

Consensus-seeking, distrust and rhetorical entrapment: The WTO decision on access to medicines

European Journal of
International Relations
16(4) 563–587

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DOI: 10.1177/1354066110366054
ejt.sagepub.com



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Abstract

While the WTO secretariat, key delegations, several NGOs, and industry publicly present the 30 August 2003 WTO Decision as an attempt to reconcile intellectual property with access to medicines, our research shows otherwise. We draw on qualitative analyses of 54 interviews and a lexicometric analysis of press releases to show that their enthusiastic public statements contrast deeply with their internal, cynical beliefs. Most of these actors not only consider the WTO Decision to be fundamentally flawed but claim to have known this prior to its adoption. We argue that a procedural norm of consensus-seeking impeded traditional bargaining over this sensitive issue and that distrust among participants hindered truth-seeking deliberation. Caught between strategic and communicative actions, state and non-state actors found themselves trapped in their own rhetoric of reconciling intellectual property with access to medicines. They realized that the appearance of a solution, rather than a functional solution, provided the only realistic outcome to a fruitless and publicly damaging continuation of debate. From a theoretical perspective, this case study sheds a new light on the gray zone between rational choice theory and constructivism, where both discourse and strategies matter. From an empirical perspective, it illustrates the risk of seeking consensus within international regimes when the procedural norm of consensus coexists with a high level of distrust.

Keywords

discourse, HIV/AIDS, intellectual property rights, norms, rhetoric

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Introduction

Gabriel García Márquez's novel, *Chronicle of a Death Foretold*, tells the story of a tragic murder in a remote tropical community. While the townspeople were well aware of the murderer's intention, each had his or her own reason not to prevent this predictable crime, creating an odd consensual collusion. One could argue that the title of this novel could as easily describe the story of the WTO Decision on generic drug exports. Actors consensually agreed to a mechanism that they knew would not work but that would save their reputations and advantageously position them for the next round of negotiations.

This alternative *Chronicle of a Death Foretold* begins with the signature of the *Doha Declaration on the TRIPs Agreement and Public Health* in November 2001. The Declaration called for international negotiations to address the need of some countries to import generic medicines produced under compulsory licensing. At the time, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) provided that compulsory licenses 'shall be authorized predominantly for the supply of the domestic market.'¹ Thus, if a developing country did not possess sufficient manufacturing capacity to make a locally issued compulsory license practicable, TRIPs prevented it from importing drugs produced under compulsory licenses in another country. With the Doha Declaration, WTO members formally agreed that this situation was unacceptable and committed themselves to find an 'expeditious solution.'

It was not until the summer of 2003 that Member States reached what WTO Director, Supachai Panitchpakdi, called 'an historic agreement.'² The so-called 30 August 2003 Decision defined conditions under which a country could export pharmaceutical products to another under a compulsory license. In December 2005, WTO members translated this Decision into a permanent amendment to the TRIPs agreement, making it the first WTO agreement to be amended. The adopted mechanism received praise from around the world, including from rock star Bono, UNICEF, the United States Trade Representative, and Pfizer. Some NGOs expressed cautious skepticism over the Decision but nevertheless soon lobbied for its implementation in domestic legislation.

The effectiveness of the global mechanism, however, proved disappointing. The early literature, published before the adoption of the final Decision and the first attempts at its implementation, presents the Doha Declaration as a breakthrough and credited NGOs for bringing public health concerns to a trade forum (Hoen, 2002; Sell and Prakash, 2004). Even some later work treated the Declaration as a victory for NGOs, but with the warning that 'at the time of writing, it was too early to assess further any net effects of this case and later events' (Odell and Sell, 2006: 106). Nine years after the Doha Declaration, the conclusion has become clear that the WTO Decision actually changed little. In the seven years following its implementation, only one compulsory license has ever been issued under this mechanism. That was between Canada and Rwanda, as exporter and importer respectively, of 260,000 packs of the HIV/AIDS combination therapy. The Canadian company involved stated that 'it's almost a miracle Rwanda may be getting any drugs under this law.'³ Meanwhile, most other developing countries continue to lack safe and affordable pharmaceutical products. 'We have failed lamentably,' concluded Stephen Lewis, the former United Nations Special Envoy for HIV/AIDS in Africa.⁴

More recent studies provide three explanations for the failure of the WTO mechanism to increase access to medicines in developing countries (Baker, 2004; Gopakumar, 2004;

Islam, 2004; Pugatch, 2006). Most argue that the hold-up is caused by the procedural requirements for obtaining a compulsory license, which are burdensome and create unnecessary transaction costs. Others explain away the current low use of the mechanism by pointing to the fact that India has been supplying affordable drugs that have not been patented in that country. Finally, others argue that the problem lies in an asymmetry of information about the mechanism such that many developing countries are not even aware that it exists. These three explanations converge on the conclusions that the legal mechanism is inadequate and that international pharmaceutical economics undermines its effectiveness.

This article addresses the upstream problem of how the world found itself in this situation. If we assume, along with most observers, that the legal mechanism is not suited to the realities of pharmaceutical economics and business models, why did policy makers adopt such an ill-fitted mechanism in the first place and why did most non-state actors publically support it? This problem is especially puzzling since frequent explanations for ineffective regimes are unsatisfactory. The facts run against the interest group literature argument that policymakers were captured by one interest group at the expense of others. Pharmaceutical companies were the only potential losers of the mechanism, but they surprisingly joined the NGOs in advocating for the implementation of the mechanism in domestic legislation. As John Odell and Susan K. Sell observed, 'if the dominant powers' preferences had been sufficient to determine the outcome, there would have been no WTO declaration at all, or one expressing sympathy for victims while reaffirming the status quo without qualification' (2006: 97).

We agree with Odell and Sell that actors may have recognized that walking away with nothing in hand was worse than a mechanism that they knew was flawed. But this does not explain how they put themselves into a situation where this would be true. It is far from clear why the United States and the pharmaceutical industry considered that a new exception to exclusive rights was better than the alternatives. It is even more difficult to understand why NGOs and developing countries felt that walking away from discussions in disgust was worse than a public health mechanism they knew to be flawed.

We argue that the actors became trapped in a rhetoric of consensus-seeking that made it preferable for all to agree to a flawed mechanism rather than to keep negotiating. With this procedural norm of consensus-seeking in place, it became more important to be seen as having participated in the process in a collaborative manner than to pursue the declared objectives of the regime. Thus, actors gave priority to reaching a shared decision over adopting an effective solution aligned with the formal objectives of the negotiations. The Decision represents more a convergence of relational interests (i.e. preserving reputation gains and ending the debate) than a convergence of minds (i.e. a moral duty to amend a treaty with the aim of increasing access to medicines).

This finding is of critical importance at a time when consensus-seeking is often presented by many policymakers and some academics as the most desirable process to govern trade-related matters (Kapoor, 2004; King, 2003; Wolfe, 2005). Such an approach is believed to avoid unfair outcomes otherwise favored by tyrannical majorities or hegemonic powers. If governments, patent-holders, generic producers, and humanitarian organizations, which are usually stuck in dead-ended antagonism, can agree on a solution, one could (wrongly) presume that it will be balanced and effective. Yet, our study shows that the procedural norm of consensus-seeking can also lead not only to unworkable outcomes, but to flawed processes as well.

Table 1. Three forms of action

	Process based on	Actor's objective	Consensus is	Outcome defined by
Strategic action	Bargaining	Gain-maximizing	A hypocrisy	Most powerful
Rhetorical action	Arguing	Gain-maximizing	A procedural norm	'Unworking agreement'
Communicative action	Arguing	Truth-seeking	An outcome	Best argument

More specifically, we argue that when consensus-seeking is elevated to the status of procedural norm, it is likely to bring participants into a position of 'rhetorical action.' Rhetorical action refers to the strategic deployment of an organized set of claims with the purpose of convincing an audience or depriving opponents of rhetorical materials (Krebs and Jackson, 2007, Müller, 2004; Risse, 2000; Schimmelfennig, 2001; Ulbert and Risse, 2005). As illustrated in Table 1, rhetorical action is situated within a continuum from strategic action based on pure gain maximization (an ideal-type conceptualized by rational choice theory) to communicative action based on pure truth-seeking deliberation (an ideal-type conceptualized by Jürgen Habermas). Lying between strategic and communicative actions, rhetorical action has characteristics of each: it is based on using arguments to persuade others but without a willingness to give up on maximizing one's own gains.

