

Wiggle Rooms: New Issues and North-South Negotiations during the Uruguay Round

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Are developing countries marginalized *in the formation of* global rules governing new issues such as services and intellectual property rights?¹ Not if they are savvy negotiators and the developed countries are not unified in their stance, suggests this study. Analysts examine the gains developing countries make in such ‘high-tech’ issue areas (Grieco 1982; Odell 1993; Singh 2002A) to note that the weak do not necessarily suffer the will of the strong. Their success with high-tech negotiations, in fact, bodes well for them in issue areas in which they are strong (for example, agriculture or textiles). Similar arguments are made for weak powers in general for a host of issues, high-tech and otherwise (Wriggins 1971; Yoffie 1983; Odell 1985; Zartman 1987; Zartman and Rubin 2000; Singh 2000A). In contrast to the ominous warnings regarding the inability of developing countries to understand or negotiate these new issues (Jawara and Kwa 2003; Oxfam 2002; Raghavan 2002; Correa 2000), the developing countries may gain no more or no less in these issues than they do in others. This also does not mean that they gain a lot.

However, the extant studies and empirical evidence point to another crucial puzzle. Why do developing countries make fewer concessions, or gain more, in a few new issue areas and not in others? This paper provides a structured focused comparison of the North-South negotiations for two Uruguay Round (1986-94) agreements, the General Agreement on Trade in Services and the Trade-Related Intellectual Property Services (TRIPS), to ascertain why developing countries made fewer concessions to the North in the former case but not the latter. The GATS accord allows for specific and tailored commitments across multiple sub-issues that benefitted the developing world (Singh 2002A) while in the TRIPS agreement, in the words of one analyst, “[T]he United States succeeded in getting most of what it wanted” (Sell, 1998: 138).

Intellectual property and services were both new issues for the Uruguay Round and their inclusion on the agenda was opposed by developing countries. However, before the Round began, the services issue was heavily contested by the developing world while there seemed to be widespread support for it in the developed world by 1986. Intellectual property issues were not so heavily debated and there was no unified position among the developed countries on this set of issues. Extrapolating from these positions would indicate that the outcomes for GATS and TRIPS for the developing world might turn out to be opposite of the way they did.

Negotiations are important in defining global outcomes. Between the power structures -- globally or in a particular issue-area -- that the developing world faces and the formation of global rules lies the realm of preference formation and negotiations. The theory of negotiations examined here shows how successive interactions among negotiating parties leads to the creation, alteration or disposal of preferences. Power structures do not pre-determine outcomes either; if they did, the North would have gained more in services than in intellectual property. In fact, in 1982, the U.S. almost agreed to a revision of the Paris Convention that would have lowered the patent standards for the developing world. TRIPS did the opposite, fourteen years later. In services, developing countries moved from opposing the inclusion of services on the GATT agenda to framing the agreement in such a way that it accorded them many benefits. Toward the end of the Round, in fact, the support for GATS from U.S. domestic industries was

¹ Intellectual property refers to “creations of the human mind” (Watal 2001: 1) such as pharmaceutical formulas, a trademark, or an industrial design. Services are intangible products or goods such as banking, tourism, telecommunications services, or professional skills.

lukewarm.

Two important negotiation effects of agenda-setting and coalition-building are identified and termed in this paper. The *café au lait effect*, named after an important moderate coalition in the Uruguay Round, refers to the ability of moderate groups to break deadlocks between two extremes. In the context of this paper, it examines the complete opposition to North's hardline agenda and formation of a moderate group allowing services to be negotiated on terms that moved both North and South away from their original positions and toward each other. However, this moderate group would not have come about had there not been a deadlock between North's coalition led by the U.S. and the South's coalition led by Brazil and India. The *delayed agenda effect* refers to the costs related to accepting an agenda late after being unable to weaken the base of support for that agenda. In this paper, it examines the consequences for the South of accepting the IP agenda, which allowed the monolithic Northern coalition to emerge and define an expansive agenda. The opposition to North's initial agenda and the inability to break the ranks of North's coalition is what resulted in an agenda that was even farther from South's concerns. It is hypothesized at the end of the paper that both these effects can take on positive or negative values and that there are many instances of such effects in international negotiations.

Negotiations, particularly multilateral ones, allow developing countries wiggle room. This space between power structures and outcomes is filled by negotiation tactics such as agenda-setting and coalition building, accounting for the differences in negotiation outcomes. Those with power can set agendas and build coalitions but so can those without. Multilateral negotiations are particularly prone to shifting agendas and coalitions. One of the primary reasons the United States has of late preferred bilateral negotiations is because it can set agendas and ward against opposition (Bhagwati and Panagriya 2003). TRIPS might even be regarded as a case, as subsequent analysis will show, of great powers 'bilateralizing' multilateral negotiations.

There is another wiggle room that matters. Domestic constituencies shape the conduct of international negotiators. Unified interests, as they were in the case of service industries in the United States in the early 1980s, limit the number of agreeable alternatives for negotiators. Getting services on the agenda thus became a take-it-or-forget-the-round issue before the Uruguay Round for the United States. However, the process of negotiation itself served to partly change the interests of the service industries, in turn allowing for the tailoring feature of the GATS agreement. On the other hand, intellectual property interests in the North became ever more unified and entrenched as the negotiation process unfolded. As opposed to the services issue then, intellectual property became the take-it-or-forget-the Round issue for North-South negotiations at the end.

Power structures shape initial preferences and negotiations but negotiations shape interests and outcomes, and therefore, the exercise of power. The theory of wiggle rooms is then, first and foremost, one of preference alteration and their disposal. Negotiation tactics account for both these changes, specifically agenda-setting and coalition building, both domestically and internationally, for the GATS and TRIPS accords. Caveat emptor: wiggle rooms allow some space to maneuver. Their effect, therefore, cannot be overestimated.

METHOD

While single case studies point toward developing country success in high-tech and in new issue areas, a comparison of similar cases or a structured focused comparison is necessary to control for a large number of factors while varying in the crucial hypothesized causal factors (Odell 2000B; George 1979). By selecting cases this way, we move toward satisfying conditions of unit homogeneity and conditional independence necessary for building causal claims (King et al, 1994: 91-95).²

The two cases selected here satisfy several methodological conditions for making causal claims. The cases can be held constant on relevant global power distributions, historical/time context, the international institutional dimension, and international actors involved, thus helping to focus on the dynamics of the negotiation. Developed and developing countries also employ similar overall negotiation strategies, a combination of hawkish and dovish behavior, and tactics (agenda-setting and coalition-building). In both cases, the developing country coalitions are headed by Brazil and India. In addition, GATS and TRIPS are also two of the best known cases in new issues-area negotiations and good representatives of the types of negotiations likely to take place as knowledge-based economies (including intellectual property and services) continue to expand globally. Finally, the two cases examined here include several observations of each negotiation, thus endorsing the call by King et al (1994: 52) to count the number of observations within a case rather than posit a case as comprising one observation.

Three hypotheses are advanced, which build on the three independent variables of this paper -- agenda-setting, coalition building, and support of domestic constituencies:

1. Unified (or, conversely, divided) levels of support from domestic constituencies constrain (or expand) the credible set of agreeable alternatives available to negotiators (the preference ordering).
2. (Given A) Increasing use of agenda-setting and coalition building, among other negotiation tactics, allow developing countries to make gains for themselves.
3. Negotiation tactics can expand or constraint the preference ordering of domestic constituencies or negotiations.

Agenda setting refers to issues being negotiated in the macro sense of the big issues included in any trade round, but also in the micro sense of issues included or excluded as the Round progresses, such as working toward formulas and frameworks. Agenda-setting thus takes place throughout a negotiation and not just at the beginning. Agenda-setting is a *process* variable leading to inclusion or exclusion of issues. Three in particular -- use of appealing frames, degrees of technical and institutional capacity/expertise, degree of inclusion and frequency of participation in meetings -- were important in the context of developing countries during the Uruguay Round.³ U.S.'s chief agenda-setting tactic, especially on intellectual

² Given variations of social phenomena, units compared can only be similar, not alike. Unlike elements of a laboratory experiment, negotiation environments are such that we cannot completely divorce independent variables from dependent ones; successive uses of the negotiations tactics examined here thus cannot be presumed to be completely independent of previous outcomes.

³ Bennet and Sharpe (1979) mention and inclusion or exclusion of particular actors as being one

property, was to flex its power through unilateral 301 pressures and to try to ‘bilateralize’ the multilateral negotiation, making it an ‘us’ versus ‘them’ game. In bilateral situations, the U.S. can limit agreeable alternatives in its favor. It also slipped in an expansive intellectual property agenda on the developing world.⁴ The chief finding related to agenda-setting in this paper is identified as the *negative delayed agenda effect* referring to the costs related to accepting an agenda late after being unable to weaken the base of support for that agenda. As noted earlier, there can be also a positive delayed agenda setting effect that accords benefits.

Coalition building refers to strategic alliances with like-minded countries or other coalitions on single or multiple issues. The chief variability here is the size of the coalition, its position or level of intensity on issues (extreme, moderate), but most importantly – in the developing country case – its ability and strength of alliances with a developed country coalition or moves that lead to a formation of a middle-level coalition, as in the one that drafted the text for starting the Uruguay round. The chief finding here is the *positive café au lait effect* referring to the ability of moderate groups to break deadlocks between two extremes.

Unified or divided domestic constituencies shape the conduct of international negotiators. Unified interests, as they were in the case of service industries in the United States in the early 1980s, limited the number of agreeable alternatives for negotiators. Services became a take-it-or-forget-the-round issue before the Uruguay Round for the United States. On the other hand, intellectual property interests in the North became ever more unified and entrenched as the negotiation process unfolded.

Any negotiation features an array of negotiation tactics: agenda-setting and coalition building are particularly important in accounting for the outcomes in GATS and TRIPS. Although, the ways in which these tactics are operationalized here are presented above, the values attached to each of the features of agenda-setting (framing, technical/institutional capacity, inclusion and participation in meetings, bilateralizing and sneaking up agendas) and coalition building (size, position/intensity, strength of alliances), can be understood only by unbundling them further and process tracing their features through a negotiation by looking for the following factors:

Agenda-setting: framing of the issue before and during the negotiations, ability to unify diverse constituencies by such frames, willingness to commit institutional and technical resources toward setting the agenda, sponsoring studies and seeking help from institutions that can help with framing, using moves away from the table to skew agendas in one’s favor, making it difficult for

of the keys to understanding agenda-setting.

⁴ Ability to sneak an expansive agenda past negotiators is particularly possible in complicated multilateral negotiations. Both developed and developing countries can be fooled. For example, French officials insist that they hardly noticed in 1989 when audio-visual became one of the sectors to be negotiated as part of the evolving services framework. French were vehemently opposed to this and finally EU took an MFN exemption on the issue. (Based on interviews)

adversaries to re-frame the discussion, making the agenda an ‘us’ versus ‘them’ game (bilateralizing multilateral negotiations), making negotiations single issue-like in practice, slipping-in agendas on adversaries without letting them contest it.

