

# **How to Negotiate Over Trade: A Summary of New Research for Developing Countries**

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# How to Negotiate Over Trade: A Summary of New Research for Developing Countries



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Developing country governments negotiate with other governments frequently over trade issues. Most developing countries are now members of the World Trade Organization and many of the rest are negotiating to join it. In the Doha Development Agenda, members find themselves facing multilateral talks of daunting complexity. The issues range from established ones such as market access, to the revision of WTO rules on antidumping, subsidies, and dispute settlement, to controversies over proposed new rules on investment and competition policies. Sometimes governments also negotiate to settle legal disputes about members' compliance with existing rules. Many are simultaneously negotiating new regional and bilateral pacts as well.

During the late 1990s it was widely agreed that many developing countries still needed to improve their capacity to participate effectively in trade negotiations. Publications and training programs were designed to familiarize new negotiators with the multilateral rules and economic issues raised by negotiating proposals. But generally lacking were writings concerning the process of negotiating itself--how to play the game effectively and avoid recognized pitfalls. Developing country negotiators rarely have the time and liberty to publish lessons they have learned from experience. Professional scholars who specialize in studying the international negotiation process (as distinct from the issues on the table) have under-represented the developing countries, as a rule.

In 2003 a group of scholars from developed and developing countries launched a new research project to address this gap. They presented preliminary findings at a conference at UNCTAD's Palais des Nations in Geneva on 6-7 November 2003. Veteran negotiators and academics offered reactions and suggestions for improving the papers. The eight studies and an introduction will eventually be published in revised form as a book edited by John Odell. The latest drafts of the complete papers can be found at the web pages of the Geneva International Academic Network (<http://www.ruig-gian.org/conf/conferences.htm>) and the Economic Negotiations Network (<http://www.usc.edu/enn>). The Network web page will put you in touch with other research on international economic negotiations.

This shorter report telegraphs an advance summary of these studies' lessons for developing country leaders and negotiators. Section I gives an overview of the project and explains terms used throughout; section II provides a summary of each paper with its lessons; for convenience section III collects in one place an analytical summary of all the lessons.

In order to even collect evidence about what occurs----negotiations after all are generally closed to outsiders--we selected a few recent cases, conducted a thorough investigation and analysis of these few (presented in the book), and thus had to leave many possible events and insights unexplored. We hope our selective conclusions are better grounded as a result of this depth and care.

This initiative and its results come from the academic world, and no government or international organization should be held responsible for this report's contents. At the same time we are most grateful for generous help from several sources. The University of Southern California's Center for International Studies made possible a workshop at which

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## **I. DEVELOPING COUNTRIES AND THE TRADE NEGOTIATION PROCESS**

Developing countries have become far more active in multilateral and bilateral trade negotiations in recent years, yet negotiation scholarship has not kept up. What happens inside these negotiations and what difference does it make? What determines the outcomes? Do strategies of developing country negotiators make any difference, considering the power disparities they face? Is it possible to generalize about this complex international process and draw useful lessons?

We often read about a shortage of communication between practitioners of international relations and academics, at least political scientists. Our group of political scientists took up that challenge. One of our goals is to add to the body of empirically grounded scholarship on the economic negotiation process that is available to support the world of practice.

The unifying theme of the project is that the content of developing countries' international trade agreements varies with the process of negotiation that produces them. This overview summarizes how we develop this theme. By the *international negotiation process* we mean a sequence of actions in which two or more governments address

demands and proposals to each other for the ostensible purpose of reaching an agreement and changing the behavior of at least one party. The central feature is the behavior of official negotiators and mediators. But trade negotiations may also involve more than government officials; they interact with markets, constituents, and sometimes international officials, mediators and non-state actors.

The outcomes of international economic negotiations are of course affected by factors other than the negotiation process, such as technological change, market trends, power structures, international rules, and domestic institutions. But our premise is that such factors do not pre-determine any official outcome completely. They leave significant space in which choices by delegations, including those from developing countries, tip their collective outcomes toward impasse or agreement and shape the distribution of costs and benefits. We attempt to offer something distinctive by exploring this space, by zeroing in on what negotiators and consensus builders do and could do, rather than abstracting from their choices and behavior as much political economy research has done.

We analyze two types of trade negotiation here: multilateral negotiations that often involve writing common rules—such as the Uruguay Round, the Doha Development Agenda, and creation of regional agreements—and negotiations to settle disputes under existing rules. When WTO members file legal complaints attempting to achieve fuller compliance, they often engage in settlement negotiations with the defending states simultaneously. In fact most disputes brought legally under the GATT and WTO have been settled by negotiation before the adjudication process has run its full course.<sup>1</sup>

The next section sets the scene by highlighting major changes in the participation of developing countries in trade negotiations in recent years. The following section introduces key analytical terms that appear throughout and help integrate the studies. Finally, our specific contributions are summarized.

### **1.1 Growing participation of developing countries in trade negotiations**

After 1990 developing country participation in dispute settlement talks increased, and their participation in multilateral trade negotiations exploded. During and after the Uruguay Round (1986-1994) more developing countries shifted their policies toward reliance on international markets for development. After establishment of the World Trade Organization (WTO) in 1995, many countries established or reinforced their missions in Geneva. Most notably in 1999, during preparations for the WTO's Seattle ministerial conference, developing countries voiced their concerns and injected dozens of formal proposals into the negotiation process. This participation explosion drew in many smaller trading countries that had been largely passive or not signatories at all prior to 1994. Many increased their investment in training their officials for international commercial negotiations, with the help of UNCTAD, the WTO and regional organizations. Many formed or joined bargaining coalitions to defend common negotiating positions through direct coordination. Almost every member state sent its minister to Seattle and again to Doha in 2001 and Cancún in 2003. These events and developing countries' role in them became front-page news worldwide.

Newer organizations are now part of the negotiator's context as well. The South Centre and the Agency for International Trade Information and Cooperation are intergovernmental organizations created to support developing countries in trade negotiations. Non-governmental organizations have become quite active not only in public protests but also behind the scenes in some cases, supplying applied analysis and proposals to developing country delegations. One of our studies documents such a case.

Meanwhile, developing countries are also parties to legal disputes, and each of those disputes creates an occasion for a possible settlement negotiation. Sometimes a developing country initiates the complaint; two of our studies illuminate what happens in such cases. More often, however, a developing country has been targeted as a defendant, and the share of cases targeting developing countries rose to 37 percent during 1995 through 2000, compared with 8 percent during the period 1948 through 1994.<sup>2</sup>

Simultaneously, developing country governments were also busy negotiating over trade inside their regions. The present project concentrates on WTO negotiations but does include one paper on the negotiation of NAFTA.

## **1.2 Main questions**

We concentrate on two general questions. The first is what determines the outcome of a trade negotiation involving developing countries. Any outcome has two dimensions--whether the process ends in deadlock or agreement, and which parties receive which gains and losses. Practical versions of this question could be "What strategies are available?" and "How can we gain more or lose less in future negotiations"? Most of our studies concentrate on this question about outcomes. Assuming one influence on the outcome is the process of negotiation, a second logical question then is, "What shapes the negotiation process?" Practical versions of this question might ask, "How can we use international rules or the mass media to shape others' strategies or responses to our moves?" "Could changes in our domestic institutions permit us to use a wider range of external strategies?" Some of our studies concentrate on explaining some aspect of the negotiation process. All these studies are tied together by use of a common set of concepts drawn from the negotiation analysis literature, particularly as represented in John Odell's book *Negotiating the World Economy*.

## **1.3 Elements of the negotiation process**

The actions negotiators take toward one another are central to the process. Any negotiator can benefit from having in mind a menu of things he or she can do in any negotiation. Sometimes these courses of action are called negotiating strategies. But the meaning of *strategy* often shifts according to the goal sought. Without some uniformity of meaning, it is difficult to compare multiple attempts to use the same strategy and thus learn the conditions when it is likely to be more and less successful. For us *strategy* means a set of behaviors or tactics that are observable in principle and associated with a plan to achieve



some objective through bargaining. Suppose the menu looks like a set of points along a continuum running between two polar ideal types, which we call distributive and integrative strategy. On one end, a *purely distributive strategy* is a set of tactics that are useful when basic aims of the parties are purely in conflict. These tactics include opening with high demands, refusing all concessions, exaggerating one's minimum needs and true priorities, manipulating information to others' disadvantage, taking others' issues hostage, worsening their alternative to agreement, filing a legal complaint, making threats, and actually imposing penalties. A defensive distributive strategy consists of analogous behaviors to offset these and protect as much as possible against losing value. Distributive strategy is not restricted by definition to the most powerful. When a weaker state asks others for benefits and refuses to grant any negotiating gain to others, it is attempting a strict distributive strategy. This strategy can also include the tactical retreat—agreeing to accept less than demanded earlier or give up more than conceded earlier. A purely distributive strategy runs the risks of discouraging the discovery of opportunities for mutual gains and of provoking deadlocks and conflict.

