

International Tax Arbitration: Global Economic Governance and the Privatization of International Tax Law

GlobalTaxGov

Research colloquium on global tax governance

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Agenda

The Specifics

- Current state of dispute settlement in international tax
- OECD Pillar One Blueprint “tax certainty” proposal
 - KEY ISSUE: HOW FAR DOES PROPOSAL GO TO EXPAND THE ROLE OF PRIVATE COMPANIES IN THE ARBITRATION PROCESS?

Creating context

- What is international arbitration today: Arbitration v. Justice
- The institutionalization of informal institutionalism
- Implications for International Economic Law Governance
 - Privatization of international tax law
 - Lessons from international investment law
 - UNCITRAL ISDS Reform Process
 - SDGs and privatized dispute settlement
- The broader context for International Economic Law and privatized dispute settlement

Conclusions

Current state of dispute settlement in international tax

- Government cooperation and information sharing
- MAP
- Taxpayer involvement in MAP limited to triggering process (except intra-EU)
- Beyond MAP to MAP arbitration
 - Limited coverage, ~30 states
- Taxpayer involvement still limited,
 - Most involvement in EU
- Limited binding impact on taxpayers
 - Mostly in EU
- Limited to no transparency
 - EU has limited transparency of awards



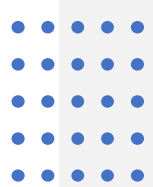
OECD Pillar One Blueprint “tax certainty” proposals

Amount A

- Expanded MAP process sets out broad negotiating mechanisms with a review panel (gov’t), followed if needed by a determination panel (non-gov’t)
- Binding on states, not on taxpayers (Legal rights to courts protected, plus possible other IIA recourses)
- Taxpayer can reject review panel or determination panel
 - Issue under discussion?
- Seeking arbitration add on
 - Role of taxpayer
 - Who are the arbitrators?
 - Process binding on taxpayer?
 - At no time is it binding currently (but question raised in para. 770 for Determination panel only)
 - Year to year only anyway
 - = massive mandatory negotiating process for states within threshold amounts, developing countries largely left in the background
- Legally dividing larger and smaller economies
- Significant “guidance” role for OECD secretariat (eg para 776)

Beyond Amount A

- Goal is move to mandatory arbitration on any issues for large size MNE taxpayers (esp. TP and PE issues)
- Role of taxpayer expands?
- Who are the arbitrators? Open issue
- More outstanding issues than resolved, including binding or not



OECD Pillar One Blueprint “tax certainty” proposals

KEY ISSUES: what are they proposing, or suggesting, or mooting in relation to expanding the role of individual taxpayers in:

Initiating extended MAP arbitration between states

- **AMOUNT A:**
 - Prepare own Amount A self assessment
 - Initiate procedure for early tax certainty binding on states only



OECD Pillar One Blueprint “tax certainty” proposals

KEY ISSUES: what are they proposing, or suggesting, or mooting in relation to expanding the role of individual taxpayers in:

Participating in extended MAP arbitration between states

- AMOUNT A:
- Available to give evidence in panels (but not a right in proposals), but: “Any approach to achieve early tax certainty relies upon active and transparent participation by an MNE group.”(para.753)
- Failure of MNE to cooperate is “only” reason for governments to deny request for certainty
- MNE can reject result of either panel and revert to courts at any time, even after final determination panel result (para777);
 - but governments still to be bound? (para 779)



OECD Pillar One Blueprint “tax certainty” proposals

KEY ISSUES: what are they proposing, or suggesting, or mooted in relation to expanding the role of individual taxpayers in:

Initiating arbitration between states on other issues

- Beyond Amount A
- Discussions to continue on mandatory binding arbitration to provide greater certainty for MNE groups “where it is most needed”
 - Dispute prevention
 - MAP process
 - Binding DS
 - “in light of the fundamental importance of tax certainty as an element of Pillar one” (para.792)
 - Binding arbitration will contribute to enhance MAP process (para. 796)
 - “the broad dispute resolution mechanism” (para. 796)
 - TP and PE main foreseen issues, but all issues potentially covered for “in scope MNEs”; only TP and PE for non-in scope MNEs
- Exclusion for small economies with no MAP cases?
 - Subject to elective binding DS process, to get used to the process (training wheels!)



OECD Pillar One Blueprint “tax certainty” proposals

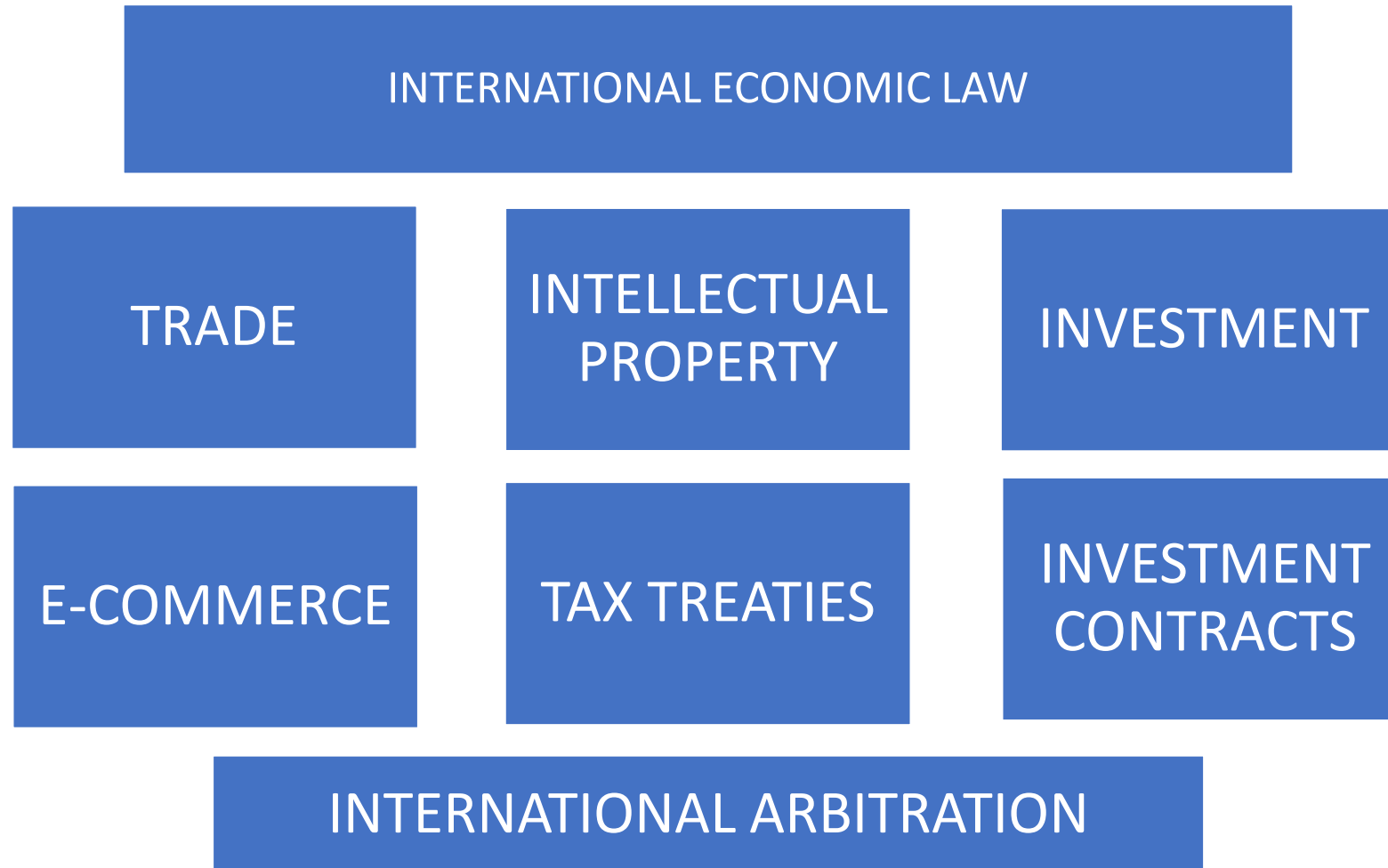
KEY ISSUES: what are they proposing, or suggesting, or mooting in relation to expanding the role of individual taxpayers in:

