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Author

Steinberg, Richard H.

Publication Date

1995-01-31

**Consensus Decision-Making
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Linkage and Law in a Neorealist
Model of Institutions**

Richard H. Steinberg

Working Paper 72
January 1995

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The author gratefully acknowledges helpful comments from John Barton, Stephen S. Cohen, David Caron, Eileen Doherty, Alexander George, Lloyd Gruber, Heather Hazard, Stephen Krasner, Charalambos Papatirou, Robert Powell, Helen Wallace, Steve Weber, and John Zysman. The author also acknowledges invaluable assistance from many government officials in the United States, the European Union, and other governments, as well as members of the GATT and UNCTAD secretariats.

Work on this paper was supported by grants from the Lawrence Livermore National Weapons Laboratory, the Los Alamos National Weapons Laboratory, and the Alfred P. Sloan Foundation.

I. INTRODUCTION

From 1959 to 1994, the General Agreement on Tariffs and Trade (GATT)¹ was governed by a consensus decision-making rule.² Operating in the shadow of that rule, North-South bargaining processes and outcomes differed greatly from what would have been expected if bargaining had taken place under the shadow of raw trade bargaining power, to the disadvantage of the more powerful, developed countries of the North in trade negotiations. Despite the expectation of U.S. and European diplomats that the consensus decision-making rule would likely continue to empower developing countries if it were carried forward into the GATT's successor organization, the World Trade Organization (WTO), United States and European Union (EU) negotiators agreed to maintain the decision-making rule. Thus, the rules, processes, and outcomes in the world's dominant post-war multilateral trade institution do not seem to reflect a one-to-one correspondence to underlying North-South power in the issue area being governed.

This article argues that Neorealism nonetheless can be used to explain maintenance of the consensus decision-making rules of the GATT, bargaining processes and outcomes in the shadow of those rules, and the decision to carry forward the consensus rule into the WTO. The explanation here is based on a modification of the Neorealist regime model of the relationship between power, the rules of international institutions, and outcomes; it also demonstrates a need to broaden the model of those relationships implicit in recent Neorealist work on international institutions by Stephen Krasner and Geoffrey Garrett.³

¹ General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. Part (5) and (6), T.I.A.S. No. 1700, 4 Bevens 639, 55-61 U.N.T.S. Part IV became effective on June 16, 1969, 17 U.S.T. 1977, T.I.A.S. No. 6139, 572 U.N.T.S. 320.

² Formally, diplomats refer to the decision-making rule as the "practice" of decision-making by consensus.

³ See Stephen Krasner, "Global Communications and National Power: Life on the Pareto Frontier," *World Politics* 43,3 (April 1991), pp. 336-66; and Geoffrey Garrett, "International Cooperation and Institutional Choice: The European Community's Internal Market," *International Organization* 46, 2 (Spring 1992), pp. 533-60.

Part II provides a theoretical baseline for analyzing decision-making rules and bargaining at the GATT and creation of the WTO, describing Neorealism's approaches to the relationship between power, international institutions and rules, and outcomes, and contrasting them with Reflectivist approaches. These models are then used as a backdrop for analyzing the history of the GATT/WTO consensus decision-making rule in the rest of the article.

Part III argues that, during the Cold War, U.S. objectives for the GATT extended to security concerns, leading to U.S. support for a consensus decision-making rule at the GATT. Neither the rule, nor processes and outcomes resulting from bargaining in its shadow, reflected underlying raw trade bargaining power: North-South bargaining that took place under the shadow of that rule effectively empowered developing countries and frustrated the United States on trade issues. Such bargaining and outcomes would have been unimaginable if undertaken in the shadow of raw trade bargaining power. But U.S. policy-makers believed that the rule served containment policy by increasing the probability that the relationship between developing countries and the developed countries of the West would not deteriorate.⁴

Part IV analyzes the post-Cold War creation of the WTO and the EU-U.S. negotiations that resulted in maintaining the practice of decision-making by consensus. It argues that with the end of the Cold War and the availability of preferential trade opportunities and incentives for Europe through the EU, U.S. and European interests in the multilateral trading system are diverging. United States policy-makers no longer have a containment rationale for the consensus decision-making rule at the GATT and they

⁴ This argument is consistent with hegemonic stability theory. Hegemonic stability theory-- and the judgment of U.S. policy-makers-- may be subject to attack on the question of whether the weak, developing countries really mattered that much in the Cold War. Nonetheless, as will be shown, it is empirically correct that U.S. policy-makers thought they mattered. See Robert Gilpin, War and Change In World Politics (Cambridge: Cambridge University Press, 1981), p. 141; Stephen Krasner, "State Power and the Structure of International Trade," World Politics 28,3 (1977); Stephen Krasner, Structural Conflict: The Third World Against Global Liberalism (Berkeley: University of California Press, 1985), chap. 3.

have stood ready to abandon it in favor of rules that would promote joint EU-U.S. management of the system. In contrast, the EU has matured into an international institution which offers Europe the opportunity and incentives to pursue a trade strategy that is more attractive than simple multilateralism. Europe is less interested than the United States in rapid multilateral liberalization through the WTO, and more interested in rapid preferential intra-community and extra-community liberalization--especially for Central and Eastern Europe, and the Mediterranean-- through the EU. Japan refused to actively promote a position on the rules of the multilateral trade institution, continuing to play the passive role in trade negotiations it has played for nearly a half century.⁵ Given these post Cold War preferences and their respective regional institutional opportunities and incentives, the United States and the European Union were willing to use their power to impose substantive results of the Uruguay Round of trade negotiations on developing countries, but the EU was unwilling to agree to the U.S. proposal to adopt new decision-making rules to institutionalize their joint management of the multilateral trading system. Thus, the United States and EU have maintained a decision-making rule of consensus that will continue to empower developing countries.

Part V concludes with an elaboration of Neorealism's model for the role of institutional rules. The analysis shows the inadequacy of Reflectivist approaches for explaining the consensus decision-making rule in the GATT and the WTO, a need to broaden the model suggested by Krasner's and Garrett's case-studies, and a need to modify Neorealist regime theory. An elaborated model is sketched-- for ease of reference called a Neorealist "Linkage and Law" model. Like Neorealist regime theory, and the Krasner/Garrett approach, the Linkage and Law model treats international institutions and

⁵ The reason for Japan's passivity is the subject of much speculation. Hypothesized reasons include: fear of international engagement because of the "lesson" learned from the catastrophic results of interwar period international engagement; and a domestic political and industrial structure that favors the status quo, fearing external pressures that could be encouraged by active international engagement. While a definitive explanation for Japan's passivity at the GATT would be interesting, it is likely rooted in domestic politics and it is beyond the scope of this analysis.

law as intervening between underlying power and bargaining processes and outcomes. But it elaborates on Neorealist regime theory (and breaks with Krasner's and Garrett's treatments) by arguing that the rules of each individual institution need not reflect underlying power in the issue area governed by the institution. Institutional rules may reflect interests well outside the issue area governed by the institution. Therefore, bargaining processes and outcomes that take place in the shadow of a particular institution's rules need not reflect underlying bargaining power in the issue area governed by that institution. Moreover, explanations of the relationship between power and institutional rules must be embedded in a broad international institutional context: in order to understand national interests in setting the rules of a particular institution, the opportunities and incentives made available by the web of existing international institutions must be known. To be consistent with Neorealist expectations, the underlying distribution of power demands merely that institutional rules in the aggregate-- across all institutions-- serve the interests of the powerful states. The Linkage and Law model, applied to the cases examined here, confirms limits to the strict Neorealist model of regimes: the GATT/WTO cases indicate at least some feedback from institutional rules onto interests and power, implying at least limited autonomy for international law. While this modified model offers broad heuristic potential for analyzing international institutions, international law, and institutional processes and outcomes, and it is a theoretically progressive step in Rationalist explanations of those relationships, it is not without limitations.

II. EXISTING FRAMEWORKS FOR UNDERSTANDING THE GATT/WTO CONSENSUS DECISION-MAKING RULE

Political scientists have long tried to understand the relationship between international politics, on one hand, and international institutions and international law, on the other. A model for understanding that relationship is necessary to explain why the

consensus decision-making rule was adopted and maintained in the GATT, the nature of bargaining in the context of that decision-making rule, and why the rule was carried forward into the WTO. Two broad approaches may compete for the job, "Reflectivism" and the "Neorealist" variant of "Rationalism."

Reflectivism and Rationalism

Some political scientists, and many sociologists, hereafter referred to as "Reflectivists,"⁶ have argued that there is a reciprocal agent-structure relationship between the identity and behavior of states and the structure of the international order. Central to their views is the notion that international social organization shapes, and is shaped by, cognition⁷ and norms.⁸ Many traditional international law scholars focus implicitly on similar factors (which some of them have called socially "constitutive" factors⁹) to explain the extent to which international law can and does shape international politics, and as one reason that compliance with international law is the norm.¹⁰

In contrast, many political scientists building on a "Rationalist" model of international institutions have suggested that, to a large degree, international politics

⁶ Robert Keohane, "International Institutions: Two Approaches," International Studies Quarterly 31 (1988), pp. 379-96.

⁷ Ibid. See also, Alexander Wendt, "Anarchy Is What States Make Of It: The Social Construction of Power Politics," International Organization 46,2, pp. 398-411. See also, Louis Henkin, How Nations Behave: Law and Foreign Policy, (New York: Frederick A. Praeger, 1968), pp. 25-23, 56; Oran Young, Compliance and Public Authority: A Theory With International Implications (Baltimore: Resources for the Future, 1979), p. 24; and Donald J. Puchala and Raymond F. Hopkins, "International Regimes: Lessons From Inductive Analysis" in International Regimes (Ithaca: Cornell University Press, 1983).

⁸ P.E. Corbett, Law and Society in the Relations of States (New York: Harcourt, Brace & Co, 1951), p.8; Henkin, How Nations Behave: Law and Foreign Policy, pp. 35-41, 88-9, and 267-68; Young, Compliance and Public Authority: A Theory With International Implications; Abram Chayes and Antonia Handler Chayes, "On Compliance," International Organization 47, 2 (Spring 1993), pp. 175-204, esp. 177; H. Lauterpacht, "The Grotian Tradition in International Law" in The British Yearbook of International Law (London: Oxford University Press, 1946), pp. 1-53.

⁹ See, H.L.A. Hart, The Concept of Law (Oxford: Oxford University Press, 1965); Myres S. McDougall, Harold D. Laswell, and James C. Miller, The Interpretation of Agreements and World Public Order: Principles of Content and Procedure (New Haven: Yale University Press, 1967). See also, Oran Young, Compliance and Public Authority: A Theory With International Implications (Baltimore: Resources for the Future, 1979).

¹⁰ See, e.g., Chayes and Chayes, "On Compliance;" Louis Henkin, How Nations Behave: Law and Foreign Policy (New York: Frederick A. Praeger, 1968), pp. 41-44, 46-52, 252; and P. E. Corbett, Law and Society in the Relations of States (New York: Harcourt, Brace and Co., 1951), p. 8.

shapes international institutions and law.¹¹ In contrast to Reflectivism, Rationalism takes the interests and identities of states as exogenous, assumes that states are rational unitary actors operating in an anarchical international system, and asks how those states maximize their welfare.¹² From those and a few other basic assumptions, Rationalists claim to be able to deduce the existence of international institutions, the international law of a particular institution, and behavior within institutions.

One group of Rationalists-- Neoliberals-- has shown that the creation and maintenance of international institutions and international law are functional: institutions offer a positive-sum outcome to a group of states by reducing transactions and information costs, and decreasing uncertainty, which would otherwise inhibit international cooperation.¹³ For example, Fawcett has argued that international law can constitute "rules of the game" that are demanded by states because they "secure stability and order by limiting behavior and making it reasonably predictable."¹⁴ In this view, international institutions and international law correct market failures, moving states towards Pareto optimality.

