

Hegemony, Private Actors, and International Institutions: Transnational Corporations as the agents of transformation of the trade regime from GATT to the WTO

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LIST OF ABBREVIATIONS

ACTN	Advisory Committee for Trade Negotiations
AIG	American International Group
Amex	American Express
APEC	Asian-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
AT&T	American Telephone and Telegraph Company
BI	British Invisibles
BIAC	Business Industry Advisory Committee
BRT	Business Roundtable
CAP	Common Agricultural Policy
CCP	Common Commercial Policy
CEO	Corporate Europe Observatory
CEO	Chief Executive Officer
CSI	→ USCSI
EC	European Commission
EEC	European Economic Community
ECSG	European Community Services Group
EFTA	European Free Trade Association
EU	European Union
ERT	European Roundtable of Industrials
ESF	European Service Forum
EU	European Union
FDI	Foreign Direct Investment
FSA	Financial Services Authority
FTA	Free Trade Agreement
GATS	General Agreement on the Trade of Services
GATT	General Agreement on Trade and Tariffs
GDP	Gross Domestic Product
GNG	Group of Negotiations on Goods
GNP	Gross National Product
GNS	Group of Negotiations on Services
IBM	International Business Machines
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IFSL	International Financial Services, London
INPAC	Investment Policy Advisory Committee
IP	Intellectual Property
IPR/IPRs	Intellectual Property Rights

IPC	Intellectual Property Coalition
IPE	International Political Economy
ISACs	Industry Sector Advisory Committees
ITA	Information Technology Agreement
ITT	International Telephone and Telegraph Corporation
LDCs	Least Developed Countries
LOTIS	UK Liberalisation of Trade in Services Committee
MFA	Multifibre Arrangement
MFN	Most-favored Nation Principle
MTN	Multilateral Trade Negotiations
NFTC	National Free Trade Council
NGOs	Non-governmental Organisations
NICs	Newly Industrialised Countries
NTI	National Treatment instrument
NTT	Nippon Telegraph & Telephone Corporation
OECD	Organization for Economic Co-operation and Development
PanAm	Pan American Airlines
PROGRES	Programme for Research on the Service Economy
Quad	Canada, EU, Japan and the United States
SCM	Subsidies and Countervailing Measures
SDT	Special and Differential Treatment
SPAC	Services Policy Advisory Committee
TABD	Transatlantic Business Dialogue
TNC	Trade Negotiations Committee
TNCs	Transnational Corporations
TPRC	Trade Policy Research Centre
TRIMS	Trade Related Investment Measures
TRIPS	Trade-related Aspects of Intellectual Property Rights
UDES	La Unión Argentina de Entidades de Servicios
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNICE	Union of Industrial and Employers' Confederations of Europe
USCIB	United States Council for International Business
USCSI	U.S. Coalition of Service Industries
USTR	United States Trade Representative
WGTI	Working Group on the Relationship between Trade and Investment
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

ABSTRACT

This dissertation aims to *understand* (1) the *transformation* of the trade regime from GATT to the WTO within the context of the world order, and (2) the roles of transnational corporations (TNCs) in this transformation. It provides a neo-Gramscian framework for analysis to fill a void in mainstream approaches in IR/IPE literatures on international regimes, which suffer from inadequacies in capturing the “intersubjective” nature of regimes and non-state actors’ roles in global politics. For neo-Gramscian scholars, international regimes are intersubjective entities that are amalgamations of ideas and power configurations inherent to historical structures. Hegemony is a concept that ties together the *social forces* as agents of historical change within international regimes and world orders. Hegemony refers to the translation of political power to *legitimate authority* through obtaining the consent of subordinate actors, and is expressed in the consensual aspect of the exercise of power in a given world order. This dissertation primarily contends that the transformation of the trade regime can be characterized as *hegemonic* because it occurred in conjunction with the transformation in the world order from U.S. post-war hegemony to neoliberal hegemony. With the transformation into the WTO, the legal scope of the trade regime was redesigned, and its *normative content* was redefined to reflect the ethical framework of neoliberalism. These changes were reflected in the newly acquired recognition of the enhanced legitimate authority of markets vis-à-vis states and the acknowledgement of the necessity to create binding *disciplines* over governments. The dissertation analyses two cases to understand the roles of TNCs in this transformation process with a particular focus on their activities and abilities to set the regime’s agenda. The first case study examines the incorporation of services into the GATT regime before and during the Uruguay Round negotiations (1986-1994), which arguably resulted in a redefinition of the *liberalisation* and *non-discrimination* norms. The second case analyses the failed attempt to integrate investment into the WTO before and during the Doha Round that began in 2001. Ultimately, the dissertation argues that U.S. based TNCs proved to be the hegemonic *agents of regime transformation* and played the leading role in the inclusion of services into the GATT regime. This was achieved by pursuing a high profile agenda-setting campaign from the late 1970s on. Their campaign succeeded in paradigmatically modifying established patterns of thought about trade, the normative content as well as intersubjective meanings of the regime in line with neoliberalism. On the other hand, the investment case suggests the emergence of certain limits to hegemonic ideas, institutions, and forces from the early-1990s on. European TNCs failed in their endeavours to further the regime transformation by integrating investment into the legal and normative framework of the WTO. TNCs’ preferences and strategies to set the WTO agenda were constrained and shaped within the context of *contested*

neoliberal hegemony which was further influenced by the resistance and counter-hegemonic cross-border campaigns emerged in the domain of civil society. The analysis in this dissertation is conducted through an interpretative assessment of data compiled from secondary and primary resources including government proposals, negotiation texts, minutes of meetings, and business statements using the qualitative instruments of discourse analysis.

ABSTRACT IN ITALIAN

Tale lavoro è volto ad analizzare (1) le trasformazioni della regolamentazione del commercio mondiale dal GATT (Accordo Generale sulle Tariffe e il Commercio) al WTO (Organizzazione Mondiale del Commercio) nel contesto mondiale, e (2) il ruolo svolto dalle aziende transazionali (Transnational Corporations o TNCs) in queste trasformazioni. La tesi propone un quadro neo-gramsciano di analisi che si propone di colmare il vuoto esistente negli approcci dominanti della letteratura sulle Relazioni Economiche e le Politiche Internazionali, i quali danno conto in modo insoddisfacente della natura “intersoggettiva” delle regolamentazioni e del ruolo degli attori non-statali nelle politiche globali. Per gli studiosi neo-gramsciani, i regimi internazionali costituiscono entità intersoggettive che sono delle amalgamazioni di idee e di configurazioni di potere inerenti a strutture storiche. L’egemonia è un concetto che unisce le *forze sociali* intese come agenti di cambiamento storico all’interno dei regimi internazionali e degli assetti mondiali. Il termine egemonia si riferisce alla traduzione di potere politico in *autorità legittima* attraverso l’ottenimento del consenso degli attori subordinati ed si esprime attraverso l’aspetto consensuale dell’esercizio del potere in un dato ordine mondiale. In questa tesi, si sostiene in primo luogo l’idea che la trasformazione del regime di commercio possa essere definita *egemonica* nella misura in cui essa si è realizzata congiuntamente al passaggio nel contesto mondiale da un’egemonia americana postbellica ad un’egemonia neoliberale. Con la trasformazione nel WTO, la portata legale della regolamentazione del commercio mondiale è stata rielaborata e il suo *contenuto normativo* ridefinito per riflettere il quadro etico del neoliberalismo. Questi cambiamenti sono visibili nel riconoscimento di un’*autorità legittima* dei mercati più forte rispetto agli stati stessi e nel riconoscimento della necessità di elaborare *regole* vincolanti al di sopra dei governi. In questa tesi vengono studiati due casi allo scopo di analizzare il ruolo delle aziende nel processo di trasformazione, ponendo particolare attenzione alle loro attività e alle loro capacità di influenzare le trattative. Il primo caso di studio esamina l’incorporazione dei servizi nel trattato del GATT prima e durante le negoziazioni dell’Uruguay Round (1986-1994), le quali portarono ad una ridefinizione delle norme di *liberalizzazione* e di *non-discriminazione*. Il secondo caso analizza il fallito tentativo di integrare gli investimenti nel WTO prima e durante il Doha Round iniziato nel 2001. La tesi qui sostenuta identifica nelle aziende transazionali basate negli Stati Uniti i veri e propri *agenti egemonici della trasformazione della regolamentazione* in virtù del ruolo di leadership da esse ricoperto nell’inclusione dei servizi nel trattato del GATT. Tale situazione è stata realizzata attraverso un lobbying molto forte sull’organizzazione dell’agenda sin dalla fine degli anni ’70, il quale è riuscito a modificare in modo paradigmatico le correnti di pensiero sul commercio, il contenuto normativo nonché il significato intersoggettivo del regime affinché risultassero in sintonia con il

neoliberalismo. Inoltre il caso degli investimenti evidenzia l'apparizione di certi limiti per le idee egemoniche, le istituzioni e le forze dall'inizio degli anni '90 ad oggi. Le aziende transazionali europee hanno fallito nei loro sforzi per continuare la trasformazione della regolamentazione integrando gli investimenti nel quadro legale e normativo del WTO. Le preferenze e le strategie delle aziende transazionali nello stabilire l'agenda del WTO sono state ostacolate e si sono dovute inserire nel contesto in un'egemonia neoliberale sempre più discussa, influenzata dalla resistenza e dalle campagne transfrontaliere di lotta contro l'egemonia provenienti dalla società civile. L'analisi effettuata in questa tesi è stata realizzata attraverso l'interpretazione di fonti secondarie e primarie (proposte dei governi, testi di negoziati, minute di incontri e comunicati di aziende) utilizzando gli strumenti qualitativi dell'analisi di discorso.

ABSTRACT IN GERMAN

Diese Dissertation hat das Ziel, zum einen die Transformation des Handelssystems von der GATT zur Welthandelsorganisation (WTO) im Kontext einer veränderten Weltordnung und zum anderen die Rollen von transnationalen Unternehmen im Rahmen dieser Transformation zu untersuchen und zu verstehen. Die Arbeit wird theoretisch vom Neogramscianismus angeleitet, da die etablierten Ansätzen in den Internationalen Beziehungen und der International Politischen Ökonomie nur unzureichend die intersubjektive Natur von Regimen und nicht-staatlichen Akteuren darstellen. Für Anhänger des Neogramscianismus sind internationale Regime intersubjektive Einheiten, deren Zusammenspiel von Ideen und Machtkonfigurationen historische Strukturen prägen. Die Hegemonie ist ein Konzept, das soziale Einflüsse als Agenten historischen Wandels in international Regimen und der Weltordnung zusammenbindet. Mit dem Konzept der Hegemonie wird eine Machtsituation beschrieben, in der politische Macht in legitime Autorität übersetzt wird, indem die Zustimmung subalternen Akteure eingeholt wird. Hegemonie beinhaltet die konsensuellen Aspekte von Machtausübung in einer jeweiligen Weltordnung. Diese Dissertation argumentiert vor allem, dass die Transformation des Handelssystems als hegemonisch bezeichnet werden kann, da sie parallel mit der Transformation der Weltordnung von einer von den USA dominierten Nachkriegszeit zu einer neoliberalen Hegemonie stattfand. Mit der Transformation zur Welthandlungsorganisation wird der legale Rahmen des Handelssystems neu strukturiert und ihre normative Grundlagen neu definiert, wodurch der ethische Rahmen des Neoliberalismus reflektiert wird. Diese Änderungen werden in der neuartigen Anerkennung der legitimen Autorität des Marktes gegenüber Nationalstaaten und der Anerkennung von der Notwendigkeit von bindenden Disziplinen, die Regierungen übergeordnet sind, reflektiert. Diese Dissertation analysiert zwei Fälle, um die Rolle von transnationalen Unternehmen innerhalb diese Transformationsprozesses zu erklären. Dabei wird der Fokus vor allem auf die Aktivitäten und Fähigkeiten der Unternehmen gerichtet, die Ausrichtung des Handelsregimes zu bestimmen. Die erste Studie untersucht die Eingliederung von Dienstleistungen in das GATT Regime vor und während der Uruguay-Runde (1986 – 1994) und argumentiert, dass diese Eingliederung zu einer Neudefinierung von Liberalisierung und Normen der Nichtdiskriminierung führte. Die zweite Studie analysiert den gescheiterten Versuch, ausländische Direktinvestitionen noch bevor und während der 2001 begonnenen Doha Runde in die Welthandelsorganisation zu integrieren. Letztendlich wird in dieser Dissertation argumentiert, dass transnationale Unternehmen, die in den Vereinigten Staaten ansässig sind, hegemonische Agenten der Regimetransformation waren und eine wichtige Rolle dabei gespielt haben,

Dienstleistungen in das GATT einzubinden. Und zwar gelang ihnen dies durch eine in den späten 1970er Jahren begonnenen Kampagne. Auf der einen Seite war die Kampagne darin erfolgreich, etablierte Denkstrukturen zu Handelsthemen systematisch im Sinne des Neoliberalismus zu verändern – und zwar sowohl hinsichtlich der normativen Inhalte als auch der intersubjektiven Bedeutungen des Regimes. Auf der anderen Seite deutet der Fall des Investitionsabkommens die Grenzen der hegemonischen Ideen, Institutionen, und Strömungen seit den frühen 90er Jahren an. Transnationale Unternehmen, die in Europa ansässig waren, sind mit ihren Bemühungen gescheitert, das Regime weiter zu transformieren und das Thema Investitionen in die legalen und normativen Rahmenbedingungen der WTO zu integrieren. Die Prioritäten und Strategien der transnationalen Unternehmen, die Agenda der WTO zu beeinflussen, waren beschränkt und wurden im Kontext einer angefochtenen neoliberalen Hegemonie geformt, die wiederum von dem Widerstand und anti-hegemonischen Kampagnen der Zivilgesellschaft beeinflusst wurden. Die Analyse in dieser Dissertation wurde durch eine qualitative Diskursanalyse von Sekundär- und Primärquellen durchgeführt: Regierungsvorschläge, Verhandlungstexte, Konferenzzusammenfassungen und Statements von Unternehmen.

CHAPTER 1 - INTRODUCTION

The Final Act of the Uruguay Round, which was signed in 1994 and consisted of several new accords similar to the General Agreement on Tariffs and Trade (GATT), changed the face of governance in international trade. It led to the institutionalisation of the GATT with the establishment of the World Trade Organisation (WTO) -a much stronger structure with a court-like supranational Dispute Settlement Body (DSB) whose juridical decisions are binding on member governments. The Uruguay package contained a revised version of the GATT text, but also included agreements related to domestic regulations governing the production of goods including agriculture and textiles and clothing, as well as intellectual property rights and trade in services. The Uruguay Round embodied a number of significant changes in the trade regime that can only be defined as a *transformation*. The multi-dimensional nature of this transformation is unprecedented when compared to the coverage and functioning of the regime since its launch after the post-World War II negotiations. At the core of this transformation lies the readjustment of the normative fundamentals of the multilateral trading regime as well as the expansion of its legal scope.

The GATT, initially signed by 23 governments in 1947, was the major authoritative accord regulating the rules of multilateral trade in goods until 1994. Its mandate was

to assure non-discriminatory application of certain border measures, such as tariffs and quotas, and to supervise their gradual reduction through multilateral negotiations among parties. The GATT was a product of the post-war economic system designed by the victorious powers orchestrated by the United States. Governance of international economic transactions by the Bretton Woods institutions and the GATT under American hegemony reflected a transatlantic consensus on the legitimate involvement of the states in the markets. International economic regimes, as John G. Ruggie (2002: 62) argues, have an “authoritative basis” as expressions of certain legitimate “social purposes” of the constituting states that define state-society relations and state authority vis-à-vis the market. Collective social purposes are latent in the basic norms and principles or the *normative content* of intergovernmental regimes. Ruggie (2002: 62-84) calls the *sui generis* social purpose implanted in the norms of the post-war regimes *embedded liberalism*, which was a synthesis of the objective of economic liberalisation with the founding fathers’ social goals to realise domestic growth, social welfare and employment through state intervention. Hence, under the *Pax Americana*, certain state controls on trans-border mobility of goods and capital were regarded as *legitimate* in defined situations taking into account domestic policy priorities of the Western powers to materialize the post-war reconstruction. The liberalisation of cross-border movement of goods and money functioned under strict

state supervision as an expression of this legitimate purpose -to embed the free market operations within broader social objectives.

Against this background, the GATT regime mirrored a delicate balance between the liberalisation of trade and the legitimate role of governments to employ protective border instruments in certain circumstances. The rules of the General Agreement and its exemptions were designed to regulate customs measures and provided the contracting parties with sufficient flexibility to resort to those instruments. Although the GATT evolved in time with the generation of new rules and instruments, the parties did not challenge the embedded liberal basis of the GATT regime until the Uruguay Round. In this respect, Ruggie (2002: 65) asserts that the changes in the post-war economic regimes until the 1980s proved to be “norm-governed” in character; in essence they kept the underlying normative basis intact.

Nonetheless, from the 1980s, the GATT regime underwent a metamorphosis which cannot be simply understood as an evolution of the regime within the embedded liberal normative texture. The most crucial dimension of the agreements signed at the end of the Uruguay Round (1986-94) has been the codification of a paradigmatic shift from borders towards domestic policies, which was characterised in the realignment of the regime’s normative content and contributed to the erosion of the embedded

liberal vision. The creation of the WTO is a manifestation of the consensus to displace embedded liberalism with a novel social purpose. This is apparent in the extended rules of the system which have minimised the protective exceptions for state regulations not only at the borders but also within the states, and in the broadening of the states' obligations to protect market liberalisation and to ensure global economic integration. Within the expansive rules of the WTO, the new normative framework places state-led protectionist measures under stricter conditions while prioritizing the proper functioning and integration of domestic markets over other social purposes such as domestic employment and social stability. In this sense, the novel normative content purports to *dis-embed* markets from state-led social restrictions while putting new restrictions on governments. The new legal structure does not only cover various tariff and non-tariff issues, but it has also enlarged the scope of the GATT regime to new areas penetrating domestic realms. Signifying this diffusion, the General Agreement on Trade in Services (GATS) and Trade Related Intellectual Property Rights (TRIPS) Agreement constituted the second and third pillars of the WTO's legal skeleton. They entailed substantive provisions regarding domestic regulations with an aim to redefine the authority of the governments with respect to market agents, which, in addition to exporters in the conventional sense, also covered service providers and intellectual property right-holders. This normative readjustment and cross-border diffusion of the regime along a deeper market integration program was

ensured through a revisit of traditional GATT norms such as non-discrimination and liberalisation in the new agreements. A completely new institutional body came into existence, armed with judicial enforcement tools to ensure the compliance of the member states with new legal disciplines. In this sense, the metamorphosis of the GATT regime through the 1980s is the manifestation of a *transformation*, rather than an evolution of the trade regime.

This shift has had a “norm-transforming” quality in contrast to a “norm-governed” change to define in Ruggie’s terms. In other words, it was the expression of a radically altered social purpose and a redefinition of the underlying “intersubjective meanings” of the regime (Ruggie 2002: 65; 95-6). Introduction of new rights and obligations for the states and markets within the new normative content of the regime redefined the meanings of trade, trader, and protectionism. This is evident in the case of the GATS, which encompassed the norms of liberalisation and non-discrimination and redesigned them for an application to services. The GATS created disciplines to ensure market access for the providers of financial, telecommunications, transportation, professional and other services both in terms of facilitating their operations in external territories and guaranteeing cross-border supply of these services to foreign consumers. Hence, the governments, to the extent they assume commitments under the provisions of the agreement, are obliged to provide access

and non-discriminatory treatment to service producers within their territories be it individuals or firms. They cannot create regulatory barriers that hinder trade in services or discriminate between the providers (in regard to whether they are of national or foreign origin). Infringement of those commitments through domestic regulations and practices are considered *protectionism* and are subject to the Dispute Settlement Mechanism of the WTO. In this regard, there is a radical difference between how the GATT and the WTO define trade and protectionism.

Introduction of services and intellectual property rights (IPRs) to the agenda of the GATT in the early 1980s was a radical development and became particularly determinative in this normative transformation. Both issues were promoted by certain Transnational Corporations (TNCs). TNCs campaigned initially in the United States for a GATT framework that would ensure better worldwide enforcement of intellectual property standards and for the elimination of regulatory barriers to services trade and investment especially in developing country markets. When the United States first brought up these “new issues” in order to inject them into the GATT framework, it faced significant resistance from developing countries who deemed them as “non-GATT” issues. In fact, there were not many trade officials who believed in the tradability of services and that services could be liberalised through trade negotiations conducted upon GATT principles. It was only after contentious

debates and laborious negotiations that the Uruguay Round could be launched with a conditional mandate on the talks in services. Along the road to the Marrakesh Agreement (which concluded the round in 1994), services became a well-established trade issue and developing countries assumed a proactive role in hammering out the GATS. The GATS and its fundamental norms were built gradually throughout deliberations and bargaining in Geneva. The transformation of the trade regime around a new social purpose was a result of the consensus that emerged from the process that started in the early 1980s and concluded in 1994. This was certainly not the end of the story.

Endeavours to further expand the normative and legal scope of the trade regime continued after the establishment of the WTO in 1995. The European Union (EU) proposed to launch a Millennium Round that would result in deeper market integration through market access in goods and services and rule-making in issues such as investment, competition and government procurement. A multilateral agreement on investment (MAI) was desired both by American and European TNCs, which joined forces for negotiations at the OECD. However, the talks for an MAI collapsed in 1998 because of the controversies between OECD governments and the politicisation of the process with rising NGO opposition. The WTO then became the preferred venue, especially for European TNCs who lobbied the European

Commission to push other WTO members, to launch the talks on investment. The proposed WTO accord on investment would create new market disciplines on governments for stronger protection of investors and non-discriminatory liberalisation of barriers to market entry and operations in foreign territories. Fundamental norms of the trade regime would further be refined for an application to cross-border movement of investment capital. Nevertheless, the story ended with a failure. Similar to the services case, there emerged intransigence from certain developing countries such as India who opposed the idea of the inclusion of investment to the WTO legal framework and, thus, the Doha Round which was initiated in 2001. India argued that “money falls in the category of neither goods nor services. The WTO is a trade-negotiating forum: it is neither a forum of bankers, nor of monetary economists” (India 2002a: 3). Yet, the *demandeurs* succeeded in inserting investment into the Doha Round with a mandate to discuss the implications of its incorporation into the WTO until the Cancun Ministerial Conference in 2003. In Cancun, the members would decide whether they would start negotiations in order to build a multilateral framework similar to the GATS. Cancun was a failure as the conference was adjourned without any decisions because of the impasse over new issues including investment as well as in agriculture. The Doha Round resumed almost a year later with a formal decision to drop investment and other new issues

from the WTO agenda. The story of investment evidences the fact that there are certain limits to the transformation of the trade regime.

In this context, this dissertation aims to understand the dynamics of regime transformation within a broader historical context that takes into account both material and ideational conditions. It intends to conceptualize this historical context with a focus on its implications for the normative content and social purpose of the trade regime. Furthermore, it aims to analyse the roles of TNCs in the process of the transformation of the trade regime concentrating in their abilities and activities to set the GATT and WTO agendas in the cases of services and investment. To this aim, the dissertation adopts a neo-Gramscian theoretical framework which provides a holistic perspective to explore both regime transformation and the roles of TNCs without discounting significant historical conditions and factors. The remainder of this chapter provides an account of existing approaches to analyse international regimes and outlines the theoretical approach adopted throughout this work. This is followed by an overview of the central research questions, arguments, and outline of the dissertation.

1.1. International Regimes

The concept of international regimes was introduced into the IR/IPE literatures during the 1970s as a conceptual tool to probe inter-state cooperation and international governance of different domains. Explicated during the 1980s, “international regimes” serve to explain why and how states cooperate. Regime theorists define international regimes as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations” (Krasner 1983: 2). Scholars from different theoretical perspectives have highlighted multiple dimensions of international regimes. Hasenclever *et al.* (1997) distinguish three “schools of thought” studying regimes, i.e. “power-based”, “interest-based” and “knowledge-based” theories.

In the power-based theories developed by neo-realist scholars, *hegemony* has proved to be a buzzword in narratives of U.S. leadership in building the post-war international order for the period between the World War II until the turbulent era of the late 1960s and the 1970s (Krasner 1976, 1979, 1983; Gilpin 1975, 1981; Keohane 1980, 1984). In an atmosphere filled with pessimistic predictions about U.S. power, economic order, and the future of post-war economic regimes, neo-realist scholars postulated the decline of U.S. hegemony as the prominent cause of economic

disorder.¹ They initiated a long-run academic debate around what Keohane later labelled *hegemonic stability theory*. Hegemonic stability thesis presumes a linear causality among three variables, i.e. U.S. hegemony, economic order, and interstate cooperation or international regimes. The concept of hegemony in this conventional application defines a certain form of relationship among the states implicating leadership, predominance, dominance or domination of a particular state. Here hegemony rests upon a particular reading of power, which is traditionally attributed to the state agents in IR/IPE.²

In this context, regimes and international order are understood as international public goods³ provided by a hegemonic state, which arguably shoulders disproportionate

¹ For alternative views critical of the postulation of the decline of U.S. hegemony see for instance Strange (1987) and Russett (1985).

²The concept of hegemony was employed in a systematic way in IR/IPE literatures to recount international domination of and power exerted by the United States in the post-war decades (Griffiths and O'Callaghan 2004, 137-9) A parallel use of the concept to understand international political economy came from the World System theorists (Wallerstein 1974, 1983, and 1984). World System theorists ontologically prioritised the economic structure of the system as a context for hegemonic relations (between states). Within this context, hegemony of a state has been understood as an outcome of a global capitalist formation that serves to reproduce global capital accumulation in the world economy from the periphery to the core. *Hegemony* as a concept has been applied to define the domination of a certain state that takes lead within history, i.e. the Dutch, the British and the American.

³ This is a natural consequence of adoption of Mancur Olson's public goods theory which assumes the need of a central authority investing resources to sustain public goods (Olson 1965). It has been influential on Kindleberger (1973) and other hegemonic stability writers.

costs for their creation and maintenance.⁴ The hegemonic powers are deemed as liberal in nature and promoters of the liberal economic system as demonstrated in the cases of British hegemony in the nineteenth century and American hegemony in the post-war era (Gilpin 1981: 144-5; Krasner 1976: 322). It is the dissemination of power which determines the outcomes and changes within regimes. Arguably, the rise or decline of hegemonic powers causes the strengthening or weakening of the regimes and shapes the liberal nature of the economic order. Economic openness is measured through quantitative indicators such as applied tariff levels and other restrictive instruments, international flow of trade or trade disputes among parties. The strength of the regimes is evaluated by observing the behaviour of the states and whether they comply with the liberal norms of the regimes or violate them. The hegemonic power and strength of the regimes are assessed and theories are tested through various scientific methods.⁵ Neorealist scholars interpreted the rise of *new protectionism* in trade in the 1970s and the collapse of the Bretton Woods monetary system as the weakening of trade, money and other regimes as a result of the decline of the U.S.

⁴ The liberal orders under British hegemony in the nineteenth century and American hegemony in the post-war world were arguably created by the provision of allegedly non-excludable public goods of free trade and monetary regimes but inducted “free-riders” who exploited the benefits of open markets at the expense of hegemonic states, a situation which is called “hegemon’s dilemma” by Stein (1984).

⁵ Keohane (1980: 91) concluded that after the decline of the U.S., the minimum change was recorded in the trade regime compared to monetary and oil regimes. Krasner (1976) used inputs such as tariff levels, trade proportions of actors, and territorial concentration of world trade, and concluded partial validity of the theory.

hegemony. In this context, Krasner (1979), in his article on the consequences of the Tokyo Round, suggested that the trading regime could be destroyed by an external shock in the absence of a hegemonic state. Following this line of thought, a few years later Gilpin (1984, 295-6) postulated:

[n]or does it follow that the decline of hegemony will lead inevitably to the collapse of a liberal world economy, although the dominant liberal power's decline does, in my judgment, greatly weaken the prospects for the survival of a liberal trading system.

In examining state power, some hegemonic stability theorists adopted an agent-oriented approach by examining the power resources of the states, while other authors prioritised the structural dissemination of power.⁶ Nevertheless, both flanks embraced a behaviorist approach focusing on policy outcomes as a reflection of the Weberian understanding of "power over." This behavioural understanding was further developed and challenged by scholars such as Russett, Keohane and Nye. Russett (1985) criticised the automatic linkage between power basis and political outcomes and introduced a new category of power separate from the power-base

⁶ The latter understanding is the case in Krasner's (1976) state-power theory, which assumes a direct relationship between openness of markets and hegemonic configuration of power, which is understood as one state's aggregate national income and share in world trade and investment. He suggested that the structuralist perspective created an alternative "positive-sum" opening through introducing a perspective of "tectonic plates" as opposed to the classical "billiard ball" (agent-oriented) model that considers IR as "zero-sum" relations (Krasner 1983: 355-56).

theory, i.e. state's control over outcomes. He argued that despite the recorded decline in the U.S. power-base, its control over political outcomes was maintained owing to a number of reasons including its prevailing cultural hegemony. Keohane (1984) similarly called the conventional automatic translation of power potentials to policy outcomes in his terms of "basic force model," while he alternatively suggested a "force activation model." His alternative perspective was based on an agent-oriented vision shifting the emphasis to domestic political processes of decision-making, political preferences and willingness of the hegemons to sustain international public goods.⁷ On the other hand, Nye (1990, 2002) formulated the concept of "soft power" to identify certain capacities of actors, such as persuasion and political agenda-setting, which would create a context in which actors determine their interests. In somewhat similar terms, Susan Strange (1997: 17-30) developed an alternative category of "structural power" to understand interstate relations by marking the necessity to take into account the *legitimacy* of the exertion of power. She criticised conventional scholars for solely concentrating on the direct or behavioural aspect of power, calling it "relational." According to Strange structural power of the state is disseminated in four different domains, i.e. security, production, finance, and knowledge. Although relational power does not need to be legitimised, structural power requires legitimacy

⁷ Snidal (1985) categorised hegemonic stability theorists according to their delineation of hegemonic states as "benevolent" or "coercive" actors based on their emphasis (or lack thereof) on coercive tools used by the hegemonic state, such as unilateral punishment to sustain openness of the system and the asymmetric costs they unilaterally paid.

and becomes *authority* owing to the perceptions of interacting actors, i.e. states, international organisations, firms, and people. In fact, these were valuable inputs towards expanding the scope of power analysis from within and out of the neorealist school and contributed to better conceptualization of the interaction between the states in the international system. However, power-based regime theories discounted the political power of non-state actors or they viewed it as a constituent of state power. This is primarily because of the ontological perspective regarding the states as unitary agents of power and welfare maximisation acting in the anarchical system (Haggard and Simons 1987: 499).

The focus of analysis shifted from power to interests with new studies produced by “interest-based” theories.⁸ Agreeing with, or at least not explicitly challenging the pessimistic depiction and presumptions of the hegemonic decline, neo-liberal institutionalists such as Keohane (1984) highlighted the possibility, importance and necessity of cooperation among states parallel to the decline of U.S. hegemony. Keohane’s explanation of economic disorder stressed the growing reluctance of the U.S. to stabilise the overall system, and the rising power and diverging interests of smaller states which helped to erode liberal regimes in money and trade through “free-riding” (Keohane 1980, 91). Relying on methods of game theory and Prisoner’s

⁸ See for example Keohane 1980, 1984, 1989; Snidal 1985, Stein 1983, 1990, and Young 1977, 1980, 1983.

Dilemma built upon a firm-state and market-states system analogy, neo-liberals proposed that regimes could be created and survive even in the absence of a single hegemonic power because of the preference of constituting states to produce public goods (Snidal 1985). For neo-liberal scholars, regimes resolve political market failure by reducing transaction costs of the states and supplying information about other states' behaviour and their intentions. Thus, regimes help states to maximize their interests or utilities under the conditions of "complex interdependence," notwithstanding sub-optimal outcomes from the regimes in the lack of a hegemonic state (Keohane 1984: 64-84). In other words, neo-liberal institutionalists contend that states presumably obey norms, rules and procedures of the regimes because doing so is to their benefit let aside the power exercised by a single hegemon. In both neorealism and neoliberalism, interests and identities of the states are considered to be determined *a priori* and considered exogenous to the analysis (Ruggie 2002: 13).

On the other hand, growing attention to non-state actors led interest-based regime studies to focus particularly on the internal pressure groups in the process of governmental preference determination.⁹ However, these mainstream regime studies

⁹ Putnam is one influential scholar in studying the role of domestic interest groups on intergovernmental negotiations. He introduced the "two level game" metaphor. Studying the Uruguay Round negotiations in agriculture, he suggested that state negotiators determine national interests through a two-level negotiation process, one taking place at the international platform, the other domestically with internal pressure groups (Putnam 1988).

did not challenge or overcome the ontological prioritisation of the states since they have locked the interest-making process in the domestic level. Because of the atomistic treatment of the states and well-established domestic/international dichotomy, the interests and the influence of transnational actors such as business associations and TNCs on international regimes trespassing borders were discounted (Haggard and Simmons, 1987: 517). Non-state actors are deemed to influence the policies of the states only *upwards*.¹⁰ The power and influence of TNCs are generally studied by extending the Weberian vision of “power over” to the exertion of the direct forms of private power over governments by lobbying. Hence neo-liberals maintain the focus on the policy outcomes without taking into account other forms of power. However, as Gill and Law (2008) argue, transnational capital is able to exert both direct and structural forms of power over the states. Structural power as applied by these and other neo-Gramscian scholars is similar to Strange’s notion, but is associated with a peculiar application of *hegemony* which entails both instrumental and ethical dimensions of power. This point is further elaborated below and in the next chapter.

This perspective was applied to different cases and improved by a number of studies (See for instance Paalberg 1997 and Patterson 1997).

¹⁰ Stopford and Strange (1991: 19-23) developed the notion of “triangular diplomacy” to emphasise that companies not only lobby their home governments but also host governments, while the interaction among actors is multiplied with state to state as well as firm to firm interactions. The diplomacy literature is dominated with works on state-state diplomacy in political issues, while scholarly production on economic diplomacy and various roles of non-state actors on interstate diplomacy is scarce (Lee and Hudson 2004).

Today, the role of non-state actors in international politics is more extensively studied out of the regime literature as part of the works on globalisation and governance. Indeed globalisation, global governance and non-state actors replaced international regimes as new key words in IPE literature during the 1990s and 2000s. The discussion shifted from the question of *if* non-state actors play any significant roles in world politics to the conceptualisation of *how* they become influential (Josselin and Wallace 2001: 12). There is a growing academic literature on the transnational advocacy networks formed by civil society organisations since the release of a book by Keck and Sikkink in 1998 who argued that through these networks civil society organisations have proved effective in promoting certain values and norms on a transnational scale.¹¹ Nonetheless, Ruggie argues that much of the IPE literature including the new line of research on non-state actors remains descriptive (Ruggie 2004: 4). Furthermore, he maintains that this literature lacks the collective paradigmatic lenses to analyse the political activities of civil society actors independent from the states (Ruggie 2004: 5).

Material-based studies that concentrate on power and interests of states have also discounted the role of ideational factors in shaping the preferences of actors as well as the normative content of the regimes. This crucial gap in regime studies was filled by

¹¹ See for example Sending and Neumann 2006, Risse 2007, and Stone 2008.

the knowledge-based regime theorists (Hasenclever *et al.* 1997: Ch.5). Hasenclever *et al.* (1997) classify knowledge-based theories according to two categories—weak cognitivists and strong cognitivists on the basis of their methodological positioning vis-à-vis *rationalism*. According to this taxonomy, the weak cognitivists intended to complete rationalism of neo-realist and neo-liberal authors by bringing in knowledge and ideas as another explanatory variable in understanding interstate cooperation. On the other hand, strong cognitivists challenged the rationalist studies from a methodological point that criticizes inherent positivism by offering a sociological alternative.¹²

Weak cognitivist studies developed analytical schemes to incorporate the role of ideas on interest formation and behaviour of states to the frameworks developed by neo-liberal scholars. To this aim, Goldstein and Keohane initiated a research program to explore the impact of ideas on state behaviour, suggesting that “ideas *as well as* interests have causal weight in explanations of human actions” (Goldstein and Keohane 1993: 4 emphasis original).¹³ Moreover, weak cognitivist contributions, in

¹² According to this taxonomy, the works of Haas (1992) and Adler and Haas (1992) fall into the category of weak cognitivism, while Ruggie (2002), Kratochwil and Ruggie (1986), Wendt (1987, 1992) and Cox (1981, 1983, 1987) into the latter group.

¹³ Goldstein and Keohane (1993: 8-10) categorise ideas as *world views*, *principled beliefs*, and *causal beliefs*. World views identify “the universe of possibilities for action”, they are “entwined with people’s conceptions of their identities, evoking deep emotions and loyalties” such as universal religions or modernist Western world view. Whereas principled beliefs

large part, served to supplement rationalism without challenging it by incorporating ideas into existing causal explanations as guidelines for policy-making and international cooperation (Bieler 2001, Goldstein and Keohane 1993).¹⁴ Within the confines of rationalism, ideas are not treated as independent from the material reality but as an additional object of study to substantiate existing assumptions about states' preferences. A more elaborate alternative to rationalism was produced by constructivist scholars within the strong cognitivist flank. These scholars challenged positivist epistemology and structural or unitary ontologies by proposing ideas as an autonomous structural environment within which actors interests, identities and interaction are formed (Neufeld 1995). Constructivism has proven particularly useful in understanding international regimes as *intersubjective entities*.

As constructivists claim, intergovernmental regimes are institutional facts, which are only intelligible within an intersubjective social context. As intersubjective frameworks of meaning, international regimes are formulations of a generative

include "normative ideas" about what is right or wrong, causal beliefs are "beliefs about cause-effect relationships" recognised by certain authorities such as scientific communities.

¹⁴ Goldstein and Keohane (1993: 6-7) acknowledge that they challenge rationalism to an extent to correct certain "empirical anomalies" came out of rationalist research program that could be overcome only when ideas are taken into consideration. Their goal is to explore the effects and influence channels of ideas not their "sources." Another contribution came from the "epistemic communities" school which focused on the role of certain scientific communities as institutional forums where decision-makers engage in collective-learning that inevitably influence their political decisions (Haas 1992).

grammar, i.e. the language of state action, which identifies the internationalisation of authority (Ruggie 2002: 63). International regimes contain both regulative and constitutive rules. Regulative rules coordinate state behaviour in a pre-constituted world. In contrast, constitutive rules are the sets of practices that make up any particular consciously organised social activity. Actors no longer think of them as rules (i.e. territorial sovereignty). The durability of constitutive rules rests on the collective intentionality of actors. Collective intentionality creates meaning and new rights and obligations (norms). International regimes contain analytical components such as actors' expectations, norms and principles as well as certain sets of rules limiting states behaviour.¹⁵ The social purpose of international regimes is embedded in the constitutive rules which are expressed in the *normative content* of the regimes. Ruggie contends that neorealists concentrate only on power and discount the legitimate social purpose underlying regimes. He maintains "[t]he problem with this formulation is that power may predict the *form* of the international order, but not its *content*." (Ruggie 2002: 64). Furthermore, rationalist theories are not able to capture

¹⁵ Kratochwil develops a useful differentiation among social facts or "worlds of social facticity" (Ruggie 2002: 12-3, 90-1; Kratochwil 1989: 22-28). Upon this taxonomy, "brute or palpable observational facts" stand for the facts that exist apart from a shared belief of actors, such as population size, market share, or material capabilities, which are often treated as "objective facts" by positivists. The second category contains the facts of "intentionality and meaning" including not only intentions, but also all mental states like expectations, desires, and beliefs that only human agents can have. The final assemblage is the "institutional facts," which comprise the world of rules including enabling or *constitutive* rules, and *regulative* and enforcement rules. In this triple categorisation, social institutions such as intergovernmental regimes fall into the group of institutional facts, which are only intelligible within an intersubjective social context.

the constitutive nature of regimes since they are confined to brute facts, and regulative rules and practices (Ruggie 2002: 22-5). Finally, constructivist scholars do not deem interests as endogenous to the analysis of international regimes. Based on ongoing constructivist research, Ruggie (2002: 15) contends that “normative factors in addition to states’ identities shape their interests, or their behaviour directly.” Thus, to understand the changing meaning of trade and the social purpose of trade regime through the Uruguay Round, one needs to analyse the changes to the *normative content* of the trade regime and how different actors contribute to this change. Notwithstanding, this is a valuable contribution in understanding international regimes, as Bieler (2001: 94) argues, constructivist approaches under-conceptualise the association between ideas and material structure, which is crucial to comprehend the transformation of the trade regime and the role of TNCs in this process. This link is elaborated in detail by another flank of the strong cognitivist category, which is the neo-Gramscian school wherein lies the theoretical framework of this thesis.

1.2. Theoretical Framework

Hasenclever *et al.* (1997: 193) points out that, in contrast to conventional approaches to international regimes which are concerned with “the sources of stability of international institutions,” the neo-Gramscian school of thought has particularly been

interested in “the possibilities of historic change in international relations involving an unravelling of existing regimes.” Despite this fact, regimes have not been the major focus of neo-Gramscian scholars. However, as Gale (1998) argues, a neo-Gramscian approach is applicable to international regimes as this school of thought appreciates the intersubjective quality of international regimes. In neo-Gramscian approaches, international regimes or institutions are taken as intersubjective entities similar to the constructivist treatment; yet, their embeddedness in the material and ideational world is particularly highlighted.

Neo-Gramscian scholars have challenged the rationalist mainstream in IPE to produce an alternative reading of world politics premised upon an intersubjective ontology and historicist epistemology. Robert Cox distinguishes the neo-Gramscian school of thought as “critical theory” in contrast to the conventional (rationalist) “problem-solving” theories (Cox 1981: 87-90). Critical theory, unlike the latter, does not take institutions and social power-relations for granted, but puts them into question by concerning itself with their origins and how and whether they might be changing (Cox 1981: 89). Historical change is understood as a reciprocal relationship between social forces and historical structures. Historical structures refer to broader historical patterns (*longue durée* of Fernan Braudel) within which certain regularities (*gestes répétées*) can be observed (Cox 1992: 149). Similar to international regimes, historical

structures are “socially constructed, i.e. they become part of the objective world by virtue of their existence in the intersubjectivity of relevant groups of people” (Cox 1992: 149). They create a “framework of action” as reflective of a particular combination of social forces (Cox 1981: 97). Neo-Gramscian research program, according to Cox, aims “to reveal the historical structures and characteristics of particular eras within which such regularities prevail. Even more importantly, this research program explains transformations from one structure to another” (Cox 1985: 53). International institutions and regimes are regarded as amalgams of inherent constellations of power (material capabilities) and consistent ideas of a particular order (Cox 1981: 99). The emergence and changes of international regimes primarily depend on the shifts in the material basis and ideational texture of historical structures and world orders. Accordingly, the rise, fall and changes of international institutions reflect the changes in the world order which are indicative of the changes in dominant material and ideational configurations. For an analysis of the world order, international regimes and historical change, neo-Gramscian scholars have introduced a particular notion of *hegemony*.

In contrast to the conventional use for the term, hegemony in its Gramscian use refers to the consensual reflection of supremacy in the exercise of power by ruling actors. The neo-Gramscian application of the concept to global politics signifies a form of

order based on *consent* penetrated into economic, social and political domains. The Gramscian concept of hegemony helps discern certain “breaking points” between hegemonic orders (Cox 1985: 55). A hegemonic world order is distinguished from a non-hegemonic one if the consensual aspect of domination is to the fore and if there is coherence between existing power configuration (material capabilities), ideas, and institutions (Cox 1981: 99; 104). Hegemonic orders entail distinctive ideological frameworks promoted by state and non-state hegemonic actors as well as international regimes that create an ethical context for authority relations at different levels. This framework penetrates international regimes and defines their intersubjective meaning or normative context. In this context, embedded liberalism as the social purpose of the post-war economic regimes was in fact an expression of the ideological framework promoted by the U.S. hegemony. As further discussed in Chapter 3, this ideological framework recognized the legitimate role of the states to regulate the markets for the purpose of social protection and employment. On the other hand, the neoliberal order that emerged from the late 1970s on created a new ideological framework that imposed market norms and strict disciplines over the states and acknowledged expanded legitimate authority of markets and market agents vis-à-vis states. This ideological shift was reflected not only in the policies of capitalist states, but also in the intersubjective frameworks of international regimes. In this vein, a neo-Gramscian inquiry of international regimes requires an analysis of

“how governments create frameworks of intersubjective meaning” within the context of hegemonic formation (Gale 1998: 260).

Secondly, the conceptualisation of a world order as hegemonic or non-hegemonic in connection with the existence of coherence between ideas, institutions, and material capabilities is somehow incomplete. Cox acknowledges “[w]hat is missing is some theory as to how and why the fit comes about and comes apart” (Cox 1981: 105). At this point, the theory is consolidated by integrating *social forces* into analysis. Social forces derive from changes in economic production and they struggle for hegemony through promoting their ideas on social organization and ideological formation of the states and institutions. They engage in a long-run struggle within the civil society which Gramsci calls a “war of position.” This implicates the use of coercive tools of the states to gain the consent of subordinate actors, but more importantly it entails strategies to convince those actors. These strategies include alliance building through production and dissemination of certain policy formulas that are responsive to the needs and interests of societal actors. Producing hegemony may require the social forces to sacrifice certain short term interests. Thus, a hegemonic relationship is built through an intersubjective education process in which hegemonic groups engage in obtaining the consent of different layers of civil society on comprehensive formulas they promote. Different social forces may struggle for hegemony by developing

counter-hegemonic policy formulas. In this regard, hegemonic production is a dynamic process and is never complete. Social forces build alliances to produce hegemony with other social actors in the society. This is called an “historic bloc”: an organic and ethical coalition around the ideological framework proposed. As suggested in the following chapter embedded liberalism was a perspective produced by the historic bloc that underpinned the American hegemonic order. On the other hand, neoliberal hegemony has been promoted by a *transnational historic bloc* constructed by TNCs which proved to be the hegemonic social forces derived from the globalisation of production as of the 1970s.

Neoliberal hegemony was characterised by a reconfiguration of global political power inclusive of core capitalist states beyond the United States as well as the enhanced structural power of TNCs that has underpinned this reconfiguration. In fact, the neoliberal ideological framework promoted by TNCs was a reflection of this amplified structural power which has a normative dimension insofar as it purports stronger disciplines on the states. Stephen Gill’s concept of “disciplinary neoliberalism” captures this normative dimension which justifies the agenda-setting activities of TNCs towards *locking in* the privatisation of public authority and market disciplines on states through *new constitutionalism*, i.e. constitutional and institutional measures and quasi-constitutional regional and multilateral arrangements (Gill 2000a; 2008). In

other words, neoliberal hegemony not only facilitates and justifies the enhanced authority of market forces and TNCs' agenda-setting activities towards limiting and shaping the role of the states in economy, but also projects a long term political-juridical program towards guaranteeing enhanced rights accorded to the TNCs (Gill 2000a: 11-12; Gill 2008: 138-42). In this regard, the changes recorded in international regimes from the late 1970s on should reflect this new authority configuration in their social purpose and normative content since they are expressions of the internationalisation of political authority in a constructivist sense. Finally, it should be noted that since the early 1990s neoliberal hegemony was contested by a growing number of actors which got mobilized within and across state borders. Even though these actors did not produce an alternative ideological framework, they have challenged the legitimate authority of neoliberal institutions, ideas and TNCs.

From a neo-Gramscian perspective, TNCs' roles on the changes in intergovernmental regimes can be understood within the context of hegemonic formation. To this aim, one needs to explore their activities towards shaping the agendas of the governments interacting within the intersubjective context of the regimes. TNCs are able to produce policy formulas and promote them to the states not only through upward lobbying but also by waging wars of position through building coalitions within and across borders with business, government and civil society actors. The penetration of their

policy formulations into the intersubjective frameworks of the regimes can be tracked by looking into the elements constituting those formulations and changes in the intersubjective and normative frameworks of the regimes.

1.3. Research Questions, Arguments, and the Outline of the Dissertation

This dissertation aims to apply a neo-Gramscian theoretical framework to understand the transformation of the trade regime from the GATT to the WTO. At its heart lies the question of “how can we conceptualize the transformation of the trade regime within the context of world order?” Such an analysis requires contextualizing the regime transformation within the historical framework of material and ideational changes in the world order. Since international regimes reflect inherent constellations of power (material capabilities) and consistent ideas of a particular order, changes in the world order must be observed in the ideational texture of the regimes, i.e. their normative content. The GATT regime was a product of the post-war U.S. hegemony, and arguably its transformation into the WTO -through significant changes to its normative texture throughout the Uruguay Round- can only be understood in the context of the transformation of the world order from U.S. hegemony to neoliberal hegemony. In this regard, this dissertation argues that the transformation of the trade regime can be distinguished as *hegemonic* since it took place in association with the

transformation of the world order. To support this argument, the dissertation concentrates only in the changes in the normative content of the GATT regime during the Uruguay Round. It demonstrates that the legal scope of the trade regime was redesigned, and its content was re-defined in this process in a way that is reflective of the new neoliberal ideological context thereby creating a constitutional framework towards disciplining the states. This dissertation puts the creation of the GATS in the spotlight since this framework was instrumental in redefining fundamental norms of the GATT, i.e. non-discrimination and liberalisation to regulate trade in services. Through such redefinition, this transformation altered the intersubjective meanings intrinsic to the trade regime including the notions of trade, trader (i.e. exporter and/or importer), protectionism and barriers to trade. It changed the meaning of trade which has for centuries meant a cross-border exchange of commodities. Today trade encapsulates both exports and imports of goods and services. The hegemonic transformation has also redefined the authority of the states and market actors vis-à-vis each other by de-legitimizing certain domestic regulations which turned to be defined as non-tariff barriers, and by according new rights to foreign service producers who got the status of traders.

On the other hand, the emergence of and changes to international regimes take place in the context of hegemonic formation, which determines the limits to the regime

transformation. In this regard, it is further argued that the transformation of the trade regime has been constrained by the challenges faced by the neoliberal hegemony in the form of counter ideas leveraged by social forces contesting neoliberalism. This argument is supported with evidence drawn from the analysis of the second case, i.e. investment. The business case for a multilateral investment framework under the WTO intended to generate further disciplines upon member states through provisions on investment protection especially against various forms of expropriation, investment liberalisation and settlement of disputes between investors and governments. The proposed framework would further transform the normative content of the regime by according new obligations to the states and extending the legal rights of investors vis-à-vis governments. Depending on the standard that would be adopted during potential WTO negotiations, the normative content of the regime would expand the scope of the norms of non-discrimination, liberalisation as well as transparency to ensure a larger space for the operations and cross-border mobility of capital. Hence, the intersubjective meanings of the regime could even further be amended by redefining trade towards encompassing cross-border movements of selected forms of capital as well as the meanings of barriers and protectionism accordingly.

Secondly, this dissertation aims to bring an answer to the question of “what are the roles played by TNCs in the normative transformation of the trade regime?” Based on its theoretical framework, the dissertation suggests that TNCs have been the major social forces to take part in the construction of the neoliberal world order and the transformation of the trade regime. The focus here is the involvement of TNCs in setting the trade regime’s agenda. It is argued that TNCs engaged in the redefinition of the fundamental norms of the trade regime through pursuing particular agenda-setting strategies, including both coercive and consensual dimensions. Agenda-setting is defined in Chapter 2 broadly to include state and non-state activities before and during intergovernmental negotiations. Both state and non-state actors engage in agenda-setting by building cases and coalitions. TNC activities may take the form of a “war of position” by developing and disseminating their case as a policy formula addressing the needs and preferences of a broad set of actors. Any changes to the trade regime require the agreement of governments including weaker states since the GATT/WTO operates on consensus. Thus, TNCs need to influence the positions of the negotiating agents through leveraging available instruments that would include both educative tools to get the consent of subordinate actors and available coercive tools in the form of trade sanctions. It is argued that TNCs utilised different strategies in the cases of services and investment because their preferences and strategies were shaped within different contexts of hegemonic formation.

From the late 1970s, the case of services was built and promoted by U.S. based TNCs which engaged in a war of position with the aim of convincing initially the American government and later other actors in the tradability of services and the necessity of a GATT framework to eliminate the regulatory barriers inhibiting international delivery of services. This case was developed as a policy formula addressing the interests and needs of negotiating states. It was projected through coalition-building within and beyond the United States and included education activities to change the established mindset of "trade in goods." They succeeded in getting the U.S. government on board followed by other OECD countries and finally developing countries (which were initially resistant to the expansion of the GATT agenda). Their campaign succeeded in putting services on the GATT agenda and in changing its intersubjective meanings. Parallel to the embracement of their case by European and developing country governments, they were also obliged to provide concessions along the road. Thus, the GATS was constructed as a flexible instrument that would achieve significant market opening only in the longer term.

On the other hand, the investment case seems to prove the emergence of certain limits to the structural power of TNCs given that their preferences and strategies to set the WTO agenda were constrained by the challenges raised in the civil society in the

context of contested neoliberal hegemony. Beginning in the mid-1990s, a group of social actors who were critical of the neoliberal trade agenda, policies and institutions emerged and mobilized within and across the borders against a new round of talks under the WTO. This dissertation argues that these forces became influential in setting domestic and multilateral trade agenda through activating policy-makers as well as other non-governmental organizations (NGOs). European TNCs who were pushing for a WTO investment constitution failed to build a strong transatlantic business coalition for an ambitious agenda in the WTO. They remained low-profile in their agenda-setting campaign which entailed mainly the utilisation of their power by directly lobbying the European Commission. Growing concerns and moral attacks on TNC operations were culminated with the formation of an NGO coalition which set a counter war of position through a cross-border campaign aiming to prevent the launch of the talks in the WTO. This coalition became influential in the entrenchment and broadening of the block of countries by educating African governments about the potential negative impacts of a WTO investment treaty and facilitating their mobilisation. The failure of the Cancun Conference was a consequence of a clear repositioning on the side of least developed countries and consolidation of the anti-investment coalition against the actors demanding the initiation of investment talks.

The remainder of the dissertation is structured in three parts. The first part develops a conceptual framework to understand the shift in the ideological framework from the U.S. to neoliberal hegemony (Chapter 2) and associated normative transformation in the trade regime (Chapter 3). The second part is devoted to the case of services. Chapter 4 analyses the emergence of the TNC coalition in the United States beginning in the late 1970s and business activities to build consensus in the U.S. and Europe. Chapter 5 explores the Uruguay Round negotiations in services and the role of TNCs in the construction of the GATS and its fundamental norms. The third part examines the case of investment. Chapter 6 outlines the pre-Doha Round deliberations, the architecture of international investment rules, and divergent transatlantic business preferences in the context of the OECD MAI negotiations. Chapter 7 studies the transatlantic business deliberations and European TNC campaigns for a WTO accord in the context of Doha negotiations, and the resistance and counter campaign of NGOs. Chapter 8 recapitulates the arguments and summarizes the findings of the dissertation.

Part I. Hegemonic Transformation and the Trade Regime: A Conceptual Framework

CHAPTER 2: A NEO-GRAMSCIAN FRAMEWORK TO ANALYSE THE ROLE OF SOCIAL FORCES IN REGIME CHANGE

Exploring the neo-Gramscian literature, this chapter intends to develop a theoretical framework to analyse the roles of TNCs as agents of the hegemonic transformation of the trade regime from the GATT to the WTO. The chapter starts by outlining the fundamental concepts used by Antonio Gramsci in his original historical materialist work. Secondly, the chapter lays out the employment of Gramscian concepts to the international realm with a focus on how the notion of hegemony is applied to the world order and international regimes. Thirdly, a neo-Gramscian reading of the hegemonic transformation from the U.S. post-war hegemony to the neoliberal order is provided. The final section discusses the application of this framework to the analysis of regime transformation and the study of the roles of TNCs in this transformation.

