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**Trade-And? The World Trade Organization's Fuzzy Borders:
A Framework Paper**

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1. Introduction

This framework paper focuses on what is generally known in the trade community as the “Trade-and-Debate”. The existing literature on this topic is largely characterised by normative and prescriptive contributions on what issues should be included in (and excluded from) the regulatory agenda of the World Trade Organization (WTO).¹ On the one side, we find advocates trying to restrain the agenda to its original scope, largely focusing on tariff and quota issues and selected non-tariff barriers to trade in goods and services hindering market access. On the other side, we witness an emerging number of champions calling for further integration of trade-related issues, including policy issues that were originally not tackled by a “self-contained” GATT regime (Elsig 2007). The first group aims to scrap the “and” to counter incentives that potentially contribute to “overstretch” while the second group strategically uses the “and” notion to enlarge the regime’s overall scope and direction.

The legal scholars’ community has extensively debated the “linkages” and “border control” issues since the late 1990s. In particular, wide attention has been given to the linkage between trade and environmental regimes.² Over time, increasing areas of overlap (where various international organizations (IOs) claim authority) have characterised the legal debate, including human rights, culture, development, competition, intellectual property rights, and investments. The growing outputs within the legal field led one leading scholar to conclude that “WTO scholarship (...) seems to be obsessed with exploring the outer boundaries of the trade regime (Alvarez 2002:1).” While legal scholarship has been largely descriptive, it has also been characterised by a strong focus on the normative question when to link and when not (Alvarez 2001). In other words, an objective has been to devise mechanisms to differentiate between the issues

¹ The debate is far from new within the global trading system and follows. Disagreement over the agenda intensified during the Tokyo Round when non-tariff barriers to trade and developmental concerns entered the Geneva club negotiations (Winham 1986). Today, the spectrum and complexity of positions has grown but similar tensions remain.

² The debate was influenced by evolving GATT and WTO case law, starting with the so-called Tuna-Dolphin cases. In addition, the debate has also influenced case-law development itself (affecting the initiation of disputes within the dispute settlement system).

that were to be addressed within the trade regime and others (Dunoff 2001). Not surprisingly, contributors to this debate disagree on the WTO's role to address trade-related issues or non-trade concerns (Guzman 2004).³ Legal scholarship has focused on how the dispute resolution apparatus should deal with border questions, what principles could guide the interpretation of the treaties and whether a certain doctrinal (speak coherent) approach towards linkage was feasible. In particular, conceptualizations of how to police the border have led to prescriptions destined to guide judges in their work as interpreters of law and gap-fillers.⁴ Discussions have focused predominantly on how to balance various obligations and legal principles. More recent work rooted in critical legal theory and strongly inspired by social-constructivism and interpretative methods has highlighted the free trade underpinning in the debate and the related consequences (see Lang 2007).

The economic literature on the linkage and boundary question is surprisingly thin. Few studies have addressed regime overlap. Hindley (2002) has suggested assessing on a case-by-case basis the contribution on aggregate welfare for any particular linkage to be accepted.⁵ Maskus (2002) has offered a conceptual check list that to assist in deciding whether a regulatory standard should move onto the WTO agenda. On the list we find economic (and cooperation) concerns, including trade flow impacts, market externalities, coordination problems and systemic trade issues such as a meaningful dispute resolution. From the few scholarly outputs, it is difficult to generalize; however, most economists tend to focus on the core trade issues and define these narrowly.⁶ Simultaneously, there are calls for strengthening those specialised global institutions that deal with non-trade issues that are not core business of the WTO (Jones 2002).

³ Differentiating between trade-and issues, trade-related issues and non-trade concerns is conceptually difficult. It's more an "eye of the beholder" problem as most issues are somehow related in an increasingly interdependent world.

⁴ There exists some discretion for judges regarding interpretation and gap-filling; there is, however, disagreement over the degree of autonomy and whether a judge should be treated as an agent or a trustee following distinct logics of delegation (see Pollack 2007, Alter 2008).

⁵ Bagwell, Mavroidis and Staiger (2002) posit that the WTO's agenda should be defined by its ability to offer market access. Their argument is based on a terms-of-trade explanation.

⁶ According to Maskus (2002) and his criteria, it is justifiable to include intellectual property rights, competition and investment, however labour and environmental rights should not be taken up.