At the other end of the spectrum, a *purely integrative strategy* is a set of tactics instrumental to the attainment of goals that are not in fundamental conflict and hence can be integrated for mutual gain to some degree. One subset of these tactics involves sharing information relatively openly to explore common problems or threats in a search for mutual gain solutions. A different type of integrative move is proposing an exchange of concessions or fallbacks that might benefit more than one party (as distinct from demanding a concession without compensation). Legislative logrolling is a well-known example. In WTO talks, proposing a formula for cutting all tariffs including those of the speaker's state embodies such an exchange of concessions. A third subset of integrative tactics involves reframing the issue space itself in a way that eases impasses. These are behaviors for gaining (through cooperation with others), not ways of giving up value to others. Simply yielding concessions under pressure without any compensation is part of a process of shifting value from one to another rather than creating gain for both. But integrative tactics, used exclusively, will also expose the party to at least some risk that others will try to exploit its relative openness.

Experienced negotiators often attempt to overcome the risks of each pure type by blending tactics into a mix. Tactical elements from the two ends of the continuum may be mixed either simultaneously or sequentially. Thus the conceptual spectrum runs from purely distributive, to mixed-distributive including a minority of integrative elements, to balanced, to mixed-integrative. Purely integrative strategy is difficult to find in international negotiations. Appendix A provides more detailed rules for classifying observed behavior along this spectrum.

This menu refers to only one party's actions; it does not assume other parties will necessarily match its strategy. To describe a party's strategy is also not to make a claim about whether it succeeded; it describes an attempt. Nor does it amount to a judgment that the strategy was good or bad. The typology only aims to describe the observed negotiating behavior. The same strategy could be judged preferable in some circumstances and inferior in others.<sup>3</sup>

A party's *reservation value* is the value of the worst deal that party would prefer to accept. If offered less, it would prefer no agreement with the other party. For example, if Washington threatens to impose antidumping duties on exports from another country and engages in settlement negotiations, the U.S. reservation value is the set of concessions that would be barely sufficient to induce Washington to settle and not impose the duties. The exporting state likewise has a reservation value, the maximum concession it would honestly prefer to make, relative to walking away from the talks without agreement. Of course the rational negotiator has an incentive to conceal or misrepresent his or her reservation value. Objective indicators can be used to estimate another government's value, but such objective estimates can only be approximate. What makes the greatest difference to the other delegation's behavior is what that delegation *perceives* as its maximum or minimum.

In fact, the subjective aspects of the negotiation process are central more generally, making the practice of negotiation an art as well as a science. We assume all players are rational but only boundedly so. None of them, including those from developed countries, has complete and perfect information about other sides' preferences and plans. None has the time or capability to calculate the value and probability of every possible scenario that might play out in the future, nor to choose a true optimum course of action. This inherent uncertainty creates space in which delegations' choices during the talks can tip the process in one direction more than another—agreement in Doha, impasse in Cancún—even in the presence of well-known constraints of domestic veto groups, national economic interests, and WTO rules.

Four of our papers attempt to study the subjective dimensions. A major part of many negotiations is a contest among partisans to establish the dominant subjective *frame* of reference. A common tactic for gaining concessions is to attempt to frame the issues by offering a reference point favorable to the negotiators' own side. For example, is the WTO TRIPS agreement to be judged as a means of promoting research on new pharmaceuticals, or as a possible barrier to saving the lives of people fighting HIV/AIDS? The tactical goal is to persuade others to evaluate rivals' positions or proposed deals in light of this reference point rather than alternative frames. We investigate when such framing attempts will succeed and when they will fail. Another subjective dimension is the credibility of threats and promises. For instance, when a WTO delegation threatens to block consensus, the effect of the threat will depend naturally on whether others believe the threat. We investigate what makes threats by developing countries or coalitions more and less credible.

Coalition formation is another common element of multiparty negotiations, yet analysis of developing country coalition attempts has only just begun to appear in print. For us, a *coalition* is a set of governments that defend a common position in a negotiation by explicit coordination. We would not include in this category a set of states that happen to act in parallel without explicit coordination, or a set of delegations that exchange information and meet to seek compromises but do not defend a common position. For us, a trade coalition may be defined according to a common product interest or a common ideology. Some WTO coalitions are relatively informal and short-lived while others last longer and have a name and a regular schedule of meetings. Thus a complex multilateral strategy may include tactics for forming and unifying coalitions, for splitting rival coalitions, and defending against efforts by outsiders to break one's own. Two of our

studies draw lessons from developing country coalitions' efforts in recent multilateral talks, and two illustrate coalitions in dispute settlement talks.

Any international negotiation process takes place in a *context*, meaning aspects of the situation that are normally beyond the influence of trade diplomats, at least in the short term, and are taken as given. The context includes the cultures of the states involved; their military-security situations; relevant domestic political institutions; and relevant international institutions. This project generally abstracts from possible context variations in order to concentrate on process variations. As exceptions, two of our studies look at what changes in negotiations when the GATT/WTO context changes.<sup>4</sup>

The *outcome* of an international negotiation is either an impasse or an agreement between governments. The outcome refers to the terms of the official agreements themselves rather than what states gain through trade later. The value of an outcome to a government varies by degrees rather than simply between success and failure. Gains and losses are almost impossible to measure precisely, however, even in trade. Some negotiations end with agreement on an agenda for another negotiation, so that the ultimate value of a gain in agenda formation--keeping an item out or getting one in--depends on later events. Some outcomes take the form of changes in international rules, and efforts to forecast their effects carry inherent uncertainty. Some final gains and losses are intangible. We classify and compare outcomes qualitatively.

Any notion of gain or loss implies some reference point. In the studies summarized here the primary reference point is the status quo before negotiations. In the end, was the country or coalition better off or worse off than before, and how much so? In several studies, two outcomes are compared with one another. What counts as a gain for a country is defined in light of the objectives of the country's government rather than the authors' personal values.

The common theme of these papers is that developing countries' trade agreements are not fully determined by conditions in the negotiators' environment such as fixed national preferences, power distributions, and WTO rules. They also depend on how developing country governments and others negotiate. Most papers assume the GATT or WTO is given and fixed in order to isolate process variations within the organization. But two papers examine what difference it makes to bilateral negotiations when the organizational context changes, when for example a developing country moves inside as a WTO member, or when the rules change to enable a new negotiating tactic for members.

## **II. LESSONS FROM EIGHT NEW STUDIES**

In this section, we present a brief summary of each paper with the main lessons for trade negotiators. The studies are presented in the following order:

- a) Multilateral negotiations during the Uruguay Round; multilateral negotiations from the end of the Uruguay Round through the Doha ministerial conference of November 2001, and a 2003 simulation exercise

on learning in multilateral trade negotiations

- b) Regional negotiations toward a new treaty
- c) Negotiations under WTO dispute settlement proceedings

These studies yield insights regarding three common tasks facing the trade negotiator and his or her chief executive: choosing an external negotiation strategy, dealing with domestic politics, and correcting for individual biases. Some papers yield additional lessons as well.

## **2.1 Multilateral Negotiations**

### **2.1.1 Wiggle Rooms: New Issues and North-South Negotiations During the Uruguay Round**

**J. P. SINGH**

Are developing countries marginalized in the formation of global rules governing new issues such as services and intellectual property rights? Why do they make fewer concessions, or gain more, in a few issue areas than in others? When these issues were first included in multilateral negotiations during the Uruguay Round (1986-94), they were met with collective resistance from the developing world. This study compares the negotiations of two Uruguay Round agreements, the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Intellectual Property Rights (TRIPS), to ascertain why developing countries made fewer concessions in GATS than TRIPS.

These cases are instructive for developing countries' negotiations in general: if developing countries make fewer concessions or effect gains in new issue areas where they are believed to be at a disadvantage, then surely they can gain more in other issue areas where they possess negotiation advantages, or they can be better prepared to cut their losses in areas where they do not possess an advantage. Second, the Uruguay Round was the first multilateral trade round to effectively include developing countries. Until then, developing countries were included only at the end of every multilateral round in what amounted to a take-it-or-leave-it option from the North to the South. In the Uruguay Round they finally made their weight felt; they chaired negotiating groups, forwarded detailed proposals, influenced agendas, formed coalitions, and influenced outcomes. Their strengths and weaknesses here can then speak to current and future trade negotiations.