2.1. Hegemony, World Orders, and International Regimes

2.1.1. Hegemony

Antonio Gramsci, a former leader of the Italian Communist Party, developed a synthetic social theory of political power in capitalist societies. This theoretical framework was developed particularly in his work, *Prison Notebooks*, which was written while he was imprisoned by the fascist regime between 1929 and 1935.¹⁶ In examining political power, Gramsci applied specific notions to define the quality of power exercised by ruling authorities. A general notion of *supremacy* subsumes two dimensions: *domination* and *hegemony*.¹⁷ In general terms, supremacy refers to an aggregation of political power penetrated in the economic base, civil society and the state. To identify domination and hegemony as reflections of supremacy in exercising power, Gramsci (1971: 170) utilized Machiavelli's image of the *centaur* -the mythical half-man, half-horse- the former entailing the ideological power of the dominator or the *consent* of the dominated whilst the latter referred to the element of physical power,

¹⁶ The primary resource of Gramsci's original political analysis, i.e. *philosophy of praxis* is the selections from his *Prison Notebooks* which were published in English in 1971 (Gramsci 1971). This section follows the interpretation of Antonio Gramsci's work by neo-Gramscian scholars such as Gill (1993), Cox (1993), and Rupert (1993) with references to his *Prison Notebooks*.

¹⁷ For a distinction between supremacy, domination, and hegemony in Gramsci's theory see Augelli and Murphy (1988).

coercion. The concept of *hegemony* helps to understand the translation of the dominant position of a class in the domain of the economic base into its supreme position in the superstructure (civil society and the state), which cannot be conceived as an automatic process. Gramsci (1971: 238) contended that in contrast to illiberal societies where civil society can be weak, in liberal societies an active *consent* of popular masses is pursued in civil society to *legitimise* the political authority of ruling classes. The prevailing position of the ruling classes in society may derive from their dominant status in economic production; however their *legitimate rule* is exercised in the domain of civil society (Gramsci 1971: 261-3). Having an essential role in the economic structure, a social group achieves hegemony in civil society when it can also sustain *domination* in the state by resorting to the legitimate use of force when deemed necessary (Gramsci 1971: 57).

Gramsci established a correlation between social order and the degree of hegemony. Although crude force is used in extreme cases by rulers, he believed that some degree of consent exists as a prerequisite of social stability. He defined two extreme ends or ideal typical situations. On one end rests pure domination, which refers to the exclusive use of force by ruling actors without seeking the consent of the dominated. On the other end, he conceptualised ethical hegemony, which is “intellectual and moral leadership” of the hegemonic classes (Gramsci 1971: 57). The extent to which

the dominated groups give their consent voluntarily, the more hegemony is *ethical* (Gramsci 1971: 160-1). Where the authority of hegemonic groups is widely questioned, dominant classes deploy *coercion* through state organs more frequently (Gramsci 1971: 170 fn. 71; 280-1). In this framework, the criterion to assess the hegemonic nature of a given social order is the degree and ethical content of the consent of the general public to the authority of ruling classes and institutions. These dynamics are reflective of the organic unity of the polity such as the relationship between civil and political society (Gramsci 1971: 263).

Gramsci extended his analysis to the domain of civil society to understand how certain social groups obtain *hegemonic* status. For Gramsci civil society is a political realm in which individuals engage in primary political acts and contacts. Hence to achieve hegemony, or to sustain an “intellectual and moral” leadership throughout society, a potential hegemon needs to develop a universally accepted political formula within civil society (Gramsci 1971: 181-82, 388). Such a formula should not only address the interests of the potential hegemonic actors but also respond to the expectations and aspirations of other groups, and suggest a coherent ideology that captures the wider public. Furthermore, to generate hegemony that reaches the mass public, this formula should be able to sustain the economic development of society as a whole (Gramsci 1971: 60-1; 181-82; 388).

Building hegemony is a long-run process and is realised through a *war of position* within civil society and entails strategic planning, engagement in sound alliances, and intellectual efforts to capture the ideological sphere. This process also requires inevitable sacrifices from immediate interests, and engagement with other groups in the form of alliances (Gramsci 1971: 119-20; 238-9). Gramsci introduced the term “historic bloc” to define the organic and ethical alliance that is required for building hegemony. A historic bloc bridges economic, political and cultural realms around an ideologically coherent goal (Gramsci 1971: 330, 366, 377). To construct hegemony and historic blocs, hegemonic classes need *organic intellectuals* who can develop overwhelming political formulas consolidated with sophisticated theories that support a coherent world view (Gramsci 1971: 330). Thus, the war of position in civil society turns into a war waged on a philosophical level by developing plausible theories to conquer public *common sense*. It can only be successful if there is a belief that such domination is logical and ethical (Gramsci 1971: 60-1; 330).

A hegemonic relationship is built upon an intersubjective education process in which hegemonic groups engage in acquiring consent of the different layers within civil society in regard to their comprehensive formulas. Using all available channels in civil society, such as media, publishing houses, and education, organic intellectuals work

to disseminate their formulas throughout society. Gramsci applied the analogy of a teacher and pupil to elucidate the cognitive nature of a hegemonic relationship:

Every relationship of “hegemony” is necessarily an educational relationship and occurs not only within a nation, between the various forces of which the nation is composed, but in the international and world-wide field, between complexes of national and continental civilisations (Gramsci 1971: 350).

To sustain not only intellectual but also moral leadership, this process is considered dynamic and inevitably reciprocal: “the relationship between teacher and pupil is active and reciprocal so that every teacher is always a pupil and every pupil a teacher” (Gramsci 1971: 350). If hegemonic classes fail to respond to the expectations of subaltern groups, and pursue their spontaneous interests at the expense of others, hegemony lacks its ethical content. In such a case, ideology morphs into a functional weapon, the reciprocal nature of the learning process is paralysed, consensus is gradually lost, and the authority of the hegemon is challenged. In other words, hegemonic production is an incomplete process that is inherent to the reproduction of capitalism and continues insofar as a capitalist class struggle exists. Hegemony can be challenged by rival classes through waging a counter war of position, by forming new historic blocs, and generating alternative organic intellectuals that can build counter-hegemonic projects. On the other hand, social order may be jeopardised in the cases of “authority crisis,” which Gramsci also called an “organic crisis.” This means the loss

of organic totality between civil society and political society and implies that the ruling classes are no longer able to play a role of intellectual and moral leadership and fulfil their ethical functions to respond to the expectations of the society. Organic crisis is in fact a “crisis of hegemony,” where coercion becomes the only tool of domination because of the absolute loss of the consent of masses (Gramsci 1971: 210).

2.1.2. Hegemonic Orders and International Regimes

Gramscian concepts were introduced into the IPE discipline by Robert Cox (1981; 1983).¹⁸ As discussed in Chapter 1, Cox conceptualized historical change as a long-term dialectical interaction between *historical structures* and *social forces* (Cox 1981: 97-101). Social forces, world orders, and forms of states are in mutual integration with each other in making up historical structures (Cox 1981: 100, 101):

¹⁸ Gramsci’s ideas are further interpreted for the world context by scholars whose works constitute the neo-Gramscian literature in IPE. Starting with the works of Cox, authors such as Gill (1990, 1993), Augelli and Murphy (1988), and Rupert (1995) produced valuable contributions to the literature. Gramsci’s work also attracted attention of scholars in other schools and disciplines with some criticism to neo-Gramscian scholars. For instance, Burnham (1991), Germain and Kenny (1998), and Mittelman (1998) brought serious criticisms to Cox’s interpretation and method of utilisation of Gramscian notions. On the other hand, the works of Hall (1994), Laclau (2000) and Laclau and Mouffe (1985) took the analysis of hegemony beyond structural and class-based perspectives focusing on different cultural, ideological and sociological elements shaping hegemonic relations. This project does neither aim to apply the concept of hegemony beyond its utilisation in IPE or to respond to all those critiques as it is limited in scope. However, the dissertation follows the general approach developed by Robert Cox and other neo-Gramscian scholars within IPE to the extent that they allow for an analysis of TNC influence on regime change.

The three levels are interrelated. Changes in the organisation of production generate new social forces which, in turn, bring about changes in the structure of states; and the generalization of changes in the structure of states alters the problematic of world order. [...] Considered separately, social forces, forms of state, and world orders can be represented in a preliminary approximation as particular configurations of material capabilities, ideas, and institutions" (Cox 1981, 100-101)

Within this broad picture, hegemony becomes a form of order produced by *social forces* deriving from the economic base through obtaining the consent of various actors in global civil society with support of a carefully elaborated set of policy ideas. Therefore, hegemony originates in the material production process, but it cannot be confined to the material world. Following Gramsci's formulation, Cox contends that social forces struggle for world hegemony in the domain of ideas through constructing historic blocs (Cox 1983: 131, 133). Although historic blocs have their roots in the domestic sphere, world hegemony proves to be an outward expansion of the hegemony established internally (Cox 1983: 137). A hegemonic world order differs from a non-hegemonic one in that the consensual nature of domination is at the forefront, whereas non-hegemonic orders global politics reflect power based confrontations (Cox 1981: 99). Based on the consensual aspect of their epochs, neo-Gramscian scholars consider *pax Britannica* and *pax Americana* as two hegemonic orders. They consider the interwar period and the period that started in the late 1960s as non-hegemonic orders (Cox 1981: 102-4; 1983: 135-7). The nature of consensus in

each hegemonic epoch is determined by an ideological framework promoted by hegemonic forces and historic blocs. The Amsterdam School of neo-Gramscian scholarship has suggested the notion of “concepts of control” to conceptualize the ideological framework determining the ethical content of authority relations within hegemonic orders. Concepts of control, as the expressions of “general interest” of the society, are developed and promoted by hegemonic social forces to assure the sustainability of social order (van der Pijl 1998, 3; Overbeek 2004: 118). According to van der Pijl, these concepts are produced by certain class fractions which gain prominence owing to the cyclical conjunctures of capitalism and maintain their economic dominance and sustain social stability (van der Pijl 1998: 53). They are generated within an intersubjective context, through a process in which corporate interests of a class or class fragment transforms into a universally acceptable world view in civil society through incorporation of other interests and by responding to expectations and aspirations of the society. In this regard, concepts of control in becoming “comprehensive” or hegemonic constitute the moral frameworks of their epoch. In van der Pijl’s words:

what was ‘normal’ in one age, say, welfare state, is anathema in another. Such codes of normalcy in practice appear subject to change, along with the shifts in labour processes and modes of accumulation, the widening and/or deepening of commodification and the discipline of capital, the changing forms of state/society relations, world politics, etc. (van der Pijl 1998: 51)

The emergence of and changes in international regimes can be understood as a function of the world hegemony. To define an order as hegemonic, Cox requires the existence of a harmonious fit between social, political and economic domains, which can be observed in the existing coherence between the global configuration of power, ideas and international institutions (Cox 1983, 137; 1981: 104). Maintenance and changes of international institutions/regimes are associated with the production and reproduction of international hegemonies (Cox 1981: 99; 1983: 138). According to Cox, international institutions fulfill the following functions:

- (1) the institutions embody the rules which facilitate the expansion of hegemonic world orders;
- (2) they are themselves the product of the hegemonic world order;
- (3) they ideologically legitimate the norms of the world order;
- (4) they co-opt the elites from peripheral countries; and
- (5) they absorb counterhegemonic ideas (Cox 1983: 138).

Nonetheless, neo-Gramscian scholars have not found the rationalist regime studies compatible with their heterodox approaches. As Gale (1998) maintains, although the neo-Gramscian tradition generates an alternative meta-theory in IR/IPE, its potential has thus far been applied mainly to understand macro-level structures; whereas this potential offers also the possibility to examine meso-level structures like international regimes. The analysis can be based on the constructivist treatment of regimes since neo-Gramscian understanding of regimes shares the ontological premises of constructivist scholars by treating international regimes as intersubjective entities. Cox

emphasizes the embeddedness of international regimes in historical structures through the penetration of two sets of ideas into institutions: *intersubjective meanings* and *collective images*. Intersubjective meanings are “shared notions of the nature of social relations which tend to perpetuate habits and expectations of behaviour.” These ideas are “durable over long periods of time” and “historically conditioned” (Cox 1981: 98). Bieler (2001: 97) argues that this understanding is parallel to the constructivist treatment of ideas. However, neo-Gramscian approaches go beyond constructivism and intend to understand the “material structure” of ideas, i.e. their relation with the material world via social forces (Bieler 2001: 94). In this regard, Cox contends that if the world order is in change, the underlying intersubjective meanings are also subject to change (Cox 1985: 51-6; 1996: 145-7). To understand the changes in the ideational texture of international institutions in association with material changes, Cox’s second category of ideas is helpful, i.e. “collective images.” Unlike intersubjective meanings, collective images are held only by a group of people. These are:

differing views as to both the nature and the legitimacy of prevailing power relations, the meanings of justice and public good, and so forth. Whereas intersubjective meanings are broadly common throughout a particular historical structure and constitute the common ground of social discourse (including conflict), collective images may be several and opposed (Cox 1981: 89).

The legitimacy of collective images supported within a regime is contingent upon their coherence with intersubjective meanings of historical structures. In Bieler's words, "[s]trategies are likely to be successful in cases where the legitimising ideas of a hegemonic project correspond to the 'intersubjective meanings' of the structure, because they appear to be logical" (Bieler 2001: 98). Nevertheless, if the world order is in the process of change and world hegemony is contested, it becomes hard to legitimize those ideas. Because in non-hegemonic world orders, institutions turn to a terrain of clashing collective images as well as power (Cox 1981: 99-100). As Cox notes:

the clash of rival collective images provides evidence of the potential for alternative paths of development and raises questions as to the possible material and institutional basis for the emergence of an alternative structure (Cox 1981: 99).

To understand the role of social forces in the transformation of the trade regime one needs to examine the collective images held by TNCs, whether these ideas were justified with references to the intersubjective meanings, and if these ideas had potential for alternative paths of development. As examined in Chapter 5, the idea of the tradability of services was promoted by certain TNCs and had a potential to change the very intersubjective meanings of the trade regime during the Uruguay Round. In fact, the counter-collective image held and promoted by developing countries, i.e. services was a non-GATT issue lost its validity in this process in tandem

with the spread of neoliberal hegemony. In this case, the trade regime underwent a transformation which re-defined its normative framework and altered the intersubjective meanings within the trade regime. On the other hand, as will be studied in Chapter 6 and 7, the idea of creating an investment accord under the WTO, which was promoted by a coalition of TNCs during the 1990s, was challenged by some governments and ultimately failed to become hegemonic. In fact, the success of the first case was directly related with the process of (neoliberal) hegemonic production. Conversely, the failure of the second was in association with the emergence of counter-hegemonic challenges to neoliberal hegemony. The next section will discuss the historical context for the two cases by exploring the transformation of the world order.

2.2. Hegemonic Transformation

2.2.1. U.S. Hegemony

Scholars exploring domestic origins of the *pax Americana* that prevailed in material, ideological and cultural spheres after World War II point out that U.S. hegemony came into existence after a certain domestic transformation in the production processes, in the class-based configuration of American society, and state-society

relations in the United States.¹⁹ At the core of the *pax Americana* lay a historically constructed *hegemonic bloc* of social forces organically allied beyond their day-to-day interest perceptions, in line with a collective world view and supportive set of ideas (Rupert, 1995: 57; Murphy 1994: 10-11; 168-71). This historic bloc was initially formed by certain fractions of American capitalists from finance (money capital) and industry (productive capital), organically connected ruling elites, and organised labour (Rupert 1995: 55-8). Neo-Gramscian scholars argue that the composition of the historic bloc was determined by a Fordist regime of capital accumulation which became the dominant form for most of the twentieth century (van der Pijl 1984: 8-20; Rupert 1995: 171-3; 178-80). Van der Pijl introduces the term “corporate liberalism” to distinguish the ideological framework (comprehensive concept of control) of American historic bloc and hegemony. Corporate liberalism, arguably, was a synthesis of three ideological components that bonded the American historic bloc together. These were (1) Fordism, (2) Wilsonian universalism expressed as multilateralism, and (3) Keynesian economic understanding (van der Pijl 1984: 8-20; Rupert 1995, 57). This framework constituted an ethical context for class-based relations within and beyond the United States and for the relations between the U.S. government and allied states.

¹⁹ The three most representative works examining the domestic socio-economic origins of the American hegemony are Cox 1987, Rupert 1995 and van der Pijl 1984.

Corporate liberalism defined the hegemonic form of state and the ethical boundaries of authority relations in the Western world.²⁰

U.S. hegemony in the international realm highlighted multilateralism -the realisation of non-discriminatory trade liberalisation and monetary stability based upon currency convertibility-to achieve peace and stability. Yet, it also recognized the role of the states in domestic economies for sustaining welfare through a flexible understanding of *Keynesianism* that paved the way for strong welfare states and social democracy in Europe (van der Pijl 1998: 4). According to Cox (1981: 108), under the *pax Americana* international regimes functioned “to reconcile domestic pressures with requirements of a world economy.” In fact, this synthesis constituted the *embedded liberal* social purpose of the post-War economic regimes as distinguished by Ruggie. As per Ruggie, embedded liberalism defining the post-war economic order was dissimilar from “orthodox liberalism” or “laissez-faire liberalism” of the nineteenth century (Ruggie 2002: 65; Lang 2006: 86).²¹ Under embedded liberalism both the monetary and

²⁰ Van der Pijl argues that during the post-war years, the corporate liberal form of state was well established in the U.S./North Atlantic region, whereas it was hotly contested by “redistributive party-commanded” form of state in the Soviet block and “cartel state” form predominant in South European/American dictatorships (van der Pijl 1998: 85).

²¹ According to Ruggie the post-war economic consensus emerged around the following description: “unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism” (Ruggie 2002: 73).

trade regimes that came out of the post-war negotiations gave sufficient economic instruments to the states to realise their domestic policy agenda for economic recovery, social protection and employment.

The two post-war decades were a perfect manifestation of the Coxian fit between American material power, a supportive ideological structure shared by allied state-society complexes, and the post-war institutions embodying the underlying constellation of power and ideas. The ethical content of American hegemony was firm in the Western world as far as its moral premises were the pillars sustaining post-war reconstruction, growth and stability. This could only be achieved with wide recognition of the authority of hegemonic ruling power and institutions. Nevertheless, the hegemonic historic bloc and its ideological framework started to dissolve in the 1970s, a time of economic stagflation, the collapse of the monetary system, OPEC crisis and new protectionism. As “stagflation” characterised the rest of the decade the United States and the social forces underlying its hegemony ceased to be able to provide a coherent hegemonic perspective that would ensure economic growth, productivity, and welfare (Cox 1987: Ch 8). The conflicts arose at the levels of production, state and world order and caused an *authority crisis* that ended U.S. hegemony. Thus, the hegemonic consensus around the American historic bloc was

eroded in capitalist countries as the bloc itself disintegrated during the 1970s (Cox 1987: 276-285).

2.2.2. Neoliberal Hegemony

Since the 1960s, global concentration of political power shifted from the U.S. to an extended constellation of social and political forces. Gill posits that the hegemonic powerhouse has geographically shifted from the United States to G-7 countries (Gill 2002: 48). With rapid economic growth led by U.S. transatlantic investment, American aid and insurance for international monetary stability, Western Europe and Japan observed a rapid economic recovery with an increasing share of world production and trade during the 1950s and 1960s (Gill 1991: 90-3). Regarding the geographic centre of the new configuration of material capabilities, Gill and Law (1988: 355) point out “a group of capitalist countries led by the US.” Agnew and Corbridge (1995: 164) refer more broadly to “a powerful constituency of liberal states, international institutions, and what might be called the ‘circuits of capital’ themselves.”

Although there are different perspectives with regard to the scale, material and ideational basis of the neoliberal hegemonic order, neo-Gramscian scholars agree that this order emerged in tandem with the material transformation in the world economy.

The pax Americana had paved the way for two significant developments: 1) the internationalisation of production mainly through foreign direct investment (FDI) by U.S. based corporations, and 2) the internationalisation of the state (Cox 1981: 107-10). This trend continued parallel to the dissolution of the U.S. hegemony, with the emergence of a new form of capital accumulation which replaced Fordism and re-energised the globalisation process in the 1970s. To distinguish social forces of globalisation, scholars put emphasis on the shift in the capital accumulation and production processes to a post-Fordist mode.²² During this process the nature of production changed with new patterns of manufacturing through networks and outsourcing and with diminishing costs of telecommunication, storage and transmission of information (Lairson and Skidmore 2003 128). TNCs have pursued the transnationalisation of production via foreign direct investment, subcontracting, global commodity chains, and worldwide alliances (Portnoy 2000, 160; O'Brian and Williams 2004, 185). Intra-firm trade increasingly constituted the major part of current international trade (Gill and Law 1988: 192). The world economy was gradually structured around networks of finance and production within which firms are able to move around the globe to avoid regulatory limitations of the states (Cox 1996: 22).

²² Because of the miniaturization of production and its non-tangible quality, and particular economies of time and space characteristics, Van der Pijl labels the post-Fordist mode of accumulation as "virtual mode" (Van der Pijl 1998: 57).

Neo-Gramscian authors contend that neoliberal hegemony was built upon a novel transnational historic bloc with new elements of transnational capital coalescing around productive TNCs, banks, skilled labour and governments (Gill and Law 1988: 355-6; Gill 2008: 71).²³ Gill (1994) calls the core of hegemonic power the “G-7 nexus” and points out a shift of political economic decision-making to gradually mobilised “globalising elites.” TNCs in knowledge and technology-intensive sectors as well as finance industries are argued to be the forces that shaped the ideological framework of the new world order (Overbeek 2004: 118; Rupert 2000, 49). Their active part in determining the hegemonic framework rests in the enhanced structural power of transnational forms of capital. Gill and Law point out that compared to different fractions of capital, other class or class fractions and states, TNCs representing large-scale, globally mobile capital have been able to exercise their power directly and structurally on a larger scale (Gill and Law 2008: 107-115). The structural form of power rests on the rising mobility of transnational capital vis-à-vis other factors of production (Lairson and Skidmore 2003; 115). This enables TNCs’ ability to set policy agendas. As Fuchs (2007: 64) argues:

²³ Rupert (2000: 49) argues that the historic bloc underlying neoliberal hegemony was in a sense a continuation of the Fordist historic bloc, the only difference being that it was now led by finance capital rather than productive capital and its loss of allies in organized labour.

given the high degree of capital mobility in today's globalized world, TNCs exercise agenda-setting power through their ability to punish and reward governments for their policy choices by moving investments and jobs.

Gill and Law (2008: 104) assert that direct forms of power of transnational capital have been based on the TNCs' possession of financial resources, their control over media, and intensive contacts with governments. Consequently, governments seeking financial resources and investment have become more responsive to the demands of TNCs. TNCs seek competitive advantage in world markets through corporate strategies. This is achieved by decreasing their costs with new production strategies and innovation, expanding their markets globally, and by increasing the quality of products applying new techniques and strategic alliances (Lairson and Skidmore 2003: 197; Gill and Law 1988: 84-89). They also pursue political strategies to enhance their competitiveness, especially by pushing for competitive deregulation (Gill (2008: 103).

As frequently stipulated by different authors, as a consequence of the rise of the neo-liberal order the authority, legitimacy and accountability has swayed away from the states in tandem with a redesignation of authority relations domestically (Cutler 1999, 2001).²⁴ Cutler claims that private corporate power enforces the norms of private

²⁴ There is a scholarly production from different experts exploring the role of private authority in the global politics such as the edited volumes of Hall and Biersteker (2002) and Higgott *et*

international trade law or the law merchant (*lex mercatoria*) to expand corporate power at the global scale. In this context, she maintains that “public” nature of power - embedded in the conventional Westphalian understanding- is no longer explanatory since it obscures the “private” authority within the global political economy (Cutler 2003). Sinclair shows that private actors are authoritatively engaged in quasi-regulative arrangements such as standard-setting and shape the policies of the governments as in the case of bond-rating agencies (Sinclair 1999).²⁵ In other words, a particular consequence of the neoliberal hegemony is the *privatisation* of political authority and the enhanced *legitimate* role of markets and market actors to set policy-agendas globally. Indeed, Susan Strange admitted that “the retreat of the state” was partially because of the given consent of different actors including the governments to the *legitimacy* of market actors to regulate the domains which were conventionally under the purview of the public authorities (Strange 1997: 12-4). In this regard, the structural power of capital has a *normative dimension* to discipline the states:

Capital, and particularly the financial fractions of capital, may have the power to indirectly discipline the state. In so far as many of the top financiers have

al. (2000), and Cutler’s book (2003). More broadly, the rise of non-state actors and the role of social forces are explored by a number of scholars such as Josselin and Wallace (2001) and Bieler and Morton (2001).

²⁵ The authority of non-state agents is also recognised because of the technical nature of new issues, standards, and areas of regulation. Since knowledge-production and authority are associated, think tanks and epistemic communities enjoy determinative roles in the re-configuration of authority (Haas 1992).

access to the government leaders, this indirect power may be supplemented by direct use of power, e.g. lobbying, and “gentlemanly” arm-twisting. However, such arm-twisting is secondary to what can be termed the “power” of markets (Gill and Law 2008: 106).

In fact, as underlined by neo-Gramscian authors the ideological framework of neo-liberal hegemony rests in this *disciplinary* dimension. In this vein, Gill (1995; 2003: 130-131) introduces “disciplinary” in defining neoliberalism²⁶ to underline the dominant “socio-economic” form solidifying the ability of capital to discipline states and influence public policies in order to ensure the capitalist market construction and to promote market norms, freedoms and mechanisms at a global scale. According to Gill, states are subjected to market disciplines and are obliged to prove their compliance with “the three C’s of the power of capital,” i.e. they need to produce public policies in “consistency” with investors’ expectations, in order to gain the “confidence” of markets and to sustain their own “credibility” (Gill 2000a, 4). Similarly, Overbeek puts the accent on the expansion of market norms and mechanisms under the neoliberal order:

The dominant tendency under neo-liberalism is the extension of commodification and the application of market principles to new geographic zones of the global system, to new spheres of economic activity, and to new areas of human existence not previously subjected to the search for private profit (Overbeek 2004: 132).

²⁶ Instead of neoliberalism, Cox prefers using the term “hyper-liberalism” to encapsulate the emerging policy synthesis in the early 1980s (Cox 1987: 285-98).

In this regard, it is argued that neoliberalism serves the acceleration of the markets to gain dominance over further social space (Rupert 2000: 42-54; Agnew and Corbridge 1995: 164). Similarly, Cox (1996: 23) contends that globalisation has become an ideology that necessitates states and states system to serve the operation of “market logic” by providing stability and security for markets. In other words, neoliberal social purpose differs from corporate (or embedded) liberal social purpose as it recognizes enhanced *legitimate authority* of markets and market actors vis-à-vis states in the domains which were traditionally under government control. On the other hand it acknowledges the necessity to create binding constraints and disciplines over the states.²⁷

How does neoliberal hegemony operate in a receptive environment recognizing the enhancement of private authority? One dimension is the rise of the “neoliberal form” of states, situated primarily in the capitalist heartland, but also extended to developing countries and transition economies. Starting with the U.S. and Britain, states in advanced capitalist countries removed Keynesian interventionist tools from the policy repertoire and promoted a limited role for the government in the economy through deregulation and privatisation, tax and budgetary cuts, tight monetary

²⁷ This perspective is similar to Harvey’s who argues that neoliberalism is a political project to “disembed” capital from the constraints created by embedded liberalism (Harvey 2009:11).

measures, and measures to keep wages down (Harvey 2009: 25; Cox 1987: 286-288). Coercion and consent worked hand in hand in the spread of neoliberal hegemony to the Third World. Integration into the global economy and production processes became a significant factor in developing countries' adoption of neoliberal policies. Countries such as South Korea, Hong Kong, Singapore, Taiwan, as well as Brazil, Malaysia and Thailand, increasingly became competitive and developed productive capacities from labour intensive to capital and technology intensive production and integrated into the new international division of labour in the last decades (Bhagwati 1993: 62-63; Mittelman 1996: 4). Cox and van der Pijl argue that neoliberalism was initially challenged by advanced developing countries such as Brazil and South Korea where "state-capitalism" had been pursued as a means for industrial catch-up (Cox 1987: 292; van der Pijl 1998: 85-88). Nevertheless, these countries together with "neo-mercantilist developmentalist states," such as Mexico, India and former Communist states, underwent significant transformations and gradually adopted neoliberal reforms (van der Pijl 1998: 85-88; 96). As will be discussed in Chapter 3 and 5, developing countries became active participants in the trade regime as they actively adopted market-based development strategies.

In addition to unilateral reforms and market-driven policies, neoliberal hegemony is also disseminated through certain international arrangements towards anchoring

governments to provide longer term guarantees to transnational capital. These arrangements include international constitutional and institutional measures and quasi-constitutional regional and multilateral arrangements *to lock in* the privatisation of public authority and market disciplines (Gill 2000a: 11-12; Gill 2008: 161-5). Gill (2000; 2008) defines this political-judicial dimension of neoliberal hegemony as “new constitutionalism.” New constitutionalism includes all set of measures to “reconfigure state apparatuses” and to “construct and extend liberal capitalist markets” to materialise economic globalisation (Gill 2000a: 11-14). In fact, it encapsulates both national measures such as constitutional changes (regardless of whether it is in connection with international arrangements), and institutional and legal measures taken to regulate rights of capital in foreign jurisdictions. These regulatory measures are often in the form of structural adjustment programs of international financial organisations and the disciplines of the WTO (Gill 2000a: 11-13).

Having said this, neo-Gramscian scholars also point out a number of inherent contradictions produced by the neoliberal hegemony. They contend that institutionalisation of a self-regulating market program through commodification of social forms and nature has generated significant dislocations and resistance in global civil society in the 1990s. For instance, agreeing with Cox (1987: 253-265), Mittelman (1996: 7-11) contends that the state has become an agent of globalisation, facilitating

economic integration while accommodating itself to new conditions through allocating resources for the needs of private actors to gain competitiveness in the world markets. Thus, as an agent of globalisation serving interests of transnational capital, the states became “accountable” to markets more than to society (Mittelman 1996: 9). Similarly, Gill contends that disciplinary neoliberalism is imposed by new constitutionalism as a “top-down” project that isolates politics from economics, states from markets while institutionalising protection for TNCs and investors from democratic accountability and social control (Gill 2000a: 12). In fact, the accountability problem creates a significant contradiction for the re-production of neoliberal hegemony. Gill lays out this contradiction in the following terms:

[Neoliberal] reforms are largely imposed *from above* on populations, and are largely premised on the subordination of democracy to the pursuit of profit. As such, they lack substantive legitimacy and hegemonic appeal. This is one reason why the new constitutional reform project is not complete since it contains political and economic contradictions, and it provokes resistance from across the political spectrum, that is resistance to the projects of new constitutionalism and neo-liberal globalisation (Gill 2000a: 19 emphasis original).

Indeed, the legitimacy of neoliberal states and institutions are being widely questioned within civil society. The 1990s observed harsh criticisms towards the IMF, World Bank and WTO for spearheading neoliberal disciplines and structural adjustment programs which have arguably had negative impacts on economic

development, income distribution, social, environmental and public health policies. This crisis of legitimacy turned civil society to a realm of vocal protests, which leads Gill (2000b: 135) to suggest that neoliberal hegemony entered the phase of “authority crisis.” This contested nature of neoliberal order was a significant factor in the failure of the investment case as argued in Chapter 7.

2.3. Research Design and Analysis

Robert Cox has been critical of the positivist epistemology underlying rationalist research programs and has suggested an alternative historicist epistemology for research. Cox admits that positivist epistemology can be explanatory within a historical structure wherein stable regularities can be sketched (Cox 1992: 147). However, in cases of historical structural change he suggests that the very ontology of rationalist scholars and positivist epistemology should be questioned because in such periods, ontologies may shift and certain problems cannot be solved through conventional methods (Cox 1992: 145). Whereas positivism deals with “description” using “data,” neo-Gramscian historicism tries to “understand” the human-made “facts” rather than establishing certain causalities (Cox 1985: 51).

To be sure, this dissertation adopts a historicist epistemological approach and qualitative methodologies, and aims to *understand* the transformation of the trade regime within the context of the world order. The neo-Gramscian conceptual framework as outlined above intends to serve this purpose. The ideological framework of the U.S. and neoliberal hegemonic orders constitute the analytical background for an analysis of the trade regime's transformation as conducted in the next Chapter. Although international regimes include both regulative and constitutive rules, Chapter 3 focuses on constitutive rules, i.e. the normative content of the trade regime. The analysis concentrates on the changes to the normative content of the GATT regime throughout the Uruguay Round (1986-94) with a view to illuminating the association of these changes with the shift in the ideological framework of the world order. To this aim, Chapter 3 contrasts the legal frameworks of the WTO with the GATT, and then focuses on the changes that ensued with the creation of the GATS to the principal norms of the GATT, i.e. non-discrimination and liberalisation. In this regard, the examination is based upon an interrogative reading to decipher the impact of those normative changes to the authority relations between the states and market actors. The legal frameworks and fundamental norms of the GATT and the WTO are examined through data compiled from relevant legal texts, and evaluated through

inference with the support of the authoritative interpretations provided in secondary resources in legal and economic disciplines.²⁸

The analysis of regime transformation and the roles of TNCs in this normative transformation is continued in Part II and III by looking into the intersubjective social context of GATT and WTO negotiations and the participation of TNCs to the process through their agenda-setting activities. Norm creation within the trade regime takes place in the context of multilateral negotiations called rounds. Norms and legal texts are built on a consensus basis through intergovernmental interactions in the form of written and verbal submissions, wherein actors aim to influence the outcome through argumentation. The negotiation process at the GATT and the WTO often starts with an official negotiation mandate agreed by all parties and continues in separable phases wherein parties incrementally agree on and narrow the parameters of rule-making. Consensus-building starts with the pre-negotiation phase where parties agree on the mandate. This preliminary phase continues during the negotiation phase where parties deliberate and try to influence the intermediate and final outcomes with their inputs. To analyse the intersubjective context of international regimes, Ruggie

²⁸ King *et al.* (1994: 46) defines inference as “the process of using the facts we know to learn about facts we do not know” which are “the subjects of our research questions, theories, and hypotheses.” According to Cox, inference is needed since “[t]he documents that can be cited as authority are themselves part of the action.” Therefore, the researchers should question them in a critical fashion “so as to make them reveal things they do not explicitly state, namely their meanings” (Cox 1980: 485).

suggests the use of narrative forms of explanation which may be either descriptive or configurative.²⁹ Accordingly, this dissertation first creates an analytical narrative of the two cases in an interpretative fashion by deconstructing existing knowledge in the academic literature and reconstructing it upon the conceptual framework developed. In line with this narrative framework, the dissertation uses the qualitative instruments of discourse analysis.

Following Hajer's definition, discourse is taken broadly as "an ensemble of ideas, concepts, and categories through which meanings are given to social and physical phenomena" (Hajer 2006: 67). He identifies discourse analysis as "the examination of argumentative structure in documents and other written or spoken statements as well as the practices through which these utterances are made" (Hajer 2006: 66). For a narrative explanation of a phenomenon, Hajer suggests the use of "story lines" which encapsulates "the social-historical conditions" within which the argumentation takes place (Hajer 2006: 67). His method is compatible for an analysis of hegemonic production which entails a struggle for power through building coalitions around certain policy formulas. Hajer (2006: 70) utilizes "discourse-coalitions" to distinguish the alliances built around a shared narrative or story line for a period in time. These

²⁹ According to Ruggie, descriptive narrative explanation "simply links 'events' along a temporal dimension and seeks to identify the effect one has on another" whereas configurative explanation "organizes these descriptive statements into an interpretive 'gestalt'" (Ruggie 2002: 94).

coalitions may become “dominant” in expanding their coalition if the ideas they promote are used by a larger group of people (“discourse structuration”) and if they are “solidifie[d] into institutions and organizational practices (discourse institutionalisation)” (Hajer 2006: 70). When translated into the neo-Gramscian lexicon, a discourse coalition can be interpreted as a coalition of actors sharing a collective image and struggling to achieve hegemony. In this regard, certain collective images may become hegemonic (dominant) and can change the intersubjective meanings of the regime through “discourse structuration” and “institutionalisation,” assuming that these images are no longer questioned and become natural and self-evident. In fact, like any multilateral institution, the GATT/WTO provides a forum where collective images may clash to become hegemonic. Actors adopt certain “agenda-setting” strategies to influence the final outcomes, i.e. to solidify their ideas into the institutional and legal frameworks under negotiation. As Singh argues:

Agenda-setting is a *process* variable leading to inclusion or exclusion of issues being negotiated. In the macro sense, it refers to the big issues included in any trade round: in the micro sense, to issues included or excluded during meetings as the round progresses as negotiating parties work toward formulas and frameworks. Contrary to a common misperception, agenda-setting takes place throughout a negotiation and not just at the beginning. It includes sets of practices used to include, exclude or keep the focus on issues (Singh 2006: 46).

Agenda-setting takes place not only by argumentation, but also through an exercise of power that comes into play in the form of coercion applied outside of the

GATT/WTO. Singh (2006: 46-7) maintains that powerful actors such as the U.S. and EU are able to coerce weaker states through the use of trade and other sanctions, thus, forging consensus around their preferences. Singh's observation is compatible with the coercive face of hegemonic relations, although coercion is deemed a secondary tool to get consent of subordinate actors. For this reason, the dissertation examines not only the negotiation processes but also external interventions with a particular focus on whether coercion came into play in the cases of services and investment and if TNCs leveraged certain coercive tools in their activities to set the GATT/WTO agenda.

Secondly, the analysis of the negotiation process was extended to TNCs through an examination of their role in the agenda-setting process which is taken as an intergovernmental phenomenon by Singh. As hegemonic social forces, TNCs can engage in agenda-setting by waging a war of position that can include case-building, education, and coalition-building activities towards gaining support of actors on the policy formulas they promote. In this context, TNCs can leverage both their structural power and direct exercise of influence through lobbying as instruments of agenda-setting. The analysis of the role of TNCs in the transformation of the trade regime was conducted through tracking the processes of production and dissemination of ideas that penetrated into intergovernmental deliberations on services and investment. In this context, the analysis focuses on the generation of ideational inputs in the form of

“collective images” and TNCs’ agenda-setting strategies in order to project these ideas to other actors including the state agents. The analysis of these ideational inputs were carried out (1) through an examination of their discursive structure, i.e. how certain problems were defined and solutions were framed; and (2) by interpreting the discursive order, i.e. which sets of ideas were dominant in a specific time. The data were further assessed to determine whether these ideas were adopted by other actors including state agents (discourse structuration), and to what extent they were interjected into negotiation texts in the multilateral setting (discourse institutionalisation). Secondly, the data on TNC strategies were processed to identify whether TNCs disseminated their ideas through building discursive coalitions with other companies and non-commercial actors, and if they endeavoured to educate policy-makers and negotiators. The same research process was applied to analyse the influence of NGOs in the WTO agenda-setting in the case of investment.

To create the story lines in the analysis of the incorporation of services and investment into the trade regime, data were collected from primary resources including government proposals, proposed and agreed negotiation texts, declarations, minutes of meetings, and secondary resources including academic literature studying the history of negotiations and trade politics. The narrative was constructed by assessing and categorising the data chronologically to distinguish “discourse coalitions” and

story lines and to identify phases and pivotal moments in GATT/WTO negotiations. Primary data were collected from two major resources. The first source is the WTO database, which provides an extensive collection of negotiation documents since the inception of the institution in 1995.³⁰ On the other hand, the data for the Uruguay Round period were largely drawn from secondary readings of the negotiations. Depending upon the availability and necessity to verify and supplement certain facts, arguments, and negotiation positions, this secondary data were supplemented with primary documents provided from the *GATT Digital Archive*,³¹ which is operated by Stanford University. The data on TNC and NGO inputs regarding services and investment issues were compiled from official letters, position statements, and articles written by campaigners as well as secondary resources in IPE literature.

Most of the study was conducted as desk research and document analysis to produce a chronology, structure concepts and ideas, and employ story lines. Semi-structured interviews were conducted with negotiators, TNC and NGO representatives in a supplementary way, either to understand the negotiation dynamics and prominent factors in consensus-building or to better capture certain key developments and

³⁰ The WTO database is accessible at http://docsonline.wto.org/gen_home.asp?language=1&_=1 last accessed on September 12, 2010.

³¹ GATT Digital Archive is accessible at <http://gatt-archive.stanford.edu/> last accessed on September 12, 2010.

cognitive shifts.³² The interviews conducted primarily in Geneva fall into the first category and are pertinent to the case of investment. The second group of interviews were conducted with selected business campaigners and negotiators in relation to the services case.

Conclusion

This chapter outlined the fundamental theoretical assumptions of the dissertation within a historical perspective taking historical changes as a long-term dialectical interaction between social forces and historical structures. Hegemony in Gramscian sense, is applied as an analytical tool linking changing dynamics between social forces and historical structures as particular constellations of world orders. It is defined as the consensual aspect of the exercise of political power and the ethical framework for political action within a given world order. The coherence between power configurations, ideas and international institutions is determined by the hegemonic formation of the world orders. Social forces are argued to produce hegemonies through waging a war of position and shape ideational and material elements of hegemonic orders and associated international regimes. The chapter also laid out the main characteristics of the U.S. hegemonic order and neoliberal order with an

³² On structured and semi-structured interviews, see Wengraf (2001: 51-70).

emphasis on the distinct ideological framework of the two orders. The neoliberal order has been built upon structural and direct power of transnational capital, especially its financial fractions and knowledge intensive elements which ascended through the process of globalisation and emerging post-Fordist capital accumulation. Global configuration of political power is no longer concentrated in the U.S. but rather dispersed along the G-7 nexus as transnational capital has largely been condensed in a tripolar regional scope centred in the U.S., Europe and Japan. Since the early 1980s, the neoliberal hegemony has been produced through projects of new constitutionalism that have advanced a market-driven economic order limiting and revising the roles of states in economy and at the same time rescaling states' authority vis-à-vis supra-state and sub-national actors and entities. Nonetheless neoliberal globalisation has generated significant dislocations and resistance in global civil society in the 1990s. There are clear signs of an authority crisis in global political economy since the mid-1990s which is expressed in the mobilisation of resistance to globalisation in different forms.

CHAPTER 3: HEGEMONIC TRANSFORMATION: FROM GATT TO THE WTO

The post-war trade regime that emerged in 1948 evolved through the 1980s, with modifications to its regulative rules and practices until the launch of the Uruguay Round negotiations in 1986. Yet, the institutional structure of the GATT, the social purpose of the regime and its fundamental norms and principles did not go through radical changes until the Uruguay Round. The embedded liberal social purpose of the trade regime that emerged in the wake of World War II remained in place despite the fact that GATT norms and principles had evolved. The Uruguay Round, which was concluded in 1994, *transformed* the trade regime as it created a new comprehensive legal and institutional structure around the WTO. At the core of this transformation rests the displacement of embedded liberalism with a neoliberal social purpose that redefined the collective meanings about the regime through adjusting its very fundamental norms and the normative structure of the regime. Since the WTO was created in conjunction with the shift in the global historical structure from post-War pax Americana to the neoliberal order, the transformation of the regime can be described as *hegemonic*.

After outlining the historical process that gave rise to the GATT regime after World War II, this chapter explores the regime's legal and normative frameworks and its transformation during the Uruguay Round. It focuses on the normative content of the GATT and the changes to liberalisation and non-discrimination norms with the General Agreement on Trade in Services (GATS). The chapter closes with a section discussing the consequences of this transformation for the trade agenda and multilateral system as well as state-society relations.

3.1. The emergence of the GATT Regime

The trade regime came into existence in 1948 as a consequence of the post-War negotiations between officials from the United States, Britain and other European countries and developing economies. Although the GATT came out of this process as the sole legal and institutional instrument, it was initially meant to be part of a broader deal that would encompass an International Trade Organisation (ITO). Both the GATT and the Havana Charter that would establish the ITO were generated during post-war deliberations that enabled the convergence of dissimilar national interests around a collectively shared, "embedded liberal" social purpose which prioritised the erosion of protectionist trade barriers while allowing state intervention to sustain domestic growth and employment. The ITO compromise was a

consequence of laborious negotiations that took place among developed and developing countries in an environment shaped by economic reconstruction, and occurred parallel to the weakening of post-war optimism among policy-makers. In late 1946, the negotiations were launched officially in London by taking the American proposals as a basis. However, it was redrafted several times during the London, New York, Geneva and Havana talks to successfully build a consensus among 54 signatories, which at that point in time represented a majority of UN membership.³³

Analysts point out that the negotiators of the ITO Charter and the GATT were not doctrinaire-free traders, but diplomats who concerned themselves with creating policy space for their governments to apply policy instruments for economic recovery and growth, and with alleviating the adjustment costs of liberalising their commodity markets (Dunoff 1999: 738; Diebold 1952: 152). As argued in the previous chapter, although embedded liberalism was a compromise reached in intergovernmental negotiations, it reflected the hegemonic ideological framework of corporate liberalism that initially emerged in the United States in the 1930s and 1940s as a synthesis of Fordism, Wilsonian universalism and Keynesian thought.

³³ While initial discussions about the trading regime started after the U.S. released its *Proposals for Expansion of World Trade and Employment* in 1945; the official negotiations under the auspices of the UN ECOSOC took place over the American *Suggested Charter for an International Trade Organisation* circulated before the London Conference in 1946. The detailed discussions about these documents and the negotiations can be found in Wilcox 1947 and 1949, and Reisman 1996.

The Havana Charter proved to be a consensus based text that deviated from the original American proposals which were prepared in the U.S. Department of State between 1943 and 1945. Initial U.S. proposals had set three key priorities (Wilcox 1949: 38-43; Capling 2000: 2-7): (1) abolition of all trade distorting measures including quantitative restrictions and certain subsidies; (2) non-discriminatory application of all barriers to trade in addition to the dismantlement of discriminatory preferential and regional arrangements such as the British Imperial Preference System; and (3) liberalisation of trade through reciprocal negotiations that would reduce and bind tariff reductions multilaterally. The Havana Charter of 1948, contained nine chapters and 106 articles covering issues of commercial policy, and also included issues such as employment, economic development, restrictive business practices, intergovernmental commodity agreements, and institutional provisions on the settlement of disputes and functioning of the ITO (Wilcox 1949: 53-62). The Charter was far from satisfying American expectations that were laid out in the beginning of the talks.³⁴ The text was a comprehensive legal package clearly connecting the rights and obligations of member states in the areas of international trade, industrial growth development, and employment policies. Discriminatory or defensive measures that

³⁴ The draft Charter tabled by the U.S. was comprised of five chapters covering issues of commercial policy, employment, commodity policy, restrictive business practices, and organisation of the ITO (Capling 2000: 9).

restricted trade were allowed in the Charter with plenty of exceptions carved out for economic development, balance of payments problems, protection of domestic industries and sustaining employment (Wilcox 1949: 57-60). Quantitative restrictions, opposed by the U.S., became permissible for a list of difficulties (Wilcox 1949: 81-93). Most significantly, the Charter grandfathered existing preferential arrangements among member states and also permitted future preferential agreements, albeit within the confines of defined criteria (Wilcox 1949: 70-72). The compromise on commercial issues in the ITO talks largely fed into the text of the GATT, whereas detailed provisions in other pillars of the Charter -i.e. the positive commitments for full employment and industrial development- were never been put in force.

While negotiations were already underway, the GATT was negotiated in 1947 as the early interim commercial chapter of the Charter to jumpstart the tariff negotiations before the overall package was concluded and ratified by the members. In fact, the creation of the GATT as an early harvest of the talks was because of the preference of the Truman administration to pursue a two-track approach. The Truman administration was induced to negotiate tariff reductions with key trading partners after the Republicans' victory in the 1946 elections. Its authority to cut tariffs up to 50% was going to expire the following year and it was at risk of renewal (Gardner 1956: 349-61). Ultimately, the GATT text and initial tariff cuts were negotiated in

Geneva on a reciprocal basis and concluded between 23 countries in 1947 in parallel with the ITO talks. The agreement on tariff reductions (GATT) would later be incorporated into the final Charter, which was finalised in 1948.³⁵ However, the Truman administration did not put it before Congress for ratification. The administration considered the GATT -which was never ratified by U.S. legislative body- as a sufficient tool to conduct multilateral negotiations for tariff liberalisation, and withdrew the ITO bill from the Congressional agenda following the Senate hearings in late 1950 without putting it to a vote (Gardner 1956: 371-8; Capling 2000: 20). Hence, the GATT came into being in 1947 as a legal accord and as a “peculiar and entirely accidental international institution” (Finlayson and Zacher 1981: 562). It remained as the sole multilateral instrument to govern international trade until 1994.

3.2. The normative content of the GATT regime

The Bretton Woods institutions, the GATT and the UN were created under U.S. hegemony and reflected that particular hegemonic order, configuration of power and ideology. Having been generated in the same intersubjective deliberation process, both the Havana Charter and the GATT reflected the embedded liberal

³⁵ The provisions of the ITO Charter dealing with commercial practices have largely been reflected in the GATT. Following the Havana Conference, the new provisions crafted for commerce were implanted into the GATT in 1948 (Finlayson and Zacher 1981: 562).

understanding. However, the Charter went beyond the General Agreement with a broader set of rights and obligations that would have created a *further* embedded economic order. By setting up a binding international mechanism with a dispute settlement system, the ITO Charter recognised and codified the rights and duties of the states *vis-à-vis* each other and regarding their citizens, well beyond the confines of “embedded liberal” order. In Drache’s words: “Embedded liberalism was, at best, a second best option. It gave a more limited role to state interventionism and by contrast, a very large play to international market needs” (Drache 2000: 28). Positive commitments regarding full employment and development in the Charter were not transferred into the text of the GATT. The balance between trade liberalisation and state intervention was struck through basic commercial norms and principles for non-discriminatory trade liberalisation, and the exceptions and safeguards which allowed state intervention to the markets. Until the radical transformation of the regime throughout the Uruguay Round, this normative content remained intact, but it evolved in time with changes to its regulative rules and procedures.

The normative texture of the GATT has been analysed by scholars who developed different classifications regarding the GATT norms, principles and rules.³⁶ Here the

³⁶ The following works provide useful insights about the changing nature of the norms, rules, principles, and procedures in the trade regime: Dam 1970, Winham 1986, Kirshner 1996, Jackson 2002, and Wilkinson 2006.

dissertation follows Finlayson and Zacher's (1981) approach which distinguishes the norms in the GATT regime as "substantive" and "procedural." They consider the guidelines for decision-making such as "multilateralism" and "major interests" as "procedural norms," while enlisting the norms that set standards for state actions to engage in the trading system as "substantive norms." The analysis here concentrates on the substantive norms as to states' behaviours regarding international trade and the trading system. Especially important for this dissertation are the *non-discrimination* and *liberalisation* norms. Nevertheless important norms instrumental for understanding the functioning of the trade regime also include: *reciprocity*, *safeguards* and *development*.

Non-discrimination and Liberalisation

The preamble of the GATT explicated its two most fundamental goals as "substantial reduction of tariffs and other barriers" and "elimination of discriminatory treatment in international commerce."³⁷ The non-discrimination norm was as important as the liberalisation norm for Americans and other developed and developing country negotiators who actively participated in the post-war negotiations (Capling 2000). Since the creation of the GATT this norm has taken an operational form in the

³⁷ GATT articles and other WTO legal texts in the dissertation are cited from WTO 1999b.

principles of most favoured nation (MFN) and national treatment (NT). All privileges and advantages accorded by one country to another are required to be extended to all contracting parties as outlined under the MFN principle detailed in Article I of the GATT (WTO 1999a: 39-40). For instance, if country A cuts its tariffs for product X of country B, it must apply this reduced tariff level to all GATT signatories exporting that product. The privileges may not only take the form of tariff reduction, but also allocation of quotas. On the other hand, the national treatment principle outlined in Article III of the GATT applies to domestic and foreign goods within national borders (WTO 1999a: 40-41). It bans any discriminatory taxes, laws, regulations and practices that would unfavourably affect the supply of imported products in the internal market in comparison to “like products” of national origin. For example, once foreign product X clears the customs and enters the national market, it cannot be subject to a certain tax or fee which is unfavourably different from the taxes or fees charged on the same or similar products of national origin.

From the beginning of the negotiations, the U.S. had sought “unconditional non-discrimination” with minimum exceptions (Wilcox 1949: 21-4). However, the exceptions created through GATT articles weakened the unconditional status of this fundamental norm. One major loophole was opened in the system for preferential trade arrangements. As noted above, existing regional trade agreements including the

British Imperial Preferences were exempted (grandfathered) from the MFN principle in consequence of the resistance of the British and French governments during the ITO/GATT talks. Article XXIV of the GATT was hammered out during the Geneva talks in 1947 to elaborate the MFN exception for existing and future preferential arrangements (including customs unions and free trade agreements) with listed criteria intending to minimize their trade distorting effects for the third parties (Finlayson and Zacher 1981: 567). The article created a legitimate basis for future regional agreements such as the European integration that ultimately evolved into a comprehensive customs union after the creation of the European Economic Community (EEC) with the Treaty of Rome of 1957. It also allowed for the enlargement of the EEC, and preferential agreements between the EEC and former European colonies (Finlayson and Zacher 1981: 568). Moreover, with the rise of “new protectionism” during the 1970s, the scope of liberalisation extended from tariffs to non-tariff measures (NTBs) which included measures such as voluntary export restraints (VERs), technical barriers, and trade distorting state practices such as subsidies (Bhagwati 1993: 43-53). NTBs were put on the agenda of the Tokyo Round that concluded with a set of “plurilateral” disciplines or “codes” created to supplement the GATT.³⁸

³⁸ These codes included agreements on technical barriers, import licenses, customs valuation, subsidies and anti-dumping measures, public procurement, as well as sectoral arrangements for civil aircraft, beef and diary products (Jackson 2002: 76).

On the other hand, the liberalisation norm entailed the gradual elimination of border measures such as tariffs and quotas through negotiations among parties, which were later called “rounds.” The norm did not take primacy in the early years of the GATT as governments sought other domestic policy goals such as full employment, economic growth and development with the discretion created by GATT articles (i.e. Article XII) (Finlayson and Zacher 1981: 570). Although the liberalisation norm was supposed to apply multilaterally, in the first two decades tariff negotiations were conducted in a bilateral manner between the industrialised nations (Dam 1970: 61-4). With the exception of the United States’ cuts on its tariffs, liberalisation remained at low levels between the first multilateral round in Geneva (1948) and the Kennedy Round (1963-1967) (Hoekman and Kostecki 2001: 103). Four of the eight multilateral GATT rounds that took place in the first decade of the regime substantially reduced U.S. tariffs (Hoekman and Kostecki 2001: 101-3). The norm of liberalisation entertained the strongest endorsement in the late 1960s (Finlayson and Zacher 1981). Until the initiation of the Uruguay Round, tariff negotiations within the ambit of the GATT covered only industrial products other than textiles and clothing. Trade in textiles and clothing was excluded from GATT disciplines, and was governed by a separate regime codified by the Multi Fibre Arrangement (MFA) in 1974. The MFA contained provisions for sectoral quotas on the amount of trade between developed

and developing countries (Jackson 2002: 206-9). Agricultural products remained immune from the GATT disciplines from the very beginning. The exemptions granted to suspend the application of certain GATT rules to farming became permanent and consequently kept this sector largely out of the GATT ambit (Yeutter 1998: 61-2).

