

**THE TWO-LEVEL POLITICS OF INTERNATIONAL DELEGATION:
THE UNITED STATES AND WTO DISPUTE SETTLEMENT**

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This is truly a draft. All comments are welcome.

Introduction

The conclusion of the Uruguay Round of multilateral trade negotiations in 1994 and resulting establishment of the 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 to defend domestic producers.

The WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes, or Dispute Settlement Understanding (DSU), created a dispute settlement mechanism (DSM) with jurisdiction over all WTO complaints, an appeals process, and authority to render legally binding decisions. At least in the area of trade, the DSU grants unprecedented power to a supranational legal tribunal and is perhaps the most notable manifestation of international "legalization" to date (Goldstein et al. 2000; Smith 2000; Finnemore and Toope 2001). Despite fears in the developed world that it represents a threat to state sovereignty and concerns among developing countries that it is too costly, the DSM continues to operate effectively and, by most accounts, is gaining momentum and legitimacy. In fact, the four-year review of the DSU agreed to by delegates at the end of the Uruguay Round did not take place by the agreed deadline, and existing calls for reform propose mostly minor modifications.³

The advent of the DSU raises interesting questions for international relations (IR) theorists. Most generally, as Beth Simmons (1998: 75-6) notes, the "development of legally binding forms of third-party dispute settlement...[is] a puzzle for the study of international relations, the traditional assumption of which has been that national governments generally desire to preserve their legal sovereignty, particularly the sole authority to judge the acceptability of their policies in the international sphere." 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). Under anarchy, as Hans Morgenthau (1985: 312) makes clear, the powerful are doubly advantaged: they can break rules without risking punishment and can enforce rules when weaker states violate them. From a

¹ John Jackson differentiates between "power-oriented" and "rule-oriented" as "settlement by negotiation and agreement with reference (explicitly or implicitly) to the relative power status statuses of the parties" versus "settlement...with reference to the norms and rules upon which both parties previously have agreed." Jackson 1978: 93.

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 For the 1994 ministerial decision to review the DSU after five years, see "Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes," available online at <www.wto.org/english/docs_e/legal_e/53-ddsu.pdf>.

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

This paper asks why the United States, a relatively autarkic economy of unparalleled size, would support—indeed, spearhead—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.

With such a decided advantage in a bilateral setting, why would the United States pursue legalization? In the stark (and somewhat exaggerated) formulation of one observer, the Clinton administration faced a choice when it came to negotiating enforcement rules in the Uruguay Round: “Should the United States be the superpower of international trade, imposing its rules and unilaterally punishing wrongdoers? Or should it simply be an equal player in a new global economy?”⁴ Based in a broader domestic-politics theory of why states delegate authority to international organizations, I offer an explanation for why the United States chose to promote an institutional arrangement that was explicitly designed to circumscribe power and constrain unilateralism.

Viewed from an international-level perspective, the Uruguay Round changes to the DSM represent a Pareto-improvement over the GATT status quo of the mid- and late-1980s. While weaker states gained some control over the powerful hegemon, the United States was able to mitigate the political costs of threatening and retaliating against its trading partners. These costs had become prohibitively high during the years of “aggressive unilateralism” in the mid- and late 1980s. 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 collective international rules and norms rather than of pure self-interest. This is especially appealing to publics, both at home and abroad, who are more susceptible than leaders to framing and who generally prefer multilateralism.⁵ These

⁴ *The Washington Post*, 12 December 1993, p. A52.

⁵ I base these assumptions on the fact that publics are less well informed than leaders and are therefore looking for information shortcuts to assess international policy issues and to engage in “low-information reasoning”. See Popkin 1991; and Sniderman et al. 1991. Effective framing may supply such shortcuts. Empirical evidence shows that domestic audiences, at least in the United States and Europe, show a preference for and are more supportive of foreign policies that are conducted multilaterally, legally, and under the auspices of an international organization. See Kull and Destler 1999; Sobel 1996; Chapman and Reiter 2004; Thompson 2008; Tomz 2008.

political benefits partially offset the flexibility and relative power advantages enjoyed by the United States under the GATT system.