There has been limited attention and work within the fields of international relations (IR) and international political economy on the boundary questions. Regime theorists have shown some interest in questions of linkages across international regimes. Ernst Haas developed an actor-centric approach advocating a holistic framework where interests of actors and knowledge of experts are the drivers of linkage and power is “present as a mediating agent (1980:372).” This work did offer some guidance to understand the shifting borders applying an actor-centric perspective, yet it overlooked structural givens (that have increased since the 1970s given the growth in regimes and regime overlap). Little attention has been paid on the boundaries and intersection issues within the IR community in recent years. Leading liberal research programmes on legalization in international politics and rational design of international organizations (Goldstein et al. 2000, Koremenos et al. 2003) have been largely silent on this question.⁷ Raustiala and Victor suggest that the “lack of systematic attention to boundaries (...) leaves a large hole in the existing body of theory (2004:278).”

Only recently, the effects of legalization on expanding the WTO agenda have been become under increased scrutiny. However, systematic studies how the border is policed and under what conditions border shifts occur in linked policy areas are missing. Empirical evidence is far from conclusive. We suggest it’s premature to conclude that the WTO’s boundaries have expanded and that “other regimes are responding both to WTO normative dominance and linkage by accommodating the WTO (Kelly 2006:81).”⁸ We posit caution as to jumping to conclusions that accommodation has been the only and uniform answer to an expanding multilateral trade regime. Instead of “policy convergence” in reaction to alleged WTO (or the larger trade regime) influence, we suspect various forms of divergence as to border management.

⁷ In addition, more recent contributions unpacking the politics of international organizations (Barnett and Finnemore 2004, Hawkins et al. 2006) abstain from focusing their attention on the interplay with other regimes.

⁸ Kelly (2006) elaborates on various mechanisms to accommodate.

We have observed in recent years an increase in legalization (soft and hard law) in various policy areas.⁹ At the same time, we have witnessed that the multilateral trading regime with the WTO at its centre has embraced a surplus of legalization in relation to other policy regimes.¹⁰ In particular in respect to delegation and obligation, the creation of a new dispute settlement system during the Uruguay Round negotiations stand out: the dispute settlement understanding (DSU).¹¹ Trade conflict resolution was re-designed and “put on its head” towards the end of the Uruguay Round negotiations. The so-called “new jewel in the crown” as it was welcomed at the time has created new and increased existing asymmetric relations with other policy regimes in the 2nd half of the 1990s (Ruloff and Elsig 2000).¹² In other words, the “harder” law of the WTO has led to a de facto hierarchy of international regimes. Due to the lack of equally enforceable binding regulations in others regimes (human rights, environment, culture, development), many actors have turned to the WTO as a short-cut instrument for global regulation.

In the current context of multiple and fragmented regimes, we therefore differ from Raustiala and Victor’s definition of regime complex as “an array of partially overlapping and nonhierarchical institutions governing a particular issue area” (2004:279).” We posit some hierarchy and wish to investigate the effects horizontally and vertically. We also assume that hierarchy does not automatically translate to similar types of reactions witnessed in other policy areas (and dominating actors within these areas) and across levels of political systems. There is no uniform answer of accommodation or diffusion of “best practise” facing increased legal hierarchy.

⁹ The notion of legalization draws on the conceptualization of Abbott et al. 2000. It is composed by three elements: obligation, delegation, and precision.

¹⁰ This also includes the increasing web of bilateral agreements that produces various types of additional obligation.

¹¹ In terms of precision, there has been less advancement. Leaving some wording in agreements vague has been frequently used as a negotiation strategy to come to a conclusion. The dispute settlement bodies of the WTO increasingly are encouraged to interpret issues that were left deliberately ambiguous by negotiators at the time. This has led to some concern (in particular in the US) and might prove an additional obstacle to further trade liberalization to materialize (see also Goldstein and Martin 2000).

¹² One could also argue that formerly parallel regimes are increasingly overlapping with an asymmetric tendency. On overlapping, parallel and nested regimes, see (Aggarwal 1998, Young 1996, Alter and Meunier 2007).

This framework paper (and all the papers presented at the Fuzzy-Border conference) aim to map an emerging avenue of research re-directing attention to the linkage question and spearheading new analytical avenues. The various contributions will provide empirical data across issue areas and address some of the questions raised by the framework paper. This paper is organized as follows. The next section sketches current debates in international relations that provide the analytical backbone of the emerging “trade-and” debate. Then, we suggest a categorization of border shifts. This is followed by a section describing different explanatory factors that deserve further attention in relation to border shifts. The paper ends with a set of underlying assumptions and lists a set of conjectures that could guide the evolving work on the politics of regime overlap.