Another GATT norm directly related to liberalisation was *reciprocity*. This norm did not become operational in the early years of the GATT because of the asymmetrical concessions given by the United States (Dam 1970: 58-64). As Japanese and European allies gained competitiveness in the 1960s with a rising share in world trade, the U.S. put stronger emphasis on reciprocal opening from other industrial countries (Dam 1970: 64-76; Finlayson and Zacher 1981: 575-6). The norm did not become operational for developing economies that benefited from market opening with no proportional cuts in return. This special status of developing countries was initially acknowledged with the insertion of Part IV on Economic Development to the GATT in 1965 parallel to the decolonisation process and the mobilisation of the Third World countries for a systemic reform (Dam 1970: 236-42). This amendment created a symbolic waiver justifying “non-reciprocity” for developing countries (Finlayson and Zacher 1981: 575). “Differential treatment” and “non-reciprocity” for developing countries were further codified with the creation of another discriminatory leeway, i.e. the inception of the Generalised System of Preferences (GSP) and the “enabling clause” decision

taken in the 1970s. The GSP legitimised duty free or advantageous access of developing countries to the markets of industrialised countries in products essential to their industrial development with no reciprocal obligation (Jackson 2002: 322-5). In the same vein, developing countries did not sign off on the Tokyo Round plurilateral codes (Finlayson and Zacher 1981: 575-8). In sum, Special and Differential Treatment (SDT) became the operational aspect of the development norm in time as it provided poor countries with exclusions from reciprocal liberalisation commitments (Jackson 2000: 164, 324; Matsushita *et.al.* 2003: 385-8). Considering their negligible share in world trade, developing economies' exemptions from reciprocal reductions in tariffs did not harm the interests of industrialised countries. Yet, from the 1970s on newly industrialised countries (NICs) gained greater competitiveness in certain manufactured products, became significant markets for developed country goods, and were gradually perceived as "free riders" (Paemen and Bensch 1995: 115). This norm would truly be institutionalised during the Uruguay Round largely as a result of the insistence of the U.S. and other OECD governments.

3.3. Transformation from GATT to the WTO

Until the early 1980s, the normative basis of the regime as well as the underlying embedded liberal social purpose remained intact (Ruggie 2002). The transformation of

the GATT regime throughout the Uruguay Round reflected the institutionalisation of the neo-liberal hegemony that replaced the *pax Americana*. This transformation codified a paradigmatic shift from *borders* towards *domestic policies*, and a radical redefinition of the normative content of the regime that also characterised the displacement of embedded liberal vision with a new social purpose reflecting neoliberal hegemony. Embedded liberalism was a state-led design allowing the pursuit of certain domestic social goals; yet, neo-liberal social purpose has proven to be a market-driven project that recognises the priority of markets in generating economic welfare while restricting or redefining the roles of the states to regulate economic operations. The new normative framework in the expansive rules of the WTO created strict disciplines for protectionist measures and prioritised global market integration over other social objectives.

The launch of the Uruguay Round in 1986 was a radical turning point in the GATT history. The encompassing negotiation mandate encapsulated critical non-conventional issues and significantly affected the future of the GATT regime and trade agenda. The outcome of the negotiations in 1994 was striking since the institution that came into existence was more comprehensive than the GATT in its legal scope, power and structure. The Final Act of the Uruguay Round signed in Marrakesh, contained several legal accords along with a revision of the GATT text.

According to Hoekman and Kostecki (2001: 413-8) the new legal scope was an expansion of the regime's mandate from the regulation of "shallow" or negative integration (featured by the elimination of border protection) to a "deep" or positive integration (which governed domestic regulations concerning the operation of markets). The legal mandate of the GATT envisaged negative integration by concerning itself only with the elimination of external measures. It served a regulatory function to liberalise trade in Fordist sectors (Murphy 1994: 232). On the other hand, the WTO mandates member governments to take domestic regulatory actions to ensure the well-functioning of markets in both goods and services. The Uruguay Round generated accords for intellectual property rights, trade related investment measures and trade in services to regulate the liberalisation of trade and investment in knowledge intensive and service industries (Murphy 1994: 265). The sectoral scope of trade liberalisation was also broadened to agriculture and textiles and clothing. The Tokyo Round codes on anti-dumping, technical barriers, and subsidies and countervailing measures were reviewed to be strengthened and multilateralised (WTO 1999a: 71-2, 80-1, 90-1). Safeguard disciplines -an issue which could not be resolved during Tokyo Round negotiations- were finally hammered out during the Uruguay Round (WTO 1999a: 104). The WTO also introduced disciplines for domestic sanitary and phytosanitary (SPS) measures to constrain hidden protectionism taking different forms in agricultural and food standards (WTO 1999a: 62-4).

As a result of the Uruguay Round agreements, the GATT *constitution*, borrowing Jackson's term, was institutionalised.³⁹ With the creation of the Dispute Settlement Mechanism and the WTO as an institution encompassing a broad package of agreements, the regime went through a process of "legalisation" under a single multilateral framework (Goldstein *et al.* 2000). Compared to the "soft law" system of the GATT era which lacked a guaranteed procedure obligating the states to obey the rules of the regime, the WTO generated a "hard law" system with enforcement tools to secure the compliance of member states (Abbott and Snidal 2000).⁴⁰ In this regard, the trade regime has eroded the autonomy of the states by creating effective disciplines and an enforcement mechanism (Dunoff 1999: 735). Chorev (2005) rightly contends that the WTO re-scaled political authority and empowered the regime vis-à-vis member states by effectively restricting states' authority to intervene in markets and by "judicializing" inter-state relations.

³⁹ On the constitutional character of the WTO law competing visions can be found in the works of Jackson (1969, 2002), Hudec (1993, 1997), Dunoff (1999), and the edited volume by Kennedy and Southwick (2002).

⁴⁰ The dispute settlement procedure under the GATT system was largely based on diplomatic negotiations among disputed parties. Decisions as to disputes could not be taken without the consent of both sides. With the judicialisation of the system, the WTO turned decision-making regarding disputes into an automatic process with a clear timeline (WTO 1999a: 27; Jackson 2002: 120-7).

The transformation of the trade regime throughout the Uruguay Round could become possible thanks to the consensus reached among developed and developing countries, which took a proactive role in shaping the content of the Final Act. While developing countries increasingly adopted market-oriented development strategies that conformed with neoliberal hegemony, they have constructively engaged in the negotiations to maximize the benefits from trade liberalisation. This new attitude contrasts with their conventional demands for non-reciprocity. According to Jane Ford (2002: 136-8) throughout the Uruguay Round developing countries increasingly adopted an identity of “reciprocal trader.” She contends that the identities are created within the social framework of a trade regime that allows “complex social learning” where actors’ perception of the “self” and their behaviour are determined by how others see them (Ford 2002: 121-3). During the GATT era developing countries established a collective identity of “Protectionist Other” vis-à-vis “developed country trading Self” parallel to the evolution of the development norm which was predicated upon exceptions and flexibilities through SDT and non-reciprocity. During the Uruguay Round they increasingly adopted the role of “reciprocal trader” alike with developed economies as the “single undertaking” became a significant feature of the negotiations that led to reciprocity in the bargaining process (Ford 2002: 123, 132).⁴¹

⁴¹ According to the single undertaking there would be no deal until a consensus was reached in all negotiation chapters (Croome 1995: 34).

This changing attitude, which was a consequence of the diffusion of neoliberal hegemony will further be examined in Chapter 5.

Revision of GATT norms for the TRIPS Agreement and the GATS

At the core of the hegemonic transformation of the trade regime lies the readjustment of fundamental GATT norms that extended the reach of the regime beyond commodities. These are the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS). The TRIPS Agreement obliges WTO member states to comply with the provisions of the Paris and Berne Conventions, which concern industrial property and copyright protection. The TRIPS Agreement envisages the global harmonisation of domestic regulations in IPRs to create a minimum standard for their protection with a view to creating a fair trading environment. The agreement sets minimum standards of protection in seven areas: copyrights, trademarks, patents, industrial designs, geographical indications, undisclosed information including trade secrets, and layout-designs (topographies) of integrated circuits (Jackson 2002: 311-2). The standards of protection cover the availability, scope, and use of IPRs in these areas. Moreover, the agreement creates monopoly rights for the inventors, innovators, producers and/or performers for commercial use of their technological products, knowledge, ideas and

artistic works for limited periods of time. The enforcement measures differ from the GATT because they not only contain commercial tools, but also civil, administrative, and even criminal procedures and remedies as well as border measures (Matsushita *et al.* 2003: 431-3). Members are obliged to notify the changes to domestic regulations regarding the IPR protection to the TRIPS Council (Matsushita *et al.* 2003: 406-7). As it sets standards for the protection of IPRs, the TRIPS Agreement also redefines the norm of non-discrimination which was originally created for exportable products. The norm in the TRIPS Agreement envisages the prevention of discriminatory treatment among *right-holders* that encapsulates both individuals and enterprises (Matsushita *et al.* 2003: 425). In this vein, both MFN and NT principles are re-formulated to ensure non-discriminatory treatment between foreign and national *legal persons* who are supposed to be granted no less favourable and identical minimum rights in member countries.⁴² Hence, the accord functions to ensure that exclusive rights gained for ideational, intellectual and artistic creation are kept intact as components of certain goods and services when these products cross state borders.

⁴² Article 3 of the TRIPS Agreement on National Treatment states that “Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property”. Article 4 of the agreement is on MFN treatment and notes that “With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”

On the other hand, the General Agreement on Trade in Services (GATS) regulates the liberalisation of trade in services. Services comprise a wide set of economic activities including financial, telecommunications, transportation, and professional services such as business consultancy and architecture. The sectoral coverage of the GATS comprises all service sectors except for those “supplied in the exercise of governmental authority” (Art. I:(3)). In a nutshell, Part I of the GATS covers the scope and definition of the agreement; Part II sets out the general obligations and disciplines to be applied comprehensively to all members and industries. It also includes provisions on unfinished business such as future talks on emergency safeguard mechanisms and subsidies, and rules on economic integration and restrictive business practices. Part III lists specific rules applied only for the liberalisation commitments scheduled by the members. Part IV sets out provisions for future negotiations and schedules. Part V and VI outline institutional and other provisions (WTO 1999a: 163-74). In addition, the agreement also contains a number of annexes designing the liberalisation of trade in financial services, telecommunications, maritime transport, and air transport. These annexes outline sector-specific principles and rules as well as provisions on the conduct of market access negotiations (WTO 1999a: 175-80). The agreement also has a separate annex on future negotiations on the movement of natural persons and an annex on MFN exceptions which outlines the conditions for members to exempt certain service sectors from general MFN treatment (WTO 1999:

164-6). Trade in services is naturally different from trade in goods since services are traded not only through cross-border movement of products, but also through other methods or “supply modes” including the temporary movement of natural persons and foreign direct investment (FDI) (WTO 1999: 63-5; See Table 1 below).

Table 1. Supply Modes of Services

<p>Mode 1. Cross-border supply (i.e. online banking, transportation, courier services);</p> <p>Mode 2. Consumption of services abroad (i.e. tourism services, education and medical services in a foreign country);</p> <p>Mode 3. Commercial presence abroad (i.e. foreign direct investment: services supplied by branches and subsidiaries of a company abroad);</p> <p>Mode 4. Presence of natural persons- temporary movement of labour (i.e. architecture services provided by employees of a certain company to consumers abroad).</p>

The GATS broadened the scope of protectionist measures through a reformulation of the norms of liberalisation and non-discrimination. The *liberalisation* of trade in services becomes possible through *market access* and *national treatment* provisions of the GATS. The agreement covers all governmental “measures” affecting trade (Art. I: (1)). The article on Market Access (Art. XVI) lists several measures which may restrict the supply of services including constraints on the number of service suppliers, the total value of service transactions, the number of service operations, natural persons to be employed, restrictions on the types of legal entity, and limits on the participation

of foreign capital. The non-discrimination norm is reformulated for “services” and “service suppliers.” In Jackson’s words the GATS “went relatively far in embracing the traditional GATT concepts (MFN, national treatment, schedules of concessions), but clearly had to adapt those concepts for the new terrain encountered” (Jackson 2002: 307). For instance, MFN treatment requires a WTO member to accord “no less favourable” treatment to other members than they accord “to like services and service suppliers of any other country” (Art. II).⁴³ Likewise, NT requires members to accord “no less favourable” treatment to foreign services and legal persons than they accord to their own “like services and service suppliers [...] in respect of all measures affecting the supply of services” (Art. XVII).⁴⁴

Notwithstanding these modifications, non-discriminatory trade liberalisation in services is contingent upon members’ commitments (Matsushita *et al.* 2003: 246-250). Different from the GATT, the GATS separates members’ commitments into two categories as “general” and “specific.” General commitments outlined in Part II of the

⁴³ Article II (1) maintains that “[w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.”

⁴⁴ Article XVII (1) states that “[i]n the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.”

agreement apply to all services excluding exceptions, whereas specific commitments detailed in Part III are applied only to service sectors and supply modes scheduled on a member's concessions list (Matsushita *et al.* 2003: 240). Each member state has a different concession list created through intergovernmental bargaining in market access negotiations. In other words, the MFN principle is identified as a general commitment -together with transparency and procedural standards- as in the GATT, whereas national treatment and market access are applicable only to services listed by member states. This dual structure is a result of the Uruguay Round negotiations during which members adopted a methodology close to "positive list" or bottom up approach in lieu of a "negative list" or top down approach (Key 1997: 14-5). Originally proposed by the U.S. in conveying TNCs' interests, the negative list approach envisaged the liberalisation of all sectors during the Uruguay Round talks with exceptions that would be negatively listed. The methodology adopted at the end of the talks basically weakened the NT principle when it became conditional upon member commitments (Matsushita *et al.* 2003: 247). Hence, trade liberalisation became contingent upon bilateral bargaining between trading partners through the exchange of requests and offers. Furthermore, even though MFN became a general principle, the GATS allowed members to take sector-wide exemptions for a limited period of time (WTO 1999: 166). Based on a general consensus during the negotiations that is outlined in a special Annex to the agreement, the air transport sector was completely

exempted from disciplines since international services in this sector are governed by bilateral agreements (WTO 1999: 175). Consequently, the negotiations in most service industries brought about a much less ambitious liberalisation at the end of the Uruguay Round than initially anticipated (Hoekman and Kostecky 2001: 252). As will be examined in Chapter 5, during GATS negotiations governments adopted a “progressive liberalisation” approach which is codified in Part IV in contrast to the ambitious liberalisation perspective of the United States and TNCs. In this context, sectoral negotiations to liberalise basic telecommunications, financial services, and maritime services were left to post-Round talks (Matsushita *et al.* 2003: 252-8).

The GATS has modified the “generative grammar” of the trade regime by bringing about a change in language for state action and new meanings for conventional trade notions. As outlined, similar to goods, the GATS treats services as *tradable*. This was a major innovation of the Uruguay Round talks. Prior to the Uruguay Round, trade was conventionally understood only as international exchange of physical goods. *Traders* under the GATS are not only exporters and importers of goods, but also “service suppliers.” This is a broad category that covers legal persons including individuals such as teachers, doctors and architects but also firms. The barriers to services trade are not tariffs, but government regulations created for a wide range of purposes. In this regard, it can be argued that this revised definition for barriers to trade has

widened the scope of *protectionism*. Although the GATS has exceptions for certain regulations functioning to achieve non-commercial objectives such as environmental protection and national security, domestic law or practices that affect non-discriminatory supply of foreign services can be considered protectionism (depending on members' commitments). With a redefinition of basic norms intersubjectively produced collective meanings were revisited in synchronicity with the shift in the legitimate social purpose of the trade regime. Drake and Nicolaidis highlight this shift in purpose in the following terms:

[b]ecause tariffs were not the relevant impediments to trade, a boundary line between *illegitimate* NTBs [non-tariff barriers] and *legitimate* regulations was required. Wherever that line could be drawn, services liberalization would necessarily involve the extensive restructuring of what were once thought of as purely domestic regulations. This required *a sea change in social purpose*. Both the intellectual frameworks in which services industries were visualised and the vast array of social interest and institutions would now have to be judged according to the narrow commercial criterion of whether they impeded trade (Drake and Nicolaidis 1992, 63 emphasis added).

Since the intersubjective meanings changed during the round, the arguments initially brought up by resistant governments, such as India and Brazil, against the incorporation of services and intellectual property could no longer be upheld as *legitimate* as the negotiations came to a close. The arguments premising that services was a "non-trade" issue beyond the scope of the GATT gradually seemed

anachronistic and were withdrawn. The negotiation process is discussed in detail in Chapter 5.

3. 4. Consequences of the regime transformation

The transformation of the regime in line with a neoliberal social purpose has had major consequences for state-society relations, the trade agenda at different levels, the multilateral trading system and the WTO at the centre of this system. As a new constitutional body functioning to spread neoliberal hegemony, the WTO helped with the penetration of market norms and mechanisms into states and imposed disciplines impacting on domestic authority relations between the states and social actors including producers, labour and others. The WTO rules on subsidies put strong disciplines on governments with regard to their support to domestic producers of exported goods (Jackson 2002: 279-85). The WTO created standards for fair competition between market agents through disciplines on state actions in antidumping, and other trade remedies and various provisions in the TRIPS and TRIMS Agreements and the GATS (Hoekman and Koesteki 2001: 426). Through the GATS, trade norms were extended to public services such as education which were conventionally delivered by public authorities in many countries (Scherrer 2005;

Higgott and Weber 2005). The new disciplines restricted the legitimate space for state action in a broad range of domains including development policies (Ayala and Gallagher 2005; Dicaprio and Gallaher 2006). The diffusion of market norms has created controversies especially with regard to the fulfilment of social objectives such as environmental protection and labour standards. Starting with the infamous Tuna-Dolphin case in the early 1990s which was lost by the U.S. who banned imports of tuna from some countries on the basis of insufficient protection for dolphins, a long-standing debate started on the legitimacy of environmental measures in the context of the trade regime (Matsushita *et al.* 2003: 448-450). Similarly, the impact of the WTO agreements on social protection for labour has been at the forefront of the criticisms.

Jean-Christoph Graz makes the following observation:

The institutional framework of the WTO lies beyond a narrow definition of a world market of goods and services. In many ways it deals with a situation where states are accountable for the impact on the international trading system of social relations engendered by the articulation between the economic and political spheres. References to 'raising standards of living' and 'full employment' are made in the very first paragraph of the WTO preamble. However, instead of exceptions for effective interventions related to such states' socio-economic functions, the Uruguay Round did not give much license to differentiated means to provide social protection. The issue of employment and welfare has now come back to the forefront of the WTO agenda (Graz 2004: 605).

The emergence of a market-oriented positive integration program in the trade domain with the inception of the WTO and expansive trade agreements such as the NAFTA

opened up a new line of political debate about the new trade agenda. Compared to the GATT era, when trade was a technical domain of bureaucrats and traders, the new trade agenda, as it affects regulations in areas of public health, food safety and environment, concerns a multitude of stakeholders (Graz 2004: 598; Dymond and Hart 2000). Since the early 1990s the trade policy debate takes place with the participation of stakeholders such as environmentalists, labour unions, development NGOs, and health activists. As will be discussed in Chapter 7 for countries such as the U.S. where legislative bodies are heavily engaged in the process of trade policy-making, the decision-making on significant trade issues has been politicised and turned into a cumbersome process. The ratification of the NAFTA and the Uruguay Round Final Act, and the fast track debates in the United States were early signs of the crisis for trade policy-making in association with the challenges faced by the neoliberal hegemony in the early 1990s. The emergence of new actors and the politicization of the trade agenda have also created a new political context for the functioning of the trade regime under the WTO. Critical analysts argue that the new constitutional texture entailing a behind-the-border regulatory program resulted in a legitimacy crisis for the WTO (Howse and Nicolaidis 2003; Zürn 2004). While the WTO was accused of a lack of accountability as it was deemed to diminish the sovereignty of the states, its decision-making process was questioned for inherent “democratic deficit” (Marceau 2002; Kahler 2004; Verweij and Josling 2003; Capling 2003). The “green

room” process which is an informal way to forge consensus through bargaining between selected key countries contributed to the criticisms on the lack of transparency in the WTO decision-making (Jawara and Kwa 2003: 17-21; Schott and Watal 2000). Similar concerns about legitimacy were raised with regard to the Dispute Settlement Mechanism, wherein decisions are taken through a confidential judicial process where appointed judges work with members to the disputes and affected third parties (Steger 2005). These tensions made the WTO the target of anti-globalization campaigns and facilitated what Wilkinson calls a “governance crisis” causing the deadlocks in its ministerial conferences in Seattle (1999) and Cancun (2003) in association with the inherent institutional asymmetries within the WTO (Wilkinson 2006).

As studied in Chapter 6 and 7, the apparent reason for the breakdown of the Seattle Ministerial Conference in 1999 was the inability of member states to reach a consensus on the future legal scope of the WTO and the new trade agenda. The transformation of the trade regime created a legitimate basis for the arguments to extend the WTO agenda to new areas of further economic integration including investment and competition.⁴⁵ Many developed countries supported a further expansion of the regulatory scope of the WTO to new trade related issues as these issues were seen as

⁴⁵ On the extreme, some liberal constitutionalists called for a broadening of the agenda to fully limit states’ roles within economy for the realization of human freedoms (Petersmann 2002).

complementary to the existing legal framework and necessary for furthering positive integration. Alternative agendas for a market-oriented expansion of the WTO framework as well as for the creation of rules for labour standards and environmental protection were contrasted with developing countries' concerns about implementing existing accords. What is strikingly different from the GATT era is the fact that consensus-making not only requires the consent of developing countries which are increasingly influential at the WTO but also of civil society actors mobilized domestically and transnationally. In this regard, the crisis of the WTO both with its governance and legitimacy aspects should be understood within the context of the crisis of neoliberal hegemony. The evolution of neoliberal hegemony with the rise of new social forces pro and against anti-globalization as well as emerging economies and their agendas are keys to understanding the limitations to transformation and the future evolution of the regime.

Conclusion

To sum up, the trade regime came into being as a product of the pax Americana and its norms reflected the underlying embedded liberal social purpose that deemed state intervention through border measures as legitimate tools to realise certain Keynesian social objectives. The GATT regime evolved through the 1980s until the launch of the

Uruguay Round negotiations in 1986 with changes to its regulative rules and practices while its fundamental norms such as non-discrimination and liberalisation remained intact. The trade regime underwent a hegemonic transformation parallel to the establishment of the neoliberal order. The emergence of the WTO through the Uruguay Round reflected the institutionalisation of the neo-liberal hegemony as it created an institutional and legal framework codifying the reconfiguration of global authority relations. The WTO emerged as a supra-national body with a strong dispute settlement body and created new rights and obligations constraining the authority of the states.

The hegemonic transformation of the regime has created a new generative grammar that has re-drawn the ethical borders of state intervention in the economic realm through significant adjustments to its fundamental norms and principles and redefinition of the collective meanings about the regime, trade, trade barriers and protectionism, as well as traders. The most significant redefinition was registered in the non-discrimination and liberalisation norms especially in the TRIPS Agreement and the GATS. These redefinitions characterised a paradigmatic shift from *borders* towards *domestic policies*, and consequently eroded the embedded liberal vision. The transformation of the regime in line with a neo-liberal social purpose enabled the penetration of market norms and mechanisms into the states and challenged the

established mechanics of relations between states and social actors. The clash of market norms with non-market norms and the penetration of trade into social realms fuelled new political conflicts between a broad set of actors within civil society. The regime transformation opened up a crisis of legitimacy for the WTO that echoes the challenges to neoliberal hegemony evident in the debate on the future trade agenda.

Part II. TNCs in Setting the Agenda For the GATT: The Case of Services

CHAPTER 4: BUILDING NORTHERN CONSENSUS FOR A GATT AGENDA ON TRADE IN SERVICES

The services issue was initially brought up to the GATT by the United States in the late 1970s. Until the mid-1980s the U.S. remained the single *demandeur* of a comprehensive initiative that would treat services as tradable, consider certain domestic regulations as barriers to trade, and dismantle them through negotiations between governments. Consensus emerged in the early 1980s within the United States and later among OECD countries that services could be liberalised through trade instruments and negotiations. When the preparations to launch the Uruguay Round

started in Geneva in 1985, there was a firm Northern agreement, although some differences remained regarding the methodology on how to liberalize services under the GATT. The Punta del Este decision to launch the Uruguay Round in September 1986 was a clear recognition of the tradability of, and applicability of trade norms to, services even though the issue of the GATT's judicial competence was not yet resolved because of the intransigence of India, Brazil and some other developing countries.

In fact, the major social forces that set the agenda of the GATT to handle services regulations as barriers to trade were a number of U.S. based TNCs which mobilized in the mid-1970s and engaged in an encompassing agenda-setting initiative. In the period between 1973 and 1979, a small coalition of TNCs arose to ensure the legal recognition of services as a trade issue. In 1979, under the leadership of business executives from the U.S. finance industry, TNCs launched a broad-based campaign which can be deemed as a "war of position" in the Gramscian sense. The campaign aimed to change the established mind-set of "trade in goods" with a new framework of trade in "goods and services" by building coalitions with other firms and policy-makers, and through engaging in knowledge-production and education of governments and the general public. The TNC coalition's case for services was disseminated across Europe and elsewhere through new alliances, building a policy

network, supporting new academic research, and utilizing the media. Hence, the TNCs established a hegemonic mental framework that gradually changed the intersubjective meanings of trade and protectionism within the core capitalist nations who were supportive of these negotiations at the GATT.

The first part of this chapter explores the engagement of certain TNCs in agenda-setting for the GATT by examining their case-building for services through redefining and converging their corporate interests in trade terms and allying themselves with other firms. The second part focuses on their war of position towards consensus building in the United States and Europe by framing their case as a comprehensive formula responding to the interests of a wide range of stakeholders, and their activities to disseminate the new framework.

4.1. Reframing Corporate Interests in Services Terms

Until the policy debate during the 1970s, international transactions of services were not considered trade although such transactions were on the rise. The ideas of the tradability of services and the elimination of regulations restricting such trade by applying GATT principles and negotiation processes were primarily issues of academic debate until a business coalition would employ these ideas to influence the

legislative agenda in the United States. An early coalition of corporate interests emerged during the legislative process for the Trade Act in 1974 to lock in some benefits for U.S. based corporations struggling to access foreign markets protected by domestic regulations restricting entry and operations. On account of the constitutional amendments to U.S. trade law in 1974 and later in 1979, 1984 and 1988, services were recognized in equal terms with goods. As a result, service producers gained the legitimacy to raise their demands of market access in trade terms. This new way of framing corporate problems and interests within the services and trade contexts also created a basis for a broader coalition of TNCs to emerge and develop a longer term strategy to bring services to the agenda of the GATT in the 1980s.

4.1.1. Trade in Services and Emergence of a TNC Coalition

Until the policy debate during the 1970s, tradability of services was considered an oxymoron, while international exchange of services was taken as an “accounting” fact registered in the balance of payments sheets as “invisible transactions” (Drake and Nicolaidis 1992: 44; Feketekuty 1998: 81). The term “trade in services” first time appeared in the Report by the High Level Group on Trade and Related Problems drafted in 1973 by a group of eminent individuals chaired by Jean Rey, former President of the European Commission, to assess the systemic problems in the world

trading system in the run up to the Tokyo Round (OECD 1973; Feketekuty 1987: 298). The framing of services in the trade context, as outlined in the Rey group report, was a radically new perspective promoted in academia by few economists such as Hugh Corbet of the Trade Policy Research Centre (TPRC) in London (Feketekuty 1987: 296).⁴⁶ In fact, these early works were produced mainly by some Anglo-American economists who constituted the intellectual basis for a growing epistemic community that helped shape the policy debate in the United States during the 1970s and 1980s (Drake and Nicolaidis 1992). In this context, trade concepts and principles were for the first time systematically applied to services by Brian Griffiths of LSE in a cornerstone book entitled “Invisible Barriers to Invisible Trade,” published in 1975. Nevertheless, aside from this early academic debate, international cooperation in services was restricted to sectoral agreements regulating intergovernmental technical cooperation in areas such as civil aviation, telecommunications and maritime.⁴⁷ Although the Treaty of Rome envisaged free movement of services as well as goods within the European Community, specific rules on trade in services were not elaborated until the launch of the Single European Act, which would pave the way for the Maastricht

⁴⁶ Hugh Corbet was an influential figure in the trade policy debate in Europe during the 1970s. Corbet was a consultant to International Chamber of Commerce in Paris and special advisor to the conservative opposition in Britain until 1979. TPRC established in 1968 would become the most significant non-U.S. body influential in the services policy debate from the mid-1970s on (Kelsey 2008: 79).

⁴⁷ The International Telecommunications Union, International Civil Aviation Organization and International Maritime Organization were the bodies where governments cooperated to set mutual standards in these sectors (Brock 1982: 236).

Treaty of 1992 (Drake and Nicolaidis 1992: 44-5). The idea of the tradability of services through applying trade norms and principles within the context of trade negotiations was taken from the academic context to the policy debate by a number of U.S. based TNCs facing significant regulatory barriers in their operations in foreign markets.

Global economic transformations from the late 1960s brought about a competitive environment for U.S. based TNCs that eventually led to the consideration to utilize trade policy instruments to dismantle barriers. American TNCs operating internationally in different service sectors faced two particular sets of challenges especially in areas where European and Japanese firms built up productive capacities (Aggarwal 1992). The first set of challenges included market access difficulties, both for their cross-border sales abroad and their investments, especially in the Japanese and NIC markets. The second challenge was in the U.S. market as these companies faced an uneven and disadvantageous business environment compared to their foreign competitors because of the relative economic openness of the U.S. market. Thus, a coalition of interests emerged among U.S. service industries in the early 1970s to handle both sets of challenges by activating U.S. trade policy tools. The leading social forces that reframed different sets of corporate interests in the context of trade policy were the U.S. TNCs operating in the financial sector, especially in insurance and banking.

American TNCs in financial services were internationally competitive because of the large scale of their financial markets and the deregulation trend initiated in the early 1970s. According to Susan Strange, domestic deregulations for financial operators and money markets in the 1970s and the scale of these markets and operators created a comparative advantage for U.S. based financial giants that were able to take relatively higher risks for profits (Strange 1988: 108, 131). The competitiveness of U.S. operators such as American Express would continue into the 1980s. According to Harry Freeman of American Express, the company became a world-scale financial leader with \$16 billion of market capitalisation in the mid-1980s, followed by American International Group (AIG) (\$10 billion), and Citicorp (around \$6 to 7 billion) (Freeman 1987: 138). However, ongoing protectionism in financial markets was an important factor increasing costs of international business for banks and insurance companies (Bhagwati 1987: 211). In the early 1980s, markets were still highly regulated even in the OECD region. In most of the advanced economies, markets were closed to the entry of foreign insurance firms (Kennedy 1992: 2). In Europe, since the inception of the EC, this sector had undergone regional liberalization for investments while the market was still closed to cross-border trade (Shelp 1981: 137-142; 171). The EC deregulation in banking had yet to start to liberalize investments while trade opening was also in a planning stage in the early 1980s (Shelp 1981: 207). A comprehensive

regional deregulation agenda in Europe would be set off with the initiation of the single market program in the second half of the 1980s. The insurance market in Japan was also protected up until the 1980s while the market was dominated by domestic companies in the mid-1980s (the share of foreigners in domestic market was only 1 percent) (Feketekuty 1988: 142; Shelp 1981: 157).

On the other hand, financial deregulations in the U.S. had created pressures and incentives to build up international competitiveness in Europe and other advanced economies that led to the liberalisation of internal markets (Strange 1988: 131). Thus a deregulatory trend in finance was put in motion in the UK, Canada and other countries in the 1970s and 1980s, which ultimately pushed banks, insurance and securities firms to operate in a more competitive environment. This trend also generated counter pressure on the American financial sector for further elimination of domestic regulations on business operations (Freeman 1987: 140). The Japanese banking and securities firms, as well as French, German, British and Canadian companies, became more competitive with growing market share and annual earnings (Freeman 1987: 138).⁴⁸ Similarly, large European insurance firms became a cause of concern as they enjoyed the ease of access to the U.S. market (Aggarwal 1992:

⁴⁸ Harry Freeman notes that top four Japanese securities firms earned almost \$3 billion in 1986, which was equal to the earnings of twenty-five to thirty top U.S. firms in securities (Freeman 1987: 138).

40). While the maintenance of market shares domestically and internationally was crucial for U.S. TNCs, an equally important goal became to enter the lucrative but heavily regulated markets of NICs (Beder 2006: 127; Freeman 2000: 456).

Similar concerns were shared by other American service suppliers in shipping, aviation, construction, and engineering. While U.S. trade policy had legal and political leverage to open markets to sectors operating in manufacturing, service industries lacked governmental assistance. Pan American Airways became the first U.S. company to concoct the idea of extending the purview of U.S. trade policies to the service industries during the policy debate around the forthcoming Trade Act of 1974. The company was excluded from international mail delivery services in some countries because of internal discriminatory regulations excluding foreign companies from operating in similar conditions with national firms (Feketekuty 1988: 299-300/2010, interview). In its campaign to insert provisions for service suppliers Pan American Airways was joined by other corporations seeking the creation of policy instruments by the government to tackle regulatory barriers abroad. The campaign was orchestrated by AIG, a U.S. insurance giant. AIG was in difficulty to enter lucrative Asian markets and was concerned about the lack of sufficient policy tools to protect its investments in Third World markets (Freeman 2001: 184; Shelp with Ehrbar 2006: 127). The leading figure who organized this intensive lobbying activity was

Ronald K. Shelp, who had been recently appointed to the position of vice presidency responsible for international relations of AIG (Feketekuty 1988: 300). Shelp's conversations with U.S. government officials illustrated that insurance was not seen as an exportable value benefiting U.S. economy as were goods in engineering, construction and manufacturing industries (Shelp with Ehrbar 2006: 126-127). Shelp puts forward that

Other companies had a prima facie case to begin with. AIG had to make a case. So AIG had to push doubly hard to persuade its own government that its overseas operations had any value (Shelp with Ehrbar 2006: 127).

Shelp was familiar with the trade policy instruments and terminology owing to his previous career with the International Department of the U.S. Chamber of Commerce (Feketekuty 1988: 300; Shelp 2010, interview). He found out that the tradability of insurance was a "totally alien concept" for government officials, and together with other TNCs they argued that insurance, banking and credit card transactions and transportation constituted the same sectoral category of "services" which were tradable like commodities (Shelp with Ehrbar 2006: 127). The campaign that was orchestrated by AIG before the legislation of the Trade Act of 1974 was, thus, joined by business executives with transportation, construction and other industries. These individuals gave testimonies about their problems in external operations during the hearings of the Senate Finance Committee and eventually secured a role in the

crafting of significant provisions for services in the 1974 bill (Shelp 1981: 153; Feketekuty 1988: 300; Kelsey 2008: 77). This early coalition of corporate interests later became the nucleus of a broader agenda-setting campaign to bring services under the purview of the GATT as of the late 1970s. Before turning to this wider scale political campaign it would be illuminating to explore the constitutional amendments in U.S. trade law from 1974 on that paved the way for TNCs in service industries to influence the trade agenda and policy-making.

4.1.2. Constitutional Changes in U.S. Trade Law

During the 1970s, U.S. Congress was under pressure from industries affected by economic recession and enhanced international competition. These included sectors demanding defensive and offensive tools of protection such as textiles and clothing, automotive parts, computer software, integrated circuits, chemicals, and entertainment. The legislative processes for important trade bills in 1974 and 1979 created important opportunities for TNCs in services and manufacturing to yield clear benefits from U.S. trade policies (Cafruny 1989: 126, 9). Consequently, the Trade Act of 1974 contained several provisions to address the needs of a wide range of industries. Most significantly it created a “fast-track” procedure delegating significant authority to the President in trade negotiations while maintaining legislative

supervision on trade policies as Congress retained its right to accept or refuse international agreements (Mundo 1999: 55-6; 114; Cohen *et al.* 2003: 40, 151). On the other hand, the Office of Special Trade Representative which was established by the 1962 Act was renamed as United States Trade Representative (USTR), and became a more autonomous body from the president with a direct mandate from Congress to deal with unfair practices in foreign jurisdictions (Mundo 1999: 115; Goldstein 1993: 167). To this aim, the 1974 Act created the Section 301 giving the executive branch the power and instruments to address unfair practices including internal regulations discriminating against U.S. exports both in goods and services (Mundo 1999: 114; Feketekuty 1988; 197-8). Section 301 would later be strengthened with the Trade Agreements Act of 1979 and the Trade and Tariff Act of 1984 (Mundo 1999: 117, 120). The Omnibus Trade and Competitiveness Act of 1988 represented the hiatus of U.S. unilateralism in tackling unfair regulations and practices of trading partners with the creation of the Special 301 as well as a Super 301 provision, which granted the USTR with an aggressive mandate and authority to take unilateral legal action (Mundo 1999: 121).

For the service producers, the first concrete result of the constitutional amendments to U.S. trade law in the 1970s was the recognition of services as an area of trade policy that led to the incremental insertion of services into U.S. trade mechanisms. While the

Trade Act of 1974 acknowledged services in similar terms with trade in goods, its provisions germane to services authorized by the executive to negotiate non-tariff barriers in this area (Feketekuty 1988: 300). The 1979 Act further underscored services as an area of clear responsibility of the USTR (Cafruny 1989: 129). With increased mobilisation of service industries in the 1980s more concrete benefits could be secured in the upcoming trade acts. The amendments to the trade law in 1984 modified Section 301 and broadened the scope of actionable unfair trade practices of foreign states with detailed provisions explicitly covering services, trade related investment measures, and IPRs (Low 1993: 60). This would in practice mean the authorisation of the USTR to take the retaliatory action of levying tariffs on the goods of a trading partner which discriminated against U.S. service providers as for example in the case of blocking the licensing of a U.S. insurance company abroad (Shelp with Ehrbar 2006: 128). Similarly, the 1988 Act which was enacted to increase U.S. competitiveness engendered additional instruments for IPRs and foreign practices in government procurement, and it contained counter measures against foreign practices restricting U.S. telecommunications goods and services exports (Low 1993: 65). Super 301 crafted in 1988 granted USTR the right to identify trading partners implementing “unfair” actions with greater discretion about what unfair practices would entail, and to initiate unilateral prosecution to investigate those measures (Krueger 1995: 64-67). Among others, the 1988 Act listed gaining market access for U.S. service exports and

the creation of an international regime of service agreements as the objectives of U.S. trade policy (Lang 2000: 1).

In addition to reconfiguring the authority in trade policies between Congress and the Executive, as well as between the President and USTR, the amendments to the U.S. trade law also opened new legitimate channels for the TNCs to influence trade policy-making. The 1974 Act mandated the president to establish an Advisory Committee for Trade Negotiations (ACTN)⁴⁹ to get feedback from private sector executives in shaping American trade policy and positions in intergovernmental trade talks (Feketekuty 1988: 301; Walter 2000: 159). Additionally, the 1979 Act mandated the creation of a joint Industry Sector Advisory Committee on Services by USTR and the Department of Commerce with private sector representatives at the vice-president level, and the formation of a Services Policy Advisory Committee to USTR (Feketekuty 1988: 312; Kelsey 2008: 61). Consequently, the ACTN would top seven sectoral policy committees representing key economic sectors impacted by trade, and seventeen Industry Sector Advisory Committees (ISACs) including representatives from sectors such as energy, consumer goods, textiles and apparel, electronics etc. as

⁴⁹ The ACTN was later renamed as the Advisory Committee on Trade Policy and Negotiations (ACTPN).

well as services.⁵⁰ The establishment of private advisory mechanisms was one of the central issues of the campaign organized by AIG (Shelp with Ehrbar 2006: 128). As a natural result of this transformation in the U.S. state apparatus, the TNCs increasingly engaged in policy-making from the mid-1970s on. The campaigners became active in these advisory bodies that channelled individual and collective views to USTR and the President.

Because of these constitutional amendments, service industries pushed the executive to take concrete measures addressing the problems of service industries. In advancing their case within policy and law-making bodies, the campaigners would pursue a “balanced strategy” between “conservative” Congress, and “free trader” executive agencies like USTR (Mundo 1999: 130). The TNCs tapped into opportunities created by the legislative agenda, and took advantage of the checks and balances between the legislative and executive bodies (Zumwalt 1996: 3). Due largely to its dependence on the “fast track” authority the Executive and its agencies became more receptive to private sector demands as pressure from Congress amplified (Zumwalt 1996: 3). With these constitutional amendments, U.S. Trade Representatives such as Bob Strauss, William E. Brock, and later Clayton Yeutter would become very receptive to the

50 The sectoral policy committees included SPAC (Services Policy Advisory Committee), INPAC (Investment), IGPAC (Intergovernmental), IPAC (Industry), APAC (Agriculture), LAC (Labor), and DPAC (Defense). http://ustraderep.gov/Who_We_Are/Mission_of_the_USTR.html accessed on April 25, 2008.

inputs from the private actors (Feketekuty 1988: 321). As a first step, in 1975 a White House Interagency Taskforce on Services and Multilateral Negotiations was initiated to examine the problems of service industries (Feketekuty 1988: 302). The Task Force prepared a report in December 1976 that recommended the insertion of service industries' concerns to the Tokyo Round negotiations on a "carefully selected" basis (Feketekuty 1988: 303). Despite this effort, the U.S. could only secure the interjection of some language on services into three Tokyo Round codes as it had difficulty to convince trading partners to embark upon a broader initiative that would tackle domestic regulations as trade barriers.⁵¹

4.1.3. Further TNC Mobilization for Trade in Services

The recognition of services as a trade issue and the creation of a legal mandate for the president and USTR during the 1970s resulted in a strategic re-orientation in thinking of corporate interests and strategies. The new conceptual framing of services in trade terms such as comparative advantage, market access, non-tariff barriers, and protectionism would provide TNCs with legitimate claims to pursue economic

⁵¹ These were the subsidies, standards and government procurement codes. Even though some wording on services was injected, these codes were not substantially extended to the area of service liberalisation. Nonetheless, the government procurement code mandated the contracting parties to consider its extension to services in 1983 (Feketekuty 1988: 304-305; Brock 1982: 230; Aronson and Cowhey 1984: 28-29).

strategies to access markets and political strategies to leverage U.S. trade policy to achieve their economic goals. From the late 1970s on, a stronger and wider scale business coalition for trade in services emerged in the United States with the mobilisation of TNCs operating in various sectors around a collective purpose to promote a coherent trade policy for service industries and eventually to put the issue on the GATT agenda (Freeman 2000: 456). At the core of the business coalition was the finance industry after American Express joined forces with AIG and Citicorp in 1978.

American Express is a financial firm operating in a wide range of areas from banking to insurance. It was particularly competent in credit cards and travel-related business including travellers check (Yoffie and Bergenstein 1985: 129-130). Like other financial firms, the company encountered significant restrictions during the 1970s because of extensive regulations both in the United States and abroad (Yoffie and Bergenstein 1985: 130). Its non-bank status was an acutely crucial challenge in accessing developing country markets, which were generally dominated by a few local banks (Freeman 2001: 184). In this regard, the interests of the country encompassed the interests in terms of conventional sectoral descriptions of banking, insurance and securities (Freeman 2001: 184). Defining company's economic interests in "financial services" terms would create substantial benefits especially to dismantle foreign barriers to its operations in different areas (Freeman 2001: 184). Thus, the company

adopted a proactive strategy to turn the company to an “integrated service company” after the appointment of Jim Robinson as chairman and CEO of Amex in 1975 (Yoffie and Bergenstein 1985: 129). Robinson made the critical decision to create a broad business coalition including both financial and non-financial firms to pursue not only the “parochial interests” of Amex, i.e. opening financial markets, but also other firms’ interests by creating political pressure on the U.S. government (Yoffie and Bergenstein 1985: 130; Freeman 2001: 184). According to Robinson’s deputy Harry Freeman, this strategic decision to amalgamate a wide range of forces behind a common cause was the “single most important decision” that was influential in the success of the business coalition in putting services on the GATT’s agenda (Freeman 2001: 184). In line with this new perspective, the company launched an aggressive and high-profile government relations initiative by restructuring its Washington office and launched efforts to expand the core TNC coalition to other corporations in financial as well as non-financial service sectors (Yoffie and Bergenstein 1985: 130; Freeman 2001: 184).

Telecommunication firms were recruited to the services cause at an early stage. Thanks to technological innovations and growth of markets in telecommunications during the 1970s, international competition escalated both for service and equipment providers in this sector (Cass and Haring 1998: 83-106). An important constraint to international trade in telecommunications stemmed from the monopolistic character

of the service markets as they were dominated by few companies usually owned by the states. The competitiveness of U.S. TNCs in the world markets increased as a result of measures by the Reagan administration towards deregulating the domestic market in 1984. These measures dismantled the American Telephone & Telegraph Company (AT&T), the historical dominator of the internal market (Wada and Asano 1997: 239). Furthermore, the 1984 deregulation also created a competitive environment both for service providers such as AT&T and telecommunications equipment suppliers including AT&T, IBM, and Motorola. While the competitiveness of American firms increased with lower prices and higher quality in services, these and other major telecommunication service providers, such as ITT and FDR Interactive, increased their pressure to the government for liberalization of foreign markets (Aggarwal 1992: 42). As the sector was brought under the purview of trade policy, sectoral leaders revised their offensive interests using trade terms. Thus major trade issues for the U.S. TNCs were crystallised as the access to especially EC and Asian markets including Japan and South Korea, restrictive government procurement procedures in these countries, and widespread governmental subsidies in these and other countries (Aggarwal 1992: 43). The immense pressure exerted by U.S. companies would result in governmental pressure on trading partners and lead to limited liberalization in telecommunication markets.⁵² While opening markets through the

⁵² For instance, Japan initiated a deregulation program in 1984. This paved the way for the

GATT became a priority for American telecom giants in the early 1980s, bilateral trade pressure was also institutionalized to have non-discriminatory access to targeted markets.⁵³ The liberalization in telecommunication markets became a significant issue also for TNCs operating in other sectors. For many firms communication costs constituted the majority of expenses after staffing expenses. Non-discriminatory access to telecommunications networks and payment systems were specifically essential for daily operations of finance firms such as Amex (Freeman 1986: 573; 2001: 184).

Construction and engineering was another leading American industry that joined the ranks of services campaigners. U.S. construction companies had heavily been engaged in international construction projects in the post-war period. However, their domination diminished in time because of growing competitiveness of other OECD countries as well as NICs such as South Korea (Bhagwati 1987: 210). An American advantage continued in engineering and design, yet developing countries such as

world's largest privatization initiative in 1986. Japan began selling shares of the government-owned NTT, even though foreign firms would not be permitted to purchase its shares until 1992 (Wada and Asano 1997: 211-2).

⁵³ Bilateral trade agreements negotiated with Japan during the 1980s covered issues such as Japanese government procurement practices in computers, satellites, and construction services, and telecommunications standards, regulations and licensing procedures in telecommunications equipment, international value-added telecommunications services, third-party radios and cellular phones (Janow 1998: 176-177 and 199).

India, Brazil, Taiwan, Lebanon and South Korea also managed to grow their market share and build up competitiveness owing to cheap labour and enhanced technology transfer (Bhagwati 1987: 210; OTA 1987: 119). One additional factor that escalated international competition in the early 1980s was the shrinking supply of reserves in OPEC countries because of the fall of oil prices and the Third World debt crisis, which decreased the amount of large scale construction projects in the Middle East and other oil-rich countries (OTA 1987: 119). As they were challenged in international markets, U.S. construction firms also faced competition at home owing to their disadvantage in financial resources vis-à-vis the heavily subsidized firms of Europe, Japan and some emerging economies (OTA 1987: 119). Hence, American companies such as Bechtel and Caterpillar Mr. and the U.S. International Engineering and Construction Industries Council would become vocal actors before and during the Uruguay Round to influence U.S. trade policy and strategies by raising their concerns about heavy government subsidization in many countries, restrictive regulations as to the establishment and location of activity as well as investment rules for the use of local content (Aggarwal 1992: 46). As will be examined in the next chapter, major developing countries would warm up to the idea of trade negotiations in the construction sector at an early stage in the Uruguay Round because they perceived a comparative advantage in their labour intensive business activities.

In sum, the business coalition was built up under the leadership of U.S. finance giants such as AIG, American Express, and Citicorp, and included other companies operating in telecommunications and data processing, construction, tourism, professional services, and film industry (Kelsey 2008: 78).⁵⁴ While these companies came together with a collective interest in opening markets through trade policies they were not part of a national constituency that would raise mutual concerns vis-à-vis policy-makers (Shelp 1986: 688). A significant step towards creating a single constituency and institutionalizing the coalition-building efforts was the creation of the Coalition of Service Industries in January 1982.⁵⁵ Chaired by Harry Freeman of Amex, this coalition came into existence after dedicated effort and leadership of other key individuals including the CEOs of American Express (Jim Robinson), AIG (Hank Greenberg), and Citicorp (John Reed) and deputies of these CEOs including Freeman, Joan Edelman Spero (American Express), and Ronald Shelp (AIG) (Freeman 2000: 456;

⁵⁴ The U.S. film industry represented by the Motion Picture Association of America, including firms such as the Walt Disney Company and MTV, was particularly concerned about the protections within the EC market as it imported more than half of U.S. exports in the 1980s. The market was largely controlled by national authorities and protected in countries such as France through limitations on foreign programs with concerns of cultural identity (Aggarwal 1992: 44). Another trade concern for the U.S. film industry was the lack of or poor protection of intellectual property rights in many developing countries. The sector became an active constituent of both services and the TRIPS campaign with a leading role of Fritz Attaway, energetic Vice President and General Counsel of the Motion Picture Association (Sell 2003: 49, 89).

⁵⁵ Among the founders were Bechtel engineering and construction, Sea-Land Corporation shipping, Peat, Marwick, Mitchell & Company accountants, Merrill Lynch, Citicorp, N.A., ARA Services diversified management services company, Roebuck, and Beneficial Corporation financial services company (Sims and Rivers 1987: 13-4; Kelsey 2008: 78; Economist 25 December 1982).

Zumwalt 1996: 3-5). Especially Ronald Shelp and Harry Freeman played a proactive role in crafting collective business strategies and in generating an action plan to make services a priority for U.S. trade policies especially for the insertion of the issue into the GATT agenda. Harry Freeman secured substantial financial backing from American Express and Jim Robinson to support the joint campaign not only in the United States but also in Brussels, Tokyo, and Geneva to build a Northern consensus to liberalise service markets through trade negotiations (Freeman 2000: 456). Coalition-building included recruitments from within the U.S. bureaucracy. A key player in the services debate was Geza Feketekuty at USTR's Office who spent enormous time and energies to activate U.S. trade machinery for service companies in cooperation with Ron Shelp and other campaigners. Before starting his career at USTR in 1974, Feketekuty had worked as an economist at the Council of Economic Advisers and Citicorp (Kelsey 2008: 80).⁵⁶ In the late 1970s, he was the most informed person on trade in services within USTR's office and played an invaluable role in shaping U.S. business and government strategies and educating American policy-makers.

⁵⁶ Feketekuty was appointed Assistant USTR in 1978, Senior Assistant USTR in 1982, and from 1985 to 1990 Counsellor to USTR (Kelsey 2008: 80).

4.2. TNCs in Agenda-Setting for the GATT

Until the late 1970s, only a narrow circle of researchers and professionals, including a dozen business executives and government officials believed that international transactions in services could be considered as “trade”, that certain regulations created obstacles to trade, and that liberalisation could be pursued through applying trade norms and principles (Drake and Nicolaidis 1992: 41-7). In other words, the new framing was a “collective image” in Coxian terms that was held only by a small group of people. Building a convincing case and promoting it through all available channels was crucial to upgrade the idea of trade in services to the status of an “intersubjective meaning” shared broadly by the trade policy community in the United States and other countries. The business leaders had to launch a “war of position” to change the established mindset of policy-makers and wider public from thinking trade only in goods to a mental framework of “goods and services.” Such a comprehensive education “campaign” as Geza Feketekuty called it, or service sector “movement” or “crusade” as Harry Freeman labelled it, aimed to capture the intellectual and moral leadership within and beyond the business community. The services case was constructed as a comprehensive policy formula, i.e. as a public good responding to a wide range of interests beyond the parochial corporate interests of a dozen companies. Services were also promoted as the engine of U.S. economy, a source of

wealth and employment, and a cure for mounting trade deficits and the trading system, which was troubled by new protectionism.

To this aim, from 1978 on Geza Feketekuty and other campaigners worked closely in a series of “mission delineation” meetings, to produce a long term “action plan” that would eventually set the GATT agenda for services (Freeman 1996: 19; Feketekuty 1988: 306). The action plan included three components: (1) Construction of a new framework of thinking and a comprehensible policy formula acceptable to policy-makers and wider public through engaging in the production and dissemination of data, knowledge, and analysis on services trade; (2) Expanding the core group of individuals believing in the tradability of services by new coalition-building and education activities targeting key decision-makers, trade experts and general public; and (3) The full activation of the U.S. trade machinery to leverage unilateral, bilateral and multilateral channels to open markets, resolve disputes, and forge international consensus over GATT negotiations on services.

4.2.1. Promoting Trade in Services as a Comprehensive Policy Formula

The business leaders launched an extensive communication campaign in 1979 to ensure the acknowledgement of the “trade status” of their activities by a wide range

of actors in the United States. To this aim, they adopted a strategy to communicate their activities, preferences and strategies through trade terminology. Ronald Shelp explains this in the following terms:

So we [...] learned a new terminology—trade terminology. Soon, we were constantly repeating a new word—“services”—and arguing that insurance, credit card transactions, transportation (airlines, ships), banking transactions all fell into this category (Shelp with Ehrbar 2006: 127).

Part of this strategy was making terms such as “services,” “financial services,” and “trade in services” widely established in daily use, especially in the media and among key policy-makers. Harry Freeman argues that the term “financial services” was coined by American Express in 1979 and became part of the trade lexicon in the coming two years as a result of an aggressive communication campaign (Freeman 2000: 457). A similar intellectual effort was energized to make “goods and services” an established pattern in defining international trade.⁵⁷

Secondly, the service campaigners formulated the liberalisation of trade in services as a public good that would not only respond to their corporate interests, but also solve a number of pressing problems. TNCs built their case vis-à-vis policy makers not only by arguing that services were a significant source of employment, crucial to the U.S.,

⁵⁷ To this aim, Freeman claims to have written at least 1600 letters to newspapers to establish the phrase “goods and services” in the mainstream vernacular (Freeman 2000: 457).

world trade and the global economy but also by effectively highlighting that it was an area subject to regulatory restrictions which could be eliminated by trade instruments and negotiations (Drake and Nicolaidis 1992: 50). Business leaders in their public speeches, contacts with policy-makers and in their media appearances highlighted services as a major source of wealth and employment for the United States and other advanced economies. These actors consistently reiterated that services constituted “from 60 percent to nearly 80 percent of gross domestic product and employment” (Freeman 1996: 19). To illustrate, in a speech, Ronald Shelp contended that 80 percent of 29 million new jobs created between 1970 and the mid-1980s were in services (Shelp 1986: 687). Similarly, Jim Robinson underscored the fact that that 13 million of 14 million new jobs created for the American female work force in the 1970s were in the service industries (cited in the Economist 25 December 1982). A representation of the services as a crucial set of economic activities vital to American wealth and employment became the standard business case for services to date.⁵⁸

Thirdly, the campaigners underscored that the U.S. was a top service exporter and that it was competitive in sectors such as financial services and telecommunications.

The liberalisation of barriers to trade in services would not only increase exports and

⁵⁸ The CSI’s mission statement starts with the following sentences “[t]he Coalition of Service Industries (CSI) represents the interests of the dynamic American service economy, which employs 80% of the workforce and generates 3/4 of national economic output.” <http://www.uscsi.org/about/> accessed on December 15, 2010.

ease the problem of trade deficits, but would also address the problem of asymmetry in the openness of U.S. market vis-à-vis external markets (Aggarwal 1992; Freeman 1987: 138; Shelp 1981: 157). In this regard, the services case was not only framed in a free trade discourse associated with the rising neoliberal understanding, but also in connection with the ability of the U.S. to respond to the decline of its hegemonic power and competitiveness (Cafruny 1989, 129). To deal with the “free-rider” problem, the United States should have provided MFN based access to its service markets only if reciprocal opening were secured from regulated markets such as that of NICs (Freeman 1986: 575). Bringing services to the GATT would not only enable the United States to open external markets, but also address the systemic problems of the GATT regime. Considering the speedy growth of world trade in services⁵⁹, and its direct association with trade in goods,⁶⁰ it was essential to broaden the scope of the GATT to curb protectionism and to update the system to address the problems of the “post-industrial revolution” (Shelp 1986: 688-9; Freeman 1986: 573). This narrative was in concurrence with the popular debate about the beginning of the “post-industrial” era with the decline of the old manufacturing base and the rise of service sector which

⁵⁹ As per Freeman, the world trade in services was growing twice as fast of manufacturing trade as it increased from \$85 billion in the early 1970s to an amount of \$620 billion in the mid-1980s (Freeman 1986: 573).