The concept of rhetoric can usefully bridge two theoretical schools. Rational choice theory alone cannot explain our case as norms and discourse have clearly affected the outcome. However, hard-core constructivism is equally insufficient. Actors had pre-defined material interests and sought to maximize their utility. We consider that rhetorical action, as a middle ground between constructivism and rational choice theory, better explains the adoption of the 2003 WTO Decision.

Rhetoric could be a powerful tool if used unilaterally. However, if all actors engage in rhetorical action and do not share any normative commitment other than the procedural norm of consensus-seeking, they will find themselves trapped in an endless debate, unable to persuade others and unwilling to move. To overcome this situation, actors have three options. First, they can turn their dynamic of rhetorical action into strategic action. For this, they must be prepared to behave in contradiction with their own discourse and suffer reputational costs. Second, they can try to elevate their rhetorical action into truth-seeking action. This, however, requires more than intersubjectively shared norms and the prevalence of argument over bargaining, two conditions identified by the current Habermasian literature on world politics (Kapoor, 2004; Mitzen, 2005; Müller, 2004; Risse, 2000). Our research suggests that trust — or at least the absence of distrust — is an independent intervening variable. Third, actors unwilling to suffer reputational costs by having behaviors inconsistent with their previous discourse and unwilling to build trust with their interlocutors by ignoring their previous behaviors, can close their debate by adopting an *unworking agreement*.

To identify the operative norms, strategies, and arguments of participants involved with formulating the WTO debate on patent and public health, we used two data sources.

The first derives from 54 semi-structured interviews we conducted with key actors (see appendix). While it is impossible to guarantee that interviewees were sincere, the structure of the interview — its confidential nature and face to face discussion — makes this method more likely than public statements or questionnaires to reveal beliefs.

The second data set was constructed from a computer-based lexicometric analysis of more than one hundred press releases and published open letters on the WTO Decision. This data set reveals how actors desired to portray themselves and negotiations at particular times. By relying on these two sources of data and using both qualitative and quantitative analyses, we were able to overcome the deficiencies of each and help control for false recollection and inconsistencies.

This article is organized in three sections. First, we show that the WTO debate on patents and public health possessed similarities to rational truth-seeking deliberations. States and non-state actors engaged in a process of argumentation, expressed their commitment to reach a consensus, and progressively converged on a common set of norms. However, as the second section establishes, the process of argumentation was not driven by communicative but by rhetorical action. Suspicions about the true motives of interlocutors led to pessimism and encouraged actors to pursue their own strategic gain-maximizing objectives. The third section describes how the actors were trapped by their own rhetoric around the procedural norm of consensus-seeking, which conflicted with their material and reputational interests. Only the establishment of an alleged consensus, privately described by participants themselves as unworkable, could allow the actors to escape from a dead-end consensual process and avoid negative reputation consequences.

The procedural norm of consensus-seeking

The appropriateness of argumentation

We argue that consensus-seeking became a procedural norm in the WTO debate on patents and access to medicines. Norms are shared understandings of the appropriate behavior for actors with a given identity, usually defined in terms of prescription or proscription (Katzenstein, 1996). International Relations scholars focus mostly on substantive norms, such as the prescription of human rights practices or the proscription of the use of chemical weapons. These norms are often correlated with behavioral changes and positive outcomes. Less well understood, but equally important, are procedural norms, such as the norm of consensus-seeking, and their effects on policy processes.

In the context of the WTO, consensus is technically considered reached ‘if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.’⁵ In the context of this study, however, we do not follow this legal definition. Given that we are interested in social rather than legal norms, we follow the Habermasian literature and conceptualize consensus-seeking as an ideal-type process that brings interested parties into a common deliberation with the objective of reaching an agreement that is rational from a subjective perspective and normatively valid from an intersubjective perspective. The objective is neither a mere agreement resulting from a majority vote nor a compromise resulting from bargaining (Habermas, 1996: 166). A consensus is reached only through the force of the better argument. While the legal norm of consensus is a key

feature of the WTO, the social norm of consensus-seeking, as an objective, can be found in several multilateral settings, especially around social and environmental issues. In fact, the WTO is less suited for Habermasian consensus than are other settings given that its core procedure is based on bargaining rather than on deliberation.

The issue of access to medicines is a 'deviant case' in international political economy (Drezner, 2007: 177) because of its strong social context. Unlike usual WTO bargaining in which it is appropriate to try to secure benefits narrowly for one's constituents, in the case of access to medicines, such conduct would have been seen as inappropriate. In public discourse on access to medicines, morality prevails over rivalry. While it is socially acceptable for a state to claim that a new free trade agreement better positions its domestic industry to be globally competitive, it would be inappropriate to brag that a decision increases the price of medicines in developing countries and increases the profit margin of pharmaceutical firms.

Distinguishing between what actors legally have to, and what they socially must, do is crucial to understand behaviors. Legally, under the *Agreement Establishing the WTO*, an interpretation of the TRIPs Agreement regarding the use of compulsory licenses could have been taken by a majority of three-quarters. But this procedural rule was not followed and the social norm of consensus-seeking dominated deliberations (Ehlermann and Ehring, 2005: 64). No country ever requested a vote, and no NGO actively promoted this option, even when only one country, the United States, was still resisting. WTO members took the necessary time to convince one another, even though some delegations presented the issue as a matter of life and death.

Non-state actors were part of and subject to the norm of consensus-seeking accepted by state actors. After the adoption of the 2001 Doha Declaration, pharmaceutical companies changed their discourse and progressively integrated the soft language of multi-stakeholder governance. A good illustration is the speech by Raymond Gilmartin, then President of the International Federation of Pharmaceutical Manufacturers & Associations (IFPMA), made in 2002 when WTO negotiations were at their peak:

To make real progress, we must adopt a new approach for constructive engagement. First, it's important to acknowledge that other stakeholders are expressing legitimate needs and then to engage with them to agree on a common goal. Next, through constructive dialogue, we must propose solutions and be prepared to take specific action. Third, we should engage with others to form coalitions to try to effect change — whether or not we share a common vision with them.... I'm a firm believer in the need to establish consensus before setting our course.⁶

Pharmaceutical companies retained this mild rhetoric of inclusiveness during most of the negotiation and implementation phases. One of the only exceptions occurred soon after Canada announced its intention to implement the WTO decision. Harvey Bale, the Director of IFPMA, warned the Canadian government that its initiative would be 'a negative black eye' that could 'very well affect the investment climate.' But less than a week later, pharmaceutical companies abandoned this confrontational approach. Their press releases and open letters used not only neutral but inclusive terms to describe interactions with other actors such as *agree, all, collaboration, common, consensus, cooperation, coordination, joint, partnership, shared, and together* (Z value of 2.7⁷). The few aggressive

nouns and adjectives employed referred to the common 'fight against diseases' and 'the battle against public health threats.' Moreover, their lexicon used notions associated with aid — like *help*, *humanitarian*, and *assistance* — more frequently than any other actor, including NGOs (Z value of 5.8).

In this lexical environment, several actors appealed to the consensus-seeking norm to make their arguments more convincing. For example, the Canadian government justified its narrow list of pharmaceutical products that could be manufactured for export by referring to international disagreements on the issue and the possibility of adding new drugs if 'an international consensus emerges.'⁸ Pharmaceutical companies, for their part, defended a provision called 'right of first refusal' on the basis that it would allow all stakeholders to fully participate in the mechanism.⁹ Interestingly, NGOs objected to both the government's list approach and the industry's right of first refusal in implementing legislation of the WTO Decision by claiming that neither reflected the 'carefully-crafted international consensus.'¹⁰

As a consequence of this normative environment, actors who disagreed with the so-called consensus felt ostracized. An interviewee working for a major international NGO was afraid of being seen as arrogant when he did not support a consensual decision: 'I worked very hard to try to make a more gentle position and more soft and help people to understand why and to excuse.' A second interviewee, who worked closely with the pharmaceutical companies, confirmed: 'If you don't agree with [the Decision] all of a sudden you become more and more considered a fringe element.'

Of course, one's discourse does not necessarily reflect one's thoughts and actions. In fact, during our interviews, many used martial terminology to describe their experience, referring to 'a fight,' 'a guerrilla,' 'a battle,' and 'a war' against 'an enemy.' However, a social norm is not revealed by personal beliefs or actions, but by the intersubjective understanding of appropriate behaviors, as usually expressed publicly. Although the 2003 WTO Decision is not the result of truth-seeking deliberation, its discursive landscape indicates the presence of a logic of appropriateness to enter into a process of argumentation.