This study identifies ways developing countries can make gains if developed countries are not unified in their stance. Negotiations, particularly multilateral ones, allow developing countries wiggle room. This space between power structures in favor of the North and possible final negotiation outcomes allows developing countries some room to practice negotiation tactics such as agenda-setting and coalition building to either effect gains or make fewer concessions to the North. Secondly, divisions in domestic constituencies in the North or South expand the set of agreeable alternatives available to negotiators.

## Main Lessons

### Negotiation strategies

#### *Agenda-setting*

- *Delay accepting agendas imposed by the North only if you are reasonably sure that the domestic interests of countries pushing the agenda will not become more united over time.* It is difficult to know when to accept an agenda, but knowing the profile of domestic interests in the developed country can be helpful. During the Uruguay Round, delays in accepting the intellectual property (IP) agenda allowed the monolithic Northern IP coalition to emerge, identified in this study as the delayed agenda effect. Developing countries remained absorbed in opposing the agenda and also failed to exploit any differences, admittedly minor, among developed countries in their positions at the beginning of the Round. The developing countries could have done better by gauging the weight of domestic interests in the North more carefully.
- *In order to influence agendas, offer technical proposals rather than simply reacting to others, and attempt to form a coalition with a Quad member.* In services, participation in GNS (Group of Negotiations on Services) meetings and forming coalitions with the EC allowed the developing world to effect a few concessions. The tailoring feature of the GATS agreement allows for positive and negative lists for making commitments. This gain resulted from a clear counter-proposal with support from the EC as well as a group of influential developing countries (Brazil, India, and Egypt). In IP negotiations, on the other hand, developing countries did not articulate a counter-agenda or a frame apart from opposing North's agenda on the inclusion of intellectual property.
- *Watch out for agendas that may sneak up on you:* Multilateral negotiations are complex exercises and participants, both from developed and developing countries, may not realize the full implications of the agenda they are endorsing. For example, French policymakers insist that they did not realize until 1990 that audio-visual or cultural industry services/goods were to be negotiated as part of the first few sectors to be negotiated during GATS negotiations. These negotiations, along with agriculture, almost pulled the Uruguay Round apart in late 1993. Consequently, at the Doha Round the EU has steadfastly refused to negotiate on audio-visual issues. Similarly, developing countries did not realize that the North's IP agenda was so expansive; they thought in 1986 that it would be limited to trade in counterfeit goods. Here, a look at the domestic interests pushing the IP agenda, especially in the United States, might have served as a note of caution for them.

### *Coalitions*

- *Consider joining or forming a coalition of countries that share similar commercial interests in the issue. Support by a Quad member is especially potent.* Of course if policy preferences differ, adding this member would raise risks that the coalition would fragment or become dominated by that member's preferences. Many of the gains made by developing countries in the outcomes for services and intellectual property resulted from issue-based coalitions. The case of positive and negative lists in GATS in services is instructive. In intellectual property negotiations too, gains on phase-ins and limited compulsory licensing for emergency use came from issue-based coalitions and technical expertise. On the compulsory licensing issue, India was backed by Canada, the EC, and Japan, thus isolating the U.S. Since then, many developing country governments have learned this lesson well. The 2001 Public Health Declaration built on the compulsory licensing provisions negotiated during the Uruguay Round under Article 31 of TRIPS. Many issue-based coalitions are at work in the Doha round.
- *If two extreme positions dominate the talks, consider forming a coalition of states with moderate positions to break a deadlock by offering a moderate proposal as an alternative.* Two extreme positions framed the talks on services prior to September 1986. The so-called café au lait coalition made such a proposal, which helped break the deadlock and launch the round using the notion of services on a separate but parallel track. The later proposal to use both positive and negative lists for services liberalization is another example. In many circumstances, though, moderate groups are unable to prevail. Sometimes an extreme coalition, usually Quad powers, makes them defect to their side. But particularly if moderate groups divide the North, then the outcome moves toward developing country interests or away from extreme positions outlined by the North.

### **Domestic Politics**

- *Know thy adversary's domestic politics to better predict its external strategy and response.* Domestic constituencies place pressure on negotiators and these pressures can change in scope and intensity during negotiations. As mentioned already, knowing these details can result in huge gains or limit losses. At the beginning of the round, developing countries lost a great deal for not knowing the strength of business interests backing intellectual property negotiations in the North. Later, in contrast, India's initial draft of TRIPS Article 31 reflected knowledge of provisions in U.S. domestic law on compulsory licensing that allowed for government procurement. India argued that the same provisions must be allowed for commercial use, and it was supported by three other Quad members. U.S. wanted separate lists for government versus commercial use.

## **2.1.2 Democratic Consolidation and Multilateral Trade Negotiation Strategies: Korean Negotiators at the Uruguay Round**

**JONGRYN MO**

This study focuses on how the government negotiator's choice of external bargaining strategy is constrained by domestic institutions and politics. An inefficient domestic system for aggregating interests and coordinating policies will, for example, bias the external strategy toward an inflexible distributive one. This point is illustrated by analyzing the Republic of Korea's strategy during the Uruguay Round, when the agricultural sector was able to exercise a veto and Korea's negotiators were highly defensive abroad.

Adopting certain bureaucratic institutions and domestic leadership tactics will tend to mobilize pro-trade constituencies to offset domestic veto groups, thereby permitting the government to adopt a more mixed external strategy that can realize larger net gains for the country as a whole.

### **Main Lessons**

#### **Domestic Politics**

- *Generate news at home about possible gains on issues other than those on which the country has a defensive position.* In Korea preoccupation with agriculture has precluded opportunities for cross-issue linkage. More news about possible gains available on other issues will sensitize citizens to the costs to the country of refusing to compromise on issues like agriculture, and give negotiators more support for trading farm concessions for gains on other issues.
- *Attempt to frame domestic debate around a general goal expressed as a numerical yardstick--such as farmers' income or commodity prices in this case--rather than focusing on defending a particular negotiating position as an end in itself.* During the Uruguay Round farmers' rallying cry was to "stop the introduction of a tariffication system for rice imports." Protectionists have often tried to obstruct coordination and mediation by committing themselves to the defense of one symbolic protectionist measure. Expressing a target in more general numerical yardsticks gives the chief negotiator greater flexibility to employ a variety of policy instruments to meet the target.
- *Provide the public reliable information about internal policy debates in other defensive countries.* Korean protectionists have often exaggerated the resolve of the EU and Japan to resist market access pressure, in order to increase Korean support for their defensive distributive strategy.
- *The president or prime minister should delegate authority for coordinating*

*the countries trade negotiating strategy to a professional economic agency with a strong reputation for impartiality.* Korean politics has often been described as the politics of vortex, referring to strong centrifugal forces. As a result, the government has relied too much on the president as the final arbiter of inter-ministerial disputes, which has allowed the agriculture ministry to exercise a veto.

- *To make policy coordination more efficient, the chief executive or his delegate should give clear direction from the beginning and intervene during the talks as needed to enforce this vision, rather than waiting until the end of the talks.* In Korea, the president is always expected to intervene in the last stage of policymaking, but this practice makes the domestic process less efficient.
- *The sooner the chief negotiator initiates open debate on compensation for sectors likely to lose protection, the better prepared the stakeholders will be for market opening and the better the compensation package he or she can offer in case of market opening.* In Korea, it has been a common practice to put together a compensation package to buy off protectionists but hastily at the last minute after giving in to international pressure. During the Uruguay Round, the government avoided the topic of compensation because the protectionists might interpret it as the government accepting the possibility of market opening.
- *The power of veto groups, and hence the distributive tendency of a negotiation strategy, will be greatest under a democratizing regime.* During the transitional period between authoritarian rule and mature democracy, effective policy coordination is especially difficult. Old ways of imposing order are no longer respected. In Korea, Confucian political culture emphasizing hierarchy and respect for authority retarded the development of a culture of negotiation and compromise necessary for efficient policy making under democracy. As Korean democracy consolidates, there are signs that the influence of this sector on external strategy is weakening.

### **2.1.3 Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health**

**JOHN S. ODELL AND SUSAN K. SELL**

The process leading to the 2001 Doha Declaration on TRIPS and Public Health offers several important lessons that could be useful in future negotiations. This outcome was a significant gain for a coalition of developing countries, which was surprising in light of opposition from powerful countries and multinational firms. To be sure, this gain was a limited one, there were special circumstances, and 2001 was not the end of the story. But how and why was this significant gain achieved?