**Initiating arbitration directly against states
(investor-state type process)**

- **Beyond amount A:**
- Appears to be open to largest MNEs?
 - Or will scope of MAPs be increased?
- Broader certainty for in scope MNEs a “quid pro quo” for Amount A obligations
- Applies to Amount B (para 800.3)
- Tied to a MAP process?
- Relation to court processes largely at control of the taxpayer

What is International Arbitration today?

- Arbitration growing as an underpinning of more parts of international economic law



Is international arbitration “justice”?

- Adjudication of a dispute \neq justice
- Reflects concept of one-off adjudication, not systemic legal impacts and consequences
- Justice is a holistic, systemic concept
- Adjudication is a minimalist concept
- Can this concept of one-off adjudication apply in a world of, eg. thousands of international tax cases?
 - Approach already parallels IIA approach of arbitration as about a dispute, not about the rule of law (baseball arbitration model)

Is international arbitration “justice”?

- Problems:
 - Lack of oversight: rules very constrained to review arbitral awards
 - Annulment
 - Judicial review:
 - Self restraint by courts to be “arbitration friendly” part of soft/self governance mechanisms
 - Legal right to be wrong in law
 - “How dare you, no arbitrator will ever deliberately choose a path they know is wrong in law!”
 - Inconsistency
 - Conflicts of interest
 - Arbitration against states is a big business (\$10M+ per arbitration)
 - Can a legal system be said to be about “justice” or “the rule of law” when correctness in law is not its core value?
 - Does this setting corrupt?

The institutionalization of informal institutionalism

- **LACK OF ORGANIZATIONAL STRUCTURE IN INTERNATIONAL ARBITRATION DOES NOT MEAN THERE IS NO ORGANIZING STRUCTURE**
 - Converts a formal structure to an informal one
 - And hides the structure
 - No one place to go to to exercise control or impact direction
 - No one governing body
 - As opposed to governing “club”
 - Less transparent, but no less impactful for it

The institutionalization of informal institutionalism

- **LACK OF ORGANIZATIONAL STRUCTURE IN INTERNATIONAL ARBITRATION DOES NOT MEAN THERE IS NO ORGANIZING STRUCTURE**
- Multi-polar system, and increasingly so
- But also a self-replicating system
 - Berge and St. John: role of World Bank, especially for contracts and domestic law
 - Catherine Rogers: Legal and economic elites working at replication at the national and international levels:
 - *“Our theory is that in order to access professional opportunities, local elites in developing and emerging economies demonstrate their understanding of and support for international arbitration by introducing into their local legal systems reforms that benefit international arbitration. These reforms come in ready-made toolkits that are easy to adopt, and that indirectly transmit the rule-of-law norms.”*

Implications for International Economic Law Governance

- Privatization of international tax law
 - **Who are the decision-makers?**
 - Part of systemic expansion of international economic arbitration
 - Blueprint: government officials not independent or objective
 - Need “independent experts”
 - Who are they?
 - The role of informal institutionalism
 - Promotes certain approaches against government “interference” with the economy
 - Career recognition and reward for towing the line
 - Supports capital owners versus other stakeholders
 - The revolving door
 - Informalism in action
 - PARA. 772: “Whether panelists should be serving tax officials, retired... tax officials or independent experts, or a combination of these groups.” Also para 802.

Implications for International Economic Law Governance

Lessons from international investment law

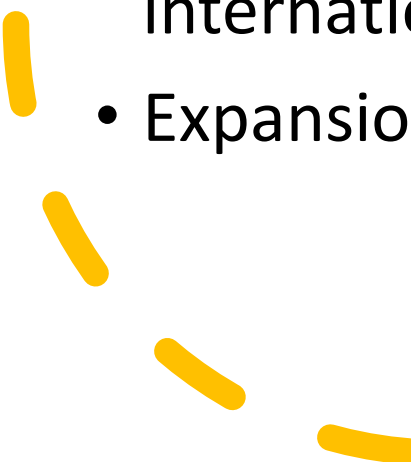
- From shield to sword
 - Tool of last resort to tool of first resort
- Takes on a life of its own
 - If you build it, they will come, and in ever more creative ways
- Reform after “experience” is almost impossible
 - Interests become vested