Another group of Rationalists-- Neorealists-- has argued that most great power fights about international institutions (and, by extension, international law) are not about solving market failures, but about the distributional consequences of a particular institutional structure or international law; they are distributional battles that constitute

¹¹ Keohane, "International Institutions: Two Approaches."

¹² Ibid. See also, Robert Powell, "Anarchy in International Relations Theory: The Neorealist-Neoliberal Debate," International Organization 48, 2 (Spring 1994), pp. 313-44. See generally, Kenneth Waltz, Theory of International Politics (Reading, Mass.: Addison-Wesley, 1979).

¹³ Keohane, "International Institutions: Two Approaches;" Arthur Stein, Why Nations Cooperate: Circumstance and Choice in International Relations (Ithaca: Cornell University Press, 1990); Powell, "Anarchy in International Relations Theory: The Neorealist-Neoliberal Debate;" see also, Robert Axelrod, The Evolution of Cooperation (New York: Basic Books, 1984).

¹⁴ James Fawcett, Law and Power in International Relations (London: Faber and Faber Ltd., 1982), p. 37. See also, Paul R. Milgrom, Douglass C. North, and Barry R. Weingast, "The Role of Institutions In the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs," Economics and Politics 2,1 (March 1990), p. 1-23 (on how domestic institutions can play the same role).

"life on the Pareto frontier."¹⁵ In the traditional realist view, regimes, institutions, and, by extension, international law are established and maintained by great powers to serve their interests.¹⁶ In its pure form, Neorealism goes a bit further. Neorealist work on regime theory argued that regimes have no independent effect on behavior; they are epiphenomenal intervening variables: relative power yields international regimes and rules, which yield the behavior desired by those with power.¹⁷ In this view, regimes and their rules are outcomes to be explained. Power explains behavior; regimes and rules have no independent role.

More recently, Krasner and Garrett have borrowed implicitly from that regimes model to explain battles about the rules adopted by international institutions. While there are many potential outcomes along the Pareto frontier, Krasner has suggested that the equilibrium will rest on a point that mirrors the relative power of the bargaining states and their interests, and that as relative power and interests shift, so will the equilibrium.¹⁸ By way of example, Krasner showed that the rules of the international institutions governing telecommunications changed as the interests and relative power of countries in those institutions changed. Using the same model, Garrett showed that the institutional rules (including the adjudicative and decision-making rules) embedded in the 1992 Single European Act reflected the interests of the big European powers-- Germany and France.¹⁹

¹⁵ Stephen Krasner, "Global Communications and National Power: Life on the Pareto Frontier."

¹⁶ See, e.g., H. Morgenthau, "Diplomacy," *Yale Law Journal* 55 (1946), pp. 1067, 1078; H. J. Morgenthau, *In Defense of the National Interest: A Critical Examination of American Foreign Policy* (New York: Knopf, 1951), p. 101; and George Schwarzenberger, *Power Politics* (London: Stevens, 3d Ed., 1964), p. 199.

¹⁷ See, e.g., Stephen Krasner, "Structural Causes and Regime Consequences: Regimes As Intervening Variables" in *International Regimes* (Ithaca: Cornell University Press, 1983), pp. 1-22.

¹⁸ Stephen Krasner, "Global Communications and National Power: Life on the Pareto Frontier." See also *Ibid.*

¹⁹ Geoffrey Garrett, "International Cooperation and Institutional Choice: The European Community's Internal Market."

Further Examination of the Krasner/Garrett Treatment

It is helpful to further define three dimensions of the relationship between power, institutions and international law, and outcomes implicit in Krasner's and Garrett's treatments.

The first dimension is what Krasner and Garrett mean by "power." The "power" that drives institutional rules could be broadly defined as some combination of military and economic power, which is how realists traditionally conceive of power;²⁰ this could suggest that a great power would sometimes use power derived from its military might to exert pressure in an international economic institution, or that a great power would sometimes use power derived from its economic might to exert pressure in an international military institution. Alternatively, power could be defined more narrowly as a function of raw bargaining power in the issue area being governed by the institution under study. While Neorealist regime theory never made a clear choice between these two conceptions of "power," Krasner and Garrett use "power" in the latter sense. Krasner argues that the outcome of disputes in global telecommunications institutions "has been determined primarily by the relative bargaining power of the states involved," and that power in those institutions is determined by three considerations: technology and market size; membership in the relevant international organizations; and juridical control over territorial access-- not geopolitical power writ large. Similarly, "following on Albert Hirschman's classic argument about asymmetric economic dependence," Garrett argues that the economic dominance of France and Germany permitted them to dominate outcomes and institutional rules associated with the Single European Act.

On a second dimension, the Krasner and Garrett treatments each focus on explaining the set of rules of a particular institution or regime. Clearly, Krasner and Garrett are not asserting that each international law (e.g., each clause of each article of a

²⁰ See, e.g., Hans Morgenthau, Politics Among Nations (New York: Alfred A. Knopf, 1978); and Kenneth Waltz, Theory of International Politics.

treaty) mirrors underlying bargaining power; they are looking at the balance of rights and responsibilities in an institution as a whole. Similarly, they are not trying to explain the set of rules across several institutions: they each examine particular institutions, one at a time, in isolation from the rules and politics of other institutions, and in isolation from interests in issue areas that are not governed by the institution under study.

The third dimension that needs to be highlighted is Krasner's and Garrett's consideration of the kinds of interests pursued by great powers in a particular institution. In Krasner's and Garrett's case studies, the interests of powerful states are described only with reference to the issue area being governed by the institution under study. In Krasner's analysis, the interests of the United States in telecommunications institutions were limited to telecommunications interests. In Garrett's analysis, the interests of Germany in the European Single Act were limited to its economic interests. In neither case is a nation's interests in the operation of a particular institution driven by broader interests outside that issue area, such as geopolitical interests. And in neither case are interests in a particular institution shaped by opportunities in other institutions.

Thus, Krasner's and Garrett's case-studies treat the rules of a particular institution as bearing a one-to-one correspondence with underlying bargaining power and interests in the issue area governed by the institution. Neorealist regime theory has been more general, suggesting that power (not fully defined, but likely conceived broadly) and interests (conceived broadly) are the "basic causal variables" explaining the decision-making rules in a particular regime, which in turn cause "related behavior and outcomes" in that regime.²¹

²¹ See Krasner, "Regimes and the Limits of Realism: Regimes As Autonomous Variables."

III. MANAGING WORLD TRADE DURING THE COLD WAR: BARGAINING IN THE SHADOW OF THE GATT RULE OF CONSENSUS

Throughout the last twenty years, the United States, Europe, and Japan have been much more powerful than the developing countries. Yet, since 1959, when developing countries began joining the GATT en masse, the primary decision-making rule at the GATT has been that decisions must be taken by consensus. Bargaining in the shadow of that rule, the developing countries have been able to extract substantial and meaningful concessions from the developed countries. The U.S. Government supported this decision-making rule, and complied with it, despite its effects on institutional processes and trade outcomes, because the U.S. Government believed that advantages for developing countries in the GATT would serve the broader Cold War objective of containment.

Relative Trade Bargaining Power Between North and South

Neorealist analyses by Krasner and Garrett (and the earlier Neorealist regime model) suggest that decision-making rules in an institution will be a reflection of raw bargaining power in the absence of rules, whereas Reflectivism and some other approaches suggest that they might not be. Hence, for purposes of understanding the relationship between institutional rules and underlying power, it would be useful to compare raw trade bargaining power with the GATT's decision-making rules.

Intuitively, the developed countries of the United States, Europe, and Japan have much more raw trade bargaining power than the developing countries. While measuring power is notoriously difficult, there are some good proxies for estimating relative trade bargaining power. Power may be defined as the ability to get someone to do what they would not otherwise do.²² In raw trade bargaining, the primary tool is the ability to open and close markets: Country A can try to get Country B to open or re-open its market, by means of Country A's promise to open its market (if it is not already opened), or Country A's threat to close it (if it is already opened). This weapon is implicitly recognized as the

²² Robert A. Dahl, "The Concept of Power," _____, p. 203.

basis of U.S. "unilateral" power to open foreign markets by Section 301 of the Trade Act of 1974, as amended.

It follows that a macroeconomic measure of relative raw trade bargaining power between two countries could be estimated roughly by comparing Country A's exports to Country B as a proportion of Country A's gross domestic product (GDP), with Country B's exports to Country A as a proportion of Country B's GDP. Such a comparison is similar to the one made by Albert Hirschman in arguing that Nazi Germany achieved national power over much of Eastern Europe in the 1930s by creating asymmetric trade dependence.²³ Table 1 uses these macroeconomic measures as means of roughly comparing the raw trade bargaining power of the United States to that of nine developing GATT contracting parties in 1990. The figures in the column farthest to the right, the "U.S. Raw Trade Bargaining Power Ratio," shows for each "other country" the ratio between that country's exports to the United States as a proportion of its GDP, to U.S. exports to that other country as a proportion of U.S. GDP. This illustrative table shows

²³ Albert O. Hirschman, National Power and the Structure of Foreign Trade (Berkeley: University of California Press, 1945).

TABLE 1: U.S. Raw Trade Bargaining Power Relative to Nine Developing GATT Contracting Parties, 1990.

Other Country	Other Country's Exports To the United States As A Percentage of GDP	U.S. Exports To the Other Country As A Percentage of GDP	U.S. Raw Trade Bargaining Power Ratio
Brazil	1.59	0.076	21.0:1
Egypt	0.80	0.045	17.8:1
India	1.09	0.041	26.5:1
Korea	7.86	0.297	26.5:1
Mexico	8.94	0.419	21.3:1
Nigeria	17.20	0.011	1578.0:1
Philippines	7.04	0.046	153.2:1
Singapore	32.04	0.177	181.0:1
Thailand	6.46	0.065	99.2:1

Sources: Gross Domestic Product and exchange rate figures from International Monetary Fund, International Financial Statistics Yearbook (IMF: Washington, D.C., 1993). Bilateral export figures from International Monetary Fund, Direction of Trade Statistics Yearbook (IMF: Washington, D.C., 1993).

that, in every case, the developing countries' GDPs are more dependent on open U.S. markets than is the United States' GDP dependent on their markets. In most cases, the other country's economy is more than twenty times more dependent on the United States than the United States economy is dependent on the other country.

This measure is an imperfect proxy for raw trade bargaining power. For example, any macroeconomic approach ignores the developing countries' monopoly on certain raw materials, and ignores their comparative advantage at producing certain types of products, such as labor intensive goods.

Nonetheless, it is hard to imagine that in a world without an international trade institution and its formal decision-making procedures, a world characterized by plenipotentiary trade negotiations, that the developing countries would have much bargaining power. More specifically, it is hard to see them stopping the EU and the United States from adopting the trading rules they desire. Individually, none of the developing countries would possess the economic or political strength to effectively demand a set of rules in their favor. Collectively, even if the developing countries could behave as a bloc,²⁴ they would not have much raw trade bargaining power.

The GATT Decision-Making Rules

Unlike some other international institutions, the formal rules of the GATT did not give decision-making powers to signatories in proportion to their raw bargaining power in the issue area. More specifically, unlike the United Nations, in which five great powers have a veto over actions taken by the Security Council,²⁵ or the International Monetary Fund, in which voting power is weighted according to cash contributions and committed reserves made by each member,²⁶ the text of the 1947 General Agreement provided each contracting party with one vote and no nation or class of nations is given formally superior voting power.²⁷ There has been formal equality among the GATT Contracting Parties.

²⁴ As Krasner has shown with respect to attempts at cartelizing raw materials, the prisoners' dilemma and free-rider problems make it unlikely that the developing countries could bargain effectively as a bloc. "Oil Is the Exception," *Foreign Policy* 14 (Spring 1974), p. 68.

