as discussed above).

A second set of alternative hypotheses can be derived from Constructivism or Sociological Institutionalism. Scholars in the constructivist tradition in International Relations theory see ideas, norms, and context-specific identity or social roles as shaping the very definition of actors' interests. In seeking to explain behavior and outcomes, constructivists then emphasize actors pursuing those interests in accordance with the logic of appropriateness.<sup>75</sup> This theoretical perspective leads us to expect that a preference for cooperation, and specifically harmonization on the basis of international SPS standards, would be driven by the perceived legitimacy of international standards-setting. We should therefore observe little controversy over this issue, unless perceptions of legitimacy differed across countries.<sup>76</sup>

Although constructivists have thought and written extensively about the general issue of cooperation, no constructivist theory of delegation has been developed. One might surmise that international delegation never constitutes “appropriate” behavior for governments if the norm of sovereignty is very strong. Yet, constructivists do not suggest that states live in an imaginary world. Given interdependence (inherently recognized by a country's participation in GATT), delegation of (some) authority to an international body may be appropriate not only if there is a strong international norm of such delegation, shared among states (such as for UN membership, which delegates some authority to the Security Council), but also if the exercise of authority by the international body in question is perceived as legitimate. Delegation to international organizations of technical, scientific experts should therefore be relatively easy (and enjoy widespread support), because “science” is usually

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74. See DREZNER, *supra* note 48, at 162 (making this point particularly forcefully and in specific application to SPS standards-setting).

75. E.g., James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT'L ORG. 943 (1998).

76. Here the distinction that Giandomenico Majone draws between delegation and trustee relationship may be pertinent but is beyond the scope of this article. Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103 (2001).

understood as having been socially constructed as highly objective and neutral, lending such organizations an inherently high degree of legitimacy.<sup>77</sup>

#### IV

#### COOPERATION AND DELEGATION: AN EMPIRICAL ANALYSIS

##### A. Research Methods

Empirical research on international negotiations presents special challenges. Public records of the negotiations are often sparse and require critical reading, since negotiating positions may have been taken for public consumption and may have differed substantially from countries' true preferences.<sup>78</sup> Internal documents of the participating governments tend to be classified—especially documents showing internal disagreements, actions subsequently regarded as mistakes, or other politically sensitive information—usually for several decades afterwards. And many important steps in international negotiations may leave no paper trail at all.<sup>79</sup> Participants in the negotiations, if contacted soon after the conclusion of the negotiations, may have strong professional and personal interests in not fully disclosing their actions and the reasons for those actions. If participants are contacted long afterwards, the incentives to provide a selective account of negotiations may have declined, but they may not remember the details—if they are still available for interviews at all.<sup>80</sup>

The following analysis of the negotiations that led to the SPS Agreement draws on the available secondary sources, but there are only very sparse prior empirical analyses of those negotiations. Fortunately, this article can draw on a large number of primary sources, in particular documents from the GATT negotiations, which have been recently released by the WTO—much earlier than is customary for diplomatic documents.<sup>81</sup>

The empirical account below is sometimes written such that it seems to equate countries' negotiating positions with their true preferences. The fact that the GATT negotiation documents were not intended to be made public (for many years, if ever) makes it more likely that these documents are genuinely informative. I did not, however, simply assume that the negotiating positions

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77. Evan Schofer, *Science Associations in the International Sphere 1875–1990: The Rationalization of Science and the Scientization of Society*, in *CONSTRUCTING WORLD CULTURE: INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS SINCE 1875* 249 (John Boli & George M. Thomas eds., 1999).

78. See, e.g., ROBERT D. PUTNAM & NICHOLAS BAYNE, *HANGING TOGETHER: COOPERATION AND CONFLICT IN THE SEVEN-POWER SUMMITS* (1987); see also P. TERENCE HOPMANN, *THE NEGOTIATION PROCESS AND THE RESOLUTION OF INTERNATIONAL CONFLICTS* (1996); JOHN S. ODELL, *NEGOTIATING THE WORLD ECONOMY* (2000).

79. See Gilbert R. Winham, *Practitioners' Views of International Negotiation*, 32 *WORLD POL.* 111 (1979).

80. The Canadian lead negotiator for the SPS Agreement, for instance, passed away a few years ago.

81. References use the GATT document number or symbol. Unless otherwise noted, all of these documents are contained in the GATT Digital Archive, <http://gatt.stanford.edu> (last visited June 17, 2007).

expressed in the documents and countries' true preferences were identical (which would of course be problematic, given the incentives for strategic misrepresentation of one's preferences in negotiations). Instead, I used a series of phone interviews with Uruguay Round trade negotiators from several countries (and some published accounts of participants) to ascertain actual preferences, sometimes through triangulation.<sup>82</sup> Interviews also played a crucial role insofar as international negotiations often leave a rather thin paper trail, and the GATT Uruguay Round negotiations were described to me by two seasoned participants of international trade negotiations as having been particularly bad in that respect: a large part of the negotiations took place over lunches and informal, private meetings among a small "core" group of negotiators (the final wording of many articles of the SPS Agreement is said to have originated on cocktail napkins). That many of the interviewees no longer have any role in government gives me some additional confidence in my reliance on a combination of documents and interviews. Inherently and inevitably, however, this research strategy cannot resolve all uncertainty; it is merely the best available.

## B. Origins of the SPS Negotiations

The Uruguay Round negotiations were officially launched by the "Ministerial Declaration" adopted on September 20, 1986, by the representatives of ninety-four countries in Punta del Este, Uruguay.<sup>83</sup> Even this launch of the negotiations was already "the culmination of five years of hard work,"<sup>84</sup> during which the liberalization of agricultural trade had emerged as one key ingredient of the package deal that was going to make it possible to launch (and ultimately conclude) the Uruguay GATT round. Including in the negotiation the liberalization of agricultural trade was a *sine qua non* for major agricultural exporters such as the United States and the Cairns Group led by Australia and also for many developing countries.<sup>85</sup>

Imposing some restrictions on the (ab)use of sanitary and phytosanitary (SPS) measures was an integral part of the demands for agricultural trade

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82. The interviews were conducted between June and August 2007.

83. *E.g.*, Press Communiqué, *Ministerial Declaration on the Uruguay Round*, GATT/1396 (Sept. 25, 1986). The GATT had at that point eighty-five contracting parties; they were joined by representatives of nine further countries whose governments took a close interest or anticipated adhering to the GATT in the near future.

84. HUGO PAEMEN & ALEXANDRA BENSCH, FROM THE GATT TO THE WTO: THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND 57 (1995).

