

Setting the Negotiation Table:

Forum Shopping and the Selection of Institutions for Trade Disputes

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Abstract

This paper examines how interest groups influence the decision to negotiate trade problems at the bilateral level, through adjudication, or in a comprehensive trade round. The institutional venues available for trade negotiations vary in terms of issues, rules, actors, and duration. Interest groups have preferences over the choice of institutional venue because differences in the scope and timing of the negotiation will directly impact their interests. Consequently, groups will lobby for both a specific fora and policy outcome. This paper presents a framework for understanding how the relative balance between interest group pressure on both sides influences the choice of negotiation forum. I argue that this dynamic pushes some of the most difficult trade problems into WTO dispute adjudication or trade rounds, while easier issues are likely to be dealt with in bilateral or regional negotiations. Deadlock in the WTO may lead governments to focus on alternative fora, but doing so reduces the prospect of resolving the toughest trade problems.

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The 2000 WTO ministerial meeting collapsed as protesters filled the streets of Seattle and governments disagreed over the agenda for a new WTO trade round. A year later, however, a meeting venue in Doha Qatar, a broader agenda, and strong U.S. leadership allowed the same governments to successfully launch the Doha Round. The 2003 WTO ministerial meeting held in Cancun Mexico was expected to finalize a draft agreement so that the round could conclude on schedule by 2005. Nevertheless, bringing 146 WTO members to agree on how to liberalize everything from agriculture to investment rules is no simple task. The Cancun meeting came to an acrimonious end without agreement when developing countries voiced discontent over lack of progress in agricultural liberalization by advanced industrial countries. The United States and Europe, on the other hand, blamed developing countries for not offering to open their own economies to trade and investment.

When the multilateral trade round stalled after the failed ministerial meeting in Cancun, the U.S. Trade Representative Robert Zoellick declared that he would pursue the American trade agenda through “advances on multiple fronts.” This has meant pushing forward bilateral agreements and talks for a regional free trade agreement with Central and South America. The United States is not alone in its strategy, for Europe has long had a network of bilateral and regional agreements for preferential trading relationships. Even Japan, which had relied exclusively on the GATT/WTO multilateral route, has begun to negotiate in earnest to conclude bilateral and regional trade agreements.

For trade negotiators, it has become increasingly common to pursue trade agendas on multiple fronts. For any given trade problem, the government could engage a trade partner in bilateral consultations, file a legal complaint for adjudication, negotiate a comprehensive bilateral or regional free trade agreement, or address the problem in the multilateral trade round. What guides the choice between these options?

Despite the proliferation of international institutions, little attention has been given to how states choose when to use an institution. Research has focused on the creation of new institutions or the effects of institutions on cooperation. Less understood is the political dynamic of selection among multiple existing institutional fora. Yet thinking more about when and why countries use institutions promises to offer insights into both the prior question of their creation and the later evaluation of their effectiveness. Drawing

on examples from several negotiations, this paper posits general expectations for patterns in the choice of institutional fora to negotiate trade disputes.

The parallel process of creating regional trade associations, participating in the multilateral trade system, and concluding new bilateral arrangements results in overlapping jurisdictions. Each institutional forum has different features regarding the level of legalization and the number of issues and actors. These features influence the scope and duration of the negotiation. Yet many trade issues could conceivably come up in any of these negotiation fora. Lobby groups and governments on both sides of a negotiation try to choose the set of rules that will favor their preferred outcome. The challenge for successful negotiation is to apply sufficient leverage to overcome the vested interests in the status quo. Choosing the appropriate institutional forum is an important part of this task.

I argue that interest group pressure tends to push governments to send the most difficult trade topics into WTO trade rounds or dispute adjudication, while less controversial trade problems are likely to be resolved in bilateral and regional venues. Governments demanding liberalization will prefer the WTO fora because the binding commitments and enforcement mechanism of the WTO address the fear of noncompliance while demonstrating to domestic lobby groups that their issue is receiving priority. The ability of the respondent government to refuse negotiations at the bilateral level limits the cases that can be negotiated to those where there is not strong opposition. Yet it is difficult for any government to keep sensitive issues off the table in a comprehensive trade round or when facing a legal complaint under WTO rules. As a result, disputes with strong resistance to liberalization are the most likely to end up in WTO negotiations. This selection dynamic makes the non-WTO fora appear more effective, when they are simply getting an easier set of cases. Countering this misperception is important to avoid the erosion of support for the multilateral process.

This paper begins with an overview of the problem of institutional choice. This first section of the paper highlights how governments have established multiple institutional fora to address trade issues, and it discusses the variation in the characteristics of each institutional venue. The second section of the paper examines how governments decide which forum to use for any given dispute. Here I emphasize that this is a politicized process in which the lobbying pressure from interest groups influences government choice

of trade negotiation forum.

1 The Choice of Negotiation Forum

The choice of institutional venue for a negotiation often gets left out of negotiation studies. Raiffa (1982) emphasizes the role of time, issues, and actors but not the institutional setting of the negotiation, even though the rules of the game will influence these other contextual variables. In their classic study, *The Practical Negotiator*, Zartman and Berman (1982, 9, 81) discuss three stages of negotiation: the diagnostic phase during the prenegotiation period, a formula phase during the actual negotiation, and the details phase that works out the agreement itself. They describe that the prenegotiation period involves efforts to agree on the need to negotiate, to define the type of situation, and to reach definitions of the problem. One of the most critical decisions made at this time – where to negotiate – goes unmentioned.

Neither do theories about two-level games between domestic and international negotiations fill the gap. As Putnam (1988) posits in his two-level game analogy, each government must look over one shoulder at the demands from strong lobbies at home and look forward to anticipate the reaction of its trade partner. A growing literature explains how interest groups, domestic political institutions, and bargaining strategies shape negotiation outcomes (Putnam, 1988; Evans *et al.*, 1993; Iida, 1993; Milner, 1997; Odell, 2000; Tarar, 2001). Yet these studies focus on domestic politics and the negotiation process, while giving little attention to the role of international institutions. In fact, leaders have a choice of whether to negotiate in an unstructured environment or to choose a more institutionalized venue. We observe that many trade negotiations occur within a very well-defined institutional structure that constrains the negotiation in terms of the agenda, rules, and procedures. On the one hand, domestic interest group pressures that influence the acceptance of an agreement also influence the earlier choice of negotiation forum. Yet in the spirit of Putnam's argument, entrepreneurial chief negotiators could manipulate these choices as yet another tactic to shape the ability to bring both domestic and international tables to a compromise.

I distinguish between two different kinds of institutional choices that states make: design and selection. The first reflects the decisions states make at the time of establishment of new institutions or major turning points in the evolution of the institutional rules. For example, the period after WWII led to a spurt of institutional creation with the establishment of the United Nations and Bretton Woods system. The formation of the EU resulted from periodic intergovernmental negotiations on new treaties to deepen and expand the scope of regional integration. The second kind of choice is less frequently the subject of scholarly attention at the same time that it is more frequent in occurrence. By selection, I mean the decision by states to use an existing institution when a specific policy problem arises. For example, during the 1980s when U.S.-Japan trade friction escalated, the United States raised many of its concerns about products ranging from beef to semiconductors in bilateral negotiations, while it rejected the bilateral route for the question of rice market access and instead chose to negotiate this issue as part of the Uruguay Round GATT trade negotiation.

1.1 Institutional Design

Why do we observe such a wide array of different institutions rather than a single form of cooperation? Much of the literature on international institutions focuses on the design of institutions. Keohane (1984) presents a functional theory to explain the establishment of international institutions as a solution to cooperation problems arising from transaction costs and inability to enforce contracts in international society. Institutions overcome these problems by providing information, facilitating issue linkages, and establishing norms that encourage a longer time horizon and reciprocity. Different kinds of cooperation problems lead states to establish an institution with specific features to resolve the obstacles to cooperation (Martin, 1992). For example, in collaboration problems such as those presented by trade liberalization among a large number of countries, there is an incentive for a state to allow others to liberalize while it continues to protect its sensitive industries. Under these circumstances, cooperation may require an institution with a formal organization and extensive monitoring to help enforce compliance. Binding commitments and a monitoring mechanism increase the costs of adopting protection, which deters free-riding by smaller states or unilateral defection by larger states. Given a situation of power asymmetry, there

is also a need to reassure smaller states that larger states can be trusted to maintain open markets. Recent studies discuss how distributional stakes or enforcement problems explain the variation in centralization, flexibility, and membership of institutions such as GATT (Koremenos *et al.*, 2001).