2. Pushing the analytical borders: current debates

Four recent research programmes in international relations serve as an inspiration from which we draw arguments for underlying conditions and evolving actor behaviour affecting the regime borders and the fuzziness of borders.¹³

First, when do we get border problems? According to the collective work on complex institutional linkages (Aggarwal 1998), relationship with other institutions is a key dimension of regime design, something that has been overlooked in the rational design literature. Institutions can be created in a parallel or nested fashion. Yet disagreements or turf wars about the choice of one or the other type of linkage often results in fuzzy borders. The efforts to harmonize relationships between EFTA and EU in the late eighties or the efforts to develop APEC in Asia and the Pacific are clear examples of failures to come up with clear-cut border lines between institutions (Dupont 1998a, 1998b). Reasons for failure to delineate clear border lines are the consequences of disagreement about the nature of the goods to be produced by the institutions, about distribution of gains in various fora as well as bureaucratic struggles (IO resistance). Whereas this strand of

¹³ The term “fuzzy” can be understood “indistinct or vague” (on-line Oxford Dictionary). We suggest only few borders are quite distinct, such as tariff negotiations as these occur within the trading regime, yet, even in this case there is a question of internal regime borders between multilateral and bilateral and unilateral approaches.

work produced a very useful framework to understand the logic of institutional linkages, its empirical applications have remained focused on specific time episode thus not really exploring life at the border in a dynamic fashion.

Second, the recent contributions on “regime complex” study the growing density of institutionalised regimes and how this affects behaviour.¹⁴ Raustiala and Victor (2004) trace various effects of regime complex, such as forum-shopping, the development of legal inconsistencies and governments’ reactions to these. In addition, the focus is on how regime complex are shaped by pre-existing rules (path-dependency).¹⁵ Given a regime complex, Drezner (2007) argues that a thicker institutional environment offers more strategic leverage to powerful states than to any other actor in the system.

Third, the research programme on legalization offers some arguments on how actors react to increasing institutionalised politics and growing density of legal commitments in world politics (Goldstein et al. 2000). Goldstein and Martin (2000) provide a cautionary note by suggesting that a more legalized WTO system (speak dispute settlement) will negatively affect future liberalization through the negotiation platform of the institution. The reasons for this are found to be in a modified balance of power among domestic interest groups due to increased transparency, precision and obligation of international trade rules.¹⁶ We suggest that similar processes have emerged not only in a vertical axis of decision-making, but also along a horizontal cooperation. And as domestic politics react differently to increased legalization, also neighbouring policy regimes will. Interesting in this respect is the argument by Shaffer and Pollack that through linkage “soft law regimes may be ‘hardened’ through their links to other regimes, losing the purported soft law advantages of flexibility and informality, while hard law regimes such as the World Trade Organization’s dispute settle-

¹⁴ Regime complex is defined by Raustiala and Victor as “an array of partially overlapping and non-hierarchical institutions governing a particular issue-area. Regime complexes are marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different set of actors (2004:279).”

¹⁵ Similarly, Alter and Meunier (2007) use the notion “regime complexity”. They treat regime complexity explicitly as an independent variable.

¹⁶ It is argued that import-competing groups will be empowered; on the relationship between transparency and negotiation outcomes, see also Stasavage 2004.

ment process may be ‘softened’” (2008:4). A related question is whether the shift to more hard law will increase the pressure to devise more precise rules or has opposite effects?

Finally, the growing work on interplay between preferential trade agreements and the multilateral system looks at interaction dynamics. In particular, the contributions concentrating on forum-shopping help us understand how actors navigate through a complex system of regimes and attempt to push their interests in specific venues often aiming to bring about change in another venue (Busch 2007, Davis 2006).

3. Conceptualizing border shifts as outcomes

We are interested in explaining borders shifts over time, including how other regimes react to an alleged WTO intrusiveness (or influence by the trading regime at large).¹⁷ Below, we present a possible conceptualization of border shifts (horizontally and vertically). It is difficult to offer a well-defined set of measures (not least because borders are usually not clearly delineated). We suggest speaking of shifts, when decisions in given regimes (or some of its key IOs) are substantially affected by the politics and law of another regime. We suggest from a WTO perspective the notion of “outward borders shifts” when formerly decisions on trade-related issues taken in a certain policy regime (horizontally) or within domestic contexts (vertically) are increasingly influenced by the WTO system. Shifts are large when trade regime dynamics start to challenge (or replace) formerly regime-internal drivers.¹⁸ We differentiate broadly 6 types of border “outcomes” in relation to neighbouring policy areas (or the domestic arena).

¹⁷ The trading regime has been dominated by the GATT/WTO system for quite some time, recently regional and bilateral trade arrangements have gained in importance. This affects the “location” of border shifts.

¹⁸ We speak of “inward border shifts” when decisions within the trade regime are affected by rules that developed outside the trading system. Linkage will possibly produce effects inwards and outwards, the question is what dominates on the aggregate. In addition, we assume increasing influence is not linear to the effects. Border shifts occur when a certain threshold of influence is surpassed.