## Main Lessons for Coalitions

### Negotiation strategies

- *When seeking to claim tangible value from others or defend against their claiming attempts, form an issue-based coalition and make it as large as possible up to the point at which the fragmentation problem (discussed below) becomes unmanageable.* In the WTO decisions are made by consensus. Forming a coalition is one means of increasing the credibility of a threat to block consensus, and all else being equal, credibility will rise with numbers. In this case the African Group decided to lead a coalition that grew to 60 member states. The gain certainly would not have been realized if they had not formed this coalition, and a much smaller one would have been easier to dismiss.
- *Design the coalition from the outset to reduce vulnerability to fragmentation. When faced with splitting tactics by others, use side payments and active diplomacy among coalition members to maintain unity.* Collective action always faces the danger that self-interested coalition members will renege and take a free ride on others' efforts. Non-members may also take steps to divide and rule. The TRIPS/health coalition included only states that shared a common preference on this narrow issue, rather than expanding to an even larger group with less preference homogeneity, such as the Group of 77. Still, homogeneity is never perfect. And up to the last minute, the United States tempted subsets of members with two offers of separate, lesser payoffs that would have weakened the group. Some members worked quickly and vigorously in private in Doha to persuade others that their interests would be served better by rejecting these offers, and this coalition remained unified. Otherwise they would have gained less.
- *Consider using a mixed-distributive strategy rather than a purely distributive one.* The TRIPS/health coalition initiated its own technical proposal demanding a clear ministerial declaration that nothing in the TRIPS agreement could prevent a member state from taking measures necessary to protect public health. The coalition's proposal also included a list of more specific, and in some cases more ambitious, related demands. At a decisive moment during the Geneva preparations, the coalition's leader threatened to block the entire Doha round if their key proposal were not sent to the ministers. These are distributive elements. But this coalition also mixed in integrative elements during the endgame. In Doha after the United States fell back and accepted their draft as the basis for final talks, the coalition decided to reciprocate by falling back from some of its more ambitious demands, in order to close a deal and capture a limited gain. A strict distributive strategy, refusing any such falling back and threatening to block unless more were conceded, probably would have provoked the United States to walk away

from any deal, despite some public opinion costs to the Bush administration.

- *As part of a strategy to claim value from others, attempt to frame the discussion by proposing a reference point favorable to your own position.* In this case, NGOs and developing country governments attempted to reframe what had been considered to be a trade issue as a public health issue. They attempted to shift the question from “should the WTO allow piracy of intellectual property?” to “should the WTO block help to innocent people fighting fatal infectious diseases like AIDS?” Other attempts at reframing have been less successful and some special circumstances probably helped this coalition. Most obviously, advocates here pointed to the horrifying HIV/AIDS pandemic to generate support for affirming and possibly widening an exception to TRIPS rules. Other research has found more generally that policy framing that emphasizes bodily harm to innocents is more likely to be persuasive politically. Still, even though it may be difficult to dramatize many trade issues to the same degree, the differences may be of degree rather than kind. In 2003, for instance, four African states and NGOs achieved considerable public sympathy in the north (though not yet an official agreement) with a campaign to denounce northern cotton subsidies. In any case, external factors like the HIV/AIDS pandemic do not produce trade negotiation gains by themselves. They affect the process only when advocates and negotiators transform such external factors into negotiating currency.
- *Consider whether nongovernmental organizations have similar preferences on the issue and whether coordination with them could help influence public opinion and other governments.* Northern NGOs played a major role in bringing this new TRIPS frame to the attention of northern mass media and publics. This publicity and editorial comment raised the costs to industrialized countries’ negotiators of refusing to respond to developing country demands. Today Southern NGOs are also becoming increasingly active as advocates.
- *Framing works best when advocates graft a new policy item or perspective onto an existing policy frame.* This campaign sought to have ministers reaffirm, for public health, an exception to property rights that was already written in TRIPS article 31 (and many national laws), but which was being challenged in practice. An attempt to reverse a settled rule or norm of the trade regime would face greater resistance.
- *The purpose of the Doha meeting was to launch a round and set its agenda.* Attempting to reframe issues and squeeze gains out of the powerful at the end of a round, after most of the negotiating has been completed, might be more difficult.

## **2.1.4 The Strict Distributive Strategy for a Bargaining Coalition: The Like Minded Group and the World Trade Organization**

**AMRITA NARLIKAR AND JOHN S. ODELL**

In contrast to the previous case, the Like Minded Group of countries illustrated the strict distributive strategy in WTO negotiations from 1998 through the Doha ministerial conference of November 9-13, 2001. This coalition put forward a number of detailed proposals that would have shifted value from North to South and denied any negotiating gain to the North until the North had first granted the group's demands. They did not mix integrative elements into their strategy. Some might ask whether this group really ever intended to negotiate as a unit, but our research indicates that at that time this was indeed a goal, certainly for some of its members. Despite a great deal of organized professional effort in Geneva, however, the group sustained a major loss and collected relatively small gains especially on its leading issue compared with the status quo by the time of the Doha conference. What can be learned from this experience?

We conclude that the strategy chosen by the LMG helps explain this disappointing outcome. For a developing country coalition the strict distributive strategy is likely to gain less than a mixed strategy, under common conditions. The purely distributive strategy carries two risks--no deal and fragmentation with loss. One condition for gaining with this strategy is credibility, which depends on unity. If a coalition makes a credible threat to block and remains united, the strategy will tend to shift the potential settlement point in its direction and result either in agreement with gains or—the first risk--no deal at all if its preferred point is more than the other side can accept. Second, the strategy may also encourage outsiders to try to divide the members and undermine their credibility. If coalition members do fragment along the way, they probably would have been better off to have used a mixed strategy.

The present case illustrates the second risk. The LMG fragmented in the last weeks. Their tangible gains as of November 2001 on their signature issue—implementation of the Uruguay round agreements—were “almost a bare cupboard,” as one LMG negotiator put it. Meanwhile they suffered what was for them a major loss—the launch of a new round without first rebalancing the last round's outcome. The coalition could rightly point to certain other gains from this period, but the evidence suggests these were mostly less tangible or due partly to causes other than LMG efforts.

### **Main Lessons for Coalitions**

#### **Negotiation strategies**

- *Before forming a coalition, spend time on a diagnosis and planning phase and attempt to set the coalition's goals, membership, and negotiating strategy simultaneously so they will be consistent. Is the goal only to raise consciousness, or to claim value from other parties and defend against their claiming attempts, or also to create mutual gains through negotiation?*

Choose members accordingly. Any distributive strategy, even if it succeeds on a given issue, runs the risk of contradicting the latter goal, by discouraging others from attempting mutual-gains tactics. The LMG strategy may have incurred some of this cost. Admittedly it is a challenge to make all these decisions at the same time. Some delegations may hesitate to make commitments until they see evidence the coalition will last.

- *When evaluating the strict distributive strategy in a particular situation, assess the two risks.* If we state our demands and refuse all compromise, what are the odds others will refuse to compromise and we will get no deal at all? What is their true reservation value, and how credible will be our threat to block on these grounds? If others privately need an agreement badly enough to meet our demands (that is, if their refusals are bluffs), and if we can convince them we are not bluffing (that we will not split and will not fall back from our demands), this strategy may yield the greatest gains. Otherwise a mixed strategy permitting at least exchanges of concessions is recommended.
- *Select the coalition's membership to enhance the credibility of its threat to block and its resilience to fragmentation.* LMG founders defined its membership as those willing to work together publicly on behalf of the principle that many Uruguay round agreements were unfair to developing countries and must be renegotiated in their favor before any new round could be launched. This coalition turned out to be a fairly small number of countries that, even so, was heterogeneous as to commercial interests, levels of development, and market size. This combination of features—a highly ambitious goal (renegotiating much of the Uruguay round), a small and heterogeneous coalition, and an inflexible strategy—evidently lacked sufficient credibility to prevent fragmentation. The strategy encouraged the Quad to offer separate payoffs to buy individual LMG members' acquiescence in the round's launch. Several members decided to defect; as some defected others faced a growing incentive to follow suit; by 14 November, India stood alone in the vanguard of resistance.
- *One alternative would be to define a coalition's membership according to a less ambitious goal or a principle that is more consistent with the regime's established norms.* Attempting to reframe only the interpretation of a single existing agreement (like TRIPS and health), or to frame understandings of new issues not yet covered by an agreement, is more likely to succeed than attempting to sell the need to reopen a large, complex, package of agreements already ratified by many parliaments.
- *Another option would be to form a coalition limited to a narrower issue or issue-area--like the Trips/health coalition, the enemies of antidumping, and the Cairns group.* The record of issue-based coalitions, however, is also mixed; they have shown themselves to be fraught with other kinds of problems (see Narlikar 2003).