The form of the GATT/WTO thus addresses the particular kind of cooperation problem presented by trade. During the trade rounds that engage in rule-making, states retain veto power through the consensus decision process. Thereafter, dispute settlement procedures provide the monitoring capacity to enforce commitments. This creates two kinds of negotiation fora within the GATT/WTO system, with relatively more flexibility for government control during trade rounds and higher levels of delegation for adjudication under the WTO Dispute Settlement Understanding (DSU). The U.S. commitment to support GATT at its creation in 1947 was necessary to reassure smaller states that the United States would continue to support free trade. Later, frustration over the growing trade deficit led the United States to accuse other countries of unfair trade policies, and a period of increased U.S. unilateralism in turn led other states to again doubt the U.S. commitment to free trade. Facing a risk that all would turn away from cooperation with the rules, the U.S. supported the strengthening of the organization as a way to signal its continued preference for free trade (Goldstein and Gowa, 2002). The establishment of the WTO added a secretariat and strengthened the enforcement capacity of the dispute settlement process. These changes both facilitated trade negotiations among an increasing membership and renewed confidence in the rules system.

Domestic political problems also influence the form of international institutions. In particular, uncertainty about special interest demands motivate states to design institutions with sufficient flexibility to enable them to respond later to unanticipated demands (Downs and Rocke, 1995; Rosendorff and Milner, 2001). For example, uncertainty about interest group demands at the time of institutional creation led to special provisions in the GATT and WTO agreements for antidumping laws and safeguard measures. This accounts for some of the apparently contradictory aspects of the GATT/WTO rules, which includes protectionist escape clauses in an institution with the goal of liberalization.

The level of delegation varies across different institutions. As mentioned above, the

GATT/WTO trade institution includes two kinds of negotiations with low delegation for the legislation of new trade rules in the round negotiations and greater delegation for the enforcement of rules in the dispute settlement procedures. Kahler (2000, 562) explains the particular form of Asia-Pacific Economic Cooperation (APEC) as a strategic choice by developing country members that would only consent to an informal institution because they feared that Japan and the United States would dominate agenda-setting and enforcement. Indeed, when designing APEC, members chose not to include a legalistic forum for dispute settlement. APEC relies on advisory committees and consultation in an informal negotiation process. Commitments are not binding and have tended to be imprecise in form. This contrasts with the legalistic nature of the GATT/WTO trade system in which countries ratify new trade rules and tariff schedules and take their complaints over violations to formal dispute panels. Bilateral negotiations may occur at the informal level of diplomatic talks that produce a letter of understanding, or as a negotiation to produce specific commitments in a bilateral trade agreement that is ratified as a treaty. Regional trade institutions run the full range in levels of formality and delegation (Smith, 2000). At the extreme of high levels of delegation, the European Union is an outlier case that brought together members with similar political and economic interests, which made them more willing to delegate substantial authority when they established the European Court of Justice.

The creation of multiple fora for trade disputes reflects that there is variation in the cooperation problem and domestic interest group demands even within the area of trade policy. In response, governments have established appropriate fora for each kind of trade problem as their needs evolved. The long negotiations that establish an institution prevent frequent renegotiation. Existing rules become a focal point such that governments rarely start over. Hence, we observe several relatively fixed institutional options for dealing with trade problems. The persistence of institutions attests to their importance but also means there are few cases of institutional creation.

One can get a better understanding of state choices by examining their behavior during the intervals between institutional creation or destruction. The literature on compliance addresses these ongoing decisions to adapt state behavior within the constraints of in-

stitutional commitments (Chayes and Chayes, 1995). Several studies have examined the effectiveness of GATT rules to bring compliance. For example, Hudec (1993, 353) says that 88 percent of complaints under the GATT period (1947-1989) were successfully resolved, while Busch and Reinhardt (2002, 471) find that 65 percent of complaints from 1948-1994 were settled with either partial or full concessions. One study comparing different negotiation fora shows that GATT adjudication and linkage in trade rounds have been more effective than bilateral negotiations to bring some liberalization in the area of agricultural trade negotiations (Davis, 2003). The evidence that the more institutionalized negotiation fora are effective to bring liberalization points to the significance of the decision to negotiate a topic in this particular context.

1.2 Institutional Selection

Choice of when to use an institution, however, presents a different dynamic than the establishment of the institution or compliance with institutional rules. The characteristics of the issue will shape preferences over institutional constraints. States will face relatively less uncertainty about domestic interest group demands given that they know the issue at stake. Consequently, decisions about the institutional forum for a given dispute reflect specific goals of the state and interest groups.

Some issues will only fall into the jurisdiction of one negotiation forum such that there is no option of strategic selection. Many issues, however, could be negotiated in more than one venue. The “jurisdictional ambiguity” that arises in these cases resembles the frequent occurrence in Congress when a new bill could be referred to more than one committee (King, 1994). For example, bills on auto safety could logically fall within the jurisdiction of either commerce or transportation committees. Even in the domestic context where appointed parliamentarians refer bills to committees, there is room for turf wars as committees try to expand the scope of issues within their jurisdiction. The EU policy context frequently raises questions of institutional selection as different actors try to frame an issue so that it will be discussed according to the procedures that would favor their preferred outcome (Jupille, 2004; Alter and Meunier, 2004). In the private sector, selection among multiple institutional fora is observed in commercial transactions by private international traders

Types	GATT/WTO	Other Fora
Consultation	WTO committees	Ad hoc bilateral talks
Sectoral	Information Technology Agreement	U.S.-Japan Semiconductor Agreement
Summits	WTO ministerial meeting	G-8 Summit, OECD meeting
Comprehensive	Trade Round	APEC, EU, FTA
Adjudication	WTO dispute settlement	NAFTA dispute settlement

Table 1: Negotiation Fora for Trade Disputes

and investors who choose between pursuit of ad hoc arbitration versus several options for institutional arbitration (Mattli, 2001).

Trade disputes between states also present a wide range of choices that allow for selective use of an international institution. Table 1 provides examples of the available options. While a few studies examine why some trade issues are taken before formal WTO adjudication (Busch, 2000; Busch and Reinhardt, 2002; Allee, 2003), more research is needed that compares different institutional venues for negotiations. Typically trade officials are not making a decision of whether to adjudicate or do nothing, but rather whether to file a complaint and/or raise the issue in a different venue. There is strong equivalence between dispute resolution systems under the WTO and NAFTA with many trade topics covered by both (Jackson, 1997, 135). Such potential for overlapping jurisdiction raises the possibility of *forum shopping* that is similar to the practice in a public law context of choosing among court jurisdictions.¹ This paper, however, looks at trade negotiation fora that differ substantially in their function and form, but nevertheless address similar trade policy issues.

