

LINKING TOPICS IN TREATIES

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1. INTRODUCTION

How broad should a treaty be? This question has taken on greater importance as governments and civil society have recognized the growing interdependence of nations. The logical response to interdependence is to increase cooperation among governments when necessary or useful. But given the broad array of topics on which agreements may be appropriate, policy actors need to decide how to group or package such topics. Are two parallel negotiations on topics "A" and "B" better than one combined A and B negotiation? Although this question has been looked at through the disciplines of economics, political science, and international law, at this time, no adequate criteria exist on how to choose between separating or combining A and B. This Article offers a framework for thinking about this question.

Although the issue of policy linkage is an old one, the so-called "trade and" debates of the 1990s have refocused attention on these issues. For example, how should the international trade regime be linked, if at all, to the international environment regime? Should trade negotiations also include talks on labor standards? How should the World Trade Organization ("WTO") and the World Intellectual Property Organization ("WIPO") work together? Governments, multinational corporations, non-governmental organizations ("NGOs"), and academics have offered answers to these questions, but often the answers seem internally inconsistent. For example, business groups have generally favored linking trade policy to intellectual property rights, but have typically opposed linking trade and environmental policies.

This Article addresses these questions in the following way. Section 2 highlights some policy linkages in the past involving the trade regime. Section 3 discusses why policymakers might want

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to link differing issues. Section 4 discusses why policymakers might want to avoid such linkage. Section 5 discusses linkage in a different context: intergovernmental organizations with exclusive memberships. Although not all instances of issue linkage need to involve international trade, this Article primarily focuses on policy coordination that does involve trade.

2. POLICY LINKAGES IN THE PAST

Commentators considering “trade and” issues have sometimes presumed a backdrop of a “pure” trade regime traditionally impervious to penetration by non-trade issues. Such a presumption is inaccurate. The foundational agreements on international trade—the bilateral Friendship, Commerce, and Navigation treaties of the 19th Century and early 20th Century—comprised an amalgam of different issues which foreshadowed the linkage issues of the 1990s.¹

Consider the following examples:

Slave Trade: The Amity, Commerce, and Navigation Treaty of 1825 between Great Britain and Argentina provided that Argentina would prohibit all persons subject to its jurisdiction from “taking any share” in the slave trade.²

Religious Freedom: The Commerce and Navigation Treaty of 1894 between Great Britain and Japan provided that each country would extend to subjects of the other country the “right of private or public exercise of their worship.”³

Travel and Emigration: The Friendship, Commerce, and Navigation Treaty of 1874 between China and Peru recognized “the inherent and inalienable right of man to change his home” and provided that citizens of each country could go freely to the

¹ See U.S. TARIFF COMMISSION, *RECIPROCITY AND COMMERCIAL TREATIES* 17 (1919) (noting that modern commercial treaties cover a wide variety of subjects such as immigration, police protection, travel, forced loans, military service, quarantine, and patents); WILLIAM SMITH CULBERTSON, *INTERNATIONAL ECONOMIC POLICIES: A SURVEY OF THE ECONOMICS OF DIPLOMACY* 25 (1925) (noting that “the scope of international treaties is as wide and diversified as are human activities and interests”).

² See Treaty of Amity, Commerce and Navigation, Feb. 2, 1825, His Majesty-United Provinces of Rio de la Plata, art. XIX, 12 B.F.S.P. 29.

³ See Treaty of Commerce and Navigation, July 16, 1894, U.K.-Japan, art. I, 180 Consol. T.S. 257, 259.

other "for the purposes of curiosity, trade, labour, or as permanent residents."⁴

Labor Rights: The Commercial Agreement of 1921 between the Czechoslovak Republic and Austria provided that each party, by separate agreement, would assure that workers from the other country would enjoy equivalent treatment with respect to the protection of workers and social insurance.⁵

Environment: The Commerce and Navigation Treaty of 1924 between Italy and the Kingdom of the Serbs, Croats and Slovenes provided that in granting concessions for industrial plants, power plants or defense work in the frontier zone, "every possible care must be taken to avoid damage to neighbouring fishing rights and the destruction of fish."⁶ The Free Trade and Economic Integration treaty between Guatemala and Honduras of 1956 directed both governments to "co-ordinate their activities with a view to protecting forest reserves and water resources and preventing forest fires and soil erosion in the frontier regions of their respective territories."⁷