A first group of outcomes could be described as a stable border. This could be the result of either cooperation or conflict. In the first case, border politics are characterised by cooperation efforts to address overlapping regimes. Joint action leads to the devise of conflict management tools.¹⁹ On recent trade and development linkages, various efforts have been undertaken to create inter-institutional settings to design rules and agree on implementation. An example of mutual management could be the integrated framework (now enhanced integrated framework) or the ongoing regulatory work on trade facilitation, where various international organisations are called to act jointly. The borders are somehow “frozen” and an equilibrium is installed. Various types of comitology systems are established (**managed freeze**).

A stable border could also be the result of conflictual relationships. In this second scenario, neighbouring policy fields fight to “defend the border” and engage in counter-pressure attempts (**forced freeze**). We have witnessed this within the trade and culture linkages (e.g. cultural diversity) or trade and biotechnology debates (e.g. biological diversity). Reactions range from containment strategies to open resistance. Similarly, one can think of the trading regime reacting to inward pressures, e.g. security-related protectionism (key actors within the trading system working towards fighting potential misuse of security-related treaty opt-outs).²⁰

A third border outcome is a result of neighbouring policy fields engaging in various forms of accommodation (**controlled shift outward**). In the area of trade-related international property rights (IPRs) this type of shift can be detected, where the World Intellectual Property Organization (WIPO) has come to accept that the lead had shifted to the WTO (a sign of political deference). Another illustration of accommodation techniques is a WTO-oriented specification on the choice of forum or choice of law applicable when various treaty obliga-

¹⁹ This is similar to what Raustiala and Victor (2004) refer to as dealing with legal inconsistency by disentangling and demarcation efforts.

²⁰ In terms of border management with domestic policy regimes, one could think of powerful trading actors that accept a certain intrusion into domestic politics, while freezing the border by shaping the regulatory agenda within the trading system (a sort of individual border freeze).

tions clash (e.g. between bilateral trade agreements and multilateral trade agreements).

A fourth outcome is a shift in the other direction. Borders are pushed inwards usually done through agreement among dominating actors (**controlled shift inward**). This could be an interpretation of the Doha declaration of TRIPS and public health where a large coalition (excluding the US) led to a weakening of the TRIPS agreements by setting exceptions for certain policy objectives. Inward shifts could also occur due to various forms of partial or missing implementation by domestic actors (calling into question to real degree of obligation).²¹ One could also envisage inward shifts through the work of WTO's legal bodies as a result of parties advocating invoking human rights and other general international law principals when ruling on cases.^{22 23}

A fifth outcome, we label **uncontrolled shifts outward**. This could be the result of a certain type of laissez-faire or benign neglect after linkage. One reason for this could be that the other policy regime lacks institutional or legalized structures, or where key countries agree to a "hardening" of a former soft law regime and shift of platform to regulate these issues. The linkage between the WTO system and Codex Alimentarius might have produced in the 2nd half of the 1990s some of this uncontrolled effects; Codex work was affected in unprecedented and unpredictable ways.

A corollary of above is as a sixth outcome **uncontrolled shifts inward**. The trading system allows non-trade concerns to dominate internal policies and law in an unchecked manner. This could be the consequence of dominating actors pursuing political goals (e.g. security, geostrategic concerns) through the WTO. It could also be a result of unintended consequences of appointments to the Appellate Body (AB). Some of the AB members that seem receptive to non-trade concerns could interpret cases in such a light, giving members little imme-

²¹ On the missing cases, see Bown and Hoekman 2005.

²² For an assessment how human rights concerns have come to influence the WTO, see Aaronson (2007).

²³ There is also the possibility of what could be called legal "deference" to decisions taken in other regimes. The WTO applies this in respect to the IMF and dispute settlement in the sense that panels may go as far as to accept the IMF's legal determinations in cases related to international finance. This seems to be an exception to existing practices in cases involving other IOs.

diate options to control shifts.²⁴ However, given the power of the members this is less likely.

How can we account for the emergence of any of the six generic border outcomes that we just outlined? Ultimately one could say that this will depend on the cost-benefit of various outcomes for members of the various organizations/regimes. Yet, given the multiplicity of actors and the complex setting in which they are embedded, this would let us with very few specific understanding of life at the border. We therefore now turn to a discussion of more general factors, conditions, be they institutional or structural or contextual, which could exert a significant influence on border outcomes.