⁶⁰ It was argued that trade in services in banking, insurance, accounting, travel, transportation etc. was intertwined with trade in goods as an “indispensable adjunct of every traded product” (Freeman 1986: 573; Arkell 1992: 24).

captured the largest share in domestic production in the U.S. and other industrialised countries (Mundo 1999: 290).

The case of services -framed in trade terminology and presented along with the interests of the United States and the world trading system- was promoted through a proactive education campaign targeting key business leaders, policy-makers and the media. A significant channel to disseminate the business case for the GATT was in the advisory business bodies, which were created in the 1970s to inform U.S. trade policies. After its establishment, Jim Robinson of American Express would chair the Services Policy Advisory Committee (SPAC) on the advice of Harry Freeman (Kelsey 2008: 78). Similarly, USTR Bob Strauss appointed Hank Greenberg of AIG to the presidential ACTN (Feketekuty 1988: 304; Kelsey 2008: 77). On the other hand, Ronald Shelp would head the Industry Sector Advisory Committee on Services in addition to his chairmanship of the services committee in the U.S. Chamber of Commerce (Feketekuty 1988: 308; Kelsey 2008: 78). Intensive contacts with government officials through these bodies and regular lobbying activities would create a loose business-government coalition for trade in services in the United States that would expand in the early 1980s.⁶¹

⁶¹ Harry Freeman was succeeded by Joan E. Spero at Amex, who also worked actively for the services campaign and CSI. Spero was appointed as Undersecretary for Economic, Business, and Agricultural Affairs under the State Department by President Clinton in 1993.

The campaigners also engaged in conferences, interviews and articles in newspapers to establish the new pattern of thinking and to disseminate their case within civil society. Beginning in 1979, Jim Robinson as well as other campaigners gave numerous speeches in meetings they attended with academics, trade officials, members of Congress and other politicians (Yoffie and Bergenstein 1985: 131). They succeeded in drawing the attention of newspapers and the media. In March 1979, TPRC co-hosted a two-day conference with the Financial Times to discuss the multilateral trade framework for services liberalisation (Kelsey 2008: 79). Yoffie and Bergenstein (1985: 131) contend that, top American Express executives engaged in the trade in services campaign were quoted on an almost weekly basis in 1982 in widely read publications such as *The Economist*, *Fortune*, and *The New York Times* (Yoffie and Bergenstein 1985: 131). The issue would attract further attention as the Reagan administration embraced the case and started pushing the GATT agenda from 1982 on. "Drama" was created with the rise of resistance from India, Brazil and some other developing countries to the new issues before the launch of the Uruguay Round, which not only kept the issue in the news, but also stimulated additional requests for information from journalists (Feketekuty 1988: 311). By the mid-1980s the services issue became a well-discussed public topic in the United States media. In 1984, the *Fortune* magazine for the first time

published a list of top 500 companies for the services sector, as the counterpart of Fortune 500 list of manufacturing companies (Zumwalt 1996, 5).

With the motive of producing a legitimate academic basis for their case, U.S. business executives also heavily engaged in the production of new knowledge and analysis on services through sponsoring research and studies, and supporting and participating in conferences. Starting from the late 1970s U.S. and UK business leaders sponsored formal and informal meetings and conferences that gathered likeminded people from around the Atlantic and the world to educate policy leadership and extend the coalition for a GATT on services to experts, academics, journalists and government officials in other countries (Feketekuty; Shelp 2010, interviews). In the academic discussion and exchange of views, Hugh Corbet and the Trade Policy Research Centre (TPRC) played an active role especially through organising conferences, seminars and private meetings in different locations such as Ditchley Park (Oxford, UK), Wiston House (south of London), and the Rockefeller property in Bellagio (Northern Italy) (Feketekuty 1988: 310; Kelsey 2008: 79). *The World Economy* journal published by TPRC helped establishing the concept of trade in services in the academy (Feketekuty 1988: 310). While some business leaders wrote in this journal to contribute to the debate, Ronald Shelp of AIG also wrote a book titled “Beyond Industrialisation, Ascendancy of the Global Services Economy” in 1981 examining the ways to apply GATT norms to

services liberalisation. On the other hand, several research institutes and think tanks in the U.S. and Europe joined the policy debate with conferences and panels they held and new publications they generated.⁶² In 1983, the International Association for the Study of Insurance Economics initiated a Programme for Research on the Service Economy (PROGRES) in Geneva to provide a venue for debate on trade in services and regulations (Kelsey 2008: 79).

Active business engagement in the academic debate and production would have two significant consequences. The first consequence was the expansion of the core group of researchers, professionals and experts studying services as an expansive policy network or epistemic community. According to Dahan *et al.* (2006: 1573), policy networks are “self-organizing forms that coordinate a growing number of public (decision-makers) and private (interest groups) actors for the purpose of formulating and implementing public policies” and are “increasingly formed and accessed by” TNCs. In fact, the transnational policy network for services that would expand

⁶² Among others these included U.S. based organisations such as U.S. Council for International Business, Council of Foreign Relations, National Foreign Trade Council, Committee for Economic Development, the Conference Board, Center for Strategic and International Studies, American Enterprise Institute, German Marshall Fund of the United States, and non-U.S. institutes and think tanks such as the Trade Policy Research Centre (London), the UK Liberalisation of Trade in Services Committee (LOTIS), Centre for the Study of International Negotiations (Geneva), Centre for Transnational Corporations (New York), Atwater Institute (Montreal), Promethee (Paris), and International Chamber of Commerce (Paris) (Feketekuty 1988: 311; 2010, interview; Wesselius 2002).

through the 1980s took the form of an *epistemic community* which is a particular form of policy network, “a network of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area” (Drake and Nicolaidis 1992; Dahan *et al* 2006: 1579; Haas 1992: 3). Drake and Nicolaidis (1992: 50) contend that the core Anglo-American nucleus of the services epistemic community were experts inspired by classical liberal thinking believing in the potential across-the-board applicability of trade norms and principles to service liberalisation (Drake and Nicolaidis 1992: 50).⁶³ According to Kelsey (2008: 77), the new research helped “construct a new legitimising discourse that depoliticised the services issue and translated [...] it into an abstract conceptual framework and technicist language that was capable of becoming law.”

To recapitulate, as envisaged by the business action plan, the tradability of services and the belief in the applicability of GATT norms to liberalize service markets became ideas shared by a broader group of people from around the world. This would eventually contribute to the change of “intersubjective meanings” within the trade

⁶³ Drake and Nicolaidis (1992; 39) note that the services epistemic community consisted of a two-tiered membership whose first tier was composed of the business, government and international agency representatives who worked for institutions with direct interest in policy options produced by the community. The campaigners initially in the U.S., from the late 1970s on also in Europe and Japan, were supported by the second tier of membership which contained academics, industry specialists, journalists and lawyers who were interested in trade in services purely from an intellectual perspective.

regime from a goods mental framework to a goods and services framework. Nevertheless, a transformation of the GATT regime would eventually come through only after fully convincing U.S. policy-makers, activating American trade bodies, and ensuring a consensus among OECD governments.

4.2.2. Activating U.S. Trade Policy

With the mandate created in 1974 and increasing pressure from TNCs through advisory channels and direct lobbying, the U.S. government took a number of steps to address the concerns of service industries in the 1970s. The U.S. government dedicated its efforts to produce data and information on trade in services. While the Commerce Department commissioned the first comprehensive study by Wolf and Company in 1976, the U.S. Chamber of Commerce launched a survey to determine the barriers to U.S. service industries abroad. This would feed into the U.S. national submission to the GATT in 1983, which became the most comprehensive compilation of data on world trade in services (Feketekuty 1988: 303, 319-10). In addition to bringing services issue to the Tokyo Round, the U.S. government also took the issue to the OECD to launch a policy debate and examine services from a trade perspective. Geza Feketekuty was representing the U.S. in the Trade Committee of the OECD where the issue was first raised by the U.S. delegation in late 1978 (Feketekuty 1988:

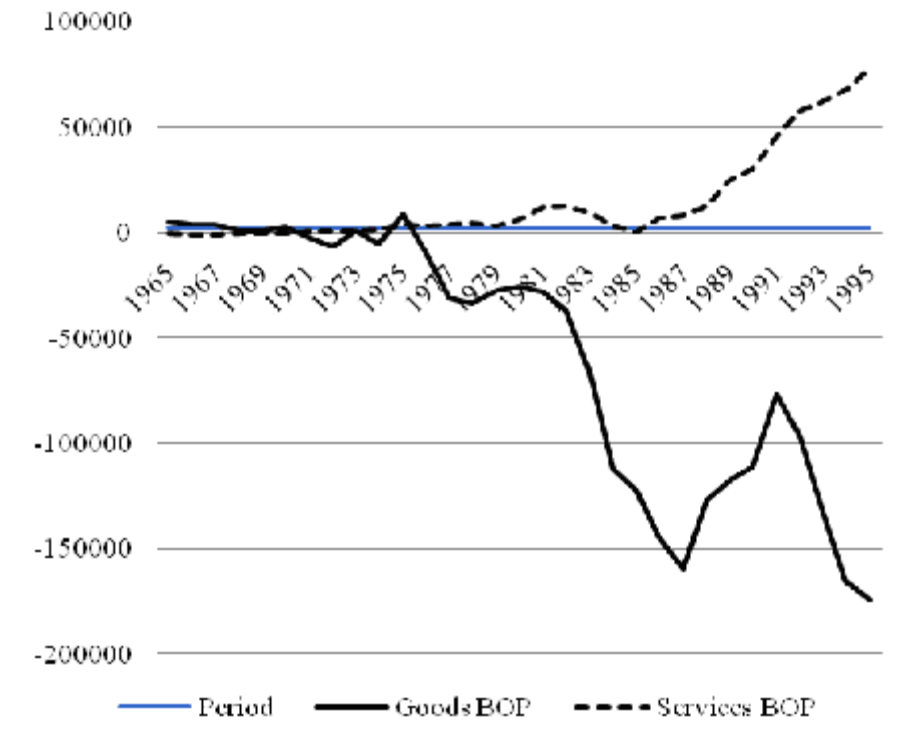
305; Kelsey 2008: 62). As Feketekuty argues, the initial debate in the OECD was on the “desirability” of a study to examine trade in services because of “widespread scepticism whether there was such a thing as trade in services” (Feketekuty 1988: 314). Nevertheless, the United States continued persisting on the initiation of such a study within the Trade Committee with the goal of producing “generic rules” for the liberalisation of trade distorting regulations for a different set of industries (Kelsey 2008: 63). The purpose was to evidence the common trade features of service industries and the barriers they face in international trade for the future deliberations on creating general principles applicable across the board. The Americans eventually convinced their counterparts to launch a generic study on trade in services as the concept was “normalised” among OECD trade officials (Kelsey 2008: 63). Although it would take a couple of more years to take all OECD members on board for a broad initiative at the GATT, a Northern consensus on the tradability of services and belief in liberalisation through trade norms and principles emerged in the early 1980s. The OECD study would be completed and published in 1987 with the title of “Elements of a Conceptual Framework for Trade in Services,” which would not only prove this consensus but also contain methodologies on the applicability of trade norms to services (OECD 1987).

The business campaign would yield more concrete benefits from 1982 on, especially as the Reagan administration found the business case concurrent with its neoliberal agenda. USTR William Brock's following statement in 1982 indicates the receptiveness of the administration:

International trade in services is critical to economic growth. It creates significant new job opportunities, stimulates gains in productivity and provides consumer benefits. It is essential to and inseparable from international trade in goods. (Brock 1982: 230)

The Reagan administration, which was under pressure from domestic lobbies, and a protectionist Congress found the idea of services liberalisation through trade negotiations in line with its free trade program. The liberalisation of services was increasingly perceived as a cure for mounting U.S. trade deficits in goods. The U.S. trade deficit in goods stood at \$31 billion in 1980, which increased five times between 1981-85, and reached \$170 billion in 1987 (Preeg 1995: 49; Paemen and Bench 1995: 93). As seen in the graph below, U.S. trade balance in goods continued to give deficit whereas U.S. services exports remained higher than imports through the mid 1990s.

Graph 1: U.S. Trade in Goods and Services - Balance of Payments (BOP) Basis



Source: U.S. Census Bureau, Foreign Trade Division (Value in millions of U.S. dollars). See the detailed figures in Annex 4.

Opening service markets abroad would help attenuate the trade deficit without closing U.S. markets, create a competitive edge for American industries, and help fight protectionism at home and abroad. New research and studies were supportive of the idea that liberalisation of trade in services would respond to the decreasing competitiveness of manufacturing by helping to curb protectionism in goods, and it would create further economic gains for the U.S. and other economies (Drake and

Nicolaidis 1992: 51; Aronson and Cowhey 1984: 17-8; Kennedy 1992: 2). USTR updated the data compiled from service industries by the U.S. Chamber of Commerce to reflect the scale of international trade and barriers faced by U.S. industries (Feketekuty 1988: 309). USTR Brock found the data convincing to pursue an ambitious plan at the GATT (Brock 1982: 237). Furthermore, USTR Brock also bought in the idea that services would complement existing GATT rules. He maintained:

If the trend of increasing barriers to trade in services continues unchecked, trade opportunities could be markedly reduced and the international trading system could be seriously harmed (Brock 1982: 234).

In this regard, services was increasingly viewed as a multidimensional vehicle to respond to trade deficits and declining competitiveness of the U.S., as an issue of systemic importance to fight rising protectionism, and as a public good to create a win-win situation for developed and developing countries. A Commerce Department official outlined the Reagan administration's perception of services in the following terms:

Services was perceived to be something we were relatively good at, something that the newly industrialised countries probably had a need for [...] The overall market-opening approach would work there, and would counter the market-closing approach here. It was based on a perception of real gains, but it wasn't based on a lot of detailed microeconomic analysis. It was sort of a general perception: there was a philosophical dimension and a political dimension (Cited in Kennedy 1992: 3).

The administration was convinced about the applicability of GATT norms, principles and procedures to trade liberalisation in services “in spite of the diversity and special characteristics of trade in services” (Brock 1982: 238). Hence it brought the issue to the 1982 Ministerial Conference of the GATT. The GATT was regarded as the primary multilateral instrument, which needed to be reinvigorated to open markets to the sectors where the US was advantageous. Services took part as the crown jewel of an ambitious American program for the GATT, which also included the liberalisation of international trade in agriculture and high technology products as well as dismantling barriers to foreign direct investment (Croome 1995: 11). Thus a new round would become a viable option, not only to resolve the “unfinished business” of the Tokyo Round, but also to integrate “new subjects” to the GATT structure, i.e. trade in services, trade related investment measures, and later intellectual property rights. Initiating a new round also had a political aspect as it would signify the ongoing leadership role of the U.S., which was now acting to curb international protectionist demands in the international realm (Preeg 1995: 22, 54). Nevertheless, the case for services was an ambitious, but premature initiative at the GATT in 1982. Given the opposition from the developing world and lack of support from the EC, the issue of services was postponed until the meeting of the Contracting Parties in 1984. Yet, it was decided that parties could submit case studies on national service sectors on a voluntary and informal basis to explore the matter (Croome 1995: 16). In the

meantime, services was further integrated in U.S. trade policy-making through the Trade Act in 1984. The U.S. put services on the agenda of the free trade negotiations with Israel, which created some provisions germane to services (Freeman 1996: 20). Similarly, the U.S. put industry-specific regulatory issues on the bilateral trade agenda. Bilateral talks with trade partners as well as forthcoming free trade agreement negotiations with Canada became the “dress rehearsals” for the multilateral talks (Feketekuty 1988: 313).

4.2.3. Building a Northern Consensus for a GATT for Services

Service campaigners not only built a loose alliance with government officials and networked with academics and journalists, but they also expanded the business coalition by recruiting other companies and business associations within the United States and abroad. As the issue occupied the trade policy agenda from the early 1980s on, sectoral business associations actively joined the debate to raise the preferences of their members on specific policy and negotiation topics defined within the trade framework.⁶⁴ The perspectives generated in sectoral and cross-sectoral bodies through an exchange of views among companies generally reflected a balance of interests of

⁶⁴ Among others, the International Insurance Council, U.S. International Engineering and Construction Industries Council, the Motion Picture Association of America, and the American Institute of Merchant Shipping were vocal sectoral bodies during the Uruguay Round (Aggarwal 1992: 45-7).

the membership. Within this picture, the Coalition of Service Industries, as the umbrella body representing pro-liberalisation TNCs, took the role of translating a wide set of business interests into a single U.S. business perspective. CSI members also took part in broader business groupings such as the Business Roundtable, the U.S. Chamber of Commerce and in other *ad hoc* coalitions emerged during the Uruguay Round. These gatherings/groupings allowed the campaigners to build cross-sectoral alliances with companies in manufacturing and other sectors. These coalition-building efforts helped create a sound domestic constituency in the United States in favour of the liberalisation of trade in services. Consequently, the tradability and importance of services for the U.S. economy became widely shared beliefs within the U.S. business community in the mid-1980s. On the other hand, as the business coalition became larger, the ambitious U.S. business vision faced a number of challenges from within the Northern block that would pave the way for an eventual compromise at the GATT for a flexible framework agreement to yield market opening in the longer term.

From the late 1970s on, U.S. campaigners worked to get European companies on board for bringing services to the GATT agenda. The earlier business interaction served as a way to gather European support for the American initiative to examine the services issue at the OECD (Feketekuty 2010, interview). As the debate intensified

in the early 1980s, the U.S. campaigners worked to convince their European counterparts to create a constituency for trade in services domestically and at the European level. A services coalition identical to CSI formed in Britain in 1982. Already concerned about the elimination of international capital exchange restrictions since 1968, the British Invisible Exports Council created the Liberalisation of Trade in Services (LOTIS) Committee as an intersectoral national coalition for the liberalization of trade in services (Arkell 2008, interview).⁶⁵ In the establishment of the LOTIS coalition, British financial sector and especially Lloyd's insurance company took the leading role (Feketekuty; Shelp 2010, interviews). Representing banking and financial firms of the City of London, the LOTIS Committee became an active European business player supportive of the services cause before and after the launch of the Uruguay Round.⁶⁶ Following the U.S. and British examples similar coalitions would proliferate in different locations such as Sweden and Ireland as well as in Australia, Hong Kong, New Zealand and Argentina in a time span of less than a decade (El-Etreby 2008). The U.S. and UK campaigners also interacted with business leaders in

⁶⁵ The British Invisible Exports Council was originally created as the Committee on Invisible Exports by the Bank of England in 1968 and was renamed British Invisibles (BI) in 1990. It was redesigned as International Financial Services, London (IFSL) in 2001. From 1 June 2010 IFSL has merged its activities, staff and business membership into TheCityUK, the new promotional body for the industry.

⁶⁶ The difference of LOTIS from the CSI was that the former incorporated government representatives in its organization through a committee-based structure. The membership included representatives of the Department of Trade and Industry (DTI), Treasury, Foreign and Commonwealth Office (FCO), the Bank of England, and the Financial Services Authority (FSA) (Beder 2006: 138).

France, Germany, Portugal, Canada, and Japan⁶⁷ for the establishment of similar domestic alliances for services (Arkell 2008). In addition to business mobilisation in key countries, European service campaigners also launched efforts to create a regional business alliance for trade in services. These efforts went hand in hand with the TNC mobilisation that rejuvenated European integration to create a single market from the mid-1980s on.

The TNC mobilisation for a single European market started in 1983 after CEOs of 17 leading companies created the European Roundtable of Industrialists (ERT) with the purpose of modernising the industrial basis of European production and enhancing their global competitiveness (Van Apeldoorn 2001: 77; Cowles 1995).⁶⁸ According to Van Apeldoorn (2001: 78-82), since its inception, ERT became the central force that promoted a neoliberal perspective for European integration. The single market program that emerged in 1992 was a synthesis of the ERT's perspective with the neo-mercantilist vision of protectionist forces in favour of defensive regionalism behind

⁶⁷ In Japan no formal services-specific coalition was formed. *Keidanren* a country-wide business association that represents Japanese business interests in both services and manufacturing became the sole vocal voice to leverage the services case vis-à-vis the government from the late 1970s on (Arkell 2008, interview; Feketekuty 2010, interview).

⁶⁸ These businessmen were Pehr G. Gyllenhammar (Volvo), Karl Beurle (Thyssen), Carlo De Benedetti (Olivetti), Curt Nicolin (ASEA), Harry Gray (United Technologies), John Harvey - Jones (ICI), Wolfgang Seelig (Siemens), Umberto Agnelli (Fiat), Peter Baxendell (Shell), Olivier Lecerf (Lafarge Coppée), José Bidegain (Cie de St Gobain), Wisse Dekker (Philips), Antoine Riboud (BSN), Bernard Hanon (Renault), Louis von Planta (Ciba-Geigy) and Helmut Maucher (Nestlé) (Cowles 1995: 505-7).

tariff walls as well as the social democratic vision of Jacques Delors, president of the European Commission (Apeldoorn 2001: 75-6).⁶⁹ In this context, while U.S. and British business leaders enabled the mobilisation of European TNCs for the services cause through regional business bodies such as ERT, the European formula for services liberalisation was shaped in an interaction of different social forces influential in the process of European trade policy-making (Arkell 2008, interview). In addition to ERT, the Union of Industrial and Employers' Confederations of Europe (UNICE) was another active player in converging national business interests into a collective European corporate vision as to the EC's Common Commercial Policies.⁷⁰ On the other hand, as Cowles (2001: 159-168) argues, national industry associations in major European countries played a crucial role in influencing European trade policies through lobbying their governments at the capitals up until the institutionalisation of regional business interaction with European institutions in Brussels in the mid-1990s. In addition to cross-sectoral domestic and regional business bodies, European service industries also established an issue-specific regional business body to shape the

⁶⁹ As a result of certain compromises among these forces during the course of the 1980s, the Maastricht Treaty of 1992 emerged as a synthesis over "embedded neo-liberalism." This theoretical framework shaped the normative content of European regional order. Van Apeldoorn (2001: 83-8) argues that under the pressure of globalisation the 1990s saw a normative shift towards further neoliberalism with an emphasis on global competitiveness.

⁷⁰ UNICE, the prominent business voice supporting European integration, has represented employers and industrial federations from around Europe since the 1950s. In 2007, UNICE changed its name into BusinessEurope (www.businesseurope.eu last accessed on November 19, 2010).

European Commission's agenda as services issue came to the GATT meetings in the early 1980s. Hence, in late 1985 they created the European Community Services Group (ECSG) which kept regular contact with the European Commission throughout the Uruguay Round (Arkell 2008, interview).⁷¹ UNICE, ERT and ECSG continued to be focal platforms shaping business opinions after the initiation of the Uruguay Round. Julian Arkell, who was a leading British campaigner with LOTIS between 1981 and 1995 and a consultant with BI from mid-1985 till late 1992, chaired the services trade group of the UNICE and functioned also as the secretary of the ECSG. He became a bridge-builder to ensure that LOTIS, ECSG, and UNICE would "channel the same message" from service industries to the European Commission (Arkell 2008, interview).

In this context, although the U.S. TNCs expanded their coalition to Europe and other OECD countries by recruiting new companies to the services cause, these pro-liberalisation forces would face the challenge of protectionist forces from within the Northern block. The U.S. business vision for services was to halt the growth of non-tariff barriers to services trade through a "standstill" decision at the GATT. Plus they called for an ambitious deregulation of barriers to trade and investment by an across-

⁷¹ The ECSG was transformed to the European Services Forum (ESF) in 1998 with the encouragement of Lord Brittan, European Commissioner for Trade and External Relations (Arkell 2008, interview).

the-board application of trade norms such as conditional MFN and national treatment preferably through a top-down liberalisation method (Freeman 1986: 575; Freeman 2001: 185). Nevertheless, the Northern consensus would emerge over a less ambitious liberalisation program.

The first challenge arose with the involvement of non-commerce bureaucratic actors in the process of national preference-building as the services issue was put on the agendas of the OECD and the GATT. The OECD debate in the early 1980s revealed certain domestic sensitivities about the non-commercial functions of internal regulations by surfacing two sets of problems (Kelsey 2008: 64-66). The first set of problems was the challenge from non-trade officials who questioned the classical trade approach to eliminate arguably legitimate regulations put in force to fulfil certain social objectives. The second related set of problems arose because of the divisions within Europe in the early 1980s especially between different bureaucratic bodies in capitals, and between member states and the European Commission, who lacked competence and resources to develop an ambitious approach to liberalise services. Distinguishing non-tariff barriers from legitimate regulations serving non-commercial purposes would become a thorny issue both for academics and Uruguay Round negotiators in Geneva (Drake and Nicolaidis 1992: 63). A remarkable example is the “prudential concerns” raised in the sectoral discussions on financial regulations

with regard to the integrity and stability of financial system (Key 1997: 18-20; Drake and Nicolaidis 1992: 77). Ironically, these non-commercial concerns were flagged not only by developing countries, but also by non-trade bureaucratic bodies within OECD governments such as the U.S. Treasury. The U.S. Treasury, worried about losing its turf to trade bodies, took a position against the incorporation of financial services into a single multilateral accord under the GATT by highlighting those prudential issues. This was at odds with the request of the U.S. financial sector as well as USTR officials who were in favour of a generic approach to all service sectors (Key 1997: 18-9).

Secondly, the activation of the European trade machinery for services took some time due to the complex decision-making process within the EC and involvement of protectionist bureaucratic forces in the process. First of all, the early European reaction to the U.S. initiative to launch a new GATT round received a cool welcome. The EC was unenthusiastic to take broad initiatives at the GATT, due largely to its concern to keep its CAP untouched, and the entrenched fear of erosion of its preferential trade with former colonies (Croome 1995: 11). Furthermore, the services issue was new to the European Commission, which lacked human resources and competence as noted above. Therefore, only after the gradual assessment of comparative advantages on the part of individual member countries such as Britain and France, the European Communities declared its official support for the new

round with services in March 1985 (Kennedy 1992: 4; Paemen and Bench 1995: 34). By 1985, with both the Europeans and Japanese on board, the Northern consensus was forged to bring services to the GATT agenda. Nonetheless, as business interests were defined in trade terms and put on the GATT agenda, protectionist interests as well as pro-liberalisation preferences would emerge on both sides of the Atlantic. While the U.S. shipping industry had taken an active part in the business campaign to insert services into the U.S. Trade Act of 1974, during the 1980s the U.S. maritime sector turned adamantly against a GATT services agreement that would include liberalisation commitments for the sector (Feketekuty 1988: 300; Aggarwal 1992: 45). These anti-liberalisation forces were later joined by the French audio-visual opposition on the other side of the Atlantic in their lobbying for exemption from market opening. Consequently, it would become clear by the end of the decade that a top-down ambitious approach to liberalisation would not be possible with the EC favouring “progressive liberalisation” together with developing countries, and domestic business lobbies in the U.S. and Europe campaigning for exclusion from liberalisation.

Conclusion

The liberalisation of services within a trade policy framework was an idea discussed among a small circle of experts up until it was adopted and promoted by some

corporate leaders in the United States during the 1970s. The regulation of services trade and investment under the GATT was pushed by the United States in the early 1980s, and services were inserted into the mandate of the Uruguay Round in 1986 only after policy-makers in the OECD countries reached consensus over the tradability of services. This chapter argued that the leading social forces that set the GATT agenda on services were American TNCs especially in the finance sector, which mobilized companies operating in other service industries in the United States and Europe. The TNCs in a wide range of service sectors redefined their interests in trade terms and coalesced around an action plan from the late 1970s on to put services on the U.S. trade policy agenda and the GATT. The TNCs as hegemonic social forces engaged in a war of position to capture the intellectual and moral leadership by changing the established mind-set of “trade in goods” with a new framework of trade in “goods and services”. Through building coalitions with other firms and government officials in the U.S. and abroad, and building a policy network of experts, the campaigners developed a policy formula reflective of interests of a broad range of actors. The new way of thinking, shared by a larger set of actors in the OECD region by the mid-1980s, would ultimately reach the status of intersubjective meaning within the trade regime after the launch of the Uruguay Round talks in 1986. The intergovernmental negotiations in Geneva are examined in the next chapter.

CHAPTER 5: BUILDING NORTH/SOUTH CONSENSUS FOR INTEGRATING SERVICES TO THE TRADE REGIME

The Uruguay Round was launched in 1986 to resolve overwhelming challenges faced by the trading regime and to address economic recession and the needs of countries of different levels of development. The United States brought services to the GATT in the early 1980s within a package of issues that would arguably respond to a set of problems that the trading system faced. The U.S. proposals were challenged by developing countries united under the Group of 77 led by India and Brazil, who argued that the GATT lacked judicial competence to negotiate services since it was not a trade issue. However, the number of countries opposing a new round with services issue decreased to 10 in 1986. As the round and the talks in services commenced, the hardliners not only lifted their embargo on services, but also proactively engaged in the negotiations to defend their interests now framed within the trade framework to ensure that the GATS was hammered out as a development friendly instrument operating upon the principle of progressive liberalization. The case promoted by the Northern block was adopted by developing countries at an early stage in the talks, showing the paradigm shift among trade negotiators who gradually acknowledged services as a subject of international trade. Nevertheless, the case of the TNCs

regarding an across the board application of GATT rules to services had to be adjusted in the process of building the legal framework to liberalize trade in services. In this regard, while developing countries joined actively in GATS talks. The ability of TNCs to set the agenda diminished as the negotiations advanced.

This chapter analyses the multilateral negotiations integrating services to the GATT regime by focusing on the consensus-building between the Northern and Southern governments, the engagement of developing countries to the agenda-setting and norm-building for the liberalisation of services, and the role of the TNCs in this process. The first two sections explore the intergovernmental consensus-building at the GATT before and during the Uruguay Round. The third section concentrates on the changing attitudes of developing countries and their engagement in agenda-setting as well as the TNC activities during the Uruguay Round in the context of hegemonic transformation. The last section sums up the role of TNCs in agenda-setting by outlining their strategies.

5.1. Towards the Uruguay Round

The initiation of the Uruguay Round was a manifestation of the collective will of governments from the North and the South to reverse ongoing protectionism and to

revitalize world trade, which would energize the world economy suffering recession. In 1980, the annual growth rate of world trade had reduced to a level of 1% (Croome 1995: 7). This trend continued in the subsequent years reaching a level of -2% in 1982 (for the first time below zero since the 1930s) parallel to a -2% annual growth rate in world output (Preeg 1995: 2, 33). Policies affecting the flow of international trade were no longer simply tariffs and quotas, but also domestic regulations and various economic policies and practices. Global economic integration had not only linked finance, development, and trade, but also investment and technology transfer policies, which altogether were guiding the strategies of the governments as well as TNCs (Preeg 1995: 12-3). Consequently, the Uruguay Round was launched with an explicit recognition of the relationship between trade and other economic policies, which emphasised "the linkage between trade, money, finance and development" (See the Punta del Este Declaration in Annex 2). This linkage naturally brought domestic economic policies onto the negotiation table to stress their impact on trade policies, as summarised in the objective of the Punta del Este Declaration, to "foster concurrent co-operative action at the national and international levels to strengthen the interrelationship between trade policies and other economic policies affecting growth and development." This declaration of September 1986 set the primary objective of the round as to "strengthen the role of GATT" and "increase the responsiveness of the GATT system to the evolving international economic environment." The mandate

contained negotiations both in conventional areas of trade in goods and new domains such as intellectual property rights, services and investment. Hence, the round covered market access talks in agriculture, manufactured goods including textiles and high technology products, and negotiations to build up new disciplines on selected trade related issues such as trade distorting investment measures and intellectual property rights. The talks in services entailed both new rule-making to create a framework and market access talks based on the created framework.

5.1.1. Launching the round

It was not easy to build up intergovernmental consensus to embark upon such an ambitious initiative. The Tokyo Round ended with many unresolved issues . The major outcome of it, the plurilateral codes were negotiated and signed mainly by developed countries (Jackson 2002: 70). The American initiative to incorporate agriculture into the GATT had failed because of European intransigence, which emanated from political sensitivities within the European Community towards protecting the Common Agricultural Policy (CAP) (Jackson 2002: 313-4). The round could not reform the malfunctioning dispute settlement system either as the disputes brought to the GATT made a record in 1980 with thirteen cases, ten of which were in agriculture (Croome 1995: 7). These outstanding issues from the Tokyo Round

constituted the work program of the Consultative Group of Eighteen, which was made by senior trade officials from eighteen developed and developing countries. To take the unfinished business of the Tokyo Round and other systemic concerns of the contracting parties, the Group of Eighteen proposed in June 1981 to convene the next GATT Contracting Parties meeting at ministerial level within the following year. Organising a GATT ministerial meeting was not a usual practice since the last such gathering was in 1973 to launch the Tokyo Round (Croome 1995: 12). In this regard, the decision signified the political importance attached to the existing problems and the willingness of the contracting parties to discuss possible ways to bring comprehensive solutions to systemic problems. The preparatory meetings for the 1982 Ministerial revealed the fact that the governments had numerous concerns to inject onto the agenda, which had to be handled through a broad action plan. Although the idea of launching a new round was in the air, a political decision and building its mandate had to wait until the 1986 Punta del Este summit.

The United States was the first actor proposing the idea of a new round as a comprehensive initiative to equip the GATT with instruments to respond to systemic and economic problems beyond conventional trade issues. The U.S. trade policy agenda of the early 1980s was set under the pressure of increasing competition from the EC, Japan and newly industrialised economies. As the world's largest debtor,

losing its technological lead with a growing trade deficit, the U.S. was exploring new strategies to open markets and to tackle the surge of imports in industries incrementally losing competitiveness (Preeg 1995: 50; Mundo 1999: 119-20; Destler 2005: 51-3). Nonetheless, the Reagan administration, which took power in January 1981, adopted a free-market program in tandem with efforts to keep protectionist sentiments at bay, within which the GATT took a cardinal role to open markets to the sectors where the US was advantageous (Cohen et al. 2003: 41-2; Destler 2005: 82-90; 196-7). Thus, the ambitious U.S. agenda for the GATT would include the liberalisation of international trade in agriculture and high technology products as well as dismantling barriers to foreign direct investment and exports of American services (Croome 1995: 11). Initiating a new round also had a political aspect since it would signify the ongoing leadership role of the U.S. in the international realm, now acting to curb international protectionist demands (Preeg 1995: 22, 54). As Preeg contends, the Reagan administration also saw the GATT as an ideological tool to impose neoliberalism as it promoted market-oriented trade policies as the only viable alternative to the import substitution option of the South and the planned economic alternative of the Communist block (Preeg 1995: 18-19). However, a GATT-based initiative required garnering support of other industrialised economies as well as developing countries.

As noted in the previous chapter, Europeans were defensive about the idea of an encompassing initiative at the GATT that would require adjustments to their Common Agricultural Policy and that would lead to the erosion of preferential trade with former colonies (Croome 1995: 11). French President Francois Mitterrand who was a former minister of agriculture, was especially vociferous in opposing any initiative that would bring agriculture under the purview of the GATT (Paemen and Bensch 1995: 32). On the other hand, the U.S. had been a long standing opponent of the EC's agricultural supports and subsidies distorting international trade, and the Reagan administration was decisive in putting the sector on a GATT round (Yeutter 1998: 64-8).⁷² Meanwhile, transatlantic trade relations were under the stress of transatlantic disputes in pasta, citrus fruit as well as steel (Golt 1988: 15). On the flipside, a GATT round might have created opportunities for the EC to address pressing issues such as the Japanese trade practices and surpluses, as well as the US-Japanese sectoral bilateral arrangements which, arguably, distorted trade flows and world prices in specific commodities important to the EC (Golt 1988: 11, 15). To come to terms with a new round, the EC needed to see clear benefits, especially if farming was to be put on the table. Hence, the EC adopted a discourse of "balance of benefits" pointing out Japan's trade practices, but also implicitly targeting NICs, which were

⁷² The ambition to include agriculture on the agenda of a new round was also related to the desire of the Reagan administration for a market-based domestic self-discipline (Paemen and Bensch 1995: 92).

perceived to benefit the advantages of open markets without granting reciprocal access to the European exporters (Paemen and Bensch 1995: 36-48, 95; Preeg 1995: 4). The EC warmed up to the idea of integrating “new subjects” into the GATT system only after assessing and identifying an offensive position in the areas of services, investments and intellectual property, but it still favoured a “go-slow” approach (Paemen and Bensch 1995: 35). The transatlantic consensus to launch the round was still a fragile one as French President Mitterrand continued to insist on keeping agriculture out of the forthcoming round at the G-7 summit of Bonn in May 1985 (Preeg 1995: 53).

Problems and expectations in the South were naturally dissimilar. Export interests of developing economies were to a large extent concentrated in labour intensive sectors such as agriculture and textiles. However, both sectors were effectively excluded from GATT disciplines. Textiles and clothing sector was governed by a non-GATT instrument, the Multifibre Arrangement (MFA) since 1974 (Jackson 2002: 207). The expectation of textile exporting developing countries was a betterment of the conditions within the MFA curbing their exports to major markets in the North (Croome 1995: 9). Under such conditions, the American proposal to initiate a multilateral round with new subjects did not receive a warm welcome from the South. In contrast, the initial American attempt to bring services to the GATT in 1982 was

negatively received by the Group of 77 (G-77), which denounced new subjects as a threat against developing country interests and even detrimental to the efforts to reform the GATT system (Croome 1995: 16). In addition developing economies were also worried about losing their privileged status under the GATT regime which was assured by special and differential (SDT) treatment provisions, allowing them to benefit from MFN access to the Northern markets without granting reciprocal access to their own markets (Croome 1995: 9; Jackson 2002: 164, 323). However, the lack of reciprocity was increasingly perceived as “free-riding” and considered as something “immoral,” especially by the United States, but also by some other OECD countries (Paemen and Bensch 1995: 115). However, acquiring consent of all developing countries to the agenda of the round would require putting some concessions on the negotiation table. It was especially important to convince the “hardliners” such as India and Brazil who were historical leaders of the G-77. Hence the injection of textiles and agriculture into the negotiation mandate became critical to launch the round (Ricupero 1998: 13-6). Furthermore, developing countries were calling for “standstill” and “rollback” of the protectionist measures employed by developed countries, standstill signifying a decision to freeze the existing protectionist measures while rollback referred to their gradual elimination (Croome 1995: 34).

The Punta del Este Declaration included a mandate to negotiate new subjects, i.e. services, trade related investment measures, and intellectual property rights, as well as agriculture and textiles (See the Declaration in Annex 5). Market access talks in goods would focus on tariffs and non-tariff measures, agriculture, textiles and clothing but also tropical products, and natural resource-based products such as fishery goods. The inclusion of agriculture was a crucial success for many developed and developing countries.⁷³ The Declaration contained wording on standstill and rollback, and established a surveillance body to report progress on the level of protectionist measures to the Trade Negotiations Committee (TNC). On the other hand, to reform the GATT system in order to better handle new forms of protectionism, the decision envisaged negotiations on existing GATT articles and codes with the goal of strengthening them. These included the provisions in safeguards, the revision of the plurilateral codes of the Tokyo Round, and multilateral trade negotiations (MTN) agreements, general functioning of the GATT system, and reforming the dispute settlement mechanism.

⁷³ A coalition including agriculture exporters from both the North and the South took form before the Punta del Este summit in August 1986 with the request of creation of GATT disciplines to trade distorting border and domestic measures. The “Cairns Group,” as it was called, has been one of the most persistent coalitions in the GATT/WTO and included Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, Malaysia, Phillipines, New Zealand, Thailand, Uruguay (Croome 1995: 31).

5.1.2. Injecting Services into the Uruguay Round

Between 1982 and 1984, the developing countries block organized around the Group of 77 reacted to the U.S. proposal to examine the services issue within the trade regime on the basis that the GATT lacked legal jurisdiction and that contracting parties should instead have focused on more conventional issues such as agriculture and textile, which were crucial to their economies (Singh 2006: 57). Since many countries did not have knowledge and data to assess their interests in trade terms, the views on services within the Southern block reflected either “scepticism” or “agnosticism” as they considered new domains *a priori* to the benefit of industrialised countries and their companies (Drake and Nicolaidis 1992: 65-6). According to S.P. Shukla, then the ambassador of India to the GATT, this strong negative attitude was partially because of the mistrust created by the “collective memory of the colonial past” as well as an assessment of threat to their development policies (Shukla 2000: 15). The 1982 conference closed with an agreement that formally recognized services as a GATT issue, but allowed contracting parties to examine their own services sectors and then exchange national studies on a voluntary basis until 1984, at which point a decision would be made on “whether any multilateral action [...] is appropriate and desirable” (GATT 1982).

In the period between 1982 and 1984, the U.S. was joined by other OECD countries in support of the services case, while the developing countries block started to disintegrate. In May 1983 the U.S. broached the idea of a new round and soon gained the support of Japan (Shukla 2000: 15). The U.S. submitted its national study in early 1984 based on the database regularly updated by the USTR with private sector inputs. The submission was followed by other studies notified by advanced economies (Stewart: 1993: 2347). Although they did not submit any national studies, developing countries recruited the UNCTAD Secretariat to explore services from a developing countries' point of view. This decision resulted in the release of an encompassing UNCTAD report in August 1984 critical of the applicability of a generic trade approach to services deregulation (Kelsey 2008: 67). Despite the United States' repeated calls for the new round including services during the GATT meeting in November 1984, the outcome became a decision to continue to review the results of national studies on an informal basis outside the GATT ambit (GATT 1984).

However, new studies as well as informal debates in Geneva, led some developing countries to refine their interests and became more receptive to the idea of a GATT initiative on services. Some developing countries participated in an informal group created in 1983 by Felipe Jaramillo, Colombian ambassador to the GATT, to examine the trade aspects of services (Singh 2006: 57; Kennedy 1992: 3-4). While in May 1984

developing countries were still united under G77 arguing against the legal jurisdiction of the GATT to negotiate services, the block was reduced to 24 countries the following year, and 10 in 1986 (Shukla 2000: 16). The ASEAN countries declared their willingness to launch the new round in July 1985 with South Korea and Chile revealing that they would not oppose the inclusion of services to its agenda (Croome 1995: 25). At the same time India submitted a proposal opposing new issues and garnered support of 24 developing countries. The proposal outlined the concerns of developing countries regarding protectionism in textiles and agriculture, and called for a decision on standstill and rollback (Croome 1995: 24).

In the meantime Arthur Dunkel, the Director General of the GATT, commissioned a group of eminent persons to prepare a report to address the problems in the trading system and produce recommendations (Golt 1988: 12; Croome 1995: 18-20). The group was chaired by Fritz Leutwiler, chairman of the Swiss National Bank and President of the Bank for International Settlements. The Leutwiler Group was composed of public and private professionals in the financial sector, as well as trade in manufacturing.⁷⁴

⁷⁴ The following individuals were the members of the Leutwiler Group: Mario Henrique Simonsen of Getulio Vargas Foundation and former Minister of Finance of Brazil; Bill Bradley, U.S. senator, member of Senate Finance Committee; I.G. Patel, Director of London School of Economics and former Governor of Reserve Bank of India; Guy Ladreit de Lacharriere, Vice President of the International Court of Justice; Sumitro Djojohadikusumo former Minister of Trade and Industry and Minister of Finance of Indonesia; and Pehr Gyllenhammar, Chairman

The report of the group entitled "Trade Policies for a Better Future," published in March 1985, was supportive of the linkages between trade and the trading system with other realms in the global economy: "[t]he health and even the maintenance of the trading system, and the stability of the financial system, are linked to [...] better international coordination of macro-economic policies, and greater consistency between trade and financial policies" (GATT 1985: 49). Unsurprisingly, it also put emphasis on "services" by pronouncing that "[g]overnments should be ready to examine ways and means of expanding trade in services, and to explore whether multilateral rules can appropriately be devised for this sector." (GATT 1985: 45). Notwithstanding, the controversies on services continued in the Preparatory Committee, which was established in November 1985 to set the agenda of the forthcoming round.

The declaration that initiated the Uruguay Round was an outcome of informal talks between three coalitions that emerged right before the Punta del Este summit scheduled for September 1986. A group of moderate developed countries led by Switzerland including EFTA countries, Canada and Australia, excluding the U.S. and EC, formed the G-9. This coalition favoured an ambitious new round, but also recognized the needs and certain considerations of developing countries (Singh 2006:

of AB Volvo. The project was financed from private non-profit resources, largely the Ford Foundation.

58; Croome: 1995: 29). The second coalition was comprised of hardliners led by Brazil, which submitted a joint proposal in June 1986 sponsored by ten developing countries including India, Yugoslavia, and Egypt. The G-10 proposal suggested a limited agenda for the new round including a decision on rollback and standstill while excluding the new issues (GATT 1986a). In parallel, a group of likeminded moderate developing countries such as Uruguay, South Korea, Colombia, Chile and Jamaica created another coalition distinguishing themselves from the hardliners as they supported the launch of negotiations on trade in services while emphasising the needs of the South (Croome 1995: 29). The consensus in Punta del Este emerged from dialogue between the coalitions of moderate middle powerhouses from the North and the South, which were orchestrated by Colombian Jaramillo and the Swiss Ambassador Pierre-Louis Girard (Kennedy 1992: 7-8). Consequently, a Swiss-Colombian "café au lait" proposal was jointly submitted to reflect the concerns of both developed and developing countries with clear wording on new issues, textiles, agriculture, and standstill and rollback (GATT 1986b).

After laborious negotiations between the United States and hardliners, the consensus was forged upon a revised version of the café au lait proposal. Until the eleventh hour, the hardliners insisted that the GATT lacked legal competence to negotiate an agreement on trade in services and opposed any legal action within the GATT. The

impasse in services would be overcome with a solution proposed by ambassador Jaramillo that would allow the launch of the talks, but on a separate track from negotiations in goods (Croome 1995: 23-4; Kennedy 1992: 9-10). Accordingly, the final Declaration was designed in two parts (See Annex 2). Part I clarified all details of negotiations in goods including intellectual property rights with great substance, whereas Part II on "Negotiations on Trade in Services" outlined the mandate in services in a few paragraphs. The language in the two parts was expressive of the nature of consensus: whereas Part I was noted as a decision of the GATT "Contracting Parties", Part II began with "Ministers also decided." This was to satisfy the hardliners insisting on preventing any official recognition of the legal competence of the GATT to negotiate services. Trade in services would be negotiated on a separate track within a Group of Negotiations on Services (GNS) whereas all other negotiation chapters would be carried out under the Group of Negotiations on Goods (GNG). Yet, both groups would report to a Trade Negotiations Committee (TNC). This procedural two-track solution would keep services integrated to the round, but it did not legally recognize services as part of the GATT system. The negotiations would be conducted upon "single undertaking", i.e. there would be no deal until the negotiations in all chapters including services were concluded. According to the Swiss-Colombian working draft, negotiations on services would focus on building up a "framework of principles and rules" before the contracting parties would make a decision on "its

incorporation in the GATT system” (Golt 1988: 18). However, the final Declaration omitted language on the relationship of the final framework with the GATT and simply stated:

Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations (Punta Del Este Declaration, full text given in Annex 2).

This outcome was parallel to the arguments of the *demandeurs* claiming services as a tradable domain of activities. It also recognized the applicability of GATT procedures and practices to negotiate and liberalise trade in services. However, the result was far from the ambitious expectations laid out in the U.S. proposals (Kennedy 1992: 9-11). According to the mandate, the negotiations would lead to the expansion of services trade through “progressive liberalisation” and “transparency” to sustain “economic growth” and “development of developing countries”. Reference to “progressive liberalisation” and “development” and the sentence “[s]uch framework shall respect the policy objectives of national laws and regulations applying to services” reflects the compromise that took on board developing countries as well as the EC. This carefully crafted mandate shaped the agenda of the services talks for the rest of the round and

enabled a constructive dialogue between the Southern and Northern actors towards creating the GATS framework. As Ambassador Shukla noted, this outcome was clearly “a further milestone on their march toward the goal of transforming GATT” (Shukla 2000: 18).

5.2. Negotiating the GATS

According to the Punta del Este Declaration, after two years of negotiations the ministers would re-convene for a mid-term review, and the round would be completed in four years. The mid-term meeting was held in Montreal, Canada in December 1988 as scheduled. However, the round took more than four years because of the controversies and impasse in issues other than services. The Brussels Ministerial Conference in December 1990 collapsed due largely to the deadlock in agriculture. The round would end in late 1993 and the Final Act was signed in the Ministerial Conference held in Marrakesh, Morocco in April 1994. The GATS was negotiated in three phases divided by Montreal and Brussels Conferences. The following three subsections outline the negotiation process with a focus on the negotiation of the fundamental norms and principles of the agreement, especially non-discrimination and market access.

5.2.1. From Punta del Este to Montreal

Between the launch of the negotiations in Punta del Este and Montreal Ministerial Conference in December 1988, GNS meetings focused on the conceptual issues and helped trade negotiators converge around the earlier Northern consensus in principle on the applicability of a trade framework to services liberalisation. The negotiations structured along a work program produced in January 1987 (GATT 1987: 25). The work program was comprised of five agenda items: definitional and statistical matters; application of GATT concepts such as MFN, national treatment and transparency to trade in services; sectoral coverage of the negotiations; examination of existing international arrangements and disciplines; and making up an inventory of measures and practices constituting barrier to services trade.

Discussion on the definition of services revealed the fact that services could be categorised not only according to individual sectors, but also through their common ways of international delivery that makes international trade possible (Singh 2003: 19). The debate on the sectoral coverage showed that almost every country had some sensitive sectors that would preferably be kept out of liberalisation commitments in future for economic or political reasons such as maritime services in the U.S., banking in India and many other countries, and the audio-visual sector in the EC (Croome

1995: 126). The conceptual discussion on the trade norms and principles for services revolved around the notions of progressive liberalisation, international competition, transparency, disciplining state-sanctioned monopolies, and non-discrimination. Particularly significant was how to identify non-discrimination, i.e. most favoured nation and national treatment for trade in services (Croome 1995: 125). Considering the non-tariff nature of barriers to trade in services such as domestic regulations or administrative measures, and different modes of delivery these norms needed to be revised for an application to service suppliers of foreign origin. In the access to foreign markets, national treatment was more crucial in services than trade in goods since most of the access problems were because of the discriminatory treatment to foreign services or service providers compared to domestic producers (Croome 1995: 125).⁷⁵

The United States was impatient about the progress in the round. It declared its hope for an “early harvest” in Montreal, at least on issues of concern such as agriculture, services, IPRs, and TRIMS (Golt 1988: 51). Early U.S. proposals ambitiously proposed drafting a framework agreement as soon as possible with full coverage of all service sectors and general commitments of national treatment and transparency, and the start of liberalisation talks during 1988 (Cafruny 1989, 129; Golt 1988, 45-7; Raghavan

⁷⁵ An examination of existing horizontal agreements in maritime, telecommunications, and civil aviation showed the fact that these accords contained provisions of national treatment and transparency, but not MFN treatment because of their bilateral nature (Croome 1995: 127).

1989).⁷⁶ On the other hand, EU proposals were less advanced than those of the U.S., but the EU primarily stipulated a careful sector-based examination before hammering out the framework (Raghavan 1985a). Similarly, developing countries were in favour of further examination of the five agenda items, especially on definitions and statistics as well as impact of liberalisation on their economic development (Golt 1988: 45). Their major problem proved to be the lack of sufficient data on the scale and competitiveness of their services exports (Raghavan 1985b, 1987b, 1994). All in all, the debates in GNS proved productive as parties agreed to produce a consensus document for the Montreal summit summarizing five items of the talks including a list of fundamental concepts that were to be used in the framework agreement (GATT 1989b: 38-41).

The Montreal decision in 1988 was a turning point as it showed the gradual shift in the approach of the hardliners to the incorporation of services into the trade regime. At this point there was a clear agreement on the applicability of basic trade norms to services and on different modes of market access including the cross-border movement of labour (Singh 2006: 64). The listed concepts in the Montreal text for a framework agreement comprised of transparency, national treatment, most-favoured-

⁷⁶ According to Chakravarthi Raghavan of the Third World Network developing countries interpreted the initial American proposals as a challenge of TNCs to “territorial sovereignty” of states (Raghavan 1989).

nation, market access, increasing participation of developing countries, safeguards and exceptions, and regulatory situation. The text identified national treatment according to the rights of domestic service providers, which should also be given to foreigners.⁷⁷ On MFN the text only noted that the framework agreement was to contain a provision to be later crafted. Finally, the text noted that market access would be provided by governments to foreign exporters “according to the preferred mode of delivery” (GATT 1989b: 40). The course of the talks made it clear that an ambitious program of liberalisation might not be pursued as expected by the TNCs since most parties put emphasis on the concept of “progressive liberalisation” (Drake and Nicolaidis: 1992: 77-9). However, the Montreal text also underlined that “the adverse effects of all laws, regulations and administrative guidelines should be reduced as part of the process to provide effective market access, including national treatment” (GATT 1989b: 39). This was indicative of the willingness of developing countries to take action against certain regulations which could be considered protectionist. Ministers at Montreal agreed to continue negotiations to reach a framework for the broadest sectoral coverage, but also noted that “certain sectors could be excluded in whole or in part for certain overriding considerations.” The issue of the sectoral

⁷⁷ The text defined national treatment in the following terms: “the service exports and/or exporters of any signatory are accorded in the market of any other signatory, in respect of all laws, regulations and administrative practices, treatment ‘no less favourable’ than that accorded domestic services providers in the same market” (GATT 1989b: 39).

coverage of the framework accord remained unresolved until the very end of the round.

5.2.2. From Montreal to Brussels

According to the work programme of the Montreal text, the negotiations continued on definitions and statistics, and examination of existing international arrangements. Parallel to the conceptual work, parties were also engaged in initial sectoral testing exercises to evaluate the applicability of new principles discussed before Montreal. Conceptual and sectoral examinations continued until late 1990.

Sectoral examination during 1989 covered professional services, telecommunications, construction, transportation, tourism, and financial services (Stewart 1993: 2372-3). It confirmed the plausibility of a trade framework to liberalisation as the TNC-led coalition argued, however it also illustrated the difficulty to apply GATT-based norms and principles to the heterogeneous realm of services (Croome 1995: 244). It would be necessary to modify some GATT norms, create new specific rules, and provide for exceptions addressing sector specific features and concerns (Drake and Nicolaidis 1992: 81-2). The exercise also further crystallised the sensitive sectors that parties

would be willing to exempt from liberalisation.⁷⁸ As non-trade officials were involved in sectoral talks they raised various issues and concerns as to the deregulation of particular domestic measures (Singh 2003: 22). New sector specific rules were needed either to take into account non-commercial objectives such as the prudential concerns in financial services or to achieve meaningful liberalisation as in telecommunications, either in the form of sector specific provisions or as separate annexes (Croome 1995: 244, 250). Agreement emerged to maintain certain regulations for safety, quality, sanitary or other non-commercial purposes (Drake and Nicolaidis 1992: 82). At this stage there was no agreement on the sectoral coverage of the proposed agreement (Croome 1995: 245).