85. *See* CROOME, *supra* note 9, at 7–28; CHRISTINA L. DAVIS, FOOD FIGHTS OVER FREE TRADE: HOW INTERNATIONAL INSTITUTIONS PROMOTE AGRICULTURAL TRADE LIBERALIZATION (2003); Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 351–53 (2002). Part of the deal that enabled launching the Uruguay Round was an agreement that improved market access for goods produced by developing countries (such as textiles), access to developing country markets, and trade in services would also be on the agenda.

liberalization.<sup>86</sup> Accordingly, the Punta del Este declaration noted among the “Subjects for Negotiations” (and as one of the three goals for the agriculture negotiations): “minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements.”<sup>87</sup> It also noted that “negotiations shall aim to improve, clarify, or expand, as appropriate, agreements and arrangements [such as the ‘Codes’] negotiated in the Tokyo Round of Multilateral Negotiations.”<sup>88</sup> Indeed, the 1979 Code for Technical Barriers to Trade (the “Standards Code”) was a natural starting point for any agreement on SPS measures, and it was not certain until the end of 1990 that there would be a separate SPS Agreement rather than some kind of SPS supplement to the TBT Agreement.<sup>89</sup> Negotiations about SPS measures, however, took place from the start within the Negotiating Group on Agriculture (NG5).<sup>90</sup>

NG5 started meeting in late February 1987 and in June and July began an initial exchange of negotiating positions on SPS measures. Then, at its tenth meeting, on September 14, 1988, it established a separate Working Group on Sanitary and Phytosanitary Regulations and Barriers, exceptionally chaired by a staff expert from the GATT secretariat, Gretchen Stanton.<sup>91</sup> It was this Working Group that negotiated the SPS Agreement during the following two years.<sup>92</sup> The

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86. Not-for-attribution interviews with negotiators of two agriculture-exporting states.

87. World Trade Organization, Ministerial Declaration of 20 September 1986, MIN(86)/W/19, 25 I.L.M. 1623, 1626 (1986).

88. *Id.*

89. See, e.g., GATT Secretariat, *Applicability of the Agreement on Technical Barriers to Trade to Sanitary and Phytosanitary Regulations and Barriers*, MTN.GNG/NG5/WGSP/W/5 (May 22, 1989); GATT Secretariat, *Harmonization and Transparency*, MTN.GNG/NG5/WGSP/W/9 (Jan. 30, 1990); GATT Secretariat, *Form and Disposition of the Agreement on Sanitary and Phytosanitary Regulations and Barriers (SPS Measures)*, MTN.GNG/NG5/WGSP/W/10 (Feb. 12, 1990); GATT Secretariat, *Summary of the Main Points Raised at the Sixth Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers*, MTN.GNG/NG5/WGSP/W/18 (May 4, 1990); GATT Secretariat, *Seventh and Eighth Meetings of the Working Group on Sanitary and Phytosanitary Regulations and Barriers*, MTN.GNG/NG5/WGSP/5 (June 19, 1990); GATT Secretariat, *Draft Text on Sanitary and Phytosanitary Measures*, MTN.GNG/NG5/WGSP/7 (Nov. 20, 1990); see also not-for-attribution interview (Aug. 2, 2007).

90. See Donna Roberts, *Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations*, 1 J. INT'L ECON. L. 377, 382 (1998). The Negotiating Group on Agriculture was the fifth of fourteen (sub)groups formed by the Group of Negotiations on Goods after its initial at-large meetings in December 1986 and January 1987. The other groups were: tariffs, non-tariff measures, tropical products, natural resource-based products, textiles and clothing, agriculture, GATT Articles, safeguards, MTN agreements and arrangements (Tokyo Round codes), subsidies and countervailing measures, dispute settlement, trade-related aspects of intellectual property rights, trade-related investment measures, and functioning of the GATT system. GATT Secretariat, *Fifth Meeting of the Group of Negotiations on Goods*, MTN.GNG/5 (Feb. 9, 1987). Services formed the fifteenth, separate negotiating group. See also CROOME, *supra* note 9, at 27f (discussing the structure of the Uruguay round negotiations).

91. The decision to form the separate WGSP was taken at the suggestion of the U.S. delegation but had widespread support. See GATT Secretariat, *Communication from the United States on a Health and Sanitary Working Group*, MTN.GNG/NG5/W/77 (Sept. 13, 1988); GATT Secretariat, *Tenth Meeting of the Negotiating Group on Agriculture*, MTN.GNG/NG5/10 (Sept. 14, 1988); CROOME, *supra* note 9.

92. Except for a few last-minute changes in 1993, the negotiations of the SPS Agreement were largely concluded by the end of 1990, four years prior to the rest of the agriculture negotiations. Several

negotiations within this group were driven primarily by a core or “drafting” group of eight countries or parties: Argentina, Australia, Canada, the European Community (EC, with Gthe Commission representing the then-twelve member states), Finland (on behalf of the non-EC “Nordic” countries), Japan, New Zealand, and the United States.<sup>93</sup> No more than about twenty other countries took a sufficiently strong interest to regularly attend the working group meetings.<sup>94</sup>

### C. Negotiating Cooperation

I have argued above for a domestic political-economic explanation of national preferences for (or against) cooperation on SPS standards and standardization.<sup>95</sup> The formation and change of the U.S. position provides a useful illustration, supporting the argument that attention to the cost-benefit analyses of different domestic groups and the political institutions that aggregate their interests leads to a better understanding of national interests *and international outcomes* than assuming unitary states. Even though international cooperation on SPS standards affected a range of interests—including not only the obvious economic groups such as (internationally competitive) U.S. farmers but also consumer-protection advocates and regulatory agencies such as the Food and Drug Administration (FDA)—U.S. agricultural interests had particular political clout in the Reagan and Bush (Sr.) administrations. The United States therefore initially approached the SPS negotiations (just as the agriculture negotiations more generally) strictly as an agricultural exporter, with an official from the U.S. Department of Agriculture as the lead negotiator. However, representatives from a number of U.S. government agencies became later part of the U.S. delegation to the SPS negotiations or formed part of an interagency group back in the United States, which had to be regularly consulted by the Geneva-based negotiators. As these agencies opposed negotiating away policy autonomy as part of any deal to gain greater access for U.S. agricultural exports to foreign markets, the inclusion of representatives from those agencies in the negotiations made the internal negotiations within the U.S. delegation at times “at least as difficult” as the

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negotiators have in interviews attributed the relatively smooth and fast progress of the SPS negotiations in part to the skill of the chairperson in facilitating negotiations and the fact that she was not affiliated with any of the national delegations. The high level of abstraction and seeming technical obscurity of the issues also facilitated agreement.