Timing and the nature of the issue limit the fora options relevant for a particular dispute. Depending on the year, there may not be an ongoing trade round that could address the problem. For a negotiation with a country that is not a member of the GATT/WTO,

¹The legal definition of “forum shopping” is “when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.” See Busch (1999) for analysis comparing forum shopping between the two dispute resolution systems of GATT/WTO and NAFTA.

moreover, bilateral negotiation outside of an institutionalized negotiation forum may be the only option. A negotiation about an issue not covered by existing trade agreements could not be addressed in a dispute settlement case, although it could be raised as part of a trade round negotiating new rules or as an ad hoc bilateral negotiation. Jackson (1998, 172) comments that GATT/WTO panels are expected to exercise judicial restraint and not change obligations under existing rules, although he adds that it is possible for a state and panel to “push the envelope” of legal interpretation.²

In potential GATT/WTO dispute settlement cases, the legal strength of a complaint will influence whether adjudication is seen as a good option. Given the considerable legal and political costs of initiating a complaint, governments will first screen whether their legal case is likely to yield a favorable ruling by a GATT/WTO dispute panel. Indeed, this constraint also affects interest group pressure. Since lobby groups pay part of the costs of adjudication in their role to provide information for the case, they are also likely to only raise issues they perceive have a viable chance to win. For the most part, this means that only when a trade barrier appears to represent a clear violation of GATT/WTO rules will states initiate a negotiation in the formal dispute settlement process.³

Nevertheless, in many trade disputes, a complaint about a particular trade barrier could be raised in multiple possible negotiation fora. An overview of several important U.S.-Japan trade negotiations illustrates this point. U.S. complaints about Japan’s quantitative restrictions on agricultural imports were addressed in the Tokyo Round, bilateral talks in the early 1980s, a GATT dispute panel in 1987, and in the Uruguay Round. Japan’s restrictions on forestry products were addressed in comprehensive U.S.-Japan bilateral negotiations, which produced the Market-Oriented Sector-Selective (MOSS) trade agreement in 1986, the Uruguay Round, and later arose as a central issue in the APEC

²In particular, Jackson argues that the provisions for rulings on “nullification and impairment” in effect open an “opportunity to bring a case that does not involve any violation of treaty obligations.” In a small number of such cases, panels have made rulings that a country should offer compensation when no policy has been found in violation and there is not a recommendation for a policy change.

³The pro-complainant pattern of panel rulings may in part reflect this tendency for states to only file complaints when a panel is likely to rule in their favor. Reinhardt (2001) finds that there was a 4:1 ratio for ruling in favor of the complainant during the GATT period.

talks on Early Voluntary Sectoral Liberalization during the 1998 Kuala Lumpur Ministerial meeting. Some trade topics involve the negotiation of an agreement in a new area and are not suitable for an adjudication forum. Nevertheless, this still leaves the option of bilateral, regional, or multilateral talks. For example, in the 1980s and 1990s, Japan and the United States concluded bilateral arrangements on semiconductors. Later semiconductor trade was subsumed within a sectoral agreement negotiated in a multilateral context. The Information Technology Agreement concluded at the WTO Singapore Ministerial in 1996 eliminated tariffs on semiconductors, telecommunications, software, and computer-related products. Alternatively, such an agreement could have been negotiated as an issue on the agenda of a trade round. Indeed, telecommunication issues were also part of the Uruguay Round service negotiations and commitments for basic service provisions were added in a 1997 Telecom Accord, which represented a sectoral agreement among a subset of 69 WTO members. As a final example, the United States has chosen to pursue investment agreements primarily on a bilateral basis, while Japan lacks bilateral agreements and urges that a strengthened multilateral framework on investment should be adopted as part of the Doha Round. In each case, governments must consider which forum will be most appropriate among several options.

Many issues are raised in multiple fora simultaneously or sequentially. Indeed, the WTO procedures explicitly encourage bilateral settlement and/or resolution through discussion of trade problems in WTO committees. Even after a complaint is filed, WTO procedures call for a formal process of bilateral consultations in Geneva before entering the panel stage of adjudication. Thus an issue such as the EU policy on bananas had been the subject of the Uruguay Round and bilateral consultations before the United States along with Latin American countries filed complaints and entered the formal consultations of the dispute process that eventually led to a panel ruling and settlement.⁴ In another example, during a Summit in June 2000, India and the EU discussed specific problems regarding EU anti-dumping measures against Indian textile exports to the EU and some of these same issues

⁴See Alter and Meunier (2004) for a discussion about how this case raised overlapping institutional commitments for EU members as they weighed the Lome convention and WTO agreement implications for the EU banana import regime.

were simultaneously the subject of formal WTO adjudication.⁵ The problems of regulating the steel industry have been addressed simultaneously in several fora: after a surge of steel imports in 1998, the United States engaged in bilateral negotiations with exporters such as Japan, Korea, and Russia; a steel subsidies agreement is being negotiated under the auspices of an OECD Steel Committee; the Doha Round negotiation group on WTO rules will clarify subsidies and anti-dumping rules that affect the steel sector as part of a broad agreement; and, several WTO dispute panels have ruled on steel anti-dumping and subsidies policies.

Indeed, pressure from one negotiation forum may encourage settlement in another forum on the same or related issues. In the case of the steel negotiations, the victory by the EU and other complainants in a WTO panel against U.S. safeguard tariffs protecting its steel industry was cited as adding more momentum to the OECD talks.⁶ The United States has also tried to use pursuit of bilateral and regional FTA agreements as a means to apply pressure on nations to do more in trade rounds – during the Uruguay Round, U.S. engagement in NAFTA, several key GATT panels, and threats of bilateral retaliation on specific issues all pressured other states to become more serious about making the compromises necessary for a Uruguay Round agreement. Similarly, following the impasse at the Cancun meeting of the current Doha trade round, the United States increased efforts to achieve a Free Trade Area of the Americas both as an alternative forum for trade liberalization and as a means to pressure states to be more compromising in future Doha Round talks. When these regional talks themselves also stalled with disagreements between the United States and Brazil, the U.S. Trade Representative Zoellick said he would exert pressure on Brazil through negotiating bilateral trade deals with other Latin American states.⁷ A review of the scholarly literature, however, shows mixed evidence about whether liberalization through bilateral and regional free trade agreements promotes multilateral liberalization (Mansfield and Milner, 1999, 595).

While it is not uncommon for an issue to be addressed in multiple fora, few are addressed

⁵See “European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,” WT/DS141/R 30 October 2000.

⁶*The Financial Times*, 6 December 2003.

⁷*The Financial Times*, 6 December 2003.

Issues:	single	multiple sectors
Rules:	formal	informal
Actors:	bilateral	multilateral
Duration:	fixed	indefinite

Table 2: Dimensions of Variation in Trade Negotiation Fora

in all possible fora – some selection is made. Trade authorities have limited resources to engage in negotiations on all fronts for all issues. A kind of triage is necessary to direct specific trade disputes to the most appropriate negotiation forum.

1.3 Variation in Negotiation Structure

Any negotiation will be characterized by an institutional context that constrains the negotiation process and shape outcomes. This institutional context can be thought of as the negotiation structure, which consists of *the agenda, rules, and procedures specific to the negotiation that regulate the interaction between states as they address a policy dispute.*⁸ The primary dimensions of variation are the issues on the agenda and their relation to each other, the rules that form the standard of evaluation, the actors who participate, and the duration of the negotiation. Table 2 presents a simple typology.

Each structural feature offers different sources of leverage to pressure for liberalization. Some negotiation fora are more or less conducive to different negotiation strategies. A legal strategy through adjudication involves filing a formal GATT/WTO complaint and relying on adjudication by a neutral panel. A more ad hoc approach is typical in bilateral negotiations that rely on informal talks, which can accommodate various kinds of diplomatic pressure including issue linkage or threat strategies. Finally issue linkage strategies can most easily be pursued in the broader context of a negotiation including multiple sectors such as a regional trade forum or GATT/WTO trade round.

First, the agenda can range from a narrow focus on a single policy to a multi-sector

⁸See Davis (2003) for analysis of the effect of negotiation structure on liberalization outcomes in the area of agricultural trade.

negotiation. The former provides greater attention to the one issue. On the one hand, this demonstrates that the government is treating the problem as a high priority. The length of negotiation is likely to be shorter than if multiple issues were on the table. On the other hand, narrow focus can also politicize an issue by highlighting the winners and losers. Both sides will face greater political costs for making concessions given the spotlight on one issue. WTO disputes have the most narrow agenda focused on the legal status of a single policy issue. Indeed, some have argued that the transparency of this legalistic negotiation could reduce liberalization because it promotes greater mobilization by protectionist groups (Goldstein and Martin, 2000). Alternatively, widening the scope by adding multiple issues allows greater flexibility that can change zero-sum bargaining into a positive-sum game with offsetting gains and losses for everyone (Raiffa, 1982; Koremenos *et al.*, 2001). This can reduce the political costs of making concessions. Protectionist interests in a position to veto a single issue have less influence over negotiations on a package of multiple issues that presents new distributional stakes and wider policy jurisdiction in the domestic policy process (Davis, 2004). Hence, a negotiation with multiple issues may lead to greater overall liberalization, but requires lengthy negotiations that frustrate interest groups on the initiating side.