²⁵ Charter of the United Nations, June 26, 1945, ch. V, 59 Stat. 1031, T.S. No. 993, 3 Bevens 1153, 1976 Y.B.U.N. 1043.

²⁶ Articles of Agreement of the International Monetary Fund, July 22, 1944, art XII, 60 Stat. 1401, T.I.A.S. No. 1501, 3 Bevens 1351, 2 U.N.T.S. 39; amended May 31, 1968, 20 U.S.T. 2775, T.I.A.S. No. 6748; amended April 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937.

²⁷ General Agreement on Tariffs and Trade, art. XXV.

From 1947 to 1994, the GATT employed two different sets of decision-making rules, both based on the principle of equality among signatories. In the early years, from 1947 to 1959, the Contracting Parties generally followed the voting and decision-making procedures originally set forth in the 1947 General Agreement, which required different proportions of support from the Contracting Parties for approval of different types of actions. For example, legislative power at the GATT may be defined as the power of the Contracting Parties to create or eliminate obligations. According to the text of the Agreement, most amendments required support by two-thirds of the Contracting Parties and are binding only between those who agree to the amendment.²⁸ Judicial power may be thought of as the power to interpret the General Agreement or to interpret "joint actions" taken by the Contracting Parties. According to the text of the 1947 General Agreement, a simple majority of the Contracting Parties may interpret the Agreement²⁹ and there was no possibility of appeal to an outside tribunal.³⁰ As with domestic law, the distinction between the power to interpret and the power to legislate sometimes may become blurred; this suggests that a simple majority of the Contracting Parties could try to effectively legislate new obligations by judicial interpretation, effectively circumventing the two-thirds rule that generally applies to legislative actions. Administrative power at the GATT may be defined as the power to implement or carry out the terms of the General Agreement and the decisions of the Contracting Parties, as a group. Generally, according to the General Agreement, a simple majority of the signatories could take "joint action" to facilitate the operation and further the objectives of the Agreement,³¹ including approving

²⁸ Amendments to the most-favored-nation provision or the tariff schedules require unanimity. General Agreement on Tariffs and Trade, art. XXX. Special provisions governing the approval of accessions and the waiver of obligations each require two-thirds support. General Agreement on Tariffs and Trade, arts. XXXIII and XXV, respectively.

²⁹ General Agreement on Tariffs and Trade, art. XXV, sec. 1. See also, GATT Doc. GATT/CP.3/SR.37 (the Contracting Parties, acting jointly, may interpret the agreement whenever they see fit); General Agreement on Tariffs and Trade, art. XXIII; GATT R. P. 18, 12 GATT Basic Instruments and Selected Docs. Supp. at 13.

³⁰ Cf., GATT Doc. GATT/CP.3/SR.37 at 5.

³¹ General Agreement on Tariffs and Trade, art. XXV.

a free-trade area,³² launching a new round of trade negotiations,³³ administering GATT dispute settlement mechanisms,³⁴ and authorizing the secretariat to service the administration of codes such as those negotiated during the Tokyo Round.³⁵

In 1959, voting at the GATT virtually ceased. In the late 1950s, the en masse accession of developing countries threatened, for the first time, to give developing countries a majority of votes. If a bloc of developing countries had formed, constituting a majority of the Contracting Parties, then that bloc would have been able to assume all of the administrative and judicial functions of the institution, and through its judicial power might have been able to legislate new obligations, even if all the industrialized countries stood together in opposition. Hence, except for votes on accessions, free-trade areas, and votes by mail on the calling of a Special Session, the last vote taken at the GATT was in 1959.³⁶

For reasons explained in detail below, alternative voting rules were not adopted; instead, from 1959 through 1994, every other decision by the Contracting Parties was taken by "consensus," regardless of the proportions set forth in the text of the General Agreement. Prior to 1990, nowhere was consensus defined in writing as it applied to decisions by the Contracting Parties. But a definition inferred from practice, which accords with the definitions of "consensus" set forth in the Arrangement Regarding Bovine Meat,³⁷ the International Dairy Agreement,³⁸ and now in the Agreement

³² General Agreement on Tariffs and Trade, art. XXIV, pt. c.

³³ General Agreement on Tariffs and Trade, art. XXV.

³⁴ See, e.g., General Agreement on Tariffs and Trade, art. XVIII and XXIII

³⁵ General Agreement on Tariffs and Trade, art. XXV. See, e.g., "Action By The Contracting Parties on the Multilateral Trade Negotiations," November 28, 1979, 26 Basic Instruments and Selected Docs. at 208, GATT Doc. L/4905 (1979).

³⁶ That last vote took place in 1959, when Brazil demanded a vote on a recommendation on Freedom of Contract in Transport Insurance, GATT Doc. SR.14/9 at 115 (1959).

³⁷ Arrangement Regarding Bovine Meat, June 30, 1979, art. II, sec. 3, 26 Basic Instruments and Selected Docs. Supp. at 89 (1979).

³⁸ International Dairy Arrangement, June 30, 1979, art. VII, sec. 1, pt. c, 26 Basic Instruments and Selected Docs. Supp. at 97 (1979).

Establishing the World Trade Organization,³⁹ may be offered: a decision by consensus shall be deemed to have been taken on a matter submitted for consideration if no signatory, present at the meeting where the decision is taken, formally objects to the proposed decision.

As this definition suggests, the "consensus custom" has formally permitted any Contracting Party to block action on any proposal made at the GATT. Every one of GATT's more than one hundred signatories has had a veto power on GATT activity.

Effects of the Consensus Rule on Bargaining Processes and Outcomes:
North-South Bargaining In the Shadow of the Law

It can be hypothesized that the consensus rule contributed to slow progress at the GATT and inflated developing country power vis a vis the North. The consensus rule conferred on developing countries the capacity to affect processes and outcomes. The extent of a developing country's will to use that capacity depended on its perception of how its underlying trade interests differed from that of the North; as will be shown, developing countries clearly had the will to affect outcomes. Two sets of examples, from the Tokyo Round of trade negotiations and then from the Uruguay Round, are offered as confirmation of the hypothesis that the consensus rule affected GATT bargaining processes and outcomes. Before turning to those examples, it is useful to understand the extent of developing country will, in the late 1970s, to use the consensus rule to improve outcomes.

The developing countries were not interested in a broad attack that would crumble the GATT system. It is true that there are several theoretical reasons to suppose that developing countries perceived they had a different stake in liberal trade than the North.⁴⁰ First, as David Lake has pointed out, if the gains from an open trading system were viewed in relative rather than absolute terms, and industrialized market economies tend to

³⁹ Agreement Establishing the World Trade Organization, [July 1, 1995], art. IX, sec. 1, n. 1.

⁴⁰ See generally, Stephen D. Krasner, Structural Conflict: The Third World Against Global Liberalism (Berkeley: University of California Press, 1985).

have higher labor productivity than developing economies, then developing countries would be concerned that industrialized economies will have greater relative gains from an open trading system.⁴¹ Second, as Krasner has pointed out, developing countries probably face greater domestic political and social vulnerability to openness than developed countries. While social stability is inversely related to openness, traditional social structures are rigid and so are less capable of absorbing external shocks than more developed societies.⁴² Third, the international power position of developing countries is more vulnerable to an open international economy than the power position of industrialized economies. Hirschman showed that the higher the cost of moving from openness to closure, the weaker the international power position of a country.⁴³ Krasner argues the corollary that the larger the national economy, the lower the opportunity cost of closure; thus, developed countries-- with larger economies-- have less downside risk in an open system than developing countries-- with their smaller economies.⁴⁴ Fourth, the intellectual orientation of many developing countries in the late 1970s, strongly influenced by dependency theories, predisposed them against endorsing an open trading system.⁴⁵

While developing countries may have had reason to challenge liberal trade, they also had a pragmatic reason for not doing so: their economies depended upon exports and so upon relatively open foreign markets. Moreover, by the 1970s, they were not participating in a truly free trade system. Their economies were well protected through relatively high tariffs and quantitative restraints permitted by the GATT Article XVIII(B)

⁴¹ See, David A. Lake, "International Economic Structures and American Foreign Policy, 1887-1934," *World Politics* 35,4 (1983), pp. 517-543; see also, Robert Gilpin, *U.S. Power and the Multinational Corporation: The Political Economy of Foreign Direct Investment* (New York: Basic Books, 1975).

⁴² Op Cit and Stephen Krasner, "Transforming International Regimes: What the Third World Wants and Why," *International Studies Quarterly* 25,1 (March 1981), pp. 119-148. See also, Samuel Huntington, *Political Order In Changing Societies* (New Haven: Yale University Press, 1968).

⁴³ Albert O. Hirschman, *National Power and the Structure of Foreign Trade*.

⁴⁴ Stephen Krasner, "State Power and the Structure of International Trade."

⁴⁵ Stephen Krasner, "Transforming International Regimes: What the Third World Wants and Why." See also, Fernando Henrique Cardoso and Enzo Faletto, *Dependency and Development in Latin America*, trans. Marjory Mattingly Urquidi (Berkeley: University of California Press, 1979).

balance-of-payments exception. And they enjoyed preferential, duty-free access to developed country markets by virtue of several mechanisms, such as the Generalized System of Preferences.

Thus, developing countries did not have an interest in fundamentally changing the GATT system. Instead, like most of the developed countries of the North, they were primarily interested in relatively marginal, sector-by-sector improvements in their trade position-- further opening foreign markets to their products and further protecting their domestic markets from foreign products in sectors where they were not competitive internationally. As the following examples show, developing countries have been quite effective at using the GATT's consensus decision-making rule to achieve those ends.⁴⁶

Bargaining In the Shadow of the Law: Negotiation of the Tokyo Round Codes⁴⁷

In the summer of 1978, more than 55 members of the GATT's Informal Group of Developing Countries (which was founded in the mid-1960s) began meeting regularly to consider a strategy on the conclusion of the Tokyo Round. Several developing country leaders argued that the GATT decision-making rules endowed the developing countries with substantial leverage over the developed countries in determining the final shape of the Tokyo Round Codes. They reasoned that the Codes being negotiated on dumping, subsidies, and customs valuation could be considered interpretations of the GATT, which would therefore require support by a consensus of the Contracting Parties; if there were a resort to voting, support from a majority of the Contracting Parties would be required⁴⁸ --

⁴⁶ The focus here on North-South relations is not intended to suggest that the glacial rate of movement at the GATT is primarily attributable to North-South disagreements. While those disagreements have slowed progress at the GATT, most of the slow progress in the last fifteen years can be blamed on disagreements among the industrialized countries.

⁴⁷ The discussion in this section is based on cited documents and background interviews with members of the GATT Secretariat and members of several delegations to the GATT. The interviews were conducted in Geneva, Switzerland in November and December 1985.

⁴⁸ General Agreement on Tariffs and Trade, art. XXV, sec. 1; GATT R.P. 18, 12 Basic Instruments and Selected Docs. Supp. at 36.

a majority which they had. Furthermore, the GATT secretariat could not provide services to administer a code without the support of a consensus of the Contracting Parties, or, if there were resort to voting, of a majority.⁴⁹ Thus, if the Contracting Parties stuck with the twenty year tradition of acting by consensus, then a small handful of developing countries could block the adoption of codes not to their liking; if the GATT reverted to decision-making by voting, then the developing countries could act as a bloc to achieve the same result. In August 1978, the legal department of the UNCTAD Secretariat prepared a memorandum which confirmed that analysis.⁵⁰ By spring, Argentina, Brazil, Egypt, India, and Yugoslavia had hardened their positions on the multilateral trade negotiations (MTN) codes and had communicated their legal position to negotiators from the United States and the EC.

