

A Domestic Logic for International Delegation: U.S. Support of WTO Legalization:

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Prepared for presentation at the PIPES workshop, University of Chicago, April 29, 2010.
This is a draft in need of improvement. All comments are welcome.

Abstract

The international relations literature typically assumes that powerful states are the most reluctant to delegate substantial authority to international organizations (IOs) because they have the most to lose. And yet one of the most dramatic instances of delegation, the establishment of a more legalized dispute settlement mechanism during the GATT/WTO Uruguay Round, was spearheaded by the United States. Existing work on delegation and legalization fails to account for this outcome because it tends to overlook the domestic political reasons for why governments transfer authority to the international level. In comparison to other domestic actors, I argue, executives benefit disproportionately when issues are managed through IOs since they act as the state's representative at the international level and have more influence over IO affairs. As a result, delegation strengthens the hand of the executive relative to legislatures and special interest groups. This paper illustrates these points by showing how domestic political conflict between the U.S. President and Congress helps explain the nature and timing of dispute settlement legalization during the Uruguay Round.

Introduction

The conclusion of the Uruguay Round of multilateral trade negotiations (1986-1994) and resulting establishment of the World Trade Organization (WTO) triggered a shift in the governance of international trade disputes from a fundamentally power-oriented system to one based more on rules and third-party adjudication.¹ Under the procedures of the General Agreement of Tariffs and Trade (GATT), defendants could avail themselves of the right to block the dispute settlement process at various stages when doing so served their interests. At their core, then, trade conflicts were resolved through self-help in the form of bargaining, coercive threats, and retaliation.² The power-based approach was epitomized by the GATT's greatest champion, the United States, which wielded powerful tools of unilateralism and bilateralism to pry open foreign markets and defend domestic producers.

The Understanding on Rules and Procedures Governing the Settlement of Disputes, or Dispute Settlement Understanding (DSU), created a dispute settlement mechanism with jurisdiction over all WTO complaints, an appeals process, and authority to render legally binding decisions. The DSU grants unprecedented power to a supranational tribunal and is perhaps the most impressive example of international "legalization" at the global level (Goldstein et al. 2001). Despite fears in the developed world that it represents a threat to state sovereignty (Barfield 2001) and serious concerns among developing countries that the process is too cumbersome and costly (Busch and Reinhardt 2003), the WTO's mechanism continues to operate effectively and, by most accounts, enjoys substantial legitimacy. A group of political science and law scholars recently offered the following assessment: "The WTO's dispute settlement process is, by far, the most used and most effective international dispute settlement process. Although it is natural that some of its decisions and processes are criticized, few would say that it is not a basically fair process or that there has been corruption" (Barton et al. 2006: 210). Indeed, most proposals for reform in the current Doha Round call for relatively modest changes (Georgiev and Van der Borgh 2006).³

The advent of the DSU raises interesting questions for international relations (IR) theorists. The development of any binding, third-party dispute settlement defies the traditional expectation that governments jealously guard their policy autonomy (Simmons 1998: 76). This puzzle is even more striking from the perspective of powerful states. We would expect weaker and more trade-dependent countries to favor a rule-oriented approach to conflict resolution, with more powerful states resisting. Systematic evidence from preferential trade agreements shows precisely this pattern at the regional level, where larger economies prefer less legalization (Smith 2000). From a bargaining perspective, states with large markets should prefer a system under which they can credibly threaten to disrupt trade (Hirschman 1945). Indeed, empirical studies of trade conflict show that relative power explains most outcomes in practice (Odell 1985;

¹ John Jackson (1989: Chapter 4) differentiates between "power-oriented" and "rule-oriented" settlement of disputes.

² To be clear, rules did matter under the old regime. In fact, compliance rates were high and unilateral measures were typically employed with sensitivity to GATT rules (Ryan 1995).

³ The Doha Declaration, the roadmap for the current round, calls for negotiations on "improvements and clarifications" of the DSU, not for any fundamental changes. WTO Doc. WT/MIN(01)/DEC/1, 20 November 2001.

Coneybear 1987). So why would powerful states agree to level a playing field that is tilted in their favor?

This paper addresses the more specific puzzle of why the United States, a relatively autarkic economy of unparalleled size, supported—indeed, spearheaded—the move toward legalized trade dispute settlement. The United States possesses all the attributes of a powerful trader, as a former Deputy United States Trade Representative (USTR) makes clear:

In trade, power is not represented by armies and navies, at least not if the system is operating properly; power is, ironically, achieved by importing. The United States is the largest importer in the world.... This means that, as against countries which do not import much from the United States, but which depend for a substantial amount of their livelihood on exports to the United States, the possibility of losing some access to our market must be taken quite seriously (Lang 1999).

In other words, the opportunity costs of a disruption in trade are almost always lower for the United States than for its trading partners, and this translates into superior influence in almost any bilateral setting.

To fully understand this behavior, we need to integrate domestic politics into the burgeoning literatures on legalization and delegation, which have remained overwhelmingly state-centric (e.g., Goldstein et al. 2001; Abbott and Snidal 2000; Hawkins et al. 2006a; Nielson and Tierney 2003; Pollack 2003; Haftel and Thompson 2006).⁴ I distinguish between the preferences of executives and legislatures and argue that the former often have incentives to move policy issues up to the international level by delegating authority to IOs. Because it is largely executives and their representatives who interface with IOs, they have an advantage over other domestic actors when it comes to setting IO agendas and controlling IO activities. Thus delegation from the domestic to the international level strengthens the hand of the executive relative to legislatures and the interest groups that normally exert influence through them.

In the context of GATT/WTO dispute settlement, I argue that through international legalization the president was able to increase his leverage over Congress in ways that served executive trade policy preferences. Specifically, the DSU was seen as a way to defend against the most extreme protectionist policies at home and as a way to pursue trade conflicts while minimizing international political costs—and thus as an institutional technology for placing executive concerns over legislative concerns. These domestic benefits help explain why governments are willing to sacrifice international leverage by delegating power to IOs.

The next section describes the move from GATT to WTO dispute settlement to establish that the outcome was significantly more legalized and represented a potential threat to U.S. flexibility and influence in trade. I then present a general theoretical framework for understanding the domestic politics of international delegation, focusing on the strategic

⁴ Exceptions in the delegation literature are Milner 2006, Broz and Hawes 2006 and Moravcsik 2000, which identify some domestic political incentives for governments to manage aid, lending and human rights enforcement, respectively, through IOs. Among works on legalization, an exception is Goldstein and Martin 2000, though they focus on the consequences not the causes of legalization.

relationship between executives and legislatures, and outline a more specific argument as applied to the case of the United States and trade dispute settlement. Two empirical sections are designed to demonstrate that the Uruguay Round changes were indeed designed to augment the president's leverage vis-à-vis Congress and to serve executive trade preferences more generally.

Dispute Settlement Legalization: From GATT to WTO

The WTO dispute settlement mechanism represents a delegation of substantial authority from member-states to an international body. This section briefly describes the changes that were negotiated during the Uruguay Round and that went into effect from January 1, 1995, comparing key features of the GATT mechanism to its successor. I then demonstrate that the new dispute settlement system is meaningfully independent from the United States and able to constrain the most powerful state in the trading system.

The Uruguay Round Changes

Under the GATT dispute-settlement regime, governed by Articles XXII and XXIII of the 1947 treaty, disputants were first required to consult with each other in order to resolve the conflict through bilateral negotiation and accommodation. If these consultations failed, the complainant could refer the matter to a GATT panel comprised of three to five trade law experts from neutral member states.⁵ The panel ruled on the merits of the complaint and then referred the matter back to the disputants for further consultation—in the hope that the negotiating incentives of the parties would be different in the shadow of a panel ruling. Failing agreement at this stage, the matter was referred to the GATT Council, comprised of all state parties, which could either consider the merits of the case again and make its own ruling or simply adopt the panel's ruling. If the defendant refused to abide by the Council's determination, the Council could authorize the complainant to impose bilateral sanctions—in the form of a suspension of obligations normally required under GATT—on the defendant.

Thus under GATT victimized states did have recourse to a rule-based assessment of behavior by a third party. However, various mechanisms were built in that rendered GATT dispute settlement toothless and power-oriented in the end.⁶ Most notable among these was the consensus requirement. Since the Council operated on the basis of unanimity, and since defendants were members of the Council, the defendant could block the dispute settlement system from working effectively. “[The consensus rule] meant,” writes Robert Hudec (1999: 9), “that the defendant had a virtual right to veto every step of the process, from the appointment of a panel to the adoption of the panel's legal ruling and the authorization of trade sanctions for noncompliance.” Predictably, sanctions were only authorized once in the history of GATT, and some regarded the provision authorizing sanctions as impotent to the point of being superfluous (Sykes 1992: 272). The fact that a losing party could avoid paying the consequences of its loss was “deemed to be the most significant defect in the GATT process” (Jackson 1998a: 167).

⁵ In fact, GATT 1947 did not specifically call for the formation of adjudicatory panels. They arose through custom and were not codified until the 1979 Tokyo Round Agreements.

⁶ To be clear, many disputes were indeed resolved under the GATT mechanism, almost all by settlement rather than retaliation. Robert Hudec argues that the GATT dispute settlement procedure was functioning with considerable success and legitimacy in its last decade despite its “flimsy” structure. Hudec 1999: 8-9.