93. Thailand is sometimes alleged to have been a member of the informal core or “drafting” group and was indeed invited to join the group, but declined since participation in the core group would have required the permanent presence of a Thai SPS technical expert in Geneva, which the Thai government considered too costly. Only changing members of the regular Thai diplomatic corps attended many of the formal meetings of the working group. The predominance of small groups of countries most active in international trade in the goods in questions had a long tradition in GATT. *See* Gowa & Kim, *supra* note 71; Steinberg, *supra* note 85, at 354 et seq.

94. Roberts, *supra* note 90, at 396 n.33. *See generally* review of documents and not-for-attribution interviews.

95. *See supra* Part III.A.

international negotiations.<sup>96</sup> Nonexport interests then gained a leading voice in shaping the U.S. negotiating position after the 1992 U.S. elections, which for the first time in twelve years gave political control of the White House and both houses of Congress to the Democrats, who have long been more favorably inclined toward regulation, for instance, for consumer protection.

The United States thus approached the Uruguay Round negotiations primarily as an agricultural exporter. Agricultural exporters considered health-related measures a “big loophole” in the GATT, which needed to be addressed through some kind of agreement on SPS measures if agricultural trade liberalization were to be effective.<sup>97</sup> The main concern here was that, if the issue were not addressed as part of the same negotiations that were going to reduce tariffs on (and subsidies for) agriculture, the use of such measures as protectionist tools would greatly increase in the aftermath of nominal liberalization of agricultural trade. International cooperation—and specifically the international harmonization of SPS standards and the privileging of international standards through a presumption of GATT compliance—was seen as offering the best way of achieving a safeguard against subsequent increases in the stringency of SPS standards for protectionist purposes. International harmonization would force countries with stringent standards to justify those standards, providing opportunities for agricultural exporters to expose and potentially block protectionist measures.<sup>98</sup> Moreover, for U.S. agricultural exporters, which were facing some of the most stringent standards at home, there was little risk that international standards would be more stringent than domestic ones, thus leveling the playing field.<sup>99</sup> Accordingly, the United States made the initial proposal (in July 1987) that the Negotiating Group on Agriculture harmonize health and sanitary standards and “base national [health and sanitary] regulations on internationally agreed standards and processing and production methods . . . .”<sup>100</sup>

Australia initially objected to an *ex ante* commitment to harmonization, noting that, in its view, the U.S. proposal “seems to go beyond the ministerial mandate.”<sup>101</sup> The members of the Negotiating Group on Agriculture, however, agreed in their December 7–8, 1987, meeting to consider the issue. They invited

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96. Interview with U.S. SPS negotiator. These internal divisions on the U.S. side also were apparent to foreign negotiators, as indicated by one of them. Not-for-attribution interviews (June 19, 2007; Aug. 2, 2007).

97. Not-for-attribution interview (June 19, 2007).

98. Not-for-attribution interviews (June 15, 2007; June 19, 2007; July 17, 2007).

99. See generally ELIZABETH DESOMBRE, DOMESTIC SOURCES OF INTERNATIONAL ENVIRONMENTAL POLICY: INDUSTRY, ENVIRONMENTALISTS, AND U.S. POWER (2000); VOGEL, *supra* note 13.

100. GATT Secretariat, *United States Proposal for Negotiations on Agriculture* at 1, MTN.GNG/NG5/W/14 (July 7, 1987).

101. GATT Secretariat, *Negotiating Group on Agriculture 6–7 July 1987* at 3, MTN.GNG/NG5/W/15 (July 24, 1987).



elaboration of national positions on this and other “technical” matters via more “specific proposals or discussion papers.”<sup>102</sup>

The United States supplied the first such discussion paper in February 1988. It presented harmonization as the only way to achieve the agreed objective of reducing the adverse effect of health and sanitary regulations on trade, and it suggested that harmonization was a legitimate means to achieve this agreed-upon objective, given that it had been “under consideration since the early preparatory stages of the negotiations.”<sup>103</sup> Indeed, two European negotiators recalled in interviews that the EC (and several non-EC European governments) had also favored international harmonization and the privileging of international SPS standards since before the beginning of the Uruguay Round negotiations because it extended to the realm of SPS measures the core logic of the Tokyo Round TBT Agreement Code. For EC member states, international institutionalized standardization also extended to the multilateral setting of the GATT the way in which EC member states had decided to deal with trade-inhibiting differences in SPS measures in the “minilateral” setting of the EC itself. EC negotiators recalled having sought international harmonization of SPS standards in part because the principle enjoyed legitimacy from having previously been endorsed by EC member states as a solution when the same kind of issue arose as part of the Single Market program of “Europe 1992.”<sup>104</sup>

The United States thus pushed for harmonization on the basis of international “scientific standards,”<sup>105</sup> and the European Community endorsed harmonization on the basis of SPS standards developed by international organizations in its submission of April 20, 1988.<sup>106</sup> Developing countries also broadly supported international cooperation on SPS standards via harmonization at the international level. South Korea, Brazil, and Colombia, for instance, explicitly endorsed the harmonization objective in written submissions,<sup>107</sup> and one observer noted that developing countries were actually

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102. GATT Secretariat, *Fifth Meeting of the Negotiating Group on Agriculture*, MTN.GNG/NG5/5 (Dec. 9, 1987).

103. GATT Secretariat, *A Discussion Paper on Issues Related to the Negotiations Submitted by the United States* at 9, MTN.GNG/NG5/W/44 (Feb. 22, 1988).

104. Not-for-attribution interviews (July 30, 2007; Aug. 2, 2007).

105. GATT Secretariat, *A Discussion Paper on Issues Related to the Negotiations Submitted by the United States* at 11–13, MTN.GNG/NG5/W/44 (Feb. 22, 1988). It also discussed specific organizations that in the U.S. delegation’s view produced such standards. Neither the European Communities nor Canada addressed the issue of SPS measures in their respective discussion papers on technical issues (GATT Secretariat, *Discussion Document on Some Technical Aspects in Relation to the Use of PSE in the Multilateral Trade Negotiations on Agriculture*, MTN.GNG/NG5/W/45 (Feb. 19, 1988); GATT Secretariat, *The Trade Distortion Equivalent (TDE): An Aggregate Indicator of Adverse Trade Effects of Measures of Support and Protection for Agriculture*, MTN.GNG/NG5/W/46 (Feb. 23, 1988)), possibly indicating the lesser interest in the specific issue of SPS standards and regulation among non-U.S. agriculture negotiators. Not-for-attribution interview (June 19, 2007).

