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# Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note

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Political scientists attempt to explain why governments adopt the policies they do. In political models, policy is the result of calculated choices made by political and economic actors. Actors' resources, and their incentives to mobilize and demand that governments attend to their interests, are the key forces explaining the policy choices we observe. When considering the impact of international legalization on political outcomes, the way in which legalization changes the interests and demands of actors provides the mechanism by which policy changes. In this article we consider how increases in the legalization of the international trade regime interact with the trade-related interests of domestic actors. Although legalization may reduce incentives for cheating by individual nations, we identify ways in which the unintended effects of legalization on the activities of domestic economic actors could interfere with the pursuit of progressive liberalization of international trade. Domestic politics cannot be treated as extraneous or as an irrational source of error that obstructs the purposes of legalization. Instead, politics operates in systematic ways and is the mechanism through which legalization exerts its effects. These effects range far beyond reducing opportunism by unitary states.

Through incremental change in the postwar years, the international trade regime has evolved away from its origins as a decentralized and relatively powerless institution and become a legal entity. The number of countries and the amount of trade covered by the rules agreed to in 1947 have expanded greatly. After 1995 and the creation of the World Trade Organization (WTO), the regime further increased its demands on members by elaborating and expanding commercial rules and procedures, including those that relate to the system of settling disputes. In practice the expansion of the regime in the post-World War II period has made trade rules more precise and binding. The result is that the implications or behavioral demands of rules have become increasingly transparent to all participants.<sup>1</sup>

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1. Legalization refers to three aspects of international law: obligation, precision, and level of delegation to a centralized authority. Abbott et al., this issue.

We argue that this increased legalization does not necessarily augur higher levels of trade liberalization, as suggested by supporters. The weakly legalized General Agreement on Tariffs and Trade (GATT) regime was remarkably successful at liberalizing trade; it is not apparent that the benefits of further legalization will outweigh its costs. This finding derives from an analysis of domestic politics and, in particular, from the incentives facing leaders to join and then adhere to the dictates of a liberal international trade regime. We support our position through an analysis of two aspects of trade politics.

First, we examine the effect of legalization on the incentives of domestic groups to mobilize and pressure their governments to adopt policies that favor them.<sup>2</sup> In that legalization entails a process of increasing rule precision, a more legalized trade regime will provide more and better information about the distributional implications of commercial agreements. Information on who will gain and lose from some international action will affect the incentives of groups to mobilize for and against trade agreements. This effect on both the mobilization of groups and the balance among them will vary depending on numerous factors. In general, however, we believe that better information will empower protectionists relative to free traders on issues relating to the conclusion of new agreements and free traders relative to protectionists on issues of compliance to existing agreements.

Second, we examine the implications of a more “binding” GATT/WTO on member governments. Although GATT rules were always obligatory in a legal sense, the provisions for using escape clauses and other loopholes interacted with domestic political realities in a way that made their use increasingly rare. This fact, combined with a strengthened dispute-resolution mechanism under the WTO, has increased the extent to which governments are “obliged,” in a political sense, to maintain their liberal commitments. Reducing the ability of governments to opt out of commitments has the positive effect of reducing the chances that governments will behave opportunistically by invoking phony criteria for protecting their industries. On the other hand, tightly binding, unforgiving rules can have negative effects in the uncertain environment of international trade. When considering the realities of incomplete information about future economic shocks, we suggest that legalization may not result in the “correct” balance between these two effects of binding.

In this article we develop both the theoretical reasoning and the empirical support for our cautionary note on the domestic effects of legalization. We begin by examining information and group mobilization and suggest that the predictability that comes with legalization has both positive and negative effects on the trade liberalization goal of the regime. We then investigate the “bindingness” of trade rules. Through examination of the use of safeguards and the new dispute-resolution procedure, we

2. The number and variety of groups participating in the politics of trade has grown in the last decades. Where the classic models assumed three groups with trade-related interests—consumers, import-competing groups, and exporters—other groups, whose interests span from human rights to a clean environment, have come to believe that their interests are influenced by trade negotiations. The logic of this article, explaining the interaction among international regimes, social mobilization, and domestic politics, applies to any interest that groups perceive to be influenced by international trade agreements.

argue that trade rules have become more binding, even if *pacta sunt servanda* has always applied to such rules, and that enforcement of rules is now more certain.

Given the relatively short history of the WTO, it is not possible to collect the empirical evidence that can conclusively demonstrate whether legalization has gone “too far.” Instead, the theoretical reasoning about the impact of legalization on domestic politics points to trends that demand close attention. Our purpose in this article is to raise questions about the potential downside of legalization that have not received sufficient attention. Appropriately legalizing international agreements is a tricky business, as the theoretical articles in this issue attest. Governments must perform a balancing act between binding themselves tightly enough to avoid cheating and allowing the flexibility to deal with the vagaries of changing information and domestic politics. Performing this balancing act well requires a clear-headed analysis of the impact of legalization on domestic politics.

### **Legalization, Information, and the Mobilization of Domestic Groups**

The logic of precision, delegation, obligation, and increased transparency played a large role in negotiations over transforming the GATT into the WTO. The intended effect of these modifications in the WTO was to expand the breadth of the trade regime and enhance compliance so as to increase the benefits of membership. The problem with this logic is that it neglected domestic politics. Maintenance of free trade is politically difficult and is a function of the differential mobilization of those who favor liberalization and those who oppose a further opening of the economy to foreign products. Mobilization itself is a function of a number of factors, including the cost of mobilizing and the potential gains from collective action. One consequence of legalizing the trade regime has been greater transparency and predictability about the effects of trade agreements. Increased information of this sort has mixed effects on the mobilization of domestic interests and therefore on the ability of governments to maintain support for liberal trade policies.

#### *The Logic of Mobilization*

Consider first the impact of increased precision of trade rules during the process of trade negotiations. The ability of leaders to sign an accord will depend on the groups mobilized for or against the accord. The pattern of mobilization is not always predictable; mobilizing interest groups requires overcoming collective-action problems that can be quite intense. Actors within these groups must realize first that they have a common interest in government policies. They must then come to believe that it is worthwhile to bear the costs of collective action. A number of factors can undermine mobilization. The factors most relevant to international trade include the large and diffuse nature of some economic interests, lack of information that the interests of

actors are at stake in particular international negotiations, and possible calculations that the costs of influencing government policy outweigh anticipated benefits.<sup>3</sup>

From the perspective of encouraging the liberalization of international trade, the fact that groups who prefer economic closure might suffer from collective-action problems is a blessing. If all antitrade forces were well organized and able to exert substantial pressure on their political representatives, the prospects for liberalization would be dim. The interaction with legalization enters the analysis at this point. In that legalization entails a process of increased precision of rules and transparency of agreements, it affects the behavior of domestic groups by increasing the information available to actors about the distributional implications of trade agreements. To the extent that such knowledge enhances the mobilization of antitrade forces relative to already well-organized protrade groups, legalization could undermine liberalization. Information matters for both protectionist and proliberalization interests. However, if these groups are differentially mobilized prior to the process of legalization, information will have the larger marginal effect on the groups that are not as well organized. The structure of the multilateral trade regime, based on the principle of reciprocity, has provided strong incentives for exporters to organize throughout the post-1950 period.<sup>4</sup> Growing dependence on exports and the multinational character of economic interests has also led to strong and effective lobbying efforts by free-trade advocates.<sup>5</sup> We therefore concentrate on the likely impact of greater information on the incentives facing protectionist groups.

Oran Young, writing on this relationship between international arrangements and the collective action of groups in the context of environmental negotiations, also argues that one important aspect of international negotiations is the distributional information available about the effects of agreements.<sup>6</sup> He argues that if actors know precisely the distributional effects of negotiations, they will concentrate on distributive issues rather than on “integrative” bargaining that searches for arrangements that benefit all. Negotiating behind a “veil of ignorance” can have the benefit of focusing minds on the mutual advantages of international cooperation, rather than arguing about how the costs will be distributed.

Young does not bring differential patterns of domestic mobilization into his analysis. Doing so increases the force of his central argument. If antitrade groups know for certain that their interests will suffer as a result of an agreement, their expected utility of collective action increases and they should be more willing to bear the costs of political participation. Thus legalization that involves highly precise and transparent rules can have the unintended effect of encouraging the mobilization of protectionist forces that see themselves as probable losers from an agreement. To the extent that these forces can now better balance already well-organized free-trade forces, negotiations about liberalization are made more difficult.