Coalition building containing diverse interests within a single coalition, making defection hard, making side-payments to maintain or increase coalition size, committing technical and institutional capacity toward coalition building, exploiting differences among adversaries while minimizing them with allies, getting important players to join the coalition, dividing adversaries especially moderate players into several coalitions or making them defect, using domestic differences at home and among adversaries effectively to strengthen coalitions.

As can be seen, the term agenda-setting as used in this paper, though an accurate reflection of negotiations, is more expansive than its usual deployment in negotiation literature to only connote the agenda of a negotiation when it begins. Undoubtedly, the latter is an important part of agenda-setting. However, most negotiations take place over a number of successive meetings and, as in the case of GATT/WTO multilateral rounds, over a number of years. Issues were dropped and added to the agenda during successive meetings in the Uruguay Round.

Such a focus on agenda-setting both deepens, as well as departs from, Zartman’s (1982) three-phase typology of negotiations: (1) diagnostics phase as setting the stage of negotiations, (2) the formula phase defining the zone within which an agreement may be reached, and (3) the details phase in which concessions are traded. Agenda-setting would seem to fall in the first phase, but Zartman (1982: 87-88) acknowledges that diagnostic activities (definitions of issues and positions that may be taken to be the equivalent of agenda-setting) continue into the second formula setting-stage. This was indeed the case with both TRIPS and GATS where even a minimal agreement on the issues to be discussed, dealing with diagnostics and formulas, did not come about until 1989 and even continued thereafter. Diagnostics are then the macro aspects of agenda-setting. However, agenda-setting, as operationalized above, also influences the formula and concession phases by itself, and these are the micro aspects of agenda-setting. Even when a formula is in place and concessions are being traded, each negotiation meeting’s agenda may define their shape and scope. For example, even after services negotiators agreed by 1989 to incorporate the principle of MFN into services (equivalent to acceptance of a formula), United States sought to change the formula at successive meetings so that it would not be applied unconditionally but be contingent upon other parties making concessions.

The issue of frames is closely tied to agenda-setting and, therefore, included here. Drake and Nicolaidis (1992) acknowledge throughout their article that framing helps to define and include issues. Frames are mental shortcuts used by negotiators to simplify and make sense of the issue (Odell 2002; Tversky and Kahneman 1986). Clearly, the issue of framing is not co-terminous or a sub-category of agenda-setting. However, framing does help to set agendas, so the two issues overlap. Many times, the reason frames are highly politicized media sound bites is to influence negotiators to accede to an agenda. Domestic industries in the U.S. used the ‘jobs and growth’ frame in services and the ‘theft and punishment’ frame in intellectual property to get

their government to put these issues on the Uruguay Round agenda. Framing also helped to mobilize constituencies of support.

Before making a detailed case now for the importance of negotiations for our theoretical understanding of global political economy, an operational definition of the dependent variable -- *negotiation outcomes* is necessary. Outcomes are measured in this paper in two ways: by detailing gains or concessions made by developing countries at the end of the Round compared to their stated implicit or explicit positions at the beginning of the Round; and as compared to BATNA on each issue at the end of the Round. In the latter sense, one can thus argue that terrible as TRIPS was for the developing world, it was better than unilateral punishment from the U.S. through 301.

THE THEORETICAL IMPORTANCE OF NEGOTIATIONS

Negotiation tactics, such as agenda-setting and coalition-building, allow developing countries to effects gains and also shape or alter the preferences and availability of agreeable alternatives to negotiators in doing so. This entails recognizing the importance of negotiations and their fit with the interests of domestic constituencies. It is useful to start with analysis of preference formation and end with the disposal of these preferences.

Negotiations are about human interactions and, thus, the first claim negotiation theory must make for itself is the changing behavior of actors through successive interactions. Take the case of actor preferences. The formation of preferences, or interests as political scientists tend to call them, is a contentious topic precisely because they are frequently taken as given -- usually derived from power structures be they economic or security based. This is myopic. There is no straightforward logic between power structures and preference formation. Existence of social institutions and habits both create as well as limit the articulation of particular preferences (Kuran 1996). Preference formation is thus a product of both constraints and opportunities. In neo-classical economics, preferences are based on intrinsic utilities of particular actions for individuals. Kuran (1995: Ch. 10) notes that such intrinsic utility calculations are the result of cognitive and social processes. Most importantly, for the purposes of this paper, he acknowledges the role of framing devices, mental shortcuts, persuasion, knowledge production, underlying social beliefs, in calculations of intrinsic utility underlying preference formation.

At best, power structures can only constitute the information base from which calculations of intrinsic utility may be derived. However, such calculations are an inherently social act, even when an individual makes them alone, for example with recourse to a framing device. They are also cognitive processes. These social and cognitive processes help an actor make sense of available information. Most theories of preference formation take note of the condition of bounded rationality in which actors form preferences with incomplete information. They could also take note of the processes that allow actors to make sense of that information in coming up with preferences. *Negotiations processes can thus be seen as the production, dissemination, and disposal of information to actors involved.* That they then result in changing the preferences of actors should come as no surprise. As in Kuran (1995), this study takes preference formation to be a social process than an outcome of deductive logic.⁵ In taking

⁵ Kuran's main point is more nuanced than the summary presented here. His agents falsify their

preferences as given, international relations theory, therefore, partly annuls the very interactions that it tries to explain.⁶

It also needs to be noted that preferences or underlying interests are different from choices. Once preferences arise, there may be several choices of action for their disposal. U.S. thus preferred to get services on the agenda but was open to the way a services agreement might be negotiated. However, by the late 1980s, its preference for an expansive services agreement seemed to wane. In intellectual property, U.S. initially preferred a limited agreement on developing codes for counterfeit goods whereas its preferences changed along the way for an expansive one. The choices underlying these preferences changed as a result, too.

More recently, the constructivist paradigm in international relations has taken up the challenge of preference formation (Wendt 1999; Katzenstein 1996). However, it now needs to relate this to broader issues in political science, such as the issue of power.⁷ At this level, the constitution of preferences via changing interactions, especially in a globalized world where the scope and intensity of interactions continues to increase, can be taken as the equivalent of *meta-power*, which delves into the ‘how’ and ‘why’ of preference formation (Singh 2002B). Explaining the ‘what’ of preference formation is close to the neo-classical conception by economists. In a similar sense, Nye (1992) notes the importance of persuasion and attraction, what he terms ‘soft power,’ in the information age in shaping the global rules of the game. However, he takes preferences as given. A plausible case can be made for persuasion changing the preferences of actors, just as it can be made for another type of human interaction, the ‘hard power’ of terror or force.

The case for negotiation theory in shaping global rules and refining international relations theory is now made effectively by several scholars (Axelrod 1985; Evans et al 1993; Odell 2000A). This paper extends these theories to thinking about (a) North-South negotiations in (b) new issues. In terms of North-South negotiations, the hypotheses outlined above, on domestic alignments and alternatives, come directly from such theory. The importance of the two levels of international relations, international and domestic, are now increasingly recognized (Rosenau 1997, Keohane and Milner 1996). For international rules to be effective, they must have

preferences to conform to social pressures and conditions. This point would be consistent with my notion of changing preferences but not with those who take preferences to be given. We could also conjecture that those exercising the social pressure, great powers in the case of this paper, have less of an incentive to falsify preferences.. Therefore, the preferences articulated by the North in IP and services are taken to be approximations of their true preferences in this paper.

⁶ A bolder claim about preference formation may be made but it is beyond the scope of this paper. Preferences are assumed to be made by rational actors who indulge in goal directed behavior and/or maximization of a utility function. In as much as these preferences arise from interactions, it is not clear how all interactions must always lead to goal directed behavior or maximization of utility functions. See Green and Shapiro (1994) and Friedman (1996).

⁷ Remember that the theses on international negotiations began with distinctions between potential and actual power (Bennet and Sharpe 1979; Keohane and Nye 1977).

“domestic resonance” (Putnam 1988). On the flip side, domestic lobbies can tie the hands of negotiators. This paper shows that these propositions may apply to developing countries -- with two twists. First, until recently, most developing countries were excluded from multilateral rounds (Winham 1986). Now that they are included, domestic constituencies can build credibility for developing countries’ proposals while also serving to limit or expand the alternatives a negotiator might accept. Negotiation alternatives for any country are directly related to the particular alignment of domestic actors and their interests. In Putnam’s words (1988: 437): “we may define the ‘win-set’ for a given Level II constituency as the set of all possible Level I agreements that would ‘win’ -- that is, gain the necessary majority among the constituents -- when simply voted up or down.” Second, divisions in the ranks of the domestic constituencies of the North can be exploited by developing countries to their benefit or it can make effective agenda-setting and coalition building difficult for the North. Either way, it is negotiation tactics that finally account for the way the preferences of domestic constituencies are created and disposed.

Domestic alignments, in turn, depend on economic and market conditions, number of issues, and the number of actors at the international level, among other things.⁸ That the economic and market conditions influence the make-up of domestic actors is well documented in international political economy literature (Gourevitch, 1985; Rogowski, 1989). However, the way actors position themselves internationally with respect to their domestic economic conditions (itself dependent on global factors) is less well-known. Negotiation theory here can help to complete the picture by showing the relative standings of domestic actors vis-a-vis global conditions. Odell (2000) shows precisely this by deriving hypotheses about negotiation strategies based on market conditions. Thus, a negotiator involved in market liberalization talks at the international level might find much more room to maneuver if she faces the choice of multiple constituencies at home (those for and against liberalization) than if her country is dominated by a protectionist coalition.⁹

Similarly, the presence of multiple issues and actors at the global level offers more alternatives to negotiators than if the talks are bilateral and concentrated around one issue (Singh, 2000A). Several issues in a negotiation can thus allow for more opportunities for coalition-building and agenda-setting while multiple actors allow more alternatives to arise from the coalitions that might exist.

This study emphasizes micro-level negotiation tactics such as agenda-setting over macro-level strategies such as hawkish versus dovish behavior. Odell’s (2000) operationalization of value-claiming (hawkish) and value-creating (dovish) strategies may in fact be seen as particular tactics deployed by a negotiator. Putnam (1988) and Zartman (1982) also eschew the language

⁸ Domestic alignments can also be influenced by the nature of the negotiating country’s formal and informal political institutions, historical circumstances, and cultural practices. For the purposes of this paper, I have singled out factors that are most relevant to its case studies.

⁹ However, having many alternatives may not be a bargaining advantage, per se. With only one coalition back home, the negotiator might argue that her hands are tied and use the situation to extract concessions from the other side.

of negotiation strategies to detail tactics instead. Thus, it seems that the real meat of the negotiation lies in particular tactics deployed as operationalized earlier.