Narcotics: The Commercial Relations Treaty of 1903 between China and the United States committed China to adopt measures to prevent the manufacture, within China, of morphine and of instruments for its injection.⁸

Intellectual Property: The Friendship, Commerce and Navigation Treaty of 1925 between France and Siam provided that Siam would ratify the Paris (industrial property), Madrid (trademarks), and Berne (artistic works) conventions on intellectual property and bring its law into conformity with them.⁹

⁴ See Treaty of Friendship, Commerce and Navigation, June 26, 1874, China-Peru, art. VI, 66 B.F.S.P. 1125.

⁵ See Commercial Agreement, May 4, 1921, Czech Rep.-Aus., art. 22, 15 L.N.T.S. 87.

⁶ See Treaty of Commerce and Navigation, July 14, 1924, Kingdom of Italy-Kingdom of the Serbs, Croats and Slovenes, Annex E, art. 22, 82 L.N.T.S. 259.

⁷ See Treaty of Free Trade and Economic Integration, Aug. 22, 1956, Guat.-Hon., art. XIX, 263 U.N.T.S. 66.

⁸ See Treaty as to Commercial Relations, Oct. 8, 1903, China-U.S., art. XVI, 156, 1 Malloy 261.

⁹ See Treaty of Friendship, Commerce and Navigation, Feb. 14, 1925, Fr.-Siam, art. 24, 43 L.N.T.S. 191.

These examples show the broad range of what was relevant to trade and friendship among countries. The fact that treaties linked "friendship" and "commerce" is itself notable because a trade economist might say that because commerce is mutually beneficial among countries that are not friends, there is no reason to link friendship to trade. It is true, as Ernst Haas has noted, that the simultaneous presence of several issues does not necessarily mean that "these issues are somehow linked to each other."¹⁰ But when these issues appear in the same treaty, they might carry a higher presumption of linkage.

From its inception, the international trade regime has included goals besides trade liberalization. The first multilateral trade treaty, the General Agreement on Tariffs and Trade ("GATT") of 1947, contained provisions related to economic development.¹¹ For example, the GATT permits developing countries to take protective or other trade measures affecting imports in order "to implement programmes and policies of economic development designed to raise the general standard of living of their people."¹² The GATT also states that trade negotiations shall take into account the "fiscal, developmental, strategic, and other needs" of the participating countries.¹³

The GATT, as amended in 1965, included additional provisions regarding economic development. For example, member governments directed the GATT to "seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies . . ."¹⁴ It was also directed to "collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations . . ."¹⁵ The GATT, however, has not promoted much collaboration along these lines.¹⁶ On the few occasions when

¹⁰ Ernst B. Haas, *Why Collaborate? Issue-Linkage and International Regimes*, 32 *WORLD POL.* 357, 363 (1980).

¹¹ See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XVIII, 55 U.N.T.S. 188 [hereinafter GATT].

¹² *Id.* art. XVIII(2).

¹³ *Id.* art. XXVIII [bis].

¹⁴ *Id.* art. XXXVIII(2)(b).

¹⁵ *Id.* art. XXXVIII(2)(e).

¹⁶ See Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in 2 *FAIR TRADE AND HARMONIZATION* 47-49 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996) (reviewing unsuccessful attempts in the

environmental issues, such as overfishing, did come before the GATT, no effort was made to integrate environmental and trade concerns.¹⁷

The Charter of the International Trade Organization of 1948 also contained goals besides trade liberalization.¹⁸ There were provisions related to full employment, fair labor standards, double taxation, cooperation with the International Monetary Fund, restrictive business practices, and intergovernmental commodity agreements.¹⁹ Indeed, its breadth probably contributed to the failure of the Charter being put into force.²⁰

Perhaps the high-water mark of policy coordination was Agenda 21, approved by nations in 1992 in a non-binding form.²¹ In Agenda 21, everything links to everything else. Regarding trade and environment, the agreement urges countries to “[h]alt and reverse protectionism” and to “[e]nsure that environment and trade policies are mutually supportive, with a view to achieving sustainable development.”²² Efforts within the WTO to ensure that environment and trade policies are mutually supportive, however, have foundered.²³

In summary, the use of trade agreements as a vehicle to agree upon non-trade issues is an old phenomenon. This practice was probably reflective of a view of trade as being one of many issues of international concern. As relationships between governments deepen, more specific treaties supplement more general ones.²⁴ The reason why some of these non-trade provisions may seem startling to contemporary analysts is that there is now greater

GATT to link trade and other policies); see also KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 387 (1970) (noting that “[c]oordination of national policies has seldom been an interest of the GATT”).