3. Collective-action problems have been central to the literature on endogenous tariff formation. See, for example, Magee, Brock, and Young 1989; and Mayer 1984.

4. Gilligan 1997.

5. Milner 1988.

6. Young 1989.

Transparency of winners and losers also has an effect on export groups. According to Michael J. Gilligan, one explanation for the liberalization that has occurred since World War II is that the process of setting tariffs encouraged the participation of export groups.<sup>7</sup> Reciprocal agreements made the gains from trade more transparent to exporters, resulting in greater support for trade liberalization than had existed fifty years earlier. Just as the potential losers from a trade agreement will attempt to undercut agreements, the potential winners will have an interest in pushing their states to sign treaties. In the absence of import-competing groups, or where the relative power between the two favors exporters, we assume policy will reflect exporters' interests. To the extent that information activates protectionists, other things being equal, nations will find it harder to build a consensus around a new liberalizing agreement.

A simple model clarifies the posited relationship between information and mobilization. Define  $p$  to be the probability with which a group believes that its interests will be at stake in negotiations. This subjective probability,  $p$ , is a random variable that takes on different values as information conditions change. We begin by assuming a poor information environment, where groups know only the total number of groups affected, not which of them will be affected.

Assume that there are  $N$  groups with an interest in trade. These groups are not mobilized initially. Assume they know that  $n$  groups will be affected by negotiations but have no information about which  $n$  groups this will be. This is an extreme assumption of poor information but a useful starting point. Each group therefore estimates that it will have a stake in negotiations with probability  $n/N$ , the ratio of affected groups to all groups. Given a lack of information, this is their best guess of the probability of being affected by negotiations. Thus, in the prelegalization environment, the variable  $p$  takes on the value  $n/N$ ;  $p = n/N$ . The value of  $p$  will change as information improves.

Given this value of  $p$  prior to legalization, does it make sense for a group to mobilize? The calculation depends on the relationship between the expected benefits and costs of mobilization. The benefits of mobilization,  $B$ , are realized only if the group is in  $n$ . If the group is not in  $n$ , it gains no benefits, but will have to bear the costs of mobilization if it chooses to mobilize. Given the pre-legalization value of  $p$ , the expected benefits from negotiations are  $p*B$ , or  $nB/N$ . Groups will mobilize if the expected benefits outweigh mobilization costs  $C$ ;  $p*B > C$ . Thus each group will mobilize if  $nB/N > C$  in the poor information environment.  $N$  is a large number, and the ratio  $n/N$  is typically small. Thus, unless  $B$  is extremely large or the costs of mobilization negligible, groups will not have an incentive to mobilize. Our expectation is that few groups will meet this stringent pre-legalization mobilization condition. As information improves,  $p$  increases above the  $n/N$  minimum. However, with uncertainty about the distributional implications of negotiations,  $p$  remains small and the ratio of  $B$  to  $C$  must be large to allow mobilization.

After legalization, we assume that groups know with certainty whether they will be included in negotiations; that is, their estimate of the probability  $p$  now becomes

7. Gilligan 1997.

either zero or 1, as groups know whether their interests are at stake or not. The value of the random variable  $p$  changes as information conditions change. Groups that do not have their interests at stake will not mobilize. However, the condition for groups that are affected by negotiations to mobilize is now  $p^*B > C$  with  $p = 1$ , which is simply  $B > C$ . This is a much easier condition to meet, as long as collective-action costs are not prohibitive (as they may be for large, diffuse groups such as consumers). Therefore, we expect that many more groups will find it worthwhile to mobilize in the richer information environment postlegalization. Even if  $p$  does not improve to the extreme values of zero or 1, it approaches these limits, with the expected effects.

As suggested earlier, information has effects on groups that may be harmed as well as helped by negotiations. Our intention here is not to make precise predictions about the policy outcomes of relative mobilization of exporters and protectionists, but simply to draw attention to the political problems created by enhanced mobilization of antitrade groups. Clearly, information will lead both groups to mobilize, given increased certainty on how interests will fare in an agreement. However, a number of factors suggest that increased information is likely to favor proprotectionist mobilization. This position goes beyond the classic explanation, for example, Schattschneider's, that protectionist interests are concentrated and free-trade interests diffuse, which still has some force.<sup>8</sup>

The first factor is that the status quo favors protected groups, not potential new exporters. Since changes from the status quo require explicit affirmation—for example, ratification of a treaty—those who benefit from the status quo gain veto power. Thus typical institutional procedures that privilege the status quo will tend to favor protectionist over liberalizing interests. Another factor pointing in the same direction is the uncertain nature of gains for exporters. Exporters only know that some market will open up, not whether they will be able to capitalize on this opportunity in the face of international competition. In contrast, protectionists know precisely what protection they will be losing as a result of liberalization, enhancing their incentives to mobilize relative to exporters. Moving beyond a strictly rationalist model, we could also mention experimental evidence that actors tend to react more strongly to losses than to gains, again favoring protectionist groups in this mobilization dynamic. Finally, if we assume, as does Gilligan, that exporters are either fully or almost fully mobilized and are already participating in the political process, the increase in information should lead to a relatively greater mobilization of the less involved, that is, the antitrade groups.

The logic of precision and mobilization does not necessarily lead one to expect economic closure. When we consider the effects of more information when maintaining as opposed to creating a trade commitment, we get the opposite effect. Although information may mobilize import-competers before the conclusion of an agreement, the effect of a more legalized regime may be to mobilize exporters in cases of certain market losses, *ex post*. In this case, precision about which exporters will bear the costs of retaliation in a trade dispute works to mobilize exporting interests who would

8. Schattschneider 1935.

otherwise have no involvement in the trade dispute. Given the potential of a market loss, they will press governments to uphold trade rules. The higher the probability that the retaliatory action will hurt them, the greater their interests in expending resources to maintain liberal trade at home.

Therefore, logic suggests that increasing rule precision will have two different, and competing, effects on trade liberalization. Increased determinacy can undermine trade deals by activating import-competing groups with veto power. Conversely, precise rules regarding responses to rule breaches will result in more trade liberalization by activating export groups in the offending country. Over time, we should see not only more antitrade groups organizing but also more political activity by export groups if strategies of retaliation are appropriately designed.

### *Mobilizing Antitrade Groups*

Empirical evidence suggests that groups affected by trade policy are often well organized and articulate. Whether the group is farmers in France, auto producers in the United States, or computer companies in Japan, those whose interests will be hurt by either continued or expanded access to foreign goods, services, and markets are articulate spokespersons for specific policies. These groups often act as veto players, and leaders who would like to negotiate the opening of world markets find that fear of competition at home undermines support for their free-trade coalition. The ability of leaders to ignore protectionist pressures rests on the willingness of proliberalization groups, those who benefit from liberalized trade, to organize and be equally active in their support. In the absence of exporters or other interested parties who articulate their free-trade positions, governments find it difficult to maintain a free-trade policy.<sup>9</sup>

Evidence of the effects of this problem of mobilizing and maintaining a free-trade coalition is found in all democracies and partially results from the concentrated benefits of trade barriers and their diffuse costs.<sup>10</sup> Rarely are those who are hurt by higher prices (consumers) present in political debate; more often, trade politics is determined by the balance between groups with specific interests in either openness or closure. In some countries, structural factors affect this balance. For example, groups may be overrepresented because of the electoral process, such as with agricultural producers in Japan, or because they have bureaucratic or corporatist support in government.

Since World War II, protectionist pressures from such groups have been mitigated through changes in the trade policymaking process, both domestic and international.<sup>11</sup> Reciprocal trade agreements, delegation to executive agencies, electoral re-

9. Numerous empirical studies document the importance of groups in setting trade policy. For a cross-national, cross-sectional examination of groups' involvement, see, for example, Verdier 1994.

10. On trade and interest groups, see Destler 1995; and Lohmann and O'Halloran 1994.

11. Whether it was a change in the balance of group interests or a shift in trade policymaking that explains the ability of governments to lower barriers to trade is difficult to determine in the early years of the GATT regime. Certainly, in the United States interest-group activity was muted because the costs of

form, and changing legislative voting rules help explain why countries support liberal trade policies that were difficult to defend in the pre–World War II period. The fact of liberalization and the specifics of the process are in equilibrium. The process may change either because underlying interests change or for exogenous reasons. Regardless of the particular reason for change, changes in the process have far-reaching consequences for policy. Process changes have made it more difficult for import-competing groups to find a majority to support their position while encouraging the organization of exporter interests.