4. A pathway to systematic border knowledge – mapping key explanatory factors

In this section, we list key factors where we situate potential causal explanation to account for observed outcomes. The first group of variables could be interpreted more as scope conditions or mere intervening variables that are likely to have an impact on border movements. The second group of factors are rather conceptualized as independent variables. We assume that these factors define opportunities and constraints for actors navigating along the borders and affecting the likelihood of borders shifting in a certain direction. The aim is not to offer an eclectic framework, but mapping variables, suggesting explanations for border politics and through conjectures directing attention to potential causal mechanisms at play.

²⁴ Options are non-election for a 2nd term, non-compliance with rulings or abstaining from initiating new cases.

4.1. Institutional features

4.1.1 Legalization

We are interested in exploring the effects of legalization on outcomes.²⁵ We expect that asymmetry of legalization in respect to obligation and to delegation to affect border outcomes. The WTO scores high on legalization due to its judicial features. The WTO moves in direction of hard law in terms of obligation (de facto bindingness of rules) and delegation (sovereignty transfer to third-party adjudication). Most of the neighbouring policy fields score lower in relation to obligation as implementation can not be improved through a strong dispute settlement system.²⁶ Turning to the decision-making processes, there is substantial variance across IOs. In the majority of specialised UN agencies, decision-making leans towards consensual modes (little delegation is visible). Some IOs are characterised by high delegation (IMF, World Bank, UN Security Council).²⁷ The WTO seems to be placed somewhere in the middle. The WTO is member-driven and consensus-oriented, yet, in practice a system of concentric decision-making favours decisions within small and powerful groups. While de jure there is little delegation related to the negotiation platform, small group negotiations de facto represent delegation to the key trading nations.²⁸ Thus, we argue that the WTO system scores high on delegation to judicial bodies (but moderate on delegation within decision-making). We combine obligation and delegation for the purpose of constructing conjectures.²⁹

²⁵ In terms of conceptualizing legalization, one of the challenges consists in aggregating the three elements usually attributed to legalization: obligation, delegation and precision. In this paper, we combine obligation and delegation.

²⁶ Lacking strong compliance features, more attention is paid to soft law instruments, including monitoring, shaming and naming.

²⁷ Delegation is witnessed through the work of executive boards and various tools of majority voting in the other pillars of the Bretton Woods system. Another example is the group of permanent and temporary members of the UN Security Council.

²⁸ When the system was dominated by the transatlantic partners, delegation effects were stronger as witnessed by the results of the Uruguay Round. Today, as the critical mass of key actors has increased in the trading system, there is de facto less delegation in decision-making.

²⁹ A high degree of obligation or a high degree of delegation does not automatically translate into high legalization. High obligation might not suffice if there are no delegation mechanisms to enforce obligation. Thus, we work with the assumption that regimes need to score high on both elements to move towards higher legalization.

The third element of legalization relates to the precision of rules. Low precision can be found in many regimes (in particular in relation to principles and overall objectives). In addition, the use of “strategic inconsistency” is an often observed tool to overcome stalemate and to conclude agreements (where parties hold different interpretations). In terms of border, there is a type of incomplete contract regarding trade-and issues. We assume that the precision on border questions vary across issue areas. We posit that high precision will constrain large border shifts, while low precision will invite strategic actors to strongly pursue various forum-shopping strategies.

4.1.2 Architecture

The rational design literature has directed our attention to additional institutional differences.³⁰ Among those, we consider two to be of particular relevance for border politics, that is, membership and scope. Yet, we need to adapt them for the purposes of this project. Regarding membership, defined in the rational design project as the number of actors engaged in an IO, we focus on the notion of mode of regulation.³¹ In other words, the characterisation of IOs could range from unilateral, bilateral, plurilateral to multilateral. The variation as to how neighbouring regimes are managed by legal instruments should affect borders.³² If a field is dominated by a somewhat unilateral logic (e.g. security policy or financial regulation) we should witness little border movement. The border should be mostly affected by bilateral and plurilateral logics (e.g. investments, official development assistance) as this increases the potential of forum-shopping activities. If there is symmetry of the “mode of regulation” (e.g. multilateralism vs. multilateralism), we suggest that borders are stable similar to the most

³⁰ Koremenos et al. (2003) study five design features: membership, scope of issues covered, centralization of tasks, rules for controlling the institution, flexibility of arrangements. Some of these features overlap with the elements of legalization.

³¹ Another question is whether asymmetry in membership size affects the depth of cooperation and thus the borders (see also Downs, Rocke and Barsoom 1998).

³² See also Thompson and Verdier 2008; they provide explanations why regimes are organized differently (multilateral, bilateral or unilateral).

asymmetric situation. Symmetric regulation inhibits the dominance of some actors to bring about rapid change to border delineation.