¹⁷ See *Problems of Trade in Certain Natural Resource Products*, GATT B.I.S.D. (32d Supp.) at 126, paras. 6, 7, 41; see also *Forestry Products*, *id.* at 136.

¹⁸ See Havana Charter for an International Trade Organization, Can. T.S. 1948:32 (not in force).

¹⁹ See *id.* arts. 3, 7, 11(2)(a)(ii), 24, 47–54, 55–70.

²⁰ See generally William Diebold, *Reflections on the International Trade Organization*, 14 N. ILL. U. L. REV. 335 (1994).

²¹ See EARTH SUMMIT AGENDA 21 (United Nations, 1992).

²² *Id.* para. 2.10.

²³ See generally Steve Charnovitz, *A Critical Guide to the WTO's Report on Trade and Environment*, 14 ARIZ. J. INT'L & COMP. L. 341 (1997).

²⁴ See GEORGE MYGATT FISK & PAUL SKEELS PEIRCE, *INTERNATIONAL COMMERCIAL POLICIES* 168 (1923).

functionalism in international relations than there was forty or 140 years ago. Bureaucratic turf only begins to weigh heavily once institutions are created.

3. REASONS FOR LINKAGE

In thinking about why governments would link *different* policy issues, it may be helpful to start with a prior question of why governments cooperate on a particular issue.²⁵ To analyze intergovernmental cooperation, distinguishing two types of such cooperation may be helpful.²⁶ *Essential* cooperation occurs when joint action is absolutely necessary to achieve the intended goal. For example, preserving the ozone layer requires the joint action of numerous users of ozone-depleting substances. By contrast, *mutually-reinforcing* cooperation occurs when countries find that, due to political considerations, joint steps increase the national will to act. For example, every nation can liberalize trade unilaterally. Yet, they typically find that acting in concert makes it easier to legislate trade liberalization. Another example of such cooperation is the recent agreement on regulating corporate bribery in the Organization for Economic Co-operation and Development. This cooperation addresses competitiveness concerns by providing a level playing field among corporations regulated by different governments. Other examples involve international cooperation in banking, securities, and antitrust regulation.

One school of thought in international economics today is that there is a limited scope for intergovernmental cooperation. Analysts who adhere to this view are usually thinking only of essential cooperation. But once we also look at potential reliance upon mutually reinforcing cooperation, the scope for such cooperation expands.

Another way of looking at the issue of cooperation is to consider the categories of market failure and government failure. Intergovernmental cooperation may be needed to address a transborder market failure. For example, imagine that there is a river separating Countries X and Y and that manufacturing plants in both countries dump toxic wastes in the river. Although this is a

²⁵ See, e.g., ROBERT Z. LAWRENCE ET AL., A VISION FOR THE WORLD ECONOMY 44-58 (1996) (discussing when international cooperation is desirable).

²⁶ See Steve Charnovitz, *Improving Environmental and Trade Governance*, 7 INT'L ENVTL. AFF. 59, 63 (1995).

market failure, neither country would act alone to regulate the pollution because solitary action would be ineffective. If the countries agree to coordinate their environmental policies, however, such joint action can address the market failure.

Imagine that the pollution has been cleaned up and riverboat companies start on both sides. For various reasons, Governments *X* and *Y* are persuaded to subsidize the riverboats. The two companies operate at a loss, but can continue due to the government subsidy. This looks like a *government* failure; it is not a market failure. Now suppose that a new party comes into power and the Government of *X* considers abandoning the subsidy. This would make good economic sense, since *X* would save the tax dollars and its citizens could still cruise on *Y*'s boats. But *X* doesn't repeal the subsidy because of domestic political opposition—for example, from the boat workers or from investors in *X*'s riverboat company. The opponents claim that it would be unfair for *X*'s riverboat company to compete with *Y*'s subsidized riverboat company. This sort of policy irrationality can continue in both countries for a long time. Now suppose that the *X* and *Y* governments get together and agree that they will *both* eliminate the subsidies. This would be an example of how mutually reinforcing cooperation can address government failure.