The success of groups who support liberalization, however, should not be construed as evidence that policymakers no longer need to worry about veto groups undercutting trade policy. Liberalization may have changed the face of the proprotection lobby, but it has not eliminated its potential power. Even in the United States, long a proponent of the liberal trade regime, elected officials repeatedly face pressures from antitrade groups. Politicians such as Ross Perot and Pat Buchanan have mobilized voters against further trade liberalization, and authorization to join the WTO was garnered only after a significant battle in which continued participation was made contingent upon a reauthorization by Congress every five years. The potential influence of an antitrade coalition was no better evidenced than during the November 1999 ministerial meeting of the WTO in Seattle as protestors took to the streets. Even though the United States retains open markets, protrade politicians who do not strategize about the creation and maintenance of their coalitions can easily find themselves overwhelmed by protectionist demands.<sup>12</sup>

These social pressures have led strategic trade negotiators to bundle the gains to exporters from access to new markets with the losses to import-competing producers from new competition from abroad. Whatever the specifics of this trade-off at the negotiating table, the result must be an agreement that can garner majority support at home. If information about the distributional implication of agreements affects the propensity of groups to organize during negotiations, it may be easier to get to that “optimal bundle” in situations where some uncertainty exists about who is and who is not affected by the trade deal. Providing this information about the effects of either a potential commercial agreement, the behavior of a trading partner, or the dissolution of a trading pact is a central function of the contemporary trade regime. The WTO collects and disseminates trade data in preparation for rounds of trade talks; it monitors compliance and inventories national practices that undermine the free flow of goods and services.

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organizing increased when the president obtained increased control of trade policymaking. Still, the shift toward openness would not have occurred without underlying social support. For an analysis of the relationship between institutional and underlying social variables, see Bailey, Goldstein, and Weingast 1997.

12. One simple metric capturing the continued involvement of proprotection groups in the United States is the number of bills entered in Congress pertaining to imports. In the 93rd–97th Congress, 1973–81, over 2,200 bills were entered; in the 98th–101st Congress, 1982–90, almost 2,300 bills were entered; and in the 102nd–105th Congress, 1991–98, over 1,600 bills were considered. Although few of these bills become law, the data suggest that liberal policy exists in the shadow of growing resistance. Numbers were obtained from Thomas Legislative Information on the Internet located at <<http://thomas.loc.gov/home/thomas.html>>.



Over time, the GATT/WTO regime has dramatically increased its ability to deliver this information to member countries.<sup>13</sup> In initial rounds of negotiations, tariff information was not systematically collected. Nations relied on data supplied by their negotiating partners, and thus the computation of offers and counteroffers for “balance” was done using often-incomplete statistics. Recognizing the need for better data, the secretariat undertook a systematic compilation of tariff and nontariff barriers following the Kennedy Round. By the time negotiators came together for the Tokyo Round, countries could utilize reports, available on computer tape, to measure the degree of reciprocity in trade deals. The information environment became even richer for the Uruguay Round. After 1985, the GATT infrastructure began to provide refined data on tariff and nontariff barriers in member countries. In 1989, the Trade Policy Review Mechanism was authorized at the Montreal midterm review of progress in the Uruguay Round. This began a process of regular country studies, providing sector and product information on practices of GATT members. The four largest trading powers—Canada, the European Union (EU), Japan, and the United States—are reviewed every two years; the sixteen member countries that are next in the value of their trade are reviewed every four years; most other members are reviewed every six years.<sup>14</sup> The result has been a more symmetric information environment.<sup>15</sup>

This increased monitoring activity in itself is not a result of “legalization” according to the definition adopted in this issue. Still, it has been tightly bound up with increased formalization and precision of commitments both at the time of and during the life of an agreement. The result is a far richer information environment than at any previous time. One aspect of WTO operations, for example, that is more public than in the past is the ministerial meeting. The November 1999 meeting was well publicized, including procedures for obtaining observer status. In response, more groups than ever before petitioned for admission to the meeting. Few of these groups were protrade, leading the secretariat to fear that the meeting would be met with pickets and protests, as it was.<sup>16</sup>

Along with changes in WTO policy, a key demand of antitrade groups has been less secrecy in WTO proceedings. Although some Western governments, including the United States, have defended the principle of transparency, most representatives in the WTO strenuously resist this demand.<sup>17</sup> Still, transparency has increased over time. Early rounds were akin to clubs. Deals were struck among a small group of like-minded representatives, behind closed doors. Later rounds eschewed this general negotiating form. Although private negotiations occurred, and were often the most productive, more time was spent in formal settings, with delegates giving pre-

13. Keesing 1998.

14. *Ibid.*

15. The GATT’s move to the Trade Policy Review Mechanism was motivated by the perception that information was key in negotiations but that it was available only to the larger countries. *Ibid.*

16. More applications were received from groups asking for admission to the talks than at any previous time in the GATT/WTO’s history (private correspondence). See also the *New York Times*, 13 October 1999, A12.

17. *New York Times*, 4 December 1999, A6.

pared speeches that offered few, if any, real trade concessions. Thus the demand for more transparency has been met by more open meetings and more press coverage, but the effect of these particular changes has been muted; delegates continue to worry about domestic constituencies and remain wary of saying anything that would get them into trouble at home.

Increased provision of information to delegates is not, we acknowledge, evidence of complete transparency in the trade regime. Although legalization has resulted in a movement toward transparency, we cannot claim to have reached a situation of complete and perfect information. The WTO retains many of the elements of the GATT, including its preservation of member countries' rights to secrecy. The empirical evidence does not adequately allow us to make precise estimates of the level of transparency. We can, however, identify a trend toward greater openness. When the GATT was established in the late 1940s, the confidentiality rule adopted by member countries was the strictest of any adopted by postwar international institutions.<sup>18</sup> The correspondence of any delegate could be claimed as privileged. If a delegate did not formally rescind a confidentiality request within three years, the information became confidential in perpetuity. Why this rule? Simply, delegates did not want information to leak back home. Offers made during negotiations could be highly sensitive, and although the final package would be made public, it came home as a "closed" deal—groups could not easily pick it apart.

The early delegates to the GATT understood that too much information would incur import-competing group pressures and undermine their ability to make trade-offs among groups. Policymakers need to be able to bundle agreements in order to procure majorities in their home countries. For politicians, the logic of membership in a multilateral trade institution is to facilitate the creation of larger bundles than are possible through bilateral bargaining.

Efforts to devise free-trade coalitions in an environment of market liberalization help explain the changing structure of trade rounds. Since the creation of the GATT, negotiators have utilized four different methods of conducting the rounds, each an attempt to finesse potential antitrade interests in member states. In the initial rounds—Geneva 1947, Annecy 1949, Torquay 1951, Geneva 1956, Dillon 1961—talks were conducted on an item-by-item basis. The form of these talks reflected the negotiating discretion of the U.S. representative. Due to the structure of U.S. trade politics, negotiators were relatively unconstrained, since they had in hand, *ex ante*, authorization to reduce tariffs, on average, by a specified amount. They could make cross-sectoral deals without fear of import-competers vetoing a final agreement. The United States abandoned its support for such a form of talks in the 1960s, partially because of efficiency concerns and what Americans perceived as an asymmetric information environment that did not favor the United States.<sup>19</sup> By the mid-1960s, industries were

18. Richard Blackhurst interviews.

19. Under 1951 and 1958 laws, U.S. negotiators were forced to consider data on which industries would be hurt by a trade agreement. Under peril point legislation, the U.S. Tariff Commission provided public information on the effect of tariff reductions on particular industries. This list told U.S. trading partners exactly who could and could not be included in a trade deal. This generated more information to

also demanding side payments, in both the United States and Europe, when they felt victimized in the name of other sectors' gains.<sup>20</sup>

Instead of negotiating item by item, participants in the Kennedy Round adopted a linear formula approach. Although advocates of this approach foresaw it as negating the power of specific groups, the formula was never a significant constraint, and the real politics of the round surrounded the balancing of members' exceptions lists. Nations came to Geneva with long lists of producers to be exempted from the linear cuts. Some nations, such as the Nordic countries, had no industries on their exception list. The United Kingdom had about 10 percent of dutiable industrial imports on its list, the United States had 18–19 percent, Japan had 20–25 percent, and the European Community had 40 percent.<sup>21</sup> The United States' exceptions list was compounded by its having made significant concession to textiles and having granted Article XIX relief to carpets and glass.<sup>22</sup> Even so, the agreements did not fare well when sent to Congress for approval.<sup>23</sup> Although initial authorization had elicited minimal resistance, hearings before the U.S. House Ways and Means Committee in 1968, at the close of the round, were more reminiscent of pre-1934 than post-1934 trade politics. Export groups were conspicuously absent, but import-sensitive groups appeared in large numbers and stopped passage of agreements to end the American Selling Price and reform the antidumping law concluded during the round.<sup>24</sup>