Second, on the issue of scope and coverage, we consider them in a dynamic perspective. Some IOs have over time remained focused on particular issues and have only shown little expansion (e.g. WIPO, International Labor Organization, World Customs Union), others are characterised by a large and expanding agenda (e.g. United Nations Conference on Trade and Development, Organization of Economic Cooperation and Development). The more constrained the agenda is, the greater should be regime-internal incentives to defend borders against intrusion. Regimes that cover a multitude of issues might be more flexible to exit and concentrate on other regulatory areas where authority is exercised.

4.2 Structural and contextual features

4.2.1 Nature of the problem

A constant and major determinant of institutional choice has been the type of problem that interdependent actors face. Going back to early work on regime theory (Stein 1982), a still prevailing dichotomy in terms of generic problems is the one between collaboration and coordination problems.³³ Following earlier work, we refer to these two generic problems as the “free-riding temptation” and the “where to meet problem” and we add a third one, the problem of “inhibiting fear” (Aggarwal and Dupont 2008).³⁴ Whereas there is no need to define the first two, often illustrated with the game theoretic matrices of the Prisoners’ Dilemma and Battle of the Sexes, the third one, better captured by the game of the Stag Hunt (Assurance), refers to situations in which actors do perceive mutual cooperation as the optimal outcome but may have a trembling hand when seeking to achieve it. In the context of globalization and economic liberalization, although

³³ The collective work on rational design uses enforcement vs. distribution problems (Koromenos et al 2001).

³⁴ Clearly this is a very rough way to address the problem of the cooperation; for a more systematic way to conceptualize it, see Aggarwal and Dupont (1999) and subsequent debates with critics (Aggarwal and Dupont 2002, 2003).

countries may be convinced that liberalization will yield benefits, they may be hesitant to risk the instability that might come from the ebb and flows of the international market.

Border politics is likely to vary with the nature of the problem. When states are concerned with free-riding, they are unlikely to tolerate fuzziness at institutional borders because this would make monitoring and subsequently sanctioning difficult. But if they are facing severe distributive tensions on how to get rid of fuzziness, we should not expect much agreement on how to clarify things. Fuzziness may also create additional anxiety to states already fearful to engage in cooperation, although border politics is less likely to matter much in this third type of situation.

4.2.2 How to regulate

We expect attitudes of actors (and paradigms that have developed within regimes) to shape the regulation of the border. This goes beyond past experience and speaks to the development of convergence (or divergence) of ideas as to “how to regulate”.³⁵ This can involve questions of regulatory philosophy (e.g. state-led vs. market-led solutions), procedural issues (e.g. a strong norm of reciprocity vs. differentiated responsibility) or whether issues can be regulated unilaterally or multilaterally. We expect that in regime dyads where liberal ideas (free trade, laissez faire) clash with other ideas (re-regulation) border conflicts might become very prominent.³⁶ In addition, technical jargons and the dominance of legal discourse create specialised environments for the development of certain regulatory philosophies (Weiler 2001). A number of questions emerge from this: What explains the rise of certain ideas on border regulation? Indirectly this speaks to the role of civil servants, epistemic communities, civil society groups in defining “how to regulate”? What is the optimal policy preferred within one set

³⁵ The emergence of paradigms are driven by „small world environments“ or „embedded relationships“ within regimes (Alter and Meunier 2007).

³⁶ Another example is the different underlying philosophy to regulate food safety in the WTO SPS agreement (scientific risk assessment) vs. the Biodiversity Convention’s Cartagena Protocol (precautionary principle), see Winham 2003.

of dominating regime actors and how do these ideas match with ideas developed in the neighbouring policy fields?

4.2.3 The power of markets

An interesting feature of the world trading system is the rather rapid change of market power (e.g. compared to the field of security policy). Aggregate power as measured by the size of the market, the share of trade flows in goods and services, and the amount of investment inflows and outflows is far from constant over time and varies from sector-to-sector.³⁷ In particular, positions of key actors are subject to rapid change. In some regulatory areas, market forces can in a very short time change the dynamics of the political-economy of leading actors in the system. States, such as Brazil or China have adjusted their positions vis-à-vis trade of genetically modified organisms (GMOs), as trade in certain products has grown in commercial importance for the country. This potentially has effects on the extent of border shifts. In other areas, such as subsidies of civil aircraft, due to the oligopolistic structure many actors are not concerned by the border questions of domestic subsidies in aircraft (competition rules) and trade. Here border effects are minimal. We expect that the speed and degree of market dynamics have an impact on border movement.

4.3 Explaining border outcomes

Now that we have identified a list of factors that can account for variation in terms of our six border outcomes, we turn to the challenging task of offering some causal conjectures explicitly linking the two sides of the equation. We omit here a discussion on the effect of the interactions of several factors on border outcomes.