The Montreal text had also mandated “to assemble the necessary elements” for a draft framework agreement until the end of 1989. There was consensus on application of certain principles such as transparency as a “general commitment” to take effect with the framework agreement. Yet the debates continued with no agreement on the status of the principles such as market access and non-discrimination, i.e. whether they

⁷⁸ As noted in the previous chapter, financial institutions from different countries engaged in the negotiation process and kept raising the necessity to address the integrity and stability of the financial system through allowing governments to take prudential measures in cases of necessity (Key 1997: 18-20). U.S. Treasury continued its concerns about the incorporation of financial services into a single multilateral accord during the Uruguay Round. Treasury officials were taken on board as they attended the negotiations on banking and other financial services while USTR handled insurance (Hills 2010, interview).

would be accorded across-the-board to all sectors and parties or if they would only be given to sectors listed by the governments (Croome 1995: 244-9). On the other hand, the discussions revealed that there were differences of interpretation of the mandate if it contained only negotiating a framework agreement as interpreted by the hardliners or also initial sectoral negotiations of market access as advocated by the U.S. and other OECD governments (Croome 1995: 246). USTR, with anticipation to conclude the round in four years in 1990 and under pressure from domestic protectionist pressures, demanded “immediate” liberalisation for a wide coverage of services including tourism, transportation, construction and telecommunication (Drake and Nicolaidis 1992: 85-7). It was also not willing to give the MFN principle a general commitment status owing to the concerns of free-riding (Croome 1995: 249). Paemen and Bensch (1995: 132-3) argue that the EC’s understanding of free-riding and reciprocity was distinguished from the Americans’. The EC anticipated “effective market access” to American and Japanese markets, while it was ready for a “proportional” contribution from developing countries through gradual liberalisation as part of SDT provisions to be injected into the agreement. While Japan was also ready to admit a limited degree of SDT compared to the EC, the U.S. was adamantly against any deviation from MFN based fast liberalisation for interested parties, which would even mean an agreement among OECD and a few newly industrialised countries (Paemen and Bensch 1995: 132-3). Along these lines, the U.S. proposals were

also the most ambitious regarding the market access methodology as they suggested a negative list or top down approach to market liberalisation with limited exceptions (Stewart 1993: 2371). Following the US submission in late 1989, developing countries joined the talks proactively tabling their draft proposal frameworks for the GATS. The first complete proposals came from Latin American countries, Afro-Asian countries, Switzerland, EC and Japan (Croome 1995: 247-8). In contrast to the U.S. approach, developing country governments took a clear position in favour of an incremental approach to deregulation based on a bottom up approach while favouring first concentrating on crafting a framework agreement that would take into consideration development concerns and undertaking sectoral negotiations in the longer term on a selective basis (Stewart 1993: 2371, 2379-81; Singh 2006: 68-69).

Notwithstanding contested opinions and harsh debates, the GNS managed to produce the first concrete result in services talks in the final weeks of 1989 by compiling a document which contained fundamental elements of the framework agreement (GATT 1989a). Replete with square brackets reflecting differences, the text contained sections on the definition and scope of the agreement, the concepts, principles and rules. The GNS started drafting the framework agreement in the summer of 1990 to prepare it for the Brussels ministerial conference. The division of perspectives among countries led the chair of the negotiation group, Felipe Jaramillo, to table a first

tentative draft of the GATS on his own authority (GATT 1990a). The text became the primary document for the rest of the negotiations until the end of the Round and the basis of the actual GATS. It outlined six sections for the framework agreement including scope and coverage, general obligations and disciplines, specific commitments, and progressive liberalisation, and sections on institutions and final provisions for the time without any content. It also included a model schedule list illustrating how a liberalisation commitment would be made according to sectors and modes of supply to grant national treatment and market access to the trading partners. The draft stated that the agreement would cover trade in “all” sectors. The revised Jaramillo draft for the Brussels meeting coupled MFN as a general commitment with other principles like transparency, domestic regulations, increasing participation of developing countries, and exceptions, although there was still no consensus on whether MFN would be a general or a specific obligation (GATT 1990b: 328-382). On the other hand, market access and national treatment were placed separately under “specific commitments.” To outline the application of GATS norms and principles as well as special rules for a number of sectors, the text also contained special annexes for maritime, inland waterway, road and air transport, basic telecommunications, telecommunications, labour mobility, and audiovisual services. Negotiations over Jaramillo’s draft left no time before the Brussels Conference to

negotiate specific market access commitments as expected by the U.S. and other developed countries.

5.2.3. The Final Stage: Towards Marrakech

After the Brussels Conference, which was adjourned due to disagreements on agriculture, the work of the GNS concentrated on the resolution of the status of the MFN treatment, final formulation of the GATS text and its sectoral annexes, and sectoral bargaining to produce the initial schedules of national commitments. The discussion on the MFN treatment continued throughout 1991 and into 1992. Many countries declared that they would prefer to exempt certain sectors from MFN treatment, while others argued that this would lead to the over-use of exemptions (Croome 1995: 314). In tandem with the debates within the GNS, Arthur Dunkel took initiative and compiled the first draft of the final act of the Uruguay Round including the texts for different negotiation chapters and a revised draft for the GATS improved by Chairman Jaramillo (GATT 1991). Even though no agreement was reached on sectoral coverage and MFN, the draft GATS left no sectors out of the framework treaty and kept the MFN principle as a general commitment.⁷⁹ As before, market access and

⁷⁹ Chairman Jaramillo also kept MFN exemptions as a temporary condition by limiting them in his text to ten years. At the end of this period, exempted sectors or sub-sectors would fully be covered by MFN treatment. This procedure was injected into the final accord.

national treatment were identified as specific commitments. The draft agreement also included a part on “Progressive Liberalisation,” which laid down an in-built agenda for “successive round of negotiations” and would begin at a point in time after the round to be determined in the final bargaining. Plus, the same part of the text reiterated that “[t]he process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Parties, both overall and in individual sectors.”

Since sectoral coverage and MFN issues continued unresolved, the market access talks started at a very late stage of the round and the outcome would be far from ambitious. Although American negotiators accepted the MFN principle as a general obligation after Brussels, exemption of financial services and telecommunications remained on the table with American concerns on free-riding and anticipation of reciprocal concessions (Croome 1995: 313). By April 1992, only 47 market access offers were received, which increased to 54 offers from 67 countries by the end of the year (Singh 2003: 25). This request-offer practice continued during 1993 parallel to the resolution of sectoral coverage issue. Controversies continued through the end of the round in telecommunications, financial and maritime services, movement of labour issues, and audiovisual services. Finally, on telecommunications parties decided to ensure the right of service providers to use public networks and services while they left market

access negotiations to post-round talks with an additional annex (Drake and Noam 1997: 29-34; Cass and Harring 1998: 191). Similarly a sector specific annex was drafted for financial services creating a “prudential carve-out” to allow member states to take measures to protect the integrity and stability of their financial systems (Key 1997: 20-1). Also in financial services and maritime transport, sectoral negotiations were postponed to the post-round talks (Croome 1995: 376-8). This was parallel to an agreement to please India and Pakistan that postponed negotiations on the movement of natural persons after the round (Croome 1995: 377). The EC unsuccessfully attempted at the eleventh hour to create a provision in the GATS or a separate annex recognising cultural identity concerns as an excuse to maintain certain protective restrictions in audiovisual services (Paemen and Bensch 1995: 234). In the final endgame, the GATS was formally incorporated into the system of the newly emerging WTO.

5.3. North-South Consensus-Building and TNCs

Between the U.S. initiative to bring services to the GATT platform for multilateral examination in 1982 and the signing of the GATS in 1994, developing countries’ attitudes toward services changed in a radical manner. While initially there was a consensus in the South that services were a non-GATT issue, the resisting developing

countries block dissolved before and during the Uruguay Round. Developing countries proactively participated in the services talks and agenda-setting in the GNS and enabled the final framework to become a flexible tool for gradual liberalisation of trade in services. In this shift in attitude, the most significant factor was a re-assessment of the interest perceptions of developing countries as they gradually recognized the benefits of services liberalisation and framed their preferences in services within trade and the negotiations context. Developing countries actively engaged in the services talks and successfully shaped the negotiation agenda and norm-building process. Thus, they contributed in the hegemonic transformation of the trade regime as they adopted the hegemonic ideas elevated by the TNC coalition and as they constructively engaged in the process endeavouring to shape it according to their evolving interests. On the other hand, the United States lost its enthusiasm in services talks as the course of the negotiations moved away from its ambitious outlook laid at the outset. The U.S. then tried to shape the outcomes through tactics turning the MFN principle into a bargaining chip. This was a result of increasing sectoral pressure from TNCs concerned with assuring reciprocal access to highly regulated markets.

5.3.1. Intergovernmental Consensus-Building

As noted above, from 1984 on the number of hardliners fell initially to 24 and then to 10 countries. As understood by some observers, this was an outcome of the amplified American pressure. According to Kelsey (2008: 68), the U.S. played “hardball” to split the intransigents’ block through “threats, incentives and disinformation to leverage its influence bilaterally in Latin America and South East Asia.” Similarly, Ambassador Shukla (2000: 16) emphasises the impact of American coercion in the weakening of opposition to services, especially through the Reagan administration’s bilateral pressure and threats that Americans would initiate alternative bilateral and regional trade arrangements if progress was not recorded in the GATT. The U.S. took an aggressive position a week before the Punta del Este conference with USTR Clayton Yeutter’s repeated statements that the U.S. would even walk out of the GATT system altogether (Kennedy 1992: 9-10; Golt 1988, 14). In the change of attitude on the side of developing countries, Ford (2002: 133-4) also stresses the impact of the changing trading patterns especially in the NICs which had gained competence in producing certain capital intensive goods and services to the Northern markets as well as their escalated need for foreign finance after the initiation of the debt crisis in the early 1980s. Similarly David M. Kennedy proclaims:

With many developing countries fearful that stubborn blocking tactics would threaten both their export markets and the goodwill of the developed countries on rescheduling their debts, the hard-liners' bloc had broken, and a new round became inevitable. (Kennedy 1992: 5)

In this context, the U.S. strategy concentrated on dividing and isolating the hardliners and building a constituency within the GATT to open the round with an aggressive mandate on services. Joining the game to split the rejectionists' coalition, the EC used its "development card" in contrast to the American stick as the Community lacked similar punitive instruments (Paemen and Bensch 1995: 133). The U.S. was more coercive, putting textiles and agriculture on the table as part of a "trade off" with new subjects; whereas the EC took a softer position to convince developing countries about the benefits of liberalisation of services for their development (Paemen and Bensch 1995: 39). Although external pressure was a variable in the repositioning of developing countries, its weight should not be given too much credit.

A significant factor in forging consensus to initiate the talks and constructing the GATS was the changing perceptions of developing countries about trade, the multilateral trading system, and protectionism. The integration of developing countries to the trading system with enhanced responsibilities had become a collective target of industrialised economies orchestrated by the U.S. due to their concerns of

free-riding (Paemen and Bensch 1995: 115). However, advanced developing countries were also increasingly concerned about protectionism in the Northern markets and were ready for reciprocal concessions by opening their markets. As discussed in Chapter 2 this was partly because of the transformation of their production basis which made the access to the world markets a higher priority, and partly owing to ongoing neoliberal reforms. These reforms led to a deregulatory wave, privatisation, and displacement of import substitution model with free trade policies as well as the adoption of the market disciplines (Ford 2002: 128-30; 133-4). For the case of services, the major problem of developing countries in the early 1980s was the lack of intellectual tools and data either to assess their comparative advantage in services or to judge the competitiveness of their service industries and the probable impact of liberalisation on their development (Drake and Nicolaidis 1992: 52, 56, 64).

The Jaramillo group discussions, the conceptual debate in the GNS and new studies helped the hardliners to revise their interests and adjust their arguments. Such change of perception would be significant for the U.S. to divide the block of G-77 and to launch the Uruguay Round on an acceptable ground. Newly industrialising countries quickly embraced the new way of thinking and started to assess comparative advantage in sectors such as construction, data processing, telecommunications, and transportation (Preeg 1995: 56; Singh 2006: 57). The two track approach was a solution

to satisfy gradually outnumbered hardliners who could only raise the argument of the legal incompetence of the GATT to justify their concerns. After the decision in Punta del Este, their arguments centred on a narrow interpretation of the negotiation mandate that the talks envisaged only building a legal framework that would allow liberalisation on a selective basis through negotiations in the longer term. The general trend naturally was a go-slow approach and they found allies in the North that would join them in highlighting “progressive liberalisation” and significance of certain regulations for development and other social objectives, and in demanding in-depth sectoral examinations before engaging in building the legal framework (Stewart 1993: 2378-81). The EC reportedly interacted with the hardliners behind the doors at the Punta del Este summit and reached an agreement on progressive liberalisation and worked to craft a better compromise in agriculture—this particular compromise was due mainly to the French dissatisfaction with the language in the Swiss-Columbian text (Preeg 1995: 5; Shukla 2000: 17). Similarly, according to Paemen and Bensch (1995: 132), the Montreal compromise was also an outcome shaped by the behind-the-scene talks between India, Brazil, Egypt, Jamaica, Argentina, Sweden and the EC in line with the Community’s “mediating” strategy entailing bridge-building between the hardliners and the U.S. With the reassessment of competence, especially in labour intensive sectors and crystallisation of different modes of delivery, developing countries formulated their proposals to sustain symmetry between mode 4 in

exchange for mode 3, which was crucial for developed countries in the pursuit of investment opportunities in other countries in sectors such as banking and insurance (Paemen and Bensch 1995: 114; Raghavan 1987a). On the other hand, to prevent future commitments which could disadvantage domestic regulations in sensitive areas, developing countries also stressed the language in the Declaration to take into account other policy objectives including development (Stewart 1993: 2379-81). In this vein, NICs argued for creating a prudential caveat for financial services to protect their immature financial services (Stewart 1993: 2391). In sum, the arguments brought by developing countries changed within the context of the negotiations as the talks took place within the borders defined by the agenda, which was determined within the GNS at subsequent stages towards building the GATS. The ideas of the legal incompetence of the GATT and that the mandate did not envisage the talks for market access negotiations were no longer legitimate as the negotiators submitted their offers and requests for market access, and gradually agreed on the fundamental norms of the framework and its integration into the GATT system. On the other hand, from an early stage in the talks, developing countries engaged in the process with the increasing number of submissions as they took a position based on evolving interest perceptions.⁸⁰ In this regard, developing countries actively negotiated to ensure that the GATS to become a flexible instrument.

⁸⁰ The list of government submissions to the GNS in Stewart 1993 (2642-7) shows that almost

As argued by some scholars, integration of services became a critical juncture in the GATT history as it induced a pro-active involvement of developing countries to the regime also through engaging in new types of coalitions. Amrita Narlikar suggests the following:

the services sector precipitated unprecedented challenges as well as potential opportunities for developing countries and thereby necessitated innovative attempts at viable coalition formation, hence the much more active participation of developing countries in the GATT since the 1980s. [It] delivered a deathblow to the old type of coalition diplomacy of developing countries in the GATT but also spawned new coalition types (Narlikar 2003: 34).

The café au lait coalition is a prime example since it was formed by middle powers from the North and the South which marginalized the hardliners and paved the way for the launch of the talks (Drake and Nicolaidis 1992: 66; Narlikar 2003; 44-51). The “café au lait effect,” as Singh defines it, resolved the deadlock in Punta del Este thanks to the emergence of a moderate wing of developing countries which saw substantial benefits in services liberalisation (Singh 2006: 75). The hardliners also coalesced with the EC and succeeded in shaping the agenda of the talks collectively along progressive liberalisation. In this regard, Singh (2006: 50) challenges the power-based explanations of negotiation outcomes by shifting the focus to the very social and

half of 61 proposal came from non-OECD countries.

cognitive process of multilateral interactions which encapsulated an evolution of interest perceptions of developing countries. He argues that developing countries gave fewer concessions in the services talks than in the TRIPS negotiations. This was because they were actively involved in agenda-setting and coalition-making parallel to an evolution of their national interests through intergovernmental interactions within the multilateral platform (Singh 2006: 41, 49). In this regard, he maintains:

Power structures do not predetermine outcomes [...], if they did, the North would have gained more in services than in intellectual property. Power structures might predispose negotiations toward a set of outcomes but negotiation interactions themselves shape interests and outcomes, and therefore, the exercise of power (Singh 2006: 43).

Having said this, it would be misleading to attribute changing attitudes, interest perceptions, and agenda-setting solely to intergovernmental interactions. As already discussed, the evolution of developing countries' interests and attitudes is also associated with material and ideational changes on the ground. Since these changes within the states and institutions are reflective of the broader hegemonic transformation, this analysis would be incomplete if social forces that underpin this transformation are not brought back to the discussion. To put it differently, before and during the Uruguay Round developing countries gradually adopted the "collective image" of tradability of services which was projected by the TNC coalition within the context of a policy formula shaped and disseminated through a war of position. In the

process of the interjection of this collective image and the very intersubjective texture of the trade regime, the TNCs took the primary agenda-setting role by crafting a new mental framework that was gradually embraced by a wide set of actors. The TNCs influenced the ideational context within which developing countries revisited their preferences and negotiation positions. Julian Arkell, a leading European business campaigner for the services case puts this cognitive aspect of the TNC campaign in the following terms:

There was a long learning process, perhaps still going on in some capitals: officials had to be convinced that the law of comparative advantage [...] also applied to services. It took much hard work by private interests to convince governments that services lie at the heart of national competitiveness, and have a crucial role in the economic growth of developing countries (Arkell 1992: 25).

However, as highlighted above the state actors from the North and the South did not become passive learners but also active shapers of the ideas and agenda that eventually built the GATS. There is no need to remind that building hegemony is an “active and reciprocal” education process through which “every teacher is always a pupil and every pupil a teacher” (Gramsci 1971: 350). Therefore, the emergence of developing countries as “reciprocal traders” and their active role in setting the agenda of services talks can both be understood within the context of hegemonic transformation. Yet, building hegemony also requires concessions and sacrifices to be given by hegemonic forces. Throughout the process of bringing services to the GATT

and building the GATS, the TNC coalition had to concede to the flexibilities and carve-outs created for social and development objectives and sector specific arrangements. In this regard, although TNCs accomplished the goal of changing the paradigm of trade from a mindset of goods to one also encompasses services as they outlined in their action plan, the GATS became an accord reflective of the needs and interests of a wide set of actors.

5.3.2 TNCs in Agenda-setting During the Uruguay Round

TNCs continued their war of position after the launch of the Uruguay Round by further enlarging their policy network with educative activities in Europe and developing countries. In addition to active participation in the GATT summits beginning in 1982 U.S. TNC executives concentrated their activities in Geneva (Freeman 2000: 456).⁸¹ In 1986, a Services World Forum was formed in Geneva to facilitate interactions with negotiators and international institutions taking part in the negotiations (Kelsey 2008: 80). To educate the negotiators unfamiliar with trade in services, American Express distributed the publications of the American Enterprise Institute in Geneva (Drake and Nicolaidis 1992: 75). The campaigners also continued sponsoring international conferences that gathered businesses with experts and

⁸¹ Harry Freeman (2000: 458) claims that during the final negotiations the U.S. private sector was present in Geneva with more than 400 lobbyists.

policy-makers from different parts of the world. These informal summits took place almost on an annual basis and were hosted by the U.S. CSI, LOTIS as well as newly formed coalitions in Europe and developing countries.

Table 2: Conferences organised by service coalitions⁸²

1986	February	US CSI / LOTIS	Ditchley Park, near Oxford, UK
	June	Swedish CSI	Stockholm, Sweden
1988	January	Keidanren	Mount Fuji, Japan
	July	LOTIS	Geneva, Switzerland
1989		US CSI	Vevey, Switzerland
1990		Australian CSI	Sydney, Australia
1991		Hong Kong CSI	Hong Kong
1992		UDES	Buenos Aires, Argentina
1993		New Zealand CSI	Auckland, New Zealand
1995		Irish CSI	Dublin, Ireland
1996		US CSI	Geneva, Switzerland
1997		US CSI	Geneva, Switzerland
1998		US CSI LOTIS	Ditchley Park, UK

A major consequence of the services campaign became the proliferation of service coalitions on the model created by the U.S. CSI. Services coalitions emerged in different locations including developing countries such as Hong Kong and Argentina, creating constituencies for liberalisation (El-Etreby 2008). Taking different forms at

⁸² The information was provided by Arkell (2008, interview).

national and regional levels the business mobilisation continued to create a global business network which would ultimately be formalised in the 1990s.⁸³

However, after the launch of the talks, the TNCs' agenda-setting influence diminished as the intergovernmental interactions and simultaneous bargaining in different chapters of the Round determined the course of the talks. This was partly because of the expansion of the policy network whose revised collective vision diverged from the ambitious outlook promoted by TNCs and the Anglo-American analysts, and partly because of the "bureaucratisation" of the policy debate which limited the space for intellectual intervention and innovative thoughts (Drake and Nicolaidis 1992: 64; 76). As the debate was shaped within the constraints of the negotiation texts and dynamics, and dominated by negotiators from different parts of national bureaucracies, including those of developing countries, the TNC coalition started to lose its coherence with rising sectoral dissatisfaction. Freeman of Amex notes that:

When the Uruguay Round negotiations actually started at the end of 1986, the outlook for a strong deal in any of the service areas, including financial services, was bleak at best. It went from bad to worse when the GATT model

⁸³ Services coalitions from different countries decided to establish a Global Services Network (GSN) in April 1998 as a regular business forum to develop strategies for service sectors, monitor the implementation of international accords, and provide information and knowledge to the private sector. <http://globalservicesnetwork.com/aboutus.htm> accessed on June 21, 2010.

for such an agreement shifted from a “top down” to a “bottom up” approach (Freeman 2001: 185).

While the TNC’s ability to set the GATT agenda diminished, they influenced the norm-building process through the instrumental use of power in the form of sectoral lobbying that turned MFN principle into a “bargaining chip” utilized by the United States for assuring reciprocal access (Ahnliid 1996: 78). U.S. TNCs in the financial sector took the lead in creating a sectoral pressure group by establishing the Financial Services Group (FSG) under the U.S. CSI with the objective of lobbying “solely in the financial services area” (Freeman 2001: 189).⁸⁴ As the negotiators converged around a flexible framework agreement that would operate upon a negative list method through member states’ concessions, the U.S. CSI and sectoral lobbies in finance and telecommunications intensified lobbies to ensure reciprocal access to external markets. While pro-liberalisation sectors were concerned about reciprocal opening, anti-liberalisation sectors such as the U.S. shipping industry voiced its opposition to liberalization commitments (Aggarwal 1992: 45..)⁸⁵ On the other hand, the Office of

⁸⁴ In 1996, FSG led the creation of a Financial Leaders Group (FLG)—a transnational business coalition that would become highly influential in the post-round financial services talks with other TNCs from Europe, North America, Japan and Hong Kong with companies such as Barclays, Chase Manhattan, Goldman Sachs and the Bank of Tokyo-Mitsubishi (Beder 2006: 140). In fact, the influential FLG model inspired Leon Brittan, the then European Commissioner for External Relations who spearheaded the creation of the European Services Group which replaced the European Community Services Group in 1998. (Beder 2006: 140-1).

⁸⁵ The U.S. shipping industry enjoyed a privileged status in domestic markets as a result of the Jones Act and, thus, opposed the incorporation of the sector into the framework agreement. U.S. shipping companies and the Maritime Industry Coalition, which represent interests of

Technology Assessment of U.S. Congress released a comprehensive study in July 1987 indicating that although the U.S. was still ahead in telecommunications, its national competitiveness was declining in banking, engineering and construction (OTA 1987). Under close Congressional monitoring and domestic pressure from sectoral lobbies, USTR took a more aggressive stance with repeated statements before the Brussels summit that it would not concede to the MFN principle becoming a general commitment. Many countries reacted to these subsequent declarations (*The Economist*: September 22 1990; Croome 1995: 250). Although the Bush administration softened its position after Brussels accepted MFN as a generic rule, it importuned to exempt mentioned sectors from this general principle (*The Economist*: 3 August 1991; Stewart 1993: 2394). The U.S. insisted on a sufficient level of offers in national treatment and market access not to exempt financial services and telecommunications sectors from the MFN principle (Ahnliid 1996: 82). The result was leaving sectoral talks in those sectors to post-round negotiations which resulted in a satisfactory opening for U.S. TNCs.

The Round concluded with a legal framework on trade in services and was a significant success for U.S. pro-liberalisation industries; however, substantial opening

maritime service providers, argued that U.S. maritime sector would not be able to compete against foreign carriers in case of liberalisation and the collapse of the industry would threaten American national security (Aggarwal 1992: 45).

in major sectors were left to post-round negotiations. Service campaigners worked hard to influence the U.S. position and to create public support for the conclusion of the talks and ratification of the Marrakesh accords in the U.S. Congress. A Multilateral Trade Negotiations (MTN) coalition was established by major TNCs in May 1990 to support USTR when the Uruguay Round negotiations entered a critical phase. While major service TNCs took part in this initiative, Harry Freeman of Amex assumed the role of the executive director of the coalition (*The Baltimore Sun*, May 16, 1990).⁸⁶ As the Round came to a close, a similar business block emerged, the *Alliance for GATT Now*, representing services and other sectors supportive of the ratification of the Final Act of the Uruguay Round by U.S. Congress (Rupert 2000: 63).

5.4. TNCs as Agenda-Setters for the GATT

The creation of the GATS was the outcome of a long-term campaign successfully conducted by a business coalition converging TNC interests around a policy formula reflective of their corporate interests, and addressing the needs and preferences of different actors. TNCs also became active in pushing the issue of intellectual property

⁸⁶ The MTN coalition was chaired by former USTRs William Brock and Robert Strauss, and supported by business and trade associations representing 13,000 companies in addition to TNCs such as General Motors, American Telephone & Telegraph, General Electric, International Business Machines, American Express, the National Association of Manufacturers, the National Federation of Independent Business and the American Farm Bureau Federation (*The Baltimore Sun*, 16 May 1990).

rights to the GATT which became another significant pillar of the trade regime during the Uruguay Round negotiations. The TRIPS Agreement was the outcome of a campaign conducted by another coalition of TNCs which amalgamated copyrights, patents, and trademarks interests for a trade-based IPR agenda. In both the services and IPR cases, TNCs, as agents of regime transformation, successfully engaged in agenda-setting for the GATT. The case of services has certain peculiarities as well as similarities with the IPR campaign in terms of corporate strategies towards shaping policy agendas. The following section outlines major characteristics of TNC strategies in the services campaign with a recap of their agenda-setting activities to build consensus over their case.

Strategic Leadership

Neither IPR protection nor services were significant elements of the trade agenda and policy making before the 1970s. Companies facing regulatory barriers in services and problems regarding counterfeiting and IPR protection in external markets were without offensive governmental tools. This situation changed when companies were strategically directed to achieve a collective goal, i.e. enhanced international IPR protection and deregulation of barriers to service industries through leveraging U.S. trade policies. Both campaigns became successful on account of the strategies crafted

by leading individuals that helped the mobilization of other business executives and government officials, in the U.S. and abroad, around a common cause. In the services case, the TNC strategies were crafted by strategic thinkers such as Harry Freeman, Ron Shelp, Julien Arkell as well as government officials like Geza Feketekuty who garnered full support of CEOs such as Jim Robinson, Hank Greenberg, and John Reed who actively participated in the campaign.⁸⁷ They orchestrated a business crusade through building a case which aggregated corporate and public interests in a new trade framework. The GATT was a strategic choice of the business leadership for both campaigns. For services, the GATT became the preferred venue as it had a successful record in eliminating barriers to trade in goods and resolution of disputes, whilst for the case of IPRs, this choice came about as a “forum-shifting” strategy because of the lack of sufficient enforcement tools for IPR protection in other fora such as the World Intellectual Property Organization (WIPO) (Braithwaite and Drahos, 2000: 566; Sell and Prakash 2004: 154).⁸⁸

⁸⁷ A similar leadership role was assumed by Edmund Pratt, John Opel and Jacques Gorlin in the IPR case. Edmund Pratt of Pfizer Pharmaceuticals and Opel of IBM led the IPR campaign, whereas Gorlin, who was an industry lobbyist, economist and consultant to the ACTN, provided a strategic roadmap to the IPR coalition (Sell 2003: 48-9).

⁸⁸ The World Intellectual Property Organization (WIPO) is the UN agency responsible for intergovernmental cooperation in IPRs through international accords on patents, copyrights and trademarks. However, the WIPO lacked mechanisms to guarantee the enforcement of domestic IPR protection (May 2002: 67). The deliberations to empower the WIPO with enforcement mechanisms failed in the early 1980s because of strong opposition from developing countries (Ross and Wasserman 1993: 5-11).

Case-building and Education

The success of both coalitions rested on a well-crafted education campaign targeting U.S. policy-makers, civil society and private sector representatives, as well as policy-makers in other OECD and developing countries. The idea to treat these new issues in the context of trade policy-making and negotiations contrasted with the conventional thinking until the 1970s. The campaigners crafted strategies to build a policy formula to solve a number of economic and systemic problems in concurrence with the normative context of neoliberalism. The cases were projected as a source of wealth and employment both for U.S. industries and home markets.⁸⁹ Business built their case and capitalised on the mounting U.S. trade deficits which was associated with the declining competitiveness of the U.S. industries vis-à-vis rising powers. The campaigners highlighted the IP-based goods and services as a way to maintain high technology innovation and prevent free-riding through ensuring reciprocal market opening and equal protection to IPRs.⁹⁰ The U.S. government came on board as the

⁸⁹ A framing of IPRs in association with free trade was not commonplace in the United States until the early 1980s. The understanding of patent rights as “grants of privilege” in a manner antithetical to free trade was well established while the patents as monopolistic privileges were subject to the U.S. antitrust law (Sell and Prakash 2004: 157; Sell 2003: 51-2, 72-4). The business coalition formulated its case for a stronger IPR regime in line with neoliberalism with strong emphasis on the linkages between IPR protection and individual entrepreneurship, property rights and market norms (Sell and Prakash 2004: 154).

⁹⁰ The United States’ loss of the technological lead was framed as a major determinant of the decline in competitiveness. Accordingly, the solution offered better enforcement of IPR protection abroad (Sell and Prakash 2004: 154).

policy formulas were perceived in concurrence with national interest. The neoliberal discourse and free trade rhetoric did not persuade developing countries because they took services for granted from a defensive point of view. Developing countries adjusted their attitudes both as a consequence of the gradual establishment of neoliberal hegemony domestically and as they framed their national interests within the new framework promoted by the TNCs. Nonetheless, their active involvement in agenda-setting, together with European governments, resulted in a compromise which moved away from the neoliberal outlook promoted by the campaigners. In any case, the TNCs succeeded in disseminating their case for the tradability of services and upgrading it from a collective image to an intersubjective meaning through agenda-setting and influencing norm-creation.

While the U.S. government was receptive to the cause of both campaigns, trade bureaucracies in the U.S. and elsewhere lacked expertise and knowledge to handle negotiations in these domains. This was both a challenge and an advantage for the business coalitions. The challenge was the difficulty in educating bureaucracies on the economic benefits and trade linkages of both areas. In addition, the involvement of bureaucracies from non-commercial areas in the services debate and negotiations brought social objectives to protect certain regulations and decreased the impact of TNCs in agenda-setting. Conversely, the advantage was that the trade bureaucracy

was dependent on the expertise of the private sector and the data provided by companies and business associations on services barriers and IPR violations abroad, including the loss estimates (Sell and Prakash 2004: 155). Trade officials needed to be educated on certain technical details in services and IPRs, especially as the Uruguay Round negotiations delved into sectoral issues and technical details.

Coalition-building

Both cases were built by a coalition of TNCs. While it was U.S. banking and insurance sectors that mobilised other firms around a services coalition, the IPR case was built upon separate coalitions organized around copyrights, patents, and trademarks issues (Sell 2003: 96, 101-3; Sell and Prakash 2004: 156). Both coalitions were transnationalized through interactions with business leaders in different countries.⁹¹ The interactions of the services coalition had a broader scope as business leaders also engaged in an aggressive public education campaign, particularly through a policy network including academics, experts, journalists and other professionals. Strategic options for a trade-based approach in services were discussed in the broader context

⁹¹ Similar to the services coalition, the IPR coalition was transnationalised after interactions with British, German and French business groups, as well as with the Union of Industrial and Employers' Confederations of Europe (UNICE) and Japanese Keidanren. These interactions produced a dialogue that would ensure a commitment to pressure home governments to work together at the GATT until achieving their mutual objectives (Sell 2003: 53-4).

of an epistemic community, whereas IPR the campaign was streamlined and centralised around the Intellectual Property Coalition (IPC) which was established in March 1986 by CEOs from twelve TNCs. This was because of a major challenge faced by the services TNCs non-existent in the IPR case, i.e. the absence of a theoretical framework and a body of international legal order for intergovernmental cooperation in trade in services. First of all, the service campaigners needed to re-frame service sectors as an object of trade negotiations in a coherent theoretical framework, which would then feed into the policy debate and the GATT agenda. In this respect, the coalition for services was heavily dependent on academic production and research to create a trade framework for deregulation. Furthermore, key TNC representatives also developed expertise as members of the epistemic community together with government officials and academics, and intensively used the knowledge produced by the academics to advance their private agenda.

The difference in the nature of coalition and network building had two major consequences regarding the content of the final accords, i.e. the GATS and TRIPS Agreement. The first difference was in the coherence of the Northern business-government coalition and the consensus over the IPR issues compared to services. The business-government coalition for IPRs in the OECD countries continued to be firm during the round with a minimum level of disagreements that concentrated on certain

details negotiated in the final trade-offs. As Gorlin argued, the IPC got 95 per cent of what it wanted at the end of the round (Cited in Sell 2003: 115, and Sell and Prakash 2004: 160). On the other hand, the *demandeurs* for services faced business resistance within the OECD zone to exclude certain sectors from liberalisation such as U.S. maritime or French audio-visual industry, but they also saw a strong resistance from the bureaucracies arguing for maintaining regulations for different purposes. The second difference was in the nature of North-South consensus. Developing countries bought into the arguments on the gains through a services framework and they gave their consent with less coercion than in the case of the TRIPS negotiations during which they faced a strong pressure in the form of unilateral U.S. actions. Consequently, developing countries gave fewer concessions in services than in IPRs and proactively joined in the paradigm shift in the trade regime that re-identified intersubjective meanings such as trade, barriers, and protectionism.

Use of U.S. Trade Machinery

Unilateral measures by the U.S. government became a major factor in getting the consent of hardliners for the TRIPS Agreement. Services created a stronger Southern reaction in the early 1980s than IPRs since it became a “take-it-or-forget-the-round”

issue for the U.S., whereas IPRs were a secondary priority (Singh 2003: 2).⁹² However in the late 1980s, IPRs became a contentious North/South issue because the U.S. and other OECD countries pursued an expansive agenda. This occurred in conjunction with the loss of enthusiasm on the side of the U.S. as the GATS was built to produce limited economic outcomes in the short term (Singh 2003: 7). In this context, U.S. trade machinery was crafted as a strong enforcement instrument and used more proactively and coercively to get consent of the hardliners to the TRIPS Agreement. TNCs aggressively resorted to the U.S. trade machinery for IPR enforcement abroad after the amendments to the U.S. trade law in 1984 that modified Section 301, which was further strengthened in 1988 together with the creation of Super 301. The investigations under Section 301 targeted the hardliners as well as other partners who had insufficient IPR protection (Sell 2003: 109-110).⁹³ The direct association of stronger IP protection with unilateral trade preferences made U.S. unilateralism more influential in achieving modifications to foreign practices (Sell 2003: 85, 90, 103). Developing countries came on board for the inclusion of IPRs within the GATT framework by late 1989 with the hope that this multilateral instrument would ease U.S. unilateralism (Sell 2003: 109-111).

⁹² The U.S. agenda for the GATT on IPRs was limited to the counterfeiting issue until the mid-1980s. The U.S. administration came on board to launch the round, not only with a mandate on counterfeited products, but also other IPR issues following directions from the IPR coalition (Sell 2003: 49).

⁹³ Between 1975 and 1990, Section 301 cases were mostly initiated against the EC, Japan, Korea, Taiwan, Argentina, and Brazil (Low 1993: 90).

On the other hand, even though the constitutional amendments to the U.S. trade law provided U.S. service industries with a menu of remedies including unilateral measures, they were not used extensively for consensus-building at the GATT. Before it expired in 1990, Super 301 was used by USTR under the leadership of Carla Hills against Japan, India, and Brazil through cases initiated for “unfair” practices in the service industry (Low 1993: 92).⁹⁴ On the other hand, in January 1989 Korea and the EC were also identified as priority countries for their discriminatory practices against U.S. telecommunications products and services under new Section 301 provisions (Low 1993: 92). As discussed before, developing countries faced U.S. pressure in different forms before the start of the Uruguay Round, but coercion was not needed once talks in services were on track with active developing country involvement. In fact, this supports the argument that the Southern consent was secured as these countries’ perceptions of interests in services evolved as they gradually appreciated services as a trade issue.

⁹⁴ The cases included government procurement practices of satellites and supercomputers in Japan, and the protection for insurance market in India (Low 1993: 92).

Conclusion

The integration of services to the GATT was an outcome of a long-term war of position under strategic leadership and guidance of key individuals who mobilized firms and governments through agenda-setting strategies including coalition and network building, education, and activating U.S. trade policies. The TNCs built a case in the form of a policy formula responsive to the needs and interests of governments in the North and the South. Their case was bought to developing countries whose interest perceptions evolved parallel to their exposure of the ideas disseminated by the TNCs. However, the GATS reflected a hegemonic compromise between the neoliberal outlook promoted by the TNCs and the protectionist concerns of governments pronounced in the form of development and social objectives of domestic regulations. As the policy debate moved to Geneva, TNCs' agenda-setting influence was constrained by the negotiation dynamics. This led the GATS to take shape upon the principle of progressive liberalisation and a bottom-up approach. Consequently, the TNCs intensified lobbying in Washington in order to prevent the MFN principle being applied unconditionally without reciprocal access to highly regulated markets. This precipitated the postponement of sectoral market access talks in the financial and telecommunications industries.

Part III. TNCs in Setting the Agenda for the WTO: The Case of Investment

CHAPTER 6: THE TWO TRACK APPROACH: INVESTMENT AT THE OECD AND THE WTO

U.S. and EU business preferences and strategies during the 1990s were shaped within the context of neoliberal hegemony. As the hegemony was increasingly contested, TNCs started acting as pragmatic “venue-shoppers” by adopting agenda-setting strategies towards promoting best policy options that would both escape domestic public scrutiny and widespread challenges within civil society, and enforce market disciplines to emerging economies. The business case for a multilateral investment regime is a prime example supporting this argument which will be further developed

in the following two chapters. This chapter aims to examine the period before the launch of the Doha Round within which U.S. and EU TNCs deliberated on a collective case for building a multilateral investment constitution, but produced diverging perspectives regarding its scope and the venue for negotiations. European TNCs were the social forces that promoted the negotiation of such a framework at the WTO through expanding the legal and normative scope of the trade regime. Nonetheless, an alternative case was produced and promoted by the U.S. TNCs. This was to negotiate a high-standards investment accord at the OECD among like-minded governments. In the mid-1990s a compromise was reached over a “two-track approach” after transatlantic business and government deliberations --putting investment simultaneously on the agendas of the OECD and WTO. The negotiations for a Multilateral Investment Agreement (MAI) at the OECD failed in 1998 owing to the disagreements in inter-government negotiations as well as the controversies between governments and TNCs parallel to an emerging counter-movement mobilized by NGOs that deepened clashes. On the other hand, the deliberations for integrating investment to the WTO started by the creation of a working group at the WTO with an educative mandate in 1996 but faltered in tandem with the failure of the Seattle Ministerial Conference in December 1999. Ultimately, an intergovernmental consensus was forged at Doha in 2001 to initiate a development round addressing developing country concerns as well as certain demands raised by the NGOs. The

decision on investment was the continuation of deliberations until the Cancun Conference in 2003 where members would reconsider whether to launch the talks on investment.

This chapter concentrates on the developments until the launch of the Doha Round with a focus on the transatlantic business deliberations regarding the multilateral framework for investment. It unfolds in three sections. The first section outlines the WTO agenda and developments until the launch of the Doha Round in 2001, and gives an outline of the existing international investment rules at various levels. The second section discusses the U.S. and European business perspectives and the OECD MAI negotiations. The third section provides an overview of the WTO discussions on investment until the Doha Ministerial in 2001.

6.1. The WTO after the Uruguay Round and Investment Rules

The post-Uruguay agenda of the WTO was shaped around a debate on the difficulties to implement the WTO agreements versus a further expansion of the trade regime to new domains with additional constitutional disciplines over the states. Although developing countries gradually adopted neoliberal reforms, they were concerned about the costs and inadequate flexibilities within the WTO package and pursued an

agenda towards strengthening multilateral development provisions. The Doha Round was launched after a compromise taking those concerns into account while narrowing the negotiation mandate on new norm generation. On the other hand, developing countries became more active in international rule-making for investment whereas their preference was to craft new rules in the bilateral setting as this approach allowed them to better shape the content in line with their needs.

6.1.1. Towards the Doha Round

The WTO agenda, following its inception, was shaped around outstanding issues from the Uruguay Round and debates over the future legal framework of the institution. Sectoral talks on services had partial success. The talks on the movement of natural persons and the negotiations on maritime transport failed whilst sectoral negotiations in high priority areas for the U.S. financial services and telecommunications were concluded successfully in 1997. Another significant issue for the U.S. was the liberalization of trade in information technology products which became subject to plurilateral negotiations which were concluded in the Singapore Ministerial Conference in December 1996 (*Bridges*: 12 December 1996). The Declaration on Trade in Information Products (ITA) would result in gradual elimination of tariffs in the sector by the year 2000 (Matsushita *et al.* 2003: 142). On the other hand, the new

Dispute Settlement Mechanism (DSM) made a jumpstart with active participation from developing countries as both complainants and respondents. The filed disputes increased from an average of 6.2 complaints per year during the 47 years of the GATT to 36.5 complaints per year for the period from 1995 to 2000 (Park 2004: 535). With their rising share in the world trade and economy developing countries have also participated in the agenda-setting in an unprecedented level. They are actively involved in the debate on further expansion of the WTO legal framework to new trade related domains versus a revisiting of the existing rules.

For many developing countries that lacked the necessary institutional, economic and human capacity, a significant concern after the conclusion of the Uruguay Round was the *implementation* of the WTO agreements. Implementing the WTO accords such as the TRIPS and TRIMS Agreements proved especially more burdensome for many developing countries since these accords required substantial domestic legal and institutional adjustment through reforms and dedication of administrative resources. The TRIPS Agreement created political tensions in many developing countries as it required systemic reforms and revisiting patent and health care regimes that eventually created a market-based system for pharmaceutical production, pricing, and imports with stronger IPR protection (May 2002: 98-101; Watal 2000: 79). On the other hand, the TRIMS Agreement envisaged the elimination of investment measures such

as local content requirements, trade balancing measures and export restrictions heavily used by developing countries (Matsushita *et al.* 2003: 531-3). Other agreements such as the Technical Barriers to Trade and Sanitary and Phytosanitary Measures required the members to implement new procedures for safety standards in the trade of agricultural and manufactured goods by developing adequate technical capacity through constructing laboratories, applying custom procedures etc. (Matsushita *et al.* 2003: 132-4). Parallel to these cumbersome disciplines, developing countries also had to put into effect the market access requirements for trade in goods including agriculture and services. In return for making numerous amendments to domestic regulations and voting resources to implement new WTO obligations, market opening in agriculture and textiles fell short of their expectations. The Agreement on Agriculture, which was crucial for developing countries, did not result in radical market opening for their products as it failed a complete elimination of domestic subsidies as well as border barriers (Jackson 2002: 314-5). Similarly, the agreement on textiles and clothing was a disappointment for many countries dependent on exports in this sector (Ricupero 2000: 69-70; Malaga and Mohanty 2003).⁹⁵ Many developing countries also voiced their discontent with the weakness of SDT provisions in a number of WTO accords for not allowing much needed flexibilities in the

⁹⁵ The agreement allowed textile-importing developed countries to bind the sector to the WTO disciplines in a gradual time schedule of 10 years that would lapse on 1 January 2005 (WTO 1999a: 65-6). This meant that material benefits for developing countries would be seen in the final phases.

implementation of their obligations. As discussed in Chapter 3, the WTO package was increasingly regarded as an imbalanced set of gains and losses for developing and developed countries. In this context, developing countries voiced their concerns about the implementation of existing WTO treaties and called for amendments allowing for additional benefits and flexibilities including extension of the phase out periods in the TRIPS and TRIMS Agreements (Watal 2000: 78-9).

On the flip side, developed countries opposed the demands to re-negotiate the WTO accords while they brought up a number of new “trade-related” issues to the WTO agenda. These included issues such as environment, labour standards, e-commerce, government procurement, competition, and investment (Schott 2000: 25-30). The EU became the primary sponsor of a Millennium Round idea that would expand the scope of the regime to some of those areas while furthering liberalisation in trade in goods and services (Deutsch 2001). Hence, starting with its first ministerial conference that convened in Singapore in 1996, the debate revolved around whether and how the WTO should have treated these new domains. The ministers decided in Singapore to take four new issues—investment, competition, government procurement and trade facilitation—to the work program for an analytical examination of their integration into the trade regime (WTO 1996). Among others, a working group was established with an educative mandate to explore the relationship between trade and investment

through exchange of views between members. The Millennium Round proposed by the EU envisaged the launch of negotiations on the four Singapore issues as well as environment (Deutsch 2001). The new issues and other traditionally difficult matters such as agriculture, textiles, and antidumping contributed to the collapse of the Seattle Conference in 1999, in an atmosphere heated with street protests of countless NGOs (*Bridges*: 3 December 1999).

The Seattle Conference became a turning point for the rise of NGOs as significant actors in setting the WTO and trade agendas. The WTO was attacked by a wide variety of actors from environmentalists to labour unions and development oriented NGOs critical of the democracy deficit of the institution. Although NGOs cannot be regarded as a coherent body of actors with a collective agenda, they became critical interlocutors in shaping governments positions on a wide range of issues from labour concerns and environment to sustainable development. The Millennium Round initiative created an incentive for cross-border coalitions with a wide scale mobilisation bringing together different stakeholders. In the run-up to the Seattle Conference more than 3000 NGOs signed an alternative Seattle Declaration submitted by Martin Khor from the Third World Network which proposed a “turn around” instead of a new round, i.e. a review of the existing agreements with a view to detect

imbalances and a reform of the WTO decision-making procedure to make it more inclusive and transparent before any new initiatives (*Bridges*: 30 November 1999).

The debate on the agenda of a possible new round continued over an “implementation-new issues” axis up until a deal was struck in the Doha Ministerial Conference that took place in November 2001. After a two-year preparation period effectively taking into account the demands of developing countries and trying to ensure the integration of NGOs in the process, WTO members agreed to launch the new round of talks--the Doha Development Agenda. This was to emphasize the content of the negotiation mandate which was supposedly taking into consideration major issues critical to developing countries. The Doha Ministerial Declarations contained a broad mandate for negotiations regarding development-related concerns such as special and differential treatment clauses, TRIPS-related matters (i.e. traditional knowledge, folklore and patentability of plant varieties and biodiversity), and the “implementation” of the Uruguay Round Agreements (WTO 2001d). The Doha package also included a separate Ministerial Declaration on the TRIPS Agreement and Public Health aiming towards facilitating access of least developed countries to pharmaceutical products essential for epidemics such as HIV/AIDS a significant issue for many African states (WTO 2001e).

On the other hand, the Doha mandate envisaged market access negotiations in agriculture, non-agriculture products and services. Among “new issues,” only environment could be injected into the negotiation package with a restricted mandate to examine the relationship between trade and multilateral environment agreements (*Bridges*: 14 November 2001). The Singapore issues were inserted into the package with a non-negotiation mandate for the continuation of their examination for future action because of strong resistance of certain developing countries such as India (*Bridges*: 14 November 2001). The examination exercise for the four issues would continue within relevant working groups for two more years until the Cancun Ministerial Conference in September 2003, where the members would decide whether the talks would be launched to craft multilateral agreements.

Nevertheless, the Singapore issues as well as the disagreements on the modalities for liberalizing agriculture created intense controversies in the run-up to the Cancun meeting which eventually caused the summit to adjourn without any decisions. The round could be resumed with a General Council decision that came in July 2004 after intensive consultations between the U.S., EU and emerging powers such as China, India and Brazil (*Bridges*: 3 August 2004). The “July decision” effectively excluded the new issues from the WTO agenda while resolving certain controversies on the issue of modalities in agriculture.

6.1.2. International Rules on Investment

Foreign investment is generally defined either in broad terms covering intangible assets such as intellectual property and portfolio investment, or narrowly as Foreign Direct Investment (FDI) (Woolcock 2001: 163). Portfolio investment refers to short-term movement of capital for purchasing securities or debt instruments while FDI covers longer term capital movements for operations in a host country (WTO 2002: 4). From the early 1980s on, parallel to the integration of global production and national production systems, global FDI flows increased at an approximate annual rate of 30 percent (at a rate larger than the growth of world trade and production) (UNCTAD 1997: 1). Between 1980 and 1996, the FDI stock increased from \$500 billion to \$1.5 trillion mostly concentrated in developed countries (UNCTAD 1997: 1). Developing countries attracted 32 per cent of total FDI flows with an amount around \$100 billion in 1995 (For detailed figures see Annex 4). This trend was an outcome of the changing attitude of developing countries towards FDI. According to UNCTAD, in the 1991-95 period less than 3 per cent of 485 changes to domestic rules regulating FDI were in the direction of control whereas the remaining measures were to liberalize and promote FDI (UNCTAD 1997: 4). This trend continued throughout the decade (UNCTAD 2002: 7).

International instruments with regard to the regulation of investment generally address three sets of issues: liberalisation of barriers to FDI, protection of investment, and settlement of disputes among relevant parties (WTO 1998a). International rules for the liberalisation of FDI deal with domestic regulations which may be restricting, discriminating or distorting international capital flows. Most common restrictions are in the form of pre-admission barriers to establishment, post-admission barriers, and incentives to attract FDI (Kurtz 2002: 11-19). Pre-admission restrictions are generally erected in response to sovereignty concerns of the states and include measures to close strategic and sensitive sectors to FDI, quantitative restrictions limiting the number of foreign investors in certain sectors of the host country, and certain screening and registration procedures (Kurtz 2002: 12). As will be discussed in the following section pre-admission barriers became a significant concern for TNCs in accessing developing country markets.

On the other hand post-admission restrictions have an economic quality since they are employed by host countries to exploit particular economic benefits of foreign investment after the foreign capital enters the market (Kurtz 2002: 13-4). There are a wide variety of such measures in the form of joint venture obligations, obligations of technology transfer or performance requirements, which are conditions imposed on

foreign investors to use domestic products (local content requirements) and to employ nationals of the host country. Host countries employ these measures to enhance domestic economic growth and development, to support the growth of certain industries, and/or encourage inward technology transfer. Likewise investment incentives are used to attract FDI by motivating foreign investors to operate in a country through fiscal or financial favours. While fiscal incentives are generally used by developing countries through reducing taxation, the latter are employed by resource rich countries to encourage foreign investors through subsidies, export credits or loan guarantees (WTO 1998c: 4-5). Incentives can be distorting since they may distort the international allocation of FDI (WTO 1998c: 16-7). Restrictive measures in pre-admission can be discriminative among home countries whereas barriers in the post-admission phase can cause discrimination among foreign and domestic actors as well as among home countries. In this respect, non-discrimination through international agreements is ensured by the MFN principle in the pre-admission phase and by both MFN and NT in the post-admission phase.

Binding international rules on FDI generally contain provisions not only to liberalise barriers to FDI either in pre-admission or post-admission phases, but also to protect investment once investors start to operate in the host country, and to settle disputes between foreign investors (or their governments) and host governments (WTO 1998a).

International rules related to FDI are disseminated in numerous accords signed in the multilateral, regional or bilateral settings. These rules set down the rights for both governments and investors. The history of multilateral investment rules dates back to the Havana Charter of the ITO signed in 1948. As outlined in Chapter 3, the Charter contained chapters on employment, development, restrictive business practices as well as trade and investment measures (Wilcox 1949). On the other hand, the GATT contained certain provisions on trade related investment measures inhibiting international flow of trade in goods. Yet, these rules did not become effective until a dispute case was brought up by the U.S. in 1982 against Canadian Foreign Investment Agency (FIRA).⁹⁶ The U.S. initiative for a new round in the early 1980s included the extension of the scope of investment rules within the GATT. The U.S. initially brought investment to the agenda of the Consultative Group of 18 in 1981, and it proposed a code on investment particularly for performance requirements in the ministerial meeting in 1982 (Woolcock 2001: 166). However, this project had limited success because of the resistance of developing countries as well as differences among the OECD countries. Thus, the Punta del Este Declaration contained a negotiation mandate only for trade related investment measures (TRIMs) (See Annex 2 for the negotiation mandate). The U.S. was especially concerned for the elimination of 14 key

⁹⁶ The U.S. argued that the Canadian FIRA breached the national treatment clause of the GATT Article III.4. Although the GATT panel ruled in favour of the U.S., it also concluded that such measures could be used by developing countries since the GATT allowed the government support for economic development (Jackson 2002: 215).

TRIMs including local equity requirements (Woolcock 1991: 66). Developing countries like India and Brazil resisted crafting new rules apart from existing GATT provisions which could harm their performance requirements in use for development purposes, whereas the EC supported by Japan and a number of NICs proposed the elimination of only 6 to 8 TRIMs (Woolcock 1991: 67). The negotiation group on TRIMs could not produce any consensus text until the Brussels meeting in 1990 (Croome 1995: 284). Consequently, the Dunkel draft and the final agreement on TRIMs prohibited a number of measures listed in the agreement including local content and trade balancing requirements, and foreign exchange restrictions and export requirements (Croome 1995: 309; Chase 2004: 5). Apart from the TRIMs Agreement, the WTO package also contained certain provisions in the GATS and TRIPS Agreement with regard to the delivery of services through commercial presence, i.e. Mode 3 and investor protection pertaining to intellectual property (Woolcock 2001: 169-70). Apart from the WTO, international instruments to liberalise investment at the multilateral level were extensively developed particularly by the OECD.

Since its establishment in 1961, OECD has utilized a number of measures to protect and liberalise investment, and to ensure transparency of domestic regulations in conjunction with FDI. These are binding and voluntary instruments aiming to provide NT (both before and after establishment); repatriation of profits, dividends, rents, and

the proceeds of liquidated investments; transparency of domestic rules; multilateral consultation to deal with conflicts; and peer review to provide rollback of existing restrictions (OECD 1997: 6-8). The primary tools have been a number of binding codes created for the liberalisation of capital movements and current invisible operations (Woolcock 2001: 164). These codes of liberalisation initially aimed to ensure transparency through notifications of the member states about their restrictions and reservations on capital movements (OECD 1997: 7-8). In practice the liberalisation was realised progressively through peer reviewing conducted under relevant OECD committees (OECD 1997: 8). Once restrictions were lifted in member countries, the codes prevented their reintroduction. In addition to these codes, progressive liberalisation and non-discrimination are guaranteed also by the 1976 Declaration on International Investment and Multilateral Enterprises, and supportive binding decisions which guided follow-up procedures including notification, review and consultation mechanisms as well as policy monitoring (Woolcock 2001: 165). The Declaration is periodically reviewed to create a better investment climate in the OECD zone, to help TNCs contribute to economic and social progress, and to deal with challenges created by the TNC operations with a view to minimising those challenges (OECD 1997: 7). In contrast to the codes, the elements outlined in the Declaration are not binding. The attempts to make the National Treatment instrument (NTI) binding and enlarge its scope in the negotiations in 1990 and 1991 failed due to the

disagreements between the U.S. and the EU on a number of issues (Woolcock 1991: 64-5). The negotiations for an MAI at the OECD were a continuation of the work to make NTI binding and the failure of the agreement partially rested in these long-standing disagreements which will be discussed later.