These hypotheticals show that when both market and government failures are considered, there is potentially a great deal of beneficial policy cooperation that governments can do. Although the scope for such cooperation is not limitless, it seems likely that the scope continues to grow. Having noted this trend, we can return to the main topic of the paper which is whether governments should link their cooperation on distinct issues.

There are four main reasons why governments might want to link issues. They are: first, to enhance policy effectiveness; second, to rebalance policies; third, to build coalitions; and fourth, to gain economies of scale.

3.1. *Enhancing Policy Effectiveness*

Enhancing policy effectiveness is the strongest reason for linkage.²⁷ Economist John Bell Condliffe put it well when he wrote:

²⁷ See James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT'L ORG. 281, 296, 298 (1983) (discussing synergy among issues). For a discussion of function-specific diplomacy, see also Michael P. Ryan, *The Function-Specific and Linkage Diplomacy of International Intellectual*

"It is inconceivable that international economic problems can be effectively handled unless their various aspects—migration, labor, production, trade, finance, investment, and money—are considered in relation to one another."²⁸ The link between intellectual property and trade is a good example of how both policies can be enhanced. By insisting that intellectual property be protected worldwide, the WTO can facilitate trade since border checks for patent and trademark violations may not be needed. Similarly, by liberalizing trade, the WTO facilitates innovation since potential markets are increased. The link between trade and competition policy is another opportunity for two policies to enhance each other.²⁹ For example, the WTO Agreement on Telecommunications provides that governments will take action to prevent firms from engaging in anti-competitive cross-subsidization.³⁰ The linkage can also occur in the opposite direction. That is, other international organizations, besides the WTO, can seek to improve trade policy. The best example is the policy intervention by the International Monetary Fund and the World Bank. According to Deputy Secretary of the Treasury Lawrence Summers, such efforts "have led to more systematic trade liberalization than our bilateral or multilateral negotiations have ever achieved."³¹

Trade liberalization and environmental protection can also be fruitfully linked.³² Greater trade liberalization can increase pros-

Property, in Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 201 (1998).

²⁸ See JOHN BELL CONDLIFFE, *THE RECONSTRUCTION OF WORLD TRADE* 386 (1940). Condliffe continues the discussion by stating the following:

This does not, indeed, mean that a single institution can deal effectively with such a wide range of problems on the international, any more than on the national, plane, but it does imply the necessity of close liaison between such institutions as may be handling various aspects of a related problem.

Id.

²⁹ See generally Daniel J. Gifford & Matsuo Matsushita, *Antitrust or Competition Laws Viewed in a Trading Context: Harmony or Dissonance*, in 2 FAIR TRADE AND HARMONIZATION, *supra* note 16, at 269-309.

³⁰ WTO Agreement on Telecommunications Services, para. 1.1, 36 I.L.M. 354, 367 (1997).

³¹ Lawrence Summers, *Why America Needs the IMF*, WALL ST. J., Mar. 27, 1998, at A14.

³² See, e.g., DANIEL C. ESTY, *GREENING THE GATT* (1994); PETER UIMONEN & JOHN WHALLEY, *ENVIRONMENTAL ISSUES IN THE NEW WORLD TRADING SYSTEM* (1997). See also Renato Ruggiero, *A Shared Responsibility: Global Policy Coherence for our Global Age*, Address to the Conference on

perity, which can enable more environmental protection. Similarly, better environmental safeguards can enable faster economic growth and can prevent disputes between countries about environmental spillovers. Some commentators have denied that the two goals of trade liberalization and environmental protection can be pursued in harmony. For example, Frieder Roessler characterizes as “illusion” the idea that “the goals of trade liberalization and environmental protection can be obtained simultaneously in a single negotiation.”³³ Roessler comes to this conclusion by viewing trade and environmental concessions as substitutes. But this is too narrow a way to view the global economy. There is no theoretical reason why Countries *A* and *B* cannot *both* be better off if they agree to lower their trade barriers *and* to raise their environmental standards. In other words, socially optimal trade and environmental policies can be complements.