With a new interest in nontariff barriers and the role of the developing economies as well as a fear of import pressures, the 1973 Tokyo Round abandoned linear formulas and adopted a formula that harmonized rates. Linear formulas reduced tariffs by the same amount for all industries. Countries with peaked tariff schedules could participate in worldwide tariff reductions and not have to change the relatively high protection granted to certain products. Harmonized formulas force greater cuts on the top, producing more liberalization as well as more resistance, explaining why the formula was adopted amid much controversy. Since the United States was one of the biggest offenders of the skewed tariff schedule, U.S. negotiators had considerable difficulty finding support at home for the cuts. The final U.S. average cut of 31 percent must be considered alongside the far smaller cuts for powerful industries: 4 percent for leather; 15 percent for apparel; 16 percent for autos; and no cuts for a variety of producers, including footwear and TVs. The United States was not alone in offering a "Swiss cheese" set of offers, and agricultural groups kept cuts in their tariffs off the table all together.<sup>25</sup>

Although in the Uruguay Round attention was focused on nontariff barriers and GATT rules, the pattern of interest-group activity helps to explain why the round

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groups than is even the case under the WTO. One effect, consistent with this analysis, is that access to this information explains the relatively modest tariff changes made in the 1950s. Goldstein 1993.

20. Shonfield 1976, 175.

21. *Ibid.*, 183.

22. Goldstein 1993, 166.

23. Evans 1971, 281.

24. American Selling Price was a valuation system used for chemical imports. *Ibid.*, 300–303.

25. Winham 1986, 17–18. A reviewer suggested the Swiss cheese metaphor, particularly applicable here since the adopted formula was Swiss.

returned to the original item-by-item approach, with deals made within, and less often across, sectors. At its core, the approach was an attempt by participants to garner support by balancing access to the home market with expanded export opportunities within sectors. All of the major nations faced stiff resistance from powerful social actors in the 1980s. The United States had used a variety of instruments, including antidumping, Section 301, and countervailing duty legislation, in response to aid requests from key sectors, such as steel, automobiles, and textiles. Even more important in both the United States and the EU was the agricultural lobby. At one point during the round the power of French farmers nearly led France to veto the Euro-American Blair House Agreement as well as the conclusion of the round itself.<sup>26</sup> Similarly, the textile lobby in both the United States and the EU worked to undermine the attempt to dismantle the Multi-Fiber Arrangement.<sup>27</sup> The power of the textile industry in the United States was no better evidenced than when a coalition of senators from the South held up the final agreement in Congress.

In all these rounds, politics was never removed from the liberalization process, although the regime's structure did affect which domestic groups were able to translate their preferences into policy. Thus, adopted formulas were never intended to be binding on parties, and national offers were rife with exceptions. Preparation for rounds involved difficult negotiations with potentially powerful veto groups, often leading to an assortment of side payments issued in the early phase of negotiations.<sup>28</sup> Drawing on U.S. congressional indexes, we illustrate in Table 1 one way that this phenomenon manifested. The table summarizes the rise in the number of bills that provided side payments, usually in place of a more direct policy to curb imports. During the 1975–94 period, the number of side-payment bills that made their way to the House floor is high, though fairly stable. The data for 1995–98 suggest that under the WTO even more side-payment bills were used, as our analysis predicts.

Our attention to antitrade groups derives from two related observations. First, although liberalization has been extremely successful in the postwar period, it has always occurred in the shadow of organized opposition. Second, groups respond to information about impending trade talks, which motivates them to pursue particularistic policies. The existence of continued openness should not be interpreted as an absence of proprotection group pressures. Although proprotection groups may have been more constrained, had less “voice,” and been balanced by well-organized exporter groups, once organized, they have powerful effects on policy.

Has there been a rise in interest-group activity since the creation of the WTO, as suggested by our analysis? Given the WTO's brief existence, assessing the data is difficult. However, as evidenced by the significant rise in the number of groups attending the WTO's November 1999 ministerial meeting, the WTO itself has engendered

26. The three major players were all plagued by antitrade pressures during the round. In the EU, differences among member countries developed over the Common Agricultural Policy. In Japan, the issue of rice protection undercut the ruling Liberal party, and in the United States, pressure from groups polarized on fast-track legislation extension. Secchi 1997, 81.

27. *Ibid.*, 79.

28. Goldstein 1993.

**TABLE 1.** *Trade bills in the U.S. House of Representatives, 1975–98*

	<i>Number of bills</i>	<i>Percentage providing side payments rather than direct protection</i>
1975–78	79	14
1979–82	43	28
1983–86	61	26
1987–90	61	21
1991–94	47	13
1995–98	48	38

*Source: Congressional Index, various years.*

more attention from a wider range of domestic groups than ever before. For a whole host of reasons, some associated with legalization, the WTO has become a focus of attention not only for labor and producer groups, the traditionally interested parties, but also for environmental, health, and safety groups. Such attention is a result of the expansion of knowledge about what the WTO is doing as well as structural changes in the scope of the regime.

The regime's effect on the mobilization of groups may also explain problems faced in initiating a new round of trade talks. The stated focus for a new WTO Millennium Round of talks is far more targeted than ever before; knowledge of who has been targeted has led to more and earlier activity than in previous rounds. The best exemplar is the agricultural sector, where good information about the locus of talks led to a cross-national campaign of producers to undercut negotiations.<sup>29</sup> These types of increasing pressures, generated by more information about the liberalization process, will make it more difficult to find nations willing to launch trade rounds and, for those who do make it to Geneva, more difficult to make the necessary trade-offs among producers, even if export groups stay mobilized. After the November 1999 ministerial meeting the fate of the Millennium Round remains an open question, with most observers offering pessimistic assessments.

### *Mobilizing Export Groups*

Although the mobilization of groups circumscribes the type of new deals that are possible, it also explains the stability of signed agreements. Leaders rarely renege on a GATT trade deal, even when faced with pressure from powerful rent-seeking industries. This stability was not due to GATT sanctions against such changes. Rather, changing specific tariffs, according to the rules, was relatively easy under a number of safeguard provisions of the GATT regime. Under GATT rules, nations could change

29. Josling 1999.

**TABLE 2.** *Post-negotiation tariff changes by invoked article for all GATT members, 1961–90*

	<i>Open season<sup>a</sup></i>	<i>Out of season<sup>b</sup></i>	<i>Article 28:5<sup>c</sup></i>
1961–66 <sup>d</sup>	9	14	3
1967–72	8	7	15
1973–78	5	3	31 <sup>e</sup>
1979–84	1	1	66 <sup>f</sup>
1985–90	1	1	19
1991–93/94	4	1	5

*Source:* GATT Analytical Index 1994.

<sup>a</sup>*Open season* refers to the usage and invocation of GATT Art. XXVIII:1.

<sup>b</sup>*Out of season* refers to the usage and invocation of GATT Art. XXVIII:4.

<sup>c</sup>Before the end of a period of “firm validity,” a country may reserve to modify their schedule. The numbers in this column refer not to the election of this right, but to its usage (the actual modification).

<sup>d</sup>The time periods correspond to two periods of “firm validity,” except the last time period (1991–93/94) for which we have only three years of data. Art. XIX data are as of 1 December 1993. Art. XXVIII data are as of 30 March 1994.

<sup>e</sup>Of these cases, 22 are either New Zealand’s or South Africa’s.

<sup>f</sup>Of these cases, 32 are South Africa’s.

tariffs every three years during the “open season,” in between these times “out of season,” and/or under Article 28:5, as long as the general tariff level remained the same. Keeping the overall level of tariffs stable, however, was not easy for politicians at home. The problem with giving compensation was the trade-off it created between the group pressing for aid and some other producer. This type of a trade-off is difficult for politicians.

Table 2 shows the use of these provisions for changing particular tariffs post-negotiation. What is striking is that, although the regime legally provided a substantial amount of flexibility, these provisions have only rarely been invoked. Given the thousands of products affected by cuts, only a few countries rescinded an agreement to bind their tariffs. For GATT members, these provisions were akin to a Pandora’s Box. Having to change a schedule, item by item, in the absence of reciprocal benefits meant trading off one domestic sector for another. The political problems this engendered assured that few GATT countries chose to deal with import problems through these means.

