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Another perspective on mobilization is evident in attempts to mobilize export groups in support of free trade by strategically using threats of retaliation. States making a threat of retaliation that is intended to mobilize exporters in other countries, such as the United States in implementing Section 301, must consider how to maximize the pressure applied by exporters to the other government. Announcing threats of definite retaliation against just a few groups would not have the desired effect. These groups would certainly mobilize, but those left off the short list would not. At the other extreme, announcing a very large or vague list of possible targets of retaliation would also fail to mobilize many exporters. This tactic would create massive collective-action problems, since each exporter would be only part of a potentially universal coalition and therefore face incentives to free ride. In addition, lack of precision in the possible targets of retaliation might encourage exporters to wait and take their chances on being hit, rather than bearing the definite, immediate costs of mobilization.

With these considerations in mind, if our story about mobilization is correct, the strategic use of retaliatory threats should be quite precise. In addition, it should target a group of exporters large enough to put pressure on the government, but not so large as to exacerbate collective-action problems. Section 301 cases provide a good source of evidence on the use of retaliatory threats, since they list the potential targets of retaliation when the other government does not reach a settlement with the United States.

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The threat of retaliation, if issued with an appropriate degree of precision, activates export groups. This suggests that the GATT/WTO should allow or even encourage retaliation in the face of deviation from regime rules. The GATT structure, incorporating reciprocal retaliation and/or alternative market access in response to reneging on a concession, even under safeguard clauses, may have been better than the alternative adopted by the WTO. WTO rules waive the right to both compensation and/or retaliation for the first three years of a safeguard action. Those who supported the change argued that this would encourage nations to follow the rules – when nations could defend their reasons for invoking safeguard actions as "just," they should be protected from retaliation.[17] The logic offered here suggests the opposite. Circumstantial evidence in

[17] Krueger 1998.

the United States supports the argument that domestic groups organize in response to government threats that affect their market position. For example, in what was supposed to be a simple incidence of using market restrictions in a Section 301 case, the United States found it politically impossible to raise tariffs on a Japanese car, the Lexus, in large part because of resistance from Lexus dealers in the United States. Lexus dealers are not the type of group that generates great sympathy from the American people. However, during a trade dispute with Japan that came to a head in 1995, they found their interests directly at stake. In an attempt to force more opening of the Japanese market, the United States announced a list of 100 percent retaliatory tariffs on Japanese luxury goods that would go into effect on 28 June.[18] Since this list included cars with a retail value over $30,000, Lexus dealers (along with Infiniti and Acura dealers) found themselves directly threatened. In response they generated a large lobbying and public relations effort. In the end a midnight deal with Japan averted sanctions.

To summarize, we argue that one of the primary political effects of legalizing the trade regime will be an interaction between increased precision about the distributional implications of trade agreements and the mobilization of domestic groups, both protectionist and free trade in orientation. In this section we have surveyed evidence on trade negotiations and the use of retaliatory tariffs during trade disputes to see if mobilization does indeed respond as we expect. From a number of perspectives, we find evidence to support our claims. During negotiations, lobbying activities are conditioned on the information available to particularistic interests. Strategic politicians, who are attempting to design the negotiating process so as to increase their ability to create mutually beneficial bundles of agreements, may find it helpful to have less than complete transparency about the details of negotiations. Antitrade group pressures make negotiations more difficult, and to the extent that transparency encourages mobilization of antitrade groups it will hinder liberalization negotiations.[19] During trade disputes, politicians similarly strategize about how to reveal information so as to mobilize groups appropriately – in this instance to maximize the mobilization of exporters in the target country.

Our findings should not be interpreted as a prediction of trade closure. Rather, we make the more modest claim that attention should be paid to

[18] *New York Times,* 9 June 1995, D3.

[19] See, for example, the history of agricultural trade in Josling 1999.

an underexplored effect of international legalization, that is, the mobilization of domestic groups. The analysis of the interaction of legalization, information, and domestic groups is a requisite to understanding the conditions under which legalization of the trade regime will be successful.