In sum, domestic alignments help to specify the zone of agreement, which is dependent on the intersection of win-sets of the negotiating countries. The particular agreement that would be effected within that win-set, if the negotiation leads to an agreement, is then contingent on the particular strategies adopted or, as in the case of this paper, particular tactics. However, our analysis is complicated by the fact that the tactics are themselves related to domestic alignments thus presenting us with a synergistic relationship between win-sets and negotiation tactics.

THE NEGOTIATION OF GATS AND TRIPS

The negotiation histories of GATS and TRIPS provide interesting similarities and contrasts. Both feature the United States as setting the agenda and building coalitions in support of these new issues. Both issues are opposed by the developing world before the Uruguay Round starts. For services, the positions of the North and the South are softened by the development of a mid-level coalition, *the positive café au lait effect*, to allow for concessions to both parties. TRIPS features a progressive hardening of the North's position and some cracks in the South's stance that eventually lead to an agreement in which the South is unable to extract concessions. *The negative delayed agenda effect* accounts for the losses resulting from the delayed acceptance of the IP agenda by the developing world.

The negotiation history is divided into four phases here: the Pre-Uruguay Round phase up-to 1986 that shows how these issues made it into the Round's agenda; the period up to the mid-term review in Brussels that shows the extent of the North-South divisions in these issues at the Montreal mid-term review in December 1988; the period from Montreal to the Brussels meeting in December 1990 that almost led to agreements; and the final phase when the details of the agreements were worked out. Tables 1 & II summarize the main empirical results.

[Tables 1 & 2 here]

GETTING TO PUNTA DEL ESTE

The September 15-22, 1986 GATT meetings in Punta del Este came at the end of over a decade's diplomacy to make new issues -- services, intellectual property and investment -- part of the new Round's agenda, especially after the GATT ministerial in 1982.

Intellectual Property: The moves toward including services and intellectual property in GATT decision-making began with industry groups in the United States as the Tokyo Round of trade talks was progressing (1973-79). At that time, there were existing frameworks governing intellectual property but services were an unexplored territory globally.¹⁰ During the Tokyo Round, famous brand names in the developed countries pushed EEC and U.S. to table a code

¹⁰ Important agreements included the Paris Convention for the Protection of Industrial Property of 1883 (governing patents and the like), the Berne Convention for the Protection of Literary and Artistic Works, 1886, and the Rome Convention of 1961, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. These treaties were administered by the World Intellectual Property Organization, which was formed in 1967 and became part of the United Nations in 1974.

curtailing trade in counterfeit products. An anti-counterfeiting coalition was announced in 1978 led by Levi Strauss and included brand names such as Samsonite, Izod, Chanel and Gucci. The intellectual property issue (hereafter IP) was also tied to U.S. negotiations with Hungary over renewal of its MFN (Devereaux 2002: 6) and the effort was spearheaded by agro-businesses such as Monsanto, FMC, and Stauffer with Monsanto's Jim Enyart trying to frame IP as a trade related issue (Sell 1999: 177). Despite these early international overtures, the work of big profile firms such as Pfizer and IBM in the GATT's Advisory Committee on Trade Policy and Negotiations (ACTPN) established by the U.S. Trade Act of 1974 is important (Ryan 1998: Chapter 4). This body, chaired by Pfizer's CEO Edmund T. Pratt, took up the cause of making intellectual property rights (hereafter IPRs) a trade-related issue. Strengthening of the Paris Convention was important to Pfizer while IBM sought to extend the Berne Convention to copyright protection of software. (Significantly, the U.S. Trade Act of 1974 introduced Section 301, which would be amended in 1984 to declare that IPR infringements were trade barriers.) The ACTPN thus worked not only to effect trade legislation in its favor but it did so by making the otherwise arcane issue of IPRs a trade-issue.¹¹

ACTPN worked closely with commercial associations in several countries and also with the Pharmaceutical Manufacturers Association and the Chemical Manufacturers Association in the United States to strengthen its ranks. The efforts culminated in the formation of the Intellectual Property Committee in March 1986 before the start of the Uruguay Round. It was headed by IBM Chairman John Opel, with a membership of 11 to 14 over the Uruguay Round period. The original 13 members were: Bristol-Myers, Du Pont, FMC Corporation, General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International, and Warner Communications.

It is significant to note that the patent and copyright interests did not come together automatically in the U.S. While IPC mostly represented the patent interest, the copyright interests came together in late-1984 to form the International Intellectual Property Alliance (IIPA), which was the umbrella group for associations representing industries producing and distributing audio and visual content. IIPA was instrumental in getting Section 301 to apply to intellectual property in 1984. The copyright interests, representing films, music and books, were initially sceptic of the need for global rules and felt that Section 301 was enough (Ryan 1998, 107).

Meanwhile, the developing countries were not organized enough on all intellectual property rights issues but countries like India had, in fact, passed laws that made such copying simple and effective (Gallagher 2000: 282-283). The 1970 Drug Price Control Order set price ceilings on essential drugs and the Indian Patent Act of 1970 disallowed product patents but recognized product processes which, in effect, led to copying of patented drugs from the developed world. The Indian pharmaceutical industry also generates significant export revenues from selling its cheaper drugs abroad. It is now the world's fourth largest exporter of pharmaceuticals. Developing countries often cited a 1974 UNCTAD study in support of their case for compulsory licensing of drug products (Devereaux 2002). This study showed that over

¹¹ In 1988, the loss to U.S. industry annually from IPR infringements was estimated to be \$40 billion (U.S. International Trade Commission, 1988).

84 percent of the patents issued in developing countries were those accorded to five developed countries: United States, the United Kingdom, West Germany, France, and Switzerland. If anything, the developing countries since 1974, with efforts dating as far back as 1967, were trying to push through a revision of the Paris Convention that would have weakened its provisions (Sell 1999). The revision almost went through; it broke down in its final stages in 1981 and 1982 at meetings in Nairobi and Geneva, respectively. Developing countries argued that with existing international treaties, the need for another one, especially via GATT, was minimal. They noted that IP protections were closely tied to restrictions on transfers of technology that were an important input for economic development and social well-being in general

However, it is puzzling that just as anti-counterfeiting, later intellectual property rights, coalitions began to pick up steam in the North, the developing countries did not think of a counter-coalition. Watal (2001: 16) notes “that developing world may have been lulled into a certain complacency” due to the support they received from the developed world for diluting the Paris Convention to allow for compulsory licensing from countries such as Canada, Australia, New Zealand, Portugal, Spain and Turkey (many of whom had compulsory licensing procedures of their own).

By the time of the 1982 GATT ministerial to discuss the possibility of a new multilateral trade round, there was no consensus that intellectual property was a trade related issue, or that it went beyond a few anti-counterfeiting issues. Right before the ministerial in 1982, India’s prime minister Indira Gandhi gave a major speech to the WHO in May lambasting the developed countries for trying to take away compulsory licensing provisions. Croome (1999:11) notes that the delay in accepting the agenda on counterfeit goods at the 1982 ministerial, because of minimal support from developed countries and no support from developing countries, allowed for the induction of a much larger agenda on trade in intellectual property later on. (Croome regards this as a positive development from the point of view of IP interests and international trade.)

Most of the movement toward getting intellectual property on the agenda came about after the 1982 ministerial and close on the heels of the Punta del Este meetings. Two moves originating in the United States -- strengthening of the intellectual property coalition and use of U.S. trade law and instruments -- are particularly important. After coming together in late-1984, IIPA lobbied successfully to have Section 301 of Trade Act of 1974 apply to intellectual property. In 1985, the USTR asked the private sector to forward its concerns on IP issues. The IIPA submitted a report to the USTR, which noted that U.S. lost \$1.3 billion to piracy of copyrighted works in ten countries (International Intellectual Property Alliance 1985). A far more significant report came from the economist Jacques Gorlin (1985) that was commissioned by John Opel. This report not only synthesized the thinking about IP as a trade issue but also advanced an agenda for multilateral negotiations through OECD and GATT, although it acknowledged that WIPO would play a consultative role.

By the time of the Gorlin paper, the U.S. government was doggedly pursuing IP issues already. Unilateral and determined moves by the United States would later be characterized during the Uruguay Round as offering the developing world a worse outcome than one they

could get via the TRIPS instruments. Bilateral consultations led to revisions of IP laws in Hungary, Taiwan and Singapore. Unilateral moves were particularly directed against countries that might oppose U.S.'s IP agenda. President Reagan himself cited Brazil and Korea as indulging in unfair trade practices under Section 301 in his weekly radio address on September 7, 1985 (coincidentally Brazil's National Day) (Odell 2000A: Ch. 6). The agreement resulting from talks with Korea in 1986 is often characterized as a model for TRIPS. The talks with Brazil dragged on for 36 months and although there was no agreement, their role in putting pressure on countries like Brazil to agree to put IP on the agenda of the Uruguay Round is undeniable.

In 1985, USTR Clayton Yeutter had also created the Assistant USTR for International Investment and Intellectual Property. By Spring 1986, Yeutter asked Opel and Pratt to lobby internationally to put IP on the new Round's agenda. The IPC was formed as a direct result of this request. During the summer of 1986, IPC representatives went to many European Capitals and Tokyo to make their case. The IPC travels resulted in a tripartite alliance between IPC, the European Union of Industrial and Employers' Confederation (UNICE), and the powerful Japanese federation of industries, the Keidenran. From summer onwards, the efforts to put IP on the agenda of the new Round are inextricably mixed with the politics of services and the efforts by hardline developing countries to block the inclusion of such new issues on the Uruguay Round agenda. It is nevertheless interesting that, until April 1986, the goals of the USTR on IP issues remained modest -- that of getting an anti-counterfeiting code developed and making it subject to the GATT dispute settlement process (Watal 2001: 17-18). In hindsight, like at the ministerial in 1982, the longer it took to put IP on the agenda, the more hardline the stance of the IP coalition became, and the more expansive its agenda.

*Services:*¹² The coalition for services in the developed world as well as its agenda showcased an impressive agenda from its inception in the 1970s. The term 'trade in services' owes its origins to the OECD, which conceptualized and developed the services agenda first before it became a GATT issue. Until the Uruguay Round, there was no umbrella agreement in services although there were a few agreements, mostly of technical nature, involving particular sectors such as telecommunication, civil aviation, shipping, and postal services (Zacher with Sutton 1996). Most of these agreements legitimized national monopolies while allowing for 'interconnection' among them and also for international rules and decision-making procedures to guard for safety and damage control. Whereas in IP, the existing agreements covered a related set of issues over a number of sectors, in services the agreements governed disparate sets of issues in individual sectors.