- *Another alternative--whatever the coalition's membership--is to choose a mixed distributive strategy.* Add some less essential demands to the coalition's initial position with the intention of dropping them later in return for concessions by others. The LMG's particular defining principle made it difficult for this coalition to use a mixed strategy, which proved more beneficial for other 2001 coalitions such as the African-Caribbean-Pacific states and the TRIPS group. LMG delegates felt that to pay for new gains by falling back on even one of the demands would have been to renege on their defining principle. This made them reluctant as a group to exchange concessions in the endgame to capture more tangible gains.
- To help implement a mixed strategy, discuss in advance the coalition's priorities among specific demands and *consider agreeing on possible concessions to make if necessary to reach a deal.* The LMG never discussed what they would do if their joint proposals were not accepted and had no fallback positions.
- *When attempts are made to split the coalition, counter them with concessions by some coalition members to other members contemplating defection, or lacking resources for side payments, counter with diplomatic efforts to persuade the latter to reject outside offers and threats.*

### **2.1.5 Learning in Multilateral Trade Negotiations: Some Results from Simulation for Developing Countries** **CÉDRIC DUPONT, STÉPHANIE PÉZARD, AND COSIMO BEVERELLI**

The paper concentrates on the subjective plane in the international negotiation process. How information is transmitted and interpreted can have an important influence on the bargaining outcome. Yet there are still many gaps in our understanding of the uses individuals make of information, particularly of changing information in a context of uncertainty, and most especially regarding developing countries. Most experimental research has been limited to individuals in developed countries. For this study, simulation exercises were conducted between December 2002 and June 2003 by the WTO Training Institute for participants from the developing world. Officials were organized into four country delegations negotiating over tariffs and subsidies, and played roles representing those found in actual WTO talks. Two major sets of questions were addressed: 1. What do delegates learn during the negotiation process? Is there any evidence that dealing with partners has changed their initial understanding of the bargaining situation? 2. How are the initial information and knowledge updated and translated into new beliefs and tactics? Do negotiators follow some pre-established cognitive rules of thumb, or do they simply react intuitively to the tactics adopted by other teams? To what extent is learning harmed by a lack of truthfulness or trust on the part of others?

The first major finding is that trade negotiators learn progressively about one another's reservation values and the bounds of a zone of agreement (the range of all outcomes acceptable to the parties) during successive rounds of talks, and their separate

beliefs converge in some respects toward common knowledge. It is also found that the tactics of individuals playing key roles can have a strong effect on beliefs of other delegations about the prospects for agreement and how cooperative each country is likely to be. Yet the study also finds that learning in these hazy situations is difficult and can be derailed by a host of factors. Like subjects from developed countries in earlier experiments, players in these simulations also demonstrate self-serving biases, which can channel learning in particular directions.

## **Main Lessons**

### **Checks against biases**

- The mere transmission of requests and information to other delegations is far from sufficient to achieve effective signaling, persuasion and agreement. In a context marked by bluffing and tactical moves, repeated explanation and argumentation are needed to persuade others to adopt one's interpretation of the situation and raise the degree of "belief" of partners in each one's negotiating position. This is true even in cases where a party is making an objectively important concession, because others tend to question the intent behind such a move.
- *Take steps to counter overconfidence, a common pitfall among negotiators.* In this simulation overconfidence is reflected in a quick belief that a zone of agreement exists. Negotiators' over-estimates of their control over the process often contribute to deadlocks. They should consider different alternative interpretations of the situation to prepare themselves to adapt quickly to surprises.
- Overconfidence is often correlated with cognitive closure, when delegates downplay information that disconfirms their prior beliefs. In a context of uncertainty, such closure may be an easy retreat from the complexity of trying to make sense of the generalized use of bluffing or other tactical positions by negotiating partners. Yet confusion about what the others really want to say or to hide should not lead to despair and ultimately closure. Taking on the job of negotiator means being able to cope with confusion and keeping some firm hope that ultimately information exchange will reveal something useful and help craft an agreement.
- *Take steps to mitigate self-serving biases on one's own team.* It would be difficult to over-estimate their current importance in multilateral trade negotiations, but bias can be mitigated by carefully selecting members of a negotiating team so as to have a variety of personalities of different traits that can either be used in different situations or compensate for each other on one issue. For those countries that are already struggling to have a team with more than one person, however, this may prove to be wishful thinking, at least in the short term.

- *Perceived truthfulness facilitates learning and smoother negotiation processes. Regular encounters between individuals are a good way to establish it.* For this reason it might be easier to negotiate among a small network of professional diplomats, based permanently in Geneva for WTO matters, than among elected politicians meeting only occasionally. On the other hand, there is some risk that Geneva delegates, lacking real political power or instructions, may play a kind of surreal diplomatic game that ultimately becomes more a problem than a cure. But interactions with capitals may limit this risk.

## **2.2 Regional Negotiations**

### **2.2.1 Getting to “No:” Defending Against Demands in NAFTA** **ANTONIO ORTIZ MENA L.N.**

How can a developing country defend itself against unwanted demands in international economic negotiations, especially when the demandeur is a large and powerful state? Such defense can be a necessary component of any strategy, not only a distributive one but also a mixed strategy aimed at a wider agreement that benefits both sides. Sometimes what looks like an unwelcome demand turns out, after exploration and exchanges of concessions, to be an acceptable element in a beneficial package deal. But some demands are unwelcome in the stronger sense that one’s government places an infinite reservation value on that particular issue. The government would prefer no agreement. In the case of a deal breaker, the delegation can walk away from the entire negotiation, but this could have large costs in opportunities foregone and even possible penalties imposed. What are the alternatives short of walking away?

Mexico’s negotiators faced such situation in the NAFTA negotiations with the United States and Canada (1990-1992), specifically in the energy sector. In general the three states sought a mutual-gains agreement, and in general each employed a mixed strategy. In energy, however, Washington made demands--regarding investment and supply commitments--that Mexico found unacceptable. At the end of the day the Mexican team managed to attain its main offensive negotiation objectives in NAFTA (significantly improved market access generally with an effective dispute settlement mechanism), as well as the main defensive ones in energy. How did they do it? The Mexican outcome, like others we have discussed, might have benefited from some conditions that will not be present in all cases. Structural conditions, such as being a neighbor of the U.S., gives Mexico certain leverage in negotiations, for the U.S. will typically take into account non-economic considerations when negotiating over economic issues. Circumstantial issues, like the difficulties faced by George Bush in the prelude to the 1992 election, also played in Mexico’s favor. Nonetheless, many lessons derived from Mexico’s energy negotiations during NAFTA can be applied across a range of cases.

## Main Lessons

### Negotiation strategies

- *Do not stick exclusively to a defensive distributive strategy as a response to unwanted claims. Mix integrative elements into your strategy to keep the game interesting to partner states.* If Mexico's negotiators had used only defensive distributive moves in a vast number of areas, the room for maneuver would have been scant and the possibility of striking a deal low. Instead, the Mexican negotiators used a mixed strategy in general. In the energy sector, the strategy consisted of improved market access via trade in energy, while maintaining limits on foreign investment and excluding energy supply commitments. This strategy made the overall game worthwhile for Washington and Ottawa and discouraged them from walking away from the table if they did not get all their demands.
- *When defending against an offensive distributive strategy use a sequential, as opposed to a simultaneous, mixed strategy.* The sequential nature of the offer, whereby Mexico stood by its defensive distributive strategy on investment and energy supply commitments throughout the negotiations and only near the end offered a mixed strategy regarding trade in energy, allowed it to successfully defend against an offensive distributive strategy. Had Mexico presented its mixed strategy at the outset of negotiations, the U.S. most probably would have kept on asking for more concessions from Mexico.
- *If a defensive distributive strategy is to be used, offset defensive demands against the other state's defensive demands, not against your own offensive claims.* Mexico, instead of "paying" for the right to exclude its energy sector from liberalization by giving up some of its offensive demands, argued that its exclusions only matched U.S. exclusions (in maritime transportation) and Canadian exclusions (in cultural industries). Having each side presenting its deal breaker issues at the outset of negotiations also avoided unpleasant surprises and brinkmanship that could have resulted in the breakdown of negotiations.
- *If partner states make no defensive demands against which to match your request for exclusion, add an issue so this strategy may be put to work.* Before the formal negotiations started Mexico intimated that it wanted to include migration in the agenda. When the U.S. steadfastly refused, Mexico replied that this U.S. exclusion meant that Mexico would have to exclude energy without paying any concessions.