However, any complete explanation of U.S. promotion of the DSU, and especially of its timing, must take into account domestic politics. Domestic politics have been largely overlooked in the literatures on legalization and delegation.⁶ I argue that through international legalization the President was able to increase its leverage over Congress in ways that served Executive trade policy preferences. Specifically, the DSU was seen as protection against the most extreme protectionist policies at home and as a way to pursue trade conflicts while minimizing international political costs, and thus as a technology for placing Executive concerns over legislative and interest-group concerns. I also propose a more general framework for thinking about delegation to IOs as a domestic political strategy for executives to gain leverage over legislatures and other domestic actors.

Dispute Settlement Legalization: From GATT to WTO

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.⁷ Complaints were not limited to actual breaches of legal violations; the majority, in fact, involved accusations of “nullification or impairment” of benefits expected under the Agreement.⁸ The panel ruled on the merits of the complaint and then referred the matter back 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 signatories, 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.⁹ Most notable among these was the consensus requirement. Since the Council operated on the basis of unanimity, and since

⁶ An exception in the delegation literature is Milner 2006, which looks at the domestic political incentives for governments to give foreign aid multilaterally. Among works on legalization, an exception is Goldstein and Martin 2000, though they focus on the *consequences* rather than the causes of legalization.

⁷ 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.

⁸ “Nullification and impairment” involve actions by contracting states that void trade benefits that another state could “reasonably expect” to receive. The concept is ambiguous, though certain practices such as subsidies and quantitative restrictions are widely seen as qualifying. See Jackson 1989: 94-5.

⁹ 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.

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).

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 DSM 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, 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 strict 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 much 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 thus removes a major defect of the previous system.

The WTO’s DSM is a much more legalized institution than its predecessor. It satisfies the key criteria for legalization of obligation, delegation, and precision,¹⁰ and has been aptly described as a “thickening of legality” in the area of international trade disputes (Lafer 1998: 39). According to Hudec, the DSM 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.¹¹ 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.”¹²

Ceslo Lafer, former Chairman of the DSB, 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 and constrains the United States in important ways.

In practice, the WTO DSM 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.¹³ The Appellate Body (AB) is especially noteworthy as part of the move toward legalization. This is true first in terms of its institutional structure, which, in the words of one law scholar, exhibit “many of the essential aspects of a judicial body” (Reitz 1996: 583). Individual cases are heard

¹⁰ See Abbott et al. 2000. The precision dimension is the least obvious among these. Insofar as the panels and AB have helped to clarify ambiguities in the GATT/WTO treaties, one could argue that they have made the rules more precise. See Steinberg 2004.

¹¹ 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, May 7, 2001 (hereafter “Parlin interview”).

¹² Author’s interview with David Christy, Counselor, Kaye Scholer, Washington, DC, May 7, 2001 (hereafter “Christy interview”); and Parlin interview.

¹³ 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”).

by three appellate judges drawn from a standing body of seven members, each of whom is chosen by the DSB 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 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.¹⁴ This stable and diverse membership—as opposed to GATT panels, which disputants themselves had a hand in choosing—helps ensure that panel decisions remain as independent as possible of state influence and interests.¹⁵ A final institutional source of independence is the fact that the Appellate Body has control over its own resources and staff, and has the right to seek outside information and experts in judging cases. This removes potential sources of leverage for states. “The result of this structure,” writes Hudec (1999: 41), “is what might be called ‘judicial independence.’”

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 with respect to the DSM’s institutional evolution. For example, it has employed a common-law style such that its decisions will take on more importance over time. Since WTO panel decisions—and to an even greater extent, Appellate Body decisions—constitute legal authority and precedent, and since both institutions have shown a willingness to pursue their own legal agenda, this limits the ability of governments to influence rulings and, more broadly, to guide WTO law according to their wishes. 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.¹⁶ The United States has recently accused a WTO panel of excessive editorializing in its decisions, criticizing U.S. regulations even when no violations of WTO commitments was found.¹⁷

Moreover, panels 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 Appellate Body 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

¹⁴ For a list of these members and their backgrounds, see Reitz 1996: 583, fn. 131.

¹⁵ For more on the relationship between membership diversity and institutional independence, see Thompson 2006.

¹⁶ For more on *amicus curiae* in the DSM process, see Covelli 1999: 35, 138-9.

¹⁷ 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.

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 DSM, they are often not represented on panels. Challenges by developing countries that would never occur bilaterally do indeed occur under the DSM, often with success.