Another limitation of GATT dispute settlement was that complaints filed in areas covered by the various Tokyo Round “codes”—which established rules for such nontariff barriers as dumping, subsidies, government procurement, important licensing, standards, and customs valuation—had to be channeled through each code’s own dispute settlement procedure and could only be filed against states that had signed on to the particular code in question. Finally, since the GATT lacked coverage of important matters such as trade in services and intellectual property, there was simply no adjudicatory recourse for states victimized in these areas.

The Uruguay Round of multilateral trade negotiations—the eighth such undertaking since the GATT’s creation in 1947—was launched in 1986 and brought together just under a hundred GATT members to further liberalize world trade and solve a number of crucial problems facing the world trading system. The negotiations were intended to end in agreement in 1990 but were not concluded until December of 1994, when the final agreement was signed by a membership that had grown to 124 nations.

The Uruguay Round produced two principal innovations in the GATT system. First, it expanded the substantive coverage of GATT rules to create new obligations in the existing areas of trade-related investment, agriculture, textiles, and sanitation (i.e., food safety), and for the first time extended coverage into the new areas of trade in services and protection of intellectual property rights. Second, the Uruguay Round created the WTO as an overarching institutional framework to administer the global trading system. The WTO’s new dispute settlement mechanism, with its increased speed, automaticity, and appellate system, has been called its “crowning institutional achievement” (Ruggiero 1998: 136).

The new dispute settlement mechanism is notably different from its GATT predecessor in several respects. First, the system is integrative, that is, unlike the codes structure maintained since the Tokyo Round, all rules apply to all parties and all disputes are channeled through the same mechanism. Second, there is an appellate process. A party to a dispute can appeal a decision to a three-member Appellate Body (AB), drawn from a standing pool of seven judges, which can choose to uphold or reject part or all of the original panel’s ruling. Third, the DSU sets a timetable for the processing of complaints, including a requirement that panels must generally rule within six months (though the process overall can still take as long as two years). Fourth, the DSU is explicitly designed to check unilateralism. Article 23 states that “Members shall not make determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding.”

The final and most striking difference between WTO dispute resolution and its predecessor is the adoption of a “negative consensus” rule. Unlike under GATT, where one member could block the process at a given stage (i.e., it required unanimous *consent*), the DSU requires a consensus in order to block the process (i.e., it requires unanimous *dissent*). Thus, all members effectively have automatic access to a panel; a panel report—or, in the case of appeals, an Appellate Body report—is binding unless there is a consensus against it; and authorization for retaliation by the Dispute Settlement Body (which is simply the Council acting as such) cannot

be blocked by the defendant. The DSU's automaticity and bindingness thus remove a major defect of the previous system.

The WTO's mechanism is a much more legalized institution than its predecessor. It satisfies the key criteria for legalization of obligation, delegation, and precision,⁷ and has been aptly described as a "thickening of legality" in the area of international trade disputes (Lafer 1998: 39). According to Hudec, it grants "an unprecedented degree of power to a legal tribunal." He continues: "In the history of international law, it is rare to find a legal institution with this much regulatory power over significant areas of government economic policy" (Hudec 1998: 101). The number of lawyers working in the WTO Secretariat is ballooning, even outside of its Office of Legal Affairs, and the resolution of disputes under the WTO has become the premiere example of litigation in international law.⁸ Private trade lawyers who argue cases in front of WTO panels report that the process "feels like litigation" and that, unlike the GATT, which "wasn't a culture of legal decision," WTO panelists rely on a "culture of reasoning."⁹

Ceslo Lafer, former Chairman of the Dispute Settlement Body, frames the intent of the DSU in these terms: "It is precisely to avoid unilateralism of interpretation and to contain 'self-help' in the application of rules through retortion and trade retaliation that the WTO multilateral dispute settlement mechanism was conceived. It is rule-oriented, in the Grotian sense, aimed at 'taming' unilateral power-oriented trends of the 'raison d'état'" (Lafer 1998: 38-9). Though it has only partly achieved these idealistic goals, the new system is indeed fundamentally different from the GATT's.

Constraints on the United States

In practice, the WTO process has shown that it can resist pressure from states to an impressive degree—including a high degree of independence from the United States. WTO panels seem to be much less susceptible to political influence than their GATT predecessors and trade officials in the United States are elsewhere are satisfied with their objectivity.¹⁰ The Appellate Body is especially noteworthy as part of the move toward legalization. Individual cases are heard by three appellate judges drawn from a standing body of seven members, each of whom is chosen by the Dispute Settlement Body to serve a four-year term (with one reappointment allowed). Article 17 of the DSU requires that these persons be "of recognized authority, with demonstrated

⁷ See Abbott et al. 2000. The precision dimension is the least obvious among these. Insofar as the panels and Appellate Body have helped to clarify ambiguities in the GATT/WTO treaties, one could argue that they have made the rules more precise. See Steinberg 2004.

⁸ One trade lawyer who has argued cases before many WTO panels describes the WTO as having a "culture of lawyers." Author's interview with C. Christopher Parlin, Partner, Kaye Scholer, Washington, DC (hereafter "Parlin interview").

⁹ Author's interview with David Christy, Counselor, Kaye Scholer, Washington, DC (hereafter "Christy interview"); and Parlin interview.

¹⁰ One recurrent complaint is that panelists sometimes lack requisite scientific or technical knowledge to make decisions. According to two European officials, a deficit in scientific knowledge about health issues and the environment led to incorrect rulings in the hormones case brought by the United States and Canada and the asbestos dispute with Canada. Author's interview with a European Commission trade official (hereafter "Commission official interview"); author's interview with a French trade official. U.S. officials complain about a lack of expertise in the subtleties of antitrust law and other opaque barriers to trade. Author's interview with a USTR official (hereafter "USTR official interview").

expertise in law, international trade and the subject matter of the covered agreements generally.” It also indicates that the AB should be “broadly representative of the membership in the WTO.” Accordingly, the first seven members included an American, a New Zealander, a German, a Filipino, a Japanese, a Uruguayan, and an Egyptian. This stable and diverse membership—as opposed to ordinary panels, which disputants themselves have a hand in choosing—helps ensure that appellate decisions remain as independent as possible of state influence and interests.¹¹ A final institutional source of independence is the Appellate Body’s right to seek outside information and expertise in judging cases. This removes potential sources of influence for states.

In addition to these institutional sources, the AB has shown further evidence of independence in the course of conducting its business. The Body has displayed considerable assertiveness, most notably by employing a common-law style such that its decisions will take on more importance over time—a process often referred to as “judicial lawmaking” (Steinberg 2004; Smith 2003). As Paul Stephan (2000: 65) concludes, “The Appellate Body’s approach...gives the tribunals greater freedom to develop interpretations that accord with their own preferences, rather than compelling adherence to the status quo. This strategy promotes legal innovation over stability, and the discretionary authority of the WTO dispute resolution process over the autonomy of WTO members.” Panels and the AB have also begun to accept *amicus curiae* briefs (i.e., submissions from third-party “friends of the court”) as part of its deliberations, a possibility that was not considered by the WTO’s framers and does not appear in the DSU text.¹² This activism (mild, to be sure, by comparison to many domestic courts) has met with some resistance by WTO member states. The United States, for example, has accused a WTO panel of excessive editorializing in its decisions.¹³

Panels and the AB have not been shy about finding members in violation of WTO rules. The appeals process routinely upholds decisions against the most powerful states; in its first decision ever, in fact, the AB found against the United States in a complaint brought by Brazil and Venezuela. The United States subsequently complied with the ruling. The European Union (EU) also lost an important case—part of the bananas dispute—to Ecuador and was ordered to pay more than \$200 million in compensation. If anything, the panelist selection process works *against* the largest states since a state involved in a dispute—whether as a plaintiff, defendant or third party—cannot have one of its nationals as a panelist. Since the United States and EU are the most frequent participants in the dispute settlement mechanism, they are often not represented on panels. Challenges by developing countries that would never occur bilaterally do indeed occur in the WTO context, often with success.

More important evidence of the WTO’s political independence from the United States is the fact that the latter has lost dozens of cases and has complied—or appears to be in the process

¹¹ For more on the relationship between membership diversity and IO independence, see Thompson 2006.

¹² For more on *amicus curiae* in the dispute settlement process, see Covelli 1999: 35, 138-9.

¹³ The panel ruled against a Canadian complaint that U.S. Uruguay Round implementing legislation violated the WTO Agreement on Subsidies and Countervailing Measures by identifying export restraints as countervailable, but criticized the U.S. law in other respects and in terms of how it *might* be used in violation of WTO rules. A memo circulated in the Senate complained that, “The matter should have ended with the dismissal of Canada’s complaint...[A]s a matter of WTO dispute settlement, panels have no business speculating on legal issues when a case is dismissed.” The memo is reproduced in *Inside U.S. Trade*, May 4, 2001, p. 23.

of complying—in almost every instance.¹⁴ In most cases where the United States has been slow to comply, doing so requires legislative action and thus the cooperation of Congress, rather than merely administrative action under existing executive branch authorities (Grimmett 2007). This generally good record exists despite the increased frequency of complaints against the United States. While Washington was chiefly a *demandeur* for WTO dispute resolution in its early years, it has found itself increasingly in a defensive position, with more than 120 cases filed against it (Leitner and Lester 2008; USTR 2008). The United States has suffered more than twice as many adverse rulings as any other party (Wilson 2007: 399).