The resulting outcomes were vastly more favorable to the developing countries than even they had predicted. Perhaps most vexing to the developed countries, the developing countries were given all of the rights to the Subsidies Code⁵¹ and the Antidumping Code,⁵² but they were not obligated to sign or otherwise abide by the obligations contained in those agreements.⁵³ The developing countries offered an interpretation that the benefits of those codes had to be provided to all GATT contracting parties on a most-favored-nation (MFN) basis, in accordance with GATT Article I, because they constituted interpretations of GATT Articles VI, XVI, and XXIII. The developed countries objected strenuously to what they characterized would be a "free

⁴⁹ General Agreement on Tariffs and Trade, art. XXV, sec. 1. See also, Director-General's General Mandate, December 16, 1950, II GATT Basic Instruments and Selected Docs. at 208.

⁵⁰ "Legal and Procedural Questions on the Conclusion of the MTN," Memorandum From the UNCTAD Secretariat, August 21, 1978, UNCTAD Doc. MTN/CB.14.

⁵¹ Formally, the "Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade," 26 Basic Instruments and Selected Docs. Supp. at 56.

⁵² Formally, the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade," 26 Basic Instruments and Selected Docs. Supp. at 171.

⁵³ As of 1990, only thirteen of the more than seventy-five developing country Contracting Parties to the GATT had accepted the Subsidies Code, and only fifteen had accepted the Antidumping Code. "Multilateral Trade Negotiations: Status of Acceptances of Protocols, Agreements and Arrangements (as at 7 December 1990)," GATT Doc. L/6453/Add. 8, 10 December 1990.

ride" for the developing countries. But it was clear that the GATT secretariat could not administer the two codes without a decision of the Contracting Parties to that effect,⁵⁴ and such a decision would be impossible if the developing countries were to block the consensus. When the "end of the day" for the Round arrived, few developing countries had signed the two codes and they still insisted on its application on an MFN basis. In a legal bind, the developed countries acquiesced, and the decision of the Contracting Parties on administration of the Subsidies Code and the Antidumping Code obtained the necessary consensus by reflecting the commitment to apply them on an MFN basis.⁵⁵

The effectiveness of the developing countries' legal leverage is even more clear in contrasting the final stage of negotiations on the Agreement on Government Procurement⁵⁶ to the final stage of negotiations on the Code on Customs Valuation.⁵⁷ The developing countries got nowhere in the Government Procurement negotiations because it was one of the few negotiations over which they had no formal power: Article III(8) of the General Agreement excludes "procurement by government agencies" from the GATT's national treatment provision. As a result, the Tokyo Round negotiations on Government Procurement effectively assumed the legal status of a plenipotentiary negotiation serviced by the GATT Secretariat. At the end of the day, a consensus or majority of the Contracting Parties could not claim the power to reject a Government Procurement Code by arguing that such a code was a judicial interpretation of the GATT. Thus, the developing countries had little legal leverage over the Government Procurement negotiations.

⁵⁴ General Agreement on Tariffs and Trade, art. XXV, sec. 1. See also, Director-General's General Mandate, December 16, 1950, II GATT Basic Instruments and Selected Docs. at 208.

⁵⁵ "Action By the Contracting Parties on the Multilateral Trade Negotiations," November 28, 1979, 26 Basic Instruments and Selected Docs. Supp. at 201.

⁵⁶ Agreement on Government Procurement, 26 Basic Instruments and Selected Docs. Supp. at 33.

⁵⁷ Formally, the "Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade," 26 Basic Instruments and Selected Docs. Supp. at 116.

The negotiating history and outcome of the government procurement negotiations reflect that lack of developing country legal leverage. At the request of the United States, Switzerland, and the Nordic countries, negotiations on a government procurement agreement were moved from the OECD to the GATT in September 1976. By November, OECD countries were negotiating from an OECD text⁵⁸ with Singapore, Korea, Hong Kong, Nigeria, India, and Jamaica. One month later, India and Nigeria proposed a text with special and differential treatment for the developing countries,⁵⁹ and argued that the developing countries should support it because the GATT secretariat's administration of the code would need developing country support. The developed countries dismissed the argument, pointing out that the Government Procurement Code was not a judicial interpretation of the GATT: it was therefore not integrally a GATT agreement, and, if necessary, the developed countries would simply to take the negotiations back to the OECD. At that point, Singapore and Hong Kong disassociated themselves with India and Nigeria. Having no legal leverage, India and Nigeria's proposal for special and differential treatment was rejected.⁶⁰ When negotiations for accession to the Code took place, only

⁵⁸ MTN/NTM/W/81, negotiated by the Subgroup on Government Procurement under the Group on Non-Tariff Measures.

⁵⁹ MTN/NTM/W/133.

⁶⁰ The Indian and Nigerian proposal for special and differential treatment had four elements. First, they wanted the code to employ a lower threshold figure than the OECD proposal of 150,000 SDRs (US\$160,000), because they believed that developing countries were better able to compete on smaller contracts; the proposal was rejected. See Agreement on Government Procurement, June 30, 1979, art. I, sec. b, 26 GATT Basic Instruments and Selected Docs. Supp. at 33 (1980). Second, they demanded that developing countries be given preferential treatment by means of a clause giving them a 10 percent margin of preference on contract bids; the proposal was rejected as discriminatory. Third, they wanted technical assistance from the North in the production of goods that are procured by government agencies; the developed countries agreed only to a non-binding commitment that they would provide technical assistance "which they may deem appropriate." See Agreement on Government Procurement, June 30, 1979, art. III, pt. 8, 26 GATT Basic Instruments and Selected Docs. Supp. at 33 (1980). Finally, India and Nigeria proposed a guarantee that developing countries would have a right to make smaller offers than the developed countries when negotiating the code; the developed countries agreed only to a non-binding commitment that a nation's status as a developing country would be "taken into account" during the process of negotiation of the code. See Agreement on Government Procurement, June 30, 1979, art. III, pt. 3, 26 GATT Basic Instruments and Selected Docs. Supp. at 33 (1980).

Hong Kong, Singapore, and Israel's offers were accepted among non-OECD countries; India's was rejected.

In contrast, the developing country legal strategy was effective in the Customs Valuation negotiations: the South had strong formal leverage in those negotiations because the Code constituted an implementation of Article VII of the General Agreement, which would need to be administered by the GATT secretariat. Negotiations on the Customs Valuation Code began formally in October 1973,⁶¹ but North-South conflict did not ripen until 1978. In June 1979, the United States and the EC reached agreement on a joint position and submitted a proposal to the Sub-Group on Customs Matters.⁶² The developing countries rejected the proposal because it excluded special and differential treatment for developing countries, and because it permitted importers to decide which of two methods customs administrations should be used to figure out transfer pricing and false invoicing. In March 1979, the developing countries proposed their own draft to the Sub-Group.⁶³ On April 11, the source of the South's legal leverage over the Customs Valuation Code was made clear at a Trade Negotiations Committee (TNC) meeting that had been called for the purpose of drafting a proces-verbal on the conclusion of the Tokyo Round. Argentina, speaking for the developing countries, first argued that no consensus had been reached on the Customs Valuation Code and that, if any draft should go forward, theirs should, since it was an interpretation of GATT Article VII and it had the support of a large majority. Several developed countries responded that the developing countries' text should not be attached alone because no agreement could be forced on any government and the TNC could not prevent a number of developed countries from entering into an agreement if they wanted to. In rejecting those arguments, Argentina said that the agreement on customs valuation was not being reached in the vacuum of a

⁶¹ In October 1973, the Trade Negotiations Committee established the Sub-Group on Customs Matters under the Group on Non-Tariff Matters

⁶² MTN/NTM/W/162.

⁶³ MTN/NTM/W/222/Rev.1.

plenipotentiary conference. Instead, it was to be an interpretation of the GATT that would bind all signatories, an interpretation that could be made by a majority of the Contracting Parties; their draft of the Customs Valuation Code should be annexed to the Proces-Verbal because it had the support of a majority.⁶⁴ Developed country representatives took this as a threat by Argentina and other developing countries to impose a Customs Valuation Code on the North via a formal interpretation of Article VII. The Swiss suggested that the TNC should operate on a consensus tradition and annex both versions to the Proces-Verbal. The Chairman then "summarized" that there was a difference of opinion, but that both texts would be annexed on an equal footing, with the expectation that both sides would negotiate to arrive at a single draft before January 1, 1981, which was the proposed date of entry into force.⁶⁵

When the developed countries left that meeting, it was clear that they would have to make concessions to the developing countries. As a result, the Customs Valuation Code reflects substantial concessions made by the developed countries after the April TNC meeting. For example, developing countries were not required to implement some provisions of the code until eight years after the date of entry into force.⁶⁶ Similarly, developing countries were not required to implement key provisions of the code until five years after the date of entry into force,⁶⁷ and could further extend implementation of those key provisions by showing "good cause."⁶⁸ Moreover, developing countries were permitted to take a reservation on the provisions that would otherwise let importers

⁶⁴ See the "Common Position" of the developing countries in MTN/P/5, 9 Jul 1979, at 42

⁶⁵ MTN/P/5, 9 Jul 1979, at 3-5.

⁶⁶ Agreement on Implementation of Article VII, June 30, 1979, art. 21, para. 2, 26 GATT Basic Instruments and Selected Docs. Supp. at 116 (1980).

⁶⁷ Agreement on Implementation of Article VII, June 30, 1979, art. 21, para. 1, 26 GATT Basic Instruments and Selected Docs. Supp. at 116 (1980).

⁶⁸ Protocol to the Agreement on Implementation of Art. VII, November 1, 1979, pt. 1, para. 2, 26 GATT Basic Instruments and Selected Docs. Supp. at 151 (1980).

decide which of two methods customs administrations should use to figure out transfer pricing and false invoicing.⁶⁹

As these examples illustrate, by the end of the Tokyo Round negotiations, it was clear that the developing countries were capable of using, and willing to use, the GATT's decision-making rules to enhance their bargaining leverage, slow the negotiating process, and achieve better outcomes than they would have achieved if they had bargained in the shadow of raw trade bargaining power.

Bargaining In the Shadow of the Law:
Launching the Uruguay Round⁷⁰

The developing countries' legal strategy was even more frustrating to the North in the context of its efforts to launch the Uruguay Round of trade negotiations, and in much of the negotiations that followed. A brief review of the history of the attempt to launch the Uruguay Round illustrates how several developing countries successfully interweaved their formal sources of bargaining power at the GATT into an effective strategy of delaying initiation of the new round for four years and allowing it to go forward only after the North had made substantial concessions to the developing countries.

Several developing countries, led by Argentina, Brazil, Egypt, India, and Yugoslavia (often referred to by some developed country diplomats as the "Group of Five" or, at more jaundiced moments, the "Gang of Five"), used three sets of GATT decision-making rules as sources of power in exacting concessions to launch the new round. First, and most important, the GATT cannot launch a new round without consensus support. The Article XXV "joint action" provision is the only textual source of authority for the GATT to launch a trade round. Under the consensus tradition, any

⁶⁹ Protocol to the Agreement on Implementation of Art. VII, November 1, 1979, pt. 1, paras. 4 and 5, 26 GATT Basic Instruments and Selected Docs. Supp. at 151 (1980).

⁷⁰ The discussion in this section is based on cited documents, background interviews with members of the GATT Secretariat and members of several delegations to the GATT, and the personal observations of the author, who worked for the U.S. Delegation to the GATT in 1985. The interviews were conducted in Geneva, Switzerland in November and December 1985.