More important evidence of the WTO's political independence from the United States is the fact that the latter has lost several cases and has complied—or appears to be in the process of complying—with each adverse ruling.¹⁸ While the United States was chiefly a *demandeur* for WTO dispute resolution in its early years, it has found itself increasingly in a defensive position. Two important losses for the United States are worth noting. 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.¹⁹ 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 1999c)—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, 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—with regard 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 U.S. choice to entangle itself in such a legalized institution presents an interesting puzzle.

¹⁸ More generally, rich states have complied with WTO rulings at about the same rate as poor ones. Stephan 2000: 68.

¹⁹ 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.

The Two-Level Politics of IO Legalization

State Leaders and IO Delegation

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 (I focus especially on legislatures in the context of trade policy), Executives benefit when policy issues are shifted to the international level and especially when they are embedded in international organizations. In democracies, this means that prime ministers, presidents, and other heads of government have an incentive to delegate to the supranational level.

This is true for at least four reasons: *agenda setting, ongoing control, superior information* and expertise, and *bargaining advantages*. First, since 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. Second, since it is executives who are formally represented at IOs, they have more control over ongoing activities than do other domestic actors. These two advantages, agenda setting and control, are closely related in practice. For example, once 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). Also, Executives often have control over interpretation and implementation of agreements and IO rules. No other actor at the domestic level has these powers; at best, a legislature may be able to exercise a retroactive veto.

Third, in interfacing with IOs, Executives gain information and develop expertise over time, leaving other domestic actors dependent on national leaders to manage IO-based affairs. 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 around which the domestic public will tend to rally, making opposition more difficult to muster.

These advantages can be better understood if we conceptualize the Executive as a “proximate principal” vis-à-vis an IO. In effect, there exists a chain of delegation that begins with the citizens and firms 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 and in the context of an IO. 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 tools to control agent—that is, IO bureaucracy—behavior. Manfred Elsig (2007) has applied the same logic to ambassadors and other mission representatives at IOs, who he refers to as “proximate principals.” He argues in the context of the WTO that such representatives “dominate the day-to-day work of IOs, often enlarging and limiting the agent’s autonomy” (Elsig 2007: 9). No other actor at the domestic level has these advantages.

Getting Presidential and Congressional Trade Preferences Right

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; Pastor 1980).

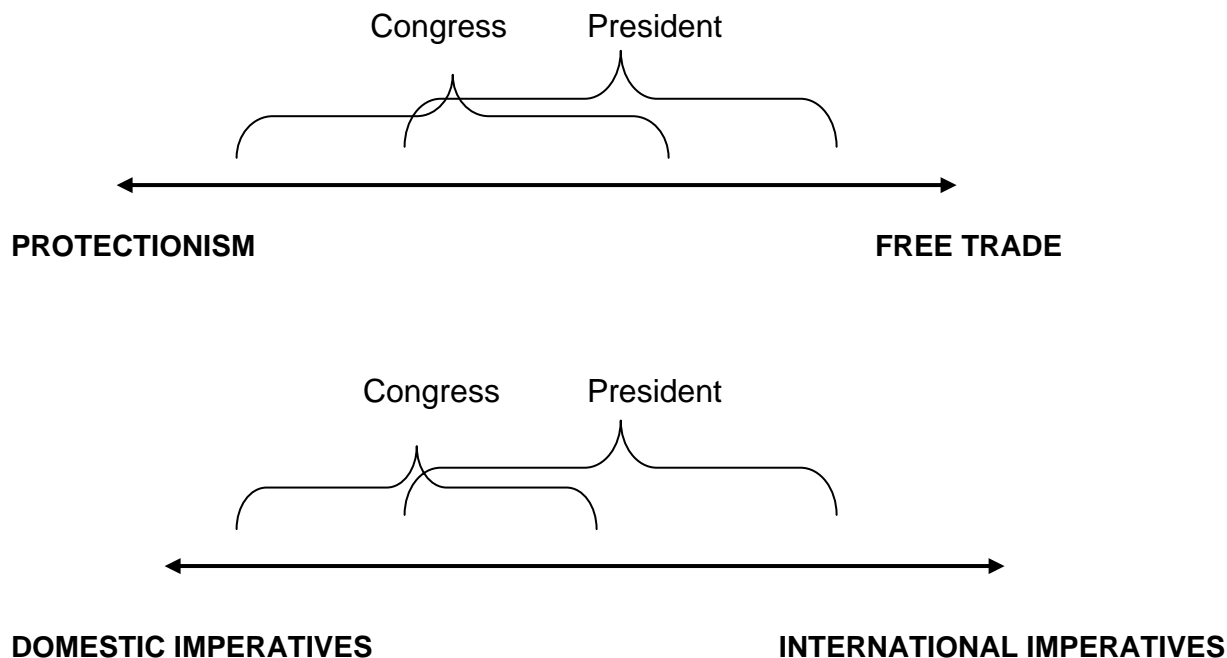
This political equation does help us understand important aspects of U.S. trade policy over time. However, the dichotomy tends to be overstated; in practice, Congress has repeatedly behaved in ways that promote free trade—from the Reciprocal Trade Agreements Act of 1934, to repeated grants of “fast-track” 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). In this sense, both Congress and the President have an interest in opening markets abroad, other things being equal. For their part, presidents are not averse to protection in some cases. Even the pro-free market 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 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.²⁰ This is natural since it is the President, Louis Henkin (1972: 169) notes, who “acts for the United States internationally.”