Implications for International Economic Law Governance

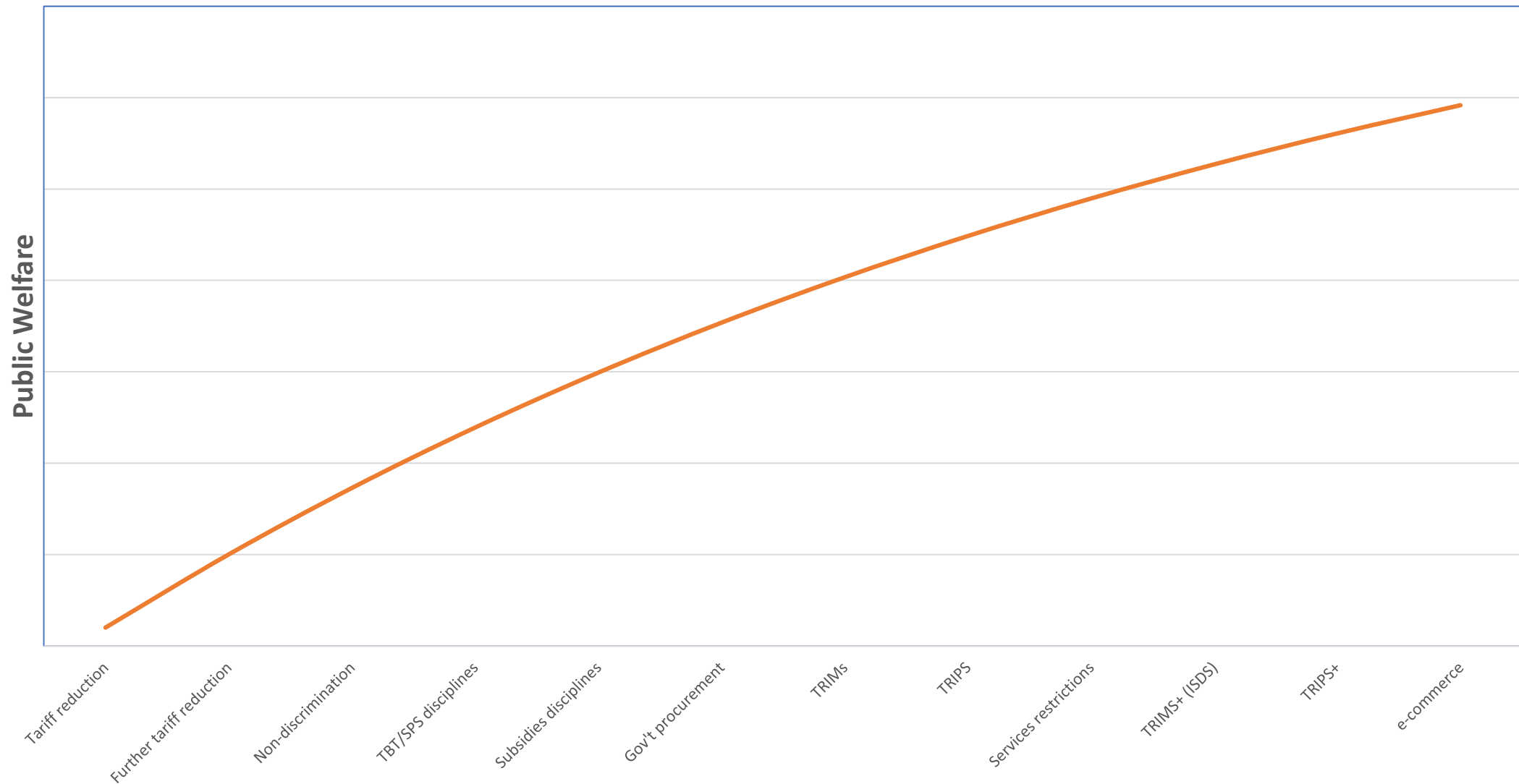
- UNCITRAL ISDS Reform Process: none of these issues feature in OECD proposals to date:
 - Began with transparency issues
 - 50+ ISDS cases address tax issues with transparency, plus EU Directive
 - Current process is reviewing
 - Arbitrator code of conduct and independence
 - Double hatting and the informal institutionalism
 - Costs and length of process
 - Consistency of reasons and results
 - Level of damages awarded
 - Investment court instead of ad hoc process



The broader context for International Economic Law and privatized dispute settlement

- Private dispute settlement as an instrument of international economic power
 - Prof. Rogers: Legal and economic elites
 - International arbitration as the enforcer of private sector international economic rights
 - Expansion tracks with evolution of international economic law growth
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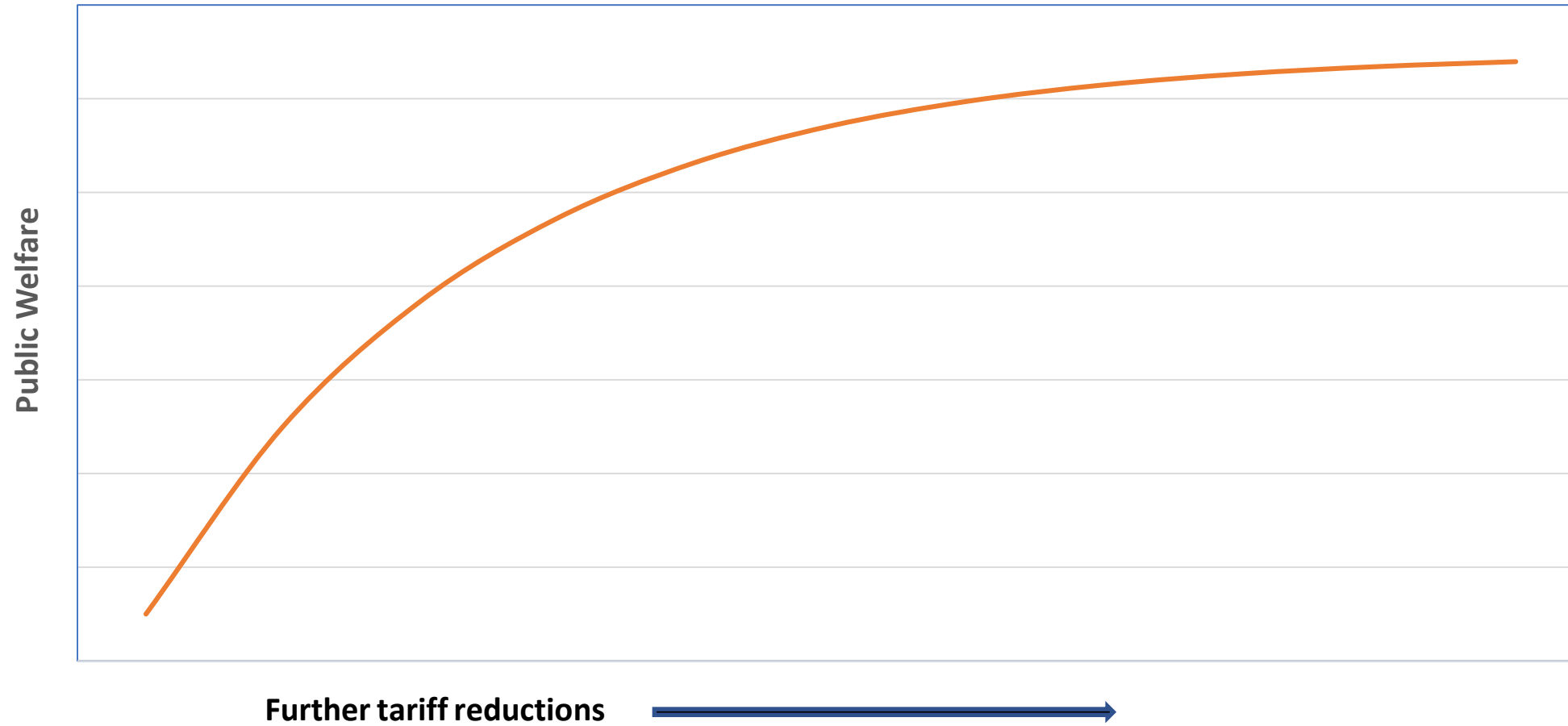
Evolution of Trade Agreements: Conventional Assumptions of Public Welfare Impacts