Trade measures are often utilized in treaties with non-trade goals such as protection of health, maintaining fair competition, protection of public morals, and protection of the environment.³⁴ Although some analysts may view this usage as exceptional, in reality, the linkage of trade measures to non-trade goals is common. This seemingly paradoxical point can be understood when one remembers that trade measures *restrict* trade. Parties to a treaty may have many reasons to take joint action to restrict trade—for example, to control narcotics supply. But pure trade motivations to restrict trade (that is, to protect a domestic economy from foreign competition) are almost never going to be implemented via a treaty. Governments that restrict trade for so-called trade reasons for example, to reduce competitive imports, do so *unilaterally* without a treaty. Thus, while trade agreements can be used to pursue joint liberalization, such agreements deregulate trade rather than employ trade measures as an instrument of policy. It

“Globalization as a Challenge for German Business” 5 (Dec. 9, 1997) (stating that the WTO has every interest in building an effective bridge between the multilateral trade agenda and the multilateral environmental agenda, not least because without a coherent strategy for addressing these challenge, it is trade liberalization that will suffer).

³³ Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 226 (Anne O. Krueger ed., 1998).

³⁴ See generally Steve Charnovitz, *Trade Measures and the Design of International Regimes*, 5 J. ENV'T. & DEV. 168 (1996) (discussing 30 cases in which treaties employ trade measures).

will be so-called *non-trade* treaties (e.g., narcotics) that will use trade measures as an instrument of policy.

Perhaps the most significant episode of policy linkage during the 1990s was the decision of the Uruguay Round trade negotiators to conclude sixteen major trade agreements as a single undertaking.³⁵ This meant that countries could not decide to join the WTO but, say, skip the agreement on intellectual property. Thus, although it is the subject of many disagreements about the appropriateness of trade linkage, the WTO itself is probably the world's greatest institutional beneficiary of policy linkage because it blends together so many disparate agreements.³⁶ The linked agreements of the WTO arose out of the long tradition in the GATT for "rounds" of trade negotiations that considered an increasing array of issues.

Another innovation of the Uruguay Round was to establish a dispute settlement system wherein a winning plaintiff could employ trade measures against a losing defendant that fails to correct the WTO violation being complained about.³⁷ In other words, the WTO allows trade measures to be used to enforce the various obligations of the new agreements. Many commentators have suggested that if trade measures for enforcement are appropriate to achieve better compliance with WTO obligations, such measures could also be made available to achieve better compliance with obligations under other treaties such as those concerning the environment.

3.2. *Other Reasons for Linkage*

A second reason for linkage is to rebalance policy spillovers induced by the new treaty. For example, because of the potential for greater trade to worsen environmental conditions, it could be useful to formulate trade and environmental policies together. Conversely, there is a potential for environmental agreements to impede international trade. For example, the Basel Convention

³⁵ See JEFFREY J. SCHOTT, *THE URUGUAY ROUND* 133-34 (1994).

³⁶ But it is interesting to note that the WTO dispute settlement agreement seems to disfavor linkage in some respects. It states that "[i]t is also understood that complaints and counter-complaints in regard to distinct matters should not be linked." *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, art. 3(10), 33 I.L.M. 1226.

³⁷ See *id.* art. 22. This provision contains rules for when the trade sanctions can be employed against other sectors other than that in dispute.

on hazardous wastes hampers trade in recyclables. That potential provides another reason to link trade and environment policies.

A third reason for linkage is to build coalitions either domestically or internationally.³⁸ The linkage of the labor and environmental side agreements to the North American Free Trade Agreement ("NAFTA") was aimed primarily at boosting U.S. public support for the NAFTA. This was not an instance of re-balancing because the side agreements contained no commitments to address any adverse labor or environmental effects of trade liberalization.

The more common reason for linkage is to build international coalitions. Two countries might not be able to agree on a single-issue negotiation because the issues will affect them differently. Yet if more issues are added, agreements may be facilitated as countries make concessions to gain what they value most highly.³⁹ For example, during the recent Uruguay Round, the Agreement on Trade-Related Aspects of Intellectual Property Rights was of great interest to major industrial countries while the Agreement on Textiles and Clothing was of great interest to developing countries. Close observers of the WIPO and the GATT/WTO have suggested that the tighter disciplines for protecting patents, copyrights, and trademarks achieved during the Uruguay Round could never have been negotiated within WIPO because that organization is so narrow. In other words, WIPO did not have the sufficient policy space to provide the necessary quid pro quo.