The impetus for services trade in the 1970s came from U.S. industries in banking, finance and software and their moves began to coincide with the U.S. balance of payments and, later, trade deficits. U.S. MNCs began to argue that the country's comparative advantage lay in service industries. Their moves were aided by the OECD whose Trade Committee began to look into the services issue in 1979 (its report came out in 1987). A host of think-tanks and other institutions (mostly in the U.S. and UK) pitched in to show that trade in services was important and growing. The U.S. government reacted by establishing the Interagency Task Force on Services and the Multilateral Trade Negotiations at the White House. Department of Commerce

¹² This sub-section borrows a great deal from Drake and Nicolaides (1992).

as well as the USTR also established offices for services. These agencies raised the services issue at the Tokyo Round. What they achieved was a proposal for GATT's Consultative Group of 18 (G-18) made up of senior trade officials to look into services and other issues (Croome 1999:2). Meanwhile, in 1979, the U.S. Chamber of Commerce was asked by the government to add services barriers to its 1976 list of trade barriers. Foreign governments turned in their own lists after consulting with their firms. All these efforts were important for not just agencies like the OECD examining this issue but, as Drake and Nicolaides (1992: 51) note, they were also a form of issue-framing shaping the services negotiation agenda in the 1980s. However, until the GATT ministerial in 1982, the U.S. was far more enthusiastic about this agenda than other developed countries.

The hard times of the early 1980s helped to push the services agenda forward. Trade growth was barely one percent, stagflation was high, and with 1982 came the international debt crisis, which plagued the developing world and the world's financial markets. Department of Commerce in the U.S. calculated that the services sector accounted for 70 percent of the total employment and 90 percent of growth in employment. Of the total world trade in services of \$350 billion, U.S. accounted for \$35 billion (statistics cited in May 1992: 2). Firms such as IBM, American Express, and insurance industries increased their lobbying toward recognition of services as a trade issue.

The next step in getting services into GATT was the ministerial in 1982. In 1982, the Coalition of Service Industries came about in the United States and the Liberalization of Trade in Services Committee in the U.K. At the 1982 meeting in Geneva, which included 82 ministers and 800 official delegates, the USTR brought up the new issues and was especially aggressive on the services issue. The Europeans, in the process of establishing an interservices group, advocated a 'go slow' approach. They feared the U.S. advantage in service industries and, except for Margaret Thatcher's U.K., most of them had no concrete plans for dismantling for their service industries, especially the national utility and transportation monopolies.

The reaction from the developing world was predictably negative. The relevant coalition to voice its concerns was the Group of 77 led by Brazil and India at the GATT. Brazil and India argued that services was not a GATT issue and focused on issues of concern to the developing world – the creeping protectionism in agriculture and textiles – and asked for the implementation of the standstill and rollback agreements on these areas at the Tokyo Round. Given the opposition from the developing world and lack of support from EEC, the issue of services was put off until the meeting of the Contracting Parties in 1984 where further studies on services would be reviewed.

The next big move, the formation of the 'Jaramillo Group' for consulting on services built on the existing coalitions in services and began to fracture the G-77 coalition. The Jaramillo Group came about in 1983 when GATT delegates began to meet informally to discuss the services issue and got its name from Felipe Jaramillo, Colombia's ambassador to GATT, an authority on international trade policy. Jaramillo convened and chaired the group's sessions, which lasted until 1986. The United States was a central player in presenting studies and listing barriers in various countries (May 1992: 4). In 1984, it submitted a comprehensive report of the state of trade in services globally, which also indicated in detailed statistical tables that the U.S.

was not the only beneficiary from services trade (U.S. Government 1984). Developed countries and a few ASEAN NICs began to come around to the U.S. position. In May 1985, the EC declared its support on the services issue with EC's Commissioner for External Affairs Willy de Clerq acknowledging that many EC countries had services surpluses.

The developing countries did not produce as many studies as the United States but did recruit UNCTAD to their cause in 1983. In a 1984 report it questioned the legality of bringing services into GATT. Arthur Dunkel, the GATT Secretary General, had appointed a commission in 1983, which came to be known as the Leutwiler Group, to look into the prospects for the new round. In April 1985, the report by this group was heavily critiqued by developing countries. In July 1985, India presented a paper to GATT questioning new issues, among other things, and easily got the support of 24 developing countries (G-24). Issues of textiles and standstill and rollbacks were brought up again.

In order to break the North-South deadlock, the Swedish trade minister brought together 24 other trade ministers in Stockholm in May, attended by Dunkel, where the idea of a two track approach, one for goods and the other "separate but parallel" one for services, was suggested to jump-start the new round (Croome 1999: 17).¹³ This meeting seemed to end in consensus but subsequent meetings in Geneva broke down again. Thus, by 1985, the battle lines on services particularly, and new issues in general, were between the North and the South. The Jaramillo Group itself was deadlocked by late 1985.

Meanwhile, the United States was working behind the scenes to push for starting the new round, which was in jeopardy mostly over LDC concerns (and differences in agriculture trade among developed countries) by 1984-85. The G-7 meetings and OECD were especially important in this regard. Like it did on intellectual property issues with Korea, the United States produced a Free Trade Agreement with Israel in 1985 that its officials began to showcase as a possible services agreement for the future (it served as a model for Canada-U.S. FTA, too).

In April 1985, the OECD countries became aggressive in trying to start a new round by asking for a preparatory committee (Prepcom) of senior trade officials to start drafting the agenda for a new round. As the summer of 1985 ended in bitter North-South disputes, the Prepcom was seen as a way of breaking the deadlock and was established on November 28, 1985.

From Prepcom to Punta del Este: Prepcom meetings took place between January and July 1986 but remained deadlocked. The United States blamed this on the WTO Secretariat and for a while flirted with the idea of submitting a draft ministerial declaration to start the new round. As the stalemate at Prepcom ran on, the Swiss Ambassador Pierre-Louis Girard convinced a group of nine (G-9) moderate developed countries (Australia, Austria, Canada, Finland, Iceland, New Zealand, Norway, Sweden, Switzerland) to draft an agenda which G-9 presented as a draft to

¹³ What Sweden suggested was already part of thinking on the subject in international legal journals where the difficulty of applying existing GATT rules to services was acknowledged (Drake and Nicolaides 1992: 63).

Prepcom on June 11, 1986.¹⁴

Brazil and India struck back immediately. On June 23, Brazil's ambassador to GATT Paulo Batista presented an official proposal W41 to Prepcom signed by ten hardline developing countries including India. The W41 move backfired; it was seen as extremist and the G-10 support itself showed dwindling of developing country ranks. Among other things, it argued for complete rollback and standstill of protectionist measures as a pre-condition for including services and other new issues in the Round. G-10 was concentrating more on keeping services out of the round than intellectual property. Watal (2001: 20) notes that this was a mistake given the push on intellectual property and the U.S. agreement with Korea.¹⁵

A direct result of the Brazilian proposal was the explicit defection of twenty moderate developing countries (G-20, including Colombia, Chile, Jamaica, Korea) who joined ranks with the G-9. The G-20 defection was led by the Korean Ambassador Kun Park (Oxley 1990: 136). Along with U.S., Japan, and EC – who played mostly observer roles– the G-9 and G-20 led by Switzerland's Girard and Colombia's Jaramillo began to meet in the EFTA offices at Geneva to prepare a proposal that came to be known as the *Café au lait proposal*, after the Swiss-Colombian leadership. Because of the EFTA meetings, the Prepcom had only four short meetings in late June 1986 to discuss the *Café au lait* proposal, which included services and language on standstill and rollbacks. The language on intellectual property issues in the Swiss-Colombian draft was “ambiguous and general” (Devereaux 2002: 14). The proposal by the G-10 hardliners (now only nine because of Argentina's defection) and a proposal by Argentina that modified the *Café au lait* proposal were the others discussed at Prepcom. But the clear winner seemed to be the Swiss-Colombian draft. However, on the last day of Prepcom meetings (July 31), EC broke ranks and sided with the hardliners (its motives may have been its own agricultural interests pushed by the French). EC suggested the two-track approach that would allow India and Brazil to save face. Dunkel thus forwarded all three proposals to Enrique Iglesias, the Foreign Minister of Uruguay, who would chair the ministerial, with a note indicating that the *Café au lait* proposal was largely favored. This drew sharp critiques in a series of letters from Brazil and India.¹⁶

The meetings at Punta del Este, September 15-22, started with USTR Yeutter arriving with a U.S. Cabinet decision that forbade him to accept a two-track proposal. Thus, the

¹⁴ G-9 was a sub-part of dirty dozen, which also included U.S., Japan, and EC. Leaving the other three out of agenda-setting would marginalize power politics and portray the G-9 in neutral light.

¹⁵ “The TRIPS proposal of the *demandeur* governments was neither effectively diluted nor countered with other proposals by its opponents” (Watal 2001: 20).

¹⁶ Arthur Dunkel had a hard act to play. Croome (1999), Devereaux (2002) note that his own interests, especially on public health provision, were broadly sympathetic to the developing world. Even before Punta del Este, he did not want to make pariahs out of the hardline countries (Interview with a participating ambassador). However, he drew continual ire from the hardliners and, in India's case, even his effigies were burnt in the streets after the so-called Dunkel Draft on IP was presented in December 1991.

negotiations on services at Punta del Este, moderated by Iglesias, were mainly between U.S., India, and Brazil. The teams remained deadlocked although the U.S. position had the support of many from the EFTA group. Eventually, Jaramillo proposed a procedural solution, albeit one favoring two tracks: the services talks would be separate as in the EC proposal but conducted by the same officials and the GATT secretariat. In other words, the two-tracks, in the language of GATT would be ‘a single-undertaking’ although it did not really apply to services. The U.S. accepted this proposal and the Uruguay Round was launched and expected to be concluded in four years.

Intellectual property was included under goods negotiations. The subject heading for the three paragraphs dealing with IP at the Punta del Este declaration pertained to IPRs including trade in counterfeit goods, which might have led developing countries to believe that only the latter would be negotiated. The language later allowed for a far broader agenda on trade-related IPRs to be brought in (Croome 1999: Annex; Watal 2001: 21). In the case of IPRs, the developed countries had slipped in an agenda without the developing countries taking much notice.

The procedural distinction agreed to at Punta del Este led to the constitution of the Group of Negotiations of Goods (GNG), the Group of Negotiations on Services (GNS), and the Round as a whole would be directed by the Trade Negotiations Committee (TNC). Arthur Dunkel and his successor Peter Sutherland after July 1993 headed the GNG and TNC while Felipe Jaramillo headed the GNS. In keeping with the Punta del Este declaration, 14 negotiating groups were appointed for goods and one for services in January 1987. Lars Annell, the Swedish Ambassador to GATT, headed the TRIPS group.

PUNTA DEL ESTE TO MONTREAL

A mid-term review was planned for Montreal in December 1988. By that time, considerable conceptual work had been done in shaping the agenda, and formulas thereof, for services liberalization. The intellectual property issues, however, remained deadlocked. If in services, the relatively open process sought to arrive at the problematique, the latter was presented as a fait accompli to the developing world in IP negotiations. The services discussion began to be characterized and framed by the North in terms of jobs and growth; IP in terms of theft and punishment.

Intellectual property: On the part of the developed world, the coalition building by IPC strengthened, its governments began to speak with a common voice in spite of minor differences, and unilateral moves by the United States increased. Developing countries woke up to the expansive way the developed world was defining the Punta del Este agenda and sought to resist it. The first two years of the TRIPS negotiating group were thus spent in trying to define the agenda of the Punta del Este mandate.