Current understanding


- ***Alternative view: At best, have diminishing returns***
- Trade benefits now largely taken from the system
- Tariffs very low
- TBTs more or less well governed
- Non-discrimination largely applied
- Few real economic gains remain, but may still have gains
- All trade agreements measured only in trade benefits now
 - CETA: Most positive estimates, 1% gdp over 15 years
 - CPTPP: Same level, but distribution wildly uneven

Evolution of Trade Agreements: Diminishing Public Welfare Impacts of Tariff Reduction





Revised understanding: from trade agreements to international economic agreements

- Trade now the smallest economic element of what we call trade agreements
 - Are broad international economic agreements, multiple areas of international activity, negotiation
 - Trade is what we call it, but that is wrong today
 - Changing X axis!
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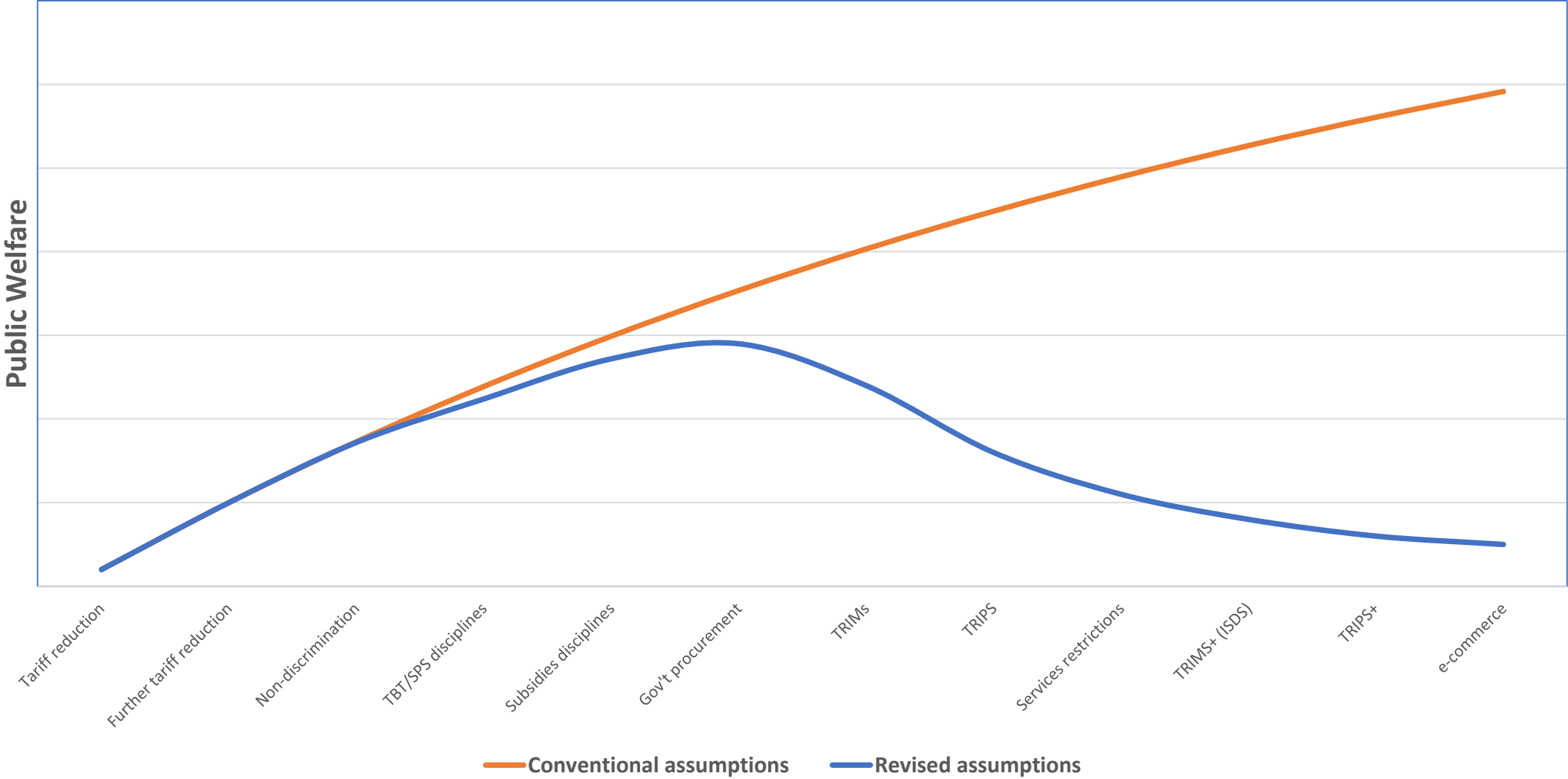
Revised understanding: from trade agreements to international economic agreements

- Changing understanding of public welfare benefits, the Y axis
 - Historically: elimination of poverty
 - Benefits often achieved, in some areas
 - But increasingly these are maxed out as trade diversification has maximized
 - Trade is not distributing broadly under these agreements
 - Investment isn't either
- Brings important new measures of public welfare
 - Distributional impacts (inequality)
 - Employment
 - Environmental
 - Gender
 - Migration
 - Equity...