A fourth reason for linkage is to gain economies of scale.⁴⁰ Rather than carry out two parallel negotiations, governments might prefer to consolidate them to save time in assembling and exchanging information. Sometimes even unrelated issues are tied together out of expediency. A good example of this was the

³⁸ See Bernard M. Hoekman, *Determining the Need for Issue Linkages in Multilateral Trade Negotiations*, 43 INT'L ORG. 693-96 (1989); Michael P. Ryan, *The Function-Specific and Linkage Diplomacy of International Intellectual Property*, in Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 201 (1998).

³⁹ See Robert D. Tollison & Thomas D. Willett, *An Economic Theory of Mutually Advantageous Issue Linkages in International Negotiations*, 33 INT'L ORG. 425, 437, 444 (1979); Haas, *supra* note 10, at 371-77; see also William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL. 227, 248-49 (1997).

⁴⁰ See David Vines, *The WTO in Relation to the Fund and the Bank: Competencies, Agendas, and Linkages*, in THE WTO AS AN INTERNATIONAL ORGANIZATION, *supra* note 33, at 62.

Treaty of Peace (Versailles) which stated that a party ratifying it would be deemed to be ratifying the Opium Convention of 1912.⁴¹ Another example was the Treaty of Peace (St. Germain-en-Laye) in which Austria agreed to adhere to multilateral treaties on white phosphorus matches and the unification of commercial statistics.⁴² These linkage provisions are striking in that they effectively require governments to join an international treaty that they might not want to join.

In summary, governments might want to link international policies for four reasons: (1) to make one or both policies more effective, (2) to offset spillovers resulting from a policy change, (3) to build coalitions necessary to get either or both policies adopted, and (4) to gain economies of scale. Separating these reasons in one's thinking can be helpful not only in deciding whether to pursue linkage, but also in countering the arguments of those opposing linkage. Economic analysis may be helpful in deciding whether to link, but it cannot be dispositive.⁴³ Because of bargaining dynamics, negotiating conditions may not be easily predictable.⁴⁴

4. ARGUMENTS AGAINST LINKAGE

Several arguments are used against policy linkage. Critics often deny that policies are linked in a substantive way or should be so linked. For example, the U.S. business community has denied that trade and labor standards are connected. Linking issues that should remain unlinked can become a precedent and encourage groups to seek future linkage. This can lead to situations where a covert linkage is made, but the parties deny publicly that a linkage exists. An example of this is the linkage between arms trading and the release of hostages.

⁴¹ Treaty of Versailles, June 28, 1919, art. 295, 112 B.F.S.P. 1. See THE INTERNATIONAL LAW OF THE FUTURE 129-30 (1944). The linkage more than tripled the number of parties to the Opium Convention.

⁴² Treaty of Peace, Sept. 10, 1919, art. 240, 226 Consol. T.S. 8.

⁴³ See JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY at xxvii (William Ashley ed., 1909) (pointing out that except on matters of mere detail, there are perhaps no practical questions, even among those which approach nearest to the character of purely economic questions, which admit of being decided on economic premises alone).

⁴⁴ See Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 INT'L REV. L. & ECON. 309 (1997).

Linkage may also be opposed if it would change the outcome of negotiations to a result opposed by the critic. For example, Llewellyn H. Rockwell is worried about the Clinton Administration's proposal for fast track because he believes that "if the Clinton Administration had its way, the entire charter of the International Labour Organization would be imposed on the Third World, dramatically raising labor costs and crippling opportunities for expanded investment."⁴⁵ Frieder Roessler has warned that the "hoped-for cross-fertilization [among trade and non-trade objectives] is likely to turn into cross-contamination."⁴⁶ Roessler bases this prediction on a study of past linkages between the GATT and monetary policy, development policy, and competition policy.

