ABSTRACT

NEGOTIATION OR LAWMAKING:
AN INSTITUTIONAL ANALYSIS OF WTO DECISION MAKING

In the past two decades, negotiation practices in the GATT/WTO have become vastly more institutionalized, to the extent that a practitioner stated: AThe Uruguay Round had effectively created a new international organization for its four year life@ (Oxley, 1990). What accounts for this development in negotiation behavior? In pursuing this question, analogies are made to the U.S. Congress where institutions similar to those of the WTO (eg., committees, committee chairs, and staffs) have long been part of the legislative process. An explanation of this development makes use of the theory of transactions costs, in which Ronald Coase and his later associates explained the existence of the firm in terms of its capacity to reduce economic transactions costs compared to other means of organizing production. This theory has been used to account for the development of institutions in Congress, and it provides a plausible explanation for institutionalization in the WTO. The role of organizational phenomena in multilateral trade negotiation should be taken into account by both practitioners and scholars.

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INTRODUCTION

The GATT/WTO is a curious institution. It was originally a set of trading rules put in place to accompany multilateral tariff-reduction negotiations held in 1948. Since that year, *faute de mieux*, the GATT served as regime to facilitate multilateral trade negotiations and implement their results. Mostly the regime developed through customary practice, which was the case for example with the important dispute settlement system (Hudec, 1991). GATT negotiations eventually produced a modicum of constitutional change mainly to facilitate the management of non-tariff measures (Jackson, 1980), and then in the 1990s the Uruguay Round negotiations greatly expanded the rules and created a more formalized regime under the World Trade Organization. Although the WTO had the appearance of being a new institution in the trade regime, in fact much of it was a codification of nearly fifty years of GATT experience.

The rules and negotiation practices of the GATT/WTO represent a largely unplanned and incremental accretion of political and legal powers in an international institution. What is it that accounts for the development of this institution? Were problems resolved for governments by the establishment of the rules and negotiation procedures of the GATT/WTO? What first needs to be explained are the central rules of the GATT/WTO regime and the purpose they serve for their adherents. Next to be explained are the practices of multilateral negotiation that have

evolved within the GATT/WTO regime. Why, for example, have institutions like negotiating committees, committee chairs, and the secretariat staff become so important in the GATT/WTO multilateral negotiations? In this regime, the negotiation process has evolved from a series of primitive bilateral tariff agreements, multilateralized by an MFN rule, to enormously complex multilateral rule-making negotiations that commit all parties through the mechanism of a single undertaking. What difficulties existed for nation-states that the GATT/WTO machinery and negotiation practices were created to address?

A seminal effort to explain the central rules of the GATT/WTO regime based on economic analysis has been provided by Bagwell and Staiger (2002). These authors observe that GATT negotiations have steadily reduced customs duties through reciprocal tariff-cutting negotiations. The reason this occurred is not easily explained by economic theory, which normally accounts for tariff liberalization in terms of the welfare benefits received by the importing country that lowers its tariffs. Bagwell and Staiger ask what is the economic purpose of tariff agreements; in other words, are they simply an economic nonsense explained by political expediency, or do they function to advance economic efficiency. The answer is that since tariffs can impose costs on trading partners through diminished terms of trade, against which countries might normally retaliate, the purpose of tariff agreements is to escape from a terms-of-trade-driven Prisoners= Dilemma. By extension, the GATT itself is an institution whose central rulesBreciprocity and non-discriminationBare designed to achieve the same purpose.[1]

[1] Bagwell and Staiger state A...the principles of reciprocity and nondiscrimination work in concert to remedy the inefficiency created by the terms-of-trade externality.@(187) This argument is particularly appropriate as applied to tariff agreements. The authors apply it to more modern WTO issues with Amixed@ results. The impact of this analysis is to emphasize economic interest as an explanation for GATT, rather than Apolitics@ or international comity.

The negotiation practices of the GATT/WTO demand as much by way of explanation and interpretation as do the rules of the institution. In the GATT/WTO, multilateral negotiation is the means by which the institution produces the rules. Behind every one of the remarkable agreements of the Uruguay Round was a lengthy negotiation process. Understanding this process is an imperative for policy makers and analysts.

The tasks confronting the GATT/WTO have grown. At the outset the institution managed mainly tariffs, for which the bargaining procedures are comparatively straightforward, even simple. By the Tokyo Round of the 1970s the agenda expanded to include non-tariff measures, and then it expanded again in the Uruguay Round to include subjects like services and TRIPS which were essentially novel to the institution. The negotiation process expanded as well. By the time of the Uruguay Round the work of the GATT had become international rulemaking, and it reflected practices and sub-institutions that are more reminiscent of national lawmaking than of the give and take of traditional tariff haggling.[2] These changes are not easy to account for in negotiation theory, where the main concern of analysts is to explain the strategy of competitive versus cooperative actions, rather than the impact of organizational structure and substantive complexities on the negotiation process. The central puzzle in explaining GATT/WTO negotiation is what accounts for the institutionalization of this process, and what purpose do these institutions serve for the participating governments?[3]

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[2] Comparisons between the WTO and the U.S. Congress have been made frequently. For example, a U.S. trade negotiator, with previous experience on Capitol Hill, observed: A[My colleague] and I used to joke about how similar the process is, the WTO and Congress.@ Confidential interview.

[3] By institution, I meanBdepending on contextBthe overall structure of the GATT or WTO, or the internal sub-institutions that impact on the negotiation process, particularly

negotiating committees, committee chairs, and the GATT/WTO Secretariat.

In pursuing the above question, it is helpful to search for analogous examples of institutional behavior. In the case of the GATT/WTO, such analogies are easier to find in domestic practices than in international politics. Specifically, there is a case to be made that negotiating behaviour in the GATT/WTO resembles legislative behaviour in the U.S. Congress. The self-evident purpose of legislative behaviour is to make laws; but arguably this has also been done in GATT/WTO negotiations where rules are made for the purpose of regulating trade relations between nation-states. For example, the Uruguay Round effectively produced a form of legislation, and the Ministers who signed off on the Round acknowledged A...the stronger and clearer legal framework they have adopted for the conduct of international trade.@[4] On the other hand, the self-evident purpose of diplomatic behaviour in GATT/WTO negotiations is to bargain and reach agreements between contending parties (ie, countries); but arguably, this is also done in Congress where students of the legislative process are accustomed to analysing legislative behaviour in terms of bargaining (Baron and Ferejohn, 1989) Furthermore, the laws that result from legislative behaviour can be viewed as agreements reached between contending parties, or as the outcome of negotiations. For example, a volume on the U.S. legislation that authorized U.S participation in the GATT Uruguay Round emphasized the negotiation aspects of law-making (Schwab, 1994). Indeed, the title of this volume [Trade Offs: Negotiating the Omnibus Trade and Competitiveness Act] could have been adapted to a book about the Uruguay Round itself.

The analogy between GATT/WTO negotiation and Congressional lawmaking receives some support in modern literature. For example, Lisa Martin and Beth Simmons (1998), in the

[4] Marrakesh Declaration of 15 April 1994.

context of arguing for the importance of international institutions in research on international relations, have noted that scholars are making greater use of models drawn from domestic politics to analyse institutions at the international level. Similarly, Helen Milner (1998) has argued that an understanding of some major issues of international politics will require a greater use of systematic analysis of domestic politics, and concluded that scholars Amight move toward more comparative institutional analysis at both the domestic and international levels.@ Lying behind the arguments of these scholars is a critique of the theory of realism in international relations scholarship. As noted by Milner, realism established international relations as a separate field from the study of politics, with the state as its primary (and even exclusive) variable operating in the context of anarchy where power is the main motivating factor behind behaviour. This conception of international relations left little place for institutions, for either they were dismissed as irrelevant, or else they were explained away as a reflection of the distribution of power between nation-states. The conclusion reached by these scholars is that institutions matter, and that research on international relations will benefit from linkages being made between international and domestic institutions.