Second, in adjudication, formal rules or international law provide a standard for judging different policies. Filing a complaint initiates a process that begins with formal consultations. While this phase resembles bilateral talks, the agenda is limited to the specific measure and its legal status. The consultation stage represents bargaining “in the shadow of the law” and 55 percent of GATT/WTO disputes end without establishment of a panel (Busch and Reinhardt, 2001, p.461). Filing a complaint performs a political function by demonstrating to domestic interest groups of the complainant country that their interest is being taken seriously. At the same time, the action also signals to the other country that this is a priority issue with risk of further escalation to a panel and/or retaliation. The pattern of rulings has overwhelmingly favored the complainants in past decisions (Reinhardt, 2001).

On the other hand, bilateral negotiations outside of the WTO or other adjudication fora take place without formal rules. Then the immediate interests of the participants

form the only standard of evaluation. The U.S. trade deficit and the import penetration of sensitive markets were the basis for U.S. demands in negotiations that produced voluntary export restraint arrangements to restrain products ranging from Japanese autos to textiles from developing countries. In another example, the U.S.-Japan semiconductor negotiations focused on the share of U.S. semiconductor exports in the Japanese market and produced an agreement allocating the United States a fixed market share. The greater flexibility of informal negotiations also allows adding issues. Such side-payments can provide leverage to help reach a mutually acceptable agreement.

The third dimension of institutional variation points to who is included in the negotiation. In some cases, a negotiation only involves two states, while in other negotiations many states are involved in the same negotiation. The former negotiations are shaped more strongly by relational factors outside of the single trade issue, which can allow additional sources of leverage as well as restraint. For example, in U.S.-Japan negotiations over beef and citrus protectionism by Japan in 1983, Japanese politicians told American politicians that further pressure on such a sensitive political issue would produce more backlash against the United States in Japan to the detriment of the security relationship.⁹ At the same time, the overall dependence of Japan on U.S. markets and security alliance also led to many calls within Japan for concessions so that the dispute would not harm the economic and security relationship. Indeed, studies on law and society find that parties with longstanding and complex ties are more likely to prefer dispute resolution in embedded fora that take advantage of this social context (Mattli, 2001, 933). Although such factors could also influence multilateral negotiations, they receive less attention. The greater number of participants offers less flexibility because the coordination task is more complicated and renegotiation becomes very costly (Koremenos *et al.*, 2001, 794). The general formula approach common in multilateral settings makes it more difficult to tailor agreements to meet specific requirements of each side.

In addition to the number of states, there are substantial differences in the officials from each state who participate in the different kinds of negotiations. Wolfe (2002, 19) writes, “Every choice of forum privileges some set of actors. Trade lawyers displace microbiologists

⁹LDP Member of House of Representatives. Interview by author. Tokyo, 8 March 1999.

and regulators when a food problem moves from the SPS committee [WTO Committee on Sanitary and Phytosanitary Measures] to a dispute panel.” This opens the door for bureaucratic politics as each agency jockeys with others to advocate the negotiation fora that will increase its influence. Framing of issues is particularly important to determine policy jurisdiction and procedural rules in EU institutions (Jupille, 2004). The policy involvement of the EU versus member states as well as co-decision procedures within EU decision making vary by issue area (Nugent, 1999, 346).

The fourth dimension refers to the time period expected to reach agreement. Disputes that are taken up in a legal fora for adjudication proceed under fixed timetables. WTO disputes that go through the last stage of the dispute settlement process typically last one to two years, but a majority of cases are settled much earlier. In other negotiation fora, the time period is not specified in advance. A negotiation may end with a single meeting of diplomats in the case of bilateral talks, while a trade round negotiation such as the Uruguay Round could stretch on for eight years. The variation along other dimensions often correlates with the duration of the negotiation, since the complexity of comprehensive talks with multiple issues and actors requires more time while a single issue could be settled in a bilateral negotiation after one or two meetings.

Any trade negotiation could be described in terms of these dimensions. Some bilateral negotiations will take place as WTO adjudication over a single issue while others may be informal talks on one or multiple sectors. Trade rounds are the largest multilateral negotiations in terms of the scope of sectors and number of participants. Regional talks like APEC also address multiple sectors and include many participants. There is not one model of an optimal institution, but rather different advantages to each. The question addressed in the next section is why states prefer one forum over another for a given trade dispute.

2 Politics of Deciding Where to Negotiate

When states face such an array of options, what factors influence the choice of two governments with a trade dispute? The nature of the issue limit some options for which fora

could be appropriate. When there are still multiple options, however, I argue that interest group pressure influences which venue governments select for a trade negotiation. The initiating side has the most control over the choice of forum, and so the preferences of the interest group harmed by the trade barrier are critical. Since the respondent can refuse to negotiate in non-WTO fora, however, the interest group pressure on the respondent government is also important. This section will examine the preferences of interest groups over the different institutional fora. I will also discuss other factors that can influence government decisions. In particular, domestic institutions filter interest group demands, economic resources limit government capacity to pursue some cases, and diplomatic concerns may over-ride interest group demands for sensitive cases.

2.1 Interest Group Pressure and Institutional Selection

One of the most important factors for the choice of negotiation forum is domestic political pressure that favors one forum over another. The study of trade policy has long centered on how economic interests shape preferences for free trade or protection (Milner, 1988; Rogowski, 1989; Grossman and Helpman, 2002; Hiscox, 2002). The trade policy orientation of governments are determined by underlying economic interests and the influence of lobby groups on policy. Yet interest group lobbying is not restricted to the simple dichotomy of favoring free trade or protection. There is close coordination between interest groups and trade officials regarding strategies for any particular negotiation. In trade rounds and bilateral negotiations, interest groups are consulted as part of the planning for initial negotiation demands and are debriefed immediately after a negotiation meeting – indeed, some governments will include representatives from interest groups as members of the national delegation sitting at the table inside the room negotiating. Public-private partnership is especially important in the highly technical area of WTO adjudication (Shaffer, 2003). Interest groups help to identify specific trade problems and urge governmental action, lobby for selection of a particular institutional forum, and use their resources to support the chosen negotiation strategy.

The interest group perspective on institutional fora

How do interest groups view the dimensions of variation in negotiation structure discussed in the previous section? On the side demanding liberalization, interest group preferences over choice of fora reflect an underlying concern to get the best outcome for their specific interest in the least amount of time. These groups will likely favor negotiation structure features that bring a narrow focus of attention on their own trade problem: single issue, fewer actors, formal rules, and fixed time schedules. A smaller number of issues and actors reduces the risk that problems in other areas of the negotiation will delay or weaken the agreement on their topic. Informal settlement is appealing because it may require the least time and effort lobbying. Yet in the face of delay tactics by the trade partner and fear of noncompliance, fixed time periods and formal rules could be attractive. The side resisting liberalization, on the other hand, prefers the negotiation forum that promises the most time and flexibility. Having more issues and participants adds complexity that brings desirable delays. Settings with formal rules and fixed time periods are less amenable to such delay tactics.

The rest of this section explains how these general preferences relate to choice of negotiation fora. I expect that interest groups on the initiating side will have a preference ordering over different fora that favors bilateral negotiations first, with adjudication as a back-up option to informal talks, and comprehensive negotiations such as a trade round or FTA as a third choice. I expect that respondent groups favoring protection will prefer comprehensive negotiation fora such as a trade round or FTA over bilateral talks, while they are likely to be the most hostile to adjudication.