Another common argument against linkage is that it will slow down negotiations.⁴⁷ For example in September 1997, a group of economists made a public statement in favor of fast track authority saying:

We strongly support fast-track legislation in the traditional form that does not link trade liberalization to requirements concerning labor and environmental standards. Insisting on such a linkage in view of the wide differences among our trading partners on appropriate standards in these areas will *slow down or even possibly halt* the opening up of world markets through trade-liberalizing negotiations

Human rights and environmental issues clearly deserve attention, but we believe they should be pursued in a proactive manner in institutions other than those concerned with the liberalization of trade More efficient outcomes are achieved by institutional specialization in policy

⁴⁵ Llewellyn H. Rockwell, *No Loss for World Trade*, J. COM., Nov. 14, 1997, at A7. Rockwell is the president of the Ludwig von Mises Institute.

⁴⁶ Roessler, *supra* note 33, at 228.

⁴⁷ See William Wallace, *Issue Linkage Among Atlantic Governments*, 52 INT'L AFF. 163, 177 (1976) (explaining that it becomes far easier to reach constructive agreement upon specific issues if the parties involved accept a limitation upon the range of related questions to be brought into consideration).

assignment coupled by consultation and coordination among the relevant organizations.⁴⁸

Jeffrey L. Dunoff has also pointed out the potential for new issues to hamper progress on old issues.⁴⁹

A related argument against linkage is that international institutions may lack the capacity for it. There may be an inadequacy of staff resources or expertise. Moreover, by blurring missions, international agencies may lose their sense of direction.⁵⁰ The economists' letter points to the benefits of functional institutional specialization in policy assignment. The economists probably mean that trade negotiations should be about trade, not about, say, worker rights. But that begs the question of where to discuss issues that intertwine the two—for example, the issue of export processing zones that derogate from the labor rights typically accorded in the rest of the country.

The economists favor "consultation and coordination" among intergovernmental organizations. One reason why there is pressure for "trade and" linkages is that the WTO remains resistant to such coordination with the International Labour Organization ("ILO") or the U.N. Environment Programme. It is interesting to note that the Charter of the International Trade Organization of 1948 called on the Trade Organization to consult the ILO when disputes arose about unfair labor conditions in production for export.⁵¹ Although the WTO has the authority to consult with the ILO,⁵² it has chosen not to do so.

In summary, several arguments are made against policy linkage: (1) there is no reason for linkage, (2) linkage would produce

⁴⁸ Peter Passell, *Loading the Trade Agenda with Diverse Issues Could Backfire*, N.Y. TIMES, Oct. 9, 1997, at D2; Letter from Bob Baldwin to Steve Charnovitz, Director of the Global Environment & Trade Study at Yale University 1 (Oct. 6, 1997) (on file with author) (citing open letter) (emphasis added).

⁴⁹ See Jeffrey L. Dunoff, "Trade and": *Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications*, 17 J. INT'L L. BUS. 759, 766 (1997).

⁵⁰ See David Palmeter, *International Trade Law in the Twenty-First Century*, 18 FORDHAM INT'L L.J. 1653, 1656 (1995) (arguing against giving the WTO responsibility for environment, labor or antitrust issues).

⁵¹ See Havana Charter of the International Trade Organization, *supra* note 18, art. 7(3).

⁵² See Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. V(1) 33 I.L.M. 1144 [hereinafter WTO Agreement].

bad policy results, (3) linkage would slow down negotiations, and (4) linkage would drain an agency's resources and confound its mission. Negotiators considering linkage will need to weigh these arguments against the purported benefits of a package.

5. RESTRICTIVE MEMBERSHIP ORGANIZATIONS

No discussion of linkage would be complete without a brief mention of restrictive-member intergovernmental organizations, such as the Organization for Economic Co-operation and Development ("OECD") and the European Union. Countries trying to join these organizations must engage in accession negotiations in which they can be asked to make domestic policy changes. For example, Korea committed to labor law changes when it joined the OECD in 1996.⁵³ Eastern European countries joining the European Union have made significant changes in their environmental policies.

The WTO is also a restrictive membership organization. For example, China has tried for over a decade to join, but has been blackballed by governments (like the United States) that are trying to link membership to domestic policy changes in China.⁵⁴ One might perceive this exclusion as a failure to qualify for membership, rather than linkage per se. Yet the WTO does not have any specific membership criteria.⁵⁵ China is being asked to liberalize markets in ways that current WTO members—for example, Cuba—are not being asked to do.