Important support for the use of domestic institutional analogies comes from the literature on non-cooperative games. Non-cooperative games assume strategic interactions between actors that are rational and opportunistic, in situations where actors are unable to make binding agreements enforced by third parties, and therefore are obliged to make self-enforcing agreements based on the present and future interests of the actors. In such games, the research task is to explain how cooperation is established among the parties and what incentives are present or created to maintain that cooperation.

Non-cooperative games effectively model international relations because nation states are said to operate in an environment of anarchy and self-help, which meets the assumptions of the theory. What is more interesting, however, is that scholars of legislative institutions have turned to non-cooperative game theory to explore important elements of the behaviour of individuals in these institutions. The use of non-cooperative game theory by students of Congressional behaviour enhances the prospects for making robust analogies between domestic and international politics, for as Martin and Simmons (1998:742) observe: AIn many essential respects the problems faced by individual legislators mirror those faced by individual states in the international system.@ In the discussion that follows, an attempt will be made to compare the situation faced by Members of Congress to that faced by nation-states in the GATT/WTO.

This paper will examine GATT/WTO multilateral negotiation in the Uruguay Round through the lens of legislative behaviour in the U.S. Congress. To this end it will first outline a formal institutional comparison between Congress and the GATT/WTO, and will follow up with specific institutional comparisons, including the operations of committees, negotiation groups, chairs, and staff officials. The paper will then advance an explanation for the behavior examined here, and consider the implications for practitioners and for the theory of negotiations.

II. FORMAL COMPARISON OF CONGRESS AND GATT/WTO

(i). The Weingast/Marshall model of the U.S. Congress.

The U.S. Congress has members, like the WTO, and these members may represent many diverse interests. Few of these interests command enough support to be automatically accepted by the whole body, hence it is common that the members will be pressured to build coalitions to

reach a final agreement . A major problem is to explain how the many agreements legislators might make along the way to creating legislation are enforced and carried through.

In approaching this problem, Weingast and Marshall (1988) review research on decision making in legislatures focused on various forms of vote trading, such as logrolling or IOU=s. It was assumed that legislators supported those measures that benefited their constituents, but since those measures may not command a majority, they exchanged their votes on issues of little interest to their constituents for the votes of other legislators on issues of greater importance. This behaviour effectively established a market in votes, and the search by legislators for votes that had a higher marginal benefit for their constituents created a price mechanism. Thus the price mechanism accounted for the behaviour of legislators. This kind of analysis worked best on pork-barrel issues decided in the legislature.

This analysis encountered various problems. One is that commitments to exchange votes were less workable for dissimilar issues, or issues with dissimilar legislative agendas or deadlines. For example, trade-offs on legislation to create infrastructure (eg., bridges) with legislation to protect civil rights would be intrinsically difficult; furthermore, once the bridges were approved, would there be any guarantee that commitments on civil rights would not be reneged? A second problem is the sheer number of contingencies that would be faced in a vote-exchange arrangement, with attendant increased transaction costs of gaining accurate information on parties= preferences. Finally, legislation is a complex interactive process, and perceptions of issues can change and increase the prospect that voting commitments may not be durable.

Weingast/Marshall conclude that A...[legislative] coalitions lack durability under an explicit market exchange system.@ They then go on to argue that legislators will create

institutions that permit a greater degree of durability to agreements made in the course of creating legislation. This analysis itself can be usefully compared to the GATT/WTO , and will be further examined in Section IV. However, in making their argument, the authors lay out the assumptions of legislative behaviour in the U.S. Congress, and as well the conditions for the operation of committees in Congress. These formal statements can be juxtaposed to the behaviour and institutions of the GATT/WTO, in order to sharpen the definition of the latter and to facilitate comparisons between the GATT/WTO and Congress.

ASSUMPTION 1: (Weingast/Marshall) Congressmen represent the (politically responsive) interests located in their district.

The authors elaborate this assumption with two observations: first, that rational ignorance pervades the political system, underpins interest group advantages, and biases the attention of legislators toward those groups that promote positions in politics; and second, that interest groups are not uniformly distributed across constituencies and therefore different legislators represent different groups. These observations support the basic contention that legislative districts are differentiated, and that legislators have conflicting interests that establish an incentive to bargain with each other.

ASSUMPTION 1 (GATT/WTO): National delegations(Ministers and/or officials) represent the (politically responsive) interests located within their nation.

The point of departure in international law is that diplomats represent the national interests of their country.[5] Beyond this truism, the above assumption that underlies Congressional

[5] Vienna Convention on Diplomatic Relations, 18 April 1961. Article 3 (1) (b) The

behaviour also describes the behaviour of international representatives in international trade. Observations about rational ignorance are transferable to international diplomacy, and the existence and activities of interest group pressures in international trade negotiations are extensively chronicled.(Preeg, 1995) Interest groups are not uniformly distributed, but are produced by varying economic interests as described by the differential allocation of the factors of production. The main point is that national interests differ, and therefore nations have an incentive for trade-offs and coalition behaviour in international negotiations.

ASSUMPTION 2: (Weingast/Marshall) Parties place no constraints on the behavior of individual representatives.

The authors state that political parties were strong influences on Congressional behaviour at the turn of the 20th century, but that this no longer holds true at their writing in the late 1980s.[6] Therefore, in their analysis they treat the individual Congressman as the decision making unit. This assumption is certainly not the case for the Westminister parliamentary system, which is the most popular form of government in the world. This explains why comparisons between behaviour in international institutions and domestic legislatures are more likely to be made with the U.S. Congress than with institutions of other countries.

ASSUMPTION 2 (GATT/WTO): Parties place no substantial or continuing constraints on

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functions of a diplomatic mission consist inter alia in: protecting in the receiving State the interests of the sending State....

[6] The validity of this assumption is not wholly clear following the reforms in House procedures introduced by the Republicans in 1995 (Wolfensberger, 2002). These reforms underscore that party discipline has fluctuated in Congress over time, but in any case it remains relatively weak in comparison with other countries. Wolfensberger (11) notes: ACongress is still an independent branch made up of members whose first loyalty is to their constituents, not their party or president.@

the behaviour of individual national representatives.

The above observation of the authors about Congress mirrors the situation in GATT/WTO negotiations, as there are no equivalents in the latter forum to the political parties found in a national legislature. There are informal negotiating groups which can place pressures on national decision making during negotiations (such as the Cairns Group of agricultural exporters), but these constitute voluntary coalitions of special interests and lack the broad aggregating characteristics of political parties.[7] The closest institutional comparison to political parties in the GATT/WTO context is the bloc of developing countries, and there is anecdotal evidence that the positions taken by this bloc influence individual countries.[8] However, it is implausible that even this bloc could exercise the constraint on behavior of individuals that political parties might exercise in a British or Canadian Parliament. In sum, there is no substantial difference between Congress and the GATT/WTO with respect to political parties.

ASSUMPTION 3: (Weingast/Marshall) Majority rule is a binding constraint.

The authors state simply: AProposed bills...must command the support of a majority of the entire legislature in order to become law@(137)

ASSUMPTION 3 (GATT/WTO): The consensus rule is a binding constraint.

[7] Eg., the Cairns Group in the Uruguay Round.

[8] Eg., on the subject of negotiating instructions, one WTO staffer observed: AOne-third of developing countries received instructions from capitol; one-third received no instructions at all; and the remaining third received instructions to support developing countries.@ Confidential interview.

GATT customary practice, now formally adopted in the WTO, was to take decisions in all bodies by consensus of the GATT Contracting Parties (now WTO Members). Consensus is now defined formally in the WTO as: AThe body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.@[9] Alternative provisions are made for voting, but these provisions have not been used.