Figure 1 maps these preferences in terms of the range of policy outcomes that are deemed acceptable by these two key actors.

²⁰ 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 1. 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.

I argue that by shifting policies to the international level the President retains authority 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. This is especially true with legalization. With regard to the first function, the President can use legalized dispute resolution in the WTO to outmaneuver Congress 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 and will provoke a (binding) legal response, or by waiting until protectionist rules are challenged at the WTO and then using negative rulings as leverage against protectionist opponents at home. In both case, the executive can avoid blame by arguing that his hands are tied.²¹

Turning to the second benefit of legalization, limiting the international political costs of trade policies, an important motivation for the Executive in deciding to promote a legalized dispute resolution mechanism in the new WTO was its sensitivity to diplomatic imperatives in pursuing trade disputes. The international costs of trade disputes are potentially high but tend

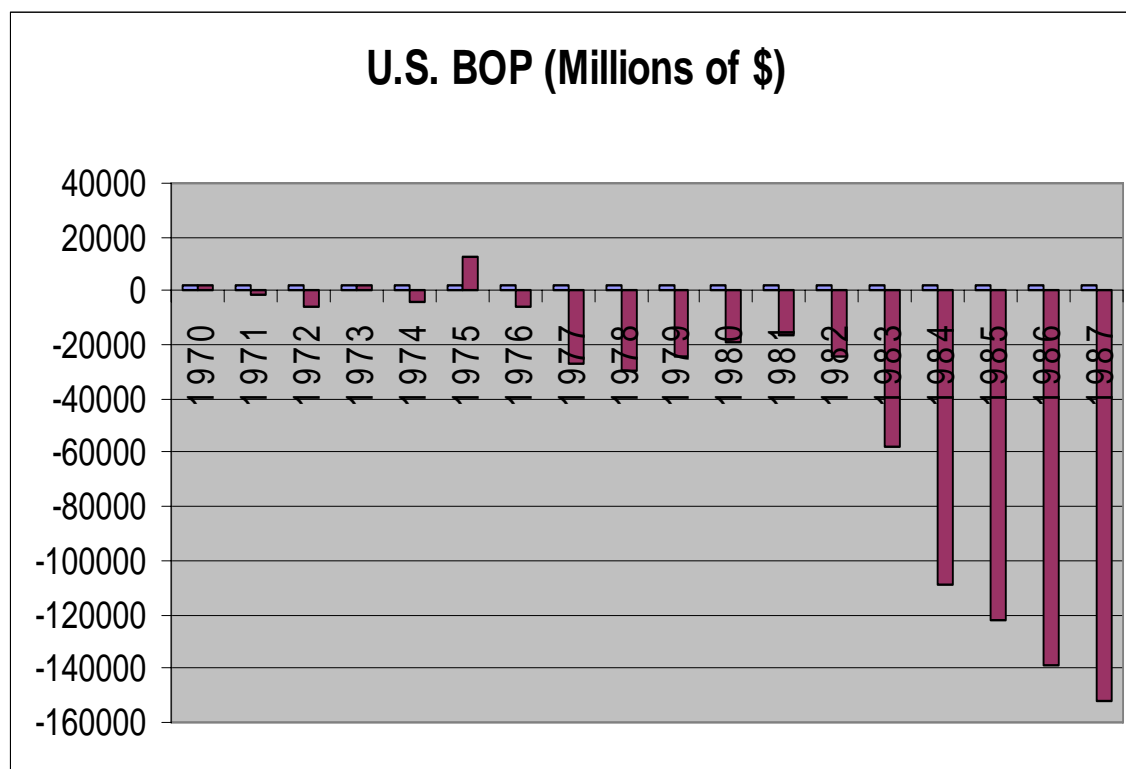
²¹ For more on the hands-tying function of the WTO, see Reinhardt 2003.