On the other hand there are regional frameworks for investment which particularly originated in Europe and North America. Starting with the Treaty of Rome, the European *acquis communautaire* gradually liberalised investment regimes in member countries, through guaranteeing national treatment and the right of establishment to the member countries (Woolcock 2001: 165-6). With the launch of the Single European Act (SEA), a *de facto* liberalisation was accomplished within the common market through sector specific directives and competition policy except for monopolies and oligopolistic market structures (Woolcock 2001: 166). On the other side of the Atlantic, the push for international rules came from the United States. The free trade agreement with Canada in 1988 included provisions on national treatment and elimination of export and production-based investment requirements (Schott and Smith 1988: 148-9). The North American Free Trade Agreement (NAFTA) which extended the U.S.-Canada FTA to Mexico contained more detailed and high standard provisions for liberalisation, investment protection, and dispute settlement. Chapter 11 of NAFTA lays down the most detailed and comprehensive international rules pertaining to

foreign investment (Kurtz 2002: 19). It contains both MFN and national treatment at federal as well as state level, and prohibits the use of performance requirements for exports; domestic content, domestic and exclusive sales requirements; and obligations to transfer technology (Woolcock 2001: 167). Additionally, Chapter 11 adopts a negative-list approach limiting the exceptions in the liberalisation of investment (Kurtz 2002: 22). It also contains rules on investment protection such as expropriation and dispute settlement procedures for state-to-state disputes and investor-to-state conflicts (Kurtz 2002: 23-5). These procedures cover the application of measures such as UNCITRAL (UN Center on Investment and Trade Law) and ICSID (International Center for Settlement of Investment Disputes of the World Bank) arbitration procedures (Woolcock 2001: 167).

In addition to multilateral and regional arrangements, there are numerous bilateral agreements on investment either in the form of Bilateral Investment Treaties (BITs) or as part of Free Trade Agreements (FTAs). BITs vary in regard to their content and scope. They generally cover provisions on the admission and protection of investment (WTO 1998a: 3). In most cases, investment is defined in broad terms including ownership and intellectual property rights, and contain MFN and national treatment provisions (WTO 1998a: 4). Virtually all BITs have dispute settlement procedures generally through arbitration with references to the mechanisms of UNCITRAL,

ICSID and/or International Chamber of Commerce (ICC) (Woolcock 2001: 171). BITs signed by the U.S. contain the most comprehensive rules covering both investment protection and liberalisation, and contain provisions of non-discrimination both for pre-admission and post-admission phases in contrast to many other treaties that mostly apply MFN to the post-establishment stage (Kurtz 2002: 13). Developing countries have also been engaged in rule-making for investment to create an enabling business environment especially through bilateral agreements. The number of BITs between developed and developing countries increased as the attitude towards FDI changed positively particularly because it became a desirable source of capital especially after the Third World debt crisis of the 1980s which made loan finance more costly (Kurtz 2002: 7). According to UNCTAD by early 1997 the number of BITs reached 1,310 a majority of which was signed during the 1990s (UNCTAD 1997: 4). This number has recently reached more than 2600 (South Centre 2010: 1). Treaties concluded from the 1990s on also include South-South accords parallel to the increase of FDI flows between developing countries (UNCTAD 1997: 4). In fact, bilateral agreements became a widely used tool by developing countries as they provided necessary flexibilities to manage FDI flows according to their needs. This point will further be elaborated in the third section which outlines developing countries' major concerns and arguments surrounding a potential WTO agreement on investment.

Finally, it should be noted that the new generation free trade agreements (FTAs) concluded after NAFTA also contain comprehensive WTO-plus rules on investment. These agreements were generally signed between developing and developed countries although some South-South FTAs also contain investment chapters. The legal scope of the majority of U.S. FTAs proved more comprehensive than other agreements that came into force as they incurred encompassing WTO-plus provisions in investment. According to Estevadeordal *et al.* (2007: 39) recent U.S. FTAs contain four main modalities of investment (establishment, acquisition, post-establishment operations and resale) as well as non-discrimination principles and dispute settlement as they cover all 17 investment provisions existent in the new generation agreements.⁹⁷

6.2. Transatlantic Business Perspectives on a Multilateral Framework on Investment

U.S. and European business leaders started deliberations on crafting a multilateral investment constitution in the early 1990s. There was an agreement on the need for such a framework because of the growing importance of investment for their cross-

⁹⁷ These are provisions for establishment, acquisition, post-establishment operation, resale, MFN treatment, national treatment, nationality of management and board of directors, performance requirements, prior comment opportunity, duty to publish, national inquiry point, denial of benefits, minimum standard of treatment, treatment in case of conflict, expropriation and compensation, transfers restrictions, investor-state disputes (Estevadeordal *et al.* 2007: 40).

border operations and the inconsistent nature and inadequacy of the patchwork of rules existing in multilateral, regional and bilateral agreements (Walter 2000: 57). Although a business consensus emerged on the need for such agreements, U.S. and European TNCs had produced different perspective regarding the scope of the framework and the venue of negotiations.

6.2.1. American Perspective on a Multilateral Investment Framework

Facing problems related to their access, operation and protection of their investments in lucrative developing country markets, U.S. TNCs started deliberations on a multilateral framework for investment rules from the early 1990s. U.S. TNCs had a number of policy instruments available to access developing economies mainly in the form of bilateral and regional agreements. However, bilateral agreements could not have signed with emerging economies in South America and East Asia (Walter 2000: 57; Walter 2001: 59). A high-standard multilateral accord was a particular demand from U.S. service industries which were vocal during the MAI talks through cross-sectoral bodies such as CSI and sectoral groupings like the Securities Industry Association (Walter 2000: 56).⁹⁸ While cross-sectoral business bodies such as ACTPN,

⁹⁸ Graham (2000: 34) indicates that the service industries supported the MAI aspiring a faster liberalization of sector-specific investment related barriers than the services negotiations at the WTO.

BRT, and NAM endorsed the idea of a multilateral regime, it was the United States Council for International Business (USCIB) which proved to be the most ambitious American business actor that pressed for negotiations at the OECD (Walter 2000: 56; Graham 2000: 49). USCIB had direct representation at the OECD via the Business and Industry Committee (BIAC) which was the body representing business communities of member states observing the work of various OECD committees (Walter 2000: 55; Smythe 1998: 105).

USCIB floated the idea of negotiating a strong investment instrument in 1991, tapping into the opportunity that the OECD launched in its third revision of the National Treatment instrument (Beder 2006: 173-175). The OECD was seen as a venue where negotiations could be kept low-profile and uncontroversial (Walter 2001: 52). For U.S. TNCs, a high standard global constitution should have included four main elements (Walter 2000: 57). The first element was non-discrimination both in the pre-admission but also in the post-establishment phase which included a provision for the “right of establishment.” Investor protection was the second area of concern especially to guarantee strict constraints on host governments from expropriation through legal processes and compensation. The third element was a wide legal scope that would cover all aspects of investment operations including transfers of capital and managerial staff as well as restrictions on performance requirements. Finally, it was

crucial to create a strong enforcement mechanism in the form of an investor-state dispute settlement which guaranteed impartial arbitration in cases of breach of these rights.

Although U.S. government was concerned about the slow process in the NT program of the OECD, it embraced the idea of a more comprehensive instrument for which it received the support of OECD ministers in June 1991 (Smythe 1998: 101). Compared to the GATT, where developing countries might have resisted new rules prohibiting performance measures, it was easier to negotiate high standard business-friendly rules among like-minded governments at the OECD (Smythe 1998: 100-101; Walter 2001: 60). The U.S. government became favourable of the OECD also because it saw the opportunity to divide the European block by taking some European governments easily on board to forge a more favourable high standard agreement (Smythe 1998: 104). Indeed, many European states with left-wing parties in government and parliaments initially favoured the WTO rather than the OECD (Egan 2001: 87). For the U.S. it was not easy to divide the Europeans at the WTO where they were represented by the Commission—whereas at the OECD, European states had individual representation. However, the launch of the MAI negotiations was postponed until 1995 because it took longer than expected to convince the Europeans to embark upon the talks.

6.2.2. European Perspective on Multilateral Rules for Investment

In contrast to the American approach to negotiate a high standard agreement at the OECD, Europeans together with the Japanese businesses inclined for a more inclusive multilateral pact at the WTO even though it would entail lower standards in line with their own BITs (Walter 2001: 60). The European Roundtable of Industrialists (ERT) started discussing a better regulatory framework for investment in the early 1990s. A particular concern for ERT was to enhance the competitiveness of European industries in world markets.⁹⁹ ERT's work program included a thorough examination of business conditions in developing countries which was conducted by its "North-South working group" formed in 1990.¹⁰⁰ ERT produced subsequent reports during the 1990s analyzing investment conditions in host countries ranking developing countries according to the attitude towards foreign direct investment (ERT 1993; 1994; 1996; 1997 and 2000).

⁹⁹ The creation of the Competitiveness Advisory Group in 1995 was a direct outcome of a proposal brought by ERT and endorsed by the European Commission. http://www.ert.be/ert_milestones_and_its_chairmen.aspx accessed on December 2010.

¹⁰⁰For a summary of the activities of the working group see http://www.ert.be/working_group.aspx?wg=18 accessed on December 2010.

Based on data collected from the “public domain” in two surveys in the 1987-92 and 1993-6 periods conducted in approximately 28 countries, ERT suggested that there was an ongoing improvement in investment conditions in developing countries (ERT 1996). ERT argued that the speed of market opening was highest in Argentina, India, Mexico, Pakistan, Philippines and Thailand with an overall “acceleration” of improvements (ERT 1996: 8, 12). ERT also outlined the drivers of change (ERT 1996: 13). According to the 1996 report a key driver was “the follow-up to the break-down of communist ideology and the people living formerly under the communist system now looking for wealth and free choice” (ERT 1996: 13). Furthermore, it was noted that developing countries were competing on rules with the globalisation of markets. The report also underlined the role of international agreements such as the WTO treaties and NAFTA as well as the promotion of liberal investment rules by the IMF and World Bank in this change of attitude. Based on these reports, ERT suggested that in many countries the deregulations which were liberalizing FDI inflows were no longer deemed as a “concession” but rather perceived as a means for economic development and increasing competitiveness (ERT 1997: 3).

ERT also produced specific policy recommendations to lock in the progress suggesting the use of “public policy benchmarking” in reaching the goals of “contestable markets” and an “enabling environment” (ERT 1996: 7; 1997: 9). The

European perspective, thus, differed from the U.S. vision as ERT proposed a *gradual* approach towards locking in the *process* rather than imposing the agreed upon *best practices* of the OECD countries (ERT 1997: 9). Instead of the idea of creating a free-standing plurilateral accord, which could later be extended to developing countries, European TNCs favoured the WTO where a framework could be negotiated with developing countries. In its earliest report in 1993, ERT proposed the creation of a “GATT for investment” (ERT 1993: 35). Even after the launch of the MAI negotiations in 1995, ERT continued its inclination to create an inclusive legal framework at the WTO built upon public policy benchmarking. This was made explicit in its report in 1997:

The ERT approach for a global agreement within WTO is *different from*, and in many respects *complementary to*, MAI. It covers a broader range of issues and is supposed to help with the process of opening and creating an enabling environment. All benchmarks will refer to countries at the same stage of economic development, not to OECD. On some aspects, practical experience with negotiating and implementing MAI or the peer review mechanism in OECD Investment Instruments may be used to help designing the new global agreement. However, *this should not further delay substantive work on the issue in WTO* (ERT: 1997: 9 emphasis added).

In this regard, a multilateral framework at the WTO was envisioned to provide higher transparency, institutionalize public policy benchmarking and peer review, as well as to introduce the MFN principle to all policies to create an enabling environment and contestable markets (ERT 1997: 9). It would also cover non-discrimination to foreign

investors, notification procedures to lock in progress, instruments for adequate competition policy and a number of alternatives for dispute settlement, and contain a constructive “modus vivendi with regional agreements” (ERT 1997: 9).¹⁰¹ After the failure of the MAI initiative and the Asian financial crisis, European TNCs became particularly concerned about a WTO accord to include pre-establishment phase for non-discrimination since most European BITs contained protection provisions and post-establishment rules but lacked provisions enabling access in the pre-admission phase (UNICE 2003a: 4, UNICE 2003b: 7).

The multilateral vision promoted by European businesses was fully embraced by the European Commission. Commissioner Sir Leon Brittan responsible for external affairs of the EU explicitly favoured the expansion of the WTO agenda to investment areas in his statements in 1994 and 1995 (Brittan 1995a, 1995b). He stressed the idea that the WTO could offer an enforceable dispute resolution mechanism and the real barriers were not within the OECD zone but in developing countries (Brittan 1995a; Smythe 1998: 106). The Commission endorsed the OECD talks but together with Canada it continued to push for serious discussions at the WTO (Smythe 1998: 105-6). A WTO framework would be more flexible than an accord at the OECD and provide market

¹⁰¹ ICC was supportive of the benchmark approach and the WTO venue although it also endorsed the OECD negotiations (Maucher 1998). ICC provided expertise to the negotiators at the OECD offering its arbitration service as one of the potential venues for investor-state dispute resolution mechanism (Balanya *et al.* 2003: 112).

access exemptions for audio visual industry on cultural basis which was a critical issue for France (Graham 2000: 21, 31). It also created binding rules both for federal and sub-federal governments -a sensitive issue for the Europeans targeting the United States (Smythe 1998: 105; Graham 2000: 26-7). Furthermore, the Commission saw the potential to negotiate comprehensive investment rules at the WTO as an opportunity to extend its authority vis-à-vis member states (Smythe 1998: 104).¹⁰² As it will be further discussed in the next chapter, the calls of Commissioner Brittan for a Millennium Round including investment and other issues were also an expression of the multilateralism-first approach adopted by the Commission.

The transatlantic divisions on the content and the venue of the negotiations of a new investment accord continued well into the mid-1990s (Graham 2000: 24). The U.S., concerned about a potential developing country intransigence that would risk the outcomes to reach a high-standard accord at the OECD, initially opposed bringing the issue to the WTO during the QUAD meetings where Canada and EU insisted on starting a parallel deliberative process at the WTO (Smythe 1998: 109). While there emerged some support for parallel efforts in collective business forums such as ICC

¹⁰² Although the Commission had full competence in trade in goods within the Common Commercial Policy (CCP) along with the European Council, it had to share the negotiation authority with member states in services and IPRs as well as investment (Pedler 2001: 164-5). The Commission pursued extended competence on investment including the right to negotiate BITs through recent constitutional amendments (Raza 2007: 77).

and Transatlantic Business Dialogue (TABD) including both Americans and Europeans, USCIB and U.S. government argued that the debates on the venue were in fact a “sabotage” delaying the actual talks at the OECD (Smythe 1998: 106). Canada’s April 1996 proposal to the WTO suggesting the formation of a working group to examine the issue secured firm endorsement from the EU and ultimately paved the way for the Singapore Ministerial decision that set up the working group (Smythe 2004: 7). The intention of the EC as well as Canada and Japan was to lay down the groundwork for future talks at the WTO. The U.S. came to terms with this “two-track approach” promoted by the three but it stipulated that the mandate of deliberations should have been educative (Smythe 2004: 10).

6.2.3. The Failure of the MAI and Deliberations for WTO talks

U.S. and European TNCs closely engaged in the OECD process which was launched in 1995 and continued with interruptions until the collapse of the process in the fall of 1998. The mandate for the MAI laid by the OECD Council of Ministers was to “provide for a broad multilateral agreement for international investment with high standards for the liberalisation of investment regimes and investment protection with

effective dispute settlement procedures.”¹⁰³ The target date to complete the talks was initially set as 1997. The standards for the MAI would be based on existing OECD instruments and norms, and follow the NAFTA model (Kurtz 2002). The negotiations were closely monitored by USCIB, which established its own working group on the MAI and had regular meetings with U.S. negotiators as well as European business groups such as UNICE (Beder 2006: 175; Balanya *et al.* 2003: 112). Business groups in the OECD countries indirectly participated in the process through BIAC by providing the negotiators with their opinions and supportive technical studies.

Differences of opinion among OECD governments came to the surface even before the launch of the talks and was a major factor for the failure of the MAI negotiations. These differences were consolidated by the time the first MAI draft was released in January 1997.¹⁰⁴ The bottom line for the Europeans was to maintain the preferential treatment of member state companies within the Union through carving out an exception within the MAI for MFN and NT commitments for regional economic integrations (UNCTAD 1999: 14-5; Graham 2000: 31). On the other hand, despite the

¹⁰³ Further information about the negotiation mandate, process and other documents relevant to the MAI talks can be found on the OECD website at: <http://www1.oecd.org/daf/mai/> accessed December 15, 2010.

¹⁰⁴ Graham (2000: 17) contends that an agreement over controversial issues was unlikely since this required political concessions that would exceed the authority of the investment negotiators who lacked access to higher-level officials and ministers. However, this seems to be the case in the early phase of the talks since the MAI captured attention of governments and parliaments as the NGO campaign started.

European insistence on the application of the MAI to all levels of government, the U.S. objected to the implementation of the MAI at sub-Federal level (UNCTAD 1999: 13-4; Graham 2000: 26-7). The Europeans were also critical of the extraterritoriality of U.S. law via applied sanctions on foreign firms that invest in Cuba, Libya and Iran (UNCTAD 1999: 20 Graham 2000: 28-30). Sectoral and country-specific exceptions submitted from early 1997 on brought about further tension since those exceptions became numerous and open-ended (UNCTAD 1999: 12; Kurtz 2002: 48-9). The most controversial exception was the carve-out requested by France and Canada for cultural sectors which was not acceptable to the Americans (UNCTAD 1999: 15; Kurtz 2002: 45). Another carve-out was demanded for taxation by most OECD governments unwilling to give up their autonomy as they enjoyed the flexibilities of the existing taxation regime which was built upon bilateral arrangements (UNCTAD 1999: 20-1).

Secondly, in early 1997 an influential anti-MAI campaign was mobilized after the leak of the draft MAI text on the Internet by a network orchestrated by the NGOs such as Friends of the Earth, Public Citizen, and the Third World Network with support of environmentalist, labour unions, consumer groups and other citizen organizations (Graham 2000: 35-48; Tieleman 2004: 11-3). The campaigners lashed out the MAI draft on multiple fronts criticizing the text for potential erosion of the sovereignty of the states and for the creation of a legal context for corporate-led exploitation of labour

and environment (Tieleman 2004: 11). A common concern was that the MAI would become “a charter of rights for [TNCs]” and a “NAFTA on steroids” without addressing the responsibilities of corporations (Walter 2001: 62). Arguably, the agreement would undermine the democratic rights of public authorities to regulate domestic laws and standards on labour rights and environment (Walter 2001: 62). The political vacuum drew a heightened public and governmental attention putting the MAI under closer domestic scrutiny which, together with existing disagreements among OECD member states, eventually led to the postponement of the deadline of the talks to May 1998.¹⁰⁵ To pacify the outraged opposition member states and the OECD launched consultations with NGOs to reconcile their demands and integrate these actors into the negotiation process (Tieleman 2004: 15-6 Balanya *et al.* 2003: 119-20). The NGOs’ criticisms on the potential destructive impact of the MAI on environmental and labour standards pushed the negotiators craft new provisions addressing these concerns (UNCTAD 1999: 17-8). However, this attempt became the third factor that eventually precipitated new divisions among governments as well as the business communities.

The debate on hammering out binding provisions in addition to the non-binding language on environmental and labour standards interjected into the preamble of the

¹⁰⁵ Neither U.S. Congress nor the general public in the States were adequately informed about the OECD talks through media or other means prior to the NGO campaign (Beder 2006: 180).

draft text caused outspoken reaction from businesses as well as some governments such as South Korea, Mexico, and Australia (Balanya *et al.* 2003: 115). BIAC expressed its concerns regarding binding provision (Balanya *et al.* 2003: 118).¹⁰⁶ U.S. business groups also failed to see any benefits in the MAI as the draft moved further away from reflecting their preferences (Graham 2000: 49). The business opposition put the governments in a difficult situation as the NGO campaign already made the MAI a deal politically hard to sell domestically. Unable to solve mounting differences, the negotiators suspended the talks for six months in May 1998 for further consultations. However, the negotiations would not be resumed as France announced its withdrawal in October 1998 which was followed by Australia and the UK (Balanya *et al.* 2003: 109). Commissioner Brittan gave a speech to the European Parliament about the deadlock of the MAI talks confirming his determination to pursue negotiations at the WTO in the following words:

The MAI negotiations have already done much to clear the ground on investment and to highlight those issues which are of key importance to the EU, including civil society. Nonetheless, I have always taken the view that the WTO is the best long-term home for this work for which the MAI has already provided valuable signposts. In present circumstances the chances of bringing the current MAI negotiations to a successful conclusion frankly do not look at all promising (*Inside U.S. Trade*: 22 October 1998).

¹⁰⁶ According to Balanya *et al.* (2003: 119) ICC president Helmut Maucher expressed his discontent with the MAI draft because of the extra “social wording”.

The final draft of the MAI produced on 24 April 1998 contained twelve chapters embodied in 145 pages addressing the three key areas, i.e. investment liberalisation, protection, and dispute settlement. According to Kurtz, “the MAI provisions represented almost a facsimile (albeit strengthened in some respects) of the NAFTA Chapter 11 model” (Kurtz 2002: 46-52). The text contained provisions for a broad asset-based definition of investment including portfolio investment beyond the scope of NAFTA. Concerning investment liberalisation, MAI provisions laid down comprehensive clauses for transparency as well as MFN and national treatment which would be applicable to both pre-admission and post-establishment stages of foreign investment. The text adopted a top-down negative list approach to liberalisation as in NAFTA. It was also stronger than the NAFTA in prohibiting a larger number of performance requirements. On investment protection the text formulated detailed provisions covering both direct and indirect forms of expropriations. On dispute settlement it contained a framework of investor-to-state as well as state-to-state procedures.

The MAI experience supports the argument made in Chapter 2 that neoliberal hegemony was highly contested from the mid-1990s on with the outspoken criticisms expressed against globalisation and neoliberal policies within civil societies. As Egan contends:

Three sets of conflicts –between OECD member states, between the OECD and subordinate social forces, and ultimately between the OECD and important elements of multinational capital- reveal the contradictory nature of the transatlantic hegemonic bloc (Egan 2001: 91).

In fact, new civil society forces became a factor in deepening, not only the conflicts within and among OECD states, but also the differences of opinion within prominent elements of multinational capital. As will be further examined in the next Chapter, transatlantic TNCs failed to produce a collective policy formula with regard to a multilateral agreement and promoted dissimilar perspectives regarding a multilateral framework agreement due largely to new domestic and transnational policy setting increasingly dominated by new social forces. In fact, as Graham argues the transatlantic consensus to negotiate the investment accord at the OECD was indeed a “shaky” one and TNCs on either side of the Atlantic avoided engaging in a countervailing initiative to save the MAI after NGOs entered the stage (Graham 2000: 15; 24). The NGO factor became particularly influential in the determination of TNC preferences and agenda-setting activities through constraining the legitimate space for action both in the MAI and WTO cases. The other factor that pushed U.S. TNCs to diverge from Europeans was the growing power and potential opposition of emerging economies to an investment regime at the WTO. The following section outlines the deliberations on investment in the WTO from the Singapore Ministerial in

1996 until the Doha consensus in 2001 and has a particular focus on the opposition from developing countries. The role of NGOs and developing countries in setting the WTO are examined in the following chapter.

6.3. Early Investment Debate at the WTO

When the investment issue was first raised by the EU and Canada during seminars and follow-up dialogues they sponsored in Geneva during 1995 and 1996, the developing country' resistance was not yet entrenched (Smythe 2004: 7-8). Although India and Tanzania reacted negatively to the initiative some countries such as Brazil and Mexico seemed somehow supportive of the educative process at the WTO. During the discussions within the Working Group on the Relationship between Trade and Investment (WGTI) established at the Singapore Conference, India was joined by other developing countries in resisting the launch of investment talks. Although these countries contradicted the expansion of the trade regime to investment rules, their resistance stemmed from a concern that multilateral disciplines would create more costs than gains. Their opposition was not against market disciplines *per se*. Some developing countries such as Brazil, Mexico, Chile, and Costa Rica as well as South Korea and Hong Kong took a more supportive position. Overall, developing countries became actively involved in this pre-round agenda-setting process contrasting the

pre-Uruguay Round services debate with their proposals based on factual data and analysis. The investment agenda for the Doha Round was set in this process and shaped by the conflicting views of *demandeurs* in the EU and the *hardliners* camp which was orchestrated by India.

6.3.1. From Singapore to Seattle

The working groups to examine the relationships between trade and investment, and trade and competition were established in the Singapore Ministerial in December 1996 as a last minute compromise. Paragraph 20 of the Singapore Ministerial Declaration envisaged that the two working groups would work in cooperation with other institutions like the UNCTAD, and the process would be reviewed by the General Council. Notwithstanding their opposition to the incorporation of investment to the WTO legal framework, many developing countries joined the Singapore consensus for the restricted educative mandate of the working group that envisaged the examination of different aspects of the relationship between FDI and trade. The paragraph reflected this compromise:

It is clearly understood that future negotiations, *if any*, regarding multilateral disciplines in these areas, will take place only after an *explicit consensus* decision is taken among WTO Members regarding such negotiations (WTO 1996).

After two years of deliberations, the General Council would decide on how to proceed on investment. In this context, the WGTI met periodically until the Seattle Ministerial Conference around a checklist of issues agreed by the members (WTO 1997). The analytical examination program had four dimensions to explore:

1. Implications of the relationship between trade and investment for development and economic growth,
2. The economic relationship between trade and investment,
3. Stocktaking and analysis of existing international instruments and activities regarding trade and investment,
4. On the basis of the work on the above-mentioned items, identification of common features and differences, and gaps in the existing international instruments; advantages and disadvantages of international rules; rights and obligations of host/home governments and investors; and the relationship between existing and possible future international cooperation (WTO 1997).

The debate in the WGTI reflected divergent preferences as to the future work of the WTO on investment: advocates of investment interpreted existing empirical data to evidence the necessity to establish a multilateral framework of investment rules, whereas sceptic countries put emphasis on the complexity of issues and need of more

profound examination of certain aspects before any kind of consideration for future negotiations. The EU, Japan, Canada, Switzerland, South Korea and Hong Kong proved to be the most ambitious to direct the WTO agenda to subsume investment rules. The United States was also supportive of the educative debates although its endorsement for future negotiations proved lukewarm as the OECD talks were still underway until late 1998. On the other hand, India, Egypt, Pakistan, Cuba, Morocco, Philippines and more generally the ASEAN group produced counter arguments to prevent any future mandate to craft a new WTO agreement. These two groups represented the two poles of contrasting ideas, with other governments adopting more moderate positions during the discussions.

During the debates on the relationship between FDI and trade, the demandeurs advanced the view that the relationship is a positive and “complementary” one (WGTI 1997a: 2; 1997b: 4, 8, 11; EU 1997a: 1, 4; 1997b: 2, 5; OECD 1997; 2, 4).¹⁰⁷ The argument was elaborated with empirical data, academic research and references to the submissions of the OECD evidencing positive contributions of FDI to host economies by enabling transfer of technology and managerial skills, stimulating export growth and diversification, and economic restructuring (WGTI 1997b: 4; 1997c: 5; 1999a: 4;

¹⁰⁷ To evidence the complementary nature of trade and FDI, the EU highlighted the proliferation of regional economic integrations that adopted an integrated approach including rules both for trade and investment (WGTI 1997b: 7).

1998a: 3; WTO 1998b; 1998d; OECD 1998). The EU argued that developing countries recognized this positive impact since they left infant industry protection strategies behind and adopted a more positive attitude towards FDI (EU WGTI 1998Ap4-5). The proponents of a WTO treaty also criticised market interventions in the form of incentives and/or performance and technology transfer requirements which were arguably distorting investment patterns and trade flows without yielding expected outcomes for the host economies (WGTI 1998b: 6; 1998: 4; 1999a; 4; 1999b: 3). The EU argued that these regulations needed to be disciplined in order to guarantee a liberal, transparent and non-discriminatory investment environment (WGTI 1999a; 3).¹⁰⁸

On the other hand, notwithstanding their recognition of the significance of FDI as a source of capital and for transfer of technology, the opponents challenged the simplistic view on positive contributions of FDI. The hardliners stressed potential negative effects of FDI on host economies, specifically on the balance of payments but also in relation to trade (WGTI 1997b: 4; 1998a: 6).¹⁰⁹ They suggested that the relationship between FDI and trade is a multifaceted and complex issue and the

¹⁰⁸ The EU argued that investment incentives had only a marginal impact on investors' decisions (WGTI 1998c: 3; 1998d: 4). Since these practices eroded other countries' competitiveness the EU also called for supplementary competition rules (WGTI 1998c: 3, 10; 1998d: 8; 1999b: 12).

¹⁰⁹ While arguing that the overall impact of FDI was positive, in its position paper Japan admitted that FDI may also have certain negative effects on balance of payments in particular circumstances (WGTI 1997b: 4; Japan 1997).

relationship could be a “substitutive” one depending on certain conditions in host economies (WGTI 1997c: 4; 1998c: 21; 1999a: 10). India and Egypt argued that existing levels of economic development, and the domestic entrepreneurial, industrial, and technological capacities of economies were factors in determining the benefits (WGTI 1998a: 6; 1998b: 1; 1999a: 6-7, 15). In this vein, they insisted on the necessity of regulating FDI particularly to achieve specific development objectives. Investment incentives and certain performance requirements were argued to be useful instruments to achieve specific developmental, political and social goals with reference to UNCTAD studies (WGTI 1998b: 5-7; 1999a: 9; 1998c: 4-5; ASEAN 1998). In this context, India with support from other members (including the ASEAN group) contended that each country needed necessary freedom of space to develop a mix of policies including performance requirements and incentives to attract and direct FDI to selected industries or regions in light of unique needs and preferences (WGTI 1999a: 3; 1999b: 2). The proliferation of BITs could be attributed to the flexibility they granted to developing countries in pursuing specific development goals while creating necessary predictability for foreign investors (WGTI 1998c: 13).

The proponents utilized the examination of the existing international rules regulating FDI as an opportunity to promote the case for the proposed multilateral framework

for investment.¹¹⁰ The EU and Japan argued that investors sought certainty and predictability of investment rules and conditions which were crucial in determining the destination of FDI, and that transparency was hampered by an unstable patchwork of international rules (WGTI 1997c: 6; 1999a: 21; Japan 1999). According to the EU although the WTO partially covered some investment rules these rules lacked coherence (WGTI 1998c: 14-15; 1999b: 7).¹¹¹ The EU further maintained that BITs were a “second best” option in consolidating investment flows in comparison to a multilateral approach whereas any alternative to a multilateral framework was “the law of the jungle” (WGTI 1998c: 24; 1999b: 13). A multilateral accord based on certain WTO principles such as non-discrimination and transparency would create a “level playing field” for all participants, enhance competitive conditions through

¹¹⁰ In response to the observation of some developing countries on the necessity to balance between the rights and obligations of foreign investors, developed countries pointed out existing instruments on corporate behaviour. They did not however support an opinion to bring corporate responsibility under a possible multilateral framework for investment. The EU argued that responsibilities of corporations were primarily an issue of domestic law (WGTI 1999c: 6).

¹¹¹ The WTO Agreements have a limited scope: the TRIMs Agreement deals with measures affecting trade in goods, and the GATS deals with trade in services. Furthermore, according to the EU there existed no rules for investment protection under the WTO, neither rules for performance requirements in the GATS but few in the TRIMs Agreement. Many performance requirements were still uncovered by the WTO disciplines so this issue should have been examined in the WGTI (WGTI 1997c: 8). The EU brought an analogy between subsidies and investment incentives and argued that the WTO had disciplines for subsidies with the Agreement on Subsidies and Countervailing Measures (SCM) but this was a partial remedy for the distorting effects of incentives since the focus of the Agreement of SCM was limited because of the inherent perspective of trade-relatedness (WGTI 1997b: 9; 1998c: 12). The EU argued that although investment and trade are increasingly integrated, the effectiveness of the rules for international trade was diminished due to the lack of multilateral disciplines as shown in the SCM which had limited reach on incentives (WGTI 1998c: 14).

disciplining investment distorting practices such as incentives, and through sustaining stability by guaranteeing favourable domestic rules (WGTI 1998c: 15, 22; 1999a:21; 1999b: 12, 14). The EU suggested that the proposed accord would not only complement existing WTO rules, but also allow expected flexibility for developing countries for pursuing specific policy targets for economic development with certain derogations for those countries (WGTI 1998d: 12). Nevertheless, the EU also cautioned with the following statement: “[t]he degree of flexibility provided [...] should be carefully balanced with the level of stability and predictability of the investment climate that the agreement intended to improve (WGTI 1999b: 18).” In this vein, the EU proposal in June 1999 suggested that the structure of the GATS was a good model to balance development objectives and flexibility with non-discriminatory treatment of FDI (WGTI 1999b: 18).

Against the arguments for a multilateral framework, the opponents contended that predictability could best be sustained through BITs, which also provided members with sufficient room of maneuver to pursue development policies through flexibilities to regulate FDI according to their unique needs and circumstances (WGTI 1998c: 13; 1999a: 10).¹¹² India stressed that BITs’ aimed investment protection in the post-

¹¹² India put forward that even developed countries did not grant an automatic right to invest and utilized exceptions and limitations to non-discrimination in their treaties for both pre and post-establishment phases (WGTI 1998a: 16-7).

admission phase without according an automatic right of investment in the pre-admission period, whereas the framework would cover both phases since it derived from a desire of market access rather than inhibiting distortions (WGTI 1999a: 11). A multilateral agreement would oblige members to liberalise investment and constrain freedom of action without guaranteeing a definite increase in FDI flows (WGTI 1998c: 13, 22; 1999b: 14).¹¹³ India further challenged the predictability argument by arguing that international agreements were not a major determinant of investment decisions citing studies which highlighted the fact that many TNCs were in fact unaware of existing BITs (WGTI 1998c: 13).

The debate on the definition of investment painted a better picture about the scope of the framework envisaged by the EU and other proponents. These countries indicated their preference for a broad definition while questioning the feasibility of adopting a narrow definition for investment (WGTI 1998c: 26; 1999a: 18). On one end, the US, Japan, Canada, and Norway argued for the advantages of an asset-based definition as in the MAI and suggested a broad scope that would include portfolio investment (WGTI 1998c: 26). The EU also took a similar position but with some nuance. The EU

¹¹³ India claimed to be one of the most open economies to FDI owing to its BITs which contained a broad definition of investment, and accorded MFN and NT at the post-establishment stage. The expropriation of foreign investments was banned with the exception of public purpose considerations and additional rights were ensured for free repatriation of capital, profits, and royalties (WGTI 2000b: 11; India 1999).

suggested a distinction on the basis of long-term and short-term investment indicating that portfolio investment was not necessarily short-term and speculative, and proposed a partial application of specific obligations to certain aspects of that definition (WGTI 1998b: 19; 1998c: 26; 1999a: 2).¹¹⁴ On the other end, the opponents objected to discussions on a broad definition which might even have contained intellectual property rights and highlighted that there were significant differences in existing instruments that begged further investigation to understand their implications (WGTI 1998a: 16; 1998b: 18; 1998c: 21). They also reiterated that the mandate of the working group was limited to FDI (WGTI 1998b: 18). Egypt and India also criticized the lack of binding international obligations for TNCs towards addressing the problems they created through restrictive business practices, transfer pricing, cartels and monopolies and other challenges relating to the transfer of technology, and underscored the need to balance their rights with binding responsibilities (WGTI 1999c: 3-4). The EU responded by arguing that responsibilities of corporations were primarily an issue of domestic law (WGTI 1999c: 6). In the run up to the Seattle Conference, the hardliners tried to slow down the debates by asking for further examination of the relationship between trade and investment.

¹¹⁴ For the EU, the definition of investment was contingent upon the quality and purpose of the agreement. The EU argued that a broad definition was generally adopted in the agreements covering the post-establishment protection of investment since a narrow definition would not be sufficient for foreign operators in this phase (WGTI 1998c: 26).

6.3.2. From Seattle to Doha

The draft texts for the Seattle Ministerial Conference were prepared by the EU with additional support from Switzerland, Japan, South Korea and the candidates for EU membership. In this regard, the preparations for the Seattle meeting proved premature in terms of bridging gaps among the membership compared to the pre-Doha Conference process. The revised ministerial draft (WTO 1999c) mandated negotiations on investment “to further the objectives of the WTO and to complement its rules” by establishing “a multilateral framework of rules on foreign direct investment.” The text indicated that the negotiations should have addressed “investment-distorting” and “trade-distorting” policies and practices. On investment liberalisation, the draft reflected the gradual approach of European businesses and indicated that the agreement would sustain non-discrimination, transparency and predictability, and operate upon “positive commitments” of the members towards achieving “progressively a higher level of liberalisation.” On other issues such as protection, the text merely noted that “[c]onsideration shall be given to the possible need for provisions on other matters, such as protection of investment and investors’ responsibilities, and to existing bilateral and regional arrangements on investment.” To reconcile the opponents’ views, the text also spelled that the framework agreement should have respected “the ability of host governments to regulate the activity of

investors in their respective territories.” A potential agreement would also address “special needs of developing least developed countries” with regard to “the contribution of foreign direct investment to their development and economic growth.” The framework integrated disputes related to investment into the DSM of the WTO. Ultimately, the draft left the scope and definition of the framework agreement to future negotiations. Thus, the text revised on 30 November 1999 did not contain any notable amendments.

Following the Seattle Conference, members started the preparations for the Doha Conference with active participation from developing countries whose concerns were put at the centre stage. The WGTI continued its meetings with its educative mandate over four items but with a clearer picture on the proposed framework. In this period, the EU accepted that the relationship between trade and FDI was a complex one and admitted the need of developing countries for broader flexibilities to pursue their diverse objectives (WGTI 2000b: 4; EU 2000). Nonetheless the EU also reiterated the need to strike “a balance between the necessary degree of flexibility, on the one hand, and certainty for economic operators, on the other” (WGTI 2000b: 5). To accomplish both goals, the EU suggested a “GATS-type entry level instrument with a positive list approach” with a stronger accent on the development-friendly nature of the proposed framework. In other words, the framework agreement would contain a GATS-type

positive list approach with a general MFN rule in both pre-admission and post-establishment phases and NT for concessions made by the countries (WGTI 2000a: 11, 14-5; 2000b: 7; 2001: 16).¹¹⁵ The members would have flexibilities through general and specific exceptions, whose scope and nature were to be defined in future talks (WGTI 2000a: 11; 2001: 8). To minimise the administrative burdens on poor economies, necessary technical assistance would be provided to facilitate the dissemination of all relevant information to foreign investors (WGTI 2001: 19).

On the other hand, the opponents reiterated their views among others that the WTO accord would not guarantee an increase in the investment flows but rather restrict the space for the parties to employ instruments for other purposes (WGTI 2000b: 7-8; 2001: 10). In addition, India opposed the framework stressing the cost of notification requirements for many developing countries that lacked sufficient human and material resources (WGTI 2000b: 16). India was also critical of the gradual approach based upon the GATS model which would pave the way for the exertion of pressure over developing countries for more ambitious obligations in future (WGTI 2001: 16).¹¹⁶

¹¹⁵ The U.S. maintained its preference for a top-down approach with limited exceptions that would also extend protection to the pre-admission phase as in NAFTA and its bilateral treaties (WGTI 2000b: 19).

¹¹⁶ This was opposed also because any attempt to substantiate existing accords with additional obligations on performance requirements, incentives, expropriation and compensation would arguably have far-reaching impacts on the WTO rules requiring substantial amendments to

The failed case of MAI was used as evidence of the lack of a mature basis to negotiate multilateral rules for investment (WGTI 2000b: 8). In this context, the preference of the opponents was to continue the examination process under the WGTI until a mature ground could be established for a more extensive initiative under the WTO, while the proponents claimed that the time was ripe for launching negotiations.

Under these circumstances the draft Ministerial texts for the Doha summit contained different options for future negotiations. The first draft text for the Doha Ministerial Conference that was produced on 26 September 2001 contained two alternatives for the future work on investment (WTO 2001a). One alternative was to continue the analytical work in the working group until the next ministerial conference (paragraph 19). The other alternative was the immediate launch of negotiations to establish a multilateral framework of rules to ensure “transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment” (paragraph 18). The “core elements” of the framework were laid out in line with the demands of the proponents as “scope and definition, transparency, non-discrimination, pre-establishment commitments based on a GATS-type approach, and the settlement of disputes between governments.” To satisfy the opponents’ demands

the agreements such as the GATS, TRIMs, and Agreement on Subsidies and Countervailing Measures (WGTI 2001: 15-16).

for flexibility the draft stated that the agreement would reflect “the interests of home and host countries” “in a balanced manner,” and take into account the development objectives and regulatory responsibilities of governments by ensuring that members would be able to “undertake obligations commensurate with their individual needs and circumstances.”

In tandem with the negotiations between the demandeurs and the opponents the draft text was revised two weeks before the Doha Conference on 27 October 2001 (WTO 2001b). The draft somehow synthesised the previous two options into one blurred mandate implying the immediate launch of the investment talks. While the work until the next ministerial conference concentrated on “the clarification of elements of a possible multilateral framework”, a decision would then be taken on “modalities of negotiations.” This meant that the negotiations would *de facto* be started at Doha, while in Cancun the decision would be made on the modalities of the framework. In this revised draft certain points were emphasised with additional wording. Instead of a “GATS-type approach,” the text stated “a GATS-type, positive list approach.” Core elements of the framework agreement were extended to “development provisions; exceptions and safeguards” and “negotiation modalities, including the question of participation.” Furthermore, the text stated that the framework should have reflected the right of host governments “to regulate in the public interest.”

The text was revised a second time during the Doha Conference (WTO 2001c). This draft became the basis of the final Declaration with a mandate for further analytical work until the following (Cancun) ministerial conference. The ministers would then decide whether to start negotiations on all four Singapore issues. The final text (WTO 2001d) required an “explicit consensus” to launch the talks. This condition was added as a response to the last minute insistence of India. In the period until the Cancun Ministerial, the WGTI would work to clarify the “scope and definition; transparency, non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance of payments safeguards; consultation and the settlement of disputes between Members.”

The process would take into account the interests of host and home countries in a balanced manner including development policies and objectives as well as the right of host governments “to regulate in the public interest.” An important aspect of the Doha Declaration was its recognition of the need for technical assistance to developing countries for capacity-building purposes both for the implementation of the obligations from the Uruguay Round agreements and to facilitate participation of poor countries in the decision-making in the WTO. In this respect the WTO launched a variety of training programs on issues including investment and other Singapore issues to support the participation of developing countries in the talks.

Conclusion

The challenges to the neoliberal hegemony created a new global political context within which trade policies and agendas were constructed and wherein business preferences and strategies were shaped. In contrast to the collective vision and strategies of transatlantic TNCs towards GATT agenda in IPR and services cases, European and American business forces were divided over their perspectives and preferences regarding the WTO agenda in the 1990s. The transatlantic consensus on putting investment simultaneously on the agendas of the OECD and the WTO was an outcome of the concerns of the U.S. TNCs that emerged from this new political environment. As discussed, the MAI initiative failed because of a number of factors but the mobilisation of a wide range of civil society actors significantly contributed to this failure as it politicised the policy debate in the OECD capitals. Similarly earlier attempts to launch investment talks at the WTO did not succeed because of the rising resistance among developing countries against the expansion of the WTO legal framework. This resistance stemmed from the existing WTO disciplines and needed flexibilities to pursue domestic development goals rather than an encompassing challenge that would suggest an alternative paradigm to free trade. The next chapter

examines in further depth the factors that shaped TNC preferences and strategies towards setting the WTO agenda with an analysis of the U.S. and European cases.

CHAPTER 7: TNCs, RESISTANCE AND FAILURE OF THE INVESTMENT AGENDA AT THE WTO

Opting for an inclusive multilateral constitution that would create a predictable business environment and a level playing field in developing country markets European TNCs promoted the investment agenda at the WTO. However, a number of factors intrinsic to the dilemmas created by neoliberal hegemony seriously restricted their agenda-setting ability. Neoliberal hegemony, institutions and policies were increasingly challenged by a large set of actors in the United States, Europe and elsewhere, and created a new context for trade agendas. The European program for a multilateral investment agreement was encountered by an NGOs campaign that worked to shape WTO members' policy and preferences against a multilateral framework by successfully leveraging the mounting discontent among developing countries about the standards set by the WTO accords. More than anything else, this new political environment characterised by the contested neoliberal hegemony restricted the ability of TNCs to build a strong transnational coalition for an ambitious investment program at the WTO.

This chapter examines the context that determined TNC preference and strategy formation by looking into the factors at different levels that led to the failure of the

investment case at the WTO. The first two sections explore the dynamics of trade policy making in the United States and the European Union, and shows the difficulties in forging a transatlantic consensus and coalition for an ambitious investment agenda at the WTO. The third section probes the TNCs role in agenda-setting at the WTO by analysing the resistance of developing countries and NGOs. The final section outlines TNC strategies in the context of contested hegemony comparing them with the case of services.

7.1. The American Business Perspective: A Bilateral Approach for Investment/A Narrow Market Access Agenda for the WTO

As the MAI talks stalled from 1998 on, European TNCs -together with the Japanese lobbies-favoured launching investment negotiations at the WTO (Walter 2001: 66). In contrast, U.S. TNCs were in favour of exploiting bilateral and regional opportunities for new rule-making instead of pushing a broad agenda at the WTO. Factors that shaped U.S. business preferences included both domestic and external elements. Domestically it seemed hard to project an ambitious agenda of rule-making at the WTO because of civil society opposition which above all paralyzed bipartisan consensus-building on trade policy within the U.S. Congress. On the other hand, especially after the collapse of the Seattle Ministerial in 1999, the WTO was perceived

as a problematic venue to push for new rule making in investment due to mounting resistance among developing countries which became vocal about their implementation issues. Hence, U.S. business priorities for the investment agenda at the WTO prevented the crafting of a low-standard accord that would risk potential gains from rule-making in bilateral agreements. This outcome was a result of the inability of TNCs to foster an ambitious collective vision at the transatlantic level, which stood in high contrast to the success of services campaign in coalition and case-building before the Uruguay Round.

7.1.1. U.S. Domestic Policy Environment

Difficulties emerged in connection with the globalization backlash and contested neoliberal hegemony constrained the U.S. administration's options for trade policy in general and for the WTO agenda in particular. Both the NAFTA and MAI debates illustrated a strong sentiment built within the American society against free trade especially on the side of organized labour and environmentalist groups. In her essay on U.S. public opinion about trade Ellen Frost proclaims the following:

[w]hat brings environmentalists and labor activists together is concern about the behavior of multinational corporations. As they see it, these corporations are abandoning workers and communities to pursue profits around the world. In so doing they are destroying U.S. jobs, undermining health and safety

standards, exploiting foreign workers, and polluting the global environment (1998: 71).

It became clear that as American workers were challenged by external competition, they increasingly perceived themselves as the victims of trade opening -which arguably threatened jobs and wages at home (Destler 2005: 257). On the other hand, an environmental opposition arose and entrenched with new trade disputes brought to the GATT/WTO and NAFTA (Graham 2000: 35-41). The NAFTA ratification debate had triggered an NGO campaign orchestrated by environmental actors joined by labour groups with concerns about potential negative implications of the treaty for employment and nature (Destler 1996: 117-8). Hence, during his election campaign in 1992, Bill Clinton promised to supplement the NAFTA with additional agreements for labour and environment standards (Destler 2005: 260; Mayer 1998: 165). After his election, President Clinton launched supplementary talks with NAFTA partners to hammer out side agreements on labour and the environment. This proved a difficult task that entailed multilevel bargaining with different stakeholders including grassroots and mainstream institutions as well as business lobbies in addition to the Mexican and Canadian governments (Mayer 1998: 165-216). According to Mayer, the negotiations and the ratification of NAFTA created a disproportionate political reaction domestically as a broad range of stakeholders attached a symbolic meaning to the treaty and mobilized with a feeling of fulfilment of a moral obligation rather

than a motive of maximisation of certain interests (Mayer 1998: 272). As Mayer proclaims, NAFTA had come to stand for stories of greedy corporations, corrupt politicians, and foreign interests in a league against workers, family farmers, communities, and the environment (Mayer 1998: 272). The MAI only added more fuel to the fire by energizing another Internet-driven opposition after the leakage of the draft in early 1997 by the Public Citizen (Destler: 2005: 265).

What became particularly problematic for Clinton's trade agenda was the administration's inability to forge bipartisan consensus on Capitol Hill and to get "fast track" authority from Congress as the trade policy debate was increasingly politicized.¹¹⁷ U.S. Congress for the first time refused to renew fast-track authority in 1993 and did not grant it despite repeated attempts on the part of President Clinton (Bergsten 2000: 50). A broad anti-fast track coalition emerged with the coordination of the Public Citizen (Destler 2005: 256-61). At a minimum the coalition called for the fast track legislation to guarantee the implantation of labour and environment standards into new trade agreements with clear enforcement provisions in the form of core provisions rather than side agreements alike with the NAFTA's (Destler 1996: 117-8; Destler 2005: 261). The coalition ensured support from most Democrats in Congress and made social clauses an inevitable priority for the administration's trade policy

¹¹⁷ Fast track authority is also called "trade promotion authority."

(Destler 2005: 260-1). The outcome was a stronger U.S. stance on these issues as seen in the WTO's Singapore and Seattle Ministerials (Schott 2000: 6; Destler 2005: 219). Besides, the failure of the Seattle Conference was partially because of the lack of fast track power which was denied for the third time in 1997 as well as Clinton's partisan focus and statements about American intentions for potential trade sanctions in future against those having lower labour standards (Destler 2005: 273; Soloway and Anishchenko 2001: 56). Without doubt, Seattle became a turning point for U.S. trade policy-making as well as anti-globalisation which perceived the collapse of the conference as a major victory (Destler 2005: 273). In a Congressional Hearing on the Seattle breakdown, Gary Hufbauer of the Peterson Institute qualified this victory as the "crowning glory" of the "global backlash forces" which successively scored significant successes in fast track and anti-MAI campaigns against free trade forces in the 1990s (U.S. Congress 2000: 71).

Internal and external challenges to neoliberalism pushed the U.S. administration to adopt a narrowly tailored program for the WTO that concentrated on market access for domestic constituencies that would support such an initiative rather than new rule-making for deeper market integration. In the run-up to the Seattle Conference, the U.S. agenda for the new round prioritised further market access in services, agriculture and industrial products as well as e-commerce for which it would be easy

to mobilize internal support. The U.S. was not enthusiastic about the EU's program for the WTO on investment and competition (Soloway and Anishchenko 2001: 58-9). U.S. trade officials became particularly unwilling to launch an ambitious round including issues such as textiles where strong domestic protectionist pressures were existent, and antidumping and competition policy where changes in U.S. law and practices (hence the Congressional blessing) were needed (Schott 2000: 8).¹¹⁸ There was no doubt that any trade negotiations that required the United States to amend its domestic law would face strong resistance in Congress.

In this context, American TNCs adopted a pragmatic approach as venue-shoppers pursuing their sectoral and cross-sectoral interests through feasible policy channels available at their disposal. For investment, one possible channel was the sectoral negotiations on financial services and telecommunications at the WTO in 1997 which became pivotal for U.S. business activism to dismantle sector-specific barriers in developing country markets. Individual firms as well as CSI proactively campaigned for a successful conclusion of these sectoral talks.¹¹⁹ In fact, these negotiations proved

¹¹⁸ Antidumping was one of the implementation issues where developing countries put a heavy weight on and ultimately interjected into the Doha agenda for improved disciplines to curb arbitrary use of these measures by developed countries (Soloway and Anishchenko 2001: 57).

¹¹⁹ For example, the U.S. Securities Industry Association, which initially endorsed MAI negotiations with a particular interest in injecting portfolio investment into the definition of investment, focused its attention to the Financial Services Talks in 1997 as the MAI proved

less threatening to NGOs and became two of the three victories of Hufbauer's open market forces versus backlash forces in the 1990s (Walter 2001: 67).¹²⁰ Other available channels to pursue new investment gains included the built-in agendas within the TRIMS Agreement and GATS for the revision of the implementation of these agreements and to launch new services talks in 2000 (Hoekman 2000: 120; Robertson 2000: 113). Similarly, WTO dispute settlement would provide another instrument where host countries could be forced to comply with their WTO obligations which included commitments on investment (Brewer and Young 2001: 145-51). Having said this, the preferred venues to push new WTO-plus rule-making in investment became bilateral and regional channels wherein the United States could flex its muscles to craft high standard provisions.

7.1.2. U.S. Bilateral Trade Agenda

After the successful ratification of NAFTA, the Clinton administration set an ambitious prospect for preferential agreements which created new opportunities for American TNCs to obtain significant investment clauses. NAFTA created a precedent

futile (Walter 2000: 56). As mentioned earlier the establishment of the Financial Leaders Group was demanded by the CSI to forge transatlantic business consensus over financial services talks at the WTO.

¹²⁰ The third victory according to Hufbauer was the conclusion of ITA negotiations at the Singapore ministerial (U.S. Congress 2000: 71).

for future negotiations as it proved to be a comprehensive accord with stringent rules on investment and intellectual property rights, but also with significant gains in market access (Hufbauer and Schott 1998: 133). It also evidenced the possibility of crafting an ambitious North-South FTA with undeniable benefits for all sides (Mayer 1998: 5). Following the ratification of NAFTA some developing countries such as Chile expressed their willingness to strike a similar deal with the United States (Schott 2001: 10). Thus, President Clinton launched new initiatives to negotiate NAFTA-like FTAs with countries in South America and Asia. In the Miami Summit of the Americas in December 1994, the Clinton administration initiated the process for a Free Trade Area of Americas (FTAA), which would become a comprehensive regional pact including 34 states in the Western hemisphere to be concluded no later than 2005 with an ambitious program for market access and WTO-plus rule-making (Hufbauer and Schott 1998: 127). An early harvest could be a free trade agreement (FTA) with Chile (Hufbauer and Schott 1998: 134). A second low hanging fruit in Latin America could be an FTA with Mercosur that would ensure earlier access to lucrative markets of Brazil and Argentina (Schott 2001: 11). On the other hand, Clinton targeted access to lucrative Asian markets through APEC. The United States hosted the APEC Economic Leaders Meeting in 1993 which was followed by the Bogor summit in 1994 that produced strong commitments to turn the Asia-Pacific region to an open trade and investment zone (Schott 2001: 14; Bergsten 1996: 265). This vision produced by U.S.

trade policy under the earlier Clinton administration was applauded by the business community which saw preferential access in trade and investments as a viable policy option.¹²¹

Nevertheless, the Clinton administration could not record meaningful progress in any of these initiatives owing to the difficulties that obscured its trade policy agenda. Successful campaigns launched by the backlash forces and successive failures to renew its fast track authority were illustrative of Clinton's inability to forge bipartisan consensus. According to Destler, with the exception of the Chinese accession to the WTO in 2001, the administration could only succeed in completing the initiatives previously set off such as the FTA with Jordan in October 2000 (Destler 2005: 237). The Republicans that came to power in 2001 became more successful in launching new trade initiatives at multiple venues, following the route of the previous Reagan and Bush administrations. USTR Robert Zoellick of the Bush administration codified the new trade strategy as "competitive liberalization" which entailed trade agreements with willing parties at different venues with a view to creating incentives for the third parties to engage in similar deals in order to gain preferential access to the U.S. market (Zoellick 2003). The competitive liberalization strategy helped to garner support from

¹²¹ For instance, CSI welcomed the conclusion of US-Chile FTA and its investment provisions such as national treatment for the establishment and operation of U.S. investors in the country, and it praised both Chilean and Singapore FTAs for large freedoms accorded for the transfers of capital (CSI 2002 and 2003).

both parties at Congress and helped the Bush administration get fast track power in 2002 (Destler 2005: 298-302). In tandem, the U.S. signed new FTAs with Chile, Singapore, Australia and Morocco parallel to the launch of the Doha Round (Destler 2005: 299-301). To reinvigorate the FTAA process, the U.S. also resumed 4 plus 1 talks with Mercosur in September 2001 (Schott 2001: 11). As outlined in the previous chapter the legal scope of most of the new American FTAs were more comprehensive than other existing deals with regard to breadth of WTO-plus provisions in investment.