Such accession negotiations are, in fact, a practical application of linkage. Membership is being used as a carrot to induce policy changes. Although all international organizations restrict their membership (if only to states), only some organizations require policy changes as a price of membership. It is interesting to note that in 1923, Ethiopia's application to join the League of Nations was opposed by three European countries until Ethiopia agreed to

⁵³ See Steve Charnovitz, *Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 TEMP. INT'L & COMP. L.J. 131, 153-54 (1997).

⁵⁴ See, e.g., Tony Walker et al., *China Vows to Defy US on GATT Entry Terms*, FIN. TIMES, Oct. 6, 1994, at 6; see also Daniel T. Griswold, *China, Stop Toying with the WTO*, J. COMM., Jan. 27, 1998, at 6A (taking the mercantilist position that China must improve its offer on furniture, toys and beer before it should be admitted to the WTO). Griswold is an analyst at the Cato Institute.

⁵⁵ See WTO Agreement, *supra* note 52, art. XII.

suppress slave traffic.⁵⁶ By contrast, the United Nations has taken an inclusive approach to applying its membership requirement of being a "peace-loving" state.⁵⁷

The creation of a regional trading block provides another context for linkage discussions. As André Dua and Daniel Esty have noted, the negotiations for greater Asia-Pacific economic cooperation seek to create a new community.⁵⁸ Within a community, demands for linkage may be harder to resist because community mechanisms should reduce negotiation costs and because the costs of unharmonized policy will become more apparent.

6. CONCLUSION

This Article has attempted to present a framework for determining the scope of potential international agreements, particularly involving trade. The question is important because there are political pressures to expand the WTO to include trade-related issues—like environment, labor, and antitrust policy. Such an expansion would build upon the Uruguay Round, which incorporated new trade-related issues like domestic subsidies, product standards, food safety rules, and intellectual property rights.

Although the debate about the proper scope of trade treaty often presupposes the existence of an ideal form of a pure trade agreement, this Article points out that there has been a long tradition of multiple-issue trade agreements. Indeed, even the GATT is not single-minded about trade; it contains provisions relating to economic development. Thus, broadening trade agreements to include non-trade goals would not represent a sharp break from the past.

Having shown that linking issues is not inherently inappropriate, the Article next considers when linkages should be made. Four reasons for making a treaty linkage are put forward and illustrated: first, to enhance policy effectiveness; second, to rebalance spillovers; third, to build political coalitions; and fourth, to gain economies of scale in negotiations. The first reason is the strongest one. By negotiating two or more issues simultaneously, governments might achieve more than by negotiating the two is-

⁵⁶ See FREDERICK A. MIDDLEBUSH & CHESNEY HILL, *ELEMENTS OF INTERNATIONAL RELATIONS* 326–27 (1940).

⁵⁷ See U.N. CHARTER art. 4, para. 1.

⁵⁸ ANDRÉ DUA & DANIEL C. ESTY, *SUSTAINING THE ASIA PACIFIC MIRACLE* 5, 109, 125–29 (1997).

sues separately. For example, it might be better for governments to reach agreement on trade and global commons protection at the same time than to do the trade agreement first hoping that the global commons agreement will be concluded later.

There may also be good arguments against linkage. Linking issues in negotiations can slow down such talks, and thus delay the benefits of earlier policy coordination. In addition, overloading new issues can impede the effectiveness of existing international institutions. These potential problems exist even when each of the goals to be linked represents sound policy. Of course, when a popular goal does not represent sound policy, skeptics have another reason to oppose linkage.

The final section of the Article notes the connection between the question of *what* issues should be considered by the WTO and the question of *who* gets to join the WTO. Unlike the United Nations which has universal membership, the WTO is a restricted membership organization. Several countries, such as China, are being kept out until they agree to make changes in their domestic policy. Thus, membership is being used as an instrument of linkage. The discussion of China is not meant to suggest that if China becomes a WTO member, it would favor WTO consideration of issues like environment or human rights. More likely, China would become an opponent of expanding the WTO's mandate.

Although much of the Article uses the example of the WTO, the suggested framework for evaluating policy linkage should be applicable to all international economic and social lawmaking. As national economies grow and engender more troublesome trans-border spillovers, there will be a greater need to deepen policy harmonization among countries. Prior treaties may provide useful templates. Yet governments and civil society should constantly look for new ways to reorganize cooperation so as to enhance global welfare.

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