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the round, adopting by consensus a set of conclusions and recommendations embodying issues of interest to all Contracting Parties, and a resolution to establish a Trade Negotiations Committee composed of representatives of all participating countries.[26] The round was launched only after the developed countries agreed to include in the negotiations issues that had the potential to make all countries – including developing countries – better off.

Bargaining in the Shadow of Power: Invisible Weighting at the GATT/WTO

In contrast to the law-based approach, realists see most legislative bargaining and outcomes in international organizations as a function of interests and power.[27] Diplomatic memoirs and works by lawyers who have been employed in international organizations are replete with stories of using state power to achieve desired outcomes from international organizations.[28] *** This work suggests that it is possible for powerful states to simultaneously respect procedural rules and use various practices to escape the constraints on power apparently intrinsic to those rules.

Relative Market Size as an Underlying Source of Bargaining Power at the GATT/WTO

While measuring power is notoriously difficult, in trade negotiations, relative market size offers the best first approximation of bargaining power. Most political scientists suggest that governments treat foreign market opening (and associated increases in export opportunities) as a domestic political benefit and domestic market opening as a cost.[29] Hence, for example, the greater the export opportunities that can be attained, the greater the domestic political benefit to the government of the country attaining them. Market opening and closure have been treated as the currency of trade negotiations in the postwar era.[30]

Whether trade bargaining takes the form of mutual promises of market opening, threats of market closure, or a combination of both, larger, developed markets are better endowed than smaller markets in trade

[26] Conclusions and Resolutions adopted on 21 May 1963, in General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents: 12th Supplement* (1964), 36–48 (hereafter GATT BISD).

[27] See Morgenthau 1940; Krasner 1983a,b; and Schachter 1999.

[28] See Kennan 1972, 24; and Wilcox 1972, 195–97.

[29] See Schattschneider 1935; Bauer, de Sola Pool, and Dexter 1963; and Putnam 1988.

[30] See Hirchman 1945; Waltz 1970; and Krasner 1976.

negotiations. The proportionate domestic economic and political impact of a given absolute change in trade access varies inversely with the size of a national economy. Larger national economies have better internal trade possibilities than smaller national economies. A given volume of trade liberalization (measured in dollar terms, for example) offers proportionately more welfare and net employment gain to smaller countries than to larger ones. The political implication is that a given volume of liberalization offers proportionately less domestic political benefit to the government delivering it in the larger country. ***

Conversely, in negotiations entailing threats of trade closure, a threat of losing a given volume of exports is a relatively less potent tactic when used against a larger country than when used against a smaller one. Hence, it is well established that developed economies with big markets have great power in an open trading system by virtue of variance in the relative opportunity costs of closure for trading partners.[31]

* * *

While market size is generally a good indicator of trade bargaining power, the possibility of linkage across issue areas potentially limits its usefulness. The value of market size as an approximation of trade bargaining power is diminished to the extent that states are willing to use non-trade sources of leverage. *** While the extent of linkage across issue areas has been a subject of theoretical and empirical debate for decades, regime theory suggests that, within a particular regime, bargaining can usually be best understood as confined to the particular issue area addressed by the regime.[32] Moreover, most empirical analyses of postwar trade policy have suggested that potential military or financial leverage has not been used in trade negotiations.[33] ***

Using market size as a measure of trade bargaining power, the EC and the United States are the world's greatest powers. As rough indicators, consider that in 1994 (the year the Uruguay Round was closed) retained merchandise imports into the EC and the United States accounted for approximately 40 percent of all retained merchandise imports in the world,[34] and that the EC-U.S. combined 1994 gross domestic product (GDP) represented nearly half the world's total GDP.[35] By this measure,

[31] Krasner 1976.
[32] Haas 1980.
[33] See Krasner 1976; Cohen 1985; and Hoekman 1989.
[34] World Trade Organization 1995, 26, table II.3.
[35] See Central Intelligence Agency 1995; and World Trade Organization 1995, 54, table III.30.

the combined power of the EC and the United States is enormous in the trade context. And to the extent that the EC and the United States can cooperate, they wield great influence in multilateral trade negotiations.[36]

Power Tactics at the GATT/WTO: Asymmetrical Contracting and Coercion

It is useful to think of a range of power tactics that influence outcomes in the GATT/WTO. First, powerful states may contract asymmetrically, generating consensus support for outcomes that are skewed in their favor. When aimed at an individual state, this contracting may be considered a "side-payment." ***