Two important losses for the United States are worth noting as examples. The first loss, in the “Shrimp-Turtle” dispute, is important because it signals that developing countries can defeat the United States over matters that bear on U.S. policy autonomy. Four South Asian countries—India, Malaysia, Pakistan and Thailand—objected to a U.S. ban on shrimp caught with nets that kill sea turtles, a ban they claimed discriminated against their fishing industries. The United States complied with the ruling, lifting the ban over objections from environmental groups and complaints of threats to U.S. sovereignty.

Another loss, the EU’s challenge of the U.S. Foreign Sales Corporation (FSC) taxing system, is notable because of the amount of money at stake and the power of the domestic constituency involved.¹⁵ Though the Clinton administration complained bitterly about the ruling—the panel “appears to have systematically disregarded the history of the issue, the applicable WTO legal rules concerning income tax measures, and the facts of the record before it,” argued USTR Barshefsky (USTR 1999b)—it also recognized the need to comply: “We cannot emphasize strongly enough how critical it is that Congress complete action on the FSC repeal and replacement legislation as expeditiously as possible. Enactment of this legislation is in our national interest. It is the only way to meet our obligations in the WTO” (USTR 2000). Compliance with the ruling, which has been slow in coming because it requires the cooperation of Congress to pass new laws,¹⁶ will mean billions of dollars in lost tax savings on export earnings for U.S. companies.

Various losses—and a mounting number of new challenges—related to U.S. application of its AD, CVD, and safeguard laws also demonstrate that WTO rules reach far into domestic politics and law. These threats to U.S. policy autonomy posed by the WTO have provoked concern among policymakers and especially in Congress. On May 21st of 2001, Senator Max Baucus sent the President a letter, signed by 61 Senators from both sides of the isle, intended to “state our strong opposition to any international trade agreement what would weaken U.S. trade laws.” In a statement accompanying the letter Baucus complained that the “WTO includes numerous constraints on the operation of U.S. trade laws that have been interpreted by dispute settlement panels in ways that undermine those laws.” The United States’ choice to entangle itself in such a legalized institution presents an interesting puzzle.

¹⁴ More generally, compliance with WTO panels is quite good and rich states have complied with rulings at about the same rate as poor ones (Wilson 2007; Stephan 2000: 68).

¹⁵ As one international lawyer involved in the case commented, when it comes to the ability of the WTO to rule against the United States, the FSC case is “where the rubber hits the road.” Christy interview.

¹⁶ In fact, Congress has passed two laws purportedly to address the issue but both have been ruled insufficient by WTO compliance panels.

The Two-Level Politics of Delegation

International relations scholars have been increasingly interested in why states design and delegate to international institutions in particular ways. The literatures on rational design (Koremenos, Lipson and Snidal 2004), legalization (Goldstein et al. 2001), and delegation (Hawkins et al. 2006a) all offer explanations for why states might want to grant substantial authority to international institutions. In almost all cases, these authors assume that powerful states will be reluctant to cede power because they have the most to lose by doing so (Smith 2000; Hawkins et al. 2006b). However, bringing domestic politics into the picture helps us understand at least one set of rationales for why this might take place. I make a general argument along these lines and then offer a more specific application in the context of trade dispute settlement.

State Leaders and IOs

Existing work on delegation to IOs and on international legalization tends to overlook the role of domestic politics. I argue that, relative to other domestic actors, executives benefit when policy issues are shifted to the international level and especially when they are embedded in international organizations. I focus on legislatures as the most relevant domestic actor that competes with the executive for influence over foreign affairs. This means that prime ministers, presidents, and other heads of government—even authoritarian rulers¹⁷—have an incentive to delegate to the supranational level when their interests clash with their legislatures'. These benefits accrue through four mechanisms: agenda-setting power, ongoing control, superior information and expertise, and domestic bargaining advantages.

First, because it is executives or their representatives who negotiate international agreements, they can set agendas when it comes to creating international rules and designing international institutions. As Rachel Brewster notes, executives have considerable agenda-setting power when it comes to international negotiations.¹⁸ While they are constrained indirectly by the demands of playing a two-level game,¹⁹ they ultimately have control over the details of their own negotiating position and over bargaining tactics, including how to respond to the demands of other states. When IOs are created and when new mandates are delegated to IOs, executives are in the driver's seat and can entrench their preferred policy.²⁰

Second, since it is executives who are formally represented at IOs, they have more control over ongoing activities than do other domestic actors. This control is buttressed by the practical realities of managing foreign affairs, which offer various advantages to the executive not possessed by legislatures: the executive is more unified and can act more quickly and more secretly than other branches of government. These "functional advantages" put the executive "in the best position to conduct foreign affairs."²¹ These two mechanisms, agenda setting and

¹⁷ While we tend to overlook the role of legislatures in authoritarian systems, there is considerable evidence that they do matter in some cases. See Gandhi 2008; Vreeland 2008.

¹⁸ Brewster 2004: 524-35.

¹⁹ Putnam 1988.

²⁰ Moravcsik 2000.

²¹ Scott 2002: 1466.

ongoing control, are closely related in practice. For example, once a treaty is made or an institution established, executives can expand commitments incrementally through international legal and administrative processes, without seeking further ratification (Keohane, Macedo and Moravcsik 2007: 4). Executives also have control over interpretation and implementation of agreements and IO rules. No other actor at the domestic level has these powers. Indeed, because legislators are often divided and plagued by cycling preferences, they may need to rely on an agenda-setting leader to pursue a coherent and stable approach to IO-based affairs.²²

Third, in interfacing with IOs, executives gain information and develop expertise over time, leaving other domestic actors dependent on national leaders to manage IO activities. In the U.S. context, Moe and Howell note that, “Because presidents are executives, they have at their disposal reservoir of expertise, experience, and organizational capacity, both in the institutional presidency and in the bureaucracy at large.”²³ Legislators simply cannot match this well of knowledge and resources. Others have noted the lack of information available to other domestic actors when it comes to assessing the foreign policies pursued by leaders and their consequences.²⁴ This asymmetry is especially acute in the context of IOs, whose activities and procedures are often opaque and arcane from the perspective of those on the outside.

Finally, because of the aforementioned benefits—agenda-setting, control and information—executives possess a domestic bargaining advantage when it comes to policies conducted at the international level. They can outmaneuver and present *fait accompli* to their domestic counterparts, who often lack policy information on the range of viable alternatives and their consequences, including how other states will react strategically to pursued policies (for example, the executive is likely to have a better sense of the international win-set). Moreover, once a new rule has been established at the international level, this provides a focal point for policy debates and makes opposition by other political actors more difficult to muster. In the context of trade, Lipson argues that GATT rules—and the existence of a multilateral trade regime and process more generally—has the effect of concentrating attention on and mobilizing support around trade liberalization.²⁵ As one consequence of international legalization, Kahler notes the role of domestic “compliance constituencies” that tend to develop around international rules and advocate for adherence to them.²⁶ These effects are most pronounced when international rules are backed by a dispute settlement mechanism, which offers leaders political cover and a hands-tying mechanism to insist on compliance—compliance with rules that presumably reflect executive preferences.²⁷

These advantages can be better understood if we conceptualize the executive as a “proximate principal” vis-à-vis the IO agent (see Figure 1). A growing body of literature treats IOs as agents to which state principals delegate tasks for a variety of political and efficiency reasons (Hawkins et al. 2006a; Bradley and Kelley 2008). While most work in this vein focuses on the state-IO relationship, in fact there exists a chain of delegation that begins with the citizens

²² On the problem of instability in legislatures, see Shepsle and Weingast 1981.

²³ Moe and Howell 1999: 138.

²⁴ Downs and Rocke 1994; Milner 2006; Thompson 2009.

²⁵ Lipson 1982: 446-47.

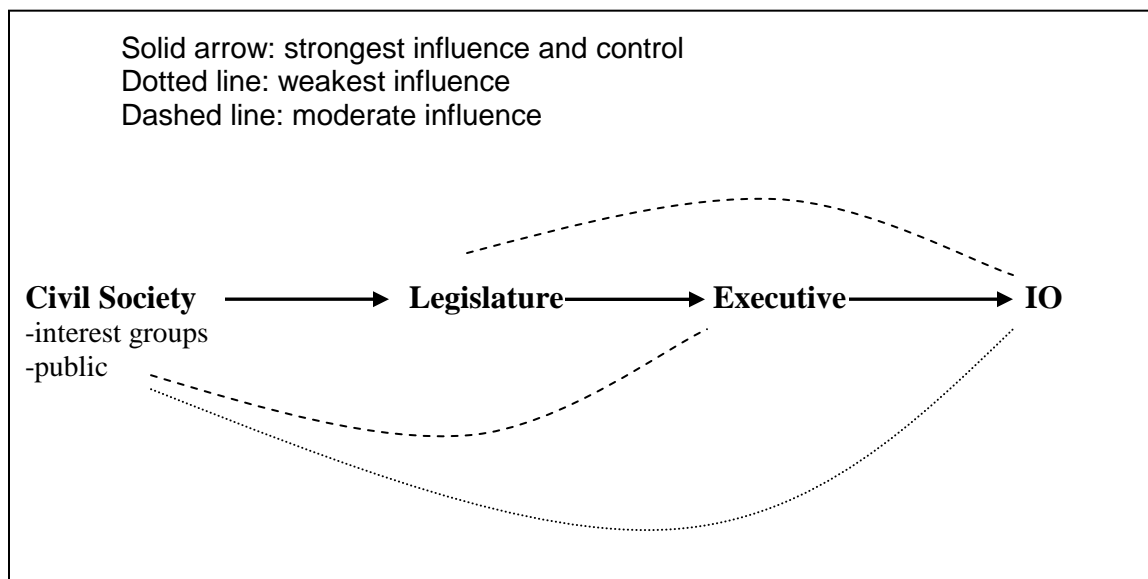
²⁶ Kahler 2000; see also Dai 2007.