Revised understanding: distributive effects

- Critical elements of impact, by design, of new elements in *international economic agreements*
 - Government procurement
 - TRIMS+ (in investment agreements too)
 - TRIPS+
 - Investment
 - Services
 - E-commerce
 - International tax
- **IT IS HAPPENING BY DESIGN OF THESE AGREEMENTS**

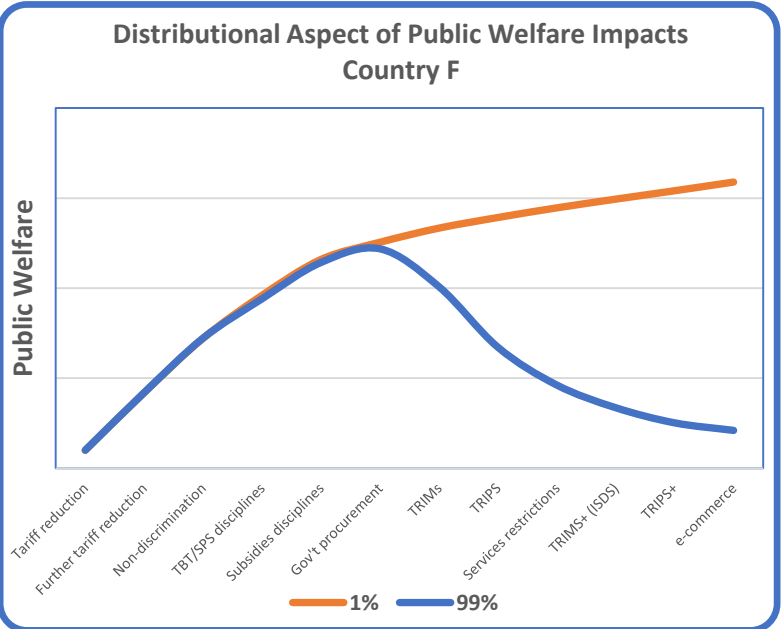
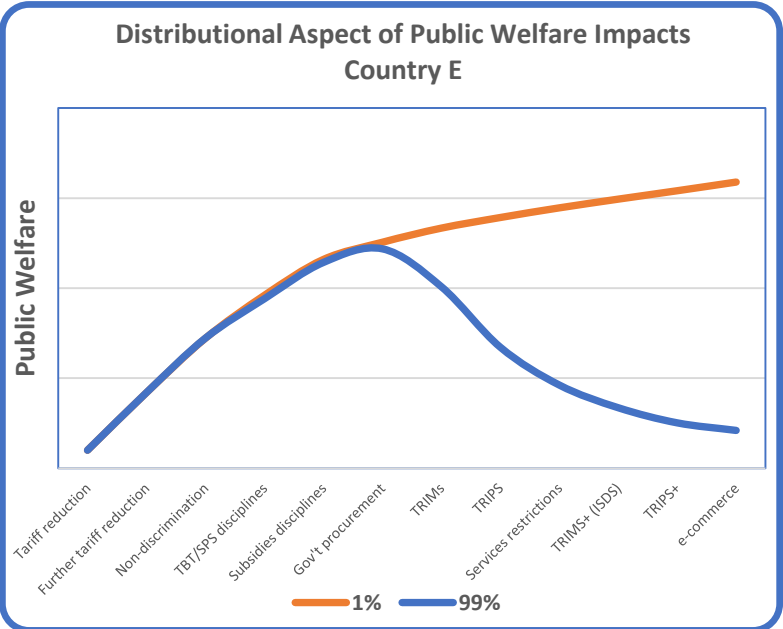
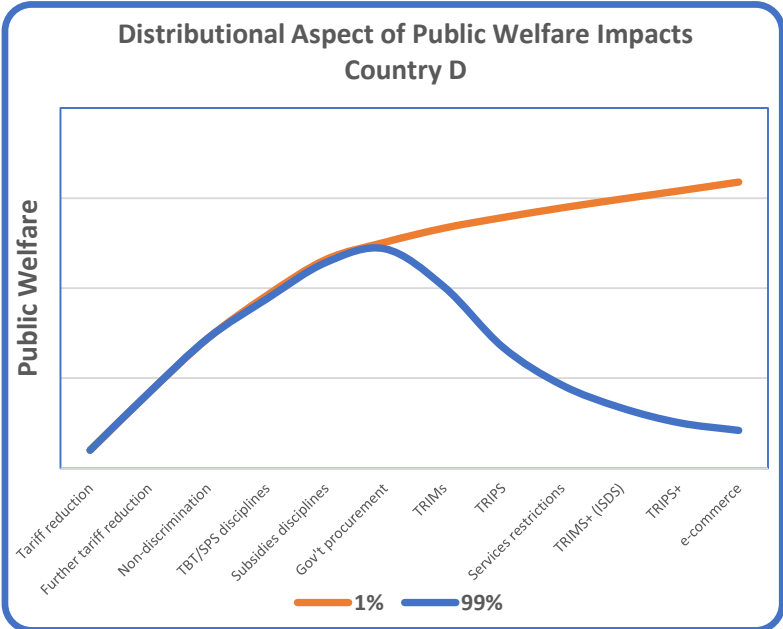
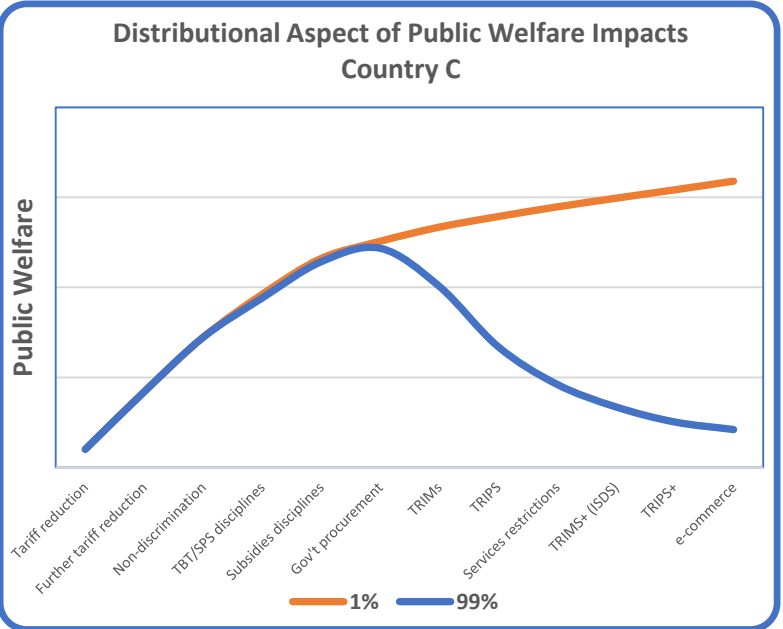
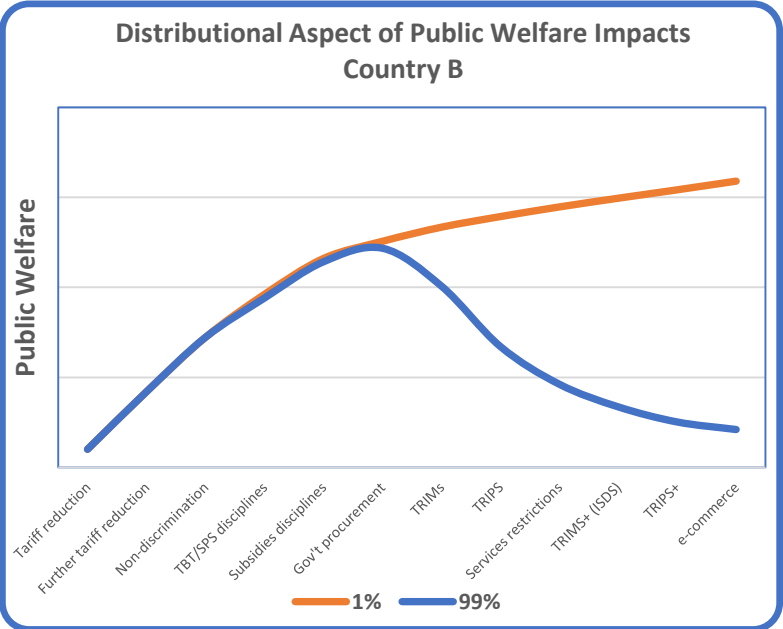
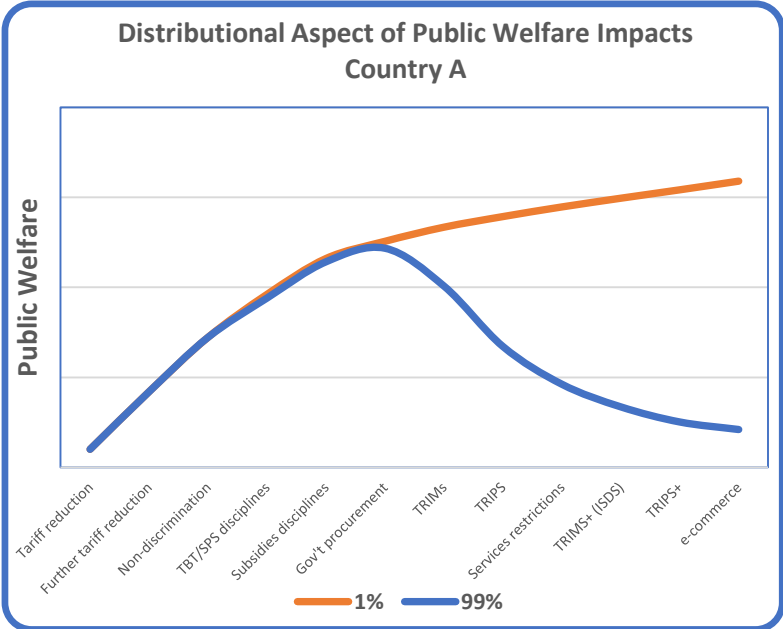
Evolution of Trade Agreements: Public Welfare Impacts