106. GATT Secretariat, *Communication from the European Communities*, MTN.GNG/NG5/W/56 (Apr. 20, 1988).

107. GATT Secretariat, *Proposal for Negotiations on Agriculture*, MTN.GNG/NG5/W/130 (Nov. 28, 1989); GATT Secretariat, *Proposal on Special, Differential and More Favourable Treatment for Developing Countries*, MTN.GNG/NG5/W/132 (Nov. 28, 1989).

on the whole more strongly supportive of international standards and standardization than some of the OECD (Organization for Economic Cooperation and Development) countries.<sup>108</sup> In short, broad agreement effectively settled the issue early on. The Summary of the October 1988 meeting of NG5 notes that “a participant” still took issue with the “undue emphasis” on harmonization and that this participant had pointed out that “there could also be other ways . . . to achieve the goals established by the Punta del Este Declaration.”<sup>109</sup> But this appears to have been an isolated position by that time already. By November 1988, the Chairman of the NG5 could include “harmonization of national [SPS] regulations” based on international standards among the issues on which there was “a broad measure of consensus.”<sup>110</sup> That consensus was confirmed and the objective endorsed by the Montreal Trade Negotiations Committee Meeting at the Ministerial Level in December 1988.<sup>111</sup>

The United States and the EC clearly played a central role in the negotiations; their agreement was crucial for the decision to focus on international standards as the means of addressing the SPS issue. This finding confirms the importance of the major powers for GATT negotiations—measured here primarily by involvement in international (nonsocialist) trade. It is consistent with Realist expectations.

The importance of the United States and EC, however, is also consistent with the expectations of liberal International Relations theory. Moreover, contrary to Realist expectations, nothing indicates that the decision to institutionalize cooperation through harmonization was imposed by richer or more powerful countries on poorer or less powerful ones. Though some of the developing countries objected to the procedures through which the agreement on harmonization and the privileging of international standards had been reached,<sup>112</sup> none of them appears to have perceived the outcome as detrimental

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108. Not-for-attribution interview (July 30, 2007).

109. GATT Secretariat, *Summary of the Main Points Raised at the Eleventh Meeting of the Negotiating Group on Agriculture* at 9, MTN.GNG/NG5/W/86 (Nov. 10, 1988).

110. GATT Secretariat, *Report by the Chairman of the Negotiating Group on Agriculture* at 1, 4, MTN.GNG/16 (Nov. 30, 1988).

111. GATT Secretariat, *Report by the Chairman of the Negotiating Group on Agriculture* at 4, MTN.GNG/16 (Nov. 30, 1988); GATT Secretariat, *Trade Negotiations Committee Meeting at Ministerial Level* 13, MTN.TNC/7(MIN) (Dec. 9, 1988). Working Group documents note expressions of concern on two later occasions (by Japan and South Korea, according to interviews) that harmonization might mean making standards identical, without regard for objective differences in geography or climate (GATT Secretariat, *Summary of the Main Points Raised at the Third Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers*, MTN.GNG/NG5/WGSP/W/6 (Oct. 17, 1989)), but these concerns did not translate into opposition to the harmonization objective as such.

112. Colombia, Chile, Cuba, Peru, and Tanzania, for instance, all went on the record with procedural objections, regarding the “insufficient transparency” of the SPS negotiations due to the tendency to restrict consultations on details to “a very small number” of participant countries (GATT Secretariat, *Trade Negotiations Committee*, MTN.TNC/10 (Apr. 27, 1989)); most of the real negotiations occurred in the informal meetings of the “core” or “drafting group,” as noted above. Such complaints caused the chair in October 1989 to ask that suggestions for changes (to the draft text) be submitted in writing (GATT Secretariat, *Draft Text for a Decision by Contracting Parties on Sanitary*

to their interests. Moreover, if developing countries indeed failed to oppose international harmonization when they “should” have (an inevitably speculative proposition), it was much more likely due to a lack of technical expertise than to formal exclusion or scarcity of financial resources.<sup>113</sup> When drafts of the agreement were circulated, thus exposing the substance of the informal agreement among the core negotiators, no objections from developing countries were recorded.<sup>114</sup>

These observations about developing countries are consistent with the expectations derived from a sociological institutionalist or International Relations constructivist perspective: developing countries should be expected to support the endorsement of, and privileged position for, international standards if international standards enjoy high legitimacy. And indeed, the tone of many of the recorded statements (and my conversations with negotiators) suggests that international standards in this realm enjoyed a high degree of legitimacy among developing and developed countries alike.<sup>115</sup>

At the same time, the findings are also consistent with liberal International Relations theory, which can explain some observations that remain unexplained otherwise. Most of the developing countries that took an interest in the SPS negotiations approached the Uruguay Round negotiations as agricultural exporters. This definition of their national interests was often due to political institutions that ensured political dominance for a small number of large-scale, internationally competitive producers of exportable agricultural products over (often more numerous) inefficient producers for the domestic market (who might oppose free trade to reduce the risk of import competition). Similarly, the United States approached the SPS negotiations predominantly from the perspective of an agricultural exporter, rather than from the perspective of a potential importer with (in global comparison) relatively high domestic levels of health and safety regulations. This U.S. approach is hard to explain in terms of some general national interest, but it should be expected given the domestic political institutions and particular political configuration at the time. Moreover, after the 1992 U.S. elections, competing interests, such as

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*and Phytosanitary Measures*, MTN.GNG/NG5/WGSP/W/26 (Oct. 1, 1990)), though there is no indication that procedures subsequently changed.

113. See, e.g., Bhagirath Lal Das, *Strengthening Developing Countries in the WTO*, THIRD WORLD NETWORK ¶ 59 (2002), <http://www.twinside.org.sg/title/td8.htm> (last visited Feb. 24, 2008); see also BÜTHE & WITTE, *supra* note 12; Mattli & Büthe, *Global Private Governance*, *supra* note 65 (showing the importance of technical expertise for the ability to influence international standardization in various fora).

114. Not-for-attribution interview (July 30, 2007). Argentina was the only developing country that had a designated SPS representative. Whereas several other developing countries took an interest in the SPS negotiations, they had very frequent turnover in attendees, which has made it impossible to interview negotiators who could discuss longer stretches of the SPS negotiations based on personal experience.

115. Note the possibility, however, that hegemony in the very definition of norms and terms of debate might disguise the exercise of power. See, e.g., STEVEN LUKES, *POWER: A RADICAL VIEW* (2d ed. 2004); Robert W. Cox, *Gramsci, Hegemony and International Relations: An Essay in Method*, 12 MILLENNIUM: J. INT’L STUD. 162 (1983).

environmental regulatory protection, gained prominence in the U.S. position on SPS issues and led to some late changes in the text of the Agreement.<sup>116</sup> This finding supports a liberal political-economy perspective that emphasizes the diversity of interests and the differential (and possibly changing) power of various interested groups *within* countries rather than assuming a unitary national interest.