## TIGHTLY BINDING TRADE RULES

In the preceding section we argued that legalization enriches the information environment. In this section we examine a second effect of legalization linked to an increase in the obligatory nature of international rules. Legalization at its core refers to *pacta sunt servanda,* or the presumption that, once signed, nations will adhere to treaty obligations. Interpretations of this responsibility are typically rendered by lawyers using a discourse focusing on rules – their exceptions and applicability – and not on interests. Given the expanding breadth of the trade regime, we suggest that the use of legal rule interpretation has made it increasingly difficult for governments to get around obligations by invoking escape clauses and safeguards or by turning to alternative measures, such as nontariff barriers. Partly, this is a result of the increased precision of rules and the inclusion of what were extralegal trade remedies, such as voluntary export restraints, in the regime itself. But the legalization of the trade regime has also moved the nexus of both rule making and adjudicating rule violations into the center of the regime and away from member states.

### The Logic of "Bindingness"

The benefits of increased precision and "bindingness" are identified in the functionalist literature on international institutions.[20] The benefit of international institutions lies primarily in the creation of disincentives for states to behave opportunistically by reneging on trade agreements and acting unilaterally. The problem of incentives to renege on cooperative arrangements, and the role of international institutions in helping states

[20] We use the term *bindingness* where the term *obligation* would seem appropriate to a political scientist. The reason is that obligation has taken on a particular legal meaning, and that meaning has been adopted in this issue. By *bindingness* we mean the political obligation created by international rules. It is a positive rather than a normative term, meaning the degree to which rules are binding, practically speaking, on governments. Rules with higher probability of enforcement, for example, are more binding (or obligatory) in this political sense.

to overcome these incentives and so reach Pareto-superior outcomes, has been central to the institutional approach to international relations.[21] The key institutional argument is that attaining cooperative outcomes is hindered by the lack of information about the intentions and behavior of others and ambiguity about international obligations that states can manipulate to their advantage. States are often caught in a "prisoners' dilemma" and find it difficult to sustain the necessary enforcement strategies to assure cooperation in the uncertain environment of international politics. The primary function of international institutions, therefore, is to provide politically relevant information and so allow states to escape from the prisoners' dilemma trap.

This argument about international institutions took shape during an era when researchers were anxious to extend their analysis beyond formal international organizations to informal institutions and regimes.[22] By focusing on legalization, the current project returns to the study of formal institutions, but the underlying logic remains the same. Making international commitments precise and explicit makes it more difficult for states to evade them without paying a cost. More precise rules allow for more effective enforcement, and legalization involves a process of increasing precision. Greater precision and transparency about the obligations and behavior of states are also created by other dimensions of legalization. Delegation of monitoring and dispute-resolution functions to centralized organizational agents, away from member states, is intended to increase the quantity and quality of information about state behavior. It therefore leads to more effective enforcement and disincentives to renege on commitments.

As we have argued, legalization has unintended effects on the mobilization of support for and against trade liberalization. Similarly, legal binding has unexpected effects on domestic politics. If agreements are impossible to breach, either because of their level of obligation or because the transparency of rules increases the likelihood of enforcement, elected officials may find that the costs of signing such agreements outweigh the benefits. The downside of increased legalization in this instance lies in the inevitable uncertainties of economic interactions between states and in the need for flexibility to deal with such uncertainty without undermining the trade regime as a whole. Legalization as increased bindingness could therefore constrain leaders and undermine free-trade majorities at home.

[21] Keohane 1984.
[22] Krasner 1983.

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The existence of uncertainty about the costs of trade agreements on the domestic level suggests that fully legalized procedures that apply high, deterministic penalties for noncompliance could backfire, leading to an unraveling of the process of liberalization.[23] Under some conditions it will be inefficient for actors to live up to the letter of the law in their commitments to one another, such as when alternative arrangements exist that increase mutual gains.[24] These alternative arrangements generally involve temporary deviations from the rules with compensation offered to the other party. The problem is to write agreements that recognize the possibility of breach but limit it to the appropriate context, such as when economic shocks occur and all will be better off by temporarily allowing deviation from rules.

At the same time, of course, writing agreements that provide the necessary flexibility creates a moral-hazard problem. If the circumstances that demand temporary deviation are not perfectly observable to other actors, parties will be tempted to cheat. Cheating in this instance would consist of a demand to stretch the rules for a while, which all would benefit from, because of an unanticipated shock, when in fact the actor is simply attempting to get out of inconvenient commitments. Such opportunistic behavior is a constant concern in strategic settings with asymmetric information. In the context of the GATT/WTO, the primary reasons that flexibility is necessary lie in the uncertainties of domestic politics. Flexibility or "imperfection" can lead to stability and success of trade agreements, but incentives also exist for states to evade commitments even when economic conditions do not justify evasion.