The IPC got busy in this period in strengthening its ranks and trying to come up with a monolithic position. In November 1986, IPC representatives met with their counterparts at UNICE and Keidenran to start this process. For the next two years, the IPC arranged meetings with 30-40 industry association every 6 to 9 months to review successive drafts of this framework. The 100 page position paper, called “Basic Framework of GATT Provisions on

Intellectual Property” was presented in June 1988. Throughout this process the IPC worked closely with the U.S. government, especially the U.S. TRIPS negotiator Mike Hathaway and with Mike Kirk of the U.S. patent office. The paper reflected the position of the earlier Gorlin paper on framing a wide-ranging IP treaty via GATT and using its dispute settlement for enforcement. The U.S. pharmaceutical industry did not want to give any grounds on the need for compulsory licensing but adjusted its position in order to get the Japanese and Europeans on board. The final TRIPS agreement reflects the Basic Framework to a great extent.

Developed countries were beginning to speak with a common voice and defined an expansive agenda for IPRs. By October-November 1987, the United States, Japan, and other developed countries including Switzerland had made it clear that they wanted to use the GATT process to discuss almost all IPRs: copyright, patents, trademarks, designs, geographical indicators, industrial designs, and trade secrets (Watal 21001: 22-23). The EC submission in November, focusing on the enforcement of such rights, was largely in concurrence with U.S.’ and IPC’s positions.

The differences among developed countries, apart from the one mentioned on compulsory licensing above, were on the omission of designs from the U.S. list, trade secrets from the Japanese list, and geographical indicators from both of them. The latter was an issue dear to the Europeans and they did not fully come on board on blessing the expansive agenda until this issue was included in mid-1988. Another difference between U.S. and EU was over copyright issues or “neighboring rights” related to performers, producers and broadcasters (this would come up later in audio-visual negotiations as part of the GNS).

Sell (1999: 186-187) notes that the consensus building among developed countries came from following the advice on meetings in enclave committees given in the Gorlin paper. This was the IPC strategy, too. Within GATT, the QUAD (U.S, Japan, EC, and Canada) and “Friends of Intellectual Property” group were key enclaves.

The hardline developing countries, led by Brazil and India, felt that they had been misled at Punta del Este. They had expected the discussions to be limited to counterfeit goods or, at the most, to trade issues in IP. While they continued to find common cause against IPR protections, they could not find any sympathetic actors in the North to take their side. They critiqued the “Basic Framework” put forth by IPC, UNICE, and Keidanran. The very character of the multilateral negotiations was thus reduced to a two-way game with an asymmetric power distribution favoring the North. In several fora, developing countries sought to exclude patents (especially in pharmaceuticals) from the agenda but the gambit did not work. The North refused to recognize the compulsory licensing claims in any great measure. Civil society protests in the developing world, that often featured groups from several countries together, served to spotlight developing countries’ causes in areas such as seeds procurement and cheap pharmaceuticals but they were not able to sway the Northern negotiators. They also pointed out that the Punta del Este declaration, specifically sub-sections (iv) and (v) of Section B, did accord them ‘Special and Differential Treatment,’ in accordance with GATT rules framed in the 1960s. Intellectual property was a make-it-or-break-it issue for India, which faced strong domestic pressure, at times resulting in violent protests, from its farmers and pharmaceutical firms (Sharma 1994). In October 1988, Brazil submitted its position, which sought to limit the agenda of the negotiating

group on IP. However, there were developing countries, Korea and ASEAN among them, that explicitly refrained from critiquing the developed country proposals (Croome 1999: 114). Many of them were under pressure from the United States on their IP practices.

Concerted pressure on the developing world came from toughening of the U.S. legislation on IP and the pursuit of infringing countries by the USTR. First, the U.S. began to tie with IP protections the granting of Generalized System of Preferences (GSP), which waived certain tariffs for developing country products. Second, in August 1988, the U.S. Congress added bite to Section 301 by passing the Omnibus Trade and Competitiveness Act of 1988 in response to business pressures. The 1988 amendment authorized the USTR to annually list, and investigate within 30 days of doing so, those countries whose IP practices resulted in unfair access to U.S. firms (Sell 1998: 134). USTR began to prepare “priority watch lists” of countries. The inaugural list, coming on heels of pressure from IIPA, included Korea, Brazil, India, Mexico, China, Saudi Arabia, Taiwan, and Thailand (Ryan 1998: 78). The 301 initiative against Brazil in 1985 was mentioned earlier. The Brazilians amended their copyright law in 1987 and the patent law in 1988. In September 1988, USTR began to investigate Argentina’s pharmaceutical patent protections. In 1989, Thailand lost GSP benefits after being named on the 301 IP watchlist.

The net result of all these moves, however, was that there was no consensus on the IP agenda by the time of the mid-term review. Mike Kirk notes that the first two years had been spent talking in generalities that resembled a “Kabuki dance....We would lob principles at the South and they would either sit there and ignore them or occasionally lob an idea back at us” (Quoted in Devereaux 2002: 15). Before the Montreal meeting, the required text describing the future course of action was difficult to frame. The text prepared by Lars Anell was rejected by the U.S. for being too weak and by developing countries as being too strong. Thus, this text along with three others (from Brazil, U.S. and Switzerland) were forwarded to Montreal. The meeting ended in deadlock and adjourned over this and, mostly, agricultural issues. However, it was in Montreal that Brazil came around followed by India on the IP issue. The differences were resolved by TNC in April 1989 when the TRIPS deadlock was broken with India playing a key role in the writing of the text.

Services: Compared to the Kabuki dances of the negotiating group on intellectual property, the GNS featured ballroom dances, admittedly tense ones at times. The developing countries had walked out with their major victory at Punta del Este with the two-track mandate. Now they worked within the GNS group to try to define principles. While this continued, the interests of a few business groups changed in the United States when they began to fear that they might not gain so much from a far-reaching agreement; on the other hand, the developing countries began to see a few benefits from a services agreement, especially if the agreement could apply toward movement of labor supplies from the South to the North. Thus, the expansive agenda of TRIPS was paralleled by a circumscribed or a tailored one for services. Multiple domestic and international coalitions from the North and the South featured several alternatives on services.

The GNS decided in January 1987 to take up five tasks: (i) definitions and statistics of trade in services; (ii) inclusion of concepts such as national treatment, MFN, transparency that may be relevant for services as whole or for particular sectors; (iii) lists of the sectors that would be covered; (iv) inventory of existing international agreements; (v) listing measures increasing or

obstructing trade in services. The “modes of supply” issue to be used for defining delivery came out of examining the first issue. By 1988, it was agreed that services could be supplied through several modes such as movement of consumers, suppliers, commercial organizations, and cross-border flows. As these required rights of establishment, developing countries capitalized on this to note that service delivery might entail movement of personnel (this later worked itself into sensitive immigration issues -- and, therefore, opposed -- in developed countries). The issue of sectoral coverage was difficult: many countries had sacred cows -- maritime in U.S., audio-visual in EC, insurance in India (Croome 1999: 105-106). It thus became clear that rules would have to be designed to include whole or specific features of sectors. It was also not clear if commitments made would apply to all those making any kind of commitments or only to those making reciprocal commitments. A Swiss proposal touted optional MFN applicable only to a few countries.

Given the hostility to services before the Round opened, the willingness of developing countries to work within the GNS is significant. Developing countries submitted several papers that helped with technical details on the formulation of principles. Frequent meetings, characterized by collective problem storming, also bred trust: the GNS met 27 times between November 1986 and January 1990 for 3-5 days each.¹⁷ There were a few protests: a few developing countries felt in late 1987 and 1988 that their issues had been ignored with Brazil taking the lead to add they were being rushed into issues that they barely understood (Croome 1999: 107). In 1987, developing countries also turned to the UNCTAD for assistance, which began to coordinate its activities with GNS. The UN Centre on Transnational Enterprises also helped the developing world and helped to articulate their concerns about MNCs and need for regulation in services (Drake and Nicolaidis 1992: 78-79).

However, by the late 1980s, the developing world also began to shift away from its import-substitution policies of the past toward liberalization. Sectors like telecommunications that were a major part of the GNS exercises were targeted. Thus, they became more willing to see that they might benefit from a services accord (Winham 1998; Oxley 1990: 108-109). The Rajiv Gandhi administration in India and the Sarney and Collor administrations in Brazil were all crafting market opening moves in their services sectors already, especially in telecommunications (Singh 1999).

Meanwhile a spate of studies about trade in services, often reflecting industry positions or shaping them, had continued to pour out of the developed world. The OECD Trade Committee, which had started working on services, released its report in March 1987. While pushing for services liberalization, it acknowledged that regulation was an essential part of services. Meanwhile an Office for Technology Assessment study in the U.S. acknowledged that while the country remained competitive in telecommunications and information technologies, its lead was declining in banking, finance, engineering and construction (Drake and Nicolaidis 1992: 76-77). Maritime and shipping in the U.S. had always articulated a protectionist position. The U.S. Treasury now began to lobby against liberalization of financial services (Oxley 1990: 186-187).

¹⁷ Narlikar (2003: 98) notes the origins of this process in the pre-Uruguay Round Jaramillo group: “the information exchange and consultation along the Jaramillo track were critical in winning the loyalty of smaller developing countries for the subsequent coalitions that emerged.”

U.S. submitted its proposal to GNS in 1987, which asked for progressive and phased liberalization and for negotiation of a framework agreement that would allow for specific sectoral agreements to come in later. The proposal was hesitant on applying national treatment to all without reciprocity. Several other proposals followed, all of them arguing for tailoring services liberalization one way or another. By the end of 1988, there were 35 proposals to consider. No final agreement could be struck but there were broad enough agreements on the services agenda and principles for the GNS to prepare a draft text for Montreal “which included a fairly large number of open points (‘square brackets’), none of which, however, seemed likely to give great difficulty” (Croome 199: 109). At Montreal, these broad principles were honed down further and a negotiating timetable was set for the future.

FROM MONTREAL TO BRUSSELS

The next ministerial of GATT to bring the Round to a close, before the Fast Track authority of the U.S. President were to expire, began on December 3, 1990, in Brussels. The months between April 1989 and December 1990 were marked in agenda-setting terms by reformulation and fine-tuning of services principles and the working of LDCs within the negotiating group on IP to try to include issues of benefit to them. The services coalitions continued evolving as they were before Montreal with division in U.S. service industries becoming entrenched. In intellectual property, developing countries made marginal gains by forming coalitions (often with EC and Japan) on particular issues.

Intellectual Property: The acquiescence of hardline countries like India, Brazil, and Argentina and the silence of others like Korea and ASEAN had a lot to do with their inability to break the monolithic IP coalition ranks of the North, 301 pressures from U.S., and also expectations of gains in other areas. After agreeing to the April 1989 text, they worked within the negotiating group to effect gains.