Consensus can be viewed from three perspectives. First, consensus formally prevents a country from being obligated to comply with a measure with which it disagrees. This perspective is wholly consistent with traditional conceptions of national sovereignty. Second, consensus probably prevents a decision from being taken that does not enjoy wide support of the membership. This perspective is reasonably consistent with conceptions of democracy. Third, consensus does not require countries to be present or to formally object on issues where they may not have a major concern, not does it prevent some countries from dissuading other countries from formally objecting on issues which the latter may not support. This perspective is reasonably consistent with conceptions of interest and power in international affairs. In sum, consensus is a unique blend of sovereignty, democracy and power. It is a decision making mechanism suited for a system characterized partly by anarchy and partly by rules-based institutionalism.[10]

[9] Article IX:1, Marrakesh Agreement Establishing the World Trade Organization.

[10] There is considerable criticism that in practice the democratic component of consensus decision making is overwhelmed by the power component. For example, Steinberg (2002:365) argues that: AGATT/WTO decision-making rules based on the sovereign equality of states are organized hypocrisy in the procedural context.@ Depending on one=s viewpoint this may be the case, but it would hardly be unexpected. As Froman (1967:172) notes of Congress, which is

equally applicable to the GATT/WTO: ANow we can see even from a cursory glance that organizations, by definition, violate the rules of perfect democracy.@ The more important point, as noted by Narlikar (2001:14) is that: AMost member states themselvesBdeveloped and developingBdo not support [the consensus principle=s] replacement with majority voting or even any significant qualifications to the full consensus principle.@

In formal terms, the different requirements for decision making by majority rule and decision making by consensus are profound; they go mainly to the greater protection of sovereignty in the consensus system, which removes the formal threat of the >tyranny of the majority=. But in behavioral terms, the differences are much less. The main task in either system is to assemble a coalition behind any given proposal, which requires bargaining and persuasion. Hence the comment from a former U.S. negotiator about the GATT/WTO: A[there is] coalition building there... shifting coalitions... [you] build a deal from the ground up through informal processes...then bridges are built between capitals that are centrists, this is done in Congress and the WTO@ (Confidential interview). A similar observation is made by Narlikar (2001:15): A...it may be noted that the entire structure and workings of the WTO rest on bargaining, consultation, negotiation and compromise....@

The Weingast/Marshall model also examines the legislative committee system of Congress. This importance of this examination is indicated by Woodrow Wilson=s classic observation that ACongress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work.@(1985:69), an observation that could also be made of GATT/WTO negotiation. Committees in Congress arose with the institution itself and are durable. In GATT/WTO negotiations, by comparison, committees are also centrally important and are normally established at the start of a negotiation. For example, the Kennedy, Tokyo and Uruguay Rounds each commenced with the formation of a Trade Negotiations Committee (TNC. In the latter negotiation which began in 1986, additionally two major groups were established, a Group for Negotiations on Goods-GNG and a Group for Negotiations on Services-GNS), with the GNG further sub-divided into 14 sub-groups (Hart, 1995:214). It is useful to compare certain

properties of the Congressional and GATT/WTO committee systems.

Weingast/Marshall note that Congressional committees have a restricted membership and have the following properties: they have jurisdiction over specific subjects (eg., commerce, agriculture); within their jurisdiction, they have monopoly rights to bring legislative proposals to the whole legislature; and their proposals must receive a majority vote to become law. By comparison, negotiating committees and groups in GATT/WTO are plenary bodies and have the following properties: they have jurisdiction over specific subjects (eg., subsidies, agriculture); within their jurisdiction, they have effective monopoly rights to bring negotiating proposals by consensus to the Trade Negotiations Committee (TNC); and their proposals must receive consensus to be included in a final agreement.

The comparison between committees in Congress and negotiating groups in GATT/WTO suggests that these institutions are organized along similar subject-specific lines and with similar powers to bring proposals forward to a superior body. Beyond that, Congressional committees are more exclusive and committee chairs have more formal powers, whereas GATT/WTO negotiating groups are more open due to their plenary construction, and committee chairs are less powerful due in part to more frequent rotation.

(ii). Single Undertaking and Trade-Offs.

A formal comparison of GATT/WTO negotiating behaviour to Congressional legislative behaviour indicates important similarities and differences. First, both arenas reflect large representational decision making processes comprising many contending parties. The parties as representatives are essentially unconstrained in their capacity to pursue their own interests. Second, these arenas have major institutional similarities, such as subject-specific committees or

negotiating groups that reflect a division of labor in the overall body. Third, each arena is characterized by a decision making mechanism that forces coalition-building among diverse interests. As for differences, first, the Congressional committee system arguably for property rights in Committee memberships and leadership positions, which has no analogy in GATT/WTO procedures. Second, decisions in Congress are taken by majority rule as opposed to consensus in the GATT/WTO. This difference is crucial, for while it may not result in differentiated behaviour, it certainly reflects a difference in the parties= commitment to the system (Waltz, 1979). Parties in a majority rule system are obliged to accept the result of the decision, whereas parties in a consensus system can formally withhold consensus and prevent a decision, or they can disengage from the process altogether. This is the essential manifestation of state sovereignty in the GATT/WTO system, and it is unlikely to change in the foreseeable future.

There are changes, however, that have increased the parties= commitment to the GATT/WTO system. One such change is the single undertaking. The single undertaking is a negotiating construct that was adopted in both the Tokyo and Uruguay Rounds.[11] In principle it means that the various parts of an agreement, or set of agreements, are treated as a single unit for purpose of final approval. Single undertaking means that no party can opt out of any portion of the agreement, that the package has to be taken as a whole, and that in the bargaining language of the day: Athere are no carve outs@, and Ait=s not approved until it=s all approved.@

The single undertaking was ignored in the conclusion of the Tokyo Round. Countries

[11] AThe negotiations shall be considered as one undertaking, the various elements of which shall move forward together.@ Tokyo Declaration of 14 September 1973. AThe launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking.@ Punta del Este Declaration of 20 September 1986.

signed final agreements on a piecemeal basis, and few developing countries signed any of the Tokyo Round codes (Winham, 1986). In the Uruguay Round, there was pressure from three directions that prevented a similar occurrence in that negotiation. The first pressure came from a legal analysis presented by Professor John H. Jackson in Geneva in 1989 (Jackson, 1990) and debated in a series of private sessions led by GATT Director General Arthur Dunkel. Jackson=s argument was that the existing GATT was not a single treaty instrument, but rather a cluster of more than 180 agreements that had differing memberships and even differing purposes. Unless there were a formal mechanism of coordination, it was likely the agreements that flowed from the Uruguay Round would produce further decentralization and even legal chaos in the trade regime. A second source of pressure was the Europeans. The EU recognized from the outset that it would be under attack in agriculture, and it sought to offset that pressure by expanding the package of issues at the negotiation. The bargaining mechanism chosen to carry out this strategy was the principle of Aglobality@, which a senior EU negotiator makes clear was equivalent to Aall or nothing@, ie., the single undertaking (Paemen and Bensch, 1995:58, 98). The third source of pressure were the Americans, who recognized that the single undertaking would be a useful mechanism to engineer the commitment of developing countries to the trade regime, thereby avoiding the piecemeal results of the Tokyo Round. (Steinberg, 2002).

The single undertaking, which was Aalways there@ in the words of a senior Uruguay Round negotiator, came to a head in the negotiations that preceded the Draft Final Act (ie., the Dunkel Text) of December, 1991. The issue that brought it to a head was cross-retaliation in the dispute settlement system. It was clear that dispute settlement would have to be integrated into a single undertaking, but the idea that countries could be authorized to retaliate in one area (eg.,

textiles) for a transgression in another area (eg., intellectual property) was something that developing countries strongly resisted. And yet, without cross-retaliation it might be difficult or impossible to provide meaningful sanctions (ie., suspension of concessions) to back up the dispute settlement system. This matter was finally settled on December 19, 1991 when India, long the principal holdout, accepted the principle of cross-retaliation.[12] The single undertaking and cross-retaliation remained part of the Uruguay Round package through to the conclusion of the negotiation on December 15, 1993.