Contracting Party can block "joint action," thus blocking initiation of a new round. With that understanding, the Group of Five blocked a consensus, demanding preconditions for negotiations which included the elimination of agenda topics of high priority to the North and the addition of agenda topics of high priority to developing countries. Second, past GATT decisions can be interpreted only by the Contracting Parties, unless they resort to a lengthy dispute settlement process, and such interpretations are made under the consensus tradition. As decisions were taken incrementally towards initiation of a new round, the Group of Five was able to block a consensus on interpretations of previous decisions to further slow progress and demand additional concessions from the North. Third, the Group of Five was able to block a consensus on interpretations of the breadth of the GATT's legal competence to address various trade issues, such as trade in services and trade in counterfeit goods.

In the summer of 1982, the United States decided to seek the initiation of a new round of trade negotiations, without preconditions. By early fall, the United States and the EC agreed that a new round would have to include tariff cuts in industrial products, a revision of the Tokyo Round Codes, and coverage of two new issues: intellectual property⁷¹ and services.⁷² They disagreed over the extent to which agricultural issues would be included in the new round, but they were prepared to initiate a new round.

⁷¹ The United States and the EC insisted that a new round would have to include trade in counterfeit goods in its agenda because of their perception that commerce in counterfeit goods were depriving their inventors and producers of the fruits of intellectual property they had developed, thereby reducing revenues, exports, and incentives to pursue research and development. In 1993, the U.S. government estimated that U.S. entrepreneurs lose \$60 billion annually from the piracy of their innovations abroad. Office of the United States Trade Representative, The Uruguay Round: Growth for the World, Jobs for the U.S.-- A Primer (Washington, D.C.: USTR, December 1, 1993), p. 6.

⁷² The United States, the EC, and Japan insisted that a new round would have to include trade in services in its agenda because of their perception that liberalization of trade in services would enhance efficiency, benefit them because of their comparative advantage in providing services, and help catalyze domestic political support for a new round. In the early 1980s, the U.S. government estimated that services accounted for nearly two-thirds of U.S. gross national products and seventy percent of U.S. employment. United States Trade Representative, U.S. National Study on Trade in Services (December 1983), in GATT Doc. "Exchange of Information Pursuant to the Ministerial Decision on Services: Communication From the United States" (January 25, 1984), p. 5.

Several developing countries, led by the Group of Five, insisted that they could not support a new trade round unless it also included: liberalization of trade in tropical products and textiles, which included elimination of the Multi Fibre Arrangement (MFA) that was effectively protecting U.S. and European apparel producers and workers from developing country products; the elimination of Voluntary Restraint Agreements (VRAs), which were used to effectively manage bilateral trade between industrialized countries, and sometimes to the exclusion of developing country products; an agreement on trade in domestically prohibited substances;⁷³ and a "standstill" commitment to provide that the developing countries would not raise tariff or non-tariff barriers above then prevailing levels during the course of the trade negotiations. Moreover, they insisted that they could not support a new round that addressed intellectual property or services, areas which they did not want to see liberalized.

After determining in the fall of 1982 that it would not be possible to build a consensus with the developing countries to launch a new round, the United States decided to at least pave the way for a new round by establishing a "Ministerial Work Program" on a new round. Before the developing countries would consent to any mention of services or intellectual property in the Ministerial Declaration establishing the Work Program, they insisted that the program include topics of importance to them such as liberalization of trade in textiles, tropical products, and VRAs. On the last day of the 1982 GATT Ministerial Meeting, the United States took the best deal it could get: it agreed to include textiles, tropical products, and VRAs in the Ministerial Work Program in exchange for the developing countries' consent to a process that would involve national examinations of the intellectual property and services issues, compilation of the examinations by the

⁷³ Companies in developed countries were manufacturing and exporting chemicals and other substances that were illegal to use in their home markets. The developing countries were concerned, on one hand, that they were therefore importing dangerous substances, and, on the other hand, that the developed countries might unilaterally and paternalistically prohibit the export of those products. The developing countries wanted an agreement that would let them decide and effectively regulate the importation and use of such products.

A few days later, at the 40th Session of the Contracting Parties, the developing countries agreed to the establishment of a Working Party on Services, and an establishment of a Group of Experts on Counterfeit Goods,⁷⁷ but only after the United States refused to otherwise block a consensus on approval of the GATT's budget. When the Contracting Parties Session closed, the developing countries were still refusing to support a consensus to launch a new trade round that would include services or intellectual property, but the United States and Europe believed they might move the process forward through the Working Party on Services and the Group of Experts on Counterfeit Goods.

When it became clear, by mid-1985, that the working group process was not moving forward, the developed countries decided to initiate a new process. Brazil and India, which had not submitted national studies on services, had joined the Working Party on Services and were blocking every attempt at reaching a consensus within the group. Thus, at the July 1985 GATT Council meeting of permanent representatives, the United States, EC, Japan, the Nordic Countries, and the ASEAN countries called for a meeting of Senior Officials to prepare for a new round. Brazil blocked the request and, on behalf of itself and 24 of the other developing countries, stated that it would support a new round only if it included, inter alia: liberalization of trade in textiles, tropical products, VRAs; a "standstill" on the imposition of all future protectionist measures; and a "two-track" structure to the negotiations such that there could be progress on the liberalization of trade in goods without progress on the liberalization of trade in services, but not vice versa.⁷⁸ The North refused to make the concessions and decided to diplomatically elevate

⁷⁷ See, "Services-- Action Taken on 30 November 1984," 31 Basic Instruments and Selected Docs. Supp. at 14 (1985), GATT Doc. L/5762 (1984), and "Trade In Counterfeit Goods-- Action Taken on 30 November 1984," 31 Basic Instruments and Selected Docs. Supp. at 14 (1985), GATT Doc. L/5758 (1984).

⁷⁸ GATT Doc. L5818. See also, GATT Doc. L/5852 and C/W/479.

the matter by calling an extraordinary "Special Session" of the Contracting Parties to consider the initiation of a new round.

The Special Session was held in October 1985, but it also resulted in deadlock. Not only had the twenty-five developing countries stuck to their demands in exchange for a consensus, but a sub-group of those countries⁷⁹ enhanced its legal bargaining power by arguing that there was no consensus among the Contracting Parties that the GATT was jurisdictionally competent to address intellectual property or services issues. Prior to the October Special Session, to lay the groundwork for an argument of legal incompetence, the Group of Five had "whipsawed" to two international organizations which operate on the basis of majority rule and in which the developing countries possess a majority: they had gone to the United Nations Commission on Trade and Development (UNCTAD) to initiate its involvement in the services issue,⁸⁰ and to the World Intellectual Property Organization (WIPO) to initiate its involvement in the problem of trade in counterfeit goods.⁸¹ The developing countries' legal competence argument was utterly baseless,⁸² which irritated the North, but, more significantly, it had raised the legal ante: the lack of a consensus on the interpretation of GATT competence signaled that the developing countries had the power not only to block a new round in which all parties would be expected to negotiate on services and intellectual property, but that the developing countries could prevent the developed countries from negotiating the issues just among themselves at the GATT. In the words of one developed country ambassador, "It would be one thing if they didn't want to go to our tea party, but it's quite another to prevent us

⁷⁹ Argentina, Brazil, Cuba, Egypt, India, Nicaragua, and Yugoslavia.

⁸⁰ See, e.g., "Services and the Development Process: Implementation of Conference Resolution 159 (VI) and Board Decision 309(XXX)— Report by the UNCTAD Secretariat," June 27, 1985, UNCTAD Doc. TD/B/1066 (1985).

⁸¹ See, "Memorandum of the [WIPO] Director General: Role of WIPO Concerning Counterfeit Goods," July 22, 1985, WIPO Doc. AB/XVI/12 (1985). See also, "Decision of the Role of WIPO Concerning Counterfeit Goods," Sept. 27, 1985, WIPO Doc. AB/XVI/21 (1985).

⁸² A detailed discussion of the GATT's legal competence is beyond the scope of this paper, but see generally, Frieder Roessler, "The Competence of GATT," *Journal of World Trade Law* __ (198_), pp. 73-83.

from having it in the first place." Thus, the Special Session deadlocked and the ante had been raised.

Finally, one month later, at the 41st Contracting Parties Session, the deadlock over initiation of a new round was broken after the United States and the EC agreed to concessions to the developing countries. The United States and the EC had already agreed to negotiate on the liberalization of trade in textiles, tropical products, and VRAs. Now they were willing to give a specific "standstill" commitment and to agree to negotiate on the export of domestically prohibited substances. That was enough to garner the support of a group of 24 sub-Saharan African countries, led by Zaire, resulting in the isolation of the Group of Five, Nicaragua, and Cuba. Those seven countries then agreed to begin preparations for a new trade round that would culminate in a Ministerial Meeting to formally launch the round, but the North and those seven countries agreed to disagree about how to handle the services issue.

In the summer of 1986, the Ministerial Meeting was held in Punte del Este, Uruguay. The Contracting Parties, acting jointly, agreed to launch what would be called the "Uruguay Round," but not before one final concession from the North: the United States and the EC agreed to the "two-track" approach to goods and services that had been demanded by the developing countries since July 1985 as a precondition to negotiations.

Explaining U.S. Support For Consensus Decision-Making and Associated Processes and Outcomes

As the examples above illustrate, the developing countries have been able to bargain in the shadow of the GATT's consensus decision-making rule to slow the pace of GATT negotiations and to exact substantial concessions from the developed countries. In contrast to Krasner's and Garrett's Neorealist treatment of the relationship between power and institutions, the GATT's consensus decision-making rule, and behavior and outcomes under it, have not reflected the underlying North-South raw trade bargaining power. In

short, why was the United States willing to support the GATT's consensus decision-making rule?

Without a change of the GATT's decision-making rules, the United States was in a legal bind: it could have resorted to the GATT's textual rule of voting, one-nation-one-vote, and majority rule on many decisions, but that would have been an unacceptable alternative given that the developing countries hold a commanding majority. The industrialized countries have been so fearful of that alternative that they have not deviated from the consensus tradition on any single proposal, even when progress was being blocked by a handful of developing country signatories: they have feared establishing a precedent. Thus, for example, even in late 1985, when the vast majority of Contracting Parties supported the initiation of a new trade round, the industrialized countries were wary of going to a vote. Brazil, which opposed the new round unless certain preconditions were met, understood the North's fear of setting a precedent and warned that those supporting a "departure from consensus" must be prepared to "accept majority rule even in cases where those in the minority might represent a larger share of world trade."⁸³ The North decided against a vote.

The obvious alternative would have been to change the GATT's decision-making rules, but that was not an attractive alternative during most of the Cold War: the United States intended developing country membership in the GATT to serve a geostrategic function. In 1947, when the GATT was created, developing country membership was not regarded as crucial. By 1957, however, when there were 21 developed country members and only 13 developing country members, that had changed: Raul Prebisch and the U.N. Economic Commission on Latin America (ECLA) were becoming vocal at the United Nations; the GATT was regarded as a "rich man's club;" and the Soviet Union began to increase its commercial relations with the developing countries and started a move for a

⁸³ Statement by H.E. Paulo Nogueira Batista of Brazil at the 41st Session of the Contracting Parties, November 27, 1985 (available from author), 5.

global trade organization in the U.N. framework.⁸⁴ With the strategy of containment dominating U.S. foreign policy and Western thinking, the United States and the GATT Secretariat embarked on a deliberate strategy of bringing the developing countries solidly into the West's foremost trade regime. Such a strategy entailed offering incentives for developing countries to join the GATT, incentives that were important topics of discussion at the 1957 GATT Ministerial Meeting, were deliberated by the Haberler Commission in 1958 and Committee III of the Action Program for the expansion of international trade (from 1958-61), and which culminated in the addition of Part IV to the GATT.⁸⁵ By 1968 there were 60 developing countries in the GATT,⁸⁶ and the West had succeeded in building a nearly global trade regime that excluded and isolated the Soviet Bloc. Subsequent deliberations within the U.S. government in the late 1970s about how to deal with what U.S. diplomats called the "UNCTADization" of the GATT were bounded by the fundamental goal of keeping all Western trade deliberations squarely within the GATT.⁸⁷ And, in post Cold War deliberations within the U.S. government about how to change the GATT's decision-making rules, it was frequently noted that the State Department would have never tolerated such an interagency dialogue prior to the collapse of the Soviet Union.