Nevertheless, the devil in details should not go unnoticed. The standard of all new U.S. FTAs proved lower than Chapter 11 of NAFTA. This is a major outcome of another victory of the backlash forces recorded in the Trade Act of 2002 that renewed the fast track authority. The Chapter 11 disputes won by TNCs during the 1990s caused strong negative reaction in the United States on the side of environmentalist groups as well as some government agencies in charge of justice and environment who became concerned about investors' growing claims (Morin and Gagne 2007: 66).¹²² Environmentalist groups launched a campaign against the agreement arguing that NAFTA gave too much power to TNCs and limited the capabilities of

¹²² For example Metalclad, a U.S. company, sued the Mexican government which banned it from constructing a toxic-waste confinement plant on a field considered dangerous by public authorities. The arbitration case was won by the company (McIlroy 2001: 328; Chorev 2007: 64).

governments to take necessary measures to protect the environment. This resulted in the adoption of Notes of Interpretation by the NAFTA Free Trade Commission that limited the scope of “minimum treatment” for foreign investors in July 2001 (Morin and Gagne 2007: 66-7). On the other hand, the pressures on U.S. Congress to narrow the mandate of USTR on negotiating investor rights in the negotiation of future FTAs increased (Destler 2005: 262). Consequently, the U.S. legislators constrained the mandate of USTR in the Trade Act of 2002 to negotiate future agreements in a manner to ensure that those agreements would not grant “greater substantive rights” to foreign investors than U.S. companies enjoyed under U.S. law (Chorev 2007: 48; Morin and Gagne 2007: 66). Although U.S. FTAs contained higher standard investment provisions than other agreements in force, the scope of investment provisions in recent FTAs proved less comprehensive than those of NAFTA.¹²³

7.1.3. Further Transatlantic Divisions on Investment

Further evidence can be brought to support the argument that U.S. TNCs did not fully get on board with the ambitious European business vision for investment negotiations at the WTO. After the breakdown of the MAI negotiations European TNCs focused their efforts on building a transatlantic consensus over the agenda of the forthcoming

¹²³ For more on the content of investment provisions in recent U.S. FTAs in comparison to the European approach see South Center (2010).

round to set a broad mandate including negotiations in investment. The efforts took place in transatlantic business platforms, particularly in the Transatlantic Business Dialogue (TABD). TABD was founded in Seville, Spain in November 1995 to coordinate transatlantic economic policies with stronger and more systematic business inputs through transatlantic working groups and annual CEO conferences.¹²⁴ The EU-US Summit in May 1998 convened in London and produced a leaders' statement including an action plan put in force in November 1998 which contained both multilateral and bilateral issues (TABD 1998). In fact the London statement revealed the failure of the transatlantic leadership to reach a consensus, both in launching a new WTO round and in negotiating investment rules at the WTO. The London statement highlighted the necessity of cooperation in investment, competition, public procurement and environment issues with initiatives in an "appropriate multilateral fora" (TABD 1998: 19). This was a critical time for the MAI talks which were suspended for six months. However, the differences could not be resolved during 1998 as the TABD CEO Conference in November 1998 issued a statement noting a general support for "an ambitious and progressive agenda" for the WTO without

¹²⁴ The TABD CEO conferences held in Seville, Chicago (1996), Rome (1997), Charlotte (1998), Berlin (1999) and Cincinnati (2000) created a systematic mechanism to introduce European and American business perspectives to the leaders gathering in the annual EU-US summits. In the United States it is the European American Business Council (EABC) who coordinates American business representation, while in Europe UNICE (BusinessEurope) represents regional industries.

mentioning the initiation of a new round.¹²⁵ Obviously the Americans were not yet ready to completely abandon the MAI and left their European counterparts alone on their request for a broad ambitious round including investment (*Inside US Trade*: 13 November 1998). The Europeans could secure the American support for the new round before the Seattle Conference in late 1999.¹²⁶ The Berlin CEO Conference in October 1999 demonstrated the late-coming consensus over the new round that would aim to liberalize trade in services, industrial goods, and agriculture, and include negotiations in areas of government procurement, environment and trade facilitation (TABD 1999: 35). On investment, transatlantic business community only expressed their expectation for “pushing forward the process of developing [...] high standard rules” at the WTO (TABD 1999: 35).¹²⁷

¹²⁵ The TABD CEO Conference report noted the following: “Among the areas where collaboration will be important, the TABD will look for early progress on services, intellectual property rights, industrial tariffs *where supported by individual industries*, investment, trade facilitation, government procurement” (TABD 1998: 4 emphasis added).

¹²⁶ According to the Corporate Europe Observatory during the Commission’s investment consultation meetings with European corporate representatives before Seattle, Commission officials stressed that it was important to intensify informal contacts with U.S. business groups to secure American support at the WTO. European representatives expressed that there still existed some support within American business community regarding the initiation of investment talks in Seattle (minutes cited in CEO 2000: 8).

¹²⁷ The statement spelled out the rules to “enhance market access; provide state of the art treatment of investors, protection for their investments and redress for the settlement of disputes; and promote transparency, predictability and stability of national investment regimes” (TABD 1999: 35).

In fact, this was a more fragile business consensus than the two-track approach. After the collapse of the Seattle meeting, U.S. TNCs continued their lukewarm endorsement for potential investment negotiations as they became concerned about the possibility of crafting of a low standard WTO accord that would legally or politically sabotage higher standard provisions of U.S. bilateral agreements.¹²⁸ The Americans could only agree on the negotiations for a sub-set of investment rules that would be stepping stones to a more ambitious accord to be constructed in the long run. Thus, further transatlantic business deliberations led a general agreement around American conditions on pushing the WTO process to produce a minimum set of rules which would not create a challenge to U.S. bilateral standards. The CEO Conference in November 2000 recommended WTO members to agree “at minimum” on provisions “to promote transparency, predictability and stability of national rules and regulations governing investment, non-discrimination, and enforcement of existing Trade-Related Investment Measures (TRIMS) obligations” (TABD 2000). These rules would become “a basis for enhanced market access, protection from expropriation, and redress for the settlement of disputes” (TABD 2000; 2001: 12). This would mean a staged approach initially targeting an agreement on modalities during the

¹²⁸ Based on communication with a U.S. negotiator Corporate Europe Observatory suggests that a political threat perception for the Americans was the potential danger of a WTO investment accord “seducing” developing countries to move away from negotiating bilateral agreements with the United States. <http://archive.corporateeurope.org/mai/conquistadors.html#uscomm> accessed on November 25, 2010.

preparatory work, then negotiating minimum standards that would set the stage for new rules on further liberalization, protection and settlement of disputes in the longer term. Since the Doha Ministerial left the decision to launch the talks to the Cancun Conference, in 2002 TABD called for a ministerial consensus at Cancun on modalities for negotiations on this subset of rules (TABD 2002). This “point of departure” according to transatlantic CEOs would be the basis of a broader deal that was going to include market access, investment protection and dispute settlement (TABD 2002: 34). In fact, the consensus over a staged approach was a lower denominator than U.S. and European TNCs could agree upon. On the other hand, European TNCs continued calling for an ambitious Doha package that would go beyond this restricted agenda.

7.2. European Business Case for Investment at the Doha Round

Following the Seattle breakdown European TNCs maintained their multilateral vision for making new investment rules and kept supporting the European Commission on its Millennium Round initiative. However, their agenda-setting activities remained low-profile and concentrated on influencing the position of the European Commission through direct lobbying or via regional business bodies. In this regard, agenda-setting for investment contrasts with the high profile war of position of service industries before the Uruguay Round.

7.2.1. EU Trade Strategy and TNCs

The European Commission became a proactive supporter of broadening the WTO agenda both as a means to accomplish its Market Access Strategy initiated in 1996 and as a vehicle to expand its authority vis-à-vis member states. The Market Access Strategy under the leadership of Sir Leon Brittan adopted a “multilateralism first” approach and made the WTO the primary venue for market access and new rule-making (EC 1996; Pedler 2001: 165; Lamy 2002). The EC maintained a defensive position in recent GATT rounds because they were started by the U.S. initiative with a desire to dismantle trade distorting measures built by the Europeans –especially in the context of the Common Agriculture Policy (CAP) (Woolcock 2000: 392-3; Deutsch 2001: 40). The Europeans saw the WTO as an opportunity rather than a threat to better access to world markets. The campaign for the Millennium Round was illustrative of the new approach but also the EU’s desire for leadership in the multilateral trading system (Winters 2000: 28). This approach was wholeheartedly embraced by Commissioner Brittan as well as his successor Pascal Lamy (Lamy 2002). On the other hand, the ambitious agenda set for the new round was also an expression of the Commission’s desire to consolidate its authority in Common Commercial Policy vis-à-vis member states. As mentioned in the last chapter the competence in new issues was

shared between the Commission and member states although the Commission was the sole negotiator on behalf of the EU (Pedler 2001: 164-5). With the Treaty of Nice signed in 2001 and put in force in 2003, the Commission gained exclusive competence on services and IPR issues with certain exceptions where members continued to have veto power (Raza 2007: 76; Nugent 2003: 410). However, members maintained their right to conclude BITs. Since the Commission negotiates international trade agreements on behalf of member states multilateral negotiations on investment would *de facto* empower the Commission vis-à-vis member states (Raza 2007: 89). The Commission also included comprehensive investment rules especially on the pre-establishment phase to recently negotiated FTAs; however, these did not contain protection provisions which were of members' authority and used through BITs (Raza 2007: 89).

On the other hand, the European Commission preferred a broad package for the WTO to ensure a balanced outcome through a trade off of issues where some offensive gains could be secured in the bargaining process (Paemen 2000: 53-4). Especially sectoral negotiations in agriculture which were supposed to start in 2000 put the EU in a defensive position because of strong external pressure for concessions requiring

amendments to domestic programs.¹²⁹ The Europeans favoured an extended package of issues where give and take could take place in the context of a new round between areas of defensive interests where strong internal protectionist pressures existed such as agriculture, textiles and clothing, and cultural services, and the areas of offensive interest including services and manufacturing, Singapore issues, e-commerce, and environment (Paemen 2000; Deutsch 2001: 34, 38). Together with investment, competition and government procurement were also crucial to dismantle discriminatory regulations against European companies in emerging markets (Paemen 2000: 56-7). Hence, in the run-up to the Seattle Conference the European Commission sought the launch of the new round which would be negotiated under a single undertaking and would last no longer than 3 years (Deutsch 2001: 39). As it was revealed in a document prepared for the Article 113 Committee meeting in December 1998, the Commission sought a broad and general negotiation mandate from member states (EC 1998). The European Council gave a negotiation mandate to the Commission before the Seattle Ministerial -which covered market access in services, industrial products and agriculture, Singapore issues, environment and systemic issues (European Council 1999). The Europeans went to the Seattle and Doha summits with an authorization that contained a general mandate on investment. The Council decision stated:

¹²⁹ The Agreement on Agriculture had an in-built agenda to resume market access talks in this sector in 2000 (Josling 2000: 91).

The WTO should begin negotiations aiming at establishing a multilateral framework of rules governing international investment, with the objective of securing a stable and predictable climate for foreign direct investment worldwide. Such a framework should focus on foreign direct investment to the exclusion of short-term capital movements, and has to ensure the right conditions for international investment to be conducive to sustainable development, and preserve the ability of host countries to regulate the activity of investors on their respective territories, in accordance with basic WTO principles, also taking into account the concerns expressed by civil society, including those regarding investors' responsibilities. Negotiations should address the issues of access to investment opportunities and non-discrimination, protection of investment, and stable and transparent business climate (European Council 1999).

The Commission, however, needed to build internal as well as international support for its Millennium Round initiative. While internally it was essential to mobilize stakeholders with offensive interests, internationally it had to take on board the U.S., other Quad countries (Japan and Canada) and developing economies. To mobilize support for the new round Commission officials worked closely with European TNCs. To this aim, an Investment Network was established in the run-up to the Seattle summit comprised of around 50 European TNCs to consult on the investment priorities of the EU at the WTO (CEO 2002; Balanya *et al.* 2003: 135). In 1999 and 2000, the Commission sent questionnaires to European firms within this network in addition to commissioning surveys, which covered around 10000 firms on the

continent.¹³⁰ The results from the questionnaires were then systematically assessed in meetings with business representatives (IW 2003). Following the backlash at Seattle, Trade Commissioner Lamy systematically integrated European NGOs into the debate in an effort to get their feedback in constructing the EU's position for the round (Dur and Bievre 2007). In addition to an intensive transatlantic traffic to overcome major differences, the European Commission adopted a development-friendly discourse to build external as well as internal consensus (van Den Hoven 2004: 267-74).¹³¹ To launch the negotiations in Doha the EU needed to convince not only major economies such as India and Brazil but also LDCs and African countries who also became key players within the consensus-based decision-making structure. In the run-up to the Doha Ministerial, both the EU and U.S. embarked upon initiatives to expand their unilateral preference programs especially for LDCs (van Den Hoven 2004: 261-3).¹³² Another significant concession was the Doha Declaration on the TRIPS Agreement

¹³⁰ The survey that was commissioned to TN SOFRES and the Opacity Report, prepared by PriceWaterhouseCoopers, showed that the lack of transparency in domestic laws was the most significant barrier for a large majority of European companies (EU 2002a: 2).

¹³¹ *Bridges* reports that USTR's Charlene Barshefsky gave a press briefing in Seattle to appease protesters suggesting that the trade regime should have been placed upon sustainable development (*Bridges*: 1 December 1999).

¹³² The Commission launched the Everything But Arms initiative extending duty and free access for all LDC products except for armaments (<http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/everything-but-arms/> accessed on December 1, 2010). A similar gesture came from the U.S. government which committed to provide additional preferential access to African countries with the African Growth and Opportunity Act initiative that was put into force in May 2000 (<http://www.agoa.gov/> accessed on December 1, 2010).

and Public Health which was crafted during the Doha conference (WTO 2001e; Odel and Sell 2006: 105-7).

7.2.2. European business agenda for investment

In contrast to the staged approach agreed with Americans in the TABD meetings, European TNCs formulated an ambitious set of proposals for an investment framework at the WTO. Business opinions were formulated and promoted mainly by UNICE with strong support of service industries organized under ESF and with an implicit endorsement of ERT. It has generally been argued that the trade policy-making was relatively isolated from domestic pressures compared to the United States (Meunier 2005: 8). In contrast to the American case, European trade policies were made with a minimum legislative intervention at the European level since the European Parliament had limited authorities to influence the negotiation mandates and to monitor the talks, and it was not empowered to ratify the final agreement (Meunier and Nicolaidis 1999). Nevertheless, European commercial policies generally reflected “concentrated” interests of sectoral and societal stakeholders organised at the EU level (Dur 2008: 38). Cowles (2001: 160) argues for the “Europeanization of business-government relations” from the mid-1990s on. In addition to the creation of ESF, with the encouragement of Commissioner Brittan, large European firms engaged

more intensively with the European Commission through direct lobbying and other channels. Cowles (2001: 163) postulates that with the creation of TABD large European TNCs became “the primary interlocutors and partners with the European Commission.” Similarly, Dur posits that the EU position in the Doha Round reflected the economic group interests owing to “excellent access to decision-makers” (Dur 2008: 38). In this vein, before the Seattle summit, European TNCs informed the Commission through the Investment Network meetings about their desire for a comprehensive accord that would deal with discriminatory and unstable law and practices. They opposed the creation of binding commitments for labour and environment standards.¹³³ While the Commission took these demands into account and sought to secure a broad mandate to negotiate “high-quality” investment rules, it framed its proposals at the WTO in a development-friendly fashion. As outlined in the previous chapter, the Commission continued and even strengthened its emphasis on a GATS-type entry level instrument with a positive list approach considering the mounting challenges at the WTO. Although it pressed the Commission to get an ambitious outcome UNICE’s statements also underscored developmental aspects of the proposed framework. This point will be discussed later.

¹³³ This information derives from the Investment Network’s minutes of meetings accessed and cited by the Corporate Europe Observatory (CEO 2000: 6-7).

The Doha decision not to launch talks in investment was disappointing for European businesses (UNICE and ESF 2001). Yet, this did not turn investment to a low priority issue for UNICE (UNICE 1999).¹³⁴ UNICE reiterated the need for equal and fair treatment to all investors through promoting similar investment terms everywhere by improving the existing system of numerous bilateral investment treaties (UNICE 2003b: 7). The multilateral framework was needed to “codify”, “safeguard” and “multilateralize” existing rules in bilateral and regional accords and to “upgrade” them (UNICE 2003a). UNICE’s proposed WTO framework contained four key elements (UNICE 2003a, UNICE 2003b: 7): (1) a broad definition, (2) principles such as transparency and non-discrimination, (3) market access provisions, and (4) investment protection and dispute settlement arrangements.

Within this four-pillar package, however, UNICE prioritized especially the principles and market access elements (UNICE 2003a: 6). UNICE was concerned about ongoing obstacles to invest abroad in relation to discriminatory rules and standards, but also

¹³⁴ After the Seattle summit, UNICE pronounced that it would support a WTO round if it included negotiations on investment (UNICE 1999). Before the Cancun Ministerial UNICE (UNICE 2003a: 1) reiterated the importance of putting investment issue among four high priority areas within the round along with market access, trade facilitation and services liberalization. UNICE also secured Keidanren’s and ICC’s backing for an ambitious outcome from Doha on investment (See for example: UNICE and Keidanren 2003, and ICC 2003a). In fact, ICC took a position on investment close to the European businesses rather than the Americans. It created a Commission on International Trade and Investment initially chaired by Arthur Dunkel, former director-general of the GATT (1980-93), to produce recommendations on various WTO issues (Balanya *et al.* 2003:138).

domestic monopolies which had a reputation of effectively hampering market access (UNICE 2000). Parallel to the Commission's positions UNICE recommended the WTO framework to go beyond bilateral and regional investment agreements which concentrated on post-establishment issues, and to contain a general MFN provision for investments in both pre- and post-establishment phases coupled with national treatment to all investments already in operation (UNICE 2003a: 4). UNICE favoured a negative list approach in contrast to the Commission's proposal, and the Doha mandate for a "GATS-type, positive list approach" which was believed to be "too cautious" (UNICE 2003a: 4-5). At a minimum, however, UNICE called for a framework containing commitments of "stand-still" and "roll-back" in order to lock in current level of openness and to prevent the creation of new exceptions to the agreement in the future (UNICE 2003a: 5).

On investor protection UNICE preferred an accord that would include clear provisions against "expropriation, nationalisation or any other measure with similar effect" but also against "creeping expropriation" which was government acts causing the erosion of the original business conditions under which the investment decision had been made (UNICE 2003a: 5). UNICE noted that it would monitor future negotiations in this track to ensure that the framework would "add value" to existing system of protection by acknowledging and "safeguarding" bilateral rules (UNICE

2003a: 5-6, UNICE 2003b: 7). In other words, the multilateral accord should have locked in standards of protection but also it would be tied to dispute settlement opportunities existing in bilateral treaties (UNICE 2003a: 5). Although in its public statements the Commission ruled out investor-state dispute settlement procedures from a WTO framework, UNICE also requested that the framework be formally linked to investor-to-state dispute settlement procedures in BITs (such as ICSID, UNCITRAL or ICC arbitration), and argued for the creation of a similar mechanism within the WTO in the long run (UNICE 2003a). In sum, the European business case on the potential WTO accord evolved into a more encompassing instrument instead of a framework of sub-set of rules envisioned and agreed on in transatlantic business bodies, and previously suggested in ERT reports.

7.3. WTO Negotiations and the Cancun Failure

In addition to their incapability for building a coherent business case and coalition to support a multilateral accord at the WTO, European TNCs were also not able to generate consent on their case in the WTO negotiations. In fact, their case for a WTO investment regime faced mounting resistance between the launching of the Doha talks until the failure of Cancun summit in September 2003. The opponents maintained their resistance to the inclusion of investment to the Doha negotiation package and the

WTO legal framework by producing counter arguments to de-legitimize the business case and through expanding their coalition among member states. The impasse in agriculture strengthened their resistance by triggering the rise of new Southern alliances unwilling to concede on the Singapore issues unless progress was recorded in agriculture. Furthermore, the mobilisation of a cross-border counter-movement of NGOs and their successful war of position towards influencing the WTO agenda constrained the European offensive by pushing the LDCs and African states to revisit their interests on the Singapore issues and turn adamantly against investment.

7.3.1. Investment Deliberations at the WTO

Following the new mandate given in Doha, the WGTI continued its work until the Cancun Ministerial in September 2003 under the chairmanship of de Seixas Correa, Ambassador of Brazil. The analytical work included the examination of development provisions, scope and definition, transparency, non-discrimination, modalities for pre-establishment commitments based on a GATS-type, positive list approach, and other issues listed in paragraph 22 of the Doha Ministerial Declaration.

During the debates in the WGTI, the EU stood as the most ambitious proponent of a framework agreement which would be built upon the GATS model. According to the

EU “the GATS [was] probably one of the most ‘development-friendly’ agreements in the WTO system” (EU 2002e: 3). The framework would eventually include measures to ensure predictability and transparency as well as provisions for non-discrimination. As a bottom line, the EU called for a future accord that would ensure predictability and transparency which were of utmost significance to investors’ decisions (EU 2002a). Implementation of transparency provisions would be supported by guarantees of technical assistance to developing countries. The framework would extend the non-discrimination principle in the GATS from investment in services to other sectors (EU 2002c and 2002d). Hence, MFN treatment would become a general obligation for both pre-admission and post-establishment phases. For national treatment, the EU proposed a two-tier approach different from the GATS. This was reflective of a broad definition of investment as demanded by European businesses which would include “all current and capital transfers” to the extent they were “related to established investments” and “investments covered by the countries’ sectoral list of commitments” (EU 2002g: 4-5).¹³⁵ The EU suggested a basic definition (FDI) for the admission phase, but a broader definition for “the protection of established investment” (EU 2002b: 5). In this context, national treatment would become a specific obligation for the pre-admission phase in association with market access commitments covering only FDI but a general obligation for the post-establishment

¹³⁵ The U.S. reiterated its preference for the inclusion of portfolio investments to any possible multilateral framework of investment (US 2002).

phase covering FDI and other forms of capital. On the other hand, the agreement would liberalise investment flows through a positive-list approach incorporating “enough flexibility to allow a gradual and progressive liberalisation of FDI, fully compatible with any development strategy adopted by WTO members.” (EU 2002c: 4). With stronger acknowledgement of the need for policy space by the developing countries, the EU also introduced the notion of “flexibility for development” (EU 2002e). In this vein, the members could enjoy flexibilities through general or sector and country specific exceptions and derogations to MFN and NT rules.¹³⁶ Admitting to the possible negative impacts of FDI on the balance of payments, the EU also suggested certain “safeguard” provisions to be incorporated into the framework “although within well-defined and internationally accepted criteria” (EU 2002g: 2-5). Finally, the EU proposed the extension of the WTO’s Dispute Settlement Mechanism to investment (EU 2002f: 3 also Japan 1997: 5).

On the other hand, the opponents challenged the views generated by the proponents by reaffirming their position and producing new reasons to prove the lack of substantial basis to start negotiations. India continued to lead the opposition with the most detailed submissions. It also garnered support from African nations such as

¹³⁶ Other suggested flexibility provisions contained “lower levels of commitments; asymmetrical phased implementation timetables; exceptions from obligations in certain areas; flexibility in the application of –and adherence to- disciplines” (EU 2002e: 7).

Zambia, Tanzania, and Kenya as well as Malaysia, Sri Lanka and some Caribbean countries. India was critical of a GATS-type approach that would incorporate investment to the trade regime. It suggested that “inclusion of commercial presence under GATS [...] does not, in any way, justify the inclusion of ‘investment’ under ‘goods’ in the WTO” (India 2002b). India contended that trade norms were not applicable to the flows of capital since the definition of investment within the GATS was an “enterprise-based” definition, i.e. bringing the service provider and consumer in contact as a mode of service delivery (India 2002b). National treatment was arguably a requirement in all binding international instruments and solely applied in the post-establishment phase; however, the GATS did not have a notion of “pre-establishment national treatment” (India 2002c). Discrimination was necessary among different kinds of investment because of the mobility of foreign investment compared to domestic investment (India 2002b). India also challenged the applicability of trade norms from a theoretical point of view by arguing that such logic would have worked and benefited both host and home countries only if perfect economic conditions existed in the world market (India 2002a).¹³⁷ Moreover, India questioned why trade

¹³⁷ India indicated that because domestic distortions and/or market failures which prevailed domestic economies, an application of the global capital efficient markets paradigm was wrong and any assumption that it necessarily had a welfare improving impact on financial liberalisation was false. In an imperfect world developing countries needed adequate flexibility to regulate FDI to ensure its benefits to growth and development. While necessary flexibility was ensured with BITs, a potential future MFI would not guarantee increase of FDI inflows in addition to the loss of policy space (India 2000 and 2002a).

norms were proposed for the movement of capital but not labour (India 2000 and 2002a). Regarding transparency, India reiterated the opponents' preference for BITs and their support for the view that FDI flows depended on many factors (India 2000). Finally, the opponents suggested opening the debate on the responsibilities of foreign investors. To this aim, a joint proposal was submitted by China, Cuba, India, Kenya, Pakistan and Zimbabwe on the obligations of investors and home governments calling for a discussion on a "binding code of conduct" which could be enforced by home countries (China et al. 2002). China's sponsorship was surprising since it had not taken a clear position against investment in the previous debates (Smythe 2004: 22).

In this context, there was no convergence of positions between the demandeurs and the opponents. In tandem with the discussions in the WGTI, the preparations started for the Cancun Ministerial Conference. The First draft ministerial declaration was issued two month before Cancun on 18 July 2003 (WTO 2003a). Parallel to laborious talks it was revised one week before the conference on 24 August 2003 (WTO 2003b). The text contained two options for investment. One option suggested launching negotiations to lay down the modalities of the framework and the other indicated the lack of consensus to start the talks. The negotiations, if started, would cover basic elements of the framework. These included: scope and definition; transparency; non-

discrimination, i.e. MFN and NT with limited exceptions; pre-establishment commitments based on a GATS-type, positive list approach that would include exceptions and balance of payments safeguards. Furthermore, the framework also included provisions to settle disputes between members; special and differential treatment measures which covered a set of flexibilities for transparency obligations and commitments on MFN and NT as well as transition periods “as necessary.” The framework contained rules clarifying its relationship with other WTO agreements as well as existing bilateral and regional accords. In a manner demonstrative of the division between the proponents and hardliners, the text suggested two alternatives for the scope and definition of investment which referred to “long-term cross-border investment, particularly FDI” and “Foreign Direct Investment.” The draft made reference to the Doha statement that the framework would take into account interests of host and home countries in a balanced manner, as well as development policies, objectives and the right of host governments “to regulate in the public interest.” The draft modalities for the framework would be made ready by 30 June 2004.

The revised draft text was released by the Conference chairman on the third day of the Cancun Conference, 13 September 2003 (WTO 2003c). The text mandated the initiation of the talks in government procurement and trade facilitation but not in competition. The text contained a conditional mandate for investment. It envisaged

the Members firstly “intensify the clarification process” and then work “to elaborate procedural and substantive modalities.” The work continued under a new Working Group in Special Session and produced “modalities that would allow negotiations on a multilateral investment framework to start.” The negotiations were launched after the adoption of the modalities text by the General Council, and would continue until a future date to be determined. This future date was tied with other chapters of the Doha round and would overlap with the deadline of the modalities negotiations in agriculture and market access in non-agricultural products. Nevertheless, the negotiations over the text did not produce a consensus and the Conference was closed with no decision.

7.3.2. Anti-Investment NGO Campaign

Concurrent with the debates in the WTO Working Group, the policy debate continued outside the negotiation rooms with a proactive NGO participation. In his essay on the Cancun breakdown, Jagdish Bhagwati (2004) argued that NGOs pressed harder for their case against investment negotiations than the lobbies of European and Japanese businesses. Indeed NGOs became influential in setting the WTO agenda before and after Seattle by organizing public campaigns against the Millennium Round and on specific WTO issues such as sustainable development, GATS negotiations, and access

to medicines as well as investment. NGOs' active interest and involvement in the WTO agenda pushed negotiating governments and business groups to adjust their strategies by taking into account NGO inputs, reactions, and actions in one way or another. The NGO activism on investment was triggered on the eve of Seattle as the issue was put on the agenda of the WTO for the proposed round. Before the Conference, a number of NGOs built a loose transnational coalition upon previous networks established during the anti-MAI campaign with the goal of opposing the negotiations of MAI-like investment rules at the WTO as they called it "MAI shell game" in a jointly signed public letter (Smythe 1999). Although the European Commission tried to incorporate NGOs' inputs into its own agenda-setting process before the summit, it could not manage the process in a transparent way to gain their confidence.¹³⁸

Following the Seattle Conference the European Commission embarked upon a Civil Society Dialogue in order to incorporate NGOs into the policy debate (Dur and Bievre: 2007). Nonetheless, it could not prevent the rise of a pan-European network organized

¹³⁸ For instance in January 1999, the Commission circulated a revised version of the above-mentioned position paper it submitted to the 113 Committee in December 1998 to NGOs (EC 1998, 1999). The revised draft lacked some points in the formal submission which dubbed controversial elements of the MAI, and included supplementary language on environment and development (EC 1999). According to Balanya *et al.*, the Commission officials responded to the criticisms stating that "especially on investment, the ideas are moving very fast." (Notes on EC-NGO dialogue meeting, Brussels 28 January 1999 cited in Balanya *et al.* 2003: 135, 243)

against its Millennium Round initiative. A pan-European network called “Seattle to Brussels” was created by 99 NGOs from 19 European countries that sent an open letter to Trade Commissioner Pascal Lamy in May 2001 strongly criticizing the Commission for prioritizing the interests of TNCs rather than farmers, small scale producers and other stakeholders; and for the nontransparent and exclusive nature of public consultations.¹³⁹ The NGOs requested the Commission to halt its initiative for the new round particularly opposing the inclusion of competition and investment issues.¹⁴⁰ The Doha compromise did not mitigate NGO activism which continued with a focus to prevent a decision launching investment negotiations in Cancun.

NGOs worked as a counter-hegemonic force critical of the very foundations of the neoliberal normative framework by effectively challenging the legitimate basis of the case for a WTO accord on investment. As Reich (2010: 2-3; 57) puts forward, NGOs have poorer resources compared to TNCs and OECD governments but they have a moral advantage, i.e. the ability to legitimize or de-legitimize policies and policy proposals. Premised upon the normative case that underpinned the anti-MAI campaign the NGOs particularly challenged the proposed constitutional framework

¹³⁹The letter is publicly available on <http://www.twinside.org.sg/title/lamy2.htm> accessed on December 12, 2010.

¹⁴⁰ The letter employed a threatening language stating: “The concerns of developing countries need to be taken into consideration. If not, the next WTO Ministerial in Qatar could turn out to be another Seattle.” *Ibid.*

which would further empower market forces at the expense of the states. The WTO agreement was perceived as a global accord that granted new rights to TNCs without addressing their responsibilities. To exemplify this point, in September 2002 ninety-nine European NGOs issued a joint statement asking the EU to withdraw its proposals that would restrict “governments’ right to regulate public interest” and instead suggested to the EU to address the lack of enforceable multilateral rules governing the behaviour of TNCs within the United Nations (S2B Network 2002; Murphy 2007: 12). A particular description of this authority shift according to NGOs was potential erosion of the policy space of developing countries and the creation of new disciplines which would constrain the use of autonomous instruments in serving poverty reduction and sustainable development (Murphy 2007: 10-11). This was a valid argument also raised by opposing governments as discussed before. The argument challenged the legitimacy of the case for investment which was framed in a development-friendly fashion to fit into the development discourse underpinning the Doha Round. The NGO challenge from 1998 on pushed the proponents (including TNCs) to craft more convincing arguments to emphasise that the WTO agreement on investment would not undermine the goals of development.

To craft the case as an instrument for economic development, the European Commission not only emphasized the flexibilities of the proposed accord with its

GATS-based model but also named it a “multilateral Investment for Development Framework” (EU 2003). Similarly, UNICE underscored the idea that FDI is a vehicle for sustainable development, and pronounced its conviction that the WTO accord would “provide an important framework to maximise the opportunities and benefits of international investment” (UNICE 2003b: 7), UNICE 2003a: 6). FDI would arguably allow developing countries to address their development concerns within the proposed framework through safeguarding “the rights of governments to determine appropriate policies in the public interest” (UNICE 2003b: 7).¹⁴¹ According to UNICE the framework would allow “opt-outs” or “exceptions” as well as specific time frames for full compliance of developing countries to the agreement (UNICE 2003a: 2). Moreover, the Corporate Europe Observatory claims that with lessons from the MAI in mind European TNCs also refrained from directly opposing potential social and environmental clauses in the framework as a tactic to get the NGO support (CEO 1999). Along these lines, UNICE publicly pronounced that

¹⁴¹ UNICE and ESF also signed on a Joint Business Charter for Cancun with business bodies in Africa and South America emphasizing mutual desire to overcome disagreements in Cancun with an agreement to launch negotiations in investment “without prejudice to the eventual outcome.” The statement was signed by UNICE, ESF, Keidanren, PanAfrican Confederation of Employers (PEC), Australian Services Roundtable, Australian Chamber of Commerce and Industry, National Confederation of Industry (CNI) of Brazil, Production and Commerce Confederation (CPC) of Chile, Mexican Confederation of Employers – COPARMEX, and Confederation Generale des Entreprises du Maroc (CGEM) of Morocco (UNICE *et al.* 2003).

A multilateral framework on investment should not limit a government's right to regulate nor encroach on areas of policy such as labour or environmental standards which are being dealt with on their own merits in appropriate fora (UNICE 2003a: 5).

A more specific concern of opponents and NGOs was that a WTO accord would delegitimize effective tools to deal with speculative capital flows as experienced in the 1997 Asian crisis. In fact, after Seattle UNICE had to push back on the framework it proposed, as it no longer promoted a broad definition including portfolio investments or short-term capital flows although it suggested to keep the scope as broad as possible (UNICE 2003b: 7).¹⁴² As outlined above, the Commission avoided including portfolio investment in its submissions while insisting on a broad scope for investment. UNICE was also receptive to the opponents' argument that there was no automatic relationship between FDI and economic growth. UNICE stated that "[r]esearch and experience indicate that increased inward investment flows can help promote development, *if the appropriate framework is in place.*" (UNICE 2003a: 2 emphasis added). The WTO investment framework would bring about an "enabling environment" and an "appropriate legal framework" and thus it could "help a country attract FDI" (UNICE 2003a: 6). It would "encourage a favourable investment climate" and support "[a]ppropriate domestic policies and pro-competitive reforms"

¹⁴² Moreover, UNICE was also receptive to the idea of incorporating certain protective measures to the proposed framework in the form of balance of payments safeguards to be employed only "in cases of severe monetary emergencies" on a non-discriminatory and temporary basis (UNICE 2003a: 3).

which were “key to attracting FDI” (UNICE 2003b: 7). This view was again challenged by the hardliners and by NGOs that cited academic literature and studies produced by the World Bank and UNCTAD in their statements and publications.¹⁴³ As argued by NGOs, governments could liberalize their investment regimes either unilaterally or bilaterally without a multilateral accord and with broader flexibilities to re-regulate in case the policies they adopted did not fulfil the goals.¹⁴⁴ There is no doubt that NGOs became more influential than TNCs in setting the WTO’s investment agenda both by de-legitimizing the proposed case from a normative point of view and by producing, disseminating, and channelling research and analysis challenging the arguments for a framework agreement on investment.

7.3.3. Cancun endgame

In addition to the NGO factor, the fate of investment at the WTO was also determined by the broader negotiation dynamics. The emergence of new coalitions among developing countries and the impasse in agriculture had direct impact on the talks in investment before and during the Cancun Conference. In fact, agriculture proved to

¹⁴³ For example, a briefing by the World Development Movement and Friends of the Earth (2003: 7-8) put together empirical proof supporting the argument that investment rules in BITs and GATS did not result in an automatic increase in FDI flows. Akin to the arguments of the hardliners, it was noted with evidence that the key determinants of FDI flows to the poorest countries are economic and infrastructural.

¹⁴⁴ For instance see World Development Movement and Friends of the Earth 2003 p.19.

be the hardest nut to crack in the Doha package. The negotiations after the deal in Doha proved highly controversial because of disagreements especially between the EU and the Cairns Group -the coalition of large exporters of agricultural products. The EU was under pressure to further reform its domestic farm programs. It could only partially succeed in improvements to the CAP with radical, albeit late-coming, steps taken under the leadership of European Commissioner for Agriculture, Franz Fischler, in 2003 (van Den Hoven 2004: 267-74). While the EU, as a conventional user of domestic subsidies was under the spotlight, it was joined by the United States in 2002. The U.S. Farm Bill in 2002 became critical to the WTO talks as the Americans with new domestic subsidies put in force by Congress distanced from the liberals league led by the Cairns Group and somehow joined with the EU and other conservative players (Narlikar 2003: 189; Narlikar and Tussie 2004: 962; Destler 2005: 250). The U.S.-EU joint proposal in agriculture right before the Cancun Ministerial created a burst of anger on the side of the Cairns Group as well as many other developing countries as it was perceived to set serious limits on the reform agenda and prospective liberalization. Neither the U.S. nor the EU could prevent the emergence and consolidation of a block of developing countries comprised of China, Brazil, India and others calling for radical cuts for trade distorting subsidies globally. These countries formed the Group of 22 before Cancun (*Bridges*: 10 September 2003; Narlikar and Tussie 2004: 949-50). This group was joined by a Group of 33 which

requested special treatment for their sensitive products to protect their sensitive sectors from the surge of subsidized Western products. Finally, a group of four African cotton producers launched the Cotton initiative with a call for the global elimination of subsidies in this sector immediately (*Bridges*: 10 September 2003; Narlikar and Wilkinson 2004: 456-7).¹⁴⁵

Growing tensions over agriculture and harsh debates on the Singapore issues would open new cracks in the fragile transatlantic business consensus. U.S. business bodies continued their preference over a staged approach before and after the Doha Conference. A USCIB letter to Assistant USTR Joseph Papovich in October 2001¹⁴⁶ and U.S. National Free Trade Council's recommendations for the Doha Round¹⁴⁷ confirm

¹⁴⁵ The cotton initiative of Benin, Burkina Faso, Mali and Chad was also launched with dedicated NGO support. The leading NGO has been the Ideas Centre in Geneva, Switzerland. <http://www.ideascentre.ch/cotton.html> accessed on November 11, 2010.

¹⁴⁶ The USCIB letter recommended "a 'staged' approach, whereby elements common to the WTO – transparency, national treatment (after entry) and TRIMs enforcement – would be negotiated in the first phase." It qualified the following rules as "more difficult" and to be handled "in a second stage of negotiations": national treatment on entry, expropriation, dispute settlement, and transfers of profits. <http://www.uscib.org/index.asp?documentID=1856> accessed on November 15, 2010.

¹⁴⁷ The NFTC report, "Vision 2005: Free Trade and Beyond: Recommendations for the Doha Development Agenda," recommended the WTO to concentrate on "a subset of issues where consensus on a high standard can be reached" spelling "transparency, national treatment, and the right of establishment." The NFTC also advised the improvement and effective implementation of existing WTO rules on investment such as the TRIMs Agreement (NFTC 2002: 22).

this persistent stance.¹⁴⁸ In the run-up to the Cancun Conference, this lukewarm support to the investment talks at the WTO started to disappear. Mounting concerns to save the Doha Round with significant market access gains pushed any remaining U.S. business demands for investment to the backburner. Joint statements that brought together transatlantic businesses as well as others called for a successful Ministerial towards concluding the Doha Round and highlighted the importance of market access chapters of the round (ERT and BRT 2003; ICC 2003b). In May 2003, U.S. Business Round Table argued against a pre-mature push for negotiations in investment that would not ensure a high level of protection, and cautioned that investment could undermine the progress in other issues in the Doha Round (BRT 2003).

Concomitantly, the hardliners in Geneva ensured the expansion of their coalition parallel to the controversies over farming. As discussed in the previous chapter, from 1996 to 2001 India gathered support of a group of countries such as Pakistan, Egypt, Morocco, and Cuba in its opposition to the inclusion of investment to the new round. Although these countries succeeded in avoiding the start of the talks in Doha, they could not succeed in preventing the continuation of the WTO work in the Singapore

¹⁴⁸ Showing the embracement of the U.S. business approach by the government, USTR's Papovich proclaimed that the U.S. endorsed the elements in investment negotiations such as transparency and non-discrimination but it would prefer more difficult issues such as expropriation to be left to later negotiations (*International Trade Daily* June 20 2002).

issues. Key developing countries such as China and Brazil remained on the fence about watching the progress in other chapters of the Round. However, the game turned from a battle between the demandeurs and opponents to a broader conflict as LDCs and the African Group countries that coalesced around a G-90 gradually joined the ranks of opponents in Cancun (Narlikar and Wilkinson 2004: 457). The hardliners also ensured the support of some G-22 members such as China.

At an earlier stage during the Cancun Conference, a group of ACP and LDC countries sent a letter to Minister for International Trade of Canada Pierre Pettigrew who was appointed as the facilitator to the Singapore issues working group indicating that there was no consensus to launch the talks in any of the four issues (*Bridges*: 14 September 2003). As the tension increased in agriculture, the opposition camp extended its reach with the declaration of a group of countries including China, India, Malaysia, Nigeria and Bangladesh as well as India stating that there was no explicit consensus to start negotiations in investment and the other three issues (*Bridges*: 12 September 2003). On the other hand, some other countries took a more moderate position such as Morocco, which implied its support for these topics in tandem with some Latin American countries' endorsement which was contingent upon progress to be recorded in other areas (*Bridges*: 12 September 2003). In this heated atmosphere, the Americans proposed the "unbundling" of the four issues and starting talks only in

government procurement and trade facilitation (*Bridges*: 13 September 2003). Meanwhile India, this time joined by 70 countries, repeated the lack of a mature basis to launch the talks, and the European camp started to break down. Reportedly, Sweden, the Netherlands, Belgium and Ireland expressed that investment was no longer a national priority (*Bridges*: 13 September 2003). The revised draft text released by the Conference chairman (WTO 2003c) attracted a strong reaction from the EU as it left investment out of the package for which the talks would immediately start (*Bridges*: 14 September 2003). The text was also unsatisfactory for India which was critical of the lack of the wording of “explicit consensus” for a potential future decision to initiate negotiations in investment as well as for NGOs some of which found it “scandalous” (*Bridges*: 14 September 2003). Green room consultations continued until the last day, during which the EU had to come to terms with the unbundling of the Singapore topics by accepting to leave competition and investment out of the round (*Bridges*: 15 September 2003). However, this eleventh hour move did not save the conference. The proposal was acceptable neither for Korea and Japan who insisted on opening the talks in all four issues, nor for India and other opponents including the African Union who opposed all topics (*Bridges*: 15 September 2003). Consequently, the Conference Chair Mexican Foreign Minister Luis Ernesto Derbez adjourned the summit without releasing a consensus declaration.

The failure in Cancun resulted in the interruption of the Doha Round for months until a General Council Decision was taken in July 2004. In the meantime, efforts continued out of the WTO to re-launch the round, which made it clear that there were no convergence of minds on the three Singapore issues including investment. Only on trade facilitation, a topic in which almost all member countries had some stake, there was some desire to initiate negotiations. The “July package” (WTO 2004) dropped investment, competition and government procurement from the agenda with a statement noting that these issues “will not form part of the Work Programme set out in [the Doha] Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.”

7.4. Transatlantic Business Preference and Strategies in the Context of Neoliberal Hegemony

In contrast to the business campaigns for services and IPR before and during the Uruguay Round, transatlantic business preferences and strategies were crafted within the context of contested neoliberal hegemony. The transformation of the trade regime and the rise of a regulatory trade agenda drew a wide set of civil society actors into the policy debates at domestic and transnational levels in the 1990s who challenged business strategies towards further de-authorization of the states vis-à-vis market

forces. Similarly, developing countries proactively challenged the regulatory trade agenda with rising concerns on Uruguay Round accords and with an outspoken emphasis on the negative impacts of the suggested market integration program for their economic development. This context shaped TNC trade preferences and strategies and constrained the formation of a collective business formula on the content of a potential constitution for investment rules and the venue of negotiations while inducing TNCs to act as pragmatic “venue-shoppers.”¹⁴⁹ Both at the OECD and WTO, the intergovernmental talks were highly politicized with an unprecedented level of NGO mobilization challenging the investment case from normative and empirical grounds. Business strategies to further transform the trade regime through the incorporation of investment rules can be contrasted with the services case in a number of ways, especially illustrating the role of hegemonic context in determining transatlantic business strategies.

Lack of a Cohesive transatlantic business coalition and Policy network

Unable to produce a shared vision, transatlantic TNCs failed to build up a strong transnational business coalition around a collective case for investment as in the

¹⁴⁹ Similar to U.S. business preference for bilateralism, European TNCs also called for preferential agreements for investment after the failure in Cancun. See UNICE statements UNICE (2003c) and 2006.

services and IPRs campaigns. While there emerged a strong transatlantic TNC mobilization for the Doha Round in general, collective business pressure was stronger for the market access elements in the negotiation package. The mounting domestic opposition to the free trade agenda in the United States was one factor shaping U.S. business preferences and weakening a potential transatlantic business coalition for a comprehensive investment program at the WTO. While Europeans assured, albeit lukewarm, support from Americans for a subset of issues in their investment project, the political tension on the Singapore issues escalated before Cancun led further erosion of the American endorsement. Availability of bilateral and regional options upon the NAFTA model became another divisive factor. As shown above American TNCs opted for bilateral and regional channels to achieve high standard rules to restrain government intervention to business activities. Both Clinton and Bush administrations were willing to launch new NAFTA-like initiatives with a heightened bargaining power in bilateral setting than at the WTO. The American competitive liberalization strategy would also ensure bipartisan support.

European TNCs, especially after Seattle Conference, remained low-profile in their promotion of the investment issue as it became highly politicized with the involvement of a wide range of civil society actors already mobilized against the MAI. After investment was pushed onto the WTO agenda it was closely monitored by

NGOs who set off a counter-campaign. Against this background, European TNCs did not create a transnational policy network for investment per se either in the form of an epistemic community as in the GATS case, or a narrower business-government network as in the TRIPs case. It was NGOs rather than TNCs who actively led the policy debate over investment which took place within a broader setting compared to the IPR and services cases with active participation from civil society. In this context, the investment case was not projected by the strategic leadership of certain business executives who could have worked to build up a transatlantic business coalition or network.

Difficulties in setting trade agendas as NGOs enter the stage

In a context where the gap between social masses and political leadership was broadened, confidence towards politics, politicians and democratic accountability of neoliberal institutions were eroded, NGOs became influential elements of trade policy-making and agenda-setting on bothsides of the Atlantic. This is evident in the cases of the fast-track debates in the United States as well as in the MAI and Seattle deadlocks. On these occasions, NGOs became high-profile players capable of activating political and social stakeholders across borders. Consequently, the investment agenda of the WTO was set not solely by negotiating governments and

business inputs but also by NGOs. Analysts point out that the agenda-setting ability of NGOs rests in their strategic use of ideas and available political opportunities as seen in the cases of TRIPS and GATS campaigns (Sell and Prakash 2004; Murphy 2007: 10).

The TRIPS and GATS cases were constructed by TNCs which constituted founding elements of an emerging historic bloc that produced the neoliberal hegemony as a policy formulation in response to the crisis emerged in the 1970s. These cases were formulated within a normative framework of free trade and neoliberalism to solve a set of problems including the competitiveness and trade deficits of the United States, systemic problems of the GATT, and economic growth problems. Similarly, NGOs succeeded in engaging in agenda-setting in the investment case as well as other cases at the WTO such as the access to medicines campaign through defining a policy problem and a solution in line with the interests of governments within a new moral and normative framework associated with “sustainable development” (Murphy 2007: 10).¹⁵⁰ The anti-investment campaigners promoted a case based on the problems created by NAFTA and warned against potential risks of an investment treaty for

¹⁵⁰ In fact, the Doha Ministerial Declaration on the TRIPs Agreement and Public Health was the outcome of a successful initiative launched by NGOs such as Health Action International, Medecins Sans Frontieres, Third World Network who joined forces for facilitating the legal access of LDCs to generic drugs. (Sell and Prakash 2004; Odell and Sell 2006: 92-8).

developing countries which would arguably legally empower TNCs and narrow the policy space of governments for development (Murphy 2007: 11, 15). The solution offered was the prevention of the launch of investment talks at the WTO.

Negotiation dynamics and NGOs

Compared to the TRIPS and GATS negotiations, the investment case was discussed in a political setting expressive of a new configuration of power in the trading system where emerging economies are able to exert their influence more forcefully in shaping the multilateral agenda and the negotiation processes. The Doha consensus represented recognition of the new power and negotiation dynamics surfacing at Seattle and afterwards as it required developed countries to give significant concessions to developing countries. The case of investment resembles the services talks more than the IPR negotiations during the Uruguay Round, since consent more than coercion came to play to get developing countries on board. The consent of developing countries was solicited through a discussion process within the WTO working group as well as through training programs launched after Doha which altogether entailed a strong educative dimension (Smythe 2004: 23-4;). There is no evidence of use of unilateral trade instruments to forge consensus on launching talks in investment per se before and during the Doha Round similar to the unilateral U.S.

actions in the form of Special 301 cases against the hardliners during the Uruguay Round. In fact, as previously discussed the European business case for investment from the beginning was premised upon the enhanced acknowledgement of the benefits of FDI in developing countries and the improvement of business environment in the Southern markets. Although investment was discussed within a working group at the WTO its failure was directly associated with the broader bargaining dynamics of the Doha Round.

The failure to reach an explicit consensus on launching talks in investment was in part because of the lack of progress in other chapters of the Round, especially in agriculture. The stalemate in agriculture triggered the emergence of new Southern coalitions. While there existed a strong India-led opposition including a dozen countries between 1996 to 2001, this coalition expanded before and during the Cancun Conference with the joining of G-90 including LDCs and the African Group countries. While the impasse in agriculture was influential in the confrontation, these countries did not perceive clear gains but actually saw certain risks in embarking upon talks in new issues (Murphy 2007: 15-6). Furthermore, they lacked capacity to negotiate new chapters as limited resources were needed for higher priorities within the Doha package. Such clear re-positioning against investment is a clear indication of the lack of emergence of a widespread consensus over the case built by European businesses

and other demandeurs. NGOs became particularly influential in this re-positioning with their close contacts with the negotiators and through providing analysis via websites such as “Investment Watch,” and several high-profile international meetings, conferences and workshops in Geneva and Africa (Murphy 2007: 11-2). In addition to legitimizing their views on the potential risks of an investment treaty through empirical evidence, NGOs succeeded “to fuse their normative ambitions with states’ interests, in order to affect the decision-making at this ‘states-only’ institution” (Murphy 2007: 12, 16).

Conclusion

The context of contested neoliberal hegemony created a new global political environment within which trade policies and agendas are made and business preferences and strategies are shaped. In contrast to the collective vision and strategies of transatlantic TNCs towards GATT agenda in IPR and services cases, European and American business forces were divided over their perspectives, preferences, and strategies regarding the WTO agenda in the 1990s. The investment case illustrates the limits to the transformation of the trade regime as the WTO was put at the centre of systemic pressures critical of furthering the neoliberal agenda through new rule-making. Transatlantic business forces faced significant difficulties in

forging consensus within the neoliberal historic bloc on a collective vision and strategy in regards to trade policies in the presence of the resistance in global civil society which had undermined the legitimacy and prevented the expansion of the neoliberal agenda. The WTO experience with investment shows that the resistance can be mobilized not only at the domestic level in the OECD capitals, but also at a transnational scale with the counter campaigns launched by NGOs. NGOs have been able to act as moral agents capable of setting the trade agenda and restricting the room for manoeuvre for the TNCs in pursuing corporate interests through trade policies. This context of contested hegemony pushes TNCs to act pragmatically to channel their resources and strategies to alternative trade policy venues where meaningful gains can potentially be secured. Consequently, bilateral and regional platforms turn to the hubs of new rule-making where TNCs quest for better access and protection.

CHAPTER 8- CONCLUSION

8.1. Hegemony, World Orders, and International Regimes

This dissertation aimed to apply a neo-Gramscian theoretical framework to understand the transformation of the trade regime from the GATT to the WTO. The analysis was conducted through contextualising regime transformation within the world order by taking into account global material and ideational changes.

In light of certain inadequacies of the mainstream approaches, a neo-Gramscian framework to analyse the transformation of the trade regime was suggested in Chapter 2. As discussed in the Introduction, for the power-based school of thought (as applied by neorealist scholars) international regimes emerge and undergo certain changes as a function of the dissemination of state power within the international system. They are deemed to be created by hegemonic states and considered as entities having no autonomous roles on interstate cooperation, rather they are viewed as a mirror reflecting the dissemination of power within the international state system. Similarly, for interest-based theories, international regimes are tools of interest maximisation facilitating bargaining among the states who arguably have pre-

determined interests and identities through certain regulative rules and practices. These conventional theories take into account non-state actors regarding the extent to which they influence the power, role and interests of the states *internally* as the states are ontologically taken as the unitary constituents of a predetermined states system. Inherent rationalism in the traditional regime theories prioritises the analysis of material factors of state behaviour and hinders an entire conceptualisation of the ideational aspects of preference formation as well as the normative content of the regimes. In contrast to the conventional theories, constructivist and neo-Gramscian perspectives regard international regimes as autonomous intersubjective entities encapsulating the internationalisation of political authority with their normative content that identifies the context for legitimate state action. Although they share the ontological premises (such international regimes as intersubjective entities) of constructivist scholars, neo-Gramscian scholars have not focused on regimes. However, as applied in this dissertation, it is possible to adopt a constructivist perspective for an employment of a neo-Gramscian reading of the changes in trade regime. Although they are under-conceptualised by constructivist scholarship, this perspective can be further broadened by elaborating on the linkages between international regimes and material reality. For neo-Gramscian scholars international regimes are intersubjective entities implanted in historical structures and they embody ideas and power configurations inherent to those structures. It is the

Gramscian concept of hegemony which ties together the social forces that are the agents of historical change, world orders and associated international regimes.

Hegemony in its Gramscian usage defines the consensual aspect of the exercise of political power and the ethical framework for political action within a given domestic order. Social forces gaining dominance within economic bases translate their supremacy in the political sphere inclusive of both ideas and institutions through a war of position pursued within civil society. While these forces may recourse to the coercive tools of the state to acquire consent of subordinate groups, hegemony becomes stronger to the extent that the exercise of power is legitimized and consent is given voluntarily. To this aim, actors that strive to build hegemony or intellectual and moral leadership through developing comprehensive ideological formulas that would ensure economic growth and respond to the needs of the society, and by negotiating those formulas with other actors in the society. These formulas facilitate the continuation of the dominant position of hegemonic forces in the production sphere and also ensure economic development of the society. Thus, as outlined in Chapter 2 social forces produce hegemony through waging a war of position by building coalitions and convincing subordinate actors through negotiation. This negotiation process sometimes requires compromising immediate interests. The coalitions built by hegemonic forces with different class fractions and social actors are called *historic blocs*

which are tied together by comprehensive ideological formulas that are the ethical glue defining the rights and responsibilities of hegemonic actors. In other words, hegemony determines the limits to the legitimate use of political authority, and there is a correlation between the degree of hegemony and social order. Hegemony of ruling actors is never complete and can be contested by other social forces that can wage counter wars of position. "Organic crisis" defines extreme situations where hegemony is contested within civil society to a degree that hegemonic ideas, institutions and actors are challenged, and intellectual and moral leadership (as well as the ethical glue holding social actors together) is lost.

Consensual use of legitimate authority is also the principal criterion in distinguishing a hegemonic order from a non-hegemonic one in the international realm. Hegemony in the global context creates an ethical framework of authority relations between actors including states and non-state agents at various levels. The coherence between power configurations, ideas and international institutions is determined by the hegemonic formation of the world orders. Hegemony can be deemed absent when global politics reflect power based confrontations and clashes in ideas, and when civil society and international institutions express clashes and controversies between different social forces. International regimes and institutions reflect dominant power configurations and ideas of a given world order. International regimes work to

institutionalise hegemonies through diffusing hegemonic norms. They contain both historically conditioned and relatively unchallenged intersubjective ideas, and collective images -the ideas held only by a group of individuals. When the hegemony of ruling actors and their comprehensive ideological framework is contested, international regimes turn to terrains of conflicting collective images.