Another perspective on mobilization is evident in attempts to mobilize export groups in support of free trade by strategically using threats of retaliation. States making a threat of retaliation that is intended to mobilize exporters in other countries, such as the United States in implementing Section 301, must consider how to maximize the pressure applied by exporters to the other government. Announcing threats of definite retaliation against just a few groups would not have the desired effect. These groups would certainly mobilize, but those left off the short list would not. At the other extreme, announcing a very large or vague list of possible targets of retaliation

tion would also fail to mobilize many exporters. This tactic would create massive collective-action problems, since each exporter would be only part of a potentially universal coalition and therefore face incentives to free ride. In addition, lack of precision in the possible targets of retaliation might encourage exporters to wait and take their chances on being hit, rather than bearing the definite, immediate costs of mobilization.

With these considerations in mind, if our story about mobilization is correct, the strategic use of retaliatory threats should be quite precise. In addition, it should target a group of exporters large enough to put pressure on the government, but not so large as to exacerbate collective-action problems. Section 301 cases provide a good source of evidence on the use of retaliatory threats, since they list the potential targets of retaliation when the other government does not reach a settlement with the United States.

The case of the United States pressuring Honduras to improve its protection of intellectual property provides a clear example of the principles of targeting in action. The U.S. Trade Representative (USTR), after deciding that Honduras was not adequately protecting intellectual property rights, announced on 7 November 1997 that it would impose sanctions on certain exports from Honduras if improvement in its policy were not forthcoming.<sup>30</sup> The annex to this announcement listed approximately thirty groups of products that would be denied preferential tariff treatment if Honduras did not comply. The annex also specified, in case there was any question, the current duty facing these products. Comments on the list were invited from the U.S. business community and due within one month of the announcement. Public hearings were also held on the proposed list.

One noticeable aspect of the target list is its degree of precision in specifying the targets of sanctions. Rather than just citing agricultural products, for example, the list identified specific agricultural exports: “mushroom spawn,” “cucumbers, including gherkins, fresh or chilled,” and “pineapple juice, not concentrated, or having a degree of concentration of not more than 3.5 degrees.” Tobacco exporters of all sorts were singled out, as were exporters of luggage (“trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases”) and wood products. Another target was exporters of “statues, statuettes, and handmade flowers, valued over \$2.50 each and produced by professional sculptors or directly from molds made from original models produced by professional sculptors.”

By developing this degree of precision in the specification of targets, the USTR left exporters with little doubt about whether they should put pressure on the Honduran government to seek a settlement with the United States. At the same time, the list was extensive without being so comprehensive that exporters could rely on others to carry the lobbying burden for them. It would have been much simpler, for example, to announce a 25 percent across-the-board increase in duties on exports from Honduras, but this procedure would have been so encompassing that it would have exacerbated collective-action problems among exporters. One other interesting aspect of

30. See *Federal Register* 62 (7 November 1997), Docket No. 301–116 (62 FR 60299).

the list of threatened sanctions is that it identified a set of exports from which the USTR would, if sanctions were actually imposed, select a subset. Thus the list of threatened sanctions was longer than the list of actual sanctions would be, again increasing the size of the mobilized exporters' pressure group.

We find similar retaliation strategies in other trade disputes. Lists of products in trade disputes with the EU and China were, as would be expected for larger trading partners, longer than those in the case of Honduras. In 1995 the USTR launched a complaint against the EU for not offering compensation when Austria, Finland, and Sweden entered the EU and adopted the EU's common external tariff.<sup>31</sup> In this instance, the first product on the list of threatened sanctions was "cheese and curd," going on to list various types of cheese in excruciating detail, and clearly aiming to mobilize French farmers to pressure the EU. Perfumes and cosmetics also appeared high on the list, again suggesting a strategy of mobilizing influential French exporters. The United States has been involved in a number of disputes with China over intellectual property.<sup>32</sup> In these cases, textiles made up the bulk of the list, although beer and chemical exporters were also targeted. In the Chinese cases, the USTR threatened to move beyond imposing a duty to imposing quantitative restrictions on imports, limiting them to 15 percent of the previous year's level.

The threat of retaliation, if issued with an appropriate degree of precision, activates export groups. This suggests that the GATT/WTO should allow or even encourage retaliation in the face of deviation from regime rules. The GATT structure, incorporating reciprocal retaliation and/or alternative market access in response to renegeing on a concession, even under safeguard clauses, may have been better than the alternative adopted by the WTO. WTO rules waive the right to both compensation and/or retaliation for the first three years of a safeguard action. Those who supported the change argued that this would encourage nations to follow the rules—when nations could defend their reasons for invoking safeguard actions as "just," they should be protected from retaliation.<sup>33</sup> The logic offered here suggests the opposite. Circumstantial evidence in the United States supports the argument that domestic groups organize in response to government threats that affect their market position. For example, in what was supposed to be a simple incidence of using market restrictions in a Section 301 case, the United States found it politically impossible to raise tariffs on a Japanese car, the Lexus, in large part because of resistance from Lexus dealers in the United States. Lexus dealers are not the type of group that generates great sympathy from the American people. However, during a trade dispute with Japan that came to a head in 1995, they found their interests directly at stake. In an attempt to force more opening of the Japanese market, the United States announced a list of 100 percent retaliatory tariffs on Japanese luxury goods that would go into effect on 28 June.<sup>34</sup> Since this list included cars with a retail value over \$30,000, Lexus dealers (along

31. *Federal Register* 60 (27 October 1995), Docket No. 301-101 (60 FR 55076).

32. *Federal Register* 56 (2 December 1991), Docket No. 301-86 (56 FR 61278); see also 57 FR 38912 and 61 FR 25000.

33. Krueger 1998.

34. *New York Times*, 9 June 1995, D3.



with Infiniti and Acura dealers) found themselves directly threatened. In response they generated a large lobbying and public relations effort. In the end a midnight deal with Japan averted sanctions.

To summarize, we argue that one of the primary political effects of legalizing the trade regime will be an interaction between increased precision about the distributional implications of trade agreements and the mobilization of domestic groups, both protectionist and free trade in orientation. In this section we have surveyed evidence on trade negotiations and the use of retaliatory tariffs during trade disputes to see if mobilization does indeed respond as we expect. From a number of perspectives, we find evidence to support our claims. During negotiations, lobbying activities are conditioned on the information available to particularistic interests. Strategic politicians, who are attempting to design the negotiating process so as to increase their ability to create mutually beneficial bundles of agreements, may find it helpful to have less than complete transparency about the details of negotiations. Antitrade group pressures make negotiations more difficult, and to the extent that transparency encourages mobilization of antitrade groups it will hinder liberalization negotiations.<sup>35</sup> During trade disputes, politicians similarly strategize about how to reveal information so as to mobilize groups appropriately—in this instance to maximize the mobilization of exporters in the target country.

Our findings should not be interpreted as a prediction of trade closure. Rather, we make the more modest claim that attention should be paid to an underexplored effect of international legalization, that is, the mobilization of domestic groups. The analysis of the interaction of legalization, information, and domestic groups is a requisite to understanding the conditions under which legalization of the trade regime will be successful.

## Tightly Binding Trade Rules

In the preceding section we argued that legalization enriches the information environment. In this section we examine a second effect of legalization linked to an increase in the obligatory nature of international rules. Legalization at its core refers to *pacta sunt servanda*, or the presumption that, once signed, nations will adhere to treaty obligations. Interpretations of this responsibility are typically rendered by lawyers using a discourse focusing on rules—their exceptions and applicability—and not on interests. Given the expanding breadth of the trade regime, we suggest that the use of legal rule interpretation has made it increasingly difficult for governments to get around obligations by invoking escape clauses and safeguards or by turning to alternative measures, such as nontariff barriers. Partly, this is a result of the increased precision of rules and the inclusion of what were extralegal trade remedies, such as voluntary export restraints, in the regime itself. But the legalization of the trade regime has also moved the nexus of both rule making and adjudicating rule violations into the center of the regime and away from member states.

35. See, for example, the history of agricultural trade in Josling 1999.

*The Logic of "Bindingness"*

The benefits of increased precision and "bindingness" are identified in the functionalist literature on international institutions.<sup>36</sup> The benefit of international institutions lies primarily in the creation of disincentives for states to behave opportunistically by renegeing on trade agreements and acting unilaterally. The problem of incentives to renege on cooperative arrangements, and the role of international institutions in helping states to overcome these incentives and so reach Pareto-superior outcomes, has been central to the institutional approach to international relations.<sup>37</sup> The key institutional argument is that attaining cooperative outcomes is hindered by the lack of information about the intentions and behavior of others and ambiguity about international obligations that states can manipulate to their advantage. States are often caught in a "prisoners' dilemma" and find it difficult to sustain the necessary enforcement strategies to assure cooperation in the uncertain environment of international politics. The primary function of international institutions, therefore, is to provide politically relevant information and so allow states to escape from the prisoners' dilemma trap.