not to be the focus of legislators as they craft trade laws. In the context of trade disputes, the Executive can use legalized dispute settlement to signal relatively benign intentions even in the context of an aggressive or retaliatory policy and can frame such actions as consistent with international rules and norms. This is an example of how channeling a policy through an IO can minimize international political costs (Thompson 2006).

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, to which I now turn, emphasize the benefits of legalization when it comes to minimizing international costs (function (b)).

THE INTERNATIONAL POLITICAL COSTS OF UNILATERALISM

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 launching of the Uruguay Round in 1986. Figure 2 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 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). The result of these efforts would put Congressional and Presidential policy preferences on a collision course.

The Omnibus Trade and Competitiveness Act of 1988 has been called the most criticized piece of foreign trade legislation since the Smoot-Hawley tariffs of 1930.²² The reactions of foreign governments manifested themselves in ways that represented serious political costs to the United States, and 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.²³ 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.²⁴ 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.²⁵ 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.²⁶

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

²² 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.

²³ 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.

²⁴ *Journal of Commerce*, 22 May 1989, p. 3A.

²⁵ *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.

²⁶ *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.”²⁷ 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.”²⁸ 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].”²⁹ 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.³⁰

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.³¹ 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.³² 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.³³ 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

²⁷ *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.

²⁸ *Journal of Commerce*, 24 May 1989, p. 1A.

²⁹ *International Trade Reporter (BNA)*, 16 August 1989, pp. 1067-8.

³⁰ *Journal of Commerce*, 13 June 1990, p. 1A.

³¹ *The Guardian*, 4 May 1989, p. 1; *Journal of Commerce*, 24 May 1989, p. 1A.

³² *Journal of Commerce*, 15 June 1989, p. 4A.

³³ *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.”

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.³⁴

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. 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.”³⁵ 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”³⁶ and 90 percent of the discussions focused on American trade laws.³⁷ 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.”³⁸ 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.³⁹ 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).

³⁴ 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.

³⁵ *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.

³⁶ *Financial Times*, 22 June 1989, p. 8.

³⁷ The 90 percent figure is attributed to an anonymous GATT official in *New York Times*, 22 June 1989, p. D1.

³⁸ *International Trade Reporter*, 3 January 1990, p. 1646.

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

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 institutions), that became so crucial politically.⁴⁰ 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 costly.⁴¹ 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."⁴² 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.⁴³

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."⁴⁴ These international political costs led one former USTR official to conclude that Super 301 was simply "not sustainable politically" in the long run.⁴⁵

SIGNALING RESTRAINT UNDER THE WTO

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

⁴⁰ 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.

⁴¹ 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.").

⁴² *The Times*, 27 May 1989, p.#.

⁴³ See *Le Monde*, 5 May 1989, p. 19.

⁴⁴ Quoted in *Washington Post*, 21 June 1989, p. D1.

⁴⁵ Parlin interview.

rhetorically.⁴⁶ 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 without its actions appearing aggressive to non-target states? Powerful trading states are faced with a dilemma. Since they have the ability to impose forcible, unilateral solutions if they so choose, it is more difficult for them to commit to a moderate style of trade conflict resolution. However, by channeling its coercion through the WTO, the United States suffers costs that help to signal its 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.”⁴⁷

An example of the WTO’s power to facilitate signaling 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].”⁴⁸ However, backed by explicit endorsement from the WTO, proposed U.S. sanctions against the EU were not perceived as threatening beyond the issue at stake (i.e., 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.⁴⁹

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 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 limits on its flexibility and its capacity to punish. By limiting its own ability to impose its will, the United States sends a meaningful signal of self-restraint.