Hence, in the service of Cold War interests, the GATT's "consensus tradition" was intended by the U.S. government to help keep the developing countries focused on the GATT as the primary institution governing trade relations. Allegiance to that goal and the consensus decision-making rule was solid, even though it enhanced the bargaining power of the developing countries at the GATT and led to negotiating processes and trade outcomes that did not reflect underlying raw trade power.

⁸⁴ See Karin Kock, *International Trade Policy and the GATT 1947-1967* (Stockholm: Almqvist & Wiksell, 1970), pp. 219-268, esp. 236.

⁸⁵ *Ibid.* at 235-44.

⁸⁶ *Ibid.* at 233.

⁸⁷ See, e.g., U.S. State Department cables in 1979 and 1980 regarding the "UNCTADization" problem (available from author).

IV. THE END OF THE COLD WAR AND OPPORTUNITIES
FOR EUROPE THROUGH THE EU:
CONSENSUS DECISION-MAKING AT THE WTO⁸⁸

The End of the Cold War and
The Emergence of the EU As a Preferential Alternative for Europe

By 1990, the Soviet Union had collapsed and the Cold War ended. This meant that the Cold War rationale for U.S. policy-makers to maintain the consensus tradition at the GATT disappeared. Moreover, in the Tokyo Round negotiations, it had become clear to U.S. policy makers that U.S. dominance of the GATT was over: no deal could be made without cooperation between the United States and the EC. During the later years of the Uruguay Round negotiations, that notion was confirmed. Thus, from a U.S. perspective, it was time to consider alternative rules for governing the GATT, preferably rules that permitted joint EU-U.S. management of the institution.

But the end of the Cold War also meant that the geopolitical glue that encouraged at least moderate European-U.S. cooperation had weakened, and European countries were increasingly interested in expanding the influence of the EU, increasing the benefits to be derived from its preferential trading structure, and expanding that structure to include Central and Northern Europe. The EU had come of age to offer Europe opportunities and incentives that would compete with multilateralism.

In that context, the WTO was born and the practice of consensus decision-making was maintained.⁸⁹

⁸⁸ This section is based on the cited sources, plus personal observations of the author while he worked for the United States Trade Representative from 1989 to 1991, and interviews with diplomats from the U.S. government, the EU, and the GATT Secretariat, which took place in Washington and via telephone in 1993 and 1994.

⁸⁹ In December 1989, Professor John Jackson delivered a speech at the Royal Institute of International Affairs in London, reviving the forty year old idea of creating a multilateral trade organization. The postwar idea for an international trade organization dates back to the years immediately following the Second World War, when the Western powers negotiated the creation of the International Trade Organization (ITO) and the GATT. The U.S. Congress refused to approve the creation of the ITO, largely because of concerns about loss of sovereignty and its rules on restrictive business practices. See John H. Jackson, *World Trade and the Law of GATT* (Charlottesville: The Michie Company, 1969), esp. pp. 1-58. Jackson's speech, later published as a book, became the basis for

A Neorealist model embedded in that geopolitical and institutional context can explain the negotiations that created the WTO. The EU and the United States together had the power to impose the results of the Uruguay Round on the rest of the world, so the basic rules of the WTO reflect European and U.S. interests. As the analysis below shows, the question of whether to end the developing countries' free ride on the Tokyo Round agreements, and whether to prevent a free ride on the new Uruguay Round agreements on services, intellectual property, and investment were North-South distributive questions on which the EU and United States could agree: with the Cold War over, EU and U.S. negotiators could agree to impose the obligations of those agreements on the South. This was a battle on the North-South Pareto frontier and, consistent with Neorealist institutional theory, the outcome reflected underlying power and interests in the issue are under examination.

In contrast, the question of alternative decision-making rules to be used in the WTO was fought along the EU-U.S. Pareto frontier. Each of the two proposed alternatives to consensus decision-making was seen as making one power better off and the other power worse off. The negotiations resulted in adopting a consensus decision-making rule for the WTO, which will likely serve as a source of bargaining power for the developing countries. Hence, the Pareto optimal Nash equilibrium in this case has an important side-effect on a third party. Adoption of this decision-making rule cannot be understood only by reference to underlying North-South raw bargaining power (since the developing countries are empowered by the rule) and multilateral trade interests. It requires understanding that Europe had an alternative institutional opportunity for liberalization-- the EU.

discussions among diplomats about the creation of the WTO. See John H. Jackson, Restructuring the GATT System (London: Royal Institute of International Affairs, 1990).

Binding the South to Multilateral Agreements:
A North-South Battle on the Pareto Frontier

As explained above, bargaining in the shadow of the GATT's consensus tradition, the developing countries had been able to achieve a free ride on many of the key Tokyo Round agreements, including the Subsidies Code and the Antidumping Code; they were able to secure the rights under those agreements, without having to sign or abide by the undertakings contained in them. As a result, few developing countries had accepted those two codes.

In addition, since the beginning of the Uruguay Round negotiations, most developing countries had stated their intention not to sign onto the TRIPs Agreement, the Services Agreement, or the Agreement on Trade Related Investment Measures (TRIMs). Nonapplication of the obligations of those agreements to the developing countries would have greatly weakened the value of those agreements to the EU and the United States. After all, most of the world's intellectual property piracy was taking place in the developing countries, the world's most closed service sectors were to be found in the developing world, and restrictive investment measures are common in the developing countries. Moreover, the EU and the United States were concerned that the developing countries would use their leverage under the consensus tradition of the GATT to block the secretariat from servicing those agreements unless the developed countries promised to extend the benefits of the agreements to the developing countries on an MFN basis-- the same maneuver the developing countries had used to free ride on the Tokyo Round codes.

Resenting the developing countries' free ride on the Tokyo Round codes; fearing that they would now try to free ride on the Uruguay Round's Services Agreement, TRIPs Agreement, and TRIMs Agreement; and recognizing that the Cold War rationale for not alienating developing countries from the West was now inapposite, U.S. government negotiators seized on proposals to create a new trade organization as a means of imposing all the agreements on the developing countries.

U.S. negotiators developed what some referred to internally as the WTO "power play." U.S. negotiators proposed this "power play" to the EC at a Quadrilateral Meeting⁹⁰ in August 1990, and it was immediately accepted, for the EC shared an identical interest with the United States in stopping the free ride.

As a result, the Agreement Establishing the WTO contains "as integral parts" and "binding on all Members": the GATT 1994; the GATS; the TRIPs Agreement; the TRIMs Agreement; the Subsidies Agreement; the Antidumping Agreement; and every other Uruguay Round multilateral agreement.⁹¹ The Agreement also states that the GATT 1994 "is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947. . ." The combined effect of these provisions forces most countries to join the WTO and all the Uruguay Round multilateral agreements. The two GATTs (the 1947 and the 1994 versions) are two distinct legal instruments. After joining the WTO (including the GATT 1994), the United States and the EU will withdraw from the GATT 1947 and will thereby not owe any GATT 1947 obligations (including most-favored-nation status) to countries which do not join the WTO. Therefore, when the big trading powers (i.e., the United States and the EU) have joined the WTO and withdrawn from the GATT 1947, everyone else will have to follow suit or lose their legal rights vis-à-vis those big trading powers. And in order to join the WTO, the WTO Agreement requires that those countries will have to join all the Uruguay Round multilateral agreements. The combined legal/political effect of the WTO Agreement will be to

⁹⁰ The Quadrilateral Countries include Canada, the EC, Japan, and the United States.

⁹¹ The Uruguay Round multilateral agreements include all of the Uruguay Round agreements, except four "Plurilateral Trade Agreements," which are: (1) Agreement on Trade in Civil Aircraft; (2) Agreement on Government Procurement; (3) International Dairy Arrangement; and (4) Arrangement Regarding Bovine Meat.

ensure that most of the Uruguay Round agreements have not a limited membership but mass membership.⁹²

Thus, in this respect, the WTO is the vehicle by which the EU and the United States were able to flex their underlying raw trade bargaining muscle to impose results on the developing countries, and the outcome improved the position of both the EU and the United States at the expense of the developing countries. It was a change along the North-South Pareto frontier that reflects the raw trade power relationship between North and South.

Alternative Decision-Making Rules For the WTO:
EU-U.S. Bargaining On the Pareto Frontier

In contrast, negotiations over the rules of governance for the WTO were part of a zero-sum battle on the EU-U.S. Pareto frontier, which neither the EU nor the United States had the muscle to win. But it is not possible to fully understand this story (how European and U.S. interests diverged) without reference to another institution and the opportunities and incentives it offered: the EU.

U.S. negotiators did not like the GATT's consensus decision-making rule. As analyzed above, it had led to a glacial rate of progress in the GATT, provided an important source of bargaining power to the developing countries in GATT negotiations, and had permitted them to free ride on the outcomes of those negotiations. Moreover, the Cold War rationale for maintaining the consensus decision-making rule was gone. At the same time, both the Tokyo Round and Uruguay Round negotiations had shown that EU-U.S. cooperation was needed to manage the system.

As a result, in mid-1990, senior U.S. negotiators proposed two new alternative rules to their EC counterparts; these new rules would have embodied fundamentally new

⁹² After acceptance of the approach by both the EC and the United States, it was included in the December 1991 "Dunkel Text." See Annex IV, Agreement Establishing the Multilateral Trade Organization, GATT Doc. MTN.TNC/W/FA, 20 December 1991.

decision-making rules in the WTO by which those with the most raw trade bargaining power would have been able to jointly manage the system. The proposal was made quietly, but had been first approved through the appropriate U.S. government inter-agency process. Under one alternative, the WTO would be managed by an Executive Committee composed of the sixteen largest trading countries, which together carry on over sixty percent of world trade. The four Quadrilateral countries-- the United States, the EU, Japan, and Canada-- would have been guaranteed permanent membership. The precise powers of the Executive Committee were to be worked out between the United States and the EC, if the EC liked the idea in principle. A second alternative was modeled on the U.N. Security Council: most decisions at the WTO would be taken by majority vote, with the four Quadrilateral Members each having a veto.

Both proposals were rejected by EC negotiators, for Europe's interests in the multilateral trading system differed fundamentally from those of the United States. While the United States viewed the GATT/WTO system as its primary means of trade liberalization, Europe viewed the EC as its primary and favored means of liberalization for at least three reasons.

First, the EC offers European countries an institutional outlet for intra-community and extra-community liberalization on a preferential basis: the reduction of tariff and non-tariff barriers among EC member states, and between the EC and nearly 80 other countries (including approximately 60 Lome Convention countries,⁹³ the five EFTA countries,⁹⁴ several Mediterranean countries,⁹⁵ and now several Central and Eastern European countries, including Russia), improves European industries' trade opportunities among

⁹³ See, Third ACP-EEC Convention (Lome III), done at Lome on December 8, 1984, Official Journal of the European Communities 1986 L 86/1, 24 I.L.M 571 (1985).

⁹⁴ See, e.g., Agreement Between the European Communities and the Swiss Confederation, Official Journal of the European Communities 1972 L 300, 191.

⁹⁵ These countries, which have entered into "association agreements" with the EC, include Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, and Tunisia.

those states at the expense of some U.S. producers. In other words, trade diversion⁹⁶ befalls those outside of the free-trade system built by the EC and its associated states, and the preferences associated with that diversion redound to industry in Europe. These preferences are magnified by the EC's rules of origin, which often provide that specified proportions, types, or qualities of EC-produced inputs must be embodied in a good for it to receive EC duty-free treatment, thereby encouraging the use of EC components over non-EC components.⁹⁷

Second, the EU can dominate negotiations to liberalize trade between itself and third countries via bilateral instruments in a way it could never dominate multilateral negotiations in the WTO.