Arguing on the appropriate behavior

As our findings show, actors can feign having sought and achieved a consensus that never occurred. The work of Habermas on communicative action is useful in distinguishing alleged from actual consensus. For Habermas, genuine consensus derived from truth-seeking deliberations is the constitutive core of rationality and the source of legitimacy (Habermas, 1984). However, the ideal speech situation required for Habermasian truth-seeking deliberations is impossible in the international sphere (Diez and Steans, 2005). There is never equal access to the discourse and power relations always play a role in determining outcomes (Hyde-Price, 2006). Communicative action must, however, be understood as an ideal-type that, like strategic action, does not perfectly describe real-world situations. Moreover, traditional Habermasian assumptions must be relaxed when the ideal-type of communicative action is applied to understanding world politics. Internationalists have specifically identified two conditions for truth-seeking deliberation (Kapoor, 2004; Mitzen, 2005; Müller, 2004; Risse, 2000). First, the use of power, although unavoidable, should not overrule the force of the better argument. This implies

that all interested parties have an opportunity to participate in the deliberative process, put forward arguments, and challenge validity claims. Second, participants must share a common *lifeworld*, that is, a set of fundamental norms and systems of beliefs against which they can weigh claims. The practice of communicative action reproduces this common *lifeworld*, while it can also, at a smaller scale, produce new interpretations of the truth, the good, and the right.

Although the August 2003 Decision is not the result of a truth-seeking deliberation, we found that its two conditions — a process of argumentation and shared norms — appear to have been fulfilled. Indeed, we disagree with those who consider that bargaining always prevails over arguing in trade matters. Consensus-seeking at the WTO is often condemned as ‘organized hypocrisy’ and a ‘procedural fiction’ (Steinberg, 2002: 342). It is said that raw bargaining, including the use of coercion, trade-offs, and sanctions, enables powerful countries to dominate the process. This realist perspective is exemplified in Frederick Abbott’s publications on the WTO 2003 Decision. He explains the Decision by the fact that the US ‘did not enjoy broad developed country support for its preferred hard-line approach to the Decision,’ while developing countries ‘stuck together better than the average family’ (2005: 349; and 2003: 2). He concludes that this exceptional bargaining structure led to the US acceptance of the 2003 Decision.

This narrative, however, is based solely on the logic of strategic action and fails to fully explain the 2003 Decision. Power dynamics and strategies were, of course, at play, but they are not sufficient to explain the outcome. Why the US was dropped by its allies on this specific issue and why developing countries formed a more cohesive group than usual (Odell, 2009) remain to be explained. One could hardly find an answer in the bargaining process itself, especially after November 2001. Once the Doha Declaration was adopted, WTO members deliberately isolated the issue of access to medicines from other trade issues where bargaining and strategic linkages are dominant negotiating principles. They adopted the Doha Declaration on TRIPs and Public Health in a separate document, agreed on a solution before the Cancun ministerial of 2003, and adopted a permanent amendment before the Hong Kong ministerial of 2005. Although development on this issue was presented by some developing countries as a condition to the launch of the Doha round of trade negotiations and by some developed countries as a stimulus for its conclusion, it was not strategically linked with any specific trade issue. As several interviewees mentioned, this procedure stood in sharp contrast to the usual trade bargaining practices under which trade-offs are specific and are often made explicit. On the issue of access to medicines, however, efforts were sought to minimize, or at least give the impression of minimizing, trade-offs with other trade issues.

Actors seemed to be primarily engaged in a process of argumentation rather than one of pure bargaining. We must recognize that it is methodologically impossible to clearly demonstrate that argumentation won out over material power (Deitelhoff and Müller, 2005). Nevertheless, we note that there is no suggestion of strategic linkages being made with other specific trade issues while there is evidence of a ‘deliberative drift’ (McLaverty and Halpin, 2008). Several studies have analyzed the negotiation process that led to the 2003 Decision, have described the discursive frames promoted by key actors on each side of the debate, and have established that discursive strategies played a key role in explaining the outcome (Odell and Sell, 2006; Sell and Prakash, 2004). It is now well known that

developing countries and NGOs contested the established orthodoxy of strong patent protection by using a set of pre-established norms. In their public statements and positions, they appealed to fairness in trade relations and international human rights to promote the counter-regime substantive norm that public health concerns should take precedence over patent protection. The US and pharmaceutical companies publicly responded to these claims and engaged in the debate. They promoted alternative interpretations of the same set of substantive norms, stating that a fair trade system implies protection of private property and international human rights include the right to have one's creation protected.

It is more difficult to establish whether actors had equal opportunity to participate in the debate. Several critics claim that the lack of transparency and the marginalization of non-state actors deprived the WTO debate from reaching its necessary public and weakened the legitimacy of the decision-making process (Charnovitz, 2002: 354; Esty, 2002; Kapoor, 2004: 532). Of course, the decision-making process at the WTO does not formally require the support of non-state actors. It also is true that the intended beneficiaries of the mechanism were not considered as relevant stakeholders and were not invited to participate in Geneva-based discussions. People suffering from the lack of medicines in developing countries remained, at best, a minor and voiceless public.

Nevertheless, some transnational NGOs acted as norm entrepreneurs in the shadow of formal WTO deliberations, in the sense that they constructed the initial cognitive framing of 'issues by using language that names, interprets and dramatizes them' (Finnemore and Sikkink, 1998: 897). Located at the impulse-generating periphery that surrounds the political center, they were able to create with government officials what Keohane and Nye called 'transnational-transgovernmental coalitions' (2001: 9). Earlier studies have shown that, during the pre-negotiation phase leading to the Doha Declaration, NGOs capitalized on the HIV/AIDS and anthrax crises to create political opportunities, disrupt the WTO's agenda, and promote the alternative frame that 'compulsory licenses = generics = lower prices = life' (Drezner, 2007; Hoen, 2002; Sell and Prakash, 2004). Our interviews further establish that non-state actors played a crucial role during the negotiation and the implementation phases, moving from the role of agenda-setters and public-mobilizers to that of direct advisers. NGOs and industry organizations provided technical support to bureaucrats, drafted submissions formally presented by WTO members, organized training sessions for negotiators, and offered 'legal clinics' during WTO conferences. They also made sure that the details of the WTO negotiations, although not formally public, would be known to those who were interested. Professor Abbott himself, who espouses a state-centric perspective in his publications, was frequently hired by NGOs to provide technical assistance to developing countries. According to some interviewees, he was even one of the main architects in the process of convincing several delegations to adopt the consensual decision.

The last condition that has been identified to establish a truth-seeking deliberation process in world politics is the existence of a common lifeworld. While the 'business-US' and the 'NGO-developing countries' coalitions may seem far apart in their positions, one should not overestimate the extent of divergence of their lifeworld. Deitelhoff and Müller found that '[i]nternational politics already represent a thin layer of a common lifeworld' (2005: 172). Governmental and transnational actors involved in the debate over access to medicines shared technical knowledge, a legal language, and a familiarity

with diplomatic practices. On the other hand, those suffering from HIV/AIDS and those conducting research on it were not part of this subculture, and were not, as noted above, considered as relevant participants in the debate. Pharmaceutical companies, major NGOs, and government officers all considered themselves and each other as valid interlocutors sharing a common conceptual framework.

Moreover, state and non-state actors alike recognized that the background context to the debate was the HIV/AIDS epidemic. The NGO–developing countries coalition had long focused on this crisis, but soon the US–business coalition agreed. First, the US government broke with its long-standing policy in May 2000 when it issued an Executive Order supporting the use of compulsory licenses for HIV/AIDS medications in sub-Saharan Africa. A year later, 39 pharmaceutical corporations dropped their controversial lawsuit against the South African government in relation to those medications and the US government announced the withdrawal of its WTO claim against Brazil over pharmaceutical patent issues. Meanwhile, the pharmaceutical companies significantly increased the amount of drugs donated to developing countries and the US government initiated an ambitious development program to assist developing countries facing the HIV/AIDS crisis (Gathii, 2003). These actions demonstrated an implicit acceptance by advocates of strict international patent standards that a rigid enforcement of the TRIPs agreement could potentially lessen access to medicine in developing countries and that they had a moral responsibility to refrain from doing harm (Barry and Raworth, 2002).