The expectations of liberal theories of International Relations are also supported insofar as a preference for cooperation via harmonization of standards was adopted on the basis of cost-benefit analyses. To be sure, the claim that harmonization was the “only feasible way” to achieve the agreed-upon objective of reducing the trade-inhibiting effect of SPS measures does not in itself prove that cost-benefit analyses of this and other means had been conducted and were underpinning the stated preference. Yet the October 1988 intervention, pointing out that alternative means to establish the agreed goals existed and had been insufficiently discussed in the full committee, shows that such alternatives were clearly recognized and had at least implicitly been rejected by the negotiators.<sup>117</sup> It is clear from the interviews with negotiators, moreover, that alternatives to international harmonization and privileging of international standards were considered within each of the delegations of the major (SPS) negotiating parties—and consciously rejected based on the practical difficulties and political costs that such alternatives would entail. Specifically, restricting the SPS Agreement to general principles (such as a requirement that every member state would have to be able to provide a scientific risk assessment for any SPS measure, if such a measure were challenged under the WTO) was rejected because negotiators expected that it would either produce deadlock, if unanimity were required to reach agreement on risk assessments once a specific dispute had arisen, or overburden the new dispute-settlement procedure of the WTO.<sup>118</sup> Moreover, small and developing countries successfully opposed such general principles, which would have put them at a disadvantage. Many of these countries had begun to adopt U.S., EC, or international standards but lacked both the research facilities to provide scientific evidence in support of such standards and the data originally underpinning these standards, as they had not themselves developed them.<sup>119</sup> Developing countries’ SPS measures would thus have always been at risk of being easily challenged. The focus on international standards and the presumption of WTO compliance for SPS measures based on these standards offered developing countries a way to adopt standards that would be safe from

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116. Not-for-attribution interviews (June 19, 2007; July 30, 2007). Those last-minute changes concerned, in particular, Annex C. They affected none of the provisions analyzed in this article.

117. See *supra* note 109 and accompanying text. The negotiator is not identified in the document.

118. Not-for-attribution interviews (July 18, 2007; July 30, 2007).

119. See GATT Secretariat, *Summary of the Main Points Raised at the Eighth Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers* at 3, MTN.GNG/NG5/WGSP/W/24 (July 2, 1990).

challenges that they could not meet—and it created opportunities for technical learning from involvement in the international standardization processes.

In sum, I find that SPS negotiators in the agriculture group early on reached the decision to institutionalize international cooperation on SPS standards by making a commitment to harmonize SPS measures on the basis of *international* standards. International standards thus attained the privileged position codified in Article 3 of the SPS Agreement, which declares national SPS measures based on such standards to be categorically in compliance with a country's obligations under the WTO Treaty.<sup>120</sup> The U.S. and EC negotiators took the lead in moving the negotiations toward agreement on this issue, but the decision was taken virtually unanimously, with broad support from developing countries, contrary to Realist expectations. The breadth of support was partly a function of the widely shared assessment that harmonization and endorsement of international standards was more efficient than alternative ways of achieving the objective—agreed in principle in advance of the Uruguay Round—to reduce the unnecessarily trade-impeding effect of SPS-related health and safety regulations (and impede the abuse of such regulations as nontariff barriers against trade in agricultural goods). These findings, along with the occasionally important conflicts of interest within the negotiating parties, are consistent with the expectations derived from the liberal political-economy tradition in International Relations. At the same time, international consensus also appears to have been facilitated by the widespread perception of international harmonization of SPS standards as an inherently legitimate means for overcoming national differences in health and safety standards, lending some support to a constructivist or sociological institutionalist perspective.

#### D. Negotiating Delegation

Agreeing on international cooperation did not yet entail an agreement to delegate. In fact, many countries at various times took the position that the Working Group on Sanitary and Phytosanitary Regulations and Barriers (WGSP) should negotiate a list of specific, existing standards, which all members of the Group considered unproblematic and which would then be recognized as international standards for purposes of this agreement. A U.S. proposal from October 1989, for instance, suggests that *specific* standards (from the CAC, OIE, and IPPC) should be recognized as “deemed to be based on sound scientific evidence.”<sup>121</sup> Two months later, the EC called for establishing a list of standards “which would be deemed to be recognized,”<sup>122</sup> and another

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120. SPS Agreement art. 3.

121. GATT Secretariat, *Submission of the United States on Comprehensive Long-term Agricultural Reform*, MTN.GNG/NG5/W/118 (Oct. 25, 1989).

122. GATT Secretariat, *Submission of the European Communities on Sanitary and Phytosanitary Regulations and Measures*, MTN.GNG/NG5/W/146 (Dec. 20, 1989). See also GATT Secretariat, *Communication from the European Communities*, MTN.GNG/NG5/W/56 (Apr. 20, 1988), which makes it clear that such a list was to be negotiated or agreed within the GATT.

three months later, the EC called for a list to be drawn up of “existing international and regional standards . . . agreed for use in the GATT context.”<sup>123</sup> This preference for negotiated, retrospective deference to specific standards developed by international bodies outside the GATT—rather than prospective delegation of SPS standards-setting authority to such bodies—is expressed in several documents by various parties throughout 1989. However, it does not appear to have correlated systematically with the distribution of power. The U.S. communication of July 10, 1989, for instance, calls for a system of retrospective designation of SPS standards as international standards,<sup>124</sup> whereas other U.S. proposals (previously and subsequently) endorse prospective delegation. “Optional” provisions in the draft agreement texts of May, July, October, and November 1990 (indicating issues on which consensus had not yet been achieved) included a provision for a specific list of recognized international SPS standards.<sup>125</sup>

The issue was not trivial. The supposedly neutral, scientific “risk assessment techniques developed by the relevant international organizations,”<sup>126</sup> for instance, existed only in very rudimentary form. Similarly, food and plant-health standards did not exist or were badly out of date for many widely traded agricultural goods.<sup>127</sup> Delegating standards-setting thus meant delegating some real authority without knowing the regulatory effect even in the near term.<sup>128</sup> What ultimately swayed negotiators in favor of delegation?