Third, the bigger and faster the EU can grow, the greater its power vis a vis the United States and Japan in the WTO, and the greater its ability to control its own destiny.

With the fall of the Iron Curtain, this preferential approach to liberalization with Eastern and Central Europe has seemed particularly attractive to Europe. It would permit Europe to ensure a rapid pace of securing new markets in the East and to control the terms upon which those markets were secured. That could serve economic ends, including the establishment of preferential trade arrangements with Central and Eastern Europe, and political ends, including encouragement of rapid and irreversible transformation of the former Eastern Bloc countries,⁹⁸ increased dependence of those economies on the EU, and expansion of the size and influence of the EU and associated states. Moreover, in the absence of a common EU- U.S. enemy, Europe was now relatively free to pursue preferential gains in the East.

⁹⁶ On trade diversion generally, see Jacob Viner, The Customs Union Issue (New York: Carnegie Endowment for International Peace, 1950).

⁹⁷ On the trade diversion effects of special rules of origin, see Richard H. Steinberg, "Antidotes to Regionalism: Responses to Trade Diversion Effects of the North American Free Trade Agreement," Stanford Journal of International Law 29, 2 (1993), p. 315.

⁹⁸ See generally, Timothy Garton Ash, "Germany's Choice," Foreign Affairs 73,4 (July/August 1994), pp. 65-81, esp. p. 69.

According to several European diplomats and members of the European Commission interviewed by this author, for those reasons, the EU favored its own mechanisms and negotiations as a means of liberalization over a speeded up WTO process.⁹⁹ Moreover, EU negotiators believed that the consensus decision-making rule conferred a stronger diplomatic position on the EU than it would enjoy under either U.S. proposal. The United States is usually the leading demandeur of multilateral liberalization and the developing countries are usually the most reticent to liberalize; EU negotiators believe that places them in the coveted diplomatic "center," where they can control the pace of events and make the United States "pay" for European cooperation in imposing rules on the developing countries.

Thus, from Europe's perspective, the only WTO decision-making rule better than consensus would have been one that granted the EU a large measure of control over the pace and substance of WTO decision-making. Such an alternative decision-making rule was precisely what the EU proposed and pushed in 1992 and 1993. Specifically, the EU proposed a rule whereby most WTO decisions could be taken by a two-thirds vote of WTO signatories, and the EU would have a number of votes equal to the number of its member states. The EU was attracted to that rule for several reasons. First, in the words of one European diplomat, it could be used to "embrace and contain" U.S. "unilateralism" (i.e., action taken by the U.S. government pursuant to Section 301 of the Trade Act of 1974, as amended), a goal shared by most signatories to the WTO. Second, the EU believed it could usually count on having the support of at least forty of the WTO's 120 members (i.e., one-third) needed to block any proposed action: the EC's twelve member states (now fifteen), combined with not even half of the 80 countries with which the EU has a preferential arrangement, would create a formidable bloc. In contrast the United

⁹⁹ In 1990, the United States did not have an analogous regional institutional outlet, and even today, neither the NAFTA, APEC, nor the FTAA can not yet be considered as offering the United States as fast and preferential a vehicle for liberalization as the EU offers Europe.

States could never count on a bloc anywhere near that size. Third, because the EU thought it could count on starting with a bloc of at least 35 to 40 votes on any given proposal, it calculated that it would need support for any given proposal from only one half of the remaining countries at the WTO to impose a result on the United States. This also suggested that in a showdown with the EU and its bloc, the United States would usually need almost unanimous support from the remaining countries to impose a result on the EU.

For the same reasons that the EU liked its proposal of a two-thirds vote decision-making rule, the United States could not possibly live with it. Indeed, it was so threatening, that the United States supported retaining the consensus decision-making rule instead of the EU's proposed rule.

Hence, in comparison to the consensus decision-making rule, the EU viewed the U.S. proposals as improving U.S. welfare and decreasing EU welfare, and the United States viewed the EU proposals as improving EU welfare and decreasing U.S. welfare. With neither great power having enough raw political muscle to impose a result on the other, the EU and the United States effectively agreed to each other's second-choice for a decision-making rule: retaining the consensus tradition.¹⁰⁰

¹⁰⁰ Each member state will have one vote and decision-making in all bodies will be generally by "consensus" (i.e., "if no Member, present at the meeting where the decision is taken, formally objects to the proposed decisions"). Agreement Establishing the World Trade Organization, art. IX, para. 1 and n. 1. When no consensus can be reached, decisions shall be taken by a majority vote, unless otherwise specified. Agreement Establishing the World Trade Organization, art. IX, para. 1. But for the same reason that the EU and the United States have not resorted to majority voting in the GATT, they are unlikely to call for or tolerate majority voting in the WTO: they do not want to establish a precedent whereby the developing countries will use their majority control to dominate the institution. Moreover, many diplomats interviewed by this author have suggested that a consensus would be required to decide that a consensus could not be reached. Decision-making rules for amendments are otherwise specified: amendments to the agreements must be adopted by a two-thirds or unanimous vote (depending upon the type of amendment); while amendments relating to procedure will bind all parties, only those parties accepting a substantive amendment would be bound by it. Agreement Establishing the World Trade Organization, art. X. Waivers of obligations contained in any of the agreements only upon approval of three-fourths of the Members. Agreement Establishing the World Trade Organization, art. IX, para. 3. Special consensus decision-making rules on dispute settlement are discussed below.

V. CONCLUSION: LINKAGE AND LAW IN
A NEOREALIST MODEL OF INTERNATIONAL INSTITUTIONS

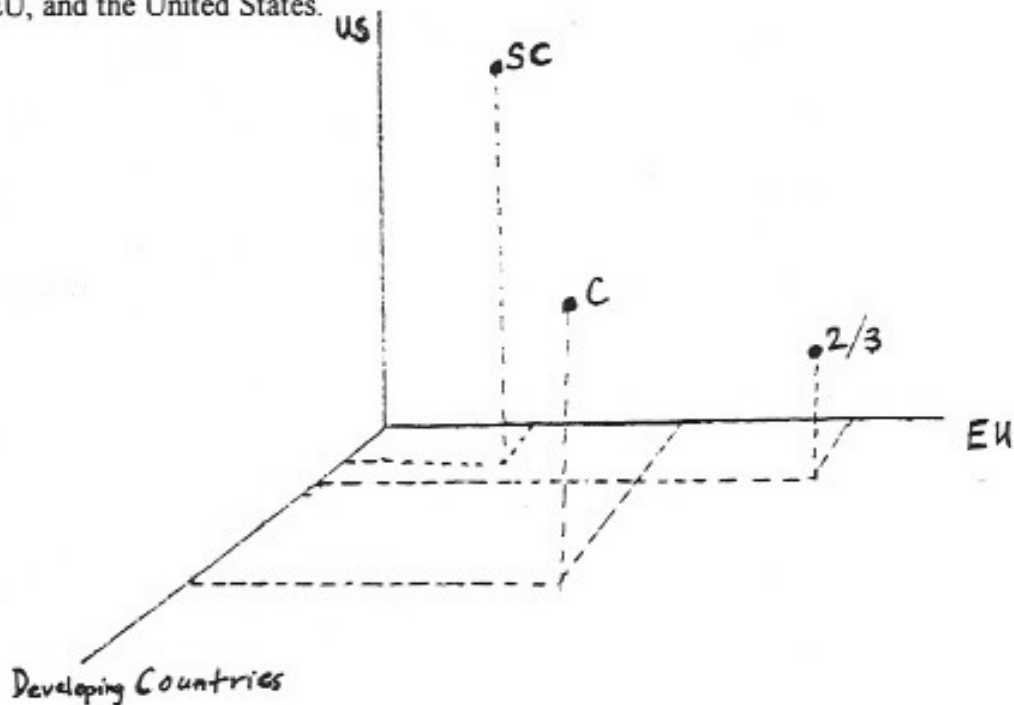
Summary of the Cases Examined

During the Cold War, the consensus decision-making rule in the GATT yielded trade outcomes that were more favorable to developing countries than would have been suggested by the underlying distribution of raw trade bargaining power. The United States complied with the rules despite its effect in empowering developing countries in GATT negotiating processes and outcomes. U.S. support for such a rule is attributable to the perception of U.S. policy-makers that it served Cold War security objectives.

When the Cold War ended, U.S. support for the consensus decision-making rule waned, but Europe preferred it to rules that would have led to more joint EU-U.S. management of the newly-created WTO. The existence of the EU as an institutional alternative to the WTO offers Europe a means of fast liberalization on its own terms and of quickly embracing Central and Eastern Europe on preferential terms, making multilateral liberalization (and rules that would enhance multilateral liberalization) relatively less desirable. With the Soviet threat gone, and cooperation with the U.S. less important to European security, Europe refused to support U.S. calls for a change of the decision-making rules that would have permitted joint management of the system. The result was that the GATT's consensus tradition will be carried forward to the WTO as the primary decision-making rule. The developing countries can be expected to bargain under the shadow of that rule in the WTO, just as they did in the GATT, deriving bargaining leverage from threats to block a consensus. Thus, EU-U.S. bargaining over the WTO decision-making rules resulted in an equilibrium on the Pareto frontier that has empowered developing countries.

Figure 1 illustrates this outcome through a three

FIGURE 1: Three Dimensional Edgeworth Box Diagram Illustrating The Effects of Alternative Proposed Decision-Making Rules on the Welfare of the Developing Countries, the EU, and the United States.



dimensional Edgeworth Box diagram, showing the likely effects of alternative decision-making rules on the welfare of the developing countries, the EU, and the United States. SC represents the expected utility that would have been derived by each party if the U.S. proposal for a Security Council type of arrangement had been adopted. $2/3$ represents the expected utility that would have been derived by each party if the EC proposal for a two-thirds voting rule had been adopted. C represents the expected utility that will be derived by each party from having maintained the consensus decision-making rule. The case shows that bargaining outcomes between two great powers can have side-effects on the welfare of weaker third parties; in this case, the bargaining outcome has magnified the institutional decision-making power of the developing countries.

Existing Theoretical Explanations?

Reflectivist factors cannot explain the GATT/WTO cases. Constancy of norms and cognition cannot explain why the United States and the EU were willing to impose the substantive results of the Uruguay Round on the developing countries in contradiction to the long-standing GATT and international law principles of equality among nations and that no nation can be forced to accept an undertaking to which it objects. Moreover, Reflectivism cannot explain why EU and U.S. negotiators were interested in abandoning the consensus decision-making rule-- with the United States in favor of a Security Council or Executive Committee approach, and the EU in favor of a two-thirds vote rule. Finally, a Reflectivist ideological commitment to principles such as "equality among nations" cannot explain why the decision-making rules of other postwar institutions, such as the United Nations and the IMF, which were created around the same time as the GATT, do not embody the principle.¹⁰¹

Neorealism offers another approach, but it needs to be elaborated to explain the cases examined here. In Krasner's and Garrett's case-studies, the rules of a particular institution bear a one-to-one correspondence with underlying bargaining power and interests in the issue area governed by the institution. That model cannot explain the cases examined here. U.S. compliance with the GATT consensus decision-making rule cannot be explained by reference only to the underlying distribution of raw trade bargaining power and the narrow trade interests of those with power; an explanation must refer also to U.S. security objectives. Similarly, European objections to changing the consensus rule when the Cold War ended cannot be explained by reference only to the distribution of raw trade bargaining power and the abstract interests of great powers in a multipolar system; those facts alone could not explain why the U.S. wanted joint management and the EU did not. Instead, an explanation of Europe's position must refer also to the existence of an

¹⁰¹ See discussion above at p13.

opportunity and incentives for preferential liberalization through another institution-- the EU. And North-South bargaining processes within the GATT are best understood, and within the WTO will be best understood, as taking place in the shadow of an international law requiring consensus decision-making. Bargaining processes under those rules, and associated outcomes, do not simply reflect underlying raw trade bargaining power and interests in isolation from other institutions.