## Checks against biases and errors

- *Consider hiring lobbyists from the partner country to help avoid the effects of biases.* Mexico's hiring of U.S. lobbyists allowed it to have firsthand and reliable information on the U.S. reservation value on a number of issues, and thus to design a negotiation strategy that ensured there was a winning coalition as a result of Mexican offers. It also meant that the U.S. could not credibly bluff in order to extract concessions from Mexico. Under a biased information scenario, it is possible to imagine an outcome where the U.S. credibly stated that an agreement without liberalization of energy investment rules and commitments on energy supplies would not be approved by the U.S. Congress, or where the costs of exclusion had been higher than they in fact were. Admittedly the costliness of foreign lobbyists could be a problem for poor countries.
- *Get top-flight level legal advice about the partner country's laws, and if necessary sacrifice expensive foreign economic advice.* While it is likely that any well-trained economist will understand the economic impact of negotiation commitments in his or her home country, a small mistake by lawyers regarding long and complex texts can have dire consequences. This is likely when negotiating with countries with a different legal system than your own. At the end of NAFTA negotiations, the agreements struck by the negotiators had to be transformed into implementing legislation by the U.S. Congress, so it was possible for Mexico to lose some gains that were made at the negotiation table in the process of turning NAFTA into U.S. domestic law. The lesson here is that while Mexico's negotiators included extremely capable economists, an area of vulnerability lay in the different nature and complexity of the U.S. legal system. If a country is to defend against an offensive distributive strategy by the U.S. in economic negotiations, it seems that the most valuable foreign advisers are not economists but lawyers.

## Domestic politics

- *Exploit opportunities offered by your partner's political system to monitor and change its negotiating positions.* The pluralistic and transparent nature of the U.S. political system means that it is possible, though onerous, to follow the positions of key legislators. In addition, Mexicans effectively lobbied U.S. legislators and interest groups during NAFTA negotiations and the subsequent ratification phase. Mexican negotiators were thus able to assess with a fair degree of certainty whether they had a "winning coalition" of backers in the U.S. Congress according to the package of offers presented by Mexico. Likewise, the frequent polls of presidential popularity during election time let Mexican negotiators know that George Bush's reelection in 1992 was far from assured, and so they could hold firm rather than conceding, for the U.S. President very much wanted to portray NAFTA as an achievement of his administration. In this respect, defense may be more

difficult against the European Union. Some issues are dealt with by the European Commission while others are reserved to the nation states, and policy coordination has become more complex now that the Union encompasses 25 states.

- *Also use multiple points of contact in the partner country's government, not only their trade negotiators.* Mexico made use of contacts with top members of the Bush cabinet and, as required, with President George Bush himself, so negotiations were not limited to what was taking place at the negotiating table. These multiple points were used to emphasize the credibility of Mexico's refusal to concede on energy. Other top U.S. politicians were urged to pressure their own negotiators, so that no single issue would derail the whole negotiation, which was important for the U.S. from a political and not only an economic perspective.

### **Other lessons**

- *Try to limit or offset potential market developments that could adversely affect your bargaining leverage.* Given the reliance of Mexican public finances on oil exports, a significant decrease in oil prices would have put them under strain. U.S. negotiators could then press hard at the negotiating table knowing the Mexicans needed an agreement to calm the markets. Near the outset of negotiations Mexico bought oil futures and thus had some control over the worst possible scenario regarding oil prices.
- *Prepare for the failure of negotiations: develop an alternative to agreement.* Mexico did not contemplate caving in on energy to avoid a breakdown. The government drafted investment agreements with several European countries and designed a financial rescue package that would be requested from the U.S. By buying oil futures and designing contingency plans, Mexico improved its alternative to a NAFTA agreement and thus strengthened its negotiators' hands, at least in their own minds. Obviously, not all of these measures should be made public lest they generate a moral hazard, but notifying the partner delegation that you have alternatives could reinforce the credibility of your negotiating position.

## **2.3 WTO Dispute Settlement Negotiations**

### **2.3.1 Do WTO Rules Create a Level Playing Field for developing Countries?**

**CHRISTINA L. DAVIS**

When a small developing country faces discrimination against its exports by a major trading partner, it lacks some negotiating tactics that major powers can use in bilateral bargaining. Retaliation is an ineffective threat, and there are few side payments a small developing country can offer the EU or the US that will persuade them to change policies

supported by strong domestic coalitions. Developing countries that are members of the WTO, however, have more options. If they can argue that the discriminatory measure violates existing rules, WTO dispute settlement procedures provide developing country members with important bargaining leverage. By filing a complaint under the DSU procedures, a member chooses a tactic of *legal framing* to negotiate its trade problem within the institutional context of formal rules and third party adjudication. This tactic helps developing countries to gain better outcomes in dispute settlement negotiations with their more powerful trade partners than if they pursued bilateral contacts without initiating a legal case, and better outcomes than non-members can negotiate.

When two states involved in a trade dispute are WTO members and A decides to file a legal complaint about B's trade practices under WTO rules, doing so is likely to worsen B's perceived alternative to a negotiated settlement, whenever the rules can be interpreted as prohibiting B's practice. Now if B stands firm, the costs of impasse may well be greater. Specifically there are four ways in which legal framing helps developing countries counter discrimination against their exports by more powerful countries. First, the option to file a legal complaint allows developing countries to challenge a refusal to negotiate a trade problem. Second, the DSU makes international trade law the standard for reaching an agreement. Third, the use of shared legal rules facilitates finding allies with related interests to support the case. Fourth, the long-term economic interest in supporting the rules encourages compliance with rulings.

Comparison of two cases highlights the usefulness of WTO dispute settlement procedures for members relative to the bargaining weakness of countries that have not yet joined the WTO. Peru, a WTO member facing European labeling policies that discriminated against its scallops and sardines exports, participated in two WTO adjudication cases in 1995 and 2001 that brought about changes in the policies of the EU. In contrast, as a non-WTO member, Vietnam had to negotiate with the United States in 2001-2003 in response to new barriers to its catfish exports on the basis of their Bilateral Trade Agreement. Ultimately, Vietnam was unable to prevent the United States from adopting a labeling regulation and anti-dumping duties that effectively excluded Vietnamese catfish from the U.S. market. Although the legal resources required for adjudication can be costly, the alternative of bilateral negotiations leaves developing countries with a far worse outlook for ending discrimination against their goods by a developed country. With more progress in the area of legal assistance for developing countries, the WTO rules for dispute settlement can help to establish a level playing field.

## **Main Lessons**

### **Negotiation strategies**

- *Joining a coalition to file a case is a good tactic for first-time DSU participation.* The scallops case provides an illustration. In 1995, as one of the first disputes initiated under the new WTO dispute settlement rules and the WTO's Technical Barriers to Trade Agreement, Canada requested consultations with the EC regarding a French government order that

prohibited Canada from marketing its particular species of scallops under the traditional French name for scallops. Since Peru and Chile also had scallops exports that would be similarly affected by the regulation, they too initiated WTO complaints against the same policy. Initiating a case following Canada lowered the legal and political costs for Peru and Chile. The legal arguments for Peru were bolstered by those already made by Canada and the legal advice received throughout the process. The larger number of countries that could potentially be authorized to issue sanctions also increased the pressure for compliance. Where Vietnam stood alone in a bilateral negotiation that seemed of little concern to any other country, Peru had Canada along with other developing countries jointly arguing the case.

- *Build the strongest possible legal argument, avoiding controversial interpretations of WTO law whenever possible, and consider exercising legal restraint.* Filing a complaint that emphasizes clear legal claims will make it easier to win legal arguments and maintain support of other countries than filing complaint that requires a controversial interpretation of WTO law. In the sardines case, Peru's team built a strong argument that the existing Codex regulation for labeling sardines made the EU policy represent a violation of Article 2.4 of the WTO's Technical Barriers to Trade Agreement. The Peruvian team received technical assistance at reduced rates from the Advisory Centre on WTO Law. They also exercised restraint by accepting a ruling on this basis rather than pushing for a ruling on every legal point where the EU could have been found in violation. The request for judicial economy saved time and lowered EU resistance to compliance because of the narrow scope of the legal precedent. The costs of membership in the Centre and legal fees for the case were more than compensated by the export gains from the improved market access.
- *Winning the ruling provides sufficient compliance pressure for many cases.* Legal rulings influence the bargaining dynamics, even before their public release or the authorization of sanctions. The scallops case reached agreement in 1996 through early settlement during the interim review, after the ruling against the EC was shown to the negotiating parties. The EC offered a full concession to allow the imported scallops to use the traditional name, given its concerns about a ruling that would set a broad precedent for labeling policies. Peru's fight against European labeling policies continued after a 1999 decision by the EC to forbid marketing of fish under the name sardines unless it was the species common to the Atlantic coast and the Mediterranean. After two years of bilateral negotiations failed to bring an agreement, Peru filed a WTO complaint in 2001. After it won the ruling, the normative and economic value of compliance with international law offered a compelling argument for EC officials to accept the need to change sensitive domestic policies. Peru won the case and obtained compliance without offering any side-payments or having any credible threats to directly pressure the EC.