²⁷ Allee and Huth 2006; Reinhardt 2003. The most developed discussion of this “lock-in” effect is offered by Moravcsik (2000) in the context of the European Court of Human Rights.

and interest groups of individual member countries, who are most closely represented by their legislators. These actors are in turn represented by their head of government at the international level, including in the context of an IO.²⁸

All principals face transaction costs when it comes to selecting an agent, controlling its behavior once delegation has taken place and, if necessary, redesigning the delegation “contract.” However, as Nielson and Tierney (2003) argue, proximate principals have much more influence over agent behavior than principals farther removed up the delegation chain because they have access to more information and more direct tools to control agent behavior. Manfred Elsig (2007) has applied the same logic to ambassadors and other mission representatives at IOs. He argues in the context of the WTO that such actors, working on behalf of the executive back in the capital, have the ability to “dominate the day-to-day work of IOs, often enlarging and limiting the agent’s autonomy” (Elsig 2007: 9). No other political actor within a state has the same degree of access, information and control. Put differently, for no other domestic actor is the principal-agent problem so attenuated when it comes to achieving desirable outcomes by the IO.

Figure 1. The Chain of IO Delegation



²⁸ For descriptions of this chain of delegation in specific settings, see Elsig 2007 (on the WTO) and Broz and Hawes 2006 (on the IMF).

Presidential and Congressional Trade Preferences

The domestic politics of international trade in the U.S. context is often understood according to a simple conventional wisdom: Congress favors protection whereas the executive favors free trade. The logic goes back to E.E. Schattschneider's classic work on the Smoot-Hawley Tariff, in which he demonstrated Congress's susceptibility to pressure from organized interests; both groups stood to gain from the concentrated benefits from protection. In contrast to the more parochial interests of legislators, the President can afford to consider aggregate benefits and thus the interests of consumers—indeed, his electoral incentives dictate such concerns. Therefore we generally expect the President to favor free trade and Congress to favor protection, at least in a relative sense (Schattschneider 1935; Destler 2005).²⁹

This political equation does help us understand important aspects of U.S. trade policy over time. However, the dichotomy tends to be overstated; in practice, Congress has repeatedly behaved in ways that promote free trade—from the Reciprocal Trade Agreements Act of 1934, to repeated grants of “fast-track” and “trade promotion” authority to the President, to enactment of implementing legislation for various international trade agreements, including NAFTA and the Uruguay Round Agreements of 1994. After all, Congress is subject to pressure not just from import-competing firms but also from export industries, which tend to mobilize against protection (Milner 1988; Gilligan 1997; Davis 2003).³⁰ At the very least, Congress has an interest in opening markets abroad. For their part, presidents are not averse to protection in some cases. Even the free market-oriented George W. Bush signed laws granting enormous farm subsidies (the 2002 Farm Bill) and protection for politically important industries (e.g., the 2002 steel tariffs). In sum, there is a risk of overstating the conventional wisdom regarding the relative trade preferences of Congress and the executive.

I suggest a different way to think about the preferences of these two key actors when it comes to trade policy. First, while both Congress and the President support protection at times, the latter prefers to avoid *the most protectionist policies* that are most likely to hurt aggregate welfare and to irritate trading partners. In other words, Congress is willing to go further than the President when it comes to protectionism and it is typically legislators who promote the most extreme policies. Second, and related, the President is more concerned than Congress with the *international* implications—especially the potential international political and reputational costs—of trade policy. Legislators tend to take into account the domestic and local impact of policies, whereas the President is obliged to consider trade policy from the perspective of international politics, including its impact in other foreign policy issue areas.³¹ This is natural since it is the President, Louis Henkin (1972: 169) notes, who “acts for the United States internationally.”

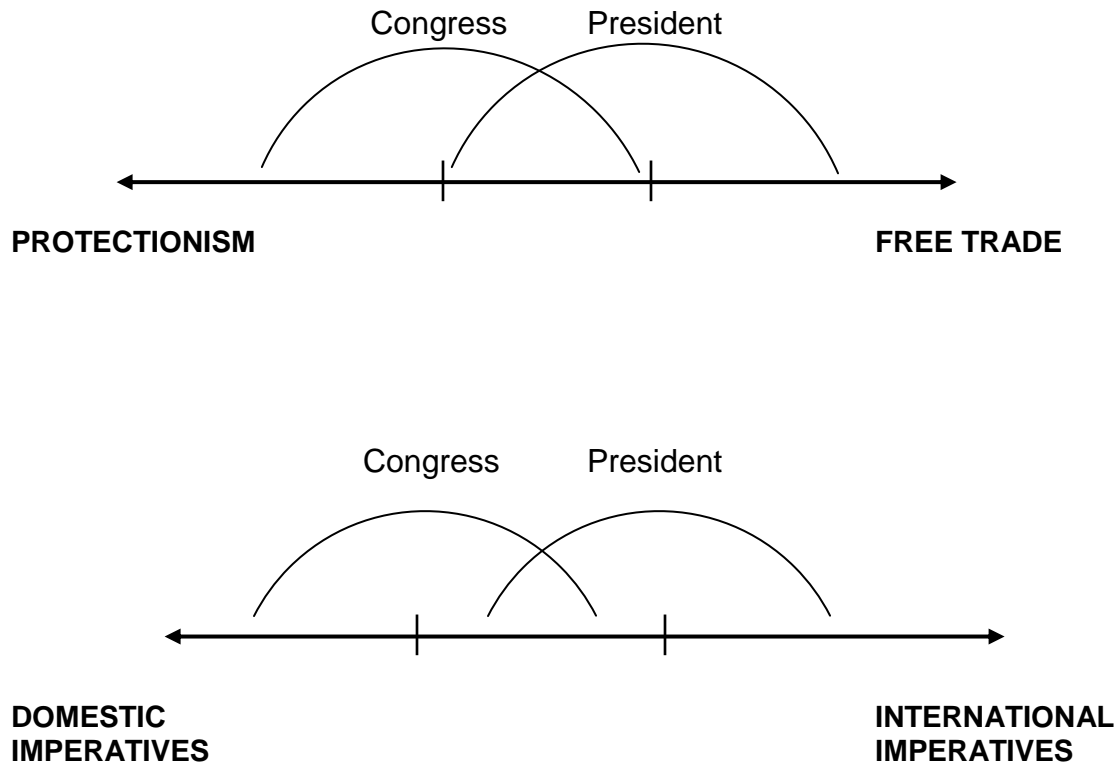
²⁹ For an historical discussion and more nuanced view of Congress's role in foreign trade policy, see Pastor 1980.

³⁰ These pressures may also vary by sector, with some industries favoring free trade and others protection (Lipson 1982; 420-21; Frieden 1988).

³¹ A similar point is made with respect to military intervention by Howell and Pevehouse (2007), who argue that Congress, with its domestic orientation, favors foreign interventions in a much more narrow set of circumstances than the President, who is preoccupied with international exigencies.

Figure 2 maps these preferences in terms of the ideal points and range of policy outcomes that are viewed as acceptable by these two key actors.³²

Figure 2. Trade Policy Preferences: Congress versus the President



These basic assumptions about trade policy preferences help us build a domestic political component into a more complete explanation for U.S. support of WTO dispute settlement reform during the Uruguay Round. The domestic politics component is a necessary but not sufficient explanation for this outcome, and must be accompanied by an international-level consideration of U.S. interests. The key point, however, is that the nature and timing of U.S. policy cannot be understood without taking domestic politics into account.

Through the four mechanisms outlined above (agenda-setting, control, superior information and bargaining advantages), the President uses trade policy delegation to (a) defeat the most extreme protectionist policies favored by Congress and (b) limit the international political costs of trade policies, particularly when disputes arise. With regard to the first function, the President can use legalized dispute resolution in the WTO to outmaneuver Congress

³² I am not making any particular assumptions about the distribution of the utility functions, beyond the basic assumption that utility is declining with increasing distance from the ideal point. I am assuming that the two actors are more divided on the domestic-international dimension than on the free trade-protectionism one.

when it comes to protectionism. This can be done either by arguing against protectionist legislation *ex ante* on the grounds that it violates international rules or by waiting until protectionist rules are challenged at the WTO and then using negative rulings as leverage against protectionist opponents at home.

Turning to the second benefit of legalization, limiting the international political costs of trade policies, an important motivation for the executive was its sensitivity to diplomatic imperatives in pursuing trade disputes. The international costs of trade disputes are potentially high but tend not to be the focus of legislators as they craft trade laws. I identify two international political advantages of channeling trade conflict through the more legalized WTO process. First, it allows the United States to signal that its motivations are not aggressive and threatening with respect to non-target states or beyond the particular conflict at issue. This makes support more likely from other state leaders. And second, it allows the United States to frame retaliation as a defense of international rules rather than of pure self-interest. This is especially appealing to publics, both at home and abroad, who generally prefer multilateral and legal approaches.³³ These political benefits partially offset the flexibility and relative power advantages enjoyed by the United States under the GATT system.