⁴⁶ *Le Monde*, 27 May 1989, p. 27. Translations are by the author unless otherwise noted.

⁴⁷ Author’s interview with a Department of Commerce official.

⁴⁸ *Maclean’s*, 22 March 1999, p. 26.

⁴⁹ *The Vancouver Sun*, 28 August 1999, p. F2.

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 DSM 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.⁵⁰

The sheer delay involved in pursuing a WTO case represents the second source of lost flexibility for the United States as compared to the expeditious Section 301 process. Though the WTO timetable is shorter than its GATT predecessor, the entire process can still take years. The DSU calls for six possible stages before the imposition of sanctions can be requested:

1. The complainant requests consultation with the government whose practices are in dispute; the consultation stage lasts a minimum of 60 days.
2. If no settlement is reached, the complainant may request the formation of a panel, which hears arguments and reviews evidence over a period of six to nine months.
3. The panel releases its report, which must be adopted by the Dispute Settlement Body within 60 days.
4. In the event of an appeal, the Appellate Body is given 60 to 90 days to issue a finding.
5. If the defendant is found in violation, it has up to 15 months to comply with the ruling.
6. If the complainant believes the defendant has not complied, it must file a petition for an assessment of compliance to be carried out (usually by the original panel) within 90 days.

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. Indeed, in some cases an unfair trader may only wish to violate WTO rules for a period of months or a year or two—this is precisely how many subsidies and safeguard policies are designed. Since the WTO offers no remedies for past practices—or even retroactive compensation for ongoing practices—the victimized country receives no damages in such cases and the violator cannot be legally punished. The offending practice will have expired by the time the dispute settlement process is concluded.

The U.S. capacity to punish other states is also constrained when retaliation is channeled through the DSM. Even when sanctions are authorized, their magnitude is typically blunted by the WTO. For example, the United States had determined that \$520 million-worth of sanctions

⁵⁰ USTR official interview.

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, 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.⁵¹ This may limit the U.S. ability to file related complaints in the future.

In short, the independence of the DSM 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."⁵² Therefore, a decision to work through the WTO is a powerful signal of self-restraint. These constraints on relative power come as no surprise to the United States or other trading states. Binding dispute settlement is a recognized way to equalize power imbalances,⁵³ and other GATT states favored a strengthened dispute mechanism precisely for the purpose of neutralizing U.S. unilateralism.⁵⁴

In addition to paying these costs to its relative power, the United States also pays commitment costs when it channels a trade dispute through the WTO. The costs of breaking a legal commitment have received considerable attention from IR scholars, who have shown that such behavior can lead to both domestic "audience costs" (Fearon 1994) and international reputational costs. Beth Simmons (Simmons 2000: 819) describes the role of reputation:

⁵¹ USTR official interview.

⁵² 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.

⁵³ 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.

⁵⁴ 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.

“Acceptance of treaty obligations raises expectations about behavior that, once made, are reputationally costly for governments to violate.” Even if it does not break a commitment, however, an actor almost automatically incurs costs by making one. Precisely because breaking a legalized commitment is costly, the committed actor’s freedom of action will be constrained as soon as the commitment is made.

It is costly to ignore WTO rules and procedures, and this leads the United States to adhere to rulings against it and to limit trade retaliation to levels authorized by the organization. In short, once the United States starts down the DSM path, it is locked into a formalized multilateral approach to the dispute. This commitment effect is enhanced by the WTO’s monitoring efforts: the DSU requires the Dispute Settlement Body to monitor the complainant and defendant to ensure that both maintain the integrity of the process. In practice, its trading partners are satisfied with the level of U.S. commitment; 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.”⁵⁵

In these ways, 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 insofar as presidents are sensitive to international political costs.

FRAMING TRADE RETALIATION UNDER THE WTO

In addition to the signaling function, the WTO facilitates certain framing strategies that allow a powerful coercer to minimize the political costs of pursuing a trade dispute. Domestic audiences shape international trade policy just as they do military-security affairs (see Busch 2000), and a state conducting trade retaliation may wish to appeal to publics both at home and in third-party states. In fact, since aggressive trade policies are almost always popular with domestic constituencies (especially those that reduce foreign trade barriers), we can assume that strategic framing in trade is largely designed to appeal to foreign publics.