The single undertaking had enormous consequences for the GATT/WTO regime. In the first place, as many commentators have observed, it constrains national sovereignty in that countries are not permitted to pick and choose those parts of the agreement they wish to sign. This is a significant departure from the procedure followed in the Tokyo Round in 1979. Second, the single undertaking reflects an increased commitment of the parties to the regime, in that it obliges parties to assess small losses within the regime against the large (and mainly unacceptable) loss of exit from the regime. Although this choice is not an issue in (stable)domestic politics, a single undertaking is what occurs in Congress or any other parliamentary body when it passes legislation. For example, in the massive U.S. Trade and Competitiveness Act of 1988, no legislator or group of legislators could choose to opt out from any portion of the Act that was deemed unacceptable. In the words of the Uruguay Round Agreements, the Act was a Asingle undertaking@. By comparison, on this point the Uruguay Round Agreements were closer to the Act than they were to the Agreements reached at the Tokyo

[12] Information on this matter comes from confidential interviews, and Croome, 1995:320-27.

Round, where countries exercised their sovereignty by refusing to sign individual Agreements they did not support.

Third, the most important effect of the single undertaking is on the bargaining behaviour of the parties. Trade-offs are considered an essential aspect of bargaining, whether it is diplomatic bargaining conducted in the GATT/WTO or legislative bargaining conducted in Congress. However, in the diplomatic setting, trade-offs have long been considered a delicate matter. Trade-offs (like prices) communicate value, they evaluate a concession in favour of one constituency against a concession denied another constituency, and they appear to force the losers to pay for the gains of the winners. For this reason GATT negotiators traditionally have been more comfortable with trade-offs within sectors than trade-offs between sectors, because the gains and losses from the exchange are taken by the same parties.[13] On the other hand, with a single undertaking parties are more obliged to pursue trade-offs across sectors, however unpalatable they might be, because the alternative of rejecting the agreement or a portion thereof is less possible. The result is that bargained trade-offs became a more explicit process in the Uruguay Round than in previous GATT negotiations.[14] This further increases the similarity

[13] See Hufbauer and Chilas (1974:6) who state: AGATT negotiations very much favor intra-industry over inter-industry specialization.@

[14] Examples of trade-offs in the Uruguay Round abound in confidential interviews with trade diplomats.. In published sources, two former negotiators have commented on trade-offs. Paemen and Bensch (1995) take note of trade-offs between services and textiles at the beginning of the Uruguay Round (39), and safeguards and intellectual property later in the Round (144). Oxley (1990:211) notes: AThe fundamental compact in the Uruguay Round is between those who want the traditionally protected sectors of trade liberalized and those who want new areas of trade liberalized....At its simplest level, if there is no liberalization of agriculture, there will be no liberalization of services. To this mix can also be added textiles and intellectual property.@

The above comments reflect trade-offs between developed and developing countries. Other trade-offs occurred between developed countries, such as the agreement by the EU to

between Congressional bargaining behaviour, where trade-offs are widely recognized as part of the game, and the equivalent behaviour found in the GATT/WTO.

The above formal comparison of Congressional lawmaking and GATT/WTO negotiation suggests there are enough similarities to justify the call by international relations scholars for more comparative study of domestic and international institutions (Milner, 1998:786). This call is further justified by looking at the internal institutions of Congress and the GATT/WTO. The next section will examine the elements of Congressional organization, namely, committees, committee chairs and the Congressional staff, which have their analogies in negotiating groups, group chairs and the secretarial staff of the GATT/WTO.

III. INSTITUTIONAL COMPARISON OF CONGRESS AND GATT/WTO

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forego blocking the dispute settlement mechanism in return for the United States= agreement to forego unilateral sanctions, which Croome (1995:324) discusses without naming the countries.

How are lawmaking in Congress and negotiation in GATT/WTO organized? As for Congress, it is an assembly of representatives. ACongress,@ writes Oleszek, Ais a collegial, not a hierarchical body.@ (1984: 9). Lawmaking is its task, which is the process by which Congress transforms an idea into national policy (1). However, Congress is also described as an organization (Froman, 1967: 169) Like other organizations, it has specialization and a division of labour, which is reflected in the system of committees in Congress. Furthermore, like organizations generally Congress has leaders, which are the committee chairs and the senior leadership positions in the body. Finally, Congress has formal rules and procedures, which also are typically found in organizations.[15]

In the same manner, a GATT/WTO negotiation is an assembly of representatives of constituents. Negotiating and concluding agreements is its appointed task. However, a large multilateral negotiation can also be described as an organization, as in the following observation by an Uruguay Round participant: AThe Uruguay Round had effectively created a new international organization for its four-year life. This would run separately and in parallel with the GATT=s own activities.@ (Oxley, 1990: 145). This organization exhibits many of the elements found in Congress, namely, specialization and division of labor, positions of leadership and rules of procedure. Much of its activity would be described as organizational behavior.

(i) Congressional committees and GATT/WTO negotiating groups.

Many observers of Congress, from Woodrow Wilson onward, have emphasized the

[15] Polsby (1985:82) has also described Congress as an institutionalized organization, having the following characteristics: (i) it is well differentiated from its environment (especially, it recruits leaders from within the organization), (ii) it is relatively complex, and (iii) it tends to use universalistic rather than particularistic criteria (ie., rules), and automatic rather than discretionary methods, to conduct its internal business.

role of committees in accomplishing the work of Congress. Oleszek (1984:6) states: AFor Congress, committees are the heart of its legislative process. They provide the division of labor and specialization that Congress needs to handle about 15,000 measures that are introduces biennially....@ This division of labour is currently managed by 19 Standing Committees, with each Committee being able to establish subcommittees (eg., the Subcommittee on International Trade of the House Ways and Means Standing Committee). The number of committees fluctuates slowly, with three committees being abolished by the Republican reforms of 1995. Committees have limited membership, and appointments to important committees are eagerly sought by Congressmen.

Committees are responsible for the decentralization of Congressional politics, and create a process characterized by A...messiness, openness, pragmatism, compromise and deliberateness...@ (Oleszek, 1984: 243). They are composed disproportionately of Ainteresteds@ (Hall, 1987:122), and are the main source of policy expertise in their respective areas. Committees have considerable control over the agenda in their area, they are policy innovators, and most important, they are deferred to by other committees, and in turn reciprocate that deference (Shepsle and Weingast, 1987: 85). Committees have both positive and negative political power (Smith, 1989: 171). The positive power flows from the fact they are responsible for making proposals, and especially that they are better informed about the often complex matters with which they are entrusted. Negative power comes from their Agatekeeping@ function, (ie.,the capacity to veto legislative proposals in their area), the discretion over the amendments, and especially their role in conference committees.[16]

[16] Conference committees are established to reconcile bills passed in the Senate and

House of representatives into a single piece of legislation. Conference committees normally include members drawn from the committees that managed the bill in the first instance, thereby offering those members an opportunity to deal harshly with any amendments they disapprove of that might have been attached to the bill in floor debates before the whole chamber. Shepsle and Weingast (1987) describe this power as an ex post veto, and argue that this power mainly explains the strong hand committees have in legislation.

GATT/WTO negotiations contain a committee structure reminiscent of that found in Congress. The structure is established at the start of a negotiation, as noted earlier, and will be restructured over time as needed. In the Uruguay Round, the initial15 negotiating groups were constructed on the basis of the negotiating issues identified in the Punta del Este Ministerial Declaration of September 20, 1986 that started the negotiation.(See Table 1). These groups were continued until April,1991, when the negotiation re-started after a hiatus and after the tabling of the Draft Final Act (ie., Dunkel Text). The 15 groups were compressed to seven, reflecting the progress and consolidation occurring in the negotiation. Again, the seven groups were reduced to four (called Atracks@) shortly after Peter Sutherland replaced Arthur Dunkel as GATT Director General. These changes can be contrasted to the relatively greater stability of Congressional committees, and reflect the shorter time span of international negotiations in comparison to domestic legislatures.