If my argument is right in the context of a given case, I expect to see at least four observable implications. First, we should see that the executive and legislature have distinct preferences over the issue in question. Second, on the question of timing, we should the move to delegate occur when these preferences are clashing, that is, when the two actors favor distinct and difficult-to-reconcile policies. Third, we should see some evidence of intentionality, i.e. that the executive seeks delegation in order to gain control *vis-à-vis* the legislature. Finally, once delegation takes place, we should see that managing the issue through the IO confers benefits to the executive in the form of policy outcomes that more closely match its preferences. On this last point, because the existing literature has focused more attention on the ability of the President to use GATT/WTO dispute settlement in order to fend off protectionism (function (a)), the empirical portion of this paper emphasizes the benefits of legalization when it comes to minimizing international costs (function (b)).

Clashing Interests: Congressional Pressure on the President

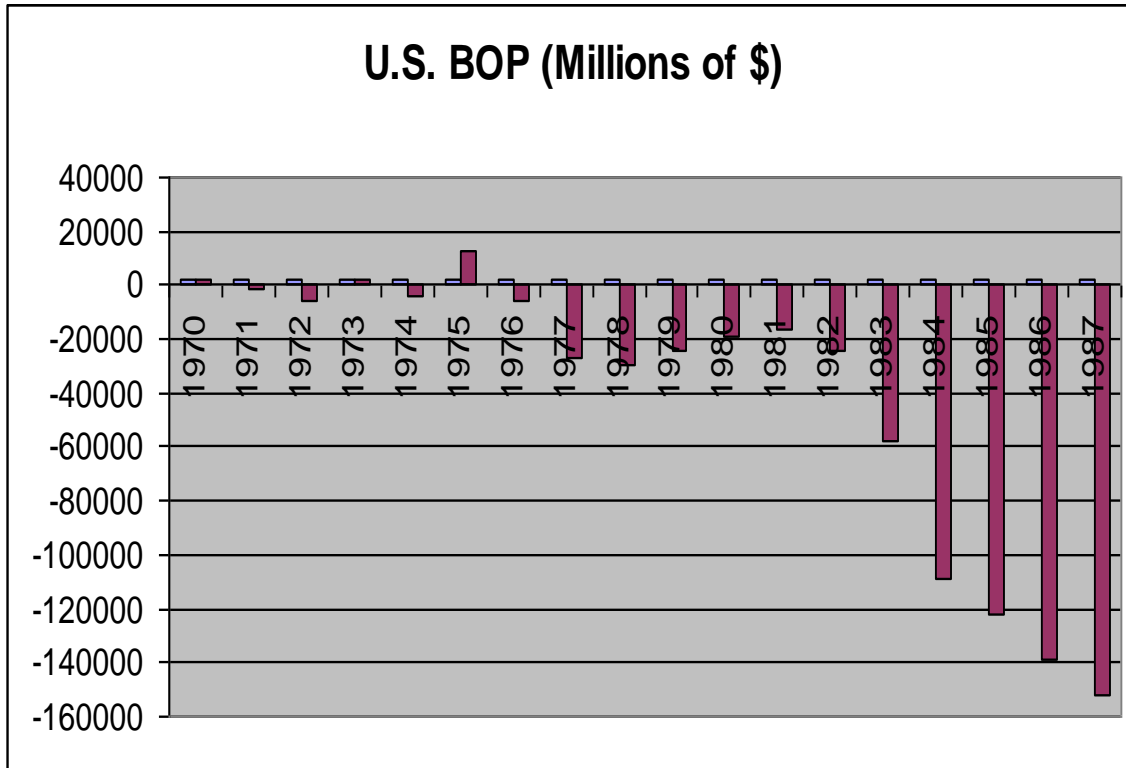
To understand why the president pursued dispute settlement legalization during the Uruguay Round, we have to understand the domestic political climate in the United States at the time. The most important background condition was the rise in trade deficits that preceded the start of the Uruguay Round in 1986. Figure 3 shows the growing balance of payments deficit.

Growing protectionist pressure, and a sense that President Reagan was not sufficiently responsive to the problem, spurred Congress to action. The number of trade bills introduced in Congress increased dramatically in the mid-1980s, peaking in 1985. Importantly, while the main target of Congress's ire was foreign governments engaging in "unfair" trade, legislators

³³ Empirical evidence shows that domestic audiences are more supportive of foreign policies conducted multilaterally, legally, and under the auspices of an international organization. See Kull and Destler 1999; Sobel 1996; Chapman and Reiter 2004; Thompson 2009; Tomz 2008.

explicitly intended to place pressure on the executive branch. As one Senate aid noted in 1985, “The target isn’t the Japanese; it’s the White House!” (quoted in Destler 2005: 131).

Figure 3. U.S. Balance of Payments, 1970-1987



The result of these efforts put Congressional and Presidential policy preferences on a collision course. This tension peaked with the passage of the 1988 Omnibus Trade and Competitiveness Act, which forced the U.S. Trade Representative to list trading partners in violation of international rules and made retaliation mandatory—the so-called “Super 301” provision—in certain circumstances. It is important to note that the explicit intention of this law was to reduce the discretion of the executive and to impose Congress’s preferences on trade policy. In early hearings on the trade bill (versions of which were percolating in Congress for several years), Massachusetts Democrat Edward Boland noted unemployment problems and the growing trade deficit and then criticized the Reagan administration: “In response, the administration offers a continuation of the passivity which is the hallmark of its current trade policy....The simple fact is that the administration’s trade policy provides the worst of two worlds. It insures a continued flood of imports to our country through a lack of response to violations of existing trade laws and agreements, and it guarantees continued limited markets

abroad because of a lack of a demonstrable link between market access to foreign products here, and market access to our products overseas.”³⁴

Reagan’s fellow Republican, Senator Bob Packwood of Oregon, put his finger on a crucial source of tension between the executive and the legislature: the former was much more sensitive to the international dimensions of adopting a tough stance with trading partners. His comments during the discussion of the Conference Report for the 1988 bill are worth quoting at some length:

“Under the present law the President is not required to initiate an action or retaliate against a foreign country's unfair barriers if he thinks it would not be in the national interest.

This was a serious point of contention between the Congress and the President because from roughly 1981 to 1985 President Reagan self-initiated no section 301 actions, nor did President Carter in all of his 4 years of Presidency. Despite the complaints of lots of American industries that other countries were unfairly putting up barriers against their products, the United States took very little action under section 301.

Part of the reason was military. The Department of Defense would say, "Well, gosh, we need Japan's intelligence-gathering activities and we need the bases."

Part of it was diplomatic from the State Department: "Don't retaliate against anybody over anything."

...

You had an internal battle within the administration as to whether or not the trade obligations of foreign countries, in terms of letting our products in, were greater than the defense or diplomatic considerations. Congress kept getting madder and madder and madder. Because there is no question that all kinds of countries have all kinds of barriers against American products.”³⁵

Consistent with Packwood’s reading of the situation, the executive branch argued vociferously against passing the law on the grounds that it was not in the broader national interest of the United States. It is no coincidence that those officials most preoccupied with foreign relations, such as the Secretary of State and National Security Advisor, were most opposed to the legislation.³⁶ A letter from USTR Clayton Yeutter (and also signed by numerous members of the administration) to the Speaker of the House complained of the possible effects of the law under consideration: “Mandatory retaliation provisions, contrary to their intent of making fair trade more ‘automatic,’ would in fact make retaliation and counter-retaliation more automatic. Cases under Section 301 of the Trade Act of 1974 are especially delicate because they

³⁴ Congressional Record, Vol. 132, No. 70. Trade and International Economic Policy Reform Act of 1986, May 22, 1986, 99th Congress, 2nd Session.

³⁵ Congressional Record, Vol. 134, No. 54. Omnibus Trade and Competitiveness Act—Conference Report, April 25, 1988. 100th Congress, 2nd Session.

³⁶ James Baker and Brent Scowcroft urged caution in the employment of Super 301. *Los Angeles Times*, 21 May 1989, p. 4-1. In fact, the first round of Super 301 designations were reportedly conducted in defiance of Baker’s advice. *The Guardian*, 26 May 1989, p. 1.

often involve issues for which international standards of fairness are ambiguous. A statutory hair-trigger could encourage nationalistic reactions by our trading partners, reversing the recent pattern of successfully negotiated market-opening settlements of these cases.” After noting that many of the bill’s provision “could violate our international commitments” and “seriously damage our credibility,” Yeutter complained to Congress that “We cannot accept the premise that the test of a ‘tough’ trade bill is the extent to which it removes Presidential discretion.”³⁷

The International Costs of Unilateralism

Confirming the Reagan administration’s concerns, the 1988 Trade Act has been called the most criticized piece of foreign trade legislation since the Smoot-Hawley tariffs of 1930.³⁸ The reactions of foreign governments manifested themselves in ways that represented serious political costs to the United States. Following the passage of the 1988 trade bill and especially the first application of Super 301 against Japan, India and Brazil in 1989, this unilateral approach to trade retaliation produced international political costs for the United States in at least four ways: (1) it complicated the Uruguay Round negotiations; (2) it prompted retaliation and negative issue linkage in other multilateral fora; (3) it damaged the reputation and leadership position of the United States; and (4) it stirred anti-American resentment among domestic audiences abroad.