A spate of 15 proposals came in by end of 1989 as the negotiating group began to meet, the most significant of which was the EC one. It was almost as strong as that of the U.S. and thus signaled, again, that Europeans were behind the Americans.¹⁸ 14 proposals came in from the developing world, too, including those from India and Brazil. The Indian submission, dating July 1989, continued to argue that many IP matters were sovereign or domestic issues though it did agree to discuss the issues at GATT. Brazil’s argued for striking a balance between rights and responsibilities. Many developing countries also stated their preference for lodging the agreement at WIPO (Watal 2001: 28). The issues on which the developing countries looked for concessions included compulsory licensing, the related issue of patent protection in pharmaceuticals, phase-in periods, and recognition of their needs with respect to development (Croome 1999: 216-217).¹⁹

¹⁸ Another motive was that by strengthening IP protections in commodities such as French wine, the EC might have been looking for concessions by the French on agriculture that had marred the mid-term review and continued to hold the Round back.

¹⁹ There are differences among observers on the level of expertise among developing country negotiators. Drahos (1995) notes that developed country negotiators treated their counterparts from the developing world as novices. Watal (2000:32) notes that countries like India had

By late 1989, therefore, the stage was set for final concessions and trade-offs and, as such, the IP negotiating group, was somewhat ahead of others. “The main issues and proposals had all been explored, the points of difference (numerous by the count of a Secretariat checklist, more than 500 in all) were known, and there was every prospect that a very substantial agreement could emerge from the negotiations” (Croome 1999: 217-218). Developing countries preferred to wait for progress in other areas before proceeding in IP. Of particular interest to them were agriculture tariff reductions and the phasing out of the MFA regime in textiles. The deadlock in IP was broken in March 1990 when U.S., EC, Japan, and Switzerland submitted texts that could form the basis of a final treaty. A group of 14 developing countries, with help from UNCTAD, put together the so-called ‘Talloires text’ or W/71 (named after the town near Geneva where they met) to counter the March proposals.²⁰ However, the Latin Americans did not want to be seen as hardliners and did not throw their weight behind this text. The text itself was not detailed enough on its provisions to really counter the other proposals. But, it did yield minor gains by providing the basis for interpreting compliance (Articles 7 and 8 of TRIPS) and sovereign control of anti-competitive practices (Article 40) (Watal 2000: 32).

The draft of the TRIPS agreement was drawn up after the Talloires text submission with a group of 10 plus 10 developed and developing countries. As with GNS, the collective brainstorming and participation in meetings seems to have yielded minor results. Watal (2000) notes several issue-based coalitions that led to developing country gains.²¹ India’s request to merge government use and compulsory licensing in exchange for not putting any restrictions on these measures was supported by EC, Japan, and Canada and made it into TRIPS. LDCs joined in with Commonwealth Countries in support of parallel trade measures. The inability of the developed world in agreeing to specific language on copyright (Article 13) and patents (Article 30) also leaves room for interpretation for the developing world.

By mid-summer 1990, 10 plus 10 put together the five proposals into a 100 page “composite draft text”, which was then edited and dwindled in size by the Brussels meeting. No country was yet committed to this text and by the time of the meeting several important issues had not been decided including term-life of patents and phase-in periods. In the meantime, U.S. 301 pressures continued having cited Brazil, China, India, Korea, Mexico, Saudi Arabia, Taiwan,

brought in separate expert negotiators for industrial property, copyrights, and layout designs. Of course, the two positions are not mutually exclusive.

²⁰ The 14 were: Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Pakistan, Peru, Tanzania, Uruguay, and Zimbabwe.

²¹ An obvious way to build coalitions would be to take advantage of differences among developed countries. The best known differences were: appellations of origin important to wine producers in France, the first to file versus first to invent patent differences between U.S. versus many others; Canada’s compulsory licensing procedures; Japanese resistance to extending copyright protections to software; European protection of moral rights of authors protecting their works from being changed or deformed by others; U.S. recording industries’ push for prohibiting rentals such as those of CDs in Japan (Devereaux 2002: 21).

and Thailand on the watch list (Ryan 1998). The Brussels meeting itself fell apart over agriculture and thus neither the outstanding issues nor those requiring high-level trade-offs could be negotiated.

Services: The preparedness of the GNS at the Montreal meeting helped to push their agenda into specific directions until the Brussels meeting. The four modes of supply and trade principles such as national treatment and market access were a fait accompli by now. Issues of sectoral coverage and application of MFN were the key agenda items. Developing countries tried to define the agenda for both of these in their favor while building coalitions of support. On one particular issue of importance to them, however, the cross-border movement of unskilled labor, they found little support. As before Montreal, the support for services negotiations continued to decrease in the U.S. and this was tied to the MFN issue, too.

With the framework of modes of supply and principles in place, GNS moved toward sectoral testing exercises in 1989. The sectors were: telecommunications, construction, transportation, tourism, professional services and financial services. This list was pared down from a list of 13 sectors and over one hundred sub-sectors. In general, these exercises revealed the limits of applying many of the GATS principles carte blanche to sectors covered. Second, specialists from these sectors got involved. In telecommunications, the support of the ITU helped to resolve many technical matters but its involvement also might have allowed developing countries to resist moves toward cost-based pricing that U.S. wanted (ITU supported the old pricing regime) (Singh 2002A).

One of the debates that arose from sectoral exercises, and the 15 papers that were submitted by countries during Autumn 1989, was the scope of sectoral coverage. Here, the U.S. wanted a top-down approach of a negative list requiring countries to list sectors and sub-sectors that were not covered. This position was viewed as extreme by most of the developing world and parts of the developed one, mainly within EC. The latter, supported by the developing world, wanted a bottom-up positive list covering only the sectors listed (Preeg 1995: 104). Furthermore, proposals by India and Brazil argued for support of infant industries and transfers of technology. By far, the most demanding proposal was that of the U.S. in October 1989, which asked for broad sectoral coverage as well as specific commitments. The proposals from U.S., Switzerland, New Zealand and Korea proposed the name of the framework: the General Agreement on Trade in Services.

The 15 page draft that GNS put together in November 1989 from these proposals was full of square brackets and thus major debates continued to flare up. A submission by the Latin American countries in February 1990 argued for special provisions and limitations of sectoral coverage for developing countries and countered the U.S. proposal. The Latin Americans were supported in May by a proposal from seven Asian and African countries including India, China and Egypt. However, by that time, there were crucial sectors or sub-sectors that even the developed world wanted to exclude. One of the most famous of these is the French ‘cultural exception,’ which applied to audio-visual negotiations. But, support for services in the U.S. was also coming undone. Maritime industries were opposed to giving up their protections, telecommunications and finance did not want to liberalize if others did not, and the airlines were hesitant. Significantly, the Coalition of Service industries changed its position and denounced

the services framework coming out of GNS. In July 1990, USTR announced that U.S. would need to derogate from MFN in shipping, civil aviation, and basic telecommunications (Drake and Nicolaides 1992: 87). This was followed by USTR Carla Hills' announcement in November that U.S. did not agree to unconditional MFN in services. EC and LDCs were outraged. Ironic, given that a little over three years ago, LDCs did not even want to negotiate services.

On July 23, however, Felipe Jaramillo sent over to TNC his own proposed text for a agreement. Even as broad agreement still needed to be struck on sectoral coverage and MFN, the proposed text contained all the elements of the agreement that would finally become GATS. Section one dealt with Scope and Coverage detailing the four modes of supply. Section two covered General Obligations and Disciplines, which included principles such as MFN, transparency, harmonization of regulations. Section three, Specific Commitments, covered market access and national treatment. Section four was Progressive Liberalization. In the Jaramillo text, Sections five and six, Institutional and Final Provisions were incomplete. Issues of sectoral coverage and MFN continued to dog the negotiations and, by late 1990, it was clear that there was no time for negotiating specific commitments that the U.S. wanted before the Brussels meeting. India, Brazil and Egypt had argued that the mandate of the GNS was only to negotiate a framework. In the Green-room discussions that followed, LDCs, in particular, were not willing to move the discussions further until issues such as textiles and agriculture were moved forward (Croome 1999: 214)

Given the disagreements, the draft that Jaramillo forwarded in November 1990 on his own responsibility added to the six sections of the May draft a list of annexes (maritime, inland waterways, road transport, air transport, basic telecommunications, telecommunication services, labor mobility, and audiovisual services). The ministers at Brussels were both impressed as well as stymied by the scope, complexity, and the tentative language. An EC delegate is quoted by Croome (1999: 215) as noting that "the ocean of brackets" made it "well-nigh impossible to distinguish substantive political opinions from mere technicalities." However, negotiations on services in Brussels were moving forward quite smoothly until the protests by 24,000 angry farmers and the agriculture impasse brought the ministerial to a close.

BRUSSELS TO MARRAKESH

The TRIPS negotiations after Brussels were fairly straightforward and essentially completed by December 1991 although developing countries did manage to squeeze a few minor concessions from the North on transition periods and dispute settlement. The services negotiations dragged on till the early morning of December 15, 1993, the deadline to conform to the twice re-sanctioned Fast Track Authority of the U.S. President for the Uruguay Round from the Congress. The text was then forwarded for the Marrakesh meeting in April 1994.

After Brussels, the GNS continued to work as it was but the other 14 negotiating groups were reduced to six; the groups on textiles, agriculture, and TRIPS were of immense importance to LDCs.

TRIPS: The final negotiations in IP took place mostly between September-December 1991 with the last meeting of the TRIPS group taking place on December 18, 1991, when 95 percent of it was deemed negotiated (Croome 1999: 276). Attempts by developing countries to try to re-open

negotiations on issues that had already been negotiated (for example, an attempt by the Andean Group on moral rights of authors) did not yield anything. However, developing countries did make a few gains on issues that had not been decided as in the difficult negotiations over transition periods. With help from the EC, the transition period for developing countries on IP protection varied between 5-10 years. Although the U.S. pharmaceutical industry was unhappy with this outcome, it was still less than the 15 originally proposed (Devereaux 2002: 25). The U.S. tried to dilute the leeway in transition periods by seeking pipeline or retroactive protection for products still in the research pipeline. An EC/India proposal countered by offering Exclusive Marketing Rights (EMRs) for five years once the product was introduced.²² The 1991 draft text which came to be known as the ‘Dunkel Draft’, then noted that countries not awarding patents had to institute EMRs for five years. For India, IP had always been a make-it-or-break-it issue. Dunkel Draft was thoroughly denounced and burned at several street demonstrations.²³

By 1991, the coalition for IP was one of the few supporting the Uruguay Round in the U.S. (Devereaux 2002: 24). Thus, it was increasingly hard for the U.S. to make any concessions and it played tough. It kept up its 301 pressures on key developing countries. India was named a priority foreign country in April 1991 and Brazil in April 1993. China, not a member of WTO, conceded to many of U.S. demands on IPRs in 1991. Thailand amended its patent laws in 1992.