Second, and more important than asymmetrical contracting for understanding GATT/WTO bargaining and outcomes, weaker states may be coerced by powerful states into consensus support of measures skewed in their favor. By threatening to make weaker states worse off, coercion may generate consensus for an outcome that makes powerful states better off and weaker states worse off,[37] or that is Pareto-improving but with benefits distributed in favor of powerful states. ***

When aimed at a group of states – and in its most potent form – coercion takes the form of a threat to exit[38] the organization that is unable to achieve consensus. In some cases, exit involves moving (or threatening to move) the issue to another organization where powerful countries are more likely to get their way. For example, in the early 1980s, when the EC and the United States were unable to attain the required majority in the World Intellectual Property Organization for broader intellectual property protection, they moved the issue to the GATT, where they were able to conclude the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement in 1994.[39] In other cases, the exit tactic may involve simply ignoring the deadlocked organization and creating a new organization that will become a source of future legal benefit in the issue area. ***

In still another variant, the exit tactic involves withdrawing from the deadlocked organization, stepping into anarchy, and reconstituting a new organization under different terms. As shown below, this is the means by which the EC and the United States closed the Uruguay Round.

[36] Steinberg 1999.
[37] Gruber 2001.
[38] Hirschman 1970, 21–29.
[39] Beier and Schricker 1989.

TRADE ROUNDS AS CYCLES BOUNDED BY LAW-BASED AND POWER-BASED BARGAINING: LAUNCHING, AGENDA SETTING, AND CLOSING TRADE ROUNDS

Trade negotiating rounds are the means by which the vast proportion of GATT/WTO law has been legislated. Bargaining in the Tokyo and Uruguay rounds is analyzed here to understand the extent to which bargaining in trade rounds has been law- or power-based. These most recent trade rounds are most likely to exemplify a representative range of law- and power-based bargaining, largely because prior to 1970 the GATT was dominated by an "anti-legal" culture that began to melt away in the late 1960s and did not completely collapse until the early 1980s.[40]

As shown below, the extent to which negotiations in trade rounds have been law- or power-based has depended on the stage of the round and geostrategic context. Trade rounds may be analyzed in three overlapping stages: launching, informal agenda setting, and closing. Generally, power has been used more overtly as rounds have proceeded from launch to conclusion, with the extent of coercion used in closing the Tokyo Round constrained by the Cold War context.

Launching Trade Rounds through Law-Based Bargaining

The easiest way to launch a round has been to attain consensus on a vague mandate for negotiation that includes virtually all initiatives offered by any member. This approach has enabled all parties to believe that the round could result in a Pareto-improving and equitable package of outcomes, with domestic political liabilities from increased import competition offset by foreign market opening. Negotiators typically haggle over alternative ways to frame issues and objectives in the mandate, but – to reach consensus – the less prejudice in the mandate, the better. In some rounds, there have been one or two issues that simply could not appear in the mandate because of domestic political constraints. But typically, a consensus on the draft negotiating mandate has been blocked until virtually all topics of interest to members have been included, and until the language has been sufficiently vague so as not to prejudice the outcome of negotiations in a manner that any country might oppose. From the perspective of powerful countries, invisible weighting could be used at later stages. Moreover, only at later stages, after years of negotiations, will powerful countries have enough information on state

[40] See Hudec 1988; and Price 1992.

preferences to fashion a package of asymmetric outcomes that they can be confident will be accepted by weaker countries. Hence, bargaining to launch trade rounds has been law-based.

In preparing to launch each of the last five rounds, there has been a North-South split over the pace, form, or structure of liberalization. Each time, the developing countries have demanded a mandate for negotiations that would include special and differential treatment. Developed countries have initially resisted including developing country initiatives in the decision to launch. But the legal power of developing countries to block a consensus has led to the inclusion of their initiatives in the consensus decisions to launch the Dillon, Kennedy, Tokyo, Uruguay, and Doha rounds.

* * *

Informal Agenda Setting in the Shadow of Closure

Many have argued that in legislative settings where authority to set the agenda (that is, formulate proposals that are difficult to amend) rests with a formally specified agent, the process of agenda setting explains outcomes better than plenary voting power.[41] In contrast, in organizations based on sovereign equality, the agenda-setting function is performed informally, largely by the coordinated action of the major powers and a secretariat that is strongly influenced by them.