GATT/WTO negotiating groups are plenary bodies in contrast to the limited membership committees of Congress. This means that the former are more democratic but less powerful than the latter. The similarity between these institutions lies in the capacity of both to provide for specialization and division of labour, and on this dimension negotiation groups are equally capable as Congressional committees to be the main source of policy expertise in their respective areas. Beyond that, however, negotiating groups cannot control the negotiating agenda in their area (because all parties can participate in the negotiating group), much less can the groups bargain and logroll with other negotiating groups to achieve trade-offs and progress toward an eventual settlement. For this purpose the GATT/WTO makes use of a wide array of more limited

informal negotiating institutions, and especially meetings known as AGreen Rooms@.[17]

(ii) Congressional committee chairs and GATT/WTO negotiating group chairs

An important principle of Congressional lawmaking has been clearly stated by Jones (1975:269): A...it is primarily the function of leadership to see to it that conclusions are reached in Congress.@ Carrying this principle one step further encounters yet another principle enunciated by Woodrow Wilson (1985): AIf there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, somebody must be trusted, in order that when things go wrong it may be quite plain who should be punished...@ When applied to Congressional committees, these principles should lead one to assume that the committees which are the locus of the real work in Congress also provide a role for vigorous and effective committee chairs. Generally this assumption is correct, but it must always be qualified by the potential impact of strong party leadership on committee independence. When political circumstances in Congress are conducive to strong leadership from the top, that leadership can constrain the control exercised by committees and their chairs over the legislative process. For much of the 20th Century the balance favoured the independence of the committee system, which led to strong committee chairs selected by custom through the automatic process of seniority. Today the committee system is in flux, owing to the reforms introduced by the Republican Party in 1995 which curtailed the independence of committee chairs and increased the power of the party leadership.[18] The pressure militating for stronger party leadership is the intensified party

[17] Wolfe (2004:2) defines AGreen Room@ as a generic term for small group meetings, usually initiated by the Director General of the GATT/WTO.

[18] Wolfensberger (2002:13) notes a turnover of 15 of 20 committee chairs occurred as a result of the reforms.

competition resulting from a near-equal balance of parties in Congress, while pressure for greater committee independence continues to come from the need for specialization and division of labour in the face of increasingly complex lawmaking.

Regardless of the exact balance of power between committee chairs and party leadership, observers of Congress continue to ascribe a considerable role to chairs in lawmaking. One observer noted: AIf you want to know how Congress operates, you need to know how the committees work, and how the chairs interact.@[19] And a former subcommittee chair observed: AMost of the time as a Congressman I felt totally impotent, but I felt I had impact on the process as a chair.@[20] The reason chairs are important is that majorities behind legislative proposals seldom occur naturally, but rather are the result of conscious consensus-building.[21] As Froman (1967:19) puts it: AOn most bills majorities are the result of the legislative process, not the pre-condition for it.@ The work of managing that process falls disproportionately to committee chairs.

In GATT/WTO negotiating groups, chairs are also instrumental in providing direction to the negotiating process. Like Congressional committee chairs, they will be expected to manage a specialized portion of the overall negotiation. They are both less and more powerful than committee chairs. Negotiating group chairs do not enjoy longevity based on seniority or other

[19] Remarks by Elizabeth A. Palmer, former Legal Affairs Reporter for the CQ Weekly Report, at a Conference on Committee Leadership in Congress, Woodrow Wilson International Center, Washington, D.C., February 8, 2002.

[20] Remarks by Howard E. Wolpe (D-Mich.), Former Chairman, House Subcommittee on Africa, Ibid.

[21] A good discussion of success and failure in leadership and consensus building in a case study of WTO negotiation can be found in Odell (2003).

criteria,[22] and outside the right to call meetings and to shape the agenda, they have few formal powers at all. Their strength lies in the fact that their committees are plenary, and therefore they will be responsible for managing the full range of cross-pressures of the entire negotiation in their committee=s specific area of expertise. Their task is to find consensus; it is the same task faced by the senior leadership of the negotiation (eg., TNC Chairman), therefore negotiating group chairs have no reason to face an institutional challenge to their leadership such as that faced by congressional chairs from senior party leadership. The way they accomplish this task, in the words of a negotiating group chair at the end of the Uruguay Round, is as follows: AYou=re trying to build a package deal, you must propose trade-offs. There=s a need to control overly-high expectations. Once you have a sense of where the negotiation is going, the role is one of transparency. You sell it, persuade that it=s not a fix, that it is good for all. I spent a lot of time with [various groups]@ (Confidential interview).

One important tool in the Aselling@ of multilateral agreements by GATT/WTO group chairs was the generally-accepted right of the chair to declare closure in multilateral sessions.. This technique was the hallmark of GATT Director General Peter Sutherland, as evidenced in the following vignette (Croome, 1995:374-5): ADuring the same evening [December 14, 1993], Sutherland Agavelled through@ more than twenty of the Uruguay Round texts in a six-hour meeting of the heads of delegation.@ As used by Sutherland and others, Anegotiation by gavel@ could be a simply a mechanism for ending a meeting when agreement is reached. However, in the context of consensus decision making, it could also be an effective means of achieving closure

[22] AGuidelines for Appointment of Officers to WTO Bodies@ WTO doc.WT/L/510 of 21 January 2003.

in a negotiation meeting where it is a matter of judgment when consensus had been reached.

Negotiation by gavel is clearly a means for putting pressure on parties hesitant to join an incipient consensus. However, it is unlikely to be effective without considerable preparation. As noted by a chair from the Uruguay Round negotiation: AYeah, I did it [negotiation by gavel], but it=s not a big thing. You do it only when you have an underlying agreement. It is mainly a mechanism to avoid re-opening the debate, or to avoid any unravelling. It needs to be pre-managed.@ (Confidential interview). Perhaps the biggest advantage chairs found in this technique is that it served as a means to change the mind-set of negotiators from haggling to decision making, and especially as a way to deal with negotiators seeking to carry on the bargaining process for its own sake. As an interviewee expressed it: A[Negotiation by gavel] requires timing and good judgment, but it=s necessary. In big groups, you always have a problem with procedural games players, and this need to be cut off. This is why it=s necessary to firm up a decision.@

(iii) Congressional staffs and GATT/WTO staffs.

Legislation in Congress and negotiation in the GATT/WTO are both large-scale, technically complex affairs. In neither forum do the participants have the capacity to fully engage without assistance from some quarter. In Congress this assistance comes from staff assigned to committees or to the offices of Congressmen themselves. In the GATT/WTO, the assistance comes from the international secretariat attached to the organization itself.

There is widespread agreement among observers of Congress that: AThe staff=s influence pervades the legislative process@ (Mann and Ornstein, 1981:154). This influence is especially noticed in policy areas of great complexity, where the staff=s capacity to access and process

information will be critical in putting Congress on a more equal basis with the Executive. In those areas where Congress takes the lead in lawmaking, the staff will be involved in setting the legislative agenda. Staff interact with constituents and interest groups, and therefore are in a position to come up with the ideas and proposals that constitute the early stages of lawmaking. As lawmaking moves forward, staffs will play a central role in the negotiations needed to build a coalition to support its legislative proposals.