Bilateral talks are typically the first option, both according to diplomatic procedure and interest groups' pressure. Interest groups that face a restriction harmful to their exports want resolution of their specific trade problem as quickly as possible. Urging their government to contact the other government about the problem may bring immediate relief and requires little back-up support. Adjudication is too costly in time and resources to be sought as a first step. It is also a risky strategy because losing a panel makes it more difficult to pressure the trade partner than before the adjudication process. A State Department official said that he often counsels groups that it would be better to get 10 percent of what

they want through bilateral negotiations rather than pursue adjudication with the risk of getting nothing if there is not a favorable ruling.¹⁰ Nevertheless, industry groups often pressure for going beyond a partial compromise in bilateral talks. The other government can stall progress in bilateral negotiations or refuse to engage seriously in talks. In the face of strong resistance to liberalization by a trade partner, bilateral talks may not be such a speedy solution.

When bilateral talks at the diplomatic level have proven ineffective or are seen as unlikely to produce any result, groups may call for initiation of a WTO legal dispute. The fixed deadlines and potential for sanctions are seen to increase the likelihood of resolving the dispute within a reasonable period. Interest groups also want a positive legal ruling in order to gain greater leverage to bring a complete change in the policy and deter future use of such trade barriers by all trade partners. For governments facing strong industry demands for relief from a trade barrier, filing a formal complaint is one way to show the industry that it is doing something to address their concern. The public nature of filing a complaint visibly demonstrates to domestic audiences that the government is engaging in aggressive export promotion.

Issues that are not violating existing rules can only be dealt with in one of the rule-making negotiation fora such as the trade rounds or free trade agreements. Given this choice, interest groups may lobby for regional over multilateral talks because a regional agreement offers economies of scale and investment opportunities with the exclusion of third country competition (Chase, 2003). Moreover, bilateral or regional agreements are typically negotiated in less time than a multilateral trade round. Industries favoring free trade have supported regional agreements when dissatisfied with the slow or inadequate liberalization that is produced by the multilateral negotiations (Busch and Milner, 1994). On the other hand, interest groups with a longer time horizon and more global market reach will support negotiations in a multilateral trade round. The multilateral system extends the terms of an agreement to include all 147 WTO members, so that a negotiation victory in a trade round will have greater impact than the same commitments in a regional context.

¹⁰Interview by author. Washington, D.C. 6 April 2000.

In the respondent state, protectionist industry demands push in the opposite direction. A comprehensive negotiation on multiple sectors, such as a trade round or regional talks, is preferred by respondents that face strong protectionist resistance to removing the trade barrier. The length of the negotiation appeals to the industry that wants to delay and minimize reform. For governments facing strong protectionist demands from interest groups at home, trade rounds reduce the political costs to negotiate tough issues. The broader focus of the trade round with multiple countries and issues diffuses the attention given to any one topic. Especially at the early stage of the negotiation, there is little information on the specific concessions that will be necessary on any given product to conclude the negotiation. Combining sensitive issues within the broader context of a trade round reduces transparency, which makes it harder for protectionist groups to mobilize their own constituency. Later, the multilateral process offers political cover to a government that agrees to liberalize a sensitive domestic industry. Blackhurst (1998, 50) describes one of the advantages of the GATT/WTO consensus decision making is that it “enables delegations to adopt a position of not opposing the consensus without actually having to cast an affirmative vote.” Offsetting gains from other issues in the negotiation help with persuasion of the domestic audience in ways that would not be possible in a negotiation on the single issue (Davis, 2004). Discussing a trade problem in a round or regional association looks especially attractive when the alternative is bilateral negotiations or adjudication of the dispute. For example, developing countries that were reluctant to include stronger protection of intellectual property rights demanded by developed nations agreed to discuss these issues in the Uruguay Round largely because they faced attack outside the GATT/WTO from the U.S. Section 301 threats against their policies (Hindley, 2002, 164).

Being singled out in a violation ruling issued by a WTO dispute settlement panel is the worst scenario for the respondent state. A violation ruling represents an authoritative recommendation for an end to the protectionist policy. The rules system has established a strong success record for compliance with GATT/WTO rulings. Hudec (1993, 353) shows that from 1945 to 1989 under the weaker GATT rules, dispute settlement cases achieved a remarkable 88 percent success rate in dealing with trade problems. The WTO dispute settlement process has also performed well in its early years. Among the first 11 cases that

were completed with full information on implementation available by the end of 1999, 9 led to adoption of the recommendations in the ruling within the implementation period (Butler and Hauser, 2000, p.518). The public nature of the dispute mobilizes resistance from the protectionist industry (Goldstein and Martin, 2000). Given the strong pressure from a ruling, one would expect protectionist interest groups to resist the adjudication forum.

The interaction of interest group pressure and forum choice

How does the interaction between these contrasting pressures from interest groups influence the choice of negotiation forum? The government that issues the demand for liberalization has the most control over forum choice. It has the right to file a complaint and request a panel, and can pressure to have its issue included in a trade round or regional talks. However, the respondent can veto the demanding country's choice of negotiation forum by refusing to negotiate. A passive response is sufficient to put the brakes on bilateral talks. In trade rounds, the consensus procedures of the GATT/WTO decision-making empower all participants with potential veto power, allowing even weaker countries to influence the early agenda-setting phase of trade rounds (Steinberg, 2002, 350-351). Only by pursuing adjudication can the initiating country unilaterally determine the negotiation forum.¹¹

Low-profile issues that do not have a strong interest group on either side could be addressed in any trade venue, but are unlikely to rise to the level of adjudication. A government will be reluctant to initiate the formal adjudication process if there is not a strong interest group with sufficient political and economic interests to gather the backing

¹¹Under the earlier GATT rules, it was possible for the defendant government to block the establishment of a panel. In the 1980s, the EC blocked several panels related to agricultural protection. Yet even when legally possible, most governments declined to use this tactic. For example, Japan initially tried to block the establishment of a panel and the adoption of a violation report in 1987 during a case against its agricultural import quotas, only to back down at both stages under international pressure and domestic criticism. The establishment of the WTO in 1995 closed this loophole by bringing greater "automaticity" to the establishment of a panel and adoption of rulings (Jackson, 1998, 164). Consequently, the respondent government has little choice in the matter of negotiation forum if the initiating government decides to file a complaint.

for a formal dispute complaint. Government officials rely on interest groups to provide the background information to help select and prepare trade dispute cases (Shaffer, 2003). Interest groups with either poor resources or low incentives are unlikely to fulfill this role.

Adjudication is likely when the following three conditions are met: the trade barrier represents a likely violation of existing trade commitments, a strong interest group in the respondent state has prevented progress in bilateral talks, and a strong interest group in the complainant state demands dispute initiation. Thus a formal complaint will only occur when there is strong interest group mobilization on both sides of the dispute. Then the respondent country can decide whether to settle early in the informal consultation stage. Protectionist interests will push governments to wait until the final ruling. Indeed, it is the hardest cases with entrenched opposition to any concession that are most likely to be selected for going to a panel (Reinhardt, 2001). One must evaluate the effectiveness of the dispute settlement system in light of this selection mechanism.

Broader issues may be addressed as part of negotiations within the framework of a bilateral or regional free trade agreement (FTA). In free trade agreements, internal tariffs are reduced and policy reforms on other regulatory issues are often far-reaching. Governments have increasingly turned to negotiate bilateral and regional free trade agreements since the 1990s (Mansfield and Milner, 1999). The EU (itself a customs union) holds thirty free trade and preferential agreements with other countries. The United States has negotiated bilateral FTAs with Israel, Jordan, Chile, Singapore, and Australia, while it has two regional agreements, NAFTA with Mexico and Canada and the recently concluded Central America Free Trade Agreement with Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. Even Japan, which long focused exclusively on multilateral trade negotiations, concluded its first bilateral free trade agreement with Singapore in 2002, recently reached an agreement with Mexico, and is currently in the process of negotiating bilateral agreements with Korea and a regional agreement with ASEAN states. In the case of service sector issues, the perception that liberalization would be easier to negotiate and implement with a small number of like-minded governments led governments to push forward regional negotiations as a way to achieve more meaningful service liberalization than they were willing to undertake in a multilateral setting (Stephenson, 2002, 204).