This argument about international institutions took shape during an era when researchers were anxious to extend their analysis beyond formal international organizations to informal institutions and regimes.<sup>38</sup> By focusing on legalization, the current project returns to the study of formal institutions, but the underlying logic remains the same. Making international commitments precise and explicit makes it more difficult for states to evade them without paying a cost. More precise rules allow for more effective enforcement, and legalization involves a process of increasing precision. Greater precision and transparency about the obligations and behavior of states are also created by other dimensions of legalization. Delegation of monitoring and dispute-resolution functions to centralized organizational agents, away from member states, is intended to increase the quantity and quality of information about state behavior. It therefore leads to more effective enforcement and disincentives to renege on commitments.

As we have argued, legalization has unintended effects on the mobilization of support for and against trade liberalization. Similarly, legal binding has unexpected effects on domestic politics. If agreements are impossible to breach, either because of their level of obligation or because the transparency of rules increases the likelihood of enforcement, elected officials may find that the costs of signing such agreements outweigh the benefits. The downside of increased legalization in this instance lies in the inevitable uncertainties of economic interactions between states and in the need

36. We use the term *bindingness* where the term *obligation* would seem appropriate to a political scientist. The reason is that obligation has taken on a particular legal meaning, and that meaning has been adopted in this issue. By *bindingness* we mean the political obligation created by international rules. It is a positive rather than a normative term, meaning the degree to which rules are binding, practically speaking, on governments. Rules with higher probability of enforcement, for example, are more binding (or obligatory) in this political sense.

37. Keohane 1984.

38. Krasner 1983.

for flexibility to deal with such uncertainty without undermining the trade regime as a whole. Legalization as increased bindingness could therefore constrain leaders and undermine free-trade majorities at home.

George Downs and David Rocke consider a similar question and conclude that the dynamics of domestic politics create some optimal level of “imperfection” in the application of international rules.<sup>39</sup> They concentrate on the uncertainty that domestic groups, particularly producers, face when they are exposed to the vagaries of the international market. They assume, reasonably, that governments are not able to perfectly anticipate negative economic shocks and the organizational capacities of groups that may be made vulnerable by trade liberalization.

The existence of uncertainty about the costs of trade agreements on the domestic level suggests that fully legalized procedures that apply high, deterministic penalties for noncompliance could backfire, leading to an unraveling of the process of liberalization.<sup>40</sup> Under some conditions it will be inefficient for actors to live up to the letter of the law in their commitments to one another, such as when alternative arrangements exist that increase mutual gains.<sup>41</sup> These alternative arrangements generally involve temporary deviations from the rules with compensation offered to the other party. The problem is to write agreements that recognize the possibility of breach but limit it to the appropriate context, such as when economic shocks occur and all will be better off by temporarily allowing deviation from rules.

At the same time, of course, writing agreements that provide the necessary flexibility creates a moral-hazard problem. If the circumstances that demand temporary deviation are not perfectly observable to other actors, parties will be tempted to cheat. Cheating in this instance would consist of a demand to stretch the rules for a while, which all would benefit from, because of an unanticipated shock, when in fact the actor is simply attempting to get out of inconvenient commitments. Such opportunistic behavior is a constant concern in strategic settings with asymmetric information. In the context of the GATT/WTO, the primary reasons that flexibility is necessary lie in the uncertainties of domestic politics. Flexibility or “imperfection” can lead to stability and success of trade agreements, but incentives also exist for states to evade commitments even when economic conditions do not justify evasion.

The enforcement structures of the GATT/WTO thus face a difficult dilemma: to allow states to deviate from commitments when doing so would be efficient but to deter abuse of this flexibility. If enforcement is too harsh, states will comply with trade rules even in the face of high economic and political costs, and general support for liberalization is likely to decline. On the other hand, if enforcement is too lax, states will cheat, leading to a different dynamic that could similarly undermine the system. Downs and Rocke, drawing on game-theoretic models, suggest that imper-

39. Downs and Rocke 1995, chap. 4.

40. Contract law recognizes the same dynamic of uncertainty requiring flexibility in contracts, under the heading of efficient breach. See Roessler, Schwartz, and Sykes 1997, 7.

41. The idea is similar to that behind the Coase theorem: efficient agreements are reached through the mechanism of one party compensating another.

fection in the enforcement mechanism is the appropriate response. Punishment for infractions of GATT commitments should be probabilistic rather than deterministic.

Changes in WTO procedures have made penalties for rule violation more certain and less probabilistic. At this point, it is difficult to say whether negotiators went too far in limiting the availability of safeguards.<sup>42</sup> However, we can point out one unanticipated effect of the tightening of safeguards that both ties this analysis to our earlier discussion of trade negotiations and generates predictions about future attempts to further liberalize trade. There is a direct connection between states' access to safeguard provisions and their stance during trade negotiations. Domestic interests can anticipate the effects of eliminating safeguards and so will bring more pressure to bear on governments during negotiations.<sup>43</sup> Those who fear the possibility of adverse economic shocks without the protection of an escape clause will be highly resistant to inclusion in liberalization. In response they will demand exclusion or, at a minimum, side payments if their sector is included in liberalizing efforts. Thus extensive tightening of safeguard provisions will lead to tougher, more disaggregated negotiations as some groups lobby strenuously for exclusion. The rise in the use of voluntary export restraints and antidumping and countervailing duty cases is almost certainly a result of this difficulty in using safeguards. It is also likely that more bindingness has led to increases in the side payments governments are forced to make to groups in order to buy their support for trade agreements. Not surprisingly, perhaps, the North American Free Trade Agreement, a highly legalized trade agreement, could only gain approval in the United States after extensive use of side payments by the government.<sup>44</sup>

It is also important to ask whether GATT or WTO provisions effectively deter opportunistic evasion. Mechanisms that deter evasion include domestic costs of violations, enforcement provisions, and reputational concerns. These mechanisms are identical to those identified in standard theories of international institutions, suggesting that extensive international cooperation does not always require legalization. Legal theorists studying the GATT have been surprised to find that the level of compliance was high in spite of its reliance on weakly legalized procedures. Friederich Roessler, Warren F. Schwartz, and Alan Sykes see the overall reduction in tariffs under the GATT as evidence that its procedures did in general deter opportunistic evasion.<sup>45</sup> Sykes also finds that reputational mechanisms in the GATT substantially constrained the United States from acting opportunistically, as does Robert Hudec.<sup>46</sup>

Few analysts dispute that the old trade regime was tremendously effective in reducing impediments to trade. Nevertheless, analysts and legal scholars involved in the GATT expressed dissatisfaction about many of its procedures and capacities. One

42. As we argue later, the safeguard reforms are counterintuitive for two reasons. First, they may be too difficult to invoke, undercutting their purpose. Second, since retaliation is limited, the stability evoked by activating export groups may have been undermined.

43. See also Sykes 1991, 259.

44. Hufbauer and Schott 1993.

45. Roessler, Schwartz, and Sykes 1997, 13.

46. See Sykes 1992; and Hudec 1999.

concern was that the dispute-resolution procedures seemed to have a fatal flaw, in that member states could undermine the creation of dispute-resolution panels as well as any decision that went against them. Another concern was that powerful states, particularly the United States, evaded GATT regulations when convenient. As the United States increasingly turned to unilateral remedies for perceived trade infractions, such as Section 301, other members grew increasingly concerned that the GATT was powerless in preventing unilateralism and not strong enough to provide effective enforcement.

The remedy to these problems, both in theory and in practice, was greater legalization of the GATT. As the GATT evolved into the more formal WTO, the dispute-resolution procedures were made more legal in nature and the organization gained enhanced oversight and monitoring authority. Multilateral rules of trade extended into new and difficult areas, such as intellectual property, and substituted for unilateral practices. The procedures for retaliation and compensation were made more precise and limiting. The process of negotiating the content of rules—including provisions for addressing rule breaches—led to greater precision.<sup>47</sup> In the next sections we evaluate these changes, asking whether or not the changes portend greater trade liberalization. Our inquiry centers on two questions. First, we ask whether the legal framework allows states to abrogate a contract when doing so would be mutually beneficial. Second, we examine the functioning of the dispute-resolution mechanism.