Congressmen have various functions in government, but the closer they get to policy making, the more they will interact with and rely on staff. As noted by former Congressman Wolpe, AStaff are the key to policy. The more esoteric the subject, the more influence have the chairman and his staff.@ As a result of the increasing complexity of government, ACommittee staff have evolved from small, centralized, support groups to relatively complex suborganizations of Congress@ (Smith and Deering, 1984:225). While this better positioned Congress to manage modern policy making, it also led to the criticism that Congressional committees were too large and independent to be controlled by senior leadership.

The observation that Congress needs staff assistance to conduct lawmaking is mirrored in equivalent statements about the importance of staff in GATT/WTO negotiations. Consistent with GATT custom, the Marrakesh Agreement on the WTO mandated that the organization Ashall provide a forum for negotiations@, but it also established a Secretariat that is Aexclusively international in character@ and prohibited from taking any action that might compromise that international character. This mandate insured that the Secretariat would have a role in assisting negotiations, but also that the role would be carried out in an objective and neutral manner. Whereas the staff in Congress are expected to owe allegiance to certain committees or

Congressmen, the GATT/WTO staff have been obliged to serve without partisan engagement. And whereas Congressional staff engage in the negotiations and coalition-building that support legislation, GATT/WTO staff have been obliged to leave the negotiations to the delegates from nation-state Members of the GATT and WTO.

The role that remains for the Secretariat is largely one of information gathering and dissemination , analysis and advice, and drafting of negotiating texts. These functions which may seem prosaic can nevertheless serve an important and even vital function during negotiations. For example, at a critical juncture in 1991 in the Uruguay Round negotiation, Director General Arthur Dunkel pulled together and promulgated a 436 page Draft Final Act (Dunkel text) intending to propose a hypothetical solution to the outstanding issues of the negotiation. This action was bold and risky, but it is likely the negotiation would have failed without the guidance that this Draft provided. At a lower level, it has become customary for negotiating group chairs to rely heavily on the Secretariat for the management of written drafts which are the essence of progress in a multilateral negotiation. For an insight as to how well this cooperation worked in the TRIPS (Intellectual Property) negotiation during the Uruguay Round, consider the following comment from Preeg (1995:104): AThe highly able chairman of the negotiating group, Lars Anell, with strong secretariat support centering around David Hartridge [Director of GATT TRIPS Division], laboriously molded the various drafts into a consolidated text.@ The point is that in the TRIPS negotiation, as in many other areas of the Uruguay Round, the negotiators relied on staff for both drafting and compilation of texts as the agreements moved forward to completion. When one considers that the outcome of the negotiation is a written agreement, the contribution of the secretariat to the negotiation process becomes apparent.

The conclusion of this brief review of committees/groups, chairs, and staff is that there is a functional similarity in the operation of these institutions at the domestic level in the U.S. Congress and the international level in negotiations in the GATT/WTO. These institutions are not identical, nor would one expect them to be, since there are individual differences between legislatures at the domestic level, and even in the same country.[23] But the important point is that analogous institutions have arisen in legislative behaviour and international negotiation to solve similar problems that the actors (legislators and nation states) face in either environment.[24] These problems include the transactions costs and complexity of conducting legislative or negotiating business in the absence of institutions, as examined in the next section.

IV. EXPLANATIONS OF INSTITUTIONALIZATION IN CONGRESS AND GATT/WTO

We return to the puzzle that was outlined earlier: what accounts for the institutionalization that can be observed in the lawmaking process in Congress or the negotiation process in the GATT/WTO? The explanation for the organizational characteristics of Congress is provided in Weingast and Marshall=s study that makes use of the theory of the economics of organization. The foundation of this theory is Robert Coase=s seminal article AThe Nature of the Firm@(1937).

[23] Oleszek (1984:196) notes: AThere are more differences than similarities between Senate and House floor procedures.@

[24] As Martin and Simmons (1998:740) note: AThe point is <u>not</u>, as much of the earlier literature assumed, that Alegislative activity@ at the international level is interesting per se. The power of the analogy rests solely on how actors choose strategies to cope with similar strategic environments.@

Coase observed that economic theory holds that production outside the firm is directed by the price mechanism, but inside the firm price-directed market transactions are eliminated and production is directed by the entrepreneur. The question arises as to what explains the firm=s existence, since production could be conducted by price movements in the open market without any organization at all. The answer, in the author=s words, is that A...there is a cost of using the price mechanism@(1937:390). This is further explained as follows: A...although production could be carried out in a completely decentralized way by means of contracts between individuals, the fact that it costs something to enter into these transactions means that firms will emerge to organize what would otherwise be market transactions whenever their costs were less than the costs of carrying out the transactions through the market. The limit to the size of the firm is set where its costs of organizing a transaction become equal to the costs of carrying it out through the market. This determines what the firm buys, produces and sells@(Coase, 1988:7).

Weingast and Marshall adeptly apply Coase=s economic theory to political institutions. They argue that Congress as an assembly of representatives faces a problem initially to form coalitions to pass legislation, and to ensure those coalitions will not be reneged. One way to establish coalitions is through decentralized market exchanges (eg., logrolling), but such market or price mechanisms are cumbersome and the agreements reached may not be durable. Instead of market exchanges, legislative committees are established because they organize the work and provide greater assurance that the exchanges made in the context of lawmaking will be durable. This analysis relies on the proposition from the theory of the economics of organization that the reason for the existence of the firm and its institutions is that they are more efficient than the price

mechanism in organizing production.[25] The specific form of the institutions, such as legislative committees, is related to the setting in which they arise; or, as the authors note, A...the institutions that evolve to support the exchange reflect the specific pattern of transaction costs underlying the potential trades@(157). For example, since one of the main costs that Congress faces is that coalitions tend to fall apart in plenary floor debates, a major purpose of legislative committees is to build coalitions in support of legislation(Weingast, 1989).

Like Congress, GATT/WTO negotiations are also an assembly of representatives. In principle, they are nothing more than a group of delegates assembled for a multilateral trade negotiation. Negotiating trade agreements is the task, which is a process whereby proposals are transformed into international agreements. However, as we have seen, GATT/WTO negotiations also exhibit organizational behavior, which was reflected in the creation of formal subject-specific negotiating groups (Hart, 1995:214), and informal groups such as the Green Room established for consultation and decision making.[26] Furthermore, GATT/WTO negotiations have leaders, which consist of the negotiating group chairs and the senior leadership positions in the negotiation, such as the chair of the Trade Negotiations Committee or the Director-General of the

[25] The authors state the seminal contribution to this theory is Coase (1937) and quote him as follows: AThe main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism. The most obvious cost of >organising= production through the price mechanism is that of discovering what the relevant prices are.@ (135)

[26] Narlikar (2001:3) notes that informal consultations operate at various levels during a GATT/WTO negotiation, including councils, committees and working parties. Between 20 to 40 delegations may participate, partly by invitation and partly by self-selection. The most notorious informal committee during the Uruguay Round was the AGreen Room@. Paemen and Bensch (1995:128) explain that: AThe name comes from the colour of the walls in the room in the GATT building in Geneva in which [Director-General] Arthur Dunkel was wont to hold informal meetings with a score of delegations to discuss particularly delicate matters, prior to submitting these same questions to all the Contracting Parties at a plenary session.@

GATT or WTO. Finally, GATT/WTO negotiations have formal rules and procedures (such as consensus or the single undertaking), which in some cases have evolved by custom since the formation of the GATT in 1947.[27]

In the above descriptions of Congressional lawmaking or GATT/WTO negotiation, few would be surprised to hear Congress described as an organization, but this description is unusual for a GATT/WTO negotiation such as the Uruguay Round. The Uruguay Round was a multilateral negotiation, and the definition of negotiation from a classic text is: ANegotiation is a process in which explicit proposals are put forward ostensibly for the purpose of reaching agreement on an exchange or on the realization of a common interest where conflicting interests are present (Ikle: 1964:3-4)@.[28] The common elements in definitions of negotiations are parties, proposals, agreements (or more precisely, behaviour-changing agreements), and likely, conflict. The typical negotiating situation is often portrayed as a face-off between parties, accompanied by a process of give and take. From these definitions one might expect in GATT/WTO negotiations to see delegates in multilateral sessions seated at a round table, or engaged in bilateral sessions on the side. One would not necessarily expect to find a bureaucratic organization, nor much less an institution with a continuity of form and structure.