Deitelhoff and Müller observed that ‘actors facing a breakdown in cooperation strive to create artificial lifeworld features’ (2005: 173). Indeed, from the eve of the Doha Conference, the public statements of both coalitions progressively converged on certain substantive norms. As a lobbyist for industry recognized during our interviews: ‘Our position at the beginning was quite strong but we did make compromises.’ Pharmaceutical companies even came to explicitly recognize that patents are one of the ‘barriers to providing basic medical care in the world’s poorest countries.’¹¹ NGOs and developing countries, for their part, recognized the legitimacy of patent protection, stopped arguing for the total exclusion of pharmaceutical products from patentability, and advocated, instead, for simple ad hoc exceptions.

This normative agreement carried over to the Doha Declaration itself. In it, WTO members agreed that the TRIPs Agreement ‘should not prevent members from taking measures to protect public health.’¹² They also explicitly recognized ‘that intellectual property protection is important for the development of new medicines.’¹³ After the pre-negotiation phase, these assumptions, heavily disputed before 2001, remained unchallenged. What was later called the ‘spirit of the Doha Declaration’ provided a common normative background against which assertions and substantive norms could be gauged.

When one takes into account their shared political culture, their reciprocal empathy, their common background context, and their agreements on basic substantive norms, one finds the basis for, at minimum, a thin layer of common lifeworld and, more likely, a more substantive one. While the ‘business–US’ and the ‘NGO–developing countries’ coalitions still had major disagreements separating them, the 2001 Doha Declaration defined a common lifeworld sufficient to ground the debate that led to the 30 August 2003 Decision. At first glance, they appeared ready to enter into a truth-seeking deliberation that would produce a rational consensus.

This section establishes that the outcome could not be explained by pure strategic action, nor could it, as the next section demonstrates, be explained by pure communicative action. We argue that participants were more concerned about the strategic position than about pursuing the better argument. While they complied with the social norm of consensus-seeking and adopted an appropriate discourse, they never internalized a common frame. Underpinning this, another fundamental condition to achieve communicative action was missing: trust.

Trust as the missing variable

Arguing without trust

Trust remains a poorly understood variable in international relations. For Mearsheimer, 'there is little room for trust among states [because fear] can never be reduced to a trivial level' (1994: 11). Among the few who take trust seriously, many adhere to an 'encapsulated interest conception' (Hardin, 2006: 19; Hoffman, 2002: 380). They assume that the person being trusted and the trusting person share an interest in cooperation that creates a sufficient incentive to be trustworthy. This conception is at the forefront of game theory in which self-reinforcing trust palliates uncertainty and favors mutually beneficial cooperation (Kydd, 2005).

However, one must distinguish the cognitive variable of trust from exogenous certainty-builders, such as information, hegemony, or iteration. Trusting is not gambling based on objective calculations of interests: it means believing that the other is expressing his or her real opinions and is not seeking to deceive, that is, to engage in rhetorical action. Truthful communications are differentiated from strategic deception based on beliefs initially generated by internal emotions and reinforced by social interactions (Garver, 2004: 142; Mercer, 2005; Müller, 2004). This emotional component makes trust a variable that cannot 'be planned with any degree of certainty' (McLaverty and Halpin, 2008: 199).

Trust is a difficult variable to assess. An analysis limited to published documentation would reveal no indication of distrust between interlocutors. Parties often challenged the truth of assertions and the moral correctness of substantive norms but rarely did they put into question the truthfulness of the speaker him or herself. When the lexeme *trust* is mentioned, it is usually in positive forms (e.g., *We trust in the ...*), whereas *bad faith* is raised in the conditional or future tense (e.g., *It would be an act of bad faith if ...*).

Nevertheless, our interviews revealed that these public statements do not represent personal experiences in which lack of trust was a major factor. Several interviewees mentioned the exceptional level of distrust that impeded rational deliberation. According to a senior officer working for an international organization:

There is almost a culture of mistrust, which does obscure the content of the issues we're working on to an inappropriate degree. I think the analytical frenzy of people assessing each other's motives and attributing hidden agendas to one another has developed its own momentum, has developed its own mind space, became a stand-alone intellectual structure, which really works in parallel to the real issues.... Not only is there an excessive degree of mistrust, I think it's becoming an analytical industry in its own right.

Most interviewees revealed their own distrust by questioning the motivations of other interlocutors. Three, for example, believed that NGOs made strong emotional appeals to attract more funding from donors and to gain a greater number of members. Three others were more specific and believed that some well-known NGOs received funding from generic companies to advocate for relaxed patent laws. Four interviewees, in addition to the previous six, qualified NGOs as 'socialist,' 'anti-market,' 'far-left,' or 'anti-corporation' organizations that exploited public health issues in developing countries for domestic political reasons, either to support a left-wing political party or to promote domestic health care reforms.

Pharmaceutical companies were considered no more trustworthy. As one lobbyist stated: 'In the court of public opinion, right now we're not the highest ranked industry in the world.' In some extreme cases, distrust reaches stratospheric levels. In 2001, newspapers around the world reported that Dr Germán Velasquez, an official of the WHO, had been assaulted in Brazil and Florida and received death threats because he had been 'messing with the pharmaceutical industry.'¹⁴ This story is well known among NGOs and provides fodder for their suspicion. One international NGO interviewee now limits personal interactions with pharmaceutical companies and avoids written criticisms of the industry because 'a lot of things have happened with people who've messed around too much with the pharmaceutical industry.' A second interviewee, a senior governmental official, found his car vandalized and tires slashed on the day of a critical meeting on access to medicines. His suspicion of industry was such that he believed this to be a warning from industry against taking an adverse position. Whether accurate and justified, these statements, which are amongst the most extreme, reveal a high level of distrust of pharmaceutical companies.

While the greatest amount of the animosity is oriented toward brand name companies, the generic industry is not trusted either. As one interviewee noted: 'The two industries were in it for self interest and neither one of them could be trusted.... They were all crooks!' Many interviewees, including government officials, politicians, negotiators, and representatives of brand name companies, believed that the generic industry is simply exploiting the access to medicines issue as a lever to obtain changes in domestic patent law that suit their interests. One policymaker said, 'We had to ensure that a Mack truck didn't come through.'

Bureaucrats were not immune from the general feeling of distrust. Some interviewees assumed that the only reason European negotiators were involved was to divert attention away from agricultural subsidies. Several also questioned the integrity of developing country bureaucrats. In fact, no less than 14 interviewees, including diplomats from developed countries, questioned the true motivations of their developing world counterparts believing that they were engaged in strategic behavior, trying to attract foreign direct investment or to continue their system of corruption. According to a senior negotiator:

Developing countries ... were not pushing really with the intention of resolving this specific issue directly and once the issue was resolved, they didn't really know what to do with it.... I'm kind of implying that their negotiators were more interested in bargaining leverage than they actually were about providing AIDS medicine to their own countries.

Even international civil servants working for international organizations were considered biased. Many interviewees noted tensions between the WTO and the WHO and attributed a bias toward developed and developing countries to each, respectively. The

WTO's Director of Intellectual Property himself expressed in a leaked memo his doubts about the trustworthiness of the WHO: 'Nothing that is given to WHO can be relied upon to remain confidential if some individuals believe that they can get any advantage from exploiting it.'¹⁵ In another letter, the US Department of Health warned the WHO that the publication of a document on patents and access to medicines undermined his 'confidence in the veracity and reliability' of WHO senior staff.¹⁶

Further, actors were not naive about their interlocutors' perceptions of their own truthfulness. Many interviewees from governmental, non-governmental, and business organizations attributed to their interlocutors at best a 'love to hate' sentiment and at worst a 'visceral hate' toward them. Pharmaceutical company lobbyists joked, in particular, about how 'evil' and 'villainous' they are. But distrust and being distrusted does not only nourish irony, it leads to cynicism and pessimism.

Cynicism and pessimism

Trust is often considered a result, rather than a condition, of deliberation. In his interpretation of Habermas, Risse states, 'arguing establishes trust among actors regarding mutual belief in the truthfulness of one's respective speech acts and in the authenticity of the speakers' (2000: 20; see also Müller, 2004). Openly questioning validity claims on truthfulness and pointing out inconsistencies between what one says and does helps to clarify misunderstandings. Arguments about the validity of facts and norms may also lead to empathy and initiate a virtuous cycle of trust-building.