We start this discussion with reference to four assumptions underlying the conjectures that follow. First, we assume rational actors who navigate the

³⁷ Every trade-and issue might be driven by different market power constellations

complex system. We basically suggest that institutional, structural and contextual conditions largely define possibilities and constraints of interest aggregation across polities, regimes and issue areas. We expect that key actors will incorporate the institutional setting when anticipating the success of their strategies. Related to this, we assume that rational actors will engage in various forms of forum-shopping as this is an important feature in overlapping policy fields; its effects, however, seem far from clear. We suggest that forum-shopping is largely influenced by the factors discussed in this framework paper. In addition, if an increasing number of actors engage in forum-shopping, individual benefits will decrease sharply. As a result, institutional differences again will gain in importance.

Second, the magnitude of state preferences will range from low to high (saliency issue). In addition, trade politics is largely driven by domestic interest groups (in particular in democracies), whereas other issue areas might be characterised by a stronger role of the state (e.g. security policy, financial stability, human rights, health, integration). This has an effect on access points and the composition of dominating actors that can vary from one regime to another.

Third, actors that should receive special emphasis are those actually patrolling and managing the borders. They are in a privileged position. Generally, we assume “border managers” to prefer cooperation over conflict; this should have a softening effect on borders shifts in general. It is possible that norm-entrepreneurs within IOs attempt to enlarge the institution’s (and their own) activities (Barnett and Finnemore 2004), however, their activities are often controlled by IO members.³⁸ Bureaucratic actors within IOs could also attempt to resist embracing additional activities as evidenced in the case of the World Bank (Nielson and Tierney 2003).

Fourth, past cooperation will have some path-dependent effects or what could be called the impact of “the shadow of the past”. There are different pathways to cooperation, yet cooperation is always shaped by existing institutional platforms and overall experience with managing actively border concerns (see

³⁸ An agent-driven mission creep is not likely in the context of the WTO – with the partial exception of dispute settlement (Elsig 2008).

Raustiala and Victor (2004). Current regulatory cooperation between the trading system and other policy areas varies. While, the institutional relationships between the WTO and the IMF have been actively managed over time,³⁹ institutional relations with other regimes have been more contentious (cultural rights, environment) or have lacked cooperative platforms. In addition, past cooperation (in particular when successful) tends produce mimicry of existing practices. Similarly, conflict-laden past cooperation increases the likelihood of border conflicts.

4.3.1 Conjectures on legalization

The higher the asymmetry of legalization, the more leeway is giving to leading members within the trading system for agreeing to redraw the border (controlled border shifts). Yet, potential intrusiveness (and missing consensus within WTO regime members) might also invite reactions by members of the neighbouring policy field leading to forced border freeze. Regime proponents might attempt to address “legalization creep” from the outside.

L1: Asymmetry of obligation and delegation makes controlled border shifts or forced border freeze more likely

Equally strong regimes will deprive both sides of flexibility for redrawing borders. When the legalization level is roughly symmetric, there is no particular urgency to clear the border line given the unlikelihood to see agency creeping in from outside. There exists a tendency towards managed border freeze. Under these conditions, past practice (the shadow of past cooperation) might yield substantial influence on the forms of border management.

³⁹ Within the WTO Secretariat, one Division is also mandated to manage inter-institutional relations with the IMF. Generally, the contracting parties of the WTO have been reluctant to delegate power to the WTO Secretariat to engage with other Secretariats of IOs.

L2: *Symmetry of obligation and delegation make managed border freeze more likely*

When high precision characterises border issues, there is by definition less leeway for members to change the existing border delineation, thus this should constrain border shifts and lead to cooperative outcomes to freeze the borders.

L3: *Clarity and consistency (high precision) of border mandates make managed border freeze more likely*

Contrary, we assume that low precision will invite strategic actors to strongly pursue various forum-shopping strategies. This may lead to uncontrolled border shifts (or if other regimes react strongly) to stalemate.

L4: *Little clarity and lack of consistency (low precision) of border mandates make uncontrolled border shifts or forced border freeze more likely.*

4.3.2 Conjectures on architecture

Related to the mode of regulation, we assume that it affects in particular the degree of border shifts. We posit that the most asymmetric and symmetric relations produce stable outcomes in forms of border freeze. While multilateral-multilateral could lead to managed border freeze, multilateral-unilateral tend to produce forced border freeze.⁴⁰

D1: *Multilateral vs. unilateral tends to produce forced border freeze*

D2: *Multilateral vs. multilateral tends to produce managed border freeze*

⁴⁰ It somewhat resembles a bell-curved relationship between mode of regulation (on a continuum from unilateral to multilateral) and degree of border movement.