The specific considerations that shaped any given country’s preference for delegation are naturally not well documented in the written record of the negotiations, but there are—from documents and my interviews with negotiators—multiple indications that the benefits of delegation emphasized by P-A theory played an important role. Several countries’ representatives, for instance, recognized explicitly that delegation would allow them to benefit from the expertise of the specialized agent(s). Standards-setting within the GATT was ruled out: the GATT negotiators themselves “could not create [SPS]

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123. GATT Secretariat, *Summary of the Main Points Raised at the Fifth Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers* at 3, MTN.GNG/NG5/WGSP/W/13 (Mar. 19, 1990).

124. GATT Secretariat, *Communication from the United States on International Scientific Organizations*, MTN.GNG/NG5/W/98 (July 10, 1989).

125. GATT Secretariat, *Synoptic Table of Proposals Relating to Key Concepts*, MTN.GNG/NG5/WGSP/W/17/Rev.1 (May 29, 1990); GATT Secretariat, *Framework Agreement on Agriculture Reform Programme*, MTN.GNG/NG5/W/170 (July 11, 1990); GATT Secretariat, *Draft Text for a Decision by Contracting Parties on Sanitary and Phytosanitary Measures* at 16, MTN.GNG/NG5/WGSP/W/26 (Oct. 1, 1990); GATT Secretariat, *Draft Text on Sanitary and Phytosanitary Measures* at 10, MTN.GNG/NG5/WGSP/7 (Nov. 20, 1990); see also GATT Secretariat, *The Working Group on Sanitary and Phytosanitary Regulations and Barriers*, MTN.GNG/NG5/WGSP/6 (Oct. 15, 1990).

126. SPS Agreement art. 5.1.

127. Not-for-attribution interview (Aug. 2, 2007).

128. As noted above, governments retained the right to deviate from international standards, but only under certain conditions and subject to challenge via the WTO dispute-settlement mechanism. See *supra* Part II.B and text accompanying notes 21–24; see also *supra* Part II.C and text accompanying notes 41–46.

standards” given the extensive technical expertise required.<sup>129</sup> And regular ex post endorsement of new or revised standards by the WTO SPS Committee was rejected explicitly as overly cumbersome (or inefficient).

Efficiency arguments combined with considerations regarding credibility: Agricultural exporters sought a credible commitment from importers that the latter would not use SPS measures to undo ex post any agricultural trade liberalization achieved in the Uruguay Round. This created, in general, a need to constrain any such abuse of SPS standards. The delegation of standard-setting authority to international organizations was seen as the most efficient way of achieving such constraints because it promised to create—through a political but public process—a clear baseline against which any given country’s standards and regulations could be compared, thus facilitating the identification of protectionist, national SPS measures and raising the costs of deviations (due to the concomitant requirements to notify all new or revised national measures and to provide scientific justifications for the use of standards that differ from the international ones). Delegation was thus expected to make more credible the commitment not to use SPS measures to disguise protectionism. Finally, the desire to shift responsibility (and avoid potential blame) clearly played a role. There was an explicit recognition that delegation would allow the negotiators to focus on general principles, on which agreement would be easier to reach, rather than on a list of specific standards,<sup>130</sup> thus shifting responsibility for the more politically contentious tasks to the designated agents.<sup>131</sup> For developing countries, delegation of standardization to international organizations promised an opportunity to gain access to advanced SPS standards, which they lacked the technological and administrative capacity to develop domestically, as well as an opportunity to acquire expertise through participation in an open standardization process—opportunities afforded by neither the alternative arrangements, nor the status quo.

As noted above, however, delegation also brings costs—here most importantly a loss of policy autonomy. An analysis of agent selection is beyond the scope of this article, but it is clear from the chronology, as well as the documents, that agreeing to delegation was for many countries linked to the question of agent selection, since different (possible) agents implied different levels of autonomy costs. The kinds of cost-benefit analyses emphasized by political-economic theory in the liberal tradition of International Relations theory thus played an important role. To be sure, countries may not have estimated those costs correctly, as the EC discovered when it lost the WTO “Beef Hormones” dispute in 1997, based in large part on the SPS Agreement

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129. E.g., GATT Secretariat, *Summary of the Main Points Raised at the Fourteenth Meeting of the Negotiating Group on Agriculture* at 4, MTN.GNG/NG5/W/103 (Sept. 4, 1989).

130. Not-for-attribution interviews (June 19, 2007; Aug. 2, 2007).

131. Similarly, the delegation of the SPS negotiations from the Negotiating Group on Agriculture (NG5) to the Working Group on Sanitary and Phytosanitary Measures (WGSP) itself seems to have been motivated, in part, by the logic of shifting responsibility.

and its failure to provide scientific justification for a food standard that was more stringent than the pertinent CAC standard. Developing countries, too, apparently overestimated their ability to bring about international standards in the CAC, OIE, and IPPC that take their interests into account (mostly due to the scarcity of technical expertise and sometimes an unwillingness to devote their experts' time to work in multilateral organizations). They also underestimated the extent to which the provisions of the agreement created costly obligations for them.<sup>132</sup>

Note that preferences were a function of real cost-benefit analyses. Countries did not simply seek to minimize autonomy costs, as they could have done, for instance, by categorically opposing agents that did not have unanimity decisionmaking rules or by insisting on ex post GATT approval. Potential losses of autonomy were seen as a tradeoff against political gains: since interdependence meant that a decision was required at the international level to achieve the broader policy objectives, decisionmaking under some kind of majority rule was actually considered more desirable than decisionmaking under unanimity, especially by the United States and other agricultural exporters, who expected the decisions likely to be taken by the majority in those organizations, on average to better serve their interests than the status quo. The negotiators thus ultimately settled on delegation to the CAC, OIE, and IPPC (only), each of which elicited support or at least indifference from the United States, the European Community, Japan, the Cairns Group countries, and numerous developing countries alike. Other potential agents were opposed by one or more of these countries or groups because their recognition as sources of international SPS standards for purposes of the SPS Agreement was expected to impose too much of an economic or political cost.<sup>133</sup>

## V

### THE POLITICS OF DELEGATING REGULATORY AUTHORITY: BENEFITS, COSTS, AND DANGEROUS DISCOURSES

The SPS Agreement—an integral part of the 1994 WTO Treaty and hence binding on all member states—is a significant departure from a long GATT tradition of not interfering with Members' regulatory policymaking autonomy. Through the Agreement, the member states of the WTO have delegated

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132. This point will be further addressed in the conclusion. *See infra* Part V. Prior to the 1994 WTO Treaty, it was quite common in the CAC (and also in the OIE and the regional organizations under the IPPC) for a country to let a standard get adopted, even if the country found the standard objectionable and would not have wanted to adopt and implement the standard itself. Letting others go ahead with establishing the objectionable standard was unproblematic because Codex, OIE, and IPPC standards were strictly advisory and not any more tied to market access than any country's domestic standards. This changed with the coming into force of the SPS Agreement, thus imposing policy autonomy costs on all WTO member states (regardless of whether they were members or participants of the three standards-developing organizations).