Our findings show, however, that argumentation does not necessarily lead to trust. Breach of trust in previous interactions could, in particular, affect the capacity of argumentation to build trust. Through these experiences, interlocutors construct a set of beliefs about the true motivations and goals of others. These beliefs may distort how the interlocutor interprets the speech acts of others. As Gambetta observes, 'peaceful signals are more likely to be interpreted as a trap' (1988: 227). Therefore, once established, beliefs in another's hostility are easy to confirm and difficult to disprove (Jervis, 1976). A bureaucrat, who was catapulted into this issue, explains the difficulty of establishing trust with non-state actors: 'Part of this goes back to people's own views of the government and what baggage they come with and what experiences they've had before this interaction.'

Distrust resulting from previous interactions is likely to produce two effects that impede communicative action. First, actors may decide that it is not worth engaging in meaningful dialogue. They discuss and adjust their claims but do not necessarily deliberate and take into account the interests of others. When we asked a leading activist if he tried to establish a direct dialogue with pharmaceutical companies, his answer was illustrative: 'We have not made any sort of active efforts to do that, and mostly because, frankly, I don't think it's worth it.' Another activist expressed the same resignation: 'That's a central flaw in thinking if somebody thinks that they can convince the drug companies that they understand their own interest better than them.' Lobbyists of the pharmaceutical industry return the sentiment, expressing similar views about NGOs. One lobbyist stated that it is useless to communicate with NGOs: 'I can probably say [the NGO's statement] for them because I've heard it 10,000 times and they could probably say my statement too because they've probably heard it 10,000 times.' Most bureaucrats from governmental or intergovernmental

organizations did not try to overcome this dialogue of the deaf and facilitate communication between NGOs and industry. Rather, they systematically preferred to meet with each group separately to avoid bringing them around the same table. NGO and industry representatives did exchange arguments and they did adjust their positions, but they did not believe in the value of this deliberative process. As one interviewee observed: 'People are not really interested in listening to each other.'

The second effect of pathologic distrust is a general pessimism about reaching a true consensual solution. This was clearly expressed by one activist: 'You know, with goodwill on the part of the brand name, the patent holders; I think the law probably could work.' Governmental decision-makers share a similar assumption, but place the blame on both NGOs and industry. A senior government official observed that 'their positions were so entrenched; they were so intractable, so intangible that I didn't think we were going to make any headway at all.' Similarly, a politician who actively worked on this issue believed that bad faith is a serious obstacle to the effectiveness of the mechanism:

I thought that if the parties actually used it in good faith, it would actually produce positive benefits, but if they were not going to use it in good faith then it wouldn't do anything, it would just sit on the shelf, a nice piece of legislation but not really do anything.... I think that just about every one of the stakeholders was not acting in complete good faith and they all bear responsibility.

Generic producers, on whom the whole mechanism relied to produce and export pharmaceutical products to developing countries, were among the most pessimistic. They kept a low profile during WTO negotiations and participated significantly less than most NGOs and pharmaceutical companies. Interviewees working with the generic industry acknowledged that they preferred investing their political capital in other policy issues. They described the mechanism as a 'predictable failure.' According to a key player in the industry, 'there's no way that this bill is ever going to be able to be used.' There is in fact little economic incentive for these companies to export generic versions of patented drugs to least developed countries (Shadlen, 2007). Even the generic industry's traditional rival, patent-holding pharmaceutical companies, agree that the mechanism offers no opportunity for profit.

WTO negotiators and national policymakers were well aware of the generic industry's lack of interest. During our interviews, 12 bureaucrats recognized that the generic industry showed little interest. When we asked a government official whether he was surprised that the mechanism he helped to design was not used, he answered: 'not particularly, it was a bit of a false issue right from the beginning.' Another bureaucrat working in an international organization said that the mechanism 'will not make any difference in terms of improvement of access to medicines.' A third admitted to never being 'of the view that by just doing this it would really alleviate significantly access to medicines in developing countries.' A bureaucrat even joked that the Martin administration named the Canadian legislation implementing the WTO Decision after the former Prime Minister Jean Chrétien — with whom the Martin administration had a tense relationship — after they realized it would fail.

Most NGOs from developed and developing countries were similarly skeptical about the mechanism's potential to realize its objectives. Although they actively pushed for its

implementation, few believed it could directly improve access to medicines in developing countries. 'Nobody went into it with their eyes glossed over,' an NGO representative explained, 'everyone went into it with immense suspicion.' Interestingly, it was the organizations that followed the multilateral debates since its beginning, such as Médecins Sans Frontières (MSF) and Knowledge Ecology International (KEI), which appeared the most disillusioned.

As a senior industry lobbyist stated: '[W]e probably could have predicted that this was going to happen and yet we spent a year of government time.' This might appear irrational in a truly deliberative process. However, this false paradox can be understood if we acknowledge that states and non-state actors never entered into a genuine truth-seeking deliberation process on this issue. Although they referred to a consensus-seeking norm and put a priority on argumentation over bargaining, the necessary condition of trust was missing. Without trust, each party's decision to support the mechanism remained largely strategic rather than communicative.

The above analysis strongly suggests that trust is a necessary, although not sufficient, condition to obtaining a workable consensus. It may not be necessary for other forms of cooperation, such as a bargain or a compromise, but it is a prerequisite to achieve a rational consensus. While one can enter into a consensus-seeking process of argumentation without it, one cannot reach a valid consensual agreement in a Habermasian sense without it (McLaverty and Halpin, 2008; Parry, 1976). If not explicitly and actively addressed, distrust and pessimism impede truth-seeking communication. Without trust, arguments are merely rhetorical.

Trapped between communicative and strategic action

A convergence of reputational concerns

To articulate an effective rhetorical discourse, speakers must translate their interests into the language of shared values or established norms. But once a rhetorical discourse is communicated, it has consequences even for the speaker. This is what Elster (1998) calls the 'civilizing force of hypocrisy.' Speakers cannot return to a pure bargaining process and openly reveal inconsistencies between their discourse and their instrumental objectives without risking the loss of credibility. Rhetoric is, as Müller puts it, a 'non-revolving door' that ejects strategists from the rational choice world into the world of arguing (2004: 425).

This means that actors engaged in rhetoric may find themselves trapped between the logic of appropriateness and the logic of consequences. Rhetorical entrapment refers to the inability to pursue a preferred option that violates a prior rhetorical statement while refusing to comply with normative standards because it would undermine material interests.

Actors in the access to medicines debate found themselves in this bind caused by the divergence of their material interests from their reputational interests. Interviewees expressed the feeling of being entrapped in different ways. For example, one lamented that he was 'forced to enter into a quiet, fake debate.' Another regretted not being able to go backward 'because we already embarked.'

While rhetorical entrapment, as a gray zone between communicative and strategic behaviors, is increasingly being explored, the access to medicines case presents a situation in which all actors are equally trapped by the same commitment to find a consensual

solution.¹⁷ The great majority of our interviewees directly or indirectly acknowledged that they had to take into account reputational costs when defining their strategic objectives.

For trade negotiators, 'the priority,' as one of them put it, 'was to demonstrate that the international trade system could accommodate the very vulnerable situation of developing countries.' With the WTO's legitimacy being questioned, 'the risk is that at the end, the whole system will collapse because we exaggerate.' As another negotiator explained: 'We took the view that whatever the merits of the issue, this was a politically very hot subject we could not avoid.' In total, 10 interviewees working in governmental and inter-governmental organizations recognized that an alleged solution on the sensitive issue of access to medicines was seen as an opportunity to demonstrate the flexibility of the trade system and the goodwill of its most powerful members.

The WTO secretariat itself hailed the 2003 Decision as evidence that the trade system can produce results on critical issues of particular interest to developing countries. In its press releases and in the speeches of its Director-General, the Decision is presented as proof that the WTO can manage humanitarian as well as trade concerns.¹⁸ This issue, said Dr Supachai, is 'of great importance not only to developing countries but to the organization itself and to the broader trade negotiations that are part of the Doha Development Agenda.'¹⁹ Governments of major developed countries expressed the same idea in their own press releases, linking the 'spirit' of the 2003 Decision to the necessity to conclude the Doha Round.²⁰ As an activist observed, 'it's amazing how many times they congratulate themselves on this decision.'