### **2.3.2 Compliance Bargaining in the WTO: Ecuador and the Bananas Dispute**

**JAMES MCCALL SMITH**

This paper concentrates on bilateral negotiations over compliance with the rules. Ecuador's tactics in challenging the EU banana import regime from 1996 to 2001 provide a useful case study for developing countries considering legal action as complainants under the Dispute Settlement Understanding (DSU) and preparing for the settlement negotiations that often accompany these cases. Negotiators from Ecuador pursued an aggressive distributive strategy that enabled it to play an influential role throughout the process and improve its outcome, despite overwhelming asymmetries (in market size, political clout, and legal resources) between itself and the principal disputants on either side of the Atlantic.

In particular, Ecuador capitalized on certain details of institutional design in the WTO — namely, the provisions for cross retaliation and for consensus approval of waivers — to enhance its bargaining leverage at key moments of the bananas dispute. A change in the institutional context under the DSU—permitting retaliation across agreements—enabled a new distributive negotiation tactic. While working generally in coalition with other WTO members, Ecuador was also careful to distance itself from its co-complainants at crucial junctures, maintaining an independent stance during the sequencing crisis, the settlement talks, and the waiver negotiations at Doha. This combination of tactics enabled Ecuador to wield surprising influence over the ultimate resolution of the case, which (despite delayed compliance) reflects Ecuador's core objectives.

The belated resolution of the bananas dispute was not merely a transatlantic truce. The outcome also reflected Ecuador's unique concerns as the world's largest and lowest-cost banana exporter. The EU's twin settlements with Ecuador and the U.S. incorporated many of Ecuador's core demands, such as a firm commitment to a tariff-only system by 2006. During the transitional phase of tariff quotas that began in 2001, Ecuador received better terms than other similarly positioned Latin American countries that did not follow the same strategy. Finally, in exchange for the waivers at Doha, Ecuador obtained an institutional guarantee from the EU in the form of a special arbitration procedure that goes beyond what WTO rules typically provide concerning the speed and finality of third-party review. For other developing country complainants, three aspects of Ecuador's strategy merit special emphasis.

#### **Main Lessons**

##### **Negotiation strategies**

###### *Coalitions*

- *Favor coalition building when submitting a claim, but be prepared to act alone after the ruling during the compliance phase if coalition partners do not support your positions.* Coalitions offer certain advantages in

compliance bargaining too, as in multilateral talks. But Ecuador's experience in the bananas case reveals that it may also be useful for developing country complainants to act alone at times. Ecuador rushed its accession to the WTO in order to join the coalition (Guatemala, Honduras, Mexico, and the U.S.) that had filed complaints against the EU. Acquiring rights as a complainant gave Ecuador a seat at the table during the protracted settlement negotiations — an advantage denied to Panama, which did not join the WTO until after the initial panel report. Joining a coalition allowed Ecuador to compensate for its limited legal resources and expertise by making use of work done by U.S. attorneys, a tactic of particular value during the early stages of the dispute. Ecuador also hired private counsel in Washington and Brussels to assist its delegation, coordinating arguments and sharing data with the U.S. After the adoption of the favorable panel and Appellate Body reports, however, Ecuador's negotiators repeatedly signaled their willingness to act alone. During the "sequencing" crisis, when the U.S. moved to retaliate quickly, Ecuador insisted on a compliance panel first despite objections from Washington. Later in the proceedings, they refused to endorse the EU-U.S. settlement without modifications and resisted approving the WTO waivers for the EU's banana regime and its new preferential agreement with the African, Caribbean and Pacific states until the very last moment at Doha. Ecuador's willingness to disagree openly with its coalition partners in all of these instances gave it additional leverage during compliance negotiations by establishing its autonomy and calling attention to its concerns, many of which were quite distinct from those of the U.S. and other Latin American banana producers.

- *Threaten cross-retaliation to lower the costs of ensuring compliance.* The WTO enforcement system relies on decentralized sanctions, a remedy intrinsically more attractive to larger, less trade dependent economies than to small developing countries. Aware of these obstacles, Ecuador adopted an unprecedented strategy in its request for sanctions. Instead of relying on the goods sector, Ecuador proposed to suspend the application of intellectual property rights to EU firms under the TRIPS Agreement. A coalition of developed countries, led by the U.S., had insisted on adding this rule permitting cross retaliation during the Uruguay Round, but Ecuador reversed the arrow, threatening retaliation under TRIPS to ensure EU compliance with GATT. With this request, Ecuador's team was charting new legal territory, and they did so in a sophisticated manner. Politically, they exempted EU countries that were sympathetic to its cause. Economically, they restricted their targets to categories of intellectual property (geographical indications on alcohol, music copyrights, and industrial designs) in which there was little or no technology transfer, so as not to jeopardize its access to valuable technologies. And legally, Ecuador proposed a system of limited and revocable licenses that could be suspended once the EU complied on bananas. Reiterating its preference for compensation, Ecuador acknowledged that any use of TRIPS would be messy, but that very fact called considerable attention to the threat. In the

end, Ecuador never acted on the authority it won from WTO arbitrators to cross retaliate, but uncertainty regarding its intentions mobilized industry associations in Europe and bolstered its delegation's position during settlement talks. Ecuador's negotiators, admitting the limited size of their markets, also stressed the implications of their cross-retaliation request as an example for larger developing countries such as India and Brazil, who may be the chief beneficiaries of Ecuador's pioneering maneuver. With greater market size and domestic manufacturing capacity, they could wield the threat of cross retaliation under TRIPS even more effectively.

- *Consider linking the bilateral talks to multilateral ones. Brinkmanship in a consensus-based system can yield benefits, especially if pursued in coalitions rather than in isolation.* In concert with other Latin American banana exporters, Ecuador's negotiators capitalized on GATT's tradition of consensus decision-making to block the EU's request for two waivers. For several months, a Latin American coalition forestalled EU attempts to initiate the waiver review, but as the Doha ministerial approached, pressure from the EU, the ACP, and (to a lesser extent) the U.S. intensified. At Doha, the Latin American coalition fell apart, eventually leaving Ecuador as the solitary "no" vote. Its representatives threatened to jeopardize the Round's launch, but on the final night endorsed a procedural compromise. Instead of a specific tariff level, which Ecuador had sought, the EU committed not to diminish the market access of Latin American producers under the tariff-only system. Moreover, the EU backed this commitment by accepting a special arbitration process. Ecuador's willingness to hold the Doha meetings hostage thus yielded certain benefits, but without coalition support near the end Ecuador was unable to achieve its principal demand.

### **III. EXECUTIVE SUMMARY**<sup>5</sup>

#### **3.1 External negotiation strategies**

- A mixed strategy will gain more for a developing country, and for a coalition of weaker states, than a strict distributive strategy under common conditions, though there are exceptions.
- In order to influence agendas, offer technical proposals rather than simply reacting to others.
- To claim value from others, attempt to frame the discussion by proposing a reference point favorable to your own position.
- Framing works best when advocates graft a new policy item or perspective onto an existing policy frame.
- Watch out for agendas that may sneak up on you.
- Delay accepting agendas imposed by the North only if you are reasonably sure that the domestic interests of countries pushing the agenda will not become

more united over time.

- Develop an alternative to agreement, in case negotiation fails.

### **3.1.1 Specifically to defend against unwelcome demands**

- If defensive distributive strategies are to be used, match defensive demands against the other state's defensive demands if possible, rather than "paying" for the exclusion by dropping one of your own offensive claims.
- If partner states raise no defensive demands against which to match your request for exclusion, add an issue so this strategy may be put to work.
- Mix some integrative elements into your strategy, to keep the game interesting for partner states.
- Use a sequential mixed strategy, as opposed to a concurrent or simultaneous mixed strategy.

### **3.1.2 Specifically on coalitions**

- Consider joining or forming a coalition of countries that share similar commercial interests in an issue or issue-area.
- Spend initial time on a diagnosis and planning phase during which the coalition's goals, membership, and negotiating strategy are chosen simultaneously. Select the membership to enhance the credibility of its threat to block, its resilience to fragmentation, and its ability to agree on fallback positions and a sequencing of distributive and integrative moves.
- Make the coalition as large as possible up to the point at which the fragmentation problem becomes unmanageable.
- Support by a Quad member is especially potent. But if policy preferences differ, adding this member would of course raise risks that the coalition would fragment or become dominated by that member's preferences.
- When faced with splitting tactics by others, use side payments and active diplomacy among coalition members to maintain unity.
- If two extreme positions dominate the talks, consider forming a coalition of states with moderate positions to break a deadlock by offering a moderate proposal as an alternative.
- A potential veto coalition's power may be greater at the launch of a Round than at its conclusion.
- The ability of a coalition to adopt a mixed strategy depends on various factors, which include the identity, structure and leadership of the coalition.