In sum, theoretical consideration of the problem of complying with commitments in an uncertain economic and political environment provides another angle on the function and process of legalization in the WTO. Moving toward more certain, legalized procedures constitutes a balancing act. Appropriate procedures should deter opportunism while allowing states to deviate from commitments under some circumstances. Focusing only on the problem of opportunism, which would lead us to argue consistently in favor of more legalized procedures, misses the dilemma that the institution actually faces. Given uncertainty on the domestic level, moving too far in the direction of legalizing trade could undermine the momentum toward liberalizing trade that the weakly legalized procedures of the GATT so effectively established.

### *Exceptions and Escape Clauses*

Trade legalization has constrained states by curtailing their ability to utilize safeguards and exceptions. The issue of exceptions, their status and use, has loomed large in many of the rounds of GATT negotiations. Pressure from import-competing groups is strong everywhere, although domestic institutional arrangements vary in how well they can “buy off” or ignore this resistance. The United States, for example, has been notorious for both retaining protection on the upper part of its schedule and for making particular industry side payments before even arriving in Geneva. The United States is also responsible for the inclusion of an escape clause into the GATT’s

47. On the extent of changes in the WTO, see Krueger 1998.

original design, reflecting a desire by Congress to maintain its prerogative to renege on a trade deal if necessary.<sup>48</sup>

Legalization of the regime has resulted in a tightening in the use of safeguard provisions, including the escape clause. Under Article XIX, a country is allowed to increase protection for a home industry if a past tariff concession does damage to it.<sup>49</sup> If a country backs out of an agreement or imposes some additional trade restriction, it must be applied in a nondiscriminatory way; that is, countries whose exports are not hurting your industry cannot retain a preferential position.<sup>50</sup> When the provision is used, other countries are allowed to retaliate by reducing an equivalent amount of concession; otherwise the country imposing Article XIX must reduce tariffs on other products, equivalent to the amount of the original concession.

Two important domestic groups are potentially affected by these limitations on the use of safeguards. If nations retaliate, exporters suffer; if the government compensates, some import-competing industry will feel increased competition. Unless offered some side payment, industries have a strong incentive to have their political representative veto their inclusion into the compensatory package. Thus both the threat of retaliation and the difficulty of reassigning tariff reductions should constrain countries from raising trade barriers as allowed under Article XIX. The logic here is consistent with that offered in the preceding section.

The data on Article XIX provide support for the argument that using this provision is difficult in practice. Table 3 shows the aggregate use of the escape clause for all GATT members. Since the 1960s, Article XIX has been invoked at a relatively consistent rate. Given increasing levels of trade, stable numbers of Article XIX invocations imply *declining* use of this mechanism. As with the safeguard measures listed in Table 2, the small number of cases, compared with the significant number of industries affected by changing tariffs, should be attributed to the difficult time countries have both with the potential for retaliation and with compensating nations through alternative tariff reductions. This difficulty explains the trend toward alternative methods of protection, such as “administered protection” in the form of subsidies and antidumping and countervailing duty provisions.<sup>51</sup> Nontariff barriers, though not often used in the 1950s, were, by the 1970s, used by most countries to circumvent problems with GATT rules. Licenses, quotas, and voluntary export restraints were all means to finesse the potential problems *at home* with the GATT compensatory system.

48. Goldstein 1993.

49. “Tariff concessions and unforeseen developments must have caused an absolute or relative increase in imports which in turn causes or threatens serious injury to domestic producers . . . of like or directly competitive goods.” Although the invoking party is not saddled with the burden of proving that it has met these requirements, the requirements nonetheless have deterred countries from invoking the escape clause.

50. This often leads to a situation where the producers causing the problems in the first place could remain in a competitive position with the higher-cost home producer. The producers who get penalized are the middle-price traders who were not the problem. Shonfield 1976, 224.

51. Baldwin 1998.

**TABLE 3.** *Use of escape clause by all GATT members, 1950–94*

	<i>Average number of cases per year</i>	<i>Nontariff barrier remedies as percentage of total uses</i>
1950s	1.9	26
1960s	3.5	56
1970s	4.7	70
1980s	3.7	51
1990s <sup>a</sup>	1.2	75

*Source:* GATT Analytical Index 1994.

<sup>a</sup>Data for the 1990s run only from 1990 to 1 December 1993.

Overall, the figures in Tables 2 and 3 suggest that use of the legally available mechanisms of flexibility in the trade regime is heavily circumscribed by the interaction of the legal provisions for their use and political realities. The increasing extent to which governments are bound by the lack of realistic escape clauses is apparent when we examine the use of compensation. Although the use of safeguards has been relatively constant, compensation or retaliation in response to the invocation of a safeguard provision was more common in the earlier years—ten cases from 1950 to 1959, ten cases from 1960 to 1969, six cases in the 1970s, and three cases in the 1980s.<sup>52</sup>

Use of compensation and retaliation was concentrated. The United States accounted for twelve of the twenty cases between 1950 and 1970 but only one case thereafter. Australia accounted for seven of the sixteen cases between 1960 and 1980. Although American use of Article XIX did not decline until the 1980s, the kind of remedy administrators chose to use did shift over time. Compensation could occur through reducing tariff barriers elsewhere. However, this would hurt other import-competing groups, so the compensation mechanism of Article XIX is unwieldy if these groups are organized. At the same time, rescinding tariff concessions without compensation opens exporters to the threat of retaliation. For these reasons, the United States had moved toward a nontariff barrier remedy by the late 1960s. The change was rather dramatic. In the early years of the regime, between 1950 and 1969, the United States compensated for a tariff hike over 93 percent of the time.<sup>53</sup> Thereafter, both the use of compensation and the number of invocations declined precipitously.

Overall, the evidence on the use of safeguards and compensation suggests that strict legal provisions were not necessary to maintain openness. The pattern of use of safeguard provisions in the GATT suggests that the regime gained in politically relevant bindingness, even when in legal terms the obligatory nature of rules did not change. Still, the WTO reforms attempted to clarify and make more stringent the

52. GATT Analytical Index, various issues.

53. The United States invoked Article XIX fourteen times between 1950 and 1969. Of these they used nontariff barriers alone in only one case.

requirements for using safeguards. Drawing on the discussion of economic uncertainty and the need for flexibility in light of the data, we suggest that increased stringency in safeguard use may be misplaced. In fact, even the GATT provisions could be interpreted to have become too tightly binding, not allowing the necessary temporary deviations from rules that contribute to long-term stability. Escape clauses, safeguards, and the like are the legal mechanisms for dealing with a world of economic uncertainty. The provisions for their use must be heavily constrained, so as to reduce the chance that states will invoke them opportunistically. However, it appears that these constraints, interacting with domestic politics, may bind states more tightly than intended.

Our cautionary note may explain why the WTO chose to forestall retaliation for three years in cases where a safeguard provision was sanctioned. Yet the choice of this tool to deal with overbinding may be a problem. Given the logic offered in the preceding section, we suggest that nations abide by their trade agreements because the threat of retaliation mobilizes export groups to counter rent-seeking producer groups. Similarly, our analysis suggests that the mobilization of groups favored those who support openness, which, in turn, deterred states from using even legal exceptions. Given the logic of domestic politics, it is hard to know whether the benefits of this new rule in terms of flexibility will outweigh its effects on the balance between pro- and antitrade groups in WTO members.

### *Dispute Settlement*

One of the major innovations of the WTO was to strengthen the dispute-resolution mechanism. States have lost the ability to wield a veto, which they used under the GATT to protect themselves against GATT-approved retaliation. In effect, residual rights of control have been shifted from states to the WTO, convened as the Dispute Settlement Body. According to proponents of the new system, the existence of veto power encouraged opportunism, whereas not having veto power deters such behavior. If this is the case, we should see predictable effects in the pattern of disputes brought to the WTO.

We suggest that the GATT dispute-settlement structure, by being more attentive to the realities of power and an uncertain economic environment, but also by providing publicity and possible sanctions when states blatantly disregarded regime rules, may have optimized the trade-off between constraint and flexibility that liberalization requires. As a way to examine this hypothesis, we ask whether the pattern of disputes has changed under the WTO in the manner predicted by the logic of reducing opportunism. The strong theoretical argument in favor of legalization claims that legalization is necessary to prevent opportunistic behavior. If we find that the incidence of opportunism has not changed in the face of increasing legalization, the argument in favor of legalization loses much of its force.<sup>54</sup>

54. We assume a goal of reducing opportunism on theoretical grounds, without claiming that all negotiators had precisely this goal in mind. Certainly the agendas of negotiators were diverse, and reducing opportunism was only one goal among many.