133. Unanimity is effectively also the default of noncoercive, noninstitutionalized, international cooperation, given traditional norms of international diplomacy.



regulatory authority to three international bodies that develop sanitary and phytosanitary standards; their standards in turn form the technical basis for many health and safety regulations. Member states retain the authority to adopt health and safety regulations based on SPS standards that are more stringent than the international SPS standards developed by the Codex Alimentarius Commission (CAC), the World Animal Health Organization (OIE), and the International Plant Protection Convention (IPPC). But diverging from these international standards is subject to several constraints and open to challenge through the new dispute-settlement mechanism of the WTO, whereas the CAC's, OIE's, and IPPC's SPS standards enjoy the legal presumption of WTO compliance. Cases decided against powerful WTO Members on the basis of the SPS Agreement show that the authority thus delegated is real.<sup>134</sup>

This article sought to answer two questions about the Uruguay Round negotiations that led to the SPS Agreement. First, what explains international cooperation in the realm of SPS standards, which took the form of a commitment to harmonization on the basis of "international standards," combined with the legal presumption of compliance with GATT/WTO obligations for health and safety regulations that are based on such standards? Second, why did the contracting parties delegate standards-setting authority and thus case-by-case control over the content of the standards that would be recognized as "international standards"? Why did they not instead draw up a list of standards from among existing ones (as in some other Uruguay Round Agreements) or institutionalize the negotiation of the content of future SPS standards within the GATT/WTO?

In Part III, I derived possible answers to these questions, primarily from the liberal (political-economy) tradition in International Relations theory, which, I have argued, allows for the richest incorporation of insights from principal-agent theory into the analysis of world politics. I also derived alternative—though not always strictly competing—answers from other theoretical perspectives: International Relations Realism and constructivism or sociological institutionalism.

Empirically, in a nutshell, I have found that the agreement to institutionalize cooperation as the most efficient way to minimize the trade-impeding effects of SPS measures was reached in the early stages of the negotiations with near-universal support from developed and developing countries in the GATT.

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134. Cases that were brought against OECD member states (or the EC) by one or multiple WTO member states and lost by the respondent solely or partly on the basis of the SPS Agreement include (the country named is always the respondent): WT/DS245, *Japan—Measures Affecting the Importation of Apples*; WT/DS18, *Australia—Measures Affecting Importation of Salmon*; WT/DS3, *Korea - Measures Concerning the Testing and Inspection of Agricultural Products*; GMO disputes WT/DS291, 292 & 293, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*. Disputes filed on the basis of the provisions of the SPS Agreement but not yet concluded include WT/DS144, *United States—Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada* and WT/DS100, *United States—Measures Affecting Imports of Poultry Products*. For more details, see WTO Dispute Settlement Gateway, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) (last visited Feb. 22, 2008).

Negotiations over whether to delegate took longer and were more contentious, in part because the issues of delegation and agent selection were closely intertwined. The benefits of delegation identified in the general P-A literature played an important part in this case of international delegation of regulatory authority, but considerations of the political costs arising from the loss of policy autonomy also played a role. The final decision in favor of delegation was therefore only made in the context of a comparison of (autonomy) costs and benefits of delegation to the Codex, OIE, and IPPC with the costs and benefits of delegating to other possible agents, and the costs and benefits of drawing up a list of specific standards (that is, not delegating).

With respect to the broader theoretical debates, I have found that the United States and the EC played a key role in all parts of these negotiations, which is consistent with the expectations derived from International Relations Realism.<sup>135</sup> Many of the detailed findings about the process of the negotiations, however, cannot be explained by that theoretical tradition, and the thinking underpinning the negotiating positions was in part directly contrary to the expectations derived from International Relations Realism. Countries differed in their preferences from each other and over time, but those differences hardly correlated with the international distribution of power. The dominance of agricultural export interests in shaping the U.S. negotiating positions, for instance, and especially the shift in U.S. preferences after the election of November 1992 cannot be explained without an analysis of divergent domestic interests and the domestic political institutions that empower some over others (subject, in the U.S. case, to the democratic process). Divisions within the EC also played a role: The main EC agriculture negotiators, who were more closely tied to protectionist agriculture lobbies in the member states than the SPS negotiators, lost interest in the SPS negotiations early on and were happy to isolate the SPS negotiations in a separate forum of “technical” experts<sup>136</sup>—what P-A theory would call “shifting responsibility.” Domestic and international politics thus interacted to bring about the decisions whether to delegate. These findings are far more consistent with the expectations derived from the liberal tradition in International Relations, which—like Realism—suggests a central role for the United States and the EC in the international negotiations, but emphasizes the diversity of interests at the domestic level and the central role of domestic institutions in aggregating those interests into a national preference that is pursued in negotiations.

Finally, many of the preferences of the EC and developing countries are also consistent with the expectations derived from a sociological institutionalist or constructivist approach. To be sure, it may be tempting for powerful political actors to cloak their exercise of power in the language of legitimacy and

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135. The relatively marginal role of Japan, despite the country's economic weight and strong feelings about agricultural imports, is puzzling but has also been noted for the GATT negotiations more broadly. *See, e.g.*, PAEMEN & BENSCH, *supra* note 84, at 102–04.

136. *See generally* not-for-attribution interviews.

appropriateness. But references to the special legitimacy of international (global) standards are equally common in the statements and verbally communicated recollections of those who lost out or who were at the time considered neutral observers. For instance, EC support for international harmonization and delegation appears to have been motivated at least in part by a perceived need for consistent (and in that sense appropriate) behavior, given prior practices among the EC member states. And developing countries commonly associated international standards with multilateralism, which was generally viewed favorably, and with international organizations, which enjoyed a high degree of legitimacy as such and thus rendered support for international standardization the “appropriate” course of action.<sup>137</sup>

That said, the SPS negotiations may have been an easy case for arguments about norms and legitimacy: there had been a real, prior consensus (consistent with material and political cost-benefit analyses) regarding the overall objectives of an SPS Agreement, whereas the Punta del Este declaration that launched the Uruguay Round had in many other issue areas merely papered over deep differences regarding the objectives. Even the text of the actual SPS Agreement contains mostly commitments to abstract concepts and principles, on which—according to several negotiators—it was both politically and practically much easier to agree than on tariff levels or cuts in subsidies, in which negotiating positions tended to be diametrically opposed.<sup>138</sup> The SPS negotiations therefore never broke down, were generally far more cordial than the rest of the agriculture negotiations, and were mostly concluded almost four years earlier than the Uruguay Round as a whole. It should also be noted that even when the negotiators agreed, as predicted by sociological institutionalism,