### **3.1.3 Specifically for dispute settlement negotiations**

- Winning the ruling provides sufficient compliance pressure for many cases.
- Build the strongest possible legal argument, avoiding controversial interpretations of WTO law whenever possible, and consider exercising legal restraint.
- Favor coalition building when submitting a claim, especially for first time DSU



participation, but if convenient, act alone after the ruling and during the compliance phase.

- Consider threatening cross-retaliation to lower the costs of ensuring compliance, if the threat can be tailored to make it credible and avoid damage to the home economy or international relations.
- Consider linking multilateral talks and even brinkmanship there if doing so will benefit the bilateral settlement.

### **3.2 Checks against biases**

- Consider hiring lobbyists from partner countries to help avoid biases when estimating those countries' interests.
- Get top-flight level legal advice, and if necessary to pay for it, sacrifice foreign economic advice.
- Regular encounters between delegates of different countries may help establish truthfulness and facilitate learning and smoother negotiation processes.
- Consider alternative interpretations of any situation to avoid premature cognitive closure.
- Take steps to counter overconfidence, a common pitfall among negotiators.
- Repeated explanation and argumentation are needed to persuade others to adopt one's interpretation of the situation and raise the degree of the partner's belief in one's negotiating position.
- Mitigate self-serving biases by carefully selecting members of the negotiating team so as to include a variety of personalities with different traits that can either be used in different situations or compensate for each other on one issue.

### **3.3 Managing domestic politics**

- Know thy adversary's domestic politics to better predict its external strategy and response.
- Exploit opportunities offered by your partner's political system to monitor and change its negotiating positions.
- Use multiple points of contact in the partner country's government, not only their trade negotiators.
- Generate news at home about possible gains on issues other than those on which one's country has a defensive position, to increase support for trading concessions and greater net gains for the country as a whole.
- Attempt to frame domestic debate at home around a general goal expressed as a numerical yardstick rather than focusing on defending a particular negotiating position as an end in itself.
- Provide the public reliable information about internal policy debates in other countries.
- The president or prime minister should delegate authority for coordinating the country's trade negotiating strategy to a professional economic agency with a

strong reputation for impartiality.

- To make policy coordination more efficient, the chief executive or his delegate should give clear direction from the beginning and intervene during the talks as needed to enforce this vision, rather than waiting until the end of the talks.
- The sooner the chief negotiator initiates open debate on compensation for sectors likely to lose protection, the better prepared the will stakeholders be for market opening and the better compensation package she can offer in case of market opening.
- The power of veto groups, and hence, the distributive tendency of a negotiation strategy, will be the greatest under a democratizing regime type.

### **3.4 Other Lessons**

- Try to limit insofar as possible, or compensate for, potential market developments that may adversely affect your bargaining leverage.
- Engage civil society for technical assistance and to support framing attempts.

## **APPENDICES**

### **A. A Typology of Negotiating Behavior**

A. DISTRIBUTIVE STRATEGY. A party's strategy is "strictly distributive" if any of the following tactics are observed and no more than a small minority of the behavior fits the definition of "integrative strategy."

BOTH DEFENSIVE AND OFFENSIVE VARIANTS. The negotiator

- criticizes the other country's or countries' actions or arrangements, blames them for the problem under discussion;
- attempts to exclude from the agenda issues on which her own country would probably have to make concessions;
- rejects or ignores demands for concessions or delays their consideration;
- avoids saying her own country is partly responsible for the problem under discussion, avoids expressing concern for the other's objectives or a desire for a mutual-gain outcome, avoids making a proposal characterized as beneficial to other parties or the world as a whole;
- manipulates information for her own advantage: avoids revealing information about own genuine objectives and priorities; makes arguments whose effect is to support her demands or refusal to concede and does not present information or arguments that are inconsistent with that position; e.g., argues that the other's alternative to agreement is worse for them than they realize, that our alternative is better than they realize, or that the other's forecasts showing future improvement for us (in absence of agreement) are not convincing, or that she simply does not have the capacity to deliver what is demanded; or that the other's proposal would harm our side or others;
- establishes a commitment to a particular outcome, by means of some public action tied to that outcome such that accepting less would be costly to the negotiator or her country;
- denies that he or she believes the other's commitments.

OFFENSIVE VARIANT: The negotiator also:

- demands concessions for the benefit of his or her own country without offering concessions in exchange;
- takes steps to worsen the other's alternative to agreement and improve her own-- e.g., unilateral actions or negotiations with third parties that would help compensate it for a breakdown in relations with the other or provide itself with a superior alternative, or raise the cost of a breakdown for the other; actions could include introducing draft legislation for official consideration at home or "talking the national currency down";
- files a legal complaint against another state under global or regional rules and demands a change in current policy or practice that will benefit the complainant. The complainant typically perceives this move as responding to and righting a wrong done earlier. In any case, relative to the status quo and from a neutral standpoint, the move's effect on the negotiation process would be to help shift value from the respondent to the

complainant rather than to make both better off than at the time of the complaint, as they see it.

- launches an antidumping or similar complaint through its national institutions, which could be done for external bargaining purposes as well as for the stated purposes;
- threatens to take action harmful to others unless they yield the desired concessions;
- actually imposes such penalties and implements its alternative to agreement.

DEFENSIVE VARIANT. The negotiator also:

- brings a counter-complaint under international rules against a state that has filed a complaint against it;
- threatens or imposes counter-threatens sanctions.

B. INTEGRATIVE STRATEGY. A party's strategy is "strictly integrative" if the following tactics are observed and if no more than a small minority of the behavior fits the definition of "distributive." The negotiator

- states that the parties have an interest in common or expresses concern for an objective held by the other;
- proposes negotiations designed to benefit both or many sides, usually aiming to agree on a joint approach to a common problem or an exchange of concessions;
- praises the other and avoids public statements criticizing the other country or blaming it for the problem or issue under discussion;
- invites the other to state frankly its genuine concerns and objectives and their priority order, as distinguished from its demands and proposals;
- proposes and implements a series of meetings whose only or main purpose is to engage the parties in joint study of problems and objectives they have in common;
- uses and refers to information about the issue or problem without shaping it to her own side's advantage; engages in an "even-handed" discussion of all the facts whether favorable or unfavorable to her side;
- proposes an exchange of concessions for mutual benefit or accepts a mediator's proposal that entails such an exchange;
- argues that a different conception of others' interests or a redefinition of the issues themselves could lead to an agreement that would benefit both parties;
- proposes a formula or agreement described as helpful to other parties as well;
- agrees to abide by binding arbitration, which can shorten a conflict and reduce its costs for all parties.

C. MIXED OR COMBINED STRATEGY. A party's behavior in a conflict or negotiation is a "mixed" strategy if distributive and integrative tactics are mixed in some proportion, either simultaneously or in a sequence.

## B. Glossary

ACP	Africa, Caribbean, and Pacific countries
AITIC	Agency for International Trade Information and Cooperation
ASEAN	Association of Southeast Asian Nations
Batna	Best alternative to a negotiated agreement
CARICOM	Caribbean Community
DSU	Dispute Settlement Understanding
EC	European Communities
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GNS	Group of Negotiations on Services
IP	Intellectual Property
IPR	Intellectual Property Rights
LMG	Like-Minded Group of countries
MERCOSUR	Common Market of the South
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
TBT	Technical Barriers to Trade
TRIMS	Trade-related Investment Measures
TRIPS	Trade-related intellectual property rights
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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<sup>1</sup> Busch and Reinhardt 2000, Table 1. Their data cover 1948 to 1999.

<sup>2</sup> Busch and Reinhardt 2002, Table 2.

<sup>3</sup> In practice a negotiator or delegation may not choose a strategy all at one time and in a self-conscious way. Some may choose one step at a time and accumulate a set of actions without considering them as a set. But even if so, our premise is that it will still be useful to classify observed behavior using these concepts, for purposes of research and improving general knowledge of negotiation.

<sup>4</sup> This report presents only elements of negotiation analysis that are used in these studies, not a comprehensive framework.

<sup>5</sup> This executive summary presents the main lessons derived from eight new empirical studies of developing countries' trade negotiations. For clarification of the terms used, please refer to section 1.3 and Appendix A, A Typology of Negotiation Strategies. Section II offers contextual information and a richer description of each recommendation.