The enforcement structures of the GATT/WTO thus face a difficult dilemma: to allow states to deviate from commitments when doing so would be efficient but to deter abuse of this flexibility. If enforcement is too harsh, states will comply with trade rules even in the face of high economic and political costs, and general support for liberalization is likely to decline. On the other hand, if enforcement is too lax, states will cheat, leading to a different dynamic that could similarly undermine the system. Downs and Rocke, drawing on game-theoretic models, suggest that imperfection in the enforcement mechanism is the appropriate

[23] Contract law recognizes the same dynamic of uncertainty requiring flexibility in contracts, under the heading of efficient breach. See Roessler, Schwartz, and Sykes 1997, 7.

[24] The idea is similar to that behind the Coase theorem: efficient agreements are reached through the mechanism of one party compensating another.

response. Punishment for infractions of GATT commitments should be probabilistic rather than deterministic.

Changes in WTO procedures have made penalties for rule violation more certain and less probabilistic. At this point, it is difficult to say whether negotiators went too far in limiting the availability of safeguards.[25] However, we can point out one unanticipated effect of the tightening of safeguards that both ties this analysis to our earlier discussion of trade negotiations and generates predictions about future attempts to further liberalize trade. There is a direct connection between states' access to safeguard provisions and their stance during trade negotiations. Domestic interests can anticipate the effects of eliminating safeguards and so will bring more pressure to bear on governments during negotiations.[26] Those who fear the possibility of adverse economic shocks without the protection of an escape clause will be highly resistant to inclusion in liberalization. In response they will demand exclusion or, at a minimum, side payments if their sector is included in liberalizing efforts. Thus extensive tightening of safeguard provisions will lead to tougher, more disaggregated negotiations as some groups lobby strenuously for exclusion. The rise in the use of voluntary export restraints and antidumping and countervailing duty cases is almost certainly a result of this difficulty in using safeguards. It is also likely that more bindingness has led to increases in the side payments governments are forced to make to groups in order to buy their support for trade agreements. Not surprisingly, perhaps, the North American Free Trade Agreement, a highly legalized trade agreement, could only gain approval in the United States after extensive use of side payments by the government.[27]

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Few analysts dispute that the old trade regime was tremendously effective in reducing impediments to trade. Nevertheless, analysts and legal scholars involved in the GATT expressed dissatisfaction about many of its procedures and capacities. One concern was that the dispute-resolution procedures seemed to have a fatal flaw, in that member states could undermine the creation of dispute-resolution panels as well as any decision that went against them. Another concern was that powerful

[25] As we argue later, the safeguard reforms are counterintuitive for two reasons. First, they may be too difficult to invoke, undercutting their purpose. Second, since retaliation is limited, the stability evoked by activating export groups may have been undermined.

[26] See also Sykes 1991, 259.

[27] Hufbauer and Schott 1993.

states, particularly the United States, evaded GATT regulations when convenient. As the United States increasingly turned to unilateral remedies for perceived trade infractions, such as Section 301, other members grew increasingly concerned that the GATT was powerless in preventing unilateralism and not strong enough to provide effective enforcement.

The remedy to these problems, both in theory and in practice, was greater legalization of the GATT. As the GATT evolved into the more formal WTO, the dispute-resolution procedures were made more legal in nature and the organization gained enhanced oversight and monitoring authority. Multilateral rules of trade extended into new and difficult areas, such as intellectual property, and substituted for unilateral practices. The procedures for retaliation and compensation were made more precise and limiting. The process of negotiating the content of rules – including provisions for addressing rule breaches – led to greater precision.[28] In the next sections we evaluate these changes, asking whether or not the changes portend greater trade liberalization. Our inquiry centers on two questions. First, we ask whether the legal framework allows states to abrogate a contract when doing so would be mutually beneficial. Second, we examine the functioning of the dispute-resolution mechanism.