Yet these agreements should also be understood in light of the fact that governments choose this venue and their trade partner when there is less political resistance. Indeed, Zoellick explicitly described efforts to negotiate bilateral and regional agreements as a decision to “move towards free trade with can-do countries.”¹² Exclusion of politically sensitive issues has been a key factor helping to build support for such agreements (Mansfield and Milner, 1999, p. 602). The smaller number of participants in free trade agreements allows for many exceptions to be made in the agreement itself. Lower stakes also mean that if an exception is not granted, states choose not to join. During the CAFTA negotiations, the United States refused to fully liberalize trade in sensitive agricultural products like sugar, while Costa Rica initially refused to join due to reluctance to liberalize telecommunications and tourism.¹³ Similarly, in FTA negotiations with Mexico, the EU and Japan were able to minimize the market opening in their sensitive agricultural sectors while the United States excluded sugar products from liberalization in the U.S. FTA agreement with Australia. Bhagwati (2004, 63) points out that regional and bilateral agreements fail to address the problem of agricultural subsidies, and few are even concluded between states with competing farm sectors. There is little prospect for FTA negotiations between the United States, EU, or Japan, which represent the largest trading states that encounter the most frequent trade disputes.

Regional talks are also susceptible to refusal by unwilling respondents. Despite its well-documented reactivity to foreign pressure, the Japanese government refused to discuss forestry and fish liberalization in the APEC 1998 Kuala Lumpur meeting (Davis, 2003). Other governments were unwilling to continue while Japan refused on those issues. After APEC trade ministers agreed to forward the entire agenda for sectoral liberalization to the WTO, the Japanese Foreign Ministry spokes-person welcomed the outcome saying that “The WTO is a far more appropriate body to reach a binding trade agreement. We are ready to put these two sectors on the WTO negotiating table.”¹⁴

Trade rounds provide a catch-all negotiation forum for a wide range of issues from minor tariff reduction to controversial market opening of sensitive products and establishment of

¹² *The Financial Times*, 22 September 2003.

¹³ *New York Times*, 18 December 2003; *Inside U.S. Trade*, 2 January 2004.

¹⁴ *New Straits Times*, 16 November 1998.

new rules. Among the thousands of items being negotiated, some will involve small stakes on both sides. Yet there will also be some tough issues that have risen to this level because their negotiation was vetoed at the bilateral or regional level. When the demanding country meets resistance from the respondent, turning to a trade round offers a mutual solution. The demanding state gains leverage from issue linkage while the responding state leaders gain political cover. When all states are negotiating their sensitive issues, it becomes more difficult for one to veto any one issue.

2.2 Domestic institutions and resources filter interest group demands

Interest group demands are not automatically translated into policy. Domestic political institutions may influence how governments resolve disputes by mediating the pressure from interest groups. First one would expect democracies to be more likely to favor adjudication. The domestic norms to resolve conflicts through third party mediation are likely to be extended to international disputes (Raymond, 1994). Certainly the United States and EU stand out as the most active users of dispute settlement proceedings. Economic interests also account for the observation that advanced industrial democracies initiate the majority of disputes. However, the pattern of behavior within disputes offers supporting evidence. Controlling for economic factors, Busch (2000) finds that pairs of democracies are more likely than others to continue to the more legalistic panel stage. Both a preference for using the legal process and the responsiveness to interest group pressures could explain the tendency for democracies to wait for the panel ruling.

Second, the trade policy process of each government will also influence its responsiveness to interest group demands. Both the United States and EU have institutionalized the process for industries to exert influence on trade negotiation strategies. These institutional processes complement their interest as the two largest traders, and it is not surprising that the United States and EU dominate trade round negotiations and lead in WTO dispute initiation.

In the United States interest group lobbying takes place quite publicly. The main avenue for industries to access trade policy is to file a petition under Section 301 of U.S. trade law.

Congressional pressure for more activist trade policies to support domestic industries led to adoption of Section 301 of the U.S. Trade Act of 1974, which mandates that the USTR pursue a negotiation in formal dispute proceedings for cases covered by GATT/WTO trade agreements (Morrison, 1999). If the USTR accepts the petition and investigates the issue as a Section 301 case, the legislation sets a time schedule with several steps that culminate in either filing a dispute complaint when possible and/or using retaliatory sanctions as the means to bring an end to the trade barrier. Of the twenty-six Section 301 cases initiated from 1995-2002, fifteen led to initiation of a WTO dispute. The focus on the two bilateral forms of resolution indicate the impatience of Congress with longer negotiations or comprehensive talks that submerge individual cases in larger trade policy objectives. Through enactment of such legislation, Congress reduced executive branch discretion for choice of negotiation forum and issues by increasing the pressure to use adjudication options when appropriate.

The EU Trade Barrier Regulation process similarly operates as a mechanism to solicit industry petitions about trade problems with deadlines for government response to their concern. The goal is to help the European Commission identify problems facing Community exporters and encourage foreign governments to change their problematic policy measure. However, whereas Congress closely monitors the Section 301 process, there is little political interference with the TBR, and the Commission has autonomy to decide whether to act on a complaint and to propose the course of action for negotiation (MacLean and Volpi, 2000, 16). In one case, the *Conseil Interprofessionnel du Vin de Bordeaux* filed a complaint on 6 December 2001 under the TBR procedures regarding Canadian practices for the labeling of geographical indications for wines. The Commission report notes that the Canadian policy violates the TRIPS agreement, but cites Community interest to delay further international action (such as a WTO complaint) while negotiating a bilateral agreement with Canada on wine and spirits.¹⁵ Yet in another TBR case related to subsidies granted by the Korean government to its shipbuilding industry, the Commission reported a failure of bilateral talks

¹⁵European Commission Directorate-General for Trade, “Report on an examination under the TBR Regulation – Conseil Interprofessionnel du Vin de Bordeaux (“CIVB”) – Canada.” Ref. 078/03 Brussels, 12 February 2003.

and decision to file a WTO complaint.¹⁶ The European Commission decided to file a WTO complaint in 9 out of 20 TBR cases initiated since 1995.¹⁷

In Japan, the government has more discretion to both select the issues and fora for trade disputes. Lacking any formal process to solicit industry complaints or obligate government action, officials of the Ministry of Economy, Trade, and Industry (METI) can select among the problems brought to their attention by industries, and determine which ones should be pursued. Most industries are not very informed about the WTO adjudication option, so they simply raise their problems in talks with the specific industry bureau, which then forwards the question to the trade policy bureau for consideration of the legal merits. In a few cases, namely the steel industry, the industry has officials who specialize in international affairs and the industry association is able to bear the cost of hiring a U.S. law firm to do the groundwork to present a strong case for filing a WTO complaint.¹⁸ Such strong industry pressure has been critical, and the steel and auto industries have accounted for 10 of the 11 cases that Japan has initiated before the WTO. With only three trade lawyers in the trade bureau at METI, the bureaucracy is so heavily resource constrained that it can only pursue cases with strong industry demand and a solid legal case.¹⁹

For developing countries, economic and legal resources limit the choice of fora. Even when there is potentially a strong legal case, costs inhibit poorer countries from filing a complaint. Least developed countries have not initiated disputes, and the share of disputes initiated by industrial countries relative to those initiated by developing countries is greater than their share of world trade (Delich, 2002, p.76, 79). Even while the Advisory Centre on WTO Law and WTO legal assistance office address this problem, developing countries are likely to be more selective than their more wealthy counterparts when choosing to file a legal complaint. They are even more constrained, however, in negotiation fora outside of the WTO context. They are not included in the G-8 summits and have little means to pressure developed countries in bilateral requests for better market access.

¹⁶The European Commission. “Commission Decision of 8 October 2002 under the provisions of Council Regulation (EC) No 3286/94 concerning trade practices maintained by Korea affecting trade in commercial vessels.” OJ L 281, 19 October 2002, pp. 15-17.

¹⁷<http://europa.eu.int/comm/trade/issues/respectrules/tbr/cases/index.en.htm>.