The GATT/WTO agenda-setting process has three overlapping stages: (1) carefully advancing and developing *initiatives* that broadly conceptualize a new area or form of regulation; (2) drafting and fine-tuning *proposals* (namely, legal texts) that specify rules, principles, and procedures; and (3) developing a *package* of proposals into a "final act" for approval upon closing the round, which requires the major powers to match attainment of their objectives with the power they are willing and able to use to establish consensus. The agenda-setting process involves iteratively modifying proposals in minor ways (for example, providing a derogation, floor, or phase-in),[42] fulfilling unrelated or loosely related objectives of weaker countries (that is, promising side-payments), and adjusting the package that will constitute the final act. After being launched, the work of trade rounds has taken place on a formal basis in proposal-specific working

[41] See, for example, Baron and Ferejohn 1989; Garrett and Tsebelis 1996; and Moravcsik 1998, 67–77.

[42] On use of these techniques in the EC, see Esty and Geradin 1997, 550–56.

groups, negotiating committees, the Trade Negotiations Committee, the GATT Council, special sessions of the Contracting Parties, and occasional ministerials. But important work takes place on an informal basis in caucuses, the most important of which are convened and orchestrated by the major powers. The process has historically operated in the shadow of the coercive power of the EC and the United States.

Most initiatives, proposals, and alternative packages that evolve into documents presented for formal approval have usually been developed first in Brussels and Washington, discussed informally by the transatlantic powers, then in increasingly larger caucuses (for example, Quad countries, G-7, OECD), and ultimately in the "Green Room." Green Room caucuses consist of twenty to thirty-five countries that are interested in the particular text being discussed and include the most senior members of the secretariat, diplomats from the most powerful members of the organization, and diplomats from a roughly representative subset of the GATT/WTO's membership. The agenda for most important formal meetings – round-launching ministerials, mid-term reviews, and round-closing ministerials – has been set in Green Room caucuses that usually take place in the weeks preceding and during those meetings. The draft that emerges from the Green Room is presented to a formal plenary meeting of the GATT/WTO members and is usually accepted by consensus without amendment or with only minor amendments.[43]

The EC and the United States have dominated advancing initiatives at the GATT/WTO for at least forty years.[44] Both weak and powerful countries may advance initiatives, and they may be included in the ministerial declaration that launches a round. But initiatives from weak countries have a habit of dying: after launching the Tokyo and Uruguay rounds, powerful countries often blocked a consensus to advance initiatives by weak countries when they were introduced for formal action in the relevant negotiating committee.[45] Moreover, weak countries are

[43] See Winham 1989, 54; Blackhurst 1998; and WTO General Council, Chairman's Statement, Internal Transparency and the Effective Participation of Members, 17 July 2000.

[44] Curzon and Curzon 1973.

[45] For example, while the declarations that launched both the Tokyo and Uruguay rounds called for "Tropical Products" liberalization and "special and differential treatment" for developing countries, most developing country initiatives in these areas died in the relevant negotiating groups, and the results in these areas disappointed developing countries. Winham 1986. In the Uruguay Round, developing country initiatives and proposals in the TRIPs negotiating group were "dead on arrival." Interview with Emery Simon, Washington, D.C., April 1994.

usually excluded from the initial informal caucuses at which powerful countries discuss with each other their important initiatives.[46]

Powerful countries have also dominated proposal development. Successful proposals have usually been drafted first in the capitals of powerful countries – Brussels or Washington. They have then been discussed informally in caucuses of the major powers, and then in other caucuses that include some less powerful countries.[47] In the Tokyo and Uruguay rounds, after the mid-term review, proposals and frameworks for negotiation that had been discussed informally in caucuses were then introduced into the formal working group meetings. *** Weaker countries rarely tabled draft texts. Tabled texts typically contained unbracketed language that all countries could accept and bracketed language representing alternative formulations favored by different groups of countries. The bracketed language became the subject of detailed negotiation in working groups and – ultimately – in the Green Room prior to and during ministerials.

Simultaneous with initiative and proposal development, powerful countries have considered the package of proposals that should be included in the final act for approval upon conclusion of a round. The package has changed depending largely on how the proposals were shaping up and how much coercion was to be exercised by powerful countries.

The secretariat has usually facilitated this process and has often engaged directly in it by tabling proposals or a package as its own. The secretariat's bias in favor of great powers has been largely a result of who staffs it and the shadow of power under which it works. ***

The End of the Day: Power-Based Bargaining in Closing Trade Rounds – and the Cold War Context as a Constraint

In closing a round, the EC and the United States must employ invisible weighting if they are to achieve an asymmetrical outcome. The decision about how much power to use to facilitate a desired outcome in a particular issue area may be linked to interests in another issue area or to geostrategic context. At the end of both the Tokyo and Uruguay rounds, there was temptation to resort to exit. Both rounds included an

[46] Winham 1986. This is typical in consensus-based organizations. Schermers and Blokker 1995, 501–502.