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## Exceptions and Escape Clauses

Trade legalization has constrained states by curtailing their ability to utilize safeguards and exceptions. The issue of exceptions, their status and use, has loomed large in many of the rounds of GATT negotiations. Pressure from import-competing groups is strong everywhere, although domestic institutional arrangements vary in how well they can "buy off" or ignore this resistance. The United States, for example, has been notorious for both retaining protection on the upper part of its schedule and for making particular industry side payments before even arriving in Geneva. The United States is also responsible for the inclusion of an escape clause into the GATT's original design, reflecting a desire by Congress to maintain its prerogative to renege on a trade deal if necessary.[29]

Legalization of the regime has resulted in a tightening in the use of safeguard provisions, including the escape clause. Under Article XIX,

[28] On the extent of changes in the WTO, see Krueger 1998.
[29] Goldstein 1993.

a country is allowed to increase protection for a home industry if a past tariff concession does damage to it.[30] If a country backs out of an agreement or imposes some additional trade restriction, it must be applied in a nondiscriminatory way; that is, countries whose exports are not hurting your industry cannot retain a preferential position.[31] When the provision is used, other countries are allowed to retaliate by reducing an equivalent amount of concession; otherwise the country imposing Article XIX must reduce tariffs on other products, equivalent to the amount of the original concession.

Two important domestic groups are potentially affected by these limitations on the use of safeguards. If nations retaliate, exporters suffer; if the government compensates, some import-competing industry will feel increased competition. Unless offered some side payment, industries have a strong incentive to have their political representative veto their inclusion into the compensatory package. Thus both the threat of retaliation and the difficulty of reassigning tariff reductions should constrain countries from raising trade barriers as allowed under Article XIX. The logic here is consistent with that offered in the preceding section.

The data on Article XIX provide support for the argument that using this provision is difficult in practice. Table 8.3 shows the aggregate use of the escape clause for all GATT members. Since the 1960s, Article XIX has been invoked at a relatively consistent rate. Given increasing levels of trade, stable numbers of Article XIX invocations imply *declining* use of this mechanism. As with the safeguard measures listed in Table 8.2, the small number of cases, compared with the significant number of industries affected by changing tariffs, should be attributed to the difficult time countries have both with the potential for retaliation and with compensating nations through alternative tariff reductions. This difficulty explains the trend toward alternative methods of protection, such as "administered protection" in the form of subsidies and antidumping and countervailing duty provisions.[32] Nontariff barriers, though not often

[30] "Tariff concessions and unforeseen developments must have caused an absolute or relative increase in imports which in turn causes or threatens serious injury to domestic producers . . . of like or directly competitive goods." Although the invoking party is not saddled with the burden of proving that it has met these requirements, the requirements nonetheless have deterred countries from invoking the escape clause.

[31] This often leads to a situation where the producers causing the problems in the first place could remain in a competitive position with the higher-cost home producer. The producers who get penalized are the middle-price traders who were not the problem. Shonfield 1976, 224.

[32] Baldwin 1998.

TABLE 8.3. *Use of Escape Clause by all GATT Members, 1950–94*

| | Average number of cases per year | Nontariff barrier remedies as percentage of total uses |
|---|---|---|
| 1950s | 1.9 | 26 |
| 1960s | 3.5 | 56 |
| 1970s | 4.7 | 70 |
| 1980s | 3.7 | 51 |
| 1990s[a] | 1.2 | 75 |

[a] Data for the 1990s ran only from 1990 to 1 December 1993.
*Source: GATT Analytical Index* 1994.

used in the 1950s, were, by the 1970s, used by most countries to circumvent problems with GATT rules. Licenses, quotas, and voluntary export restraints were all means to finesse the potential problems *at home* with the GATT compensatory system.

Overall, the figures in Tables 8.2 and 8.3 suggest that use of the legally available mechanisms of flexibility in the trade regime is heavily circumscribed by the interaction of the legal provisions for their use and political realities. The increasing extent to which governments are bound by the lack of realistic escape clauses is apparent when we examine the use of compensation. Although the use of safeguards has been relatively constant, compensation or retaliation in response to the invocation of a safeguard provision was more common in the earlier years – ten cases from 1950 to 1959, ten cases from 1960 to 1969, six cases in the 1970s, and three cases in the 1980s.[33]