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[27] Occasionally, rules or procedures were informal. Eg., AIn order to protect his text from an avalanche of amendments, Arthur Dunkel introduced a principle whereby no amendment would be taken into consideration unless the proposing country had held informal negotiations beforehand with other partners and obtained their support@ (Paemen and Bensch, 1995:203).

[28] More recently, Odell (2000:4) has offered a similar definition: ABriefly, negotiation and bargaining refer to a sequence of actions in which two or more parties address demands and proposals to each other for the ostensible purpose of reaching agreement and changing the behavior of at least one actor.@

The reason why the Uruguay Round took on the attributes of an organization can be appreciated by examining the situation faced by negotiators. One would expect negotiators to seek out exchanges in order to build coalitions behind their preferred outcomes. However, there were 128 countries at the Uruguay Round, and negotiators at the outset identified 15 separate issues for negotiation. Now assume that issues could be expressed in binary categories (a heroic oversimplification as a cursory glance at any Uruguay Round Agreement would demonstrate), and further assume that delegations could express preferences only in binary choices. Even given such simplifying assumptions, there would still be a daunting task for each delegation to acquire and process the needed information to make agreements with all other parties to assure that any given proposal would achieve multilateral consensus, and to insure that agreements once made would be durable. The transactions costs of any such endeavour would be formidable. These costs are further increased because even though formal equality among participants is ensured by the consensus principle, the reality is more complicated since participants are not homogeneous and are sharply differentiated in terms of the per cent of world trade that they represent.

Thus, the Uruguay Round adopted the demeanor of an organization because institutions arise in GATT/WTO negotiations for the same reason they arise in Congress: namely, to reduce A [t]he costs of negotiating and concluding a separate contract for each exchange transaction which takes place on a market [basis]....(Coase, 1937:392-3). In the above example of 128 countries and 15 issues, negotiations conducted on a bilateral or plurilateral basis would be unlikely to succeed. Nor would they be likely to succeed where the issues before the negotiation are complex rule-making agreements.[29]

[29] It is worth noting that multilateral tariff negotiations (the mainstay of GATT

negotiations since 1947) are mainly conducted bilaterally in the GATT/WTO, with the results being multilateralized through the most-favoured nation (MFN) principle in GATT Article I. Tariff negotiations are considerably simpler than law-making agreements. As the GATT moved toward negotiation of the latter in the Tokyo Round onward, the institutional complexity of the GATT negotiations grew apace.

Perhaps the most interesting application of Coase=s analysis is to explain the use of the AGreen Room@ at the Uruguay Round, which was an example of informal top-down leadership deeply distasteful to developing countries.[30] On the one hand, given that developing countries accounted for over two-thirds of the negotiating delegations, it would seem counterproductive to try to reach agreement through the use of institutions of which they disapprove. On the other hand, GATT/WTO negotiations face certain realities, namely: (i), delegations are accorded unequal influence in relation to their technical negotiation expertise or their political capacity to represent a group of like-minded countries; (ii), delegations are accorded unequal influence in relation to the trade flows of their countries; and (iii), two delegations (the U.S. and EU) are accorded unequal influence because without their participation international trade agreements are effectively valueless. These realities make it impossible to conduct a multilateral negotiation in the GATT/WTO on the basis of, in Coase=s terms, a market or price mechanism. Instead, institutions like the Green Room evolved in order to take account of the unique set of circumstances found in the GATT/WTO situation. Even though unpalatable, it was accepted by all Uruguay Round participants as a necessary decision making mechanism in the process of reaching multilateral consensus. In the case of the Green Room itself, the name was dropped for political reasons following the tenure of Director General Arthur Dunkel, but the practice of informal top-down consensual meetings continues in the WTO when necessary.

Coase=s transactions cost model provides further insight on the historical development of the negotiation method in the GATT/WTO. Traditionally, tariff negotiations have been the

[30] Narlikar (2001:9) notes: AInformal meetings [like the Green Room] were often by invitation only, or through a process of self-selection by a small clique within the WTO.@

mainstay of the GATT regime. Tariff negotiations are mainly bilateral and are based on the interplay between request and offer, which are the basic elements of bargained exchange in any negotiation. The rules of tariff negotiations are simple: requests to importing countries for a tariff reduction would be made in principle by countries that constituted the principal suppliers of the product in question; importing countries might or might not grant a concession, consisting of a tariff binding or reduction; importing countries from which concessions were requested would in turn make reciprocal requests on those countries from which requests were received; and concessions extended to another GATT country must be extended to all countries (ie, MFN) (Hoda, 26-27). Arguably, the latter rule Amultilateralized@ the results of tariff negotiations, but the negotiation process remained inherently bilateral and decentralized.

Tariff negotiations are an example of price-directed market transactions that in Coase=s schema represent the alternative to transactions carried out within the firm. The purpose of GATT negotiations is to produce agreements, and in the manner by which they are negotiated tariff agreements represent Aproduction carried out in a completely decentralized way by means of contracts between individuals.@(Coase, 1988:7). The institutional structure needed to carry out such negotiation was minimal. In the Kennedy Round, which was primarily a tariff negotiation, the parties established a Trade Negotiations Committee in the GATT, with three sub-committees below it. The committee structure remained stable throughout the negotiation. The committees had chairs, but since the main action of the negotiation was over industrial tariffs which were negotiated bilaterally, neither the chairs nor the committees played a significant role in the negotiation. More influential were informal groups such as the Abridge club@ of the US, EC, Britain and Canada, but even this group was constrained by the fact that trade-offs were

ultimately exchanged between principal suppliers and their major customers.

Over time tariff negotiators clearly faced a situation of advancing complexity due to the increase of products and parties at the negotiations, but this problem was largely handled by improved data management techniques and not by a change in negotiation methods. Thus by the time of the Uruguay Round, tariff negotiators would have found an essentially similar bargaining structure to what existed at mid-century. The Uruguay Round did produce the innovation of Azero-for-zero@ (ie, free trade) bargaining in industrial sectors, but the Round also reverted to the Aproduct-for-product@ approach that characterized the earliest negotiations in GATT.

The essential nature of GATT negotiation began to change in the 1970s as GATT countries tackled the problem of non-tariff measures (NTMs). The difference between NTMs and tariffs has been explained in the literature (Baldwin, 1970), but what is important here is the way they are disciplined in international trade negotiations. Tariffs are reduced through an accumulation of contracts between individual countries, whereas NTMs are disciplined through written agreements that all or most participants intended to sign. Negotiations on NTMs were inherently multilateral, where all participants worked toward the completion of a single text. The tasks for NTM negotiators were to reach common understandings of the practices they were seeking to discipline, to reach agreement on the disciplines to be placed on those practices, and to draft clear rules that would direct and constrain national decision makers in the pursuit of international commercial policy. This changed the nature of most of GATT negotiation from a mainly bilateral exchange over numbers to a multilateral exchange over numbers. The idiosyncratic nature of GATT tariff bargaining gave way to a model of rulemaking negotiations that is typical of those found in national governments, and increasingly in international

organizations.