[47] This process is typical in consensus-based organizations. See M'bow 1978; and Schermers and Blokker 1995, 502.

ambitious set of nearly completed agreements covering topics that went far beyond the traditional tariff-cutting protocols of earlier years. Reaching consensus on such an ambitious package would be difficult if only contracting could be used. Yet U.S. trade negotiators ultimately decided not to exit in closing the Tokyo Round and to instead contract through law-based bargaining. In the Uruguay Round, they made the opposite decision, choosing to coerce by exiting the GATT and reconstituting the system. The difference in choices is attributable ultimately to the Cold War context: U.S. policymakers, particularly in the Department of State, maintained a trade policy-security policy contextual linkage that constrained the U.S. use of power in concluding the Tokyo Round;[48] this linkage did not operate in closing the Uruguay Round.

Closing the Tokyo Round

In the summer of 1978, as the Tokyo Round was about to close, [several developing country leaders] argued that the GATT decision-making rules endowed the developing countries with substantial leverage in determining the final shape of the Tokyo Round codes. They reasoned that the codes being negotiated on dumping, subsidies, and customs valuation could be considered interpretations of the GATT, which would therefore require support by a consensus of the Contracting Parties. Moreover, these developing countries offered an interpretation that the benefits of those codes had to be provided to all GATT Contracting Parties on an MFN basis, in accordance with GATT Article I, because they constituted interpretations of GATT Articles VI, XVI, and XXIII. Finally, the GATT secretariat could not provide services to administer a code without a consensus of the Contracting Parties. In August 1978, the legal department of the UNCTAD secretariat prepared a memorandum that synthesized this legal analysis.[49] ***

The Tokyo Round outcome reflected the success of this legal strategy: the developing countries received all of the rights to the subsidies code and the anti-dumping code, but they were not obligated to sign or

[48] This argument is based on authorities cited below and interviews or conversations in Washington, D.C., in either December 1985, November 1989–February 1990, or July 2000, with Walter Hollis, Richard Matheison, Peter Murphy, and Doug Newkirk (who worked at STR at the close of the Tokyo Round), and Chip Roh and Jerry Rosen (who worked at the Department of State during that period).

[49] Legal and Procedural Questions on the Conclusion of the MTN, Memorandum From the UNCTAD Secretariat, 21 August 1978, UNCTAD Doc. MTN/CB.14.

otherwise abide by the obligations contained in those agreements.[50] The developed countries had objected strenuously to what they characterized as a "free ride" for the developing countries. But in a legal bind, the developed countries acquiesced: the decision of the Contracting Parties on administration of the subsidies code and the antidumping code obtained the necessary consensus by reflecting the commitment to apply them on an MFN basis.[51] ***

U.S. trade negotiators were disturbed by these outcomes, which many thought could have been avoided by the use of more potent bargaining tactics. *** Some special Trade Representative (STR) negotiators wanted to break the developing countries' law-based leverage by threatening to create an alternative preferential regime, proposing to move all or part of the negotiations to the OECD and concluding the round as something akin to a GATT-Plus package. In 1974, when the round was just beginning, the Atlantic Council had proposed establishment of a GATT-Plus regime. The plan provided that the EC, the United States, and most industrialized countries would deepen trade liberalization among themselves, extending the benefits of the arrangements only to those willing to undertake the obligations.[52] The result would have been a two-tiered global trade regime, which would quietly pressure the developing countries into liberalizing or otherwise facing the trade and investment diversion associated with the more liberal GATT-Plus regime.[53]

The approach was controversial within the STR's office, but the U.S. State Department killed it. *** The State Department was strongly opposed on the grounds that such an action risked hardening the "UNCTADization" of the GAIT, diplomatic spillovers into other

[50] As of 1990, only thirteen of the more than seventy-five developing country Contracting Parties to the GATT had accepted the subsidies code, and only fifteen had accepted the anti-dumping code. Multilateral Trade Negotiations: Status of Acceptances of Protocols, Agreements and Arrangements (as at 7 December 1990), GATT Doc. L/6453/Add. 8, 10 December 1990.

[51] Action By the Contracting Parties on the Multilateral Trade Negotiations, 28 November 1979, and Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, in GATT BSID *26th Supplement,* (1980), 201, 203–205. The United States Congress did not faithfully implement the international commitments: U.S. law accorded the injury test in countervailing duties cases only to "countries under the [Subsidies Code] Agreement." Tariff Act of 1930, as amended by Section 101 of the Trade Agreements Act of 1979. As a result of this contravention, the Executive Branch had to compensate several countries, including India, with a package of commercial concessions.

[52] Atlantic Council 1976.