Use of compensation and retaliation was concentrated. The United States accounted for twelve of the twenty cases between 1950 and 1970 but only one case thereafter. Australia accounted for seven of the sixteen cases between 1960 and 1980. Although American use of Article XIX did not decline until the 1980s, the kind of remedy administrators chose to use did shift over time. Compensation could occur through reducing tariff barriers elsewhere. However, this would hurt other import-competing groups, so the compensation mechanism of Article XIX is unwieldy if these groups are organized. At the same time, rescinding tariff

[33] GATT *Analytical Index*, various issues.

concessions without compensation opens exporters to the threat of retaliation. For these reasons, the United States had moved toward a nontariff barrier remedy by the late 1960s. The change was rather dramatic. In the early years of the regime, between 1950 and 1969, the United States compensated for a tariff hike over 93 percent of the time.[34] Thereafter, both the use of compensation and the number of invocations declined precipitously.

Overall, the evidence on the use of safeguards and compensation suggests that strict legal provisions were not necessary to maintain openness. The pattern of use of safeguard provisions in the GATT suggests that the regime gained in politically relevant bindingness, even when in legal terms the obligatory nature of rules did not change. Still, the WTO reforms attempted to clarify and make more stringent the requirements for using safeguards. Drawing on the discussion of economic uncertainty and the need for flexibility in light of the data, we suggest that increased stringency in safeguard use may be misplaced. In fact, even the GATT provisions could be interpreted to have become too tightly binding, not allowing the necessary temporary deviations from rules that contribute to long-term stability. Escape clauses, safeguards, and the like are the legal mechanisms for dealing with a world of economic uncertainty. The provisions for their use must be heavily constrained, so as to reduce the chance that states will invoke them opportunistically. However, it appears that these constraints, interacting with domestic politics, may bind states more tightly than intended.

Our cautionary note may explain why the WTO chose to forestall retaliation for three years in cases where a safeguard provision was sanctioned. Yet the choice of this tool to deal with overbinding may be a problem. Given the logic offered in the preceding section, we suggest that nations abide by their trade agreements because the threat of retaliation mobilizes export groups to counter rent-seeking producer groups. Similarly, our analysis suggests that the mobilization of groups favored those who support openness, which, in turn, deterred states from using even legal exceptions. Given the logic of domestic politics, it is hard to know whether the benefits of this new rule in terms of flexibility will outweigh its effects on the balance between pro- and antitrade groups in WTO members.

[34] The United States invoked Article XIX fourteen times between 1950 and 1969. Of these they used nontariff barriers alone in only one case.

## Dispute Settlement

One of the major innovations of the WTO was to strengthen the dispute-resolution mechanism. States have lost the ability to wield a veto, which they used under the GATT to protect themselves against GATT-approved retaliation. In effect, residual rights of control have been shifted from states to the WTO, convened as the Dispute Settlement Body. According to proponents of the new system, the existence of veto power encouraged opportunism, whereas not having veto power deters such behavior. If this is the case, we should see predictable effects in the pattern of disputes brought to the WTO.

We suggest that the GATT dispute-settlement structure, by being more attentive to the realities of power and an uncertain economic environment, but also by providing publicity and possible sanctions when states blatantly disregarded regime rules, may have optimized the trade-off between constraint and flexibility that liberalization requires. As a way to examine this hypothesis, we ask whether the pattern of disputes has changed under the WTO in the manner predicted by the logic of reducing opportunism. The strong theoretical argument in favor of legalization claims that legalization is necessary to prevent opportunistic behavior. If we find that the incidence of opportunism has not changed in the face of increasing legalization, the argument in favor of legalization loses much of its force.[35]

If the primary effect of further legalization in dispute settlement is reducing opportunism, it should appear in the data as reduced political manipulation of the regime. Eliminating the power to veto should have observable effects on the activities of states and the outcome of disputes. Political scientists are producing a burgeoning literature on GATT/WTO dispute settlement, using sophisticated statistical techniques. However, this literature, regardless of the techniques involved, cannot escape problems of selection bias, since states chose whether to bring disputes and at what stage to resolve them. Here we suggest a few simple hypotheses about how the pattern of disputes should change with legalization if its major effect is a reduction in opportunism. If the data do not support these simple hypotheses, the case for legalization is substantially weakened.

[35] We assume a goal of reducing opportunism on theoretical grounds, without claiming that all negotiators had precisely this goal in mind. Certainly the agendas of negotiators were diverse, and reducing opportunism was only one goal among many.