First, U.S. professions that Super 301 was merely a vehicle for strengthening the multilateral trading system were widely perceived as hypocritical, and aggressive unilateralism conflicted with U.S. interests in the GATT and the ongoing Uruguay Round negotiations. During the first year of Super 301 designations, the EC warned of grave consequences for the ongoing multilateral trade talks if the United States proceeded.³⁹ When Brazil and India were targeted with 301 in 1989, this served to harden their intransigence with regard to incorporating services, investment and intellectual property protection under the GATT umbrella, which were important American goals in the Round.⁴⁰ Arthur Dunkel, Director-General of the GATT at the time, publicly condemned 301 retaliation as illegal, and GATT ministers convened a special meeting in March of 1989 designed to lambaste the U.S. turn toward unilateralism, warning that it would wreck the Round and that they would counter-retaliate if targeted.⁴¹

These GATT-related costs grew more serious as the Uruguay Round proceeded. The United States has a vital interest in maintaining the long-term health of the multilateral trade regime as the most efficient way to promote liberalization, and this long-term goal must be weighed against the short-term political and economic advantages of unilateral retaliation. Weeks before she was obliged to designate the first round of unfair trading practices and

³⁷ Congressional Record, Vol. 134, NO. 56. Omnibus Trade and Competitiveness Act—Conference Report, April 27, 1988. 100th Congress, 2nd Session.

³⁸ Hudec 1999: 113. Bhagwati and Patrick (1990) present a number of criticisms from the perspectives of Japan, Korea, Brazil and Europe. The year after Super 301 was created, a group of forty prominent American economists also published an open statement in the journal *The World Economy* condemning the turn toward unilateralism in U.S. trade policy.

³⁹ *Journal of Commerce*, 22 May 1989, p. 3A.

⁴⁰ *Journal of Commerce*, 30 May 1989, p. 1A. India could afford to be especially defiant since it had little trade dependence on the United States.

⁴¹ *The Independent*, 9 February 1989, p. 27; Hudec 1990: 113-4.

countries under Super 301, USTR Carla Hills warned in hearings before the Senate that, “Unilateral retaliation can undermine the very system of international rules we are trying to promote and expand in the Uruguay Round.”⁴² A week before the designations were made, an anonymous U.S. trade official expressed even more serious concern: “If we walk away from the multilateral option and pursue the Super 301 remedy, then I think we’ll jeopardize the future of the round.”⁴³ Their fears were realized, as the quality of the talks degenerated following the first Super 301 designations in June of 1989. In Hills’ words: “The bad news is that after the designation, the quality of the talks has not been the same...[T]hat high plateau of progress just fell off a cliff...[I]t’s hard to start talks when you’re starting with a lecture [from foreign governments].”⁴⁴ By the second round of Super 301 designations, in 1990, the Bush administration had determined that these threats to the GATT and Uruguay Round were becoming too great to countenance and avoided naming important trading partners for fear that doing so would derail ongoing negotiations.⁴⁵

American unilateralism in trade also created a costly political backlash in other multilateral fora and through linkage to other issue-areas. Indeed, following threats from the EC that U.S. provocation could complicate their broader relationship, the Bush administration chose not to target the EC as an unfair trader under Super 301 partly for fear that it would harm talks at an upcoming NATO summit.⁴⁶ In June of 1989, the six members of ASEAN condemned Super 301 in a letter to Bush and agreed to forge closer trading ties with Canada at the expense of the United States.⁴⁷ In response to being specifically named in the Omnibus Trade and Competitiveness Act, Japan sought support against the United States within COCOM, the 16-nation group of states that controlled exports of strategic goods to the Soviet Union and its satellites.⁴⁸ In addition, diplomats from APEC nations asserted that using Super 301 would undermine that forum and “make it difficult to launch negotiations for freer trade and investment in the [Asian-Pacific] region” (Bayard and Elliott 1994: 322). Finally, the passage of the 1988 bill created such acrimony at the OECD that its 1989 ministerial meeting was dominated by criticisms of the United States and discussion of the evils of unilateralism—the final communiqué proclaimed that OECD governments “reject the tendency toward unilateralism” and should “avoid any discriminatory or autonomous actions which undermine the... integrity of the multilateral trading system.” This preoccupation with U.S. policy came at the expense of discussing important economic issues of the time, such as inflation and trade imbalances.⁴⁹

Another, more intangible international political cost of unilateralism was damage to American leadership and prestige in the area of free trade promotion. The hypocrisy of the U.S.

⁴² *Journal of Commerce*, 4 May 1989, p. 1A. A few months earlier, in testimony before the House, Hills stressed repeatedly that the Uruguay Round, not bilateral efforts, should be the U.S.’s top trade priority. U.S. House of Representatives 1989: 7, 12.

⁴³ *Journal of Commerce*, 24 May 1989, p. 1A.

⁴⁴ *International Trade Reporter (BNA)*, 16 August 1989, pp. 1067-8.

⁴⁵ *Journal of Commerce*, 13 June 1990, p. 1A.

⁴⁶ *The Guardian*, 4 May 1989, p. 1; *Journal of Commerce*, 24 May 1989, p. 1A.

⁴⁷ *Journal of Commerce*, 15 June 1989, p. 4A.

⁴⁸ *Christian Science Monitor*, 25 August 1988, p. 7. *The Times* (2 April 1988, p. 1) reported that the passage of the 1988 trade bill “would rather impede the co-operation among Cocom countries toward more effective export controls.”

⁴⁹ The OECD meeting is discussed in *Financial Times*, 1 June 1989, p. 26; *New York Times*, 1 June 1989, p. D1; and *New York Times*, 2 June 1989, p. D1.

approach undermined its position as a standard-bearer of liberalization; this made it difficult for the United States to authoritatively persuade others of the virtues of free trade. “Small wonder,” notes the *Economist*, “that some GATT members are asking themselves why they should agree to America’s plea for tougher GATT rules when America does not consider itself bound to respect existing ones.”⁵⁰ The United States simply could not at once play a leadership role in GATT and employ aggressive unilateralism. At a twice-yearly meeting of the GATT Council in June of 1989 (one month after the first Super 301 designations), the United States was subjected to a “veritable fusillade of censure”⁵¹ and 90 percent of the discussions focused on American trade laws.⁵² A Japanese trade official captures the crux of the problem: “The U.S. government has repeatedly expressed its support for the multilateral, free-trade system, and made efforts to strengthen GATT. The adoption of a unilateral trade policy by the United States obviously contradicts the basic position of the U.S. government, and will largely undermine U.S. leadership at GATT negotiations” (Kuroda 1990: 230). In short, Super 301 left some trading partners “with doubts about U.S. allegiance to the multilateral system.”⁵³ Such doubts were especially costly since it is in the context of repeated negotiations—such as the Uruguay Round, or the evolution of the multilateral trading system more generally—that reputations matter most (Kreps 1990: 106-8; Yarbrough and Yarbrough 1997: 136).

Finally, the United States paid an international political cost by fanning anti-Americanism and protectionism among domestic audiences and interests abroad. Two prominent American trade lawyers (and former USTR officials) have warned of this effect of Super 301: “An inflexible and rigid requirement to retaliate could easily do more harm than good by provoking nationalistic reactions in other countries. . . . Too often threatening a trading partner could provoke that government to stonewall or retaliate rather than to satisfy American demands, thereby closing, rather than opening, markets around the world” (Bello and Holmer 1990: 60). Indeed, the Indian government won domestic praise for rebuffing U.S. 301 pressure (Bayard and Elliott 1994: 320-1). EC officials complained that U.S. efforts to force Europe to liberalize its telecommunications market (under Section 1377 of the Trade Act) actually complicated political efforts within the EC to produce reforms by creating a defiant environment.⁵⁴ One Korean trade official makes a more general argument that U.S. unilateralism in the late 1980s “provid[ed] ammunition to elements that oppose close relations with the United States” (Kim 1990: 253). Even allowing room for official rhetoric, it is certainly plausible that a process similar to Robert Putnam’s (1988) “reverberation” occurred as a result of U.S. policy: A factor at the international level (aggressive unilateralism by the United States) affected domestic politics (a backlash within other countries), which in turn influenced international politics (other states grew more resentful of and resistant to U.S. influence).

Of course, we would expect criticism to be leveled at the United States from the targets of Super 301, Japan, Brazil and India. But it was the reactions of third-party states, and the ability of the target states to rally support from third parties (often in the context of multilateral

⁵⁰ *The Economist*, 21 April 1990, p. 117 (U.K. edition). Rubens Ricupero (1998: 14), a Brazilian diplomat, refers to the “demoralizing” effect of U.S. behavior on the GATT machinery.

⁵¹ *Financial Times*, 22 June 1989, p. 8.

⁵² The 90 percent figure is attributed to an anonymous GATT official in *New York Times*, 22 June 1989, p. D1.

⁵³ *International Trade Reporter*, 3 January 1990, p. 1646.