[53] Hufbauer 1989. See generally, Viner 1950.

international organizations, and disturbance of diplomatic relations with developing countries more broadly – all of which were undesirable in the Cold War context in which the United States did not want to alienate developing countries.[54] *** With State Department opposition, it was apparent to STR negotiators that the Trade Policy Committee could not reach the consensus required to support a formal diplomatic threat of exit.[55]

*** When it became apparent to the developing countries, in spring 1979, that the transatlantic powers would ultimately not exercise power to force them on board, the Tokyo Round was closed with law-based bargaining, yielding a final package that gave developing countries a free ride on many agreements.

Closing the Uruguay Round: The Single Undertaking[56]

In contrast, by the time USTR negotiators settled on a plan for concluding the Uruguay Round, the Cold War had ended and the State Department had dropped its opposition to an overt use of power.

Since the beginning of the Uruguay Round negotiations, most developing countries had stated their intention not to sign on to the agreements on TRIPs, TRIMs, or the General Agreement on Trade in Services (GATS). U.S. negotiators considered developing country acceptance of these agreements crucial to U.S. interests and to Congressional support of a final package. Moreover, the EC and the United States were concerned that the developing countries would use their leverage under the

[54] This analysis is consistent with arguments by others that U.S. Cold War policy sought to avoid alienating developing countries and so led to their free-riding. See Krasner 1976; and Gilpin 1981.

[55] Without such a consensus, U.S. law on and practice in the interagency trade policy process would have required a Presidential decision on the matter. See Section 242 of the Trade Expansion Act of 1962, as amended, 19 U.S.C 1801; amended by P.L. 93–618; and 40 Fed. Reg. 18419, 28 April 1975. STR officials were unwilling to take the matter to the President.

[56] The analysis in this section is based on interviews or conversations with several European, U.S., and GATT/WTO Secretariat officials, including Julius Katz, Washington, D.C., August–December 1990, and March 1995; Horst Krenzler, Los Angeles, September 1999; and Warren Lavorel, Washington, D.C., August–December 1990, and Geneva, March 1995; and several U.S. government documents, including the following memoranda (on file with author): Memorandum to UR Negotiators and Coordinators, Preliminary Legal Background on Ending the Uruguay Round, From USTR General Counsel, 1 December 1989; Memorandum for Ambassador Warren Lavorel and Ambassador Rufus Yerxa, A Single Protocol for Concluding the Round, From USTR General Counsel and Deputy General Counsel, 20 July 1990; and Memorandum for General Counsel's Office, Options for Concluding the Round, 13 August 1990.

consensus tradition of the GATT to block the secretariat from servicing those agreements unless they were applied to both signatories and non-signatories on an MFN basis.

In late spring of 1990, USTR negotiators decided to try to build a U.S. government consensus on what some at USTR referred to internally as "the power play," a tactic that would force the developing countries to accept the obligations of all the Uruguay Round agreements. The State Department supported the approach and, in October 1990, it was presented to EC negotiators, who agreed to back it. The plan was later to be characterized as the single undertaking approach to closing the round. Specifically, as embodied in the Uruguay Round Final Act, the Agreement Establishing the WTO contains "as integral parts" and "binding on all Members": the GATT 1994; the GATS; the TRIPs Agreement; the TRIMs Agreement; the Subsidies Agreement; the Anti-dumping Agreement; and every other Uruguay Round multilateral agreement. The Agreement also states that the GATT 1994 "is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947 . . ." After joining the WTO (including the GATT 1994), the EC and the United States withdrew from the GATT 1947 and thereby terminated their GATT 1947 obligations (including its MFN guarantee) to countries that did not accept the Final Act and join the WTO. The combined legal/political effect of the Final Act and transatlantic withdrawal from the GATT 1947 would be to ensure that most of the Uruguay Round agreements had mass membership rather than a limited membership.

GATT Director-General Arthur Dunkel agreed to embed the plan in the secretariat's draft Final Act, which was issued in December 1991. From that time forward, it remained in all negotiating drafts, enabling the transatlantic partners to more completely dominate the agenda-setting process in the Uruguay Round than in the Tokyo Round.

MAINTAINING SOVEREIGN EQUALITY RULES TO GENERATE INFORMATION ABOUT THE INTERESTS OF ALL STATES

As shown below, at the GATT/WTO, powerful states have used invisible weighting to define not only substantive rules, but also future decision-making rules. Powerful countries could choose either weighted voting or sovereign equality rules to achieve asymmetric outcomes. But sovereign equality rules are more likely than weighted voting to confer legitimacy on those outcomes. Whether or not that legitimacy sticks, sovereign equality rules are more useful than weighted voting in generating information that