The stiff opposition by civil society on IP led India to try to negotiate concessions up till the end-game (Watal 2000: 34-35). In December 1993, with Canada’s help, it was agreed that certain TRIPS violation complaints would not be brought to dispute settlement for five years. Apart from this final concession, TRIPS was part of what Dunkel described as “final political trade-offs” (Quoted in Croome 1999: 275). Brazil specifically called for decisions in agriculture and textiles (ibid 253).

Services: The MFN issues in 1991-92 and the services sectoral commitment issues in 1992-93 dominated the Round in many ways, apart from discussions in agriculture.

MFN discussions took all of 1991 in GNS. The U.S. had softened its stand on MFN in Brussels but was still afraid of according a general obligation with no restrictions, especially as its telecommunications and financial sectors were quite open already (Croome 1999: 271-272). One set of countries in GNS wanted sectoral agreements on exemptions but others felt it would lead to widespread use of exemptions. The compromise in July was to ask countries to submit list of activities or measures for which they would seek MFN exemptions rather than entire

²² As drugs can have R&D and trial periods of several years before introduction to the market, U.S. firms wanted patent protection while they were still in the pipeline and also after they were introduced in the market. The EMR agreement, while not quite offering pipeline protection, did bar rival drugs from being sold even if they were developed.

²³ For example, at a November 1993 protest in Bangalore, India, half a million Indian farmers were addressed by both farm and non-farm organizations from Brazil, Ethiopia, Indonesia, Korea, Malaysia, Nicaragua, the Philippines, Sri Lanka, Thailand, and Zimbabwe (Brecher and Costello, 1994: 7). At protests like these a familiar refrain was “Reject Dunkel, Reject Imperialism.” (Tolan, 1994:20).

sectors. However, the MFN issue was kept alive by the U.S. insisting, until mid-1992, that it was not ready to give MFN to those countries making weak sectoral offers.²⁴

The TNC reviewed the 440-page Draft Final Act on December 20, 1991, and noted the lack of sectoral commitments in services. In January, a four-track approach toward the Round emerged, with tracks one and two in goods and services, respectively. A March deadline was fixed for making commitments but only 47 offers had come in by April. The number increased to 54 covering 67 countries by end of 1992.

Sectoral commitment negotiations continued into 1993. In telecommunications, India and Egypt opposed a measure proposed by the U.S. calling for cost-based pricing. The services group did not agree but the U.S. delegation in December 1993 gave in. EC support was crucial here (Singh with Gilchrist, forthcoming: Chapter 3). As a result of this and the complicated nature of telecommunications, it was agreed to continue negotiations in basic telecommunications (and also financial services) after the Round closed. The agreement in telecommunications came about in 1997 (Singh 2002A). The hotly contested issue, one that almost broke down the Uruguay Round at the last minute, was audio-visual. While this was mostly a U.S.-EU issue, both India and Brazil would benefit from trade liberalization in audio-visual. However, India sided with U.S. on this issue, while Brazil supported the EU. Quite a marked difference from the types of coalitions that came about in TRIPS!

FINAL ANALYSIS

The GATS and TRIPS agreements were shaped in large part by the negotiation process. The concessions made by the North as well as the South and the shape and scope of the final agreements are better explained by a deeper look at the negotiations than by theories that overlook them.

An examination of outcomes and negotiations compared with BATNAs at the beginning and at the end of the Round is instructive for both issues. At the beginning of the negotiations, developing countries did not want to negotiate services issues and felt that they had much to lose from including these on the agenda. The developed world presented more or less a monolithic coalition in support of the agenda which, beginning with the Jaramillo group and the EFTA meetings during summer 1986, also picked up LDC and NIC partners. By the time GATS came into being, developing countries could walk away with an agreement that did not ask them to make concessions too far beyond their domestic liberalization schedules. Most observers would concur with the following assessment: "Differences in national policy orientation, negotiating strength, and sectoral interests have translated into wide differences in commitments across members, sectors, and modes. Although it might be tempting to use the term 'imbalance' in this context, member governments with low levels of commitments would probably insist that their schedules are a balanced reflection of the Uruguay Round process and of domestic policy constraints that might preclude liberalization of individual areas" (Adlung et al 2002: 262). In fact, an assessment by the WTO (Table 3) shows that the commitments in number of sectors by

²⁴ The most famous MFN exemption in GATS was, of course, the one claimed by EU after the failed audio-visual talks on December 13, 1993 (See, Singh 2003 for a history of these negotiations).

WTO members varies positively with the level of development.

[Table 3 here]

Achieving consistency between domestic and international constraints was not automatic. It was agenda-setting and coalition building on the part of the North and South that accounted for the outcomes. The two-track decision at Punta del Este and the subsequent formulation of positive and negative lists are to be regarded as perhaps the biggest gains of the developing world in terms of coalition building and agenda-setting. While much work would need to be done in this area, and the position may be controversial for those opposed to liberalization, it may be noted that developing countries alternative to no GATS was in fact inferior at the end of the Round. Several instances in negotiation history also corroborate the claim that just as the North, especially U.S., was backing off from making commitments in services, the LDCs kept up the pressure and pushed the services agenda forward.

The TRIPS process features the opposite of services outcomes. Taking cues from the quote above, here the domestic interests of the developing world hardly mattered and did not translate into the agreement, at least in any great measure. To quote Sell (1999: 188), the IPC “got 95 percent of what it wanted.” Again, the results were not automatic. At the beginning of the negotiation, the IP issue was not as contested as the services one and the North did not reveal the kind of unified coalition and monolithic interests as it did when the negotiations progressed. An attractive alternative just before the Uruguay Round that almost went through was the revision of the Paris Convention, which would have diluted, rather than strengthened, patent protections. The ability to build and to keep up the unified coalition and agenda have to be regarded as the North’s biggest strengths in the TRIPS negotiations. Whatever little concessions that the developing world was able to extract came not from North’s altruism but due to LDCs regard to agenda-setting and coalition building, especially in specific sub-issues like compulsory licensing, transition periods, and dispute settlement. “Given the relatively unified assault by the North against the largely weak and divided South, the achievements of developing countries in maintaining a certain balance between public interest and strengthened protection, were small but surprisingly significant...these results would not have been possible without the direct or indirect issue-based support from several developed countries” (Watal 2000: 43). The developing fared worse at the end of the Round with TRIPS, as opposed to if the Paris Convention revision had gone through or if IP had not been negotiated at all. However, in as much as the alternative to TRIPS was, in fact, USTR and 301 threats, then TRIPS with its international legal backing might be the better of the two bad outcomes for the developing world.

Generalizations are hard in social science even with quantitative data. This study attempts to generalize carefully, I hope, with a structured focused comparison of two cases. A combination of agenda-setting and coalition building tactics, with domestic constituencies operating in the background, yields two effects that are presented below. Quite obviously, they would need further empirical verification to hold (or to be dismissed):

1. *The café au lait effect: Moderate groups or agendas can break deadlocks when extreme ones exist:* the success of the café au lait coalition and the emergence of the two-track issue and the idea of having both positive and negative lists came about only in the presence of extreme alternatives. This is termed the ‘café au lait effect’ or the phenomena of negotiating between

extremes to try to effect moderation or break deadlocks.²⁵ I am thankful to my social movements theorist colleague Cathy Schneider for noting that this is what social movement theory terms the ‘positive radical flanks effect’ [Haines 1984]. However, I prefer the term ‘café au lait effect’ because it calls attention to one of its most famous exemplars in negotiation history and also steers clear of any group being termed radical because in negotiations, depending on the context, the same party may go back and forth as being moderate or extreme. Social movement theory also uses it to show how groups in the middle *always* draw most support. In negotiation histories, the effect is more about breaking deadlocks and is not observed that frequently. Here actors are aligned most of the time with the extreme groups at either end. The café au lait effect is, thus, more of a wiggle room effect rather than its commanding heights position in social movement theory. However, I am instructed by the social movement literature, which notes that this effect may be positive or negative. Haines (1984) examines the funding of the civil rights groups from 1957-1970 to show that donors gave more to perceived moderate groups because of groups that got characterized as “too far out.” Similarly, Schneider (1995) argues that U.S. government courted the Christian Democrats in Chile after Allende came to power because it was afraid of the possibility of a communist regime. This effect can be positive or negative. The café au lait effect was positive, but in many circumstances the effect may be negative as when the moderate groups are either unable to prevail [Narlikar (2003) mentions the Cairns group] or the other extreme, usually quad powers, makes them defect to their side. Thus, the effect may be negative when it allows no space for moderate groups to operate.

The history of the Café au lait coalition, often examined positively in opposition to the hardline G-10, has been examined extensively in all Uruguay Round accounts. However, the basic social science understanding of the conditions under which moderate groups can define agendas and their effects need further analysis. By remaining critical of the hardline groups, we miss the obvious fact that the Café au lait group would not exist without the Quad or the G-10 defining and, at times, explicitly shaping outcomes from the margins. For example, the two-track decision emerged from the café au lait proposal as a possibility, after being shelved earlier, when EC sided at the last minute from the EFTA meetings with the hardline group. Second, it also needs to be noted that the effect can not be used as a tactic by extreme groups to move everyone to the middle. The bluff will be too easy to call and the negotiators will lose credibility. However, moderate groups can and do use this tactic, which combines elements of agenda-setting as well as coalition building, to break deadlocks and propose solutions.

2. *The delayed agenda effect -- Delays in accepting agendas can result in worse outcome if the domestic interests of countries pushing the agenda are united or close ranks over time:* This was the case with IP for the developing world. Opposition to North’s agenda and inability to break the ranks of North’s coalition resulted in an agenda that did not reflect the South’s concerns. Here the developing countries could have gained something from gauging the weight of domestic interests in the North. Delays in accepting the IP agenda allowed the monolithic

²⁵ This is not the same as mediation by a third party or the middle role of a negotiator between internal/domestic and external/international parties (Lax and Sebenius 1986: 172-178, 339-361). It is also different from Raiffa’s (1982: 242-243) identification of a mid-mid solution in arbitration of disputes.

Northern coalition to emerge. Developing countries remained absorbed in opposing the agenda and also failed to exploit any differences, admittedly minor, among developed countries in their positions. In this case, the effect was negative, but one can envision many circumstances where the effect may be positive when the opposing side's delay tactics surrounding agenda-setting help to break down the coalition supporting it.

There may be circumstances under which the *café au lait effect* and the *delayed agenda effect* operate together and take on the same values. The former is rooted in moderating extremes while the latter is rooted in reluctance to accept an agenda that may be perceived as negative by a negotiating party. The acceptance of services via the two-track decision and the *café au lait* coalition might be viewed together as an example of both effects taking positive values. A situation of negative effects on both counts might be the current situation in the Doha Round where moderate countries like Peru, Columbia and Venezuela are defecting from the developing countries' coalition, G22 or G21, and the fear that if this coalition digs its heels in or if it loses credibility then there may be few concessions from the North.