¹⁸Steel industry official. Interview by author. Tokyo, 6 June 2003.

¹⁹METI official. Interview by author. Tokyo, 5 June 2003.

WTO trade rounds offer developing countries relatively more influence at less cost. The consensus rules theoretically give any one country veto power. By working as a coalition in a comprehensive negotiation such as a trade round, developing countries both share the informational costs of preparing their negotiation positions and broaden the economic weight in support of their demands. Such coordination has been an important part of developing country participation in trade rounds. During the Uruguay Round, developing country pressure was a critical force to uphold momentum for agricultural liberalization. (Ricupero, 1998). More recently during the Seattle ministerial meeting, India led a group of developing countries in the so-called “like minded coalition” to advocate revisions of subsidies and antidumping rules while African nations formed a coalition to demand flexibility on trade-related intellectual property rights. Steinberg (2002) warns that developing countries are still vulnerable to coercive policies of developed countries in the power politics at the end of a trade round. Nevertheless, when considering their options among the different trade policy fora, it is likely that trade rounds are a leading venue for developing countries.

2.3 Diplomatic checks and balances

Few governments completely separate trade policy decisions from broader foreign policy strategy. Allies are more likely to trade with each other and trade sanctions are a frequent tool in disputes over military policies or human rights issues unrelated to trade. Diplomatic concerns influence the choice of negotiation fora because some venues are seen as more antagonistic than others. In particular, filing a legal complaint can be taken as a hostile move. Raising the same issue in the multilateral setting of a trade round is less controversial. Negotiating a bilateral free trade agreement on the other hand can be used to reward allies for their support. The pattern of FTAs pursued by the Bush Administration reflects the focus on helping those who support its Iraq policy.

Governments are attuned to the diplomatic costs of raising a suit against a trade partner. Such considerations are especially likely to become a factor in the government’s choice of negotiation forum for politically sensitive topics. The case of Japanese rice policy has already been mentioned. The U.S. Embassy favored negotiations in the Uruguay Round

over bilateral talks as a way to reduce the political tensions for U.S.-Japan relations. For other cases, a bilateral relationship may be so sensitive that direct trade conflict must be avoided. The historical legacy of Japan's occupation of Korea has made Japan-Korea diplomatic relations sensitive so that Japanese diplomats are reluctant to initiate a WTO dispute against Korean policies for fear of sparking anti-Japanese sentiment. When Japanese industries faced discrimination from a trade diversification scheme of the Korean government that had been in place since the 1980s, the government did not initiate a dispute even when the policy represented a clear GATT violation. Rather, Japanese officials suggested that the OECD should do a study of this policy when Korea was applying for OECD membership. Eventually, this OECD study provided the basis for urging the abolition of the policy as part of Korea's reforms during its recovery from the 1998 financial crisis.²⁰

Most countries have been notably hesitant about bringing a WTO complaint against China. A USTR official commented that sub-cabinet officials endorsed bringing a case against China for its improper administration of tariff-rate quotas and its use of export subsidies on agricultural products, but administration officials were said to decline going forward with a WTO complaint for fear it would hurt the bilateral relationship.²¹ Japan has also chosen bilateral negotiations with China on issues that it could have raised as WTO complaints. For example, China has been charging tariffs higher than its bound tariff rates for certain film products, which is a clear violation of Article II of the GATT. Yet the Japanese government chooses to pursue talks in bilateral channels, and officials admit that Japan will find it difficult to initiate a WTO complaint against China out of consideration for diplomatic concerns and the likelihood that China would retaliate with trade sanctions against any action taken.²²

When the demanding government has concern for the bilateral relationship or more specifically for the political fortunes of the incumbent government of the respondent state, it is more likely to defer sensitive issues to a trade round. As discussed above, the broader

²⁰METI official. Interview by author. Tokyo, 3 June 2003.

²¹*Inside U.S. Trade*, 21 March 2003.

²²METI. "2003 Report on the WTO Consistency of Trade Policies by Major Trading Partners." (Industrial Structure Council: Tokyo, 2003) p. 84; MOFA official. Interview by author. Geneva, 5 May 2003.

scope of the agreement offers political cover for the respondent government to talk about the problem. Reducing the focus on a unilateral demand shields tensions from spilling over to harm the bilateral relationship.

2.4 Examining Cases of Interest Group Influence on Forum Choice

Although it is difficult to measure the influence of interest group pressure on negotiations, a brief overview of several cases indicates the importance of their lobbying on the choice of negotiation forum. The four brief case studies below highlight the involvement of interest groups in the decision process of selecting negotiation strategies. The first two examples about the U.S.-Japan photographic film dispute and the U.S.-EU genetically modified food dispute show how interest group pressure can push a case into the WTO adjudication process even when there is a weak legal case or there are diplomatic concerns. The third example about the U.S.-Japan rice import dispute, on the other hand, shows how strong resistance by interest groups in the respondent state and diplomatic concerns can push a negotiation into a trade round. The final example about digital trade issues illustrates the more complex choices for issues that require new rules.

In a trade dispute between Kodak and Fuji film companies, industry pressure was sufficient to over-ride the tendency to pursue adjudication only for cases where legal victory can be anticipated. Kodak film invested considerable lobbying pressure to show that business practices by Fuji film led to unfair discrimination that prevented Kodak products from being able to increase their market share in Japan. After receiving a petition under Section 301 of U.S. trade law, the USTR initiated an investigation in July 1995. The government considered raising the issue with the Japan Fair Trade Commission, which was the more appropriate jurisdiction for an issue about Japanese competition policies. Kodak found this unacceptable, however, and wanted the government to instead initiate a WTO dispute. Since the issues fundamentally revolved around competition policies that are not covered explicitly in WTO rules, this was not a strong legal case. A former USTR negotiator involved in the Kodak dispute commented that their lawyers said it would be a difficult case to win, but they went ahead with the complaint in response to the industry

pressure.²³ Predictably, the ruling went against the United States.²⁴ A former Senate staff member commented, “it was not a good case, but we can say we argued what they [Kodak] wanted.”²⁵

U.S. negotiations with Europe over EU regulations restricting import of genetically modified (GM) products illustrate the interplay between domestic interest group pressure and choice of negotiating forum. Since 1998, the EU has effectively banned trade of GM foods by refusing to approve any new GM products for import.²⁶ The U.S. interest groups aligned against this policy include both biotech companies such as Monsanto and agricultural producers. In November 2002, 25 U.S. farm organizations requested that the United States should file a complaint to the WTO over the EU ban.²⁷ Corn producers were among those most deeply hurt, and Senate Finance Committee Chairman Chuck Grassley (R-IA) waged an aggressive campaign to push the administration to initiate a WTO dispute. He urged immediate action rather than waiting for progress in the internal EU reform process or the ongoing talks about agriculture in the Doha Round.²⁸ The EU policy is estimated to cost American farmers several hundred million dollars in lost export sales to Europe and risks further losses as other countries follow the European example.²⁹ Resistance on the EU side, however, has been equally strong with a coalition of consumer groups opposed to “Frankenstein foods” and agricultural interests more than happy to see American products excluded from European markets. France has led the opposition.

Concern about sparking another trans-Atlantic trade dispute amidst already tense relations led the U.S. administration to delay initiating a WTO case and continue to engage Europe in bilateral talks. There were also reasons to be skeptical about the utility of bringing a dispute against such strong political opposition in Europe. Few need to be reminded of the beef hormone dispute in which the United States won a panel ruling against the EU

²³Interview by author. Washington, D.C. 6 April 2000.

²⁴World Trade Organization. *Japan – Measures Affecting Consumer Photographic Film and Paper. Report of the Panel.* Report No. WT/DS44/R, 31 March 1998.

²⁵Interview by author. Washington, D.C. 3 April 2000.

²⁶Although the EU has since approved the import of two GM products in 2004, the Commission failed to pass a measure calling on member states to end their moratorium policies on GM imports.

²⁷*The Wall Street Journal*, 25 November 2002.