The pharmaceutical companies understood early that policymakers were seeking reputational gain. During our interviews, many industry representatives described debates on access to medicines as a 'political exercise,' a 'symbolic issue,' the 'easiest scapegoat,' a 'media-visible solution,' or a 'total political process.' Nevertheless, they adjusted their short-term objectives and elaborated, according to one of the principal architects of the industry strategy, 'something very intelligent.' They realized that their material interests could be spared and their own reputation improved if they cooperated and supported the political process. This debate was a unique opportunity for them to reverse the public criticism that followed the ill-fated South African lawsuit. This case was reported around the world as a conflict between 39 powerful transnational corporations defending excessive profit margins and a weak state defending human life. Having learned its lesson from this 'huge PR mistake,' industry resolved to adopt a proactive, rather than defensive, strategy and developed 'a greater level of understanding of how better to communicate.' It 'became politically necessary to conclude [negotiations] in a manner that would be perceived as beneficial to least developed countries' (Pugatch, 2006: 270).

NGOs also faced their own reputation challenges. While some expressed skepticism, most did not want to criticize too harshly a mechanism that, according to both policymakers and the media, was a result of their advocacy efforts. NGOs had political incentives of being able to claim that they succeeded in changing a WTO agreement. A campaigner admitted that 'there is a competition to be able to think and to be persuaded that your policy contribution is greater than the other camp.' In addition, many interviewees from the NGO community believed a consensual mechanism itself had significant political value, irrespective of its effectiveness: it creates a global momentum, raises awareness, and opens policy space. A consensual adoption of a WTO decision could increase the

political will of governments to adopt public health policies and resist pressure to raise their patent protection. Therefore, like pharmaceutical companies and policymakers, some of the NGOs' objectives could only be met if the mechanism was consensually adopted.

An agreement to close the debate

When all actors participate in rhetorical action, the outcome can be deadlock. Arguing alone is insufficient to move forward if no one is ready to be convinced by the best argument. As Risse points out, they 'can argue strategically until they are all blue in the face and still not change anyone's mind' (2000: 8). But actors could not afford to stagnate and endlessly repeat their positions. The nature of discussion — even one premised on a lack of true engagement — requires movement, at least formal interaction with other interlocutors, responses to criticism, restatement of positions in different forms, and formal participation in the discussion.

Paradoxically, the procedural norm of consensus-seeking provided actors in the access to medicines debate with an exit strategy. By focusing their efforts on reaching an agreement, they escaped from potentially endless negotiations and avoided hypocrisy costs. In the end, they were generally satisfied with the evolution of the issue. They closed the debate at the WTO and are now in a better position to pursue other objectives.

From the point of view of developed country trade negotiators, the WTO Decision crossed a sensitive issue off the agenda. Access to medicines is no longer actively discussed at the WTO TRIPs Council or even at WTO public symposia for civil society. 'The debate has not gone away but certainly has significantly diminished' observed a trade negotiator. Most of them are pleased that this controversy ceased to obstruct other trade issues. As one said, 'luckily, this issue has been resolved.' Another gratified himself for this success: 'Of course I know that the problem on the ground — HIV/AIDS — is still a major issue, but as a political issue, I think we maneuvered in such a way that indeed the confrontational and emotional debates have really almost died out.'

Pharmaceutical companies were pleased with the WTO Decision for similar reasons. Meir Perez Pugatch, from the market-oriented think-tank Stockholm Network, explains that the Decision closed the door on further contestation over the legitimacy of TRIPs: 'IP owners have lost the battle but in the long run may be better positioned to win the war' (2006: 272). By signing the deal, developing countries 'essentially declared that the TRIPs Agreement no longer obstructs efforts to promote public health' (Pugatch, 2006: 271). Accordingly, several interviewees from the pharmaceutical industry consider the public controversy on patents and access to medicines to be over. Their renewed self-confidence is exemplified by a recent return to a belligerent attitude. While industry refrained from initiating legal disputes against developing countries for several years, they are now actively challenging the laws or policies of several countries, including Thailand, India, South Korea, and Kenya.

Finally, NGOs and governmental officers from developing countries were also pleased the WTO debate is over: 'It's been off the agenda because we let it slip off the agenda,' said one activist. The mechanism's poor results, for which they expressed skepticism even before its adoption, is evidence that other solutions must be found. According to them, 'it should be a wakeup call,' 'it's very clear now you have to find something different,' they have 'such a strong case for completely different models' and 'we need

to go back to the drawing board.’ This failure offers unique opportunities to reframe the debate. An interviewee expressed this paradox as follows: ‘I am seeing as a very positive development that we lost.’ Indeed, the end of the WTO debate coincided with the opening of the WHO debate on access to health. This forum shift toward the WHO is seen as a positive development by activists and governmental officials working on public health. Discussions still include patent issues, but within a broader framework. Options being considered are not limited to compulsory licensing for countries with insufficient manufacturing capacity, but include patent pools, prize funds, and technology transfer to increase developing-country manufacturing capacities. To the great satisfaction of NGOs, ‘a new chapter is starting at the WHO.’ A key actor in the debate concluded that it would be misleading to say that the WTO mechanism ‘was ever intended to be used.’

Given that the 2003 WTO Decision was founded on a convergence of interests around consensus rather than mutual conviction, it cannot be qualified as a ‘rational consensus’ in the Habermasian sense. States and non-state actors were not prepared to revise their views and, due to a lack of trust, never really engaged in a truth-seeking deliberation. Nor were they involved in a ‘systematically distorted communication,’ wherein actors deceive themselves over the appearance of consensus (Habermas, 1981). They were conscious of the process and tried to deceive others through the use of rhetorical argument. They were not even engaged in a ‘weak communicative action,’ where actors try to reach an empirical consensus on factual truth and coordinate their actions with a success-oriented perspective (Habermas, 1984). Most state and non-state actors avoided empirical questions on access to medicines and came to focus their actions on their own reputational and strategic objectives. For the same reason, the 2003 Decision could not be portrayed as an ‘overlapping consensus’ based on the avoidance of controversial issues (Rawls, 1987). It is not their beliefs about the best way to implement the Decision that overlapped, but their common interest in reaching an agreement, any agreement. Finally, the Decision cannot be described as a compromise resulting from bargaining. Trade-offs with other issues were deliberately discarded, powerful actors renounced relying on coercion, and norms played a crucial role in the outcome.

In fact, the 2003 WTO Decision could be described as a ‘working agreement’ (Eriksen, 2003; Habermas, 1984). The Habermasian literature defines working agreements as agreements resulting from a process of argumentation but supported by actors for different reasons. However, we prefer the neologism of *unworking agreement*, as the only shared truth is that the mechanism would not affect, positively or negatively, material interests of key stakeholders. An unworking agreement is made of ‘sham standards’ (Drezner, 2007: 81), permitting a claim to the *de jure* existence of a mechanism and relieving pressures for the continuation of the debate as previously framed.

Conclusion

In their study of WTO negotiations over access to medicines, Odell and Sell observe that discursive frames, even if not internalized, seem to have affected behavior. From this observation, they conclude that ‘constructivist theories of communicative action’ might be a promising lens through which to study the negotiation process (2006: 110). This article accepted this challenge.

More specifically, we brought together material and ideational perspectives into a common analytic frame. We considered seriously both gain-maximizing objectives and

argumentative processes, and showed how rhetorical action, at the interplay between strategic and communicative actions, can affect outcomes. On the one hand, one must recognize that talk is not always cheap. 'Speaking is an activity with normative consequences' (Onuf, 2001: 77), such as the establishment of a normative requirement to reach an agreement. On the other hand, arguing rather than bargaining does not prevent strategic behaviors, such as pursuing an unworking agreement to close a debate and open new opportunities in other fora. Caught between two behavioral logics, rhetoric is a process through which arguing prevailed over raw bargaining, but gain-maximizing prevailed over truth-seeking.

We were able to identify a procedural norm of consensus-seeking and weigh its internalization by contrasting public discourses with views expressed in semi-structured interviews. Although all state and non-state actors in the access to medicines debate appealed to the norm of consensus-seeking, they did not argue in the Habermasian sense of communicative action. They were engaged in rhetorical action and none were actually open to being convinced by the force of the better argument. Each party actively sought to be seen as consensus-seeking in public, but did not actually believe in the consensus in private. They were trapped in a process in which their stated objectives (reaching a rational consensus) and their reputational objectives (being seen as complying with the norm of consensus-seeking) contradicted their material objectives (to pursue a fixed position). To escape this situation, they agreed to adopt a flawed but consensual mechanism that would save their reputation, allow them to reframe the issue elsewhere, but do nothing to address the issue at hand. This explains both the enthusiasm and hope apparent in published documents and the cynicism and pessimism expressed in our private interviews.