Revised understanding: distributive effects

- This global assessment is being replicated now at national levels and via bilateral and regional economic agreements



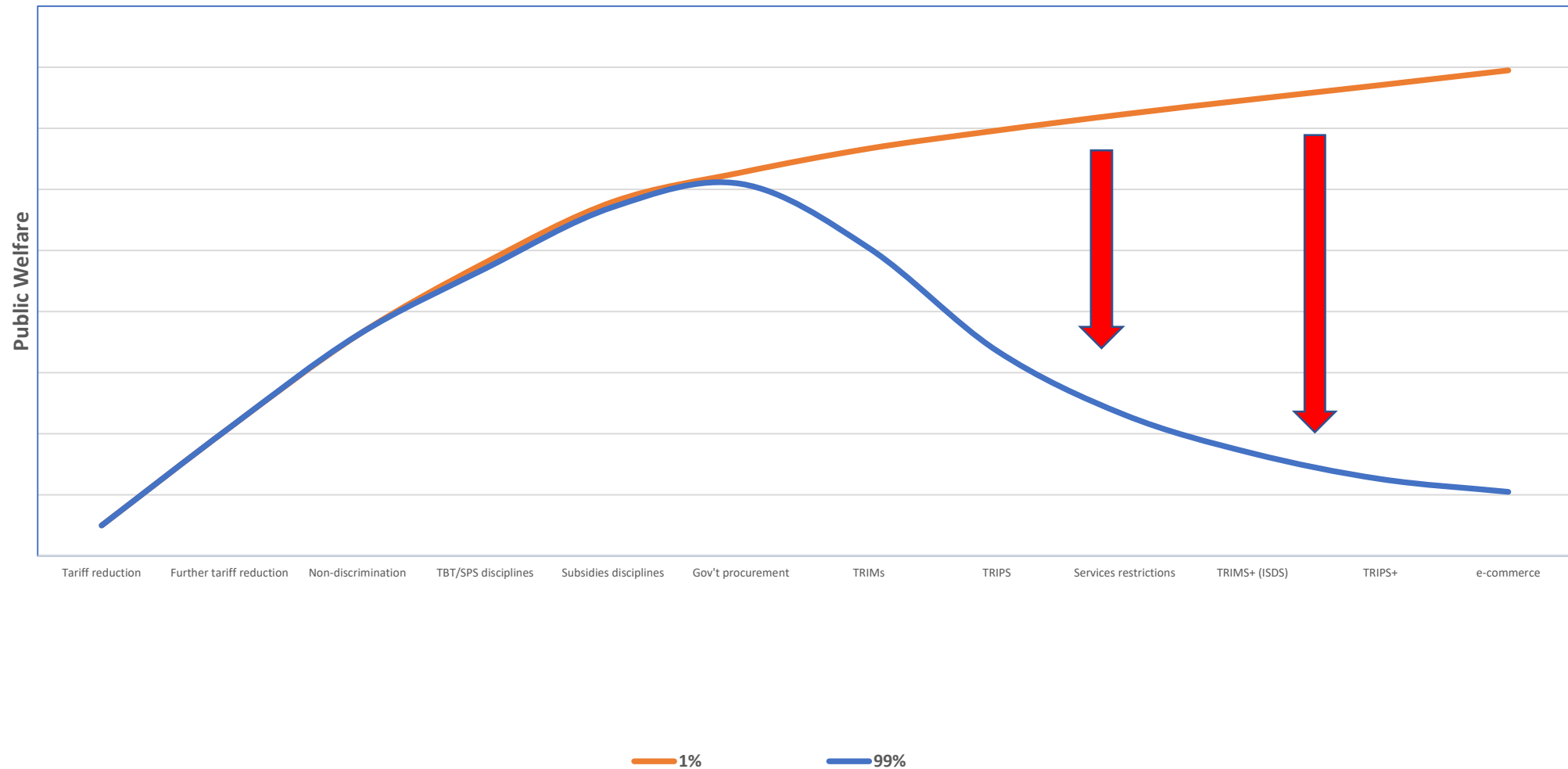
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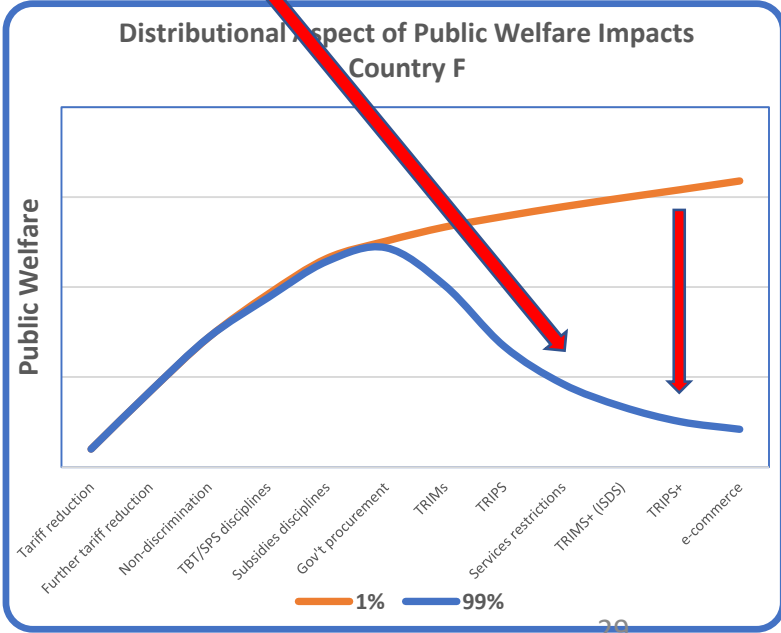
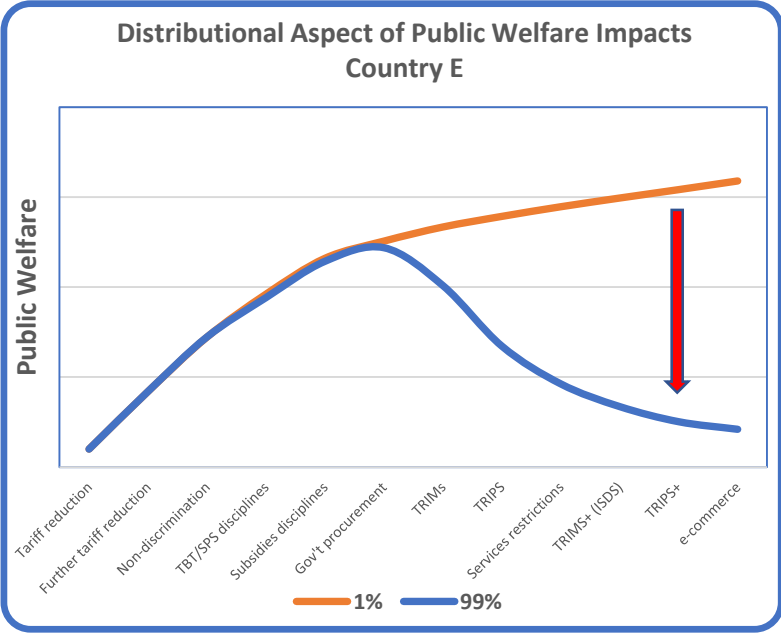
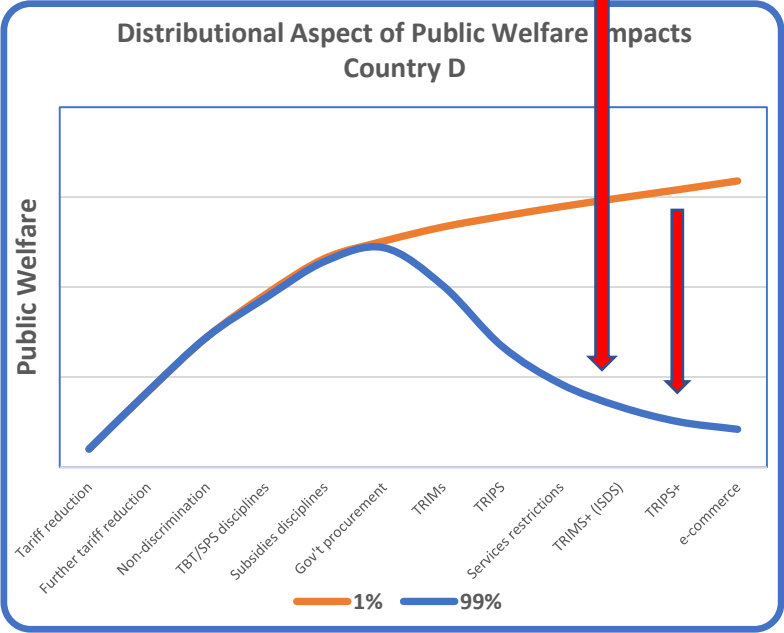
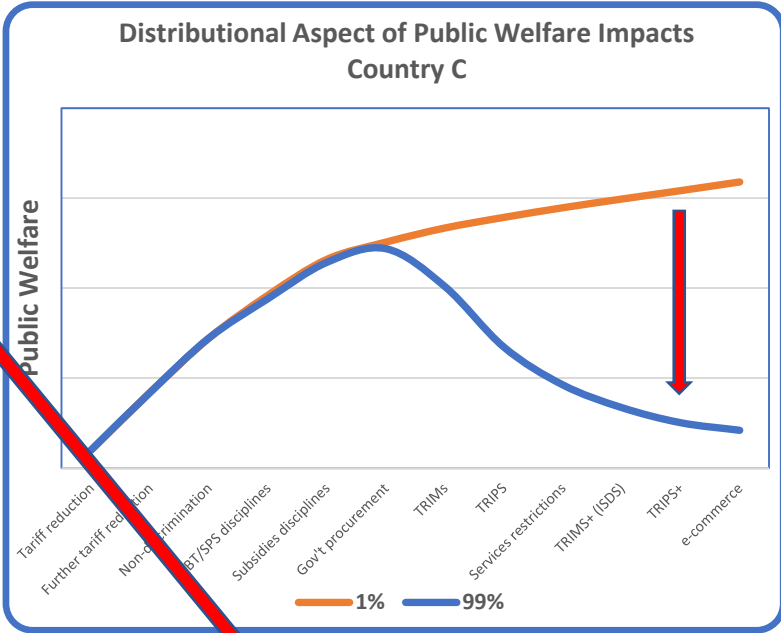
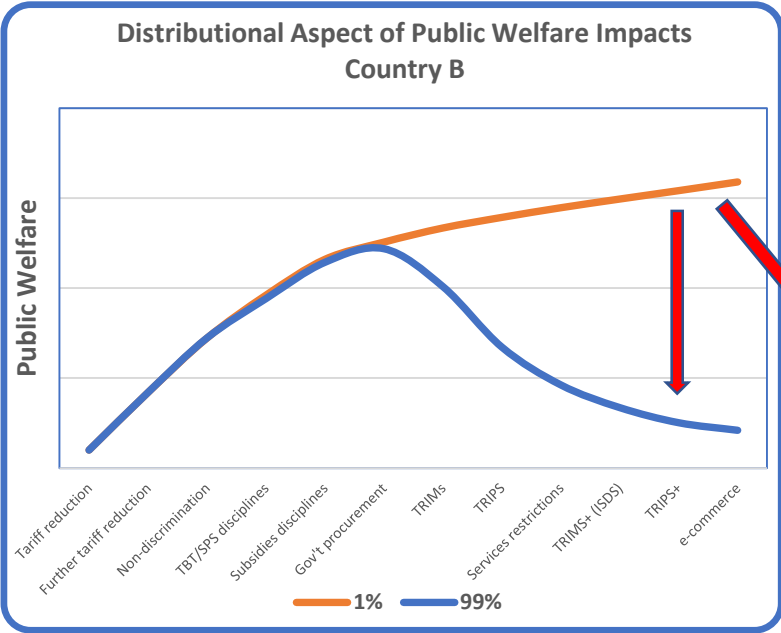
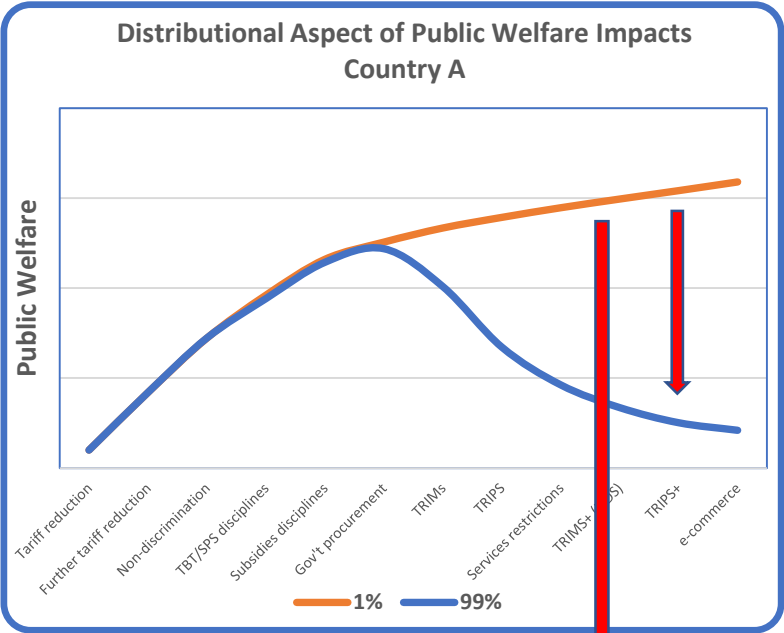
Revised
understanding:
legalizing and
entrenching the
distributive
effects:

Maximizing the right
to maximize profit

At expense of other
economic
stakeholders

Distributional Aspect of Public Welfare Impacts Country A





Conclusion: Our challenge

- New vision needed
 - What works for development, what does not
 - What works for inclusiveness, what does not
 - Need to define an international economic law agenda and content that is about sustainable development, not about a right to maximize profits
 - Tax Governance needs to be fit for purpose, not simply what MNEs want to see
 - Proper institutions governed by states, formally, from negotiation to dispute settlement
 - Full participation of developing countries
 - Transparent public law regime: decisions public
 - Truly independent