²⁸*Inside U.S. Trade*, 2 May 2003 and 9 May 2003.

²⁹*The Economist*, 17 May 2003.

policy and implemented sanctions, but still could not bring a change to the policy. Even trade hawks such as Clyde Prestowitz, President of the Economic Strategy Institute, joined diplomats to warn against trying to adjudicate this case given the likelihood of backlash in Europe and consumer resistance to the products.³⁰ Nevertheless, after much delaying, domestic political pressure forced the Bush Administration to initiate a complaint May 13, 2003. Neither side was able to settle such a controversial issue in consultations, and the EU blocked the first U.S. request for a panel August 18th. Taking advantage of the WTO rules that guarantee a panel upon a second request, the United States went forward with the case, which is currently working its way through the adjudication process with a ruling expected later in June 2005.³¹ Politicization and high stakes on both sides left little room for the United States and Europe to reach a bilateral settlement. Unfortunately these same factors that pushed the dispute into the WTO DSU forum will also make a successful resolution more difficult to achieve.

Japan chose to negotiate its most sensitive trade item, rice, in the Uruguay Round as a way to avoid confronting the United States in either a bilateral negotiation or GATT dispute panel. The U.S. Rice Miller's Association had filed Section 301 petitions in 1986 and again in 1988, and it sought a GATT panel on the Japanese rice import ban, which was almost certain to be found in violation of GATT law. Japanese government officials strongly requested that the U.S. government raise its demands about rice market access in the Uruguay Round, and the U.S. State department cautioned that a bilateral negotiation would cause more strain on U.S.-Japan relations. An official from an agricultural interest group said his organization did not oppose the government promise to discuss rice liberalization in the Uruguay Round because his group hoped to get support from France and other countries and thought the talks would go better than if Japan faced the United

³⁰*The New York Times*, 25 January 2003.

³¹In October 2003 – one month after the EU published a draft of new labeling requirements that would seriously constrain U.S. exports of food produced through biotechnology, twenty-five U.S. agribusinesses and the American Farm Bureau Federation submitted a letter to U.S. Trade Representative Robert Zoellick requesting immediate initiation of a WTO dispute (*Inside U.S. Trade*, 28 November 2003). The WTO panel has experienced delays while waiting for an expert group to provide answers to scientific and technical questions (*Inside U.S. Trade*, 12 November 2004).

States alone in bilateral talks (Davis, 2003, 184). Even the strongest groups may not be able to veto all discussion of an issue. Instead, they must push for what they perceive to be the more favorable negotiation forum, which often is the comprehensive trade round with its long schedule and broad agenda.

The possibility for a government to choose the negotiation forum according to the level of expected resistance can be seen in the U.S. approach to digital trade issues. Since this is a new trade area there are not existing WTO commitments and it is not a candidate for WTO dispute settlement. This leaves the bilateral, regional, and WTO trade round as the main options. Digital trade currently faces few trade barriers, so the U.S. goal is to prevent their emergence through strengthening of the intellectual property regime. A coalition of high-tech firms and the motion picture association has pushed forward this trade agenda, while bipartisan support in Congress has urged the government to negotiate agreements to remove barriers to e-commerce in legislation, such as the 1998 Internet Tax Freedom Act (Wunsch-Vincent, 2003, 9). The resistance centers around many WTO members, led by the EU, that are reluctant to liberalize cultural and audiovisual services, and argue that digital products are services rather than goods. The United States has pursued a comprehensive agreement as part of the Doha round, but e-commerce and other issues related to digital trade received only brief mention in the Doha agenda, and talks remain stalled as hard-liners resist compromises on these issues (ibid., 26). The United States has pursued digital trade issues more aggressively through bilateral agreements. The U.S. FTA agreements with Chile and Singapore have embraced parts of the digital trade agenda to freeze existing regulations, which meant granting full market access for new media where no discriminatory regulations currently existed (ibid., 30). Gains in digital trade were cited by the U.S. as a key benefit from the FTA with Australia, as the Australian government agreed after original resistance to include provisions that guarantee it will not restrict internet broadcasting or e-commerce.³² The clear pattern emerges of establishing solid model bilateral agreements, while using the WTO forum to raise the issue with the strongest opponents.

³²*Inside U.S. Trade*, 28 May 2004.

3 Conclusion

Deciding where to negotiate a trade dispute is an increasingly difficult task for negotiators given the range of options. Multiple negotiation fora offer different combinations of institutional features. Each configuration reflects the interests of states at the time they designed the institution. A specific negotiation, however, involves the contingent decisions of two governments that face immediate pressure from their respective interest groups. Along with concern for diplomatic costs, the level of interest group pressure is an important factor that influences state choice of negotiation forum. The political pressures on governments regarding forum choice ensure that the hardest cases are likely to go forward to the formal dispute process. Strong interest group pressure on the demanding side pushes for initiation while strong interest group resistance on the responding side makes it difficult for the other government to reach a settlement in bilateral consultations.

This has important implications for the study of trade negotiations. The GATT/WTO adjudication system has been very effective when considering that the politics of institutional selection tends to place the most difficult cases in this negotiation forum. For the notable failures, such as the EU refusal to comply with the WTO ruling against its ban on hormone treated beef, it is questionable whether a different negotiation forum could have been more effective. Given the strong interest group pressure on both sides, some of these negotiations may simply be too politicized to resolve.

Some have expressed concern that the adjudication process may actually increase conflict (Alter, 2003; Goldstein and Martin, 2000). Certainly, the dispute settlement process acts as a lightning rod to attract controversial disputes. On the export side interest groups are drawn to push their complaints forward to receive the highest level attention as a dispute case while on the importer side protectionist groups mobilize against liberalization. Nevertheless, these same conflicts would otherwise have been addressed in a different trade forum. In bilateral talks there is the risk that lack of progress would lead to festering tension or an outright trade war with unilateral sanctions.

Trade rounds present the opportunity for tradeoffs across issues and less clarity over winners and losers. As such, they are used for both a large number of minor trade issues of little controversy as well as politically sensitive cases. The comprehensive agenda prevents

protectionist interests in the respondent country from vetoing the start of negotiations on the topic. Eventually, the same broad interests apply leverage for compromise agreements. This combination was sufficient during the Uruguay Round to get developing countries to accept the services and intellectual property rights agreements that they had initially opposed and to bring the EU and Japan to accept moderate agricultural reforms. Yet few lobbying groups in the demanding country are eager to have their problem addressed in a trade round if there are other alternatives. Consequently, some cases that might be better left to a trade round instead are negotiated in WTO legal disputes that strain the system.

The multiple venues for trade negotiations offer governments the opportunity to resolve trade problems while taking into consideration the nature of the trade problem and the interest group pressures on both sides. When chosen appropriately, the institutional context provides the necessary leverage and legitimacy to bring a policy change. Bilateral negotiations help to filter out the easier problems that can be settled quickly, while WTO adjudication and trade rounds take on the toughest problems. Frustration with the occasional failures or slow progress of the WTO fora should be tempered with awareness of this dynamic in institutional selection. The danger is that bilateral or regional negotiations will appear more effective, leading policy-makers to put priority on these negotiations to the neglect of the WTO. While the trade gains from resolving disputes quickly through these other fora are important, solving easier disputes with accommodating trade partners does not help with other festering trade problems. On the contrary, if the hardest trade issues with entrenched interests on both sides are left to the last, there will not be any tradeoffs at that time to pressure for compromises.

This paper has addressed a new area for the analysis of institutional selection. If we are to understand the effectiveness of institutions, we must also consider what factors influence the decision to use an institutional forum for a particular problem. Doing so requires attention to interest group pressure, government priorities and policy process, and strategic interaction between states. In the area of trade policy, I have argued that these factors create a selection effect to encourage more difficult problems going to WTO negotiation fora. More research is necessary, however, to test the claims on a wide range of economic negotiations. There are also opportunities to examine the selection process in other areas

where overlapping institutions present states with multiple options for negotiating policy problems. Given that governments are consciously pushing forward policy agendas on multiple fronts, more research should engage in comparative institutional analysis.

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