In employing certain framing strategies during trade disputes channeled through the WTO, the United States takes advantage of the political independence of the IO and its endorsement—i.e., its “legitimation”—to frame coercive actions in politically appealing ways. When conducted through the WTO, trade retaliation is framed as (1) a defense of international rules and therefore as an act of “enforcement” in response to a “violation”; and (2) as a defense of the integrity of the multilateral system rather than a state-versus-state conflict. The effect of these framing tactics is to transform what otherwise might seem like an act of naked aggression in pursuit of self-interest into an appropriate and benign act that serves collective international interests. The norm underlying this transformation is embodied in the concept of reprisals or countermeasures in international law, which are actions that would normally be illegal but which are rendered legal by a prior act on the part of the target state.⁵⁶

Because they are neutral and diverse, the rulings of WTO panels—and to an even greater extent the Appellate Body—serve to, in the words of Hudec (1993: 361), “communicate the international community’s condemnation [of the target] with...clarity and authority.” This can

⁵⁵ Commission official interview.

⁵⁶ For more on the international law of reprisals and countermeasures, see Malanczuk 1997: 4-5; and Zoller 1984.

influence how other states react to trade retaliation if the WTO and its rulings are perceived as inherently legitimate; even without assuming any norm-based influence, however, a ruling in a plaintiff's favor may simply provide information to third-party actors making their own assessment of causal responsibility. By retaliating through the WTO, the United States appeals directly to publics abroad and empowers governments inclined to support its actions to frame events strategically to their own domestic audiences. In this way, WTO rules may allow third-party leaders to resist domestic political opposition to a pro-coercion policy.⁵⁷

The framing benefits of channeling retaliation through the WTO can only be fully appreciated if contrasted with the liabilities of the 301 process in this regard. The problem with Section 301, and especially its "super" variant, is that it calls upon the United States to unilaterally judge its trading partners. Claims of neutrality are implausible, and appeals by the USTR to its own National Trade Estimates reports on foreign trade practices serve only to heighten the perception that 301 is "a monument to the rejection of multilateral due process."⁵⁸ Unilateral accusations typically lead to counter-accusations, devolving into bilateral confrontations of a "he-said-she-said" nature. After the first set of Super 301 designation in 1989, the EU responded with its own report listing U.S. barriers to European trade and accusing Washington of flouting GATT rules by proceeding unilaterally. The report turned the tables on the United States by claiming that although U.S. discrimination was as severe as its trading partners', "Unlike the U.S., which accords itself the right to take unilateral action, the Community does not intend to take the law into its own hands and rectify its grievances through resort to illegal unilateral measures."⁵⁹ The EU response to 301 and the NTE demonstrates how easily unilateral claims can be framed as unfair. By contrast, references to the WTO's own Trade Policy Review reports and panel rulings serve to, in the words of a USTR official, "bring in third parties and thus give legitimacy to our claims."⁶⁰ Counter-framing strategies are preempted and neutralized, just as Saddam Hussein's accusations of Western "imperialism" were during the Gulf conflict.

Though U.S. leaders tried to frame Super 301 as a defense of international rules and as a source for strengthening the multilateral trading system, these strategies failed. The President and USTR portrayed 301 as a means to ensure "fair play" by targeting violations of free trade norms and rules, but foreign leaders responded by calling these unilateral determinations of unfair trade "irrational" and "arbitrary", and by arguing that GATT members "should not be

⁵⁷ See Finger & Winters 1998: 366. Hudec (1992: 28) points out that the WTO's appeals process offers another layers of legitimation by allowing leaders to argue to their publics that they are "doubly bound" to defend international rules.

⁵⁸ Low 1993: 205. It should be noted that claims of neutrality are implausible because *actual* neutrality is impossible. As Helen Milner (1990: 177) notes, "No fair way exists for one country to evaluate its own case in a dispute with another." The NTE report itself has been criticized as a case in point: "[The report] consists merely of a compilation of self-serving industry claims and anecdotal hearsay slapped together under one cover." Barfield 1990: 105.

⁵⁹ *The Times*, 4 May 1989, p. 27a.