The change toward NTM negotiation came in the Tokyo Round of the 1970s. In comparison to the Kennedy Round, the negotiation process in the Tokyo Round became more elaborate and especially more bureaucratized. At the outset a Trade Negotiations Committee (TNC) was established for the Tokyo Round similar to that of the Kennedy Round, but concurrently six substantive negotiating groups were drawn up from the six negotiating areas outlined in paragraph 3 of the Tokyo Declaration(Winham, 1986, 97-100). These groups were eventually designated as Tariffs, Non-tariff Measures, Sector Approach, Safeguards, Agriculture and Tropical Products. Later in the negotiation, three negotiating subgroups were created under Agriculture (Grains, Meat, and Dairy Products), and five subgroups were set up under the Non-tariff Measures Group (Quantitative Restrictions, Technical Barriers to Trade, Customs Matters, Subsidies and Countervailing Duties, and Government Procurement). A final organizational change was the addition of a seventh group called the Framework Group, tasked to respond to requests of the developing countries to re-examine the legal structure of the GATT.

Committee and group chairs gradually assumed more responsibility in the negotiation process, and with that came an informal power to influence the flow of the negotiation, and where possible to get results. The GATT Secretariat also became more involved with the negotiation process. In the Kennedy Round, there had been a very small GATT Secretariat that assisted the negotiation, but that assistance was wholly record keeping and not substantive. In the Tokyo Round the analytical tasks in the tariff negotiation alone had multiplied, and the staff became larger and took on roles of analysis and preparation of the issues under negotiation.[31] In

[31] Hoda (69) notes: AIn the initial rounds, the Secretariat=s role in the conduct of (tariff)

addition, the role of the Secretariat became even more important in the negotiation of non-tariff measures, especially where the subjects were conceptually difficult (eg., subsidies and countervailing duties), or particularly numerous and diverse (eg., technical barriers to trade), or novel to the GATT (eg., government procurement). In short, in response to the increasing complexity of the issues before GATT negotiations, the negotiation process itself became more organized and characterized by a hierarchical structure, and more in need of assistance of technical expertise.

The move from tariff bargaining to NTM negotiation in the GATT could not be accomplished without a change in the negotiation process. Just as Coase has argued that Athe distinguishing mark of the firm is the suppression of the price mechanism(389)@, the distinguishing mark of NTM negotiation was the de-emphasis of decentralized bilateral contractual bargaining in the GATT. What replaced the price mechanism in the firm was the Asystem of relationships(393)@ established by the entrepreneur-co-ordinator, and what replaced contractual bargaining in the GATT were the institutions of the GATT/WTO described earlier in this paper. The initial motivation for the institutionalization of the GATT/WTO negotiation process was the increasing transactions costs associated with the use a negotiation model designed for tariff bargaining to produce negotiated agreements over NTMs.

IV. CONCLUSION

This paper has promoted two arguments. One is that comparisons can be made between

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negotiations was very modest.... However, by the time of the Tokyo Round, the Secretariat was providing considerable support for the tariff negotiations by preparing comprehensive, detailed and usable basic material on tariffs.@

Congressional legislative behaviour and GATT/WTO negotiation behaviour, for the purpose of deepening our understanding of the latter. The second is that negotiation behaviour in the GATT/WTO can be explained with reference to transaction cost analysis in the same manner that legislative behaviour has been explained by use of this analysis. Beyond these concerns, the findings may speak to the practice of multilateral diplomacy, and to the development of the theory of multilateral negotiation.

To appreciate the question of practice, consider the following hypothetical representation of the situation faced by the trade negotiator. In a traditional tariff negotiation, an ambassador might receive instructions to seek increased market access in Country X for a particular product or sector, which translated would mean Aget X to lower its tariff on that product or sector.@ Who and what would enter into the ambassador=s negotiation would be largely determined by knowable patterns of trade and protection, specifically trade volumes and tariff levels. How the ambassador would proceed would be determined by learned patterns of bargaining exchanges, such as the basic request/offer procedure, the principle of negotiating with the principal supplier, and then later, the existence of formula approaches for tabling offers. The process of negotiating tariffs thus had an essentially simple structure, notwithstanding that the numbers of products and countries in a multilateral negotiation could present an intimidating problem of scale for the ambassador, or that the economic decisions on what levels of tariffs are appropriate for particular products or sectors could present a challenging task of analysis.

By comparison, early in the Uruguay Round the ambassador might have received instructions to ensure that specific subsidies to isolated geographical points in a regionally disadvantaged area within a subsidizing country should be non-actionable. A little investigation

would reveal to the Ambassador that subsidies are a longstanding issue in the international trade regime. They were the subject of two GATT Articles and one Tokyo Round Code, and in none of this legal verbiage were subsidies even defined, let alone subsidies to regionally disadvantaged areas. Can one calculate who gains and who loses when the subject of the negotiation has not been defined? Where does the Ambassador start amid this uncertainty?

Who should the Ambassador call to arrange a negotiation session on this subject; the Americans? the Colombians? possibly the Malaysians? Then too, what should the Ambassador negotiate? In this case, who and what will enter the ambassador=s negotiation will be determined partly by certain fixed realities in the negotiation, such as the economic importance and influence of major actors, but also by the ephemeral interplay of issues, actors and institutions as an often indeterminate number of countries wrestle with ostensibly the same problem. How the ambassador will proceed will be determined less by a standardized recipe of bargaining strategies, and more by the ambassador=s assessment of the state of play of the negotiation, understood especially in institutional terms. Included in that state of play will be varying perspectives of many countries on how to define the issues before the negotiation, and on how to make progress. The ambassador will find that the negotiation lacks the simple structure that existed in tariff negotiations, with the result that negotiation behavior is inherently more complex and considerably richer than what was encountered in typical tariff bargaining

In the Uruguay Round, the Ambassador would have quickly learned that to carry out his (or her) instructions it would be necessary to engage in an organizational process. That process contains institutions and procedures that have evolved to facilitate the task of reaching agreements in the sort of negotiations he is about to enter. An argument as to how these

institutions work and why they have arisen has been presented in this paper. In any case, the Ambassador would have learned by practice that one would have to achieve an understanding of these institutions before one could even address adequately questions like subsidies to regionally disadvantaged areas. Only then would one be capable of representing a country to the best of one=s ability.

For the scholar, there should be as much interest as for the Ambassador to understand the institutions of multilateral diplomacy. In contemporary negotiation theory, there is more emphasis put on the interaction between parties than on the environment in which they interact. In multilateral negotiation, these interactions often cannot take place without working through an institution-rich environment, and that environment can influence deeply the way parties interact with one another.

There are a number of research questions that can be posed based on the analysis presented here. First, in his theory of the firm, Coase (1937:388-89) has argued that outside the firm, production is directed by price movements and co-ordinated through exchange transactions on the market. Inside the firm, however, the price mechanism is suppressed, and is replaced by the bureaucratic structure and institutions of the firm. Were this theory to be applied to GATT/WTO negotiations (as Weingast and Marshall have applied it to legislative behaviour) one might view traditional GATT bilateral and plurilateral tariff negotiations as a form of market transactions, to be distinguished from negotiations over non-tariff measures conducted in the institution-rich environment described in this paper. Are there systematic differences in negotiation behaviour between these two fora, and are these differences accounted for in negotiation theory? Should negotiation theory be broadened to include aspects of the theory of

bureaucratic organizations, or of leadership?

Second, the comparison that has been advanced here between domestic legislative behaviour and international negotiation may be profitably used to speculate about future problems at the international level. For example, pressure groups are a phenomenon that occur in both Congress and the WTO , and informal negotiating group (eg., Cairns Group) have an analogy in informal voting-bloc groups in Congress; examination of these phenomena in the domestic context could generate useful propositions about WTO processes. The impact of political cleavage particularly through party activities is an area where analogies can be drawn, especially at a time when developing countries are increasing their influence in WTO politics. Finally, it is recognized in research on Congress (Froman, 1967:31)that Congress handles certain issues well, others poorly and some not at all, which could provide the basis for an analysis of the future political competence of the WTO. In short, the study of diplomacy and international negotiation stands to gain from comparative research on domestic and international institutions, and because of its constitution and politics the WTO is a likely area for this effort to take place.

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