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137. Note that any particular international organization’s legitimacy is not a fixed, static characteristic. For instance, the lack of concern among both U.S. and EC negotiators over the possibility of being outvoted in the international organizations (which might diminish policy autonomy or could provide cover for protectionist SPS measures) is hard to explain from a political-economy perspective, given the majoritarian decisionmaking rules of OIE and CAC. Part of the legitimacy of these organizations, which appears to provide a better explanation for the lack of concern, seems to have been derived from a perception of these organizations as *not* being majoritarian, even though their rules clearly permitted such decisionmaking. That perception was well justified by CAC practice in the pre-WTO period: there was a strong emphasis on reaching consensus, even if it came at the expense of the quality or specificity of the standard. See Alan Swinbank, *The Role of the WTO and the International Agencies in SPS Standard Setting*, 15 *AGRIBUSINESS* 323 (Summer 1999); David G. Victor, *The Operation and Effectiveness of the Codex Alimentarius Commission* 175–215 (1998) (chapter in unpublished Ph.D. thesis, *Effective Multilateral Regulation of Industrial Activity: Institutions for Policing and Adjusting Binding and Nonbinding Legal Commitments*, Massachusetts Institute of Technology) (on file with author). As Victor puts it, many Codex standards were therefore “modest, vague, or both.” As standards-setting in these organizations has become more contentious post-WTO, this procedural legitimacy has surely declined.

138. See BRAITHWAITE & DRAHOS, *supra* note 62, at 402 (noting that most countries are both agricultural exporters and importers). Having a dual role as exporter and importer—or more generally facing uncertainty about one’s future role—can facilitate compromise, because uncertainty over the side of a bargain on which each actor will end up creates incentives to write rules that are fair to both sides. (I thank Joseph Grundfest for an earlier discussion of this issue.) Yet SPS negotiators seem to have had quite clear expectations of how their respective countries (and the most politically salient groups within) would be affected by SPS standards. Not-for-attribution interview (Aug. 2, 2007).

they did not necessarily do so for the reasons suggested by some authors in that tradition: on many occasions during the negotiations, concerns were raised about the objectivity of “science,” and several interviewees noted having recognized—maybe not in the beginning, but during the course of the negotiations—that science is “not monolithic.”<sup>139</sup>

One further issue should be noted. In recent years, many developing countries have expressed dismay at the obligations they undertook via the SPS Agreement.<sup>140</sup> They have found that many international standards to which they committed themselves are much more costly to implement or certify than expected, and that the standards are allegedly inappropriate in some contexts (such as when they reduce scarce food supplies rather than making them more secure or healthy).<sup>141</sup> At the time of the Uruguay Round negotiations, however, no developing country appears to have foreseen any of this. As far as I could discern, even the usually most vocal guardians of developing countries’ interests, such as India and Brazil, registered no opposition to any part of the SPS agreement prior to the conclusion of the Uruguay Round.<sup>142</sup> Although it appears “stunning” in retrospect,<sup>143</sup> developing countries appear to have accepted what turned out to be very costly obligations for little in return.

In many respects, this behavior by developing countries is a puzzle for any rationalist theoretical framework, such as International Relations liberalism. The argument that developing countries lacked the information to understand what they were getting themselves into<sup>144</sup> raises as many questions as it answers. The text of the SPS Agreement was (except for some minor changes in 1993) known for almost four years before the conclusion of the Uruguay Round, and draft texts had circulated for many months in 1990. How could practically all developing countries have failed to gather the information to assess the Agreement? Büthe and Mattli’s theory of institutional complementarity might provide a partial explanation in that most of the negotiators from developing countries who attended meetings of the Working Group on Sanitary and Phytosanitary Regulations and Barriers were officials from ministries of agriculture, often at the domestic level institutionally separated from their countries’ officials with knowledge of the international standards-setting organizations.<sup>145</sup> The pervasiveness of developing country ignorance, however, suggests another, ideational explanation: The development of what the former

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139. Not-for-attribution interviews (June 15, 2007; Aug. 2, 2007).

140. *E.g.*, MUCHKUND DUBEY, AN UNEQUAL TREATY: WORLD TRADING ORDER AFTER GATT (1996); Das, *supra* note 113; Simonetta Zarrilli, *WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries*, in A POSITIVE AGENDA FOR DEVELOPING COUNTRIES: ISSUES FOR FUTURE TRADE NEGOTIATIONS 309–38 (UNCTAD ed., 2000).

141. Zarrilli, *supra* note 140, at 310, 321, 324.

142. *See also* Mark Axelrod, Saving Institutional Benefits: Path Dependence in International Law (2008) (unpublished Ph.D. dissertation, Duke University) (on file with author).

143. Not-for-attribution interviews (June 19, 2007; Aug. 2, 2007).

144. *See* JOHN H. BARTON ET AL., THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO, at 47f (2006).

145. *See, e.g.*, Mattli & Büthe, *supra* note 41; *see also* Das, *supra*, note 113, ¶ 57.

Indian ambassador to the GATT in retrospect called “a rational negotiating strategy”<sup>146</sup> appears to have been impeded not just by the normatively favorable association of international standards with multilateralism and international organizations, but also by the predominant focus on special treatment and financial and technical assistance for developing countries in “development” discourses.

Developing countries concentrated almost all of their energies during the SPS negotiations on getting vague commitments to this “development” agenda and vague promises of assistance (in Articles 9 and 10 of the Agreement).<sup>147</sup> Such primary emphasis on short-term (technical and financial) assistance over the long-term effects is consistent with liberal International Relations theory’s emphasis on the distinction between the government and (a variety of) societal interests insofar as the benefits of such assistance accrue predominantly to current governments while the long-term costs are borne by a broader segment of the population. Yet there is little indication of any variation among developing countries in this respect (as a domestic-politics explanation would lead us to expect). Ideas, norms, and discourses mattered indeed, but ironically, it was developing countries’ own development discourses that worked to their detriment: obsessed with the inclusion of provisions for short-term exceptions and development assistance, which were always peripheral to the long-term legal and regulatory obligations in the Agreement, developing countries mostly failed to conduct meaningful cost-benefit analyses of these obligations.

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146. Das, *supra* note 113, ¶ 37.

147. Egypt, Jamaica, Mexico, and Peru, for instance, made formal submissions that sought to tie international harmonization to technical and development assistance for developing countries.