One can draw three conclusions from this case study. First, a procedural norm can influence both process and outcome. The procedural norm of consensus-seeking brought all interlocutors into a process of rhetorical action that led to an 'unworking agreement'. This situation is arguably common in world politics, as the procedural norm of consensus-seeking seems to be spreading in multilateral settings, especially in contexts in which economic, social, and environmental objectives converge. It remains, however, under-examined as analysis continues to focus on the impact of substantive rather than of procedural norms.

Second, a truth-seeking process only lives up to its name in situations in which actors come to trust one another. The prevalence of argumentation and the existence of a common *lifeworld*, while necessary, are not sufficient for communicative action. Trust is also needed to enter into a truth-seeking process and to achieve a rational consensus. This finding is an important response to critics who claim that there is a circular logic between trust and argumentation in Habermasian theories (Bially Mattern, 2007: 106). Although they facilitate one another, trust does not necessarily emerge from argumentation and is not a necessary condition for arguing. However, as Chollet and Goldgeier (2002: 167) observed, trust is one of these areas of decision-making 'that most policy-makers regard as indispensable but most scholars ignore.' Further research is required, not only on how trust enhances cooperation, but more importantly on how trust can actually be built. It would also be necessary to clarify if it is the absence of trust, or the presence of high-level distrust as in this case, that impedes rational communication.

Third, rhetoric might constrain the speaker as much as the audience. Earlier studies on the access to medicines debate have shown that discursive frames promoted by NGOs and pharmaceutical corporations have had an impact on their audience (Odell and Sell, 2006; Sell and Prakash, 2004). To this finding, we add that rhetoric has also entrapped speakers.

Statements, even if not reflecting heartfelt beliefs, may constrain one's behavior. When combined with a procedural norm of consensus-seeking, it could even simultaneously entrap all speakers and all audiences. This boomerang effect, although less studied than unidirectional communication channels, is likely to be frequent when complex issues bring together a small number of major actors. Advocates, bureaucrats, and lobbyists may tend to avoid risks and hypocrisy costs by implementing earlier commitments, even if these commitments were made before fully appreciating their long-term consequences.

When consensus-seeking, distrust, and rhetorical action are combined, when actors are unwilling to suffer reputations costs and unprepared to trust each other, only an unworking agreement having the appearance of consensus can free them from their collective entrapment. This finding should serve as a cautionary tale for the current debate over patents and biodiversity protection. NGOs, pharmaceutical companies, and policy-makers have once again come together to reconcile two regimes. They should be reminded that including all interested parties in a policy process is unlikely to be fruitful if the problem of distrust remains unaddressed.

Acknowledgements

This article is part of a broader research project funded by the Canadian Institutes for Health Research. The authors would like to thank co-investigators, Tania Bubela and Cecile Bensimon, for their contribution to this article, Jaye Ellis for her helpful comments on an earlier draft, and the Duke Centre for Genome Ethics, Law and Policy for its warm welcome.

Appendix I: List of interviewees

Interviewee	Affiliation	Date of Interview
Abbott, Frederick M.	Florida State University	16 January 2007
Addor, Felix	Swiss Federal Institute of Intellectual Property	14 February 2007
Armstrong, Christopher	Canadian International Development Agency	17 January 2007
Austin, Sara	World Vision	23 August 2006
Bennett, Catherine	Formerly with Pfizer	6 October 2006
Berger, Jonathan	AIDS Law Project (South Africa)	2 April 2007
Blouin, Chantal	North South Institute	21 June 2006
Bonin, Marie-Hélène	Formerly with Médecins Sans Frontières	8 November 2006
Charles, Furaya	Government of Rwanda	20 November 2007
Clark, Bruce and Hems, John	Apotex	30 January 2007
Clark, Douglass	Industry Canada	17 November 2006
Connell, Jeff	Canadian Generic Pharmaceutical Association	30 January 2007
Drummond, John	Department of Foreign Affairs (Canada)	31 October 2006
Elliott, Richard	Canadian HIV/AIDS Legal Network	31 January 2007
Elouardighi, Khalil	Act Up Paris	30 October 2006
Finston, Susan	Formerly with PhRMA	5 October 2006
Foster, John	North South Institute	8 September 2006
Fried, Mark	Oxfam	8 September 2006
George, Douglas and Boisvert, Julie	International Trade Canada	7 September 2006

Appendix I: (Continued)

Interviewee	Affiliation	Date of Interview
Gerhardsen, Tove Iren	IP Watch	1 November 2006
Gorlin, Jacques	Gorlin Group	5 October 2006
Jennings, Marlene	Member of the Canadian Parliament	10 October 2006
Jorge, Fabiana and Cullen, Dolores	MFJ International	6 October 2006
Kiddell-Monroe, Rachel	Médecins Sans Frontières	10 November 2006
Kurji, Feyrouz	Formerly at the Private Council Office (Canada)	10 January 2007
Lee, David K.	Health Canada	8 September 2006
Lewis-Lettington, Robert	Genetic Resources Policy Initiative (Kenya)	4 April 2007
Lexchin, Joel	York University	31 January 2007
Love, James	Knowledge Ecology International	23 September 2006
Matthews, Merrill	Institute for Policy Innovation	2 November 2006
McCool, Terry	Eli Lilly	8 February 2007
McCoy, Stanford	United States Trade Representative Office	6 October 2006
Musungu, Sisule	South Center	10 November 2006
Noehrenberg, Eric	International Federation of Pharmaceutical Manufacturers and Associations	1 November 2006
O'Connor, Michael	Interagency Coalition on AIDS and Development	8 November 2006
Otten, Adrian and Watal, Jayashree	World Trade Organization	31 October 2006
Passarelli, Carlos	Government of Brazil	13 December 2007
Patry, Bernard	Member of the Canadian Parliament	8 November 2006
Pettigrew, Pierre	Former Canadian Minister of International Trade	14 December 2006
Pitts, Peter	Center for Medicines in the Public Interest	25 January 2007
Pugatch, Meir	The Stockholm Network	20 December 2006
Smith, Eric	International Intellectual Property Alliance	6 October 2006
Smith, Patrick	Intellectual Property Institute of Canada	22 January 2007
Spennemann, Christoph	UNCTAD	1 November 2006
Sreenivasan, Gauri	Canadian Council for International Cooperation	7 September 2006
Tamakloe, Joseph	Ghanaian Patent Office	16 November 2007
Taubman, Antony	WIPO	17 January 2007
Twiss, Caroline	Canadian Activist	7 March 2007
Vandoren, Paul and Ravillard, Patrick	European Commission	13 December 2006
Van-Eeckhaute, Jean Charles	European Commission	19 December 2006
Velasquez, German	World Health Organization	31 October 2006
Weissman, Robert	Essential Action	5 October 2006
Williams, Russell	Canada's Research-Based Pharmaceutical Companies	20 December 2006
Yong-d'Hervé, Daphné	International Chamber of Commerce	5 December 2006

Notes

1. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 31, f.
2. World Trade Organization, news release, 9 September 2003.
3. Tanya Talaga, AIDS drug fiasco a tale of red tape. *The Toronto Star*, August 2007, p. A1.
4. Editorial, *The Toronto Star*, 14 August 2006.
5. Marrakesh Agreement Establishing the World Trade Organization, note 1.
6. Raymond V. Gilmartin, Presidential address, Annual Business Briefing, Merck & Co Inc, news release, 10 December 2002.
7. We used the SATO software to measure discursive variations. The Z value indicates how many standard deviations above or below the mean a value is. We consider a Z value as statistically significant when it is above 2 or below -2.
8. Industry Canada, news release, 6 November 2003.
9. Jean-Michel Halfon, Saving lives in the Third World. *National Post*, 28 April 2004.
10. Canadian HIV/AIDS Legal Network, news release, 2 April 2004.
11. Hoffman-La Roche submission regarding 'Response to the Consultation Paper Re: Canada's Access to Medicines Regime', unpublished data, 24 January 2007.
12. World Trade Organization. Declaration on the TRIPS Agreement and Public Health, 20 November 2001, WT/MIN(01)/DEC/2.
13. Ibid.
14. John Vidal, Police guard WHO official after assaults and threats. *Guardian* (Manchester), 31 August 2001, special reports.
15. Posting of Mike Palmedo, mpalmedo@cptech.org, to IP-Health Listserv, Adrian Otten Missive on WTO-WHO Cooperation, Available at: <http://lists.essential.org/pipermail/ip-health/2001-September/001900.html> (accessed 21 September 2001).
16. Office of the Secretary, Department of Health and Human Services. Unpublished data, 18 August 2006.
17. Others used the concept of rhetorical entrapment to study the same case but failed to recognize that all actors were equally entrapped by their rhetoric (Busby and Greenhill, 2007).
18. World Trade Organization, news release, 30 August 2003; 6 December 2005; 4 October 2007.
19. World Trade Organization, news release, 20 December 2002.
20. Office of the United States Trade Representative, news release, 30 April 2003. Canada, Office of the Prime Minister, news release, 20 April 2004.