For neo-Gramscian scholars, U.S. hegemony was a construct of social forces that gained ascendancy in the production space dominated by the Fordist capital accumulation. It was built around a historic bloc of capitalist and labour class fractions as well as ruling elites over a compromise on a “corporate liberal” ideological framework. U.S. hegemony rested on a commitment to provide global economic growth and development through trade and investment especially of goods of the Fordist mode of production that was facilitated with institutions endorsing economic multilateralism. While promoting economic liberalism and multilateralism, the corporate liberal framework acknowledged the legitimate role of the states in the economic realm and justified Keynesian policies towards ensuring domestic adjustment and employment. The United States as the hegemonic state and allied powers supported international regimes reflecting the collective social purpose of “embedded liberalism,” which was necessarily a reflection of the corporate liberal hegemonic compromise. Post-war economic regimes endorsed the multilateral

liberalisation of trade and money flows but also left sufficient space for states to intervene in markets to ensure social welfare objectives such as employment. Nevertheless, the American historic bloc and the corporate liberal ideological framework disintegrated with the authority crisis that emerged parallel to the economic downturn in the 1970s. Hegemonic actors, institutions and policy formulas failed to create welfare and address economic stagflation.

In the coming decade, a new hegemonic order was built by social forces which arose from the globalisation of economic production and the emergence of the post-Fordist mode of capital accumulation. Transnational capital fractions consolidated in TNCs and operated in knowledge and technology-intensive sectors—which constituted the fundamental pillars of a *new transnational historic bloc* bringing together capitalist classes and ruling elites in core capitalist countries. This bloc projected a neoliberal ideological framework redefining world wide authority relations and signified a shift of authority from the states to markets and market actors. Neoliberal hegemony rose over the enhanced structural power of transnational capital concentrated in the “G-7 nexus” and provided transnational capital with the ability to set policy agendas. In other words, the neoliberal ideological framework is distinct from corporate liberalism in that it recognizes the enhanced legitimate authority of markets and a reduced regulatory role for the states to facilitate market operations and deeper global

integration. Consequently, states assumed strict disciplines and became accountable to markets while gradually losing their authority to pursue certain economic policies including welfare instruments (as previously operated by governments) to distribute economic resources and supply public health and environmental services. Neoliberal hegemony and the neoliberal form of states spread to developing countries and transition economies through international institutions, and bilateral and unilateral mechanisms and measures. Neoliberal hegemony operates through new constitutional mechanisms to lock in market norms and reforms at the international level with supra-state judicial mechanisms, free trade agreements, and regional economic integration arrangements. However, neo-Gramscian scholars point out that neoliberal hegemony was increasingly contested since the early 1990s with the rise of social movements against globalisation and neoliberal policies and institutions. Some scholars even argue that the neoliberal hegemony entered an authority crisis as the legitimacy of the states, institutions and policies is challenged within civil societies.

8.2. Hegemonic Transformation of the Trade Regime: From the GATT to the WTO

The GATT regime emerged in 1948 and reflected the corporate liberal framework in its normative content. It projected the legitimate social purpose by deeming border measures in specified circumstances as legitimate tools to realise certain Keynesian

social objectives. The GATT functioned to assure nondiscriminatory liberalization of international trade especially in consumer durables of Fordist mode of production while it provided sufficient exceptions and safeguards for governments to pursue protective adjustment policies. The normative content of the GATT regime remained unchanged until the launch of the Uruguay Round in 1986, although it went through a norm-governed evolution. As argued in Chapter 3, the changes within the regime during the Uruguay Round can be identified as a hegemonic transformation since these modifications reflected the transformation in the world order, i.e. the changes in the production sphere, in political power configurations, and the ideological framework.

The WTO was created to regulate international trade which was increasingly characterized by cross-border flow of goods and services of post-Fordist production parallel to economic globalization, the emergence of cross-border value chains and growing intra-firm trade. The GATT was an instrument for shallow or negative integration whereas the WTO operates to sustain positive or deep integration through harmonizing domestic regulations concerning the operation of markets. The GATT was designed to serve reducing border barriers especially between developed countries whereas developing countries were not active participants of the trade regime. With the rise of Japan, Europe and later newly industrialized economies,

reciprocity became a norm increasingly emphasized by the United States. As developing countries gained competitiveness and took a growing share in world trade, concerns of free-riding put them under the microscopes of the U.S. and other advanced economies. Throughout the Uruguay Round, developing countries assumed the role of reciprocal trader as they left protectionist models of growth, adopted neoliberal policies, and actively engaged in trade talks to secure their access to the markets. Consequently, the WTO accords reflected a collective desire to discipline border and intra-border state measures affecting international trade almost in all sectors of goods and services and included additional responsibilities to ensure fair competition through rules on domestic subsidies, technical standards and IPR protection. Member states, including the U.S., also acknowledged the enhanced authority of the WTO to enforce those disciplines with a supra-national Dispute Settlement Mechanism. In other words, the WTO is the embodiment of a new social purpose characterising the institutionalisation of neoliberal hegemony through new constitutional accords and mechanisms codifying the reconfiguration of global authority relations.

The emergence of the WTO entailed a norm-transforming quality—demonstrating the shift in the social purpose in tandem with the replacement of corporate liberalism with neoliberal ideological framework. The erosion of the embedded liberal vision

and associated paradigmatic shift from *borders* towards *domestic policies* were reflected in a re-formulation of the fundamental norms of the GATT (such as non-discrimination and liberalisation). The GATS was particularly instrumental in the re-designation of these norms. Similar to goods, the GATS considers services *tradable*. According to the agreement, international trade in services occurs not only through cross-border movement of service products, but also through other “supply modes” requiring the mobility of service providers, consumers or capital (in the form of FDI). The GATS broadened the scope of protectionist measures by reformulating the liberalisation norms in its market access provisions. This applied to the measures restricting different supply modes. Barriers to market access include several regulatory measures inhibiting the cross-border provision of services such as banking and the consumption of services like education in other countries. They also may take the form of restrictions to commercial presence through FDI, and measures preventing temporary movement of natural persons such as architects to provide services abroad. *Traders* under the GATS are not only exporters and importers of goods, but also service providers such as teachers, and legal persons including firms. In this regard, non-discrimination was reformulated in a manner to cover both services and service suppliers including individuals and companies. The GATS is a global constitution which imposes strong disciplines to prevent protective state measures inhibiting access to markets, but it envisages a long term gradual approach

for market opening. It adopts the principle of progressive liberalisation and a positive list approach through distinguishing the norm of most favoured nation as a general commitment from national treatment and market access (which are specific commitments to be applied to sectors negotiated among parties). These adjustments to fundamental norms and principles took place in an intersubjective framework that was gradually shaped by emerging consensus around the new social purpose reflective of the spread of neoliberal hegemony. The evolution of the intersubjective framework of the trade regime brought about a new “generative grammar,” which modified the collective meanings produced under the GATT. The analytical lenses provided by neorealism and neoliberalism would hardly capture the intersubjective quality of the trade regime’s hegemonic transformation.

This normative transformation could have continued if WTO members had decided to launch the talks for a multilateral investment agreement as proposed by the European Union and other demandeurs. The proposed framework agreement for investment would further expand the legal scope of the WTO through developing rules on investment covered by TRIMS and TRIPS Agreements and the GATS. International instruments on investment out of the WTO generally address issues of protection of investment and investors, liberalisation of the barriers to FDI, and settlement of disputes among relevant state and non-state parties. Since the creation of the NAFTA,

many free trade agreements have contained WTO-plus provisions addressing these issues. The multilateral framework proposed by TNCs and other demandeurs was expected to generate further disciplines upon member states with provisions on transparency, investment protection especially against various forms of expropriation, investment liberalisation and settlement of disputes. The advocates of the framework suggested a broad definition for investment to ensure enhanced rights for TNCs' operations and cross-border mobility of capital. The proposed framework was to liberalise investment flows by enlarging the scope of non-discrimination and market access with pre-admission provisions through narrowing the sovereign rights of the states to screen and monitor investment and related capital inflows. MFN and national treatment principles would apply selectively to pre-admission and post-establishment phases of investment with the individual commitments of member states. In this vein, the intersubjective meanings of the regime were reformulated to broaden the scope of protectionism with enlarged definitions of barriers to trade and the meaning of international trade to encompass cross-border movements of different forms of capital.

Nonetheless, the transformation of the trade regime stalled because of the contradictions that emerged within the realm of civil society in the form of a backlash against globalization and challenges against neoliberal hegemony. Market norms

penetrated into the states both as a result of the transformation of the trade regime and other new constitutional mechanisms, and undermined the established mechanics of relations between the states and social actors. Growing resistance in civil society against globalisation, neoliberal institutions and policies is evidence of the erosion of the legitimacy of hegemonic actors and institutions. A particular expression of this challenge to neoliberal hegemony is the crisis of trade agenda and policies that began in the mid-1990s. Opposition against the NAFTA, MAI, and the WTO, and civil society coalitions in the United States against the renewal of the fast track authority are manifestations of the growing discontent about the neoliberal trade agenda. Since the emergence of anti-globalisation campaigns, the WTO has been criticized for its behind-the-border regulatory program, and scrutinized for its lack of transparency in decision-making and the subsequent lack of democratic accountability and legitimacy. The collapse of the Seattle Ministerial in 1999 was a critical turning point and showed the scale of opposition and the ability of NGOs to mobilize across borders and around networks. As contended by some observers, NGOs act as moral agents and are able to de-legitimize neoliberal policies and policy proposals. NGOs mobilized against the MAI and potential investment negotiations at the WTO became instrumental in the failure of both initiatives. At the heart of their opposition were concerns about the further empowerment of market actors vis-à-vis states and the potential implications of the proposed agreements for environment and labour standards.

8.3. TNCs as Social Forces of Regime Transformation

8.3.1. The Case of Services

This dissertation suggests that TNCs were the major social forces responsible for both the construction of the neoliberal world order and the transformation of the trade regime. As social agents of neoliberal hegemony, TNCs took a proactive role in determining the normative transformation and the social purpose underlying the trade regime. Globalisation of economic production created material conditions for such a role through integrating markets in production chains and escalating competition. Regulatory barriers to access markets and operate in host countries pushed TNCs in the 1970s to develop corporate strategies for a better business environment that would help reduce operation costs and facilitate investments. Through their demands on better IPR enforcement and deregulation, TNCs in knowledge and capital intensive industries such as pharmaceuticals, chemicals, microelectronics, financial and telecommunications services became the driving force that initially shaped the trade agenda of the United States and then of other OECD countries. The TRIPS Agreement and the GATS came into existence after IPRs and services were inserted in the GATT agenda in the early 1980s. This was a result of the

business campaigns launched by TNC coalitions which pursued an aggressive agenda-setting strategy after allying around a set of policy formulas.

As examined broadly in Chapter 4, ideas regarding the tradability of services and liberalisation of services within a trade policy framework were raised by only a group of Anglo-American experts until the mid 1970s. The new framing was adopted by some American business leaders especially in the financial sector who then pushed for activating U.S. trade policy instruments for the dismantling of regulatory barriers in external markets. A “collective image” of tradability of services became instrumental in the creation of a small coalition of TNCs who campaigned for legal recognition of services as a trade issue in the period between 1973 and 1979. The new conceptual framing in trade terms with notions of comparative advantage, market access, non-tariff barriers, and protectionism created scientific justification for such recognition. TNCs succeeded in incremental gains in U.S. trade law in 1974 which provided a precedent for further benefits in the 1979, 1984 and 1988 amendments to the law. Parallel to constitutional changes, a broader business coalition was built up in 1979 with a longer term goal for incorporating services to the GATT system. This dissertation argues that business leaders from financial services sector launched a war of position in the Gramscian sense to set the GATT agenda. The business campaign contained strategies of case-building, education of policy-makers and broader public

and coalition-building with actors in private sector, government agencies, academia and media. At the heart of the campaign laid the motive to change the established mind-set of “trade in goods” with a new paradigm of thinking inclusively about services. Case-building strategy encapsulated the development of a comprehensive policy formula suggesting the tradability of services as an objective fact and emphasising the economic importance of service sectors for the U.S. economy, employment and world trade. The case for services was framed as a hegemonic policy formula in the normative texture of neoliberalism, concurrent with free trade discourse and as a solution to growing protectionism. The business case suggested that services could be liberalised through an across the board application of GATT norms and negotiation practices, and that this would help attenuate the growing trade deficits of the United States. Case-building and education activities -coupled with an active engagement in knowledge production through sponsoring new research and conferences- in the U.S. and abroad helped services coalition gain intellectual and moral leadership with growing receptiveness of their case in academia and public discussion. The TNC-led services coalition took the form of a transnational policy network through dissemination activities in Europe and elsewhere through reaching out to business leaders, policy-makers, academics and journalists abroad.

As a consequence of this proactive agenda-setting campaign and constitutional recognition, the Reagan administration took the initiative to put services on the GATT agenda beginning in 1982. Before and during the Uruguay Round, TNCs successfully created a domestic constituency and ensured Congressional support for USTR's push for new round including services. With TNCs' campaign in European capitals and the U.S. government's initiative at the OECD, a consensus was gradually forged in the North about the tradability of services during the mid-1980s. Nevertheless, with the participation of European bureaucracies in the debate there emerged differences of opinion on the across-the-board application of GATT norms and concerns about the elimination of certain regulations which served social objectives. Similarly, as demonstrated in Chapter 5, the ambitious liberalisation prospective of U.S. TNCs was challenged by developing countries who allied with Europeans for a gradual approach to market opening. All the same, the launch of the services talks in 1986 was a great victory considering the fact that the U.S. proposal in 1982 had been opposed by the bloc of the "Group of 77," led by India and Brazil on the basis that the GATT lacked legal competence to negotiate the deregulation of services. The arguments of resistant governments that services and intellectual property were "non-trade" issues beyond the scope of the GATT gradually seemed anachronistic and could no longer be upheld as *legitimate* as the negotiations came to a close.

A significant factor in the insertion of services into the GATT legal and normative framework was the constructive participation of developing countries to the consensus building process in the course of multilateral deliberations. In fact, the early Southern coalition against services began to dissolve before the Uruguay Round and quickly deteriorated during negotiations parallel to the evolution of developing countries' interests and attitudes towards the services case. The change of attitudes positively correlated with the growing embracement of the role of reciprocal trader because of material changes that turned many developing countries important service providers and participants to supply chains. With the diffusion of neoliberal hegemony, many of these countries moved away from import substitution and shifted toward adopting market-based reforms and, thus, became eager for concessions in order to gain reciprocal access to Northern markets in services as well as other sectors. In addition to the TNC campaign to disseminate the new thinking through education activities in Geneva and other channels, developing country negotiators were also exposed to new thinking about services during the negotiations. Although they initially took the services case from a defensive point (due mainly to the lack of knowledge and inability to assess their competitiveness in trade terms) they gradually recognized the benefits of services liberalisation and framed their preferences within the trade and negotiations contexts. Developing countries proved active in shaping

the negotiation process. They contributed to the creation of the GATS as a flexible tool that would open markets in a gradual manner with caveats created for social and development objectives and sector specific arrangements. Integration of services became a critical juncture in the GATT history as it induced a proactive involvement of developing countries to the regime also by engaging in new types of coalitions. Although the United States coerced developing countries to dissolve the hardliners' block before the launch of the Uruguay Round, the need for punitive actions after the negotiations started disappeared since developing countries increasingly perceived certain benefits. At an early stage in the talks, developing countries became more willing to negotiate the agreement as far as it was designed to satisfy their interests. Consequently, the GATS reflected a collective desire to open markets through taking into account certain sectoral, social and development needs raised parallel to a re-assessment on the side of developing countries. In this regard, the GATS case contrasts with the negotiations of the TRIPS agreement where coercion was exerted through the active use of unilateral trade sanctions by the United States. It can be contended that the GATS proved to be a product of hegemonic consensus of a wide range of actors and that the GATS did not simply project a predetermined outcome of existent power structures as it would be argued by neo-realists. The negotiations also show that the interest perceptions and identities of developing countries evolved along the process—a fact that contrasts with the neoliberal postulations taking

international regimes as bargaining platforms of state agents which presumably participate in negotiations with predetermined identities and interests. Finally, the dissertation illustrated in Chapter 5 that the ability of the TNC coalition to influence the agenda-setting gradually diminished after the launch of the round as the debate moved to Geneva and took place in a multilateral setting actively dominated by trade and non-trade bureaucrats. As the outlook of the GATS moved from a promising compact that would lead to an immediate opening for crucial service industries, the United States lost its enthusiasm in the run up to the Brussels Conference in 1990. The U.S. then embraced negotiation tactics and turned the MFN principle into a bargaining chip to ensure positive market access commitments from significant trade partners. This was also a consequence of the growing pressure from U.S. based TNCs who were concerned about guaranteeing access to those markets. At the end of the day, the collective image of tradability of services was embraced by the participants of the trade regime and changed the intersubjective meanings inherent to the regime.

8.3.2. The case of Investment

As analysed in Chapter 6 and 7, the case of investment poses significant demarcations from the services case. Although U.S. and European TNCs produced a collective vision for the creation of a multilateral constitution from the early 1990s on, their

attempts at the OECD and the WTO were doomed to fail. The push for further transformation of the trade regime through the interjection of an investment accord into the WTO came from the eastern side of the Atlantic. European TNCs were the social forces which, together with other demandeurs, produced a case for the WTO. Yet, they could not bring U.S. TNCs on board for a comprehensive multilateral trade agenda. U.S. TNCs generated an alternative case to negotiate a high-standard accord at the OECD among like-minded governments that could then be extended to developing countries. Transatlantic business and government deliberations ended up with a fragile compromise on a two-track approach that envisaged the initiation of Multilateral Investment Agreement (MAI) negotiations at the OECD and an educative deliberation process at the WTO. The MAI talks adjourned in the Fall of 1998, leaving the WTO as the only venue to negotiate a multilateral treaty. The European call for a Millennium Round, including a broad package of issues for rule-making, did not receive a warm welcome either from the United States or from developing countries. The Seattle Ministerial Conference in 1999 collapsed owing to controversies surrounding the future agenda of the WTO and the mandate of the forthcoming round. A consensus among member states was forged in 2001 over a Development Round in Doha which mandated the continuation of the educative deliberations in new (Singapore) issues until the next WTO ministerial that convened in Cancun. The Cancun Conference also crumbled without any decisions as a result of the impasse on

four Singapore issues as well as agriculture. In July 2004 investment as well as competition and government procurement were completely taken off of the Doha and WTO agendas. The case of investment substantiates the central thesis of this dissertation -that changes to international regimes are constrained by historical material and ideational conditions intrinsic to the hegemonic formation of the world orders. In fact, the ability of TNCs to set the WTO agenda was restrained by a number of factors inherent to the contradictions that emerged in the neoliberal hegemony as of the early 1990s. In terms of agenda-setting these factors can be analysed in three groups.

Firstly, the failure of both attempts at the OECD and the WTO to negotiate an investment agreement was partially a consequence of the controversies among state and non-state actors within the transnational historic bloc. MAI talks expounded the differences between the United States and other OECD member governments on the content of the draft especially in regards to the exceptions and carve-outs for certain sectors and policies. The rise of an anti-MAI campaign and NGOs' demands for binding rules for labour and environmental standards and their critiques against further empowerment of investors vis-à-vis states became factors in deepening these differences. The attempts to compromise on NGO demands attracted negative reactions from TNCs, which resulted in a loss of enthusiasm and, indeed, wore away

the business desire to engage in a counter-initiative to resume the talks after the adjournment of the negotiations in 1998. Similarly, the U.S. and European governments produced two different perspectives with regard to the future agenda of the WTO and the content of a potential investment accord. The Clinton administration favoured a narrowly defined market access agenda supported by U.S. businesses while the European Commission pushed for a Millennium Round including a wide set of new issues for future rule-making. These differences, coupled with other concerns and demands from developing countries, precipitated the imminent failure in Seattle.

In addition to differences in the trade strategies produced by the U.S. and EU, transatlantic TNCs were unable to construct a strong and coherent transatlantic business case and coalition for investment negotiations at the WTO. From the beginning U.S. TNCs favoured a high-standard accord and initially pushed for the OECD, and after the postponement of MAI talks they endorsed preferential trade arrangements as a venue for rule-making. They cautioned that potential WTO negotiations could produce a low standard accord which would legally endanger U.S. FTAs under consideration or negotiation. On the other hand, the European TNCs, together with Japanese businesses, initially favoured a low-standard but inclusive investment treaty that could be negotiated with developing countries at the WTO.

European businesses assessed the positive trend and improvements in the business environment in key developing countries as a point of departure, and supported a WTO accord that would bind these improvements. After the failure in Seattle in 1999 and the launch of the Doha talks in 2001, European TNCs lobbied the European Commission to push for an ambitious WTO framework. The proposed accord would have a broad scope for the definition of investment, and contain provisions ensuring transparency, protection and non-discriminatory liberalisation including pre-establishment provisions. Differences of opinion remained prevalent although the U.S. and European businesses reached a fragile consensus over a “staged approach” that would arguably ensure high standard outcomes from potential WTO investment talks for a subset of rules including transparency, non-discrimination and enforcement of existing Trade-Related Investment Measures (TRIMS) obligations. Other core provisions such as enhanced market access, investment protection and dispute settlement were supposed to be left to future talks. However, as shown in Chapter 7, neither U.S. nor European TNCs pushed hard for this collective business case. While European business groups continued for a more ambitious outcome, the Americans withdrew their lukewarm support in the run-up to the Cancun Conference. As they saw increasing tensions on agriculture and Singapore issues, U.S. business groups called for removing investment from the WTO talks in 2003. To sum up, the fundamental elements of the transnational historic bloc, i.e. TNCs, were

divided in their preferences and could not generate a strong collective vision or coalition as they did in the case of services.

Secondly, the emergence of counter-hegemonic forces contesting neoliberal hegemony was a major factor in deepening controversies within the transnational historic bloc and obstructing the generation of a cohesive policy formula for a multilateral WTO accord. Environmentalists, labour unions, development NGOs and other civil society actors critical of neoliberalism actively involved in trade agenda-setting in core capitalist states during the 1990s. Domestic and multilateral trade agendas became scenes for confrontation within which a broad range of stakeholders struggled to shape policies. The crisis of the trade agenda was expressed in the NAFTA, MAI and fast-track debates in the United States, wherein the administration faced significant difficulties in forging bipartisan consensus in U.S. Congress. Consequently, environmental and labour standards were put on the front burner of President Clinton's trade policy agenda, whereas these issues were contested by developing countries. In this context, U.S. TNCs adopted pragmatic strategies for setting the trade agenda and started to act as "venue-shoppers," i.e. they promoted the most feasible policy options among a menu of possibilities that would escape domestic public scrutiny and challenges within civil society, and enforce market disciplines to emerging economies. On the other hand, with the rise of the Internet in the 1990s

NGOs became as mobile as capital through transnational networks. NGOs undoubtedly contributed to the breakdown of the MAI talks and the Seattle Ministerial Conference on account of their cross-border mobilisation and coordinated vocal campaigns. In this context, the investment debate at the WTO was shaped by inputs from an anti-investment coalition that resurrected the networks that had mobilised against the MAI. Especially after the Seattle breakdown, the European Commission attempted to engage NGOs in the decision-making process by launching a systematic consultation mechanism. Instead of challenging the NGOs by launching a high-profile education campaign and network-building endeavour (as in the case of services), European TNCs focused their energies on influencing the Commission's agenda by direct forms of lobbying and through channels such as the Investment Network created by the Commission to incorporate business views. Nonetheless, it is clear that NGOs gained a moral advantage within civil societies and pursued a high-profile war of position narrowing the manoeuvre space of TNCs.

Thirdly, the challenge against the expansion of the neoliberal agenda for the WTO was also emerging out of the block of advanced capitalist states. The resistance from developing countries at the WTO did not take the form of a counter-hegemonic program suggesting an alternative paradigm to the neoliberal hegemony such as the promotion of a closed market agenda with infant industry strategies. Conversely,

developing countries endorsed an open market agenda responding to their market access demands in sectors including agriculture, textiles, industrial products and services. The rise of the neoliberal state in developing countries and associated reforms either through the implementation of the WTO agreements or in the form of bilateral arrangements and unilateral measures had led to the liberalisation of their markets. The dominant concern of developing countries was the perceived imbalance of the WTO package in terms of benefits and losses. They complained about the difficulties they faced in implementing their obligations due mainly to the capacity constraints and gradual loss of their autonomy in pursuing development policies internally. Consequently, before any kind of expansion of the WTO legal framework to new domains, developing countries argued for the improvements to the existing accords that would allow certain flexibilities to implement market reforms. In other words, they were not against the WTO disciplines *per se* and were actually supportive of the strengthening of some disciplines for developed countries to prevent arbitrary and extensive use of unfair practices such as antidumping measures and agricultural support programs. In this regard, the Doha Round launched in 2001 reflected a carefully crafted compromise that balanced development concerns with further market access negotiations.

In contrast to the services case, developing countries participated actively in the pre-round agenda-setting in investment with their submissions and proposals based upon factual data and research. A group of countries orchestrated by India argued against any new WTO disciplines, whether in investment or other new areas, that would further erode government autonomy to pursue development policies. The opponents produced well-crafted counter-arguments to prevent the launch of investment talks. Notwithstanding their acknowledgement of the benefits of FDI for their economies, the hardliners contended that the proposed multilateral accord would not lead to an automatic rise of FDI flows, rather it would dismantle sovereign capabilities to monitor and control capital flows according to their needs, and would bring about burdensome obligations to ensure transparency. They indicated their preference for bilateral investment treaties since BITs provided necessary flexibilities while helping to create a business friendly environment. Nonetheless, the India-led opposition against the investment agenda at the WTO was not capable of completely removing the issue from the WTO agenda up until the Cancun Conference. Many developing countries such as Brazil and China remained indifferent about investment as they were concerned about the progress in other crucial areas of the Doha Round such as agriculture. The controversies surrounding the agriculture modalities before the Cancun Conference resulted in new forms of developing country coalitions including G-22 -which comprised power houses such as China, Brazil and India, and other issue

specific groupings. The lack of progress in agriculture turned countries on the fence against investment and other Singapore issues. In addition, the anti-investment coalition was further broadened with the joining of African states and Least Developed Countries before and during the Cancun meeting. In the re-positioning of resource poor countries, NGOs played a significant role as they actively engaged in agenda-setting in Geneva and Africa. These campaigners waged a war of position constitutive of coalition-building and education activities as exemplified in the business campaign for services. Strikingly, NGOs worked as a counter-hegemonic force critical of the very foundations of the neoliberal normative framework by effectively challenging the legitimate basis of the case for a WTO accord on investment. An aggressive education campaign towards developing country negotiators through the dissemination of research and analysis aimed to mobilize African governments against the initiation of the investment talks by emphasising potential negative impacts of a WTO accord in investment.

Through a neo-Gramscian reading of the transformation of the trade regime from the GATT to the WTO this dissertation intended to show that changes to international regimes can not be fully captured without taking into account the material and ideational quality of and changes in the world orders. International regimes as inherent constellations of material capabilities and consistent ideas of a particular

order emerge, evolve and transform in connection with the shifts in the world order. The social forces that create world orders are also the driving force of the changes in international regimes. They take part in the regime change not only through a direct internal exercise of power over the states and promoting their interests upward, but also through shaping the very ideational context within which the states build up their identities, interests, rights and obligations. The hegemonic quality of the world order is also determinative of the ability of hegemonic forces to shape the normative content of international regimes.

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ANNEXES

ANNEX 1: List of Interviews

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Bartel, Constantine (2008) Assistant Programmes Director, International Centre for Trade and Sustainable Development (ICTSD), 26 February, Geneva.

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Gupta, Krishna (2009) Counsellor in the Permanent Mission of India, 8 July, Geneva.

Hamdani, Khalil (2008) Special Adviser on South Business Forum, the South Centre, 18 July, Geneva.

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Hills, Carla A. (2010) Chair & CEO, Hills & Company, International Consultants, 1 September, Washington DC.

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Rames, Christophe (2008) First Counsellor, Permanent Delegation of the European Commission to the International Organisations in Geneva, 17 June, Geneva.

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Schagrin, Kenneth A. (2008) Senior Director, Telecommunications and E-commerce Trade Policy, Office of the United States Trade Representative, 11 July, Geneva.

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Sloten, Rene Van (2009) Executive Director of Industrial Policy in CEFIC (European Chemical Industry Council), and Chairman of Market Access Working Group of Business Europe, 14 July, Brussels.

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Vastine, Bob (2009) President, US Coalition of Service Industries, 1 April, Washington D.C.

ANNEX 2: Punta Del Este Declaration

GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) PUNTA DEL ESTE DECLARATION

Ministerial Declaration of 20 September 1986

Ministers, meeting on the occasion of the Special Session of the CONTRACTING PARTIES at Punta del Este, have decided to launch Multilateral Trade Negotiations (The Uruguay Round). To this end, they have adopted the following Declaration. The Multilateral Trade negotiations will be open to the participation of countries as indicated in Parts I and II of this Declaration. A Trade Negotiations Committee is established to carry out the negotiations. The Trade Negotiations Committee shall hold its first meeting not later than 31 October 1986. It shall meet as appropriate at Ministerial level. The Multilateral Trade Negotiations will be concluded within four years.

PART I

NEGOTIATIONS ON TRADE IN GOODS

The CONTRACTING PARTIES meeting at Ministerial level,

Determined to halt and reverse protectionism and to remove distortions to trade;

Determined also to preserve the basic principles and to further the objectives of the GATT;

Determined also to develop a more open, viable and durable multilateral trading system;

Convinced that such action would promote growth and development;

Mindful of the negative effects of prolonged financial and monetary instability in the world economy, the indebtedness of a large number of less developed contracting parties, and considering the linkage between trade, money, finance and development;

Decide to enter into Multilateral Trade Negotiations on trade in goods within the framework and under the aegis of the General Agreement on Tariffs and Trade.

A. Objectives

Negotiations shall aim to:

- (i) bring about further liberalization and expansion of world trade to the benefit of all countries, especially a less-developed contracting parties, including the improvement of access to markets by the reduction and elimination of tariffs, quantitative restrictions and other non-tariff measures and obstacles;
- (ii) strengthen the role of GATT, improve the multilateral trading system based on the principles and rules of the GATT and bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines;
- (iii) increase the responsiveness of the GATT system to the evolving international economic environment, through facilitating necessary structural adjustment, enhancing the relationship of the GATT with the relevant international organizations and taking account of changes in trade patterns and prospects, including the growing importance of trade in high technology products, serious difficulties in commodity markets and the importance of an improved trading environment providing, *inter alia*, for the ability of indebted countries to meet their financial obligations;
- (iv) foster concurrent cooperative action at the national and international levels to strengthen the inter-relationship between trade policies and other economic policies affecting growth and development, and to contribute towards continued, effective and determined efforts to improve the functioning of the international monetary system and the flow of financial and real investment resources to developing countries.

B. General Principles Governing Negotiations

- (i) Negotiations shall be conducted in a transparent manner, and consistent with the objectives and commitments agreed in this Declaration and with the principles of the General Agreement in order to ensure mutual advantage and increased benefits to all participants.
- (ii) The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis by agreement prior to the formal conclusion of the

negotiations. Early agreements shall be taken into account in assessing the overall balance of the negotiations.

(iii) Balanced concessions should be sought within broad trading areas and subjects to be negotiated in order to avoid unwarranted cross-sectoral demands.

(iv) The CONTRACTING PARTIES agree that the principle of differential and more favorable treatment embodied in Part IV and other relevant provisions of the General Agreement and in the Decision of the CONTRACTING PARTIES of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries applies to the negotiations. In the implementation of standstill and rollback, particular care should be given to avoiding disruptive effects on the trade of less-developed contracting parties.

(v) The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e. the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

(vi) Less-developed contracting parties expect that their capacity to make contributions or negotiated concession or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

(vii) Special attention shall be given to the particular situation and problems of the least-developed countries and to the need to encourage positive measures to facilitate expansion of their trading opportunities. Expedient implementation of the relevant provisions of the 1982 Ministerial Declaration concerning the least-developed countries shall also be given appropriate attention.

C. Standstill and Rollback

Commencing immediately and continuing until the formal completion of the negotiations, each participant agrees to apply the following commitments:

Standstill

- (i) not to take any trade restrictive or distorting measure inconsistent with the provisions of the General Agreement or the Instruments negotiated within the framework of GATT or under its auspices;
- (ii) not to take any trade restrictive or distorting measure in the legitimate exercise of its GATT rights, that would go beyond that which is necessary to remedy specific situations, as provided for in the General Agreement and the Instruments referred to in (i) above;
- (iii) not to take any trade measures in such a manner as to improve its negotiating positions.

Rollback

- (i) that all trade restrictive or distorting measures inconsistent with the provisions of the General Agreement or Instruments negotiated within the framework of GATT or under its auspices, shall be phased out or brought into conformity within an agreed timeframe not later than by the date of the formal completion of the negotiations, taking into account multilateral agreements, undertakings and understandings, including strengthened rules and disciplines, reached in pursuance of the Objectives of the Negotiations;
- (ii) there shall be progressive implementation of this commitment on an equitable basis in consultations among participants concerned, including all affected participants. This commitment shall take account of the concerns expressed by any participant about measures directly affecting its trade interests;
- (iii) there shall be no GATT concessions requested for the elimination of these measures.

Surveillance of standstill and rollback

Each participant agrees that the implementation of these commitments on standstill and rollback shall be subject to multilateral surveillance so as to ensure that these commitments are being met. The Trade Negotiations Committee will decide on the appropriate mechanisms to carry out the surveillance, including periodic reviews and evaluations. Any participant may bring to the attention of the appropriate surveillance mechanism any actions or omissions it believes to be relevant to the fulfillment of these commitments. These notifications should be addressed to the GATT secretariat which may also provide further relevant information.

D. Subjects for Negotiation

Tariffs

Negotiations shall aim, by appropriate methods, to reduce or, as appropriate, eliminate tariffs including the reduction or elimination of high tariffs and tariff escalation. Emphasis shall be given to the expansion of the scope of tariff concessions among all participants.

Non-tariff measures

Negotiations shall aim to reduce or eliminate non-tariff measures, including quantitative restrictions, without prejudice to any action to be taken in fulfillment of the rollback commitments.

Tropical products

Negotiations shall aim at the fullest liberalization of trade in tropical products, including in their processed and semi-processed forms and shall cover both tariff and all non-tariff measures affecting trade in these products.

The CONTRACTING PARTIES recognize the importance of trade in tropical products to a large number of less developed contracting parties and agree that negotiations in this area shall receive special attention, including the timing of the negotiations and the implementation of the results as provided for in B(ii).

Natural resource-based products

Negotiations shall aim to achieve the fullest liberalization of trade in natural resource-based products, including in their processed and semi-processed forms. The negotiations shall aim to reduce or eliminate tariff and non-tariff measures, including tariff escalation.

Textiles and clothing

Negotiations in the area of textiles and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines, thereby also contributing to the objective of further liberalization of trade.

Agriculture

The CONTRACTING PARTIES agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets.

Negotiations shall aim to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines, taking into account the general principles governing the negotiations by:

- (i) improving market access through, inter alia, the reduction of import barriers;
- (ii) improving the competitive environment by increasing discipline on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade, including the phased reduction of their negative effects and dealing with their causes;
- (iii) minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements.

In order to achieve the above objectives, the negotiating group having primary responsibility for all aspects of agriculture will use the Recommendations adopted by the CONTRACTING PARTIES at their Fortieth Session, which were developed in accordance with the GATT 1982 Ministerial Work Program, and take account of the approaches suggested in the work of the Committee on Trade in Agriculture without prejudice to other alternatives that might achieve the objectives of the negotiations.

GATT Articles

Participants shall review existing GATT Articles, provisions and disciplines as requested by interested contracting parties, and, as appropriate, undertake negotiations.

Safeguards

(i) A comprehensive agreement on safeguards is of particular importance to the strengthening of the GATT system and to progress in the Multilateral Trade Negotiations.

(ii) The agreement on safeguards;

- shall be based on the basic principles of the General Agreement;
- shall contain, inter alia, the following elements: transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, degressivity and structural adjustment, compensation and retaliation, notification, consultation, multilateral surveillance and dispute settlement; and
- shall clarify and reinforce the disciplines of the General Agreement and should apply to all contracting parties.

MTN Agreements and Arrangements

Negotiations shall aim to improve, clarify, or expand, as appropriate, Agreements and Arrangements negotiated in the Tokyo Round of Multilateral Negotiations.

Subsidies and countervailing measures

Negotiations on subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN Agreement on subsidies and countervailing measures with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade. A negotiating group will be established to deal with these issues.

Dispute Settlement

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing

and monitoring of the procedures that would facilitate compliance with adopted recommendations.

Trade-related aspects of intellectual property rights, including trade in counterfeit goods

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.

Trade-Related investment measures

Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade.

E. Functioning of the GATT System

Negotiations shall aim to develop understandings and arrangements:

- (i) to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral trading system:
- (ii) to improve the overall effectiveness and decision-making of the GATT as an institution, including, inter alia, through involvement of Ministers;

(iii) to increase the contribution of the GATT to achieving greater coherence in global economic policy-making through strengthening its relationship with other international organizations responsible for monetary and financial matters.

F. Participation

(a) Negotiations will be open to:

(i) all contracting parties,

(ii) countries having acceded provisionally,

(iii) countries applying the GATT on a de facto basis having announced not later than 30 April 1987, their intention to accede to the GATT and to participate in the negotiations.

(iv) countries that have already informed the CONTRACTING PARTIES, at a regular meeting of the Council of Representatives, of their intention to negotiate the terms of their membership as a contracting party, and

(v) developing countries that have, by 30 April 1987, initiated procedures for accession to the GATT, with the intention of negotiating the terms of their accession during the course of the negotiations.

(b) Participation in negotiations relating to the amendment or application of GATT provisions or the negotiation of new provisions will, however, be open only to contracting parties.

G. Organization of the Negotiations

A Group of Negotiations on Goods (GNG) is established to carry out the programme of negotiations contained in this Part of the Declaration. The GNG shall, inter alia:

(i) elaborate and put into effect detailed trade negotiating plans prior to 19 December 1986;

(ii) designate the appropriate mechanisms for surveillance of commitments to standstill and rollback;

(iii) establish negotiating groups as required. Because of the interrelationship of some issues and taking fully into account the general principles governing the negotiations as stated in B(iii) above it is recognized that aspects of one issue may be discussed in more than one negotiating group. Therefore each negotiating group should as required take into account relevant aspects emerging in other groups;

(iv) also decide upon inclusion of additional subject matters in the negotiation;

(v) co-ordinate the work of the negotiating groups and supervise the progress of the negotiations. As a guideline not more than two negotiating groups should meet at the same time;

(vi) the GNG shall report to the Trade Negotiations Committee.

In order to ensure effective application of differential and more favourable treatment the GNG shall, before the formal completion of the negotiations, conduct an evaluation of the results attained therein in terms of the Objectives and the General Principles Governing Negotiations as set out in the Declaration, taking into account all issues of interest to less-developed contracting parties.

PART II

NEGOTIATIONS ON TRADE IN SERVICES

Ministers also decide, as part of the Multilateral Trade Negotiations, to launch negotiations on trade in services.

Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations.

GATT procedures and practices shall apply to these negotiations. A Group of Negotiations on Services is established to deal with these matters. Participation in the negotiations under this Part of the Declaration will be open to the same countries as

under Part I. GATT secretariat support will be provided, with technical support from other organizations as decided by the Group of Negotiations on Services.

The Group of Negotiations on Services shall report to the Trade Negotiations Committee.

IMPLEMENTATION OF RESULTS UNDER PARTS I AND II

When the results of the Multilateral Trade Negotiations in all areas have been established, Ministers meeting also on the occasion of a Special Session of CONTRACTING PARTIES shall decide regarding the international implementation of the respective results.

ANNEX 3: U.S. Trade in Goods and Services - Balance of Payments (BOP) Basis

June 10, 2010

Value in millions of dollars
1960 thru 2009

Period	Balance			Exports			Imports		
	Total	Goods BOP	Services	Total	Goods BOP	Services	Total	Goods BOP	Services
1960	3,508	4,892	-1,384	25,940	19,650	6,290	22,432	14,758	7,674
1961	4,195	5,571	-1,376	26,403	20,108	6,295	22,208	14,537	7,671
1962	3,370	4,521	-1,151	27,722	20,781	6,941	24,352	16,260	8,092
1963	4,210	5,224	-1,014	29,620	22,272	7,348	25,410	17,048	8,362
1964	6,022	6,801	-779	33,341	25,501	7,840	27,319	18,700	8,619
1965	4,664	4,951	-287	35,285	26,461	8,824	30,621	21,510	9,111
1966	2,939	3,817	-878	38,926	29,310	9,616	35,987	25,493	10,494
1967	2,604	3,800	-1,196	41,333	30,666	10,667	38,729	26,866	11,863
1968	250	635	-385	45,543	33,626	11,917	45,293	32,991	12,302
1969	91	607	-516	49,220	36,414	12,806	49,129	35,807	13,322
1970	2,254	2,603	-349	56,640	42,469	14,171	54,386	39,866	14,520
1971	-1,302	-2,260	958	59,677	43,319	16,358	60,979	45,579	15,400
1972	-5,443	-6,416	973	67,222	49,381	17,841	72,665	55,797	16,868
1973	1,900	911	989	91,242	71,410	19,832	89,342	70,499	18,843
1974	-4,293	-5,505	1,212	120,897	98,306	22,591	125,190	103,811	21,379
1975	12,404	8,903	3,501	132,585	107,088	25,497	120,181	98,185	21,996
1976	-6,082	-9,483	3,401	142,716	114,745	27,971	148,798	124,228	24,570
1977	-27,246	-31,091	3,845	152,301	120,816	31,485	179,547	151,907	27,640
1978	-29,763	-33,927	4,164	178,428	142,075	36,353	208,191	176,002	32,189
1979	-24,565	-27,568	3,003	224,131	184,439	39,692	248,696	212,007	36,689
1980	-19,407	-25,500	6,093	271,834	224,250	47,584	291,241	249,750	41,491
1981	-16,172	-28,023	11,851	294,398	237,044	57,354	310,570	265,067	45,503
1982	-24,156	-36,485	12,329	275,236	211,157	64,079	299,391	247,642	51,749
1983	-57,767	-67,102	9,335	266,106	201,799	64,307	323,874	268,901	54,973
1984	109,072	112,492	3,420	291,094	219,926	71,168	400,166	332,418	67,748
1985	121,880	122,173	294	289,070	215,915	73,155	410,950	338,088	72,862
1986	138,538	145,081	6,543	310,033	223,344	86,689	448,572	368,425	80,147
1987	-	-	7,874	348,869	250,208	98,661	500,552	409,765	90,787

	151,684	159,557							
	-	-							
1988	114,566	126,959	12,393	431,149	320,230	110,919	545,715	447,189	98,526
		-							
1989	-93,141	117,749	24,607	487,003	359,916	127,087	580,144	477,665	102,479
		-							
1990	-80,864	111,037	30,173	535,233	387,401	147,832	616,097	498,438	117,659
1991	-31,135	-76,937	45,802	578,344	414,083	164,261	609,479	491,020	118,459
1992	-39,212	-96,897	57,685	616,882	439,631	177,251	656,094	536,528	119,566
		-							
1993	-70,311	132,451	62,141	642,863	456,943	185,920	713,174	589,394	123,780
		-							
1994	-98,493	165,831	67,338	703,254	502,859	200,395	801,747	668,690	133,057
		-							
1995	-96,384	174,170	77,786	794,387	575,204	219,183	890,771	749,374	141,397
	-	-							
1996	104,065	191,000	86,935	851,602	612,113	239,489	955,667	803,113	152,554
	-	-							
1997	108,273	198,428	90,155	934,453	678,366	256,087	1,042,726	876,794	165,932
	-	-							
1998	166,140	248,221	82,081	933,174	670,416	262,758	1,099,314	918,637	180,677
	-	-							
1999	264,239	336,310	72,072	965,885	698,034	267,850	1,230,123	1,034,345	195,779
	-	-							
2000	378,780	446,233	67,453	1,070,597	784,181	286,416	1,449,377	1,230,413	218,964
	-	-							
2001	364,393	421,980	57,586	1,004,896	730,277	274,618	1,369,289	1,152,257	217,032
	-	-							
2002	420,524	475,345	54,821	977,470	696,268	281,202	1,397,994	1,171,613	226,381
	-	-							
2003	494,183	541,544	47,361	1,019,897	728,258	291,639	1,514,080	1,269,802	244,278
2004	-	-	56,286	1,158,576	819,870	338,707	1,767,921	1,485,501	282,420
	609,345	665,631							
2005	-	-	69,625	1,281,186	909,016	372,171	1,995,362	1,692,817	302,546
	714,176	783,801							
2006	-	-	80,216	1,452,783	1,035,868	416,916	2,212,023	1,875,324	336,700
	759,240	839,456							
2007	-	-	121,093	1,648,665	1,160,366	488,299	2,350,763	1,983,558	367,206
	702,099	823,192							
2008	-	-	135,850	1,839,012	1,304,896	534,116	2,537,814	2,139,548	398,266
	698,802	834,652							
2009	-	-	132,036	1,570,797	1,068,499	502,298	1,945,705	1,575,443	370,262
	374,908	506,944							

**U.S. Census Bureau, Foreign Trade
Division.**

NOTE: (1) Data presented on a Balance of Payment (BOP) basis. Information on data sources and methodology are available at www.census.gov/foreign-trade/www/press.html.

ANNEX 4: Foreign-Direct-Investment Inflows and Outflows, 1983-1995 (Billions of Dollars and Percentage)

Year	Developed countries		Developing countries		Central and Eastern Europe		All countries	
	Inflows	Outflows	Inflows	Outflows	Inflows	Outflows	Inflows	Outflows
Value (billion dollars)								
1983-1987	58.7	72.6	18.3	4.2	0.02	0.01	77.1	76.8
1988-1992	139.1	193.3	36.8	15.2	1.36	0.04	177.3	208.5
1990	169.8	222.5	33.7	17.8	0.30	0.04	203.8	204.3
1991	114.0	201.9	41.3	8.9	2.45	0.04	157.8	210.8
1992	114.0	181.4	50.4	21.0	3.77	0.10	168.1	203.1
1993	129.3	192.4	73.1	33.0	5.59	0.20	207.9	225.5
1994	132.8	190.9	87.0	38.6	5.89	0.55	225.7	230.0
1995	203.2	270.5	99.7	47.0	12.08	0.30	314.9	317.8
Share in total (per cent)								
1983-1987	76	95	24	5	0.02	0.01	100	100
1988-1992	78	93	21	7	0.77	0.02	100	100
1993	62	85	35	15	2.70	0.09	100	100
1994	59	83	39	17	2.60	0.24	100	100
1995	65	85	32	15	3.80	0.09	100	100
Growth rate (per cent)								
1983-1987	37	35	9	24	-7	68	29	35
1988-1992	-4	3	15	16	298	46	1	4
1993	13	6	45	52	46	99	24	11
1994	3	-1	19	17	7	179	9	2
1995	53	42	15	22	106	-45	40	38

Source: UNCTAD-DITE, World Investment Report 1996. Investment, Trade and International Policy Arrangements (Sales No. E.96.II.A.14). Reproduced from UNCTAD (1997).

ANNEX 5: Investment in WTO Ministerial Declarations/Drafts

1. Seattle Ministerial Conference Revised Ministerial Draft (WTO 1999c), 19 October

[Investment]

(See also paragraph 56)

41. [Taking into account the work already undertaken in the WTO Working Group on the Relationship between Trade and Investment, negotiations shall aim to establish a multilateral framework of rules on foreign direct investment, to further the objectives of the WTO and to complement its rules, so as to enhance the contribution of international trade and investment to economic growth and development, and to help create a stable and predictable climate for the treatment of foreign direct investment world-wide.

The framework should:

- (a) contain provisions on scope and definition;
- (b) be based on WTO principles of non-discrimination, while respecting the ability of host governments to regulate the activity of investors in their respective territories;
- (c) ensure transparency and predictability of domestic investment regimes, and the dissemination of information in this respect;
- (d) address as an integral part of the framework the special needs of developing and least developed country participants with respect to the contribution of foreign direct investment to their development and economic growth;
- (e) provide for negotiated, positive commitments by participants regarding access to investment opportunities in their territories, with a view to achieving a progressively higher level of liberalization;
- (f) address investment-distorting and trade-distorting policies and practices;
- (g) take account of, and ensure consistency with, relevant WTO provisions related to investment; and
- (h) provide for the applicability of the WTO dispute settlement mechanism to resolve disputes between governments.

Consideration shall be given to the possible need for provisions on other matters, such as protection of investment and investors' responsibilities, and to existing bilateral and regional arrangements on investment.]

[The Relationship between Trade and Investment]

(See also paragraph 41)

56. [The Working Group on the Relationship between Trade and Investment shall pursue its present mandate, building on work undertaken to date. Further work should focus on issues of interest to developing countries, in particular, the effects of foreign direct investment, positive and negative, on the development objectives of host countries, the obligations of foreign investors to host countries, and the obligations of home countries in respect of disciplines on their investors. The Working Group shall report to the Fourth Session of the Ministerial Conference on the results of its work [with its findings, and its recommendations].]

2. Drafts for the Doha Ministerial Conference

First Draft, (WTO 2001a), 26 September 2001

RELATIONSHIP BETWEEN TRADE AND INVESTMENT

18. We agree to negotiations which shall aim to establish a multilateral framework of rules to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment. The framework shall reflect in a balanced manner the interests of home and host countries, and take due account of governments' regulatory responsibilities and economic development objectives. It shall include as core elements provisions on scope and definition, transparency, non-discrimination, pre-establishment commitments based on a GATS-type approach, and the settlement of disputes between governments. The special development, trade and financial needs of developing and least-developed country participants shall be taken into account as an integral part of the framework, which shall enable Members to undertake obligations commensurate with their individual needs and circumstances. The negotiations shall pay due regard to other relevant WTO provisions and to existing bilateral and regional arrangements on investment.

We commit ourselves to ensure that appropriate arrangements are made for the provision of technical assistance and support for capacity building both during the negotiations and as an element of the agreement to be negotiated.

OR

19. The Working Group on the Relationship between Trade and Investment shall undertake further focused analytical work, based on proposals by Members. A report on this work shall be presented to the Fifth Session of the Ministerial Conference.

First Revised Draft (WTO 2001b), 27 October

RELATIONSHIP BETWEEN TRADE AND INVESTMENT

20. In the period until the Fifth Session of the Ministerial Conference, work will focus on the clarification of elements of a possible multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, and to contribute to the expansion of trade. Core elements are: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and safeguards; consultation and the settlement of disputes between Members; and negotiating modalities, including the question of participation.

The framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of the framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions.

Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment. At the Fifth Session, a decision will be taken on modalities of negotiations in this area.

We commit ourselves to ensuring that appropriate arrangements are made for the provision of technical assistance and capacity building throughout, and as an element of the outcome.

Second Revised draft (WTO 2001c), 13 November 2001

RELATIONSHIP BETWEEN TRADE AND INVESTMENT

20. [Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade,] we agree that at the Fifth Session of the Ministerial Conference a decision will be taken on whether to launch negotiations in this area.

21. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment

commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance of payments safeguards; consultation and the settlement of disputes between Members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

22. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

Doha Ministerial Declaration (WTO 2001d), 14 November 2001

RELATIONSHIP BETWEEN TRADE AND INVESTMENT

20. Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

21. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through

appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

3. Drafts for the Cancun Ministerial Conference

First Draft (WTO 2003a), 18 July 2003

Investment 13. Taking note of the work done by the Working Group on the Relationship between Trade and Investment under the mandate we gave at Doha, and the work on the issue of modalities carried out at the level of the General Council, we [adopt by explicit consensus the decision on modalities of negotiations set out in document ...]

[decide that ...].

Competition 14. Taking note of the work done by the Working Group on the Interaction between Trade and Competition Policy under the mandate we gave at Doha, and the work on the issue of modalities carried out at the level of the General Council, we [adopt by explicit consensus the decision on modalities of negotiations set out in document ...][decide that ...].

First Revised Draft (WTO 2003b), 24 August 2003

Investment 13. [Taking note of the work done by the Working Group on the Relationship between Trade and Investment under the mandate in paragraphs 20-22

of the Doha Ministerial Declaration, we decide to commence negotiations on the basis of the modalities set out in Annex D to this document.]

[We take note of the discussions that have taken place in the Working Group on the Relationship between Trade and Investment since the Fourth Ministerial Conference. The situation does not provide a basis for the commencement of negotiations in this area. Accordingly, we decide that further clarification of the issues be undertaken in the Working Group.]

Annex D

Relationship between Trade and Investment

1. The objective of the negotiations shall be to establish an agreement to secure transparent, stable and predictable conditions for [long term cross-border investment, particularly foreign direct investment][foreign direct investment], that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area. Any agreement will reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of the host government as well as their right to regulate in the public interest.
2. Paragraphs 45-51 of the Doha Ministerial Declaration shall apply to these negotiations.
3. The Chair of the Negotiating Group on Investment shall hold the Group's first meeting within one month from the date of this decision. The Chair of the Negotiating Group shall conduct the negotiations with a view to presenting a draft text by no later than [30 June 2004].
4. On the basis of paragraph 22 of the Doha Ministerial Declaration and the work done thus far under the Working Group on the Relationship between Trade and Investment, the multilateral framework shall include the following elements:
 - Scope and Definition ([long-term cross-border investment, particularly FDI][Foreign Direct Investment]);
 - Transparency;
 - Non-discrimination (MFN and NT with limited exceptions);
 - Pre-establishment commitments based on a GATS-type, positive list approach;
 - Exceptions and balance-of-payments safeguards;
 - Consultations and the settlement of disputes between Members (investor to state dispute settlement mechanisms shall not be included);
 - Special and Differential Treatment for developing and least-developed country Members including flexibility regarding transparency obligations, commitments (NT, MFN and pre-establishment commitments) and transition periods, as necessary;
 - Provisions as necessary to clarify the relationship between this Agreement and relevant WTO provisions;

- Provisions to clarify the relationship between this Agreement and existing bilateral and regional arrangements on investment;

- Other issues that participants may wish to put forward.

5. Recognizing the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development, we shall work in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to continue to provide strengthened and adequately resourced technical assistance and capacity building to respond to these needs during the negotiations and after their conclusion.

Second Revised Draft (WTO 2003c), 13 September 2003

Investment 14. We note with appreciation the valuable work that has been carried out in the Working Group on the Relationship between Trade and Investment under paragraphs 21 and 22 of the Doha Ministerial Declaration.

In accordance with relevant provisions of the Doha Ministerial Declaration, we commit ourselves to provide strengthened and adequately resourced technical assistance to developing and least-developed countries to respond to their needs for enhanced support in this area.

We agree:

- to intensify the clarification process called for in paragraph 22 of the Doha Declaration, covering the elements listed in that paragraph as well as other elements raised by Members, including the elements identified in WT/MIN(03)/W/4;

- to convene the Working Group in Special Session to elaborate procedural and substantive modalities on the basis of paragraphs 20, 21 and 22 of the Doha Declaration, and other elements raised by Members. We reiterate that the special development, trade and financial needs of developing and least developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Consideration should be given to the relationship of the negotiations to the Single Undertaking;

- modalities that will allow negotiations on a multilateral investment framework to start shall be adopted by the General Council no later than [*date*]1.

“July Text” First Draft (JOB(04)/96), 16 July 2004

Para.1.f.

Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.

July Text Second Draft (JOB(04)/96/Rev.1), 30 July 2004

Para.1.g.

Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.

July Text Final (WTO 2004), 2 August 2004

g.

Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.