We suggest border shift effects when multilateral regimes either face bilaterally or plurilaterally organized regimes. This type of asymmetry will increase the leverage and leeway for some actors as they can more easily overcome collective action problems.

D3: *Multilateral vs. bilateral (or plurilateral) tends to produce controlled and uncontrolled border shifts*

When the neighbouring regime tends to focus on a narrow set of regulatory issues, there are internal pressures to defend the regime's exercise of authority more vigorously. When the regime is challenged, actors will design counter-strategies most likely leading to forced border freeze. If the regime remains unchallenged, we should witness forms of managed border freeze.

D4: *Narrow coverage tends to produce forced or managed border freeze*

When the coverage is broad then border shifts are more likely as actors within regimes might have varying priorities and attach less importance to some issues. They could potentially agree to "abandon" some regulatory authority over an issue allowing for a controlled shift. Uncontrolled shifts occur when little authority has been exercised over a certain issue area.

D5: *Broad coverage tends to produce controlled or uncontrolled border shifts*

4.3.3 Conjectures on the nature of the problem

Fuzziness of borders is a major concern when the major problem of cooperation is free-riding since it provides avenues for escape. In such situations, there is a big incentive for mutual border clarification. This is most obvious in the case in which free-riding is a dominant concern of both sides of the borders but it is also true in case of asymmetry. Indeed the side for which free-riding is not a major

problem is keen on avoiding intrusion into its scope of authority by the other side tempted to pursue free-riders.

NP1: *The more severe the free-riding problem, the more likely are controlled shifts or managed border freeze.*

Distributive tensions between the two sides of the border make a mutual agreement on the contour of the border difficult. Change is therefore most likely to either be forced or out of benign (or not) neglect.

NP2: *The more severe the where to meet problem, the more we should expect either forced border freeze or uncontrolled shifts.*

Border politics is not a central concern when the major problem of cooperation is to inhibit the fear of actors to engage in it. True, clear borders may help to reassure members who are navigating in peripheral waters but the very essence of the situation is to make sure that members do not find themselves in such peripheral waters.

NP3: *When the nature of the problem is inhibiting fear we should expect either uncontrolled shifts or freeze.*

4.3.4 Conjectures on how to regulate

We expect that in regime dyads (or a policy issues) where liberal ideas of regulation clash with other ideas (re-regulation), spill-over to the management of the border should be visible. When actors on both sides do not agree on how to regulate criteria to draw the border, they are likely to either impose their views or to abstain from any explicit action along the border.

R1: *When there is cognitive divergence on how to regulate, we should expect forced border freeze or uncontrolled shifts.*

In contrast to the previous conjecture, consensual knowledge and goals help define clearly defined and bounded issue-areas (Haas 1980) based upon explicit agreements.⁴¹

R2: *When there is cognitive convergence on how to regulate, we should expect controlled shifts or managed border freeze.*

4.3.5 Conjectures on market change

We posit that this variable has not been sufficiently studied in relation to regime overlap. We assume that rapid and extensive changes in markets affect members' preferences in significant ways. In particular, market pressure might overcome blocking powers and veto points. This can lead to a modification of the preference structure of key actors. Thus, we posit following conjectures:

M1: *When market change is fast and large, we are more likely to see uncontrolled shifts.*

M2: *When market change is slow and shallow, we are more likely to see managed border freeze.*

4.4 Extensions of the arguments

Above conjectures focus primarily on the horizontal effects between policy regimes (and between the leading institutions within a regime), however, some of the conjectures can apply to the vertical dimension (relationship between an international regime and domestic politics). The vertical dimension can be observed in various stages of the regulatory cycle from agenda-setting to imple-

⁴¹ According to Haas (1980), this corresponds to situations dominated by rationalists.

mentation. There are gate-keeping activities that decide whether an issue will be linked and in what ways. There are different ways of decision-making and direct influence of domestic actors. We suggest that implementation might be one of the areas underexplored where border issues arise; here we assume important wiggle room (e.g. in the national context) for actors to shape the final borders!

A final issue is the location of border action as this may vary over time within regimes. We have recently witnessed an increase of activities towards greater market integration through bilateral and regional trade agreements. Many of these agreements include non-trade concerns. In other words, we notice that pressures that affect the trade-and borders have temporally moved from the WTO to bilateral trade agreements.

5. Conclusion

We assume difference of border management and shift of borders between regimes (horizontally) and across the international-national divide (vertically). In this framework paper, we suggest various conjectures and hope through the conference to encourage empirically and theoretically-inspired research to address above conjectures in explicit or implicit terms. In particular we encourage unpacking causal mechanisms at play along the WTO's fuzzy borders.

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