A Modification of the Neorealist Regimes Model:
Linkage and Law

Krasner's and Garrett's cases lent themselves to a narrow definition of power, an examination of institutions in isolation from one another, and consideration of national interests only in a particular issue area. That approach is not required by Neorealist logic and does not work for the cases examined here. A modification of Neorealist regime theory (and of the model implicit in Krasner's and Garrett's approach) could view international law and institutions as a set of functional structures, each institution reflecting a broad set of interests influenced by other institutional opportunities and the geopolitical distribution of power writ large,¹⁰² instead of implicitly viewing the rules of each institution as reflecting underlying bargaining power and interests in the issue area under examination.

Such an elaboration would be consistent with the Neorealist model of international regimes as intervening between power and outcomes.¹⁰³ However, in contrast to that earlier model, and Krasner's and Garrett's approach, the elaboration suggested here would give international institutions and international law an important role in explaining international behavior and outcomes. Figure 2 contrasts one aspect of the modified

¹⁰² This modified model's view of international law may be seen as similar in some senses to Habermas' structural Marxist views of international law as superstructure, except that the driving force behind state interests in this modified model is power, whereas in Habermas' view it is the maintenance of capitalism. See Jurgen Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975).

¹⁰³ Stephen Krasner, "Regimes and the Limits of Realism: Regimes As Autonomous Variables."

approach to Neorealist regime theory and the Neorealist framework used by Krasner and Garrett. In the modified approach, which may be called a Neorealist "Linkage and Law" model, for ease of reference, the rules of a single institution need not necessarily reflect

FIGURE 2

Neorealist Regime Theory

Basic Causal Variables -----> Regimes -----> Related Behavior and Outcomes

Neorealism (Krasner and Garrett Cases)

Distribution of Power and Interests In An Issue Area -----> Rules in a Particular Institution Reflect Underlying Bargaining Power and Interests in the Issue Area -----> Behavior in that Instn Reflects Underlying Bargaining Power In That Issue Area

Modified Approach: Neorealist Linkage and Law Model

Distribution of Geopolitical Power and Underlying Interests -----> Set of Institutions Rules of Instn 1 -----> Behavior In the Aggregate Reflects Underlying Geopolitical Power and Interests

underlying power, but the rules of all the institutions would. And underlying "power" is defined broadly. Moreover, the rules governing behavior in a particular issue area do not necessarily reflect interests related only to that issue area. This modification accounts for why U.S. policy-makers supported a consensus decision-making rule in the GATT: they believed it advanced security objectives.

In addition, the model sketched in Figure 2 should be embedded in a context of other international institutions that shape national interests. As the case examined here showed, the availability of alternative trade strategy opportunities for Europe through the

EU played a crucial role in defining European interests in deciding between different WTO decision-making rules. This suggests that interests in a particular international institution may be affected by incentives and opportunities available in other international institutions.¹⁰⁴ In Neorealism, interests are determined exogenously. In the Linkage and Law approach presented here, one may have to look to other institutions to understand alternative strategies available to great powers and their resulting interests in each particular institution.

Therefore, one may have to understand the full web of international institutional, legal, and political linkages across issue areas before being able to predict how a shift in power could affect rules in any particular institution. In that sense, the international web of institutional structures and interests bounds Krasner's and Garrett's treatment of the relationship between power, rules, and outcomes in any particular institution.

Embedding the model of power and rules of a particular institution in the context of broader interests and other international institutions opens the way for an equilibrium in any particular institution that may *appear* to be inefficient. In contrast to Krasner's and Garrett's treatment, the modified approach offered here could allow for a case in which a particular institution maintains a rule that confers substantial institutional power and unexpectedly good institutional outcomes on smaller powers: such a rule (and compliance with it) could be acceptable and functional if it were evaluated as such by big powers in the context of other interests and institutions that extend beyond the immediate issue area

¹⁰⁴ For a discussion of this idea in the regimes literature, see Arthur Stein, "Coordination and Collaboration: Regimes in An Anarchic World" in International Regimes (Ithaca: Cornell University Press, 1983). This approach is analogous to some comparative political-economy analyses which argue that the institutional structure of a national economy creates a distinct pattern of constraints and incentives that defines actors' interests and shapes their behavior. See, e.g., John Zysman, "How Institutions Create Historically Rooted Trajectories of Growth," in Industrial and Corporate Change (forthcoming). See also, Alexis de Tocqueville, The Old Regime and the French Revolution, trans. by Stuart Gilbert (Gloucester, Massachusetts: Peter Smith, 1978); and M. Granovetter, "Economic Action and Social Structure: A Theory of Embeddedness," American Journal of Sociology Vol. 19 (3), pp. 481-85. There are, however, important differences between those analyses and the model presented here: for example, norms (which often play a central role in that literature) do not play a role in the model presented here.

governed by the institution under study. This is precisely what the case studies above showed in the GATT: the consensus decision-making rule conferred power on developing countries, resulting in unexpectedly good outcomes for them.

This approach thereby gives international law a bigger role than the earlier Neorealist approach, without conceding any role for Reflectivist factors. Institutional rules would provide a better explanation for bargaining behavior in a particular institution than would be provided by underlying power and interests in the issue area being governed by the institution. In Krasner's and Garret's Neorealist treatment, since the decision-making rules of each institution reflect underlying bargaining power and interests in the issue area governed by the institution, any bargaining under those rules is equivalent to bargaining about those interests under the shadow of power. And in Neorealist regime theory, regime rules are purely epiphenomenal. In contrast, under the modified approach offered here, the rules of a particular institution could help those with relatively little power in that institution and could serve interests that extend beyond those in the issue area governed by the institution. Big power interests that extend beyond the issue area governed by the institution, cross-institutional linkages, and favorable big power assessments of outcomes across those institutions, would make compliance with the rules likely. Hence, inter-state bargaining within the institution could take place under the shadow of that rule, much like lawyers bargain under the shadow of enforceable domestic law¹⁰⁵ -- despite the fact that such bargaining would lead to processes and outcomes that differ significantly from bargaining in the same issue area in the shadow of raw power.¹⁰⁶ Law would matter.

¹⁰⁵ See Robert H. Mnookin and Lewis Kornhauser, "Bargaining In the Shadow of the Law: The Case of Divorce," *Yale Law Journal* 88 (1979), p. 950.

¹⁰⁶ This is consistent with arguments by some international legal scholars that the long-term value of maintaining a particular law, and of maintaining a set of legitimate laws that enjoy compliance, will usually outweigh the short-sighted and immediate gains of non-compliance. See, e.g., Henkin, *How Nations Behave: Law and Foreign Policy*.

Nothing about the modified approach offered here need be inconsistent with the bigger story of Neorealism; despite the role of law in explaining processes and outcomes in the GATT, the story here is essentially about power: power considerations drove the United States and the EU to support various rules at various times in the multilateral trade institution. The modified approach is firmly rooted in power considerations. To be consistent with Neorealism, the underlying distribution of power would demand that institutional rules in the aggregate--across all institutions-- serve the interests of the powerful states. The world's international institutions and international laws in the aggregate would still be epiphenomena of international structure. General predictions about world politics derived from Waltz's three variables (nature of the units, distribution of power, and anarchy) would still hold.

The Linkage and Law approach has some of the same limits facing Neorealist regime theory: institutional rules could serve as a source of power, feed back onto underlying power capabilities, change calculations of interest, or fundamentally redefine underlying interests,¹⁰⁷ offering international law a crucial dynamic role in explaining state behavior and change of the structure of the international system. This study indicates that international law is autonomous in a limited sense: international law does feed back onto calculations of interest (e.g., the existence of the EU affects its member-states' calculations of interest in the WTO) and may serve as a source of power in a particular issue area (e.g., the GATT consensus decision-making rule served as a source of developing country bargaining power). But the study provides no evidence that international law has changed fundamental capabilities or underlying preferences in a way that would undermine Neorealism's definition of the structure of the international system. Similarly, this study

¹⁰⁷ Stephen Krasner, "Regimes and the Limits of Realism: Regimes As Autonomous Variables," in Stephen Krasner, ed., *International Regimes* (Ithaca: Cornell University Press, 1983).

suggests that history may be seen as providing a "path dependent"¹⁰⁸ set of linkages across international institutions and issue areas at each point in time, influencing great powers' calculations of interest with respect to future changes in each particular institution as power shifts in the system.¹⁰⁹ But it provides no evidence that those "path-dependent" developments are altering the structure of the world order.

Hence, the set of all international institutions and international law would represent a particular implementation of a given geopolitical structure. One can envision virtually infinite permutations of combinations of institutional arrangements that could provide outcomes that complement a particular international power structure.¹¹⁰ A more complete understanding of international political behavior in any epoch would require understanding not only the three factors identified by Waltz in his Neorealist theory of international politics, but also the institutions that exist, international law, and relationships across international institutions and issue areas. Armed with that contextual knowledge, Neorealist analyses could be extended to explain and predict more details about how history is unfolding as power shifts.

Limitations and Advantages

The Linkage and Law approach is not without limitations. Any attempt to use it in explaining a particular institutional structure or rule would have difficulty deciding whether to look at that structure or rule in isolation, or in conjunction with other interests,

¹⁰⁸ On "path dependence" generally, see, e.g., Steve Weber, "Institutions and Change." See also, E. Helpman and P. Krugman, Market Structure and Foreign Trade (Cambridge: MIT Press, 1985); and Paul David, "Clio and the Economics of Qwerty," Amer. Econ. Rev. Proc. 75 (1985), pp. 332-337.

¹⁰⁹ For example, one could make the following path-dependent arguments from this study. GATT Article XXIV, which permits the establishment of preferential trade areas, was originally intended by the United States to serve as a means of increasing the pace of liberalization among a like-minded sub-set of countries in the multilateral system, and to permit the formation of the EC in the service of containment policy. That rule permitted the birth of the EC, into which transnational actors have "locked" member-states and which has evolved into an institution that now profoundly shapes Europe's trade strategy alternatives, including its interests in the rules of the multilateral system. Similarly, the entire set of rules that comprises the GATT system may be seen as offering so many benefits to the United States, and as providing a legal environment for a set of so many transnational ties, that the United States could not dream of withdrawing from the GATT/WTO system; it is effectively locked-in.

¹¹⁰ Steve Weber, "Institutions and Change."

structures, or rules. Explanations would become much more context-dependent, and the predictive value of the approach would be limited: one would have to understand the full web of institutional, legal, and political linkages before being able to predict how a shift in power could affect rules and institutions. And for that reason, the Linkage and Law model of Neorealist regime and institutions theory is less parsimonious than Krasner's and Garrett's treatment.

Nonetheless, the Linkage and Law approach has the virtue of being necessary to explain the cases here: understanding political linkages across rules, institutions, and issue areas is necessary to explain GATT negotiations under the shadow of law and WTO negotiations over the shape of international institutions and laws. More generally, it suggests that it may be necessary to understand international legal rules when trying to explain bargaining behavior in a particular institution, and that national interests cannot be known without understanding the web of international institutions that affect them. After building up a knowledge base about how interests and rules are linked across institutions and interests, the approach will have significant predictive and explanatory power.

Thus, the Linkage and Law approach is a theoretically progressive modification of Rationalism. The approach can be combined with both Neoliberal explanations about how institutions can solve market imperfections and with broader Neorealist views about change in and of the international system to lend Rationalism increased heuristic power in understanding international institutions, suggesting the value of further empirical work on international institutions in the context of a Rationalist research program.