⁵⁴ *Journal of Commerce*, 22 May 1989, p. 3A.

institutions), that became so crucial politically.⁵⁵ India's outspoken criticisms of U.S. behavior generated praise from developing country governments and anger against the United States. Condemnation from Canada and important European capitals, like Paris and Bonn, were especially important.⁵⁶ A European Commission press release made clear that the EC was concerned about the threat posed by 301 despite the EC's not being named in its first deployment (European Commission 1989). "It's... a dangerous weapon," an EC diplomat was quoted as saying. "It just so happens it hasn't been point at us this time."⁵⁷ The EC responded to the 1989 Super 301 investigations by effectively scuttling negotiations over its agricultural subsidies—the single most important trade issue for the United States at the time—and by releasing its own report condemning U.S. trade practices.⁵⁸

The result of the 1989 Super 301 experience was an isolated superpower fending off various efforts at political retaliation. "Our problem is that we are going to be all alone. Nobody will defend us," bemoaned one senior White House official. "Here is what happens when you take on the world in trade. Eventually the world turns on you."⁵⁹ These international political costs led one former USTR official to conclude that Super 301 was simply "not sustainable politically" in the long run.⁶⁰

Diplomatic Advantages under the WTO

Other scholars have noted that leaders conducting trade policy in the shadow of the more legalized WTO are better able to resist domestic pressure for protection. This is true because they are able to argue plausibly that their hands are tied to respect international rules and to comply with panel rulings when such rules have been violated (Reinhardt 2003; Finger & Winters 1998: 366). As Hudec (1992: 28) points out, the WTO's appeals process adds yet another layer of legal responsibility, allowing leaders to argue to domestic interests that they are "doubly bound" to resist protectionism. These effects at the domestic level help leaders avoid the international political conflict that so often arises from domestic trade politics.

The WTO's dispute settlement mechanism also affects how states pursue trade conflicts and the international political consequences of doing so. In this section I focus on this issue, which has received much less attention in the literature. How can powerful states, in particular, pursue trade disputes in a way that is more sensitive to international diplomatic considerations? A key strategy for the United States is to channel its policies through the WTO, a process that serves two functions. First, because working through the WTO imposes costly constraints, it helps U.S. leaders to signal that they have moderate goals and relatively benign intentions. Second, working through the WTO allows leaders to frame their actions in a more politically

⁵⁵ At the 1989 OECD ministerial meeting referred to above, Japan is reported to have lobbied for support against the United States and received it, especially from Europe. *The Guardian*, 1 June 1989, p. 1; *Le Monde*, 2 June 1989, p. 41.

⁵⁶ On Canadian reactions to Super 301, see *Toronto Star*, 27 May 1989, p. D2; and *International Trade Reporter (BNA)*, 28 June 1989, p. 830 (quoting a Canadian official characterizing 301 as "a threat to the central viability of the multilateral trade system.").

⁵⁷ *The Times*, 27 May 1989, p.#.

⁵⁸ See *Le Monde*, 5 May 1989, p. 19.

⁵⁹ Quoted in *Washington Post*, 21 June 1989, p. D1.

⁶⁰ Parlin interview.

appealing way—as a defense of international rules rather than as selfish or bullying. Both functions help reduce the diplomatic costs of challenging trade partners.

Signaling Restraint

During the first episode of Super 301 designations in 1989, the French newspaper *Le Monde* reported that USTR Hills “professed the good intentions of the administration and underlined that this ‘exercise’ is not intended to be ‘offensive,’” and then proceeded to deride the statement as transparently incredible. “Can one start a war while claiming goodwill?” the article asks rhetorically.⁶¹ Assertions that other countries had nothing to fear did not reassure U.S. trading partners; such statements were perceived as so much cheap talk.

How can a powerful state pursue trade disputes in a way that’s more sensitive to international diplomatic considerations? A key strategy for the United States is to channel such policies through the WTO, a process that helps U.S. leaders signal that they have moderate goals and relatively benign intentions. As one U.S. Department of Commerce official puts it, the WTO “allows us to raise concerns in a non-threatening manner.”⁶²

An example of the WTO’s power to signal moderate intentions can be seen in Europe’s attempts to scare—and thereby garner the support of—third-party states during the course of the bananas dispute. After receiving panel and Appellate Body rulings in its favor, and after the EU failed to implement changes to its banana import regime, the United States threatened sanctions against a wide variety of EU goods. The EU tried to portray this as aggressive bullying, as Japan had done so successfully during the 1989 Super 301 episode. The EU ambassador appealed to the Canadians: “Today, it’s Caribbean bananas; tomorrow it may be Canadian magazines [referring to a brewing dispute between Canada and the United States over the former’s policies to protect its domestic magazine industry].”⁶³ However, backed by an explicit endorsement from the WTO, proposed U.S. sanctions against the EU were not perceived as threatening beyond the issue at stake (Europe’s bananas policy) and beyond the intended target (Europe). On the contrary, a Canadian editorial written a few months after the EU’s attempt to fan anti-American sentiment blamed the EU for escalating the dispute:

[T]his is not the first time the European Community has opted to ignore the WTO....[T]he WTO found the EC consistently discriminated against Latin American and South American exporters in favour of producers in former colonial territories....The European Community simply ignored the ruling, thereby threatening another confrontation with the Americans. Indeed, the European Community has characterized most of these disputes as simply another form of American bullying tactics. This is quite a stretch of the imagination.⁶⁴

The WTO allows the United States to signal unthreatening intentions with respect to non-target states and to the multilateral trading system more generally because working through the

⁶¹ *Le Monde*, 27 May 1989, p. 27. Translations are by the author unless otherwise noted.

⁶² Author’s interview with a Department of Commerce official.

⁶³ *Maclean’s*, 22 March 1999, p. 26.

⁶⁴ *The Vancouver Sun*, 28 August 1999, p. F2.

organization imposes costly constraints on a trade coercer—costs that a state with more aggressive intentions would not be willing to pay. These costs come in the form of a relative power loss for the United States in terms of lost flexibility and a diminished capacity to punish. By limiting its own ability to impose its will, the United States sends a meaningful signal of self-restraint.

The loss of flexibility is generated from two sources in particular. The first is the need to limit the basis for retaliation to existing WTO rules. Whereas Section 301 complaints can be directed at a wide variety of “unfair” practices and justified on unilaterally imposed criteria (legal or political), arguments before a dispute settlement panel must be limited to the substantive rules of the regime. This is especially constraining for the United States since many of the trade barriers it opposes—such as structural impediments and lax competition law—are difficult to identify concretely and to quantify and therefore are difficult to create rules for. It is no coincidence that Japan experts at the USTR did not advocate a strong DSU; they knew that arguments restricted to WTO rules could not adequately challenge Japan’s opaque NTBs.⁶⁵

The sheer delay involved in pursuing a WTO case represents the second source of lost flexibility for the United States as compared to the Section 301 process. Though the WTO timetable is shorter than its GATT predecessor, the entire process can still take years. The implementation stage is the most frustrating in terms of time: a guilty defendant is sometimes given more than a year to change its practices, and even then the plaintiff must seek another ruling—the Article 21(5) process under the DSU—to assess whether compliance has occurred. For a government trying to defend domestic interests, this delay can be economically and politically costly.

The U.S. capacity to punish other states is also constrained when retaliation is channeled through the WTO’s mechanism. Even when sanctions are authorized, their magnitude is typically blunted by the authorizing panel. For example, the United States had determined that \$520 million-worth of sanctions was required to offset the harm caused by Europe’s import regime for bananas. In the end, however, the WTO only approved sanctions on \$191 million of goods. In other cases U.S. attempts at retaliation are simply blocked by panel or AB rulings, rendering threats of trade sanctions impotent. The “Kodak case” brought against Japan is symbolically important in this regard. The United States argued that government practices and regulations closed off distribution channels to foreign producers of film, but a WTO panel ruled in favor of Japan. A former USTR official complained bitterly about the ruling, arguing that the “panel, rather than looking at the realities facing foreign companies in Japan and analyzing how the Japanese government and the Japanese market actually operate, took a narrow, legalistic approach to conclude that there was no evidence of discrimination against foreign film....[T]he panel demonstrated that the WTO was unable to deal with the ubiquitous trade barriers that so many foreign companies face in Japan, that is, those barriers that are the most opaque, subtle, and complex” (Wolf 1999).

The Kodak case points to why the United States is in some respects *more* likely than other countries to have complaints blocked by WTO rulings. Because the United States is an outlier with regard to attitudes toward government-industry relations and competition policy,

⁶⁵ USTR official interview.

there is a higher probability that WTO panels will disagree with the U.S. position in cases like Kodak. And these losses are important beyond individual cases: the USTR worries that Japan's victory in the Kodak case will serve to legitimize opaque protectionist practices more generally.⁶⁶ This may limit the U.S. ability to file related complaints in the future.

In short, the independence of the WTO process has resulted in several important defeats that represent an “apparent thwarting of U.S. objectives” and “suggest serious limitations on the ability of the United States to shape the international environment.”⁶⁷ One European trade official notes that once the United States begins the dispute settlement process, “there is no longer the fear of getting hit by unilateral sanctions.”⁶⁸ For these reasons, a decision to work through the WTO is a powerful signal of self-restraint. These constraints on relative power came as no surprise to the United States or other trading states. Binding dispute settlement is a recognized way to equalize power imbalances,⁶⁹ and other GATT states ultimately supported a strengthened dispute mechanism precisely for the purpose of neutralizing American unilateralism.⁷⁰

Framing Retaliation

Working through the WTO also allows the United States to frame its retaliatory actions in a politically advantageous way. Such actions can be described as a defense of international rules and as legitimate enforcement in response to a violation—in other words, as consistent with a multilateral and unaggressive approach. These strategies help to minimize the backlash from foreign leaders and their publics in response to the coercive behavior of a powerful state.

The bananas and beef hormone disputes with Europe offers cases in point. In the mid-1990s, the United States complained of European import preferences for bananas grown in its former colonies, arguing that they discriminated against Latin American countries seeking to export bananas to Europe (and thereby against U.S. firms, like Chiquita and Dole, with operations based in Latin America). The EU responded sharply to this criticism. A European Commission “fact sheet” was released “to put the record straight and to show that the arguments put forward by the USTR are at a minimum groundless and indeed aim at distorting the reality as regards the banana regime” (European Commission 1997). Leon Brittan, Vice President, of the Commission, urged the United States to pursue the dispute without resort to unilateralism: “My message to the United States is a simple one: use the WTO system, but do not expect us to bend

⁶⁶ USTR official interview.