Counter explanations may now be examined. International relations would seek to explain the outcomes in GATS and TRIPS, the current regimes in services and intellectual property, without much of a look at negotiation theories or processes. Three of these explanations are reviewed here. In order to make these counterfactuals stronger, their extrapolations are also presented in negotiation theory terms as counter-explanations, where possible.

1. Power structures matter more than negotiation processes (Krasner 1991): This seems to be the case with IP. Krasner's theory would hold that the developing world's railings against IP were really about resistance to a global liberal order commanded by the North. This is a power struggle in which the South cannot win. However, times have changed. The South does not resist the global liberal order that much now but it still resists the North. However, that conclusion is consistent with Krasner. What is still puzzling is why did the developed world not get equally important concessions from the developing world in services? Both power and process matter. If in the TRIPS case, U.S. was able to use its power, then the question is how did it control the negotiation process in such a way that the developing world had to make all the concessions? In the case of TRIPS, power had to be filtered through agenda-setting and coalition-building. The BATNA favored the developing world.

A negotiation corollary of the explanation above may be that the overall Uruguay Round package still shows that the developing world received a bad deal even if they effected a good deal in services.²⁶ While intuitively obvious, this explanation calls for empirical operationalization and substantiation. Most importantly, it begs the question: bad deal as compared to what? As compared to being left out of the Round? Bilateral deals with the US? BATNA before the Round opened or after it closed? In terms of what economists term 'welfare effects'? An answer to these questions may make it less than obvious that the developing world received such a bad deal, after all. Winham (1998: 117) calls the overall package "an acceptable

²⁶ Richard Steinberg pointed this out to me at the American Political Science Association Convention in Philadelphia, August 30, 2003.

outcome”: “Developing countries as a group benefitted from the agreements on agriculture, textiles and clothing, and safeguards, and they were probable, but uncertain, gainers on services. Developing countries were disadvantaged on balance by agreements on intellectual property and antidumping, and probable, but uncertain losers on subsidies.”

2. Globalization and interdependence mean that services and intellectual property issues are favored by important transnational interests, differentiated according to particular issue-areas (Zacher with Sutton 1996): Actors then converge around various positions. However, such convergence is the stuff of negotiations. Between interests and convergence, globalization and interdependence theorists inevitably bring in power. But, power by itself is an insufficient explanation.

Negotiation history presents two counter arguments, corollary to the convergence of interests explanation.²⁷ First, it can be argued that the developing world’s ‘wins’ at the Uruguay Round, especially in IP, can be explained by a prior convergence of interests, the special and differential (S&D) treatment provision, dating back to the Kennedy Round in the 1960s. In fact, it has been argued that the longer transition periods accorded to the developing world at the Uruguay round honored the S&D provisions (Pangestu, 2002: 157-158). However, it is also pointed out that S&D was a controversial issue in the Uruguay Round and the developed world – especially the United States – was loathe to make such concessions, wanting developing countries to graduate instead. Oyegide (2002) argues that after a hard fought battle, the Round reduced, and not expanded, the scope of S&D provisions “to extended transition periods” (p. 507). Arguably, then, the transition periods may not have been accorded, as the U.S. pharmaceutical industry wanted, without agenda-setting and issue-based coalitions by the South toward the end of the Round. Second, developing country gains in the two issues examined above extended to more than just transition periods, as in services and thus go far beyond the S&D provisions. Third, before and at the beginning of the Round, the developing countries were more concerned with the inability of the developed world to implement standstill and rollbacks in textiles and agriculture than they were with S&D provisions.

It is also argued that the developing world caved in or enthusiastically supported the GATS framework because the developing world coalition leaders like India and Brazil were already carrying out services liberalizations at home. They had domestic support for their positions (Winham 1998).²⁸ However, this explanation is consistent with the conclusions of this paper. There was nothing straightforward about this domestic support, which hardly created any wiggle room for these countries to accept the services agenda. In fact, LDCs remained opposed to the services agenda until 1989. Their biggest victories in services, the two-track proposal and

²⁷ These were posed to me by Beth Yarborough.

²⁸ I have argued the same in the case of telecommunications for NICs and LDCs (Singh 1999, 2000A, 2000B, 2002). Winham (1998: 112) also argues that Argentina produced a moderate text for services in 1989 when it defected from the developing world coalition opposing services, because it saw its main interest in not opposing the services agenda but furthering the agriculture one. This text’s provisions helped to define many features of GATS later. Argentina’s move is consistent with the *café au lait* effect noted above.

the idea of combining positive and negative lists, came about before liberalizations had really been accepted as a *fait accompli* in the developing world. As Winham himself notes, India did not come around until 1991. Most of Brazil's services liberalizations were delayed until Cardoso came to power because of opposition from domestic groups. Developing country domestic industry until the mid-1990s was Janus faced about services liberalization: it wanted liberalization but not for foreign service providers.

3. Epistemic communities -- groups with shared beliefs and ideas help to shape agendas (Cowhey 1990, Drake and Nicolaidis 1992): By this line of reasoning, the bigger the epistemic community, the more likely that an agenda will go through. Drake and Nicolaidis use this explanation specifically for GATS. However, the TRIPS epistemic community was smaller and yet the developed North got more concessions from the developing South. Again, it was not just who supported and shared particular ideas but how these ideas were translated into agenda-setting and coalition building that mattered. Cowhey's (1990) explanation is consistent with the conclusion of this paper in noting that the 'small bang' of negotiation will push the work of the liberalization oriented epistemic community forward.

Negotiations provide developing countries wiggle room against brute power or coerced convergence of interests. We need to pay attention to negotiation theory to see how negotiation tactics allow for the *creation as well as alteration of preferences* to accommodate others' preferences or to exclude them. Keohane (1984) writes of empathic self-interests without giving us a theory of interactive circumstances under which these types of interests may or may not arise. Coase (1937, 1960) inched toward a theory of transaction costs by noting that if markets are so efficient, then why do firms exist? Williamson (1985) substantiated the same in posting the relationship between markets and hierarchies. We may inch toward a positive theory of negotiations – rather than treating the latter as a residual variable – by asking the following: if power or markets are so efficient, then why do negotiations exist? They exist because power and markets provide ample wiggle room for the creation, alteration, and resolution of interests.

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**TABLE 1: INTELLECTUAL PROPERTY ISSUES:
AGENDA-SETTING AND COALITION BUILDING
DURING THE URUGUAY ROUND**

	AGENDA-SETTING		COALITION-BUILDING	
	NORTH	SOUTH	NORTH	SOUTH
PRE-URUGUAY ROUND	<ul style="list-style-type: none"> *ACPTN establishment *1974 Trade Act and 301 (IIPA lobbying) *Gorlin paper *Bilaterals from US: Korea exemplar *Assistant USTR *slipping in the agenda on counterfeit goods and IP 	<ul style="list-style-type: none"> *Minimal or no IP protection on drugs in developing countries *Delay tactics on accepting any kind of agenda on IP 	<ul style="list-style-type: none"> *Anti-counterfeiting coalition *ACPTN to IPC and IIPA *IPC to UNICE and Keidanran 	<ul style="list-style-type: none"> *Revision of the Paris Convention but otherwise no counter-coalition India and Brazil
UP TO MONTREAL	<ul style="list-style-type: none"> *theft and punishment frames *unified IPC position: “Basic Framework” *all IP issues to be discussed *toughening of US legislation and link with GSP 	<ul style="list-style-type: none"> *G-10 against an expansionary agenda: “Kabuki dance” *no counter framing on the North’s ‘theft and punishment’ frame 	<ul style="list-style-type: none"> *IPC strengthens ranks *Quad unified 	<ul style="list-style-type: none"> *Brazil and India fight back *civil society protest in LDCs
TO BRUSSELS	<ul style="list-style-type: none"> *Composite draft text from 10+10 developed and developing countries *301 pressures 	<ul style="list-style-type: none"> *Talloires text: compulsory licensing, phase-in issues *linkage before giving in 	<ul style="list-style-type: none"> *10 plus10 group develops the draft text 	<ul style="list-style-type: none"> *Group of 14 developing countries draft Talloires text *issue-base coalitions: EC help
TO MARRAKESH	<ul style="list-style-type: none"> *1991 Draft text: Dunkel draft *301 pressures 	<ul style="list-style-type: none"> *attempts to re-open closed issues 		<ul style="list-style-type: none"> *help from EC on transition periods *stiff opposition from civil society

**TABLE 2: SERVICES:
AGENDA-SETTING AND COALITION BUILDING
DURING THE URUGUAY ROUND**

	AGENDA-SETTING		COALITION-BUILDING	
	NORTH	SOUTH	NORTH	SOUTH
PRE-URUGUAY ROUND	<ul style="list-style-type: none"> *OECD: "trade in services" frame *US government agencies and taskforces: identify service barriers *Jaramillo Group *Two track approach *Israel FTA *Café au lait proposal 	<ul style="list-style-type: none"> *not trade at all: call attention to standstill and rollbacks and other issues *Jaramillo group: The café au lait effect *Two track approach. 	<ul style="list-style-type: none"> *Impetus and lobbying from US service industries *Coalition of Service Industries and Liberalization of Trade in Services Committee *Jaramillo Group *G-9 and G-20 	<ul style="list-style-type: none"> *G-77 opposed: India and Brazil leadership *G-24 *G-10 *EC sides with hardliners in July 1986
TO MONTREAL	<ul style="list-style-type: none"> *jobs and growth frames *five tasks of GNS: modes of supply *draft text with square brackets 	<ul style="list-style-type: none"> *developing countries participate in GNS meeting frequently: share the tasks listed in opposite column 	<ul style="list-style-type: none"> *spate of studies: OTA study cautionary 	
TO BRUSSELS	<ul style="list-style-type: none"> *negative lists (U.S.) *move toward excluding sectors *July & November 1990 Jaramillo text: broad strokes of an agreement 	<ul style="list-style-type: none"> *positive lists *infant industry issues *only framework to be discussed *linking to textile and agriculture 	<ul style="list-style-type: none"> *divisions in US service industries 	<ul style="list-style-type: none"> *Brazil and India and coalitions of support *Latin American, Asian and African proposals *India, Brazil and Egypt on framework issue
TO MARRAKESH	<ul style="list-style-type: none"> *MFN discussions: exemptions *Sectoral commitments 	<ul style="list-style-type: none"> *cost-based pricing opposition *LDCs goad quad countries to complete the Round. 		<ul style="list-style-type: none"> *EC help on cost-based pricing *AV issue: India with US, Brazil with EC

**TABLE 3:
DISTRIBUTION OF COMMITMENTS
ACROSS MEMBERS IN SERVICES**

Committed Sectors	Number of Members	Composition
1-20	44	Least developed countries and many low-income developing countries
21-60	47	Mostly middle-income developing countries
over 60	53	All developed countries, several developing countries, a few least-developed countries, all recent accessions

Total number of sectors: ~160

Source: WTO Secretariat, November 2002