⁶⁰ USTR official interview.

judge and jury in their own case.”⁶¹ And proponents of Super 301 were forced to make sometimes bizarre statements in their attempt to frame the measures as a positive catalyst for multilateralism. U.S. industry representatives argued that “[t]he Super 301 decisions announced in 1989 reinforced the high priority that the Bush Administration correctly placed on the successful conclusion of the Uruguay Round” (U.S. Senate 1990: 81). Administration officials appealed to U.S. trading partners along similar lines. “Despite any appearance of unilateralism,” one argued, “the United States has sought to use section 301 in a constructive way.”⁶² Reactions to these framing tactics were predictable: the Japanese Foreign Minister called Super 301 “a threat to the open multilateral trading system” and a British commentator referred to “the flagrant contradiction between the declared multilateral objectives of U.S. trade policy and the pursuit of bilateral objectives by unilateral means.”⁶³

Employing these same framing strategies in the shadow of a WTO ruling proved far more fruitful for the United States. The bananas and beef hormone disputes with Europe are 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 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.” U.S. 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

⁶¹ These responses came from the Indian government, a French academic, and the EC Trade Commissioner, respectively. *Le Monde*, 31 May 1989, p. 41; *Le Monde*, 6 December 1988, p. 22; and *Financial Times*, 1 June 1989, p. 26.

⁶² Maruyama 1990: 395. The author was the Deputy Associate Director for International Economic Policy in the White House’s Office of Policy Development. In fact, according to a former Deputy Counsel to the USTR, these were largely rhetorical strategies motivated by politics. “Those in the trade community didn’t take the argument seriously that Super 301 strengthened the multilateral trading system.” Parlin interview.

⁶³ *Financial Times*, 1 June 1989, p. 26; *Financial Times*, 22 June 1989, p. 8.

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.⁶⁴ 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.”⁶⁵ After being called on by 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.⁶⁶

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 drugs. Drugs is what it really is about.”⁶⁷ 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.”⁶⁸ 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

⁶⁴ *Washington Post*, 21 December 1998, p. A22.

⁶⁵ USTR 1999b; emphasis added.

⁶⁶ “Statement of Ambassador Peter Scher Regarding WTO Arbitrator’s Decision,” available at <www.ustr.gov/enforcement/dispute.shtml> (visited 7/26/01) under the link “The EU Banana Import Regime.”

⁶⁷ 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.

⁶⁸ “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.”

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”.⁶⁹ A *Le Monde* article claimed that “the decidedly unilateral reprisals [proposed] by the U.S. are illegal.”⁷⁰ 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,”⁷¹ thereby framing its actions as enforcement of international rules. The United States has since imposed sanctions on Europe, which maintains its ban despite growing worldwide opposition and, increasingly, internal dissent.

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 why the United States, as the most influential economic player in world trade, would agree to a system designed to constrain its power and create a more level playing field. I argue that we can only understand this transformation by appreciating the various political costs associated with pursuing trade disputes unilaterally and by contrasting these with the political benefits of channeling actions through a legalized dispute settlement mechanism. Two benefits in particular are the ability to signal restraint and benign motivations even while challenging the actions of others, and the advantages associated with framing the dispute as a defense of international rules and collective interests.

I also argue that a complete understanding of U.S. support of legalized dispute resolution, especially its timing, requires an understanding of domestic politics, especially the strategic relationship between the legislative and executive branches. At the very least, the timing of the Uruguay Round changes seems to be explained by the executive branch’s desire to counter the influence of Congress in the formation of foreign trade policy. 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 GATT/WTO framework, the Uruguay Round minimized the discretion available to U.S. trade officials and transferred power (in a relative sense) from Congress to the executive branch. This is consistent with arguments that Executives often prefer to channel foreign policies through international institutions in order to strengthen their position at home.⁷²

While the United States and other powerful states may face set-backs under the WTO regime and may find themselves constrained at times, over the long term their interests will be

⁶⁹ *Le Monde*, 22 November 1988, p. 1.

⁷⁰ *Le Monde*, 24 November 1988, p. 35.

⁷¹ *Washington Post*, 20 July 1999, p. E1.

⁷² See Drezner 2003. For a lengthier discussion and partial counter to this argument, see Snidal and Thompson 2003: 213-16.

served more effectively by a system based on rules rather than on power. This case helps us understand why states sometimes find it useful to design and delegate to institutions that are legalized, formalized or independent by providing specific examples of the political virtues—at both the international and domestic levels—of imposing constraints on oneself. On the other hand, it serves as a reminder that power always plays a role in shaping regime evolution, even when the weak also benefit from a given transformation.

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