⁶⁷ Stephan 2000: 51, 65. “The broader message,” according to Stephan, “is that the normal tools for maintaining a well-run hegemony may not be available if they otherwise run up against GATT rules.” Stephan 2000: 55-6.

⁶⁸ Commission official interview.

⁶⁹ Canada sought binding authority for the binational adjudicatory panels of the U.S.-Canadian Free Trade Agreement as a way to counter the superior bargaining power of its superpower neighbor. See Goldstein 1996: 545.

⁷⁰ Jackson 1998b: 300. According to the chief U.S. negotiator for the DSU text, other delegations informally referred to Article 23 (which outlaws unilateralism) as the “get 301 provision.” Parlin interview. For evidence that many parties—including the EC, Japan, Canada, Thailand, and various developing and trade-dependent states—saw the DSU as a way to check American unilateralism, see Smith 2000a: 14; Funabashi 1995: 196-7; *Financial Times*, 6 March 1990, p. 8; *Financial Times*, 11 May 1990, p. 4; “Nakayama Criticizes Unilateral Measures in GATT Speech,” Japan Economic Newswire, 3 December 1990 (accessed via Lexis-Nexis); and *Financial Times*, 3 December 1991, p. 34.

it to suit a timetable that you are seeking to impose by means of illegal unilateral action. If you have a case, provide it in a proper way” (European Commission 1998).

This is precisely what the United States did. Channeling the dispute through the WTO and achieving a favorable panel ruling armed U.S. policymakers with the appropriate framing strategies to counter Europe’s denials and ultimately to justify its own retaliation. The import regime could be legitimately described as a violation of WTO rules that required compliance by Europe. USTR Barshevsky was able to argue that “this action [by the WTO] validates what the United States has been saying for the past years—the EU has not complied with its obligations We urge the EU to comply fully” (USTR 1999a). A bilateral dispute between two self-interested states could thus be framed as an issue of rule breaking. “It’s not really about bananas,” stated the U.S. ambassador to the WTO, “it’s about rules.” *American* accusations were now *WTO* accusations as well.

When Europe failed to bring its import regime into compliance with the ruling, the Dispute Settlement Body authorized the United States to impose sanctions on the EU. Trade retaliation was no longer bullying or coercion; it could now be framed as enforcement of international rules. “We are determined to enforce our rights,” proclaimed Barshevsky.⁷¹ In fact, according to Barshevsky, “The EU’s deliberate refusal to comply with WTO rulings *leaves us no choice* but to exercise our right to suspend concessions.”⁷² After being called on by the EU to seek an IO-based solution to the dispute, the United States could now turn the tables on the Europeans and frame its retaliation as perfectly justified—indeed, as required for the collective international good. Two years after the EU had derided U.S. complaints as unfounded and warned against unilateralism, the situation was reversed. In the words of Special Trade Negotiator Peter Scher:

In the banana case, we have used the WTO process as it was intended. And the WTO arbitrators . . . confirmed today what we have been saying: that the EU remains in violation of its WTO obligations by maintaining a discriminatory banana regime Therefore, the U.S. will impose 100 percent duties on nearly \$200 million worth of products imported from the EU We have been patient as the EU refused to acknowledge the clear WTO-inconsistency of its regime. We have been patient as it tried to deflect its guilt with cries of U.S. “unilateralism.” We have been patient as it used every procedural tactic possible to delay compliance. But their time has run out.⁷³

The Europeans were now in a very defensive position with regard to their banana regime. Whereas before the WTO became involved European officials could shift attention from the substance of their banana importation rules to the potential for U.S. unilateralism, once their practices were condemned by the WTO they were forced to adduce other—sometimes plainly untenable—arguments to defend the banana regime. A British trade official warned of the consequences of dismantling the regime for the countries benefiting from preferential treatment: “Otherwise, these economies will go bust. And when they cannot grow bananas, they will grow

⁷¹ *Washington Post*, 21 December 1998, p. A22.

⁷² USTR 1999b; emphasis added.

⁷³ “Statement of Ambassador Peter Scher Regarding WTO Arbitrator’s Decision,” USTR, April 6, 1999.

drugs. Drugs is what it really is about.”⁷⁴ Thus while Europeans groped for excuses, the United States could accuse them of not living up to their international obligations. “The implications of the EU’s actions go far beyond this dispute, threatening the effectiveness of the multilateral trading system as a whole.”⁷⁵ The same framing strategies used to condemn Super 301 as a threat to the integrity of the global trade regime were now being employed in the United States’ favor; the political costs were now Europe’s to pay.

The “hormone beef” dispute, triggered by an EU ban on beef from the United States and Canada treated with hormones, is especially interesting since it began before the WTO was established and thus has a pre- and post-DSU phase. When the confrontation began brewing in the late 1980s, it centered on dueling scientific claims: the Europeans argued that hormones were a health threat while the North Americans argued that they were innocuous. When the United States threatened to apply sanctions in November of 1988, Europe was able to paint U.S. actions as “threats” based on flimsy legal “pretexts”.⁷⁶ A *Le Monde* article claimed that “the decidedly unilateral reprisals [proposed] by the U.S. are illegal.”⁷⁷ A decade later, however, a WTO panel ruled that the EU had not provided sufficient scientific evidence that hormone-treated beef poses a health threat and struck down the EU’s beef ban. Now the USTR could call on the EU to “honor its WTO obligations,”⁷⁸ thereby framing its actions as enforcement of international rules. The United States and Canada have since imposed sanctions on Europe, which maintains its ban despite growing worldwide opposition and, increasingly, internal dissent.

By signaling restraint and allowing leaders to frame their actions as consistent with international rules, the United States uses the DSU to pursue trade disputes without undermining its perceived commitment to the multilateral trade regime. While this can be costly in terms of lost flexibility and coercive power, the net benefits make it preferable to unilateralism for presidents who are sensitive to international diplomatic imperatives.

Conclusion

The multilateral trade regime underwent a fundamental transformation from the power-oriented era associated with the weaker GATT—which reached its apogee with the passage of the Omnibus Trade and Competitiveness Act of 1988 in the United States—to the more legalized and rule-oriented system of the WTO. I have tried to explain the puzzle of why the United States, the most influential economic player in world trade, agreed to a system designed to constrain its power and create a more level playing field. I argue that we can best understand this transformation by turning to a domestic political logic, and in particular by understanding the strategic relationship between the legislative and executive branches. From the mid-1980s, the President and USTR were under enormous pressure from Congress to deal with unfair foreign trade practices more aggressively. By more thoroughly embedding U.S. trade policy—especially regarding the settlement of disputes and the imposition of retaliation—within the

⁷⁴ Robert Culshaw, Minister-Counselor for Trade and Transport at the British Embassy to the United States, quoted in *Washington Post*, 20 November 1998, p. A50.

⁷⁵ “U.S. Response to EU Banana Import Regime,” available at <www.ustr.gov/enforcement/dispute.shtml> (visited 7/26/01) under the link “The EU Banana Import Regime.”

⁷⁶ *Le Monde*, 22 November 1988, p. 1.

⁷⁷ *Le Monde*, 24 November 1988, p. 35.

⁷⁸ *Washington Post*, 20 July 1999, p. E1.

GATT/WTO framework, the Uruguay Round had the effect of shifting the balance of power from Congress to the executive branch.

Others have noted that leaders sometimes use international institutions as hands-tying mechanisms to counter domestic opposition or to lock in future governments to a preferred policy path. Arguments along these lines have been made to explain IO-based commitments in the areas of human rights (Moravcsik 2000; Pevehouse 2005), economic liberalization (Vreeland 2003), and territorial disputes (Allee and Huth 2006). The framework presented here is consistent with such arguments but goes further to identify the variety of advantages that executives might gain by delegating policy issues to the supranational level. The two-level logic of international delegation goes well beyond the need for credible commitments.

Of course, the question remains of how general my argument is. How well might the argument travel beyond helping us understand U.S. support of GATT/WTO legalization? The argument should apply in any issue-area where the executive and legislature have distinct preferences. If preferences fall along party or ideological lines, rather than along institutional lines, then there is less incentive for the executive to delegate and thereby to transfer authority away from other domestic institutions. I would argue that executive and legislative preferences do diverge insofar as the former tends to seek policies that serve aggregate benefits and broad principles, and that serve international interests, whereas the latter seek policies that provide more narrow or parochial benefits defined in domestic terms. This is true beyond trade.

The executive-legislature distinction is obviously most relevant for democracies and especially for separation-of-powers systems. Nevertheless, we can apply the distinction to parliamentary democracies as well, with the prime minister and cabinet distinguished from backbenchers (though it is less likely that these individuals' preferences would align with their institutional status, which is more fluid). Even autocratic leaders often face competition at the domestic level, including from other political institutions—usually the military or the legislature—that matter when it comes to foreign policy (Vreeland 2008; Gandhi 2008; Gandhi and Przeworski 2006; Hathaway 2007). In any case, these potential limitations of the argument are more usefully thought of as a source of cross-sectional hypotheses. For example, one observable implication of my argument is that more constrained executives should show a greater propensity to delegate substantial authority to IOs.

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