References

- Abbott F (2003) Trade diplomacy, the rule of law and the problem of asymmetric risks in TRIPS. Quaker United Nations Office, Occasional Paper 13. Available at: www.quno.org
- Abbott F (2005) The WTO medicine decision: World pharmaceutical trade and the protection of public health. *American Journal of International Law* 99(2): 317-358.
- Baker B (2004) Arthritic flexibilities for accessing medicines: Analysis of WTO action regarding paragraph 6 of the Doha Declaration on the TRIPS agreement and public health. *Indiana International and Comparative Law Review* 14(3): 613-716.
- Barry C, Raworth K (2002) Access to medicines and the rhetoric of responsibility. *Ethics and International Affairs* 16(2): 57-70.

- Bially Mattern J (2007) Representational force and attraction in world politics. In: Berenskoetter F, Williams M (eds) *Power in World Politics*. New York: Routledge, 98–119.
- Busby J, Greenhill K (2007) Have you no shame? The normative sources of weak actor influence. Paper presented at the annual meeting of the *American Political Science Association*, 30 August.
- Charnovitz S (2002) Triangulating the world trade organization. *The American Journal of International Law* 96(1): 28–55.
- Chollet D, Goldgeier J (2002) The scholarship of decision-making: Do we know how we decide? In: Snyder RC, Bruck HW, Burton S, et al. (eds) *Foreign Policy Decision Making (Revisited)*. New York: Palgrave Macmillan, 153–180.
- Deitelhoff N, Müller H (2005) Theoretical paradise — empirically lost? Arguing with Habermas. *Review of International Studies* 31(1): 167–180.
- Diez T, Steans J (2005) A useful dialogue? Habermas and international relations. *Review of International Studies* 31(1): 127–140.
- Drezner D (2007) *All Politics is Global: Explaining International Regulatory Regimes*. Princeton: Princeton University Press
- Ehlermann C-D, Ehling L (2005) Decision-making in the world trade organization. *Journal of International Economic Law* 8(1): 51–75.
- Elster J (1998) Deliberation and constitution making. In: Elster J (ed.) *Deliberative Democracy*. Cambridge: Cambridge University Press, 97–122.
- Eriksen EO (2003) Integration and the quest for consensus: On the micro-foundation of supranationalism. In: Eriksen EO, Joerges C, and Neyer J (eds) *European Governance, Deliberation and the Quest for Democratization*. Oslo: Arena, 163–232.
- Esty DC (2002) The world trade organization's legitimacy crisis. *World Trade Review* 1(1): 7–22.
- Finnemore M, Sikkink K (1998) International norm dynamics and political change. *International Organization* 52(4): 887–917.
- Gambetta D (1988) Can we trust? In: Gambetta D (ed.) *Trust: Making and Breaking Cooperative Relations*. New York: Blackwell, 213–238.
- Garver E (2004) *For the Sake of Argument: Practical Reasoning, Character, and the Ethics of Belief*. Chicago: University of Chicago Press.
- Gathii JT (2003) The structural power of strong pharmaceutical patent protection in US foreign policy. *Journal of Gender, Race & Justice* 7(2): 267–314.
- Gopakumar KM (2004) The WTO deal on cheap drugs: A critique. *Journal of World Intellectual Property* 7(1): 99–114.
- Habermas J (1981) Social action, purposive activity, and communication. In: Cooke M (ed.) *On the Pragmatics of Communication*. Cambridge: MIT Press, 105–182.
- Habermas J (1984) *The Theory of Communicative Action, vol. 1: Reason and the Rationalization of Society*. Boston: Beacon Press.
- Habermas J (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge: MIT Press.
- Hardin R (2006) *Trust*. Cambridge: Polity Press.
- Hoen E (2002) TRIPS, pharmaceutical patents, and access to essential medicines: A long way from Seattle to Doha. *Chicago Journal of International Law* 3(1): 27–46.
- Hoffman AM (2002) A conceptualization of trust in international relations. *European Journal of International Relations* 8(3): 375–401.

- Hyde-Price, A (2006) Normative power Europe: A realist critique. *Journal of European Public Policy* 13(2): 217–234.
- Islam MR (2004) The generic drug deal of the WTO from Doha to Cancun: A peripheral response to a perennial conundrum. *Journal of World Intellectual Property* 5(5): 675–692.
- Jervis R (1976) *Perception and Misperception in International Politics*. Princeton: Princeton University Press.
- Kapoor I (2001) Deliberative democracy and the WTO. *Review of International Political Economy* 11(3): 522–541.
- Katzenstein PJ (1996) Introduction: Alternative perspectives on national security. In: Katzenstein PJ (ed.) *The Culture of National Security: Norms and Identity in World Politics*. New York: Columbia University Press, 1–6.
- Keohane RO, Nye JS (2001) *Power and Interdependence: World Politics in Transition*. New York: Longman.
- King LA (2003) Deliberation, legitimacy, and multilateral democracy. *Governance* 16(1): 23–50.
- Krebs RR, Jackson PT (2007) Twisting tongues and twisting arms: The power of political rhetoric. *European Journal of International Relations* 13(1): 35–66.
- Kydd A (2005) *Trust and Mistrust in International Relations*. Princeton: Princeton University Press.
- McLaverty P, Halpin D (2008) Deliberative drift: The emergence of deliberation in the policy process. *International Political Science Review* 29(2): 197–214.
- Mearsheimer JJ (1994) The false promise of international institutions. *International Security* 19(3): 5–49.
- Mercer J (2005) Rationality and psychology in international politics. *International Organization* 59(1): 77–106.
- Mitzen J (2005) Reading Habermas in anarchy: Multilateral diplomacy and global public spheres. *American Political Science Review* 99(3): 401–417.
- Müller HM (2004) Arguing, bargaining and all that: Communicative action, rationalist theory and the logic of appropriateness in international relations. *European Journal of International Relations* 10(3): 395–435.
- Odell JS (2009) Braking deadlocks in international institutional negotiations: The WTO, Seattle and Doha. *International Studies Quarterly* 53(2): 273–299.
- Odell JS, Sell SK (2006) Reframing the issue: The WTO coalition on intellectual property and public health, 2001. In: Odell JS (ed.) *Negotiating Trade: Developing Countries in the WTO and NAFTA*. Cambridge: Cambridge University Press, 85–113.
- Onuf N (2001) Speaking of foreign policy. In: Kubáľková V (ed.) *Foreign Policy in a Constructed World*. Armonk: Sharpe, 77–97.
- Parry G (1976) Trust, distrust, and consensus. *British Journal of Political Science* 6(2): 129–142.
- Pugatch MP (2006) Political economy of intellectual property policy-making — an observation from a realistic (and slightly cynical) perspective. *The Journal of World Investment & Trade* 7(2): 257–274.
- Rawls J (1987) The idea of an overlapping consensus. *Oxford Journal of Legal Studies* 7(1): 1–25.
- Risse T (2000) Let's argue!: Communicative action in world politics. *International Organization* 54(1): 1–39.
- Schimmelfennig F (2001) The community trap: Liberal norms, rhetorical action, and the eastern enlargement of the European Union. *International Organization* 55(1): 47–80.

- Sell SK, Prakash A (2004) Using ideas strategically: The contest between business and NGO networks in intellectual property rights. *International Studies Quarterly* 48(1): 143–175.
- Shadlen KC (2007) The political economy of AIDs treatment: Intellectual property and the transformation of generic supply. *International Studies Quarterly* 51(3): 559–581.
- Steinberg RH (2002) In the shadow of law or power? Consensus-based bargaining in the GATT/WTO. *International Organization* 56(2): 339–374.
- Ulbert C, Risse T (2005) Deliberatively changing the discourse: What does make arguing effective? *Acta Politica* 40(3): 351–367.
- Wolfe R (2005) Decision-making and transparency in the ‘medieval’ WTO: Does the Sutherland Report have the right prescription? *Journal of International Economic Law* 8(3): 631–645.

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