If the primary effect of further legalization in dispute settlement is reducing opportunism, it should appear in the data as reduced political manipulation of the regime. Eliminating the power to veto should have observable effects on the activities of states and the outcome of disputes. Political scientists are producing a burgeoning literature on GATT/WTO dispute settlement, using sophisticated statistical techniques. However, this literature, regardless of the techniques involved, cannot escape problems of selection bias, since states chose whether to bring disputes and at what stage to resolve them. Here we suggest a few simple hypotheses about how the pattern of disputes should change with legalization if its major effect is a reduction in opportunism. If the data do not support these simple hypotheses, the case for legalization is substantially weakened.

Adopting the unitary state/opportunism model, we derive propositions about how legalization should influence patterns of disputes. Assuming the problem of opportunism suggests that the loss of veto power should have two primary effects: a *deterrent* effect and a *distributive* effect. States will behave strategically both in deciding when to bring disputes and whether to comply preemptively so that others have no cause to bring a dispute. This two-sided strategic behavior could render many predictions indeterminate. To identify refutable hypotheses, we focus on expected changes in the relative behavior of developed and developing states. Since both are subject to the same incentives in deciding whether to comply with changes in GATT/WTO rules, changes in the proportions of disputes brought are likely caused by changed calculations about the chances of success in a dispute and not by changed patterns of compliance. Although developing countries have more trade restrictions than developed countries, the marginal impact of new dispute-resolution procedures on compliance decisions should be the same for both. In addition, we concentrate on just the first few years of experience under the WTO rules. Since states can change their behavior in bringing disputes more quickly than they can change their basic trade regulations, the patterns we observe should be due primarily to calculations about whether bringing disputes is worthwhile, not fundamental changes in compliance.

A deterrent effect refers to the likelihood that the existence of veto power would deter states from bringing disputes. Bringing a formal dispute is costly and time consuming, and states could calculate that doing so is not worth the trouble if the powerful will simply veto any decision that goes against them. Thus we generate a deterrence hypothesis: *the existence of veto power deters some states from bringing disputes, and with the loss of veto power these states are no longer deterred.*

In order to collect data relevant to this general hypothesis, we need to derive some observable implications from it. We do so on the assumption that the intent of legalizing dispute-resolution procedures is to reduce opportunistic behavior by powerful states such as the United States.<sup>55</sup> One implication is that, since powerful states can no longer veto decisions that go against them, *we should expect the proportion of complaints against developed countries to rise under the WTO* (hypothesis 1). If states were deterred from bringing complaints against the powerful because of the

55. Jackson 1998.

existence of the veto, then such complaints should have a higher probability of success as a result of the loss of the veto. Therefore, we should see more disputes brought against the powerful. This should be true even if states are, for strategic reasons, complying more fully under the WTO. Better compliance should hold for both developed and developing states; there is no reason to expect the proportion of disputes against the powerful to change as a result of changes in compliance patterns.

Second, since less powerful countries may now have a greater chance of having decisions in their favor implemented, *we should see developing countries increasingly bringing complaints* (hypothesis 2). Simply put, the deterrence hypothesis suggests that under the WTO, weak states should no longer be deterred. Like hypothesis 1, hypothesis 2 should hold even if patterns of compliance have improved, since improved compliance should hold for both developed and developing states. There is no reason to expect strategic compliance behavior to lead to a change in the proportion of disputes brought by developing countries.

Finally, a process marred by opportunism should be most evident in relations between powerful and weak states. Thus a third implication of the deterrence hypothesis is that *we should see an increase in the proportion of cases brought by developing countries against developed countries* (hypothesis 3). As the WTO depoliticizes trade and so encourages the less powerful to demand their legal rights, we should see more of these “asymmetric” disputes.

The evidence on these three hypotheses about deterrent effects is mixed.<sup>56</sup> Regarding hypothesis 1, of the complaints raised under the GATT through 1989, 87 percent were brought against developed states.<sup>57</sup> Under the WTO, this percentage has dropped, contrary to the expectation from the opportunism perspective, to 64 percent. This is likely a result of the expansion of regime rules to cover more developing-country trade. The high percentage of complaints brought under the GATT against developed states is not surprising, considering the value of their market for other states. Yet it indicates that the power to veto did not allow powerful states to deter others from bringing complaints against them. This finding suggests that the GATT, in spite of the decentralized nature of its dispute-resolution process, was able to constrain the behavior of developed countries, as Hudec also concludes.<sup>58</sup> Preventing opportunism does not require high levels of legalization.

Hypothesis 2 posits that developing countries will be more likely to use the WTO procedures than they were to use the GATT mechanism. If this is true, we should see the percentage of complaints brought by developing countries rising under the WTO. This prediction holds up better than the first. Under the GATT (through 1989), only 19 percent of complaints were brought by developing countries.<sup>59</sup> This number has risen to 33 percent in the first few years that the WTO mechanisms have been in effect. However, considering the evidence just discussed on the identity of defen-

56. For a more thorough examination of patterns of disputes in the GATT and the WTO, see Hudec 1999; and Sevilla 1998.

57. Hudec 1993, 297.

58. Hudec 1999.

59. Hudec 1993, 296.

dants, it seems likely that this increased reliance on the dispute-resolution mechanism reflects some dynamic other than a decreased ability of the powerful to deter complaints against themselves. In particular, it seems likely that increased legalization has reduced the costs of bringing suits, thus making it more frequently worth the cost of bringing a complaint for poor states, regardless of the identity of the defendant.<sup>60</sup> In other words, legalization has encouraged weaker states to bring more complaints, generally because doing so is easier, not because the powerful will no longer veto them.

Hypothesis 3 predicts an increase in the number of complaints brought by developing countries against developed countries under the WTO. This hypothesis fares badly, because the data show that under the GATT developing countries targeted almost solely the rich world in their disputes. Hudec's data show almost no cases of developing countries bringing complaints against one another. The exceptions are disputes between India and Pakistan. In contrast, the twenty complaints brought by developing countries so far under the WTO have been just about evenly divided between targeting the developed and developing world. Two factors might explain this finding. First, the costs of bringing disputes are now lower, so it is more often worthwhile to bring them against developing countries. Second, the Uruguay Round extended many trade rules to developing countries, so the dispute-resolution procedures can be used against them for the first time. Regardless of the particular mechanism at work, the pattern of complaints shows that the major change under the WTO procedures has been an increased willingness of developing countries to bring complaints against one another. This effect is not consistent with reduced opportunism.

If legalization reduces opportunism as intended, a second effect that should result from eliminating the veto power is enhanced equity in the outcomes of disputes. We can formalize this as a fourth hypothesis: *legalization of dispute resolution has reduced the bias toward the powerful in the settlement of disputes* (hypothesis 4). A distributive effect could be estimated by comparing the outcomes of disputes brought under the GATT versus under the WTO. Unfortunately, since few cases have yet been resolved under the WTO, we can say nothing definitive on this issue. However, we can look at dispute outcomes under the GATT to see if they tended to favor developed countries as expected. If the weakly legalized GATT mechanisms encouraged opportunism, this trend should appear as a bias toward the powerful in the outcomes of disputes under the GATT. Eric Reinhardt has provided a careful statistical study of the factors determining the distributive outcomes of GATT disputes.<sup>61</sup> He tests the hypothesis that powerful states tend to get a larger share of the benefits of resolved disputes. Employing a number of alternative operationalizations, Reinhardt found no evidence that asymmetries of power work in favor of the powerful. Instead, he found a bias in favor of defendants, regardless of power asymmetries.

As with the data on the choice to bring complaints, in looking at the outcomes of disputes we find little evidence that the GATT operated in an overtly politicized

60. Sevilla 1998.

61. Reinhardt 1995.

manner, with powerful states using the GATT dispute-resolution procedures to deter weaker states from bringing complaints or to force outcomes of disputes to favor the powerful. The GATT, in spite of its weak level of legalization, provided many of the benefits we expect to see from international institutions. It discouraged opportunism without a resort to highly legalized mechanisms. This finding raises further questions about the benefits that states will be able to derive from further legalization.

Improving the compliance of powerful states with their explicit obligations under the rules of international trade was one of the primary motivations behind the enhanced dispute-resolution mechanisms of the WTO. Thus moving from a politicized process to a more legalized one should have an observable impact on the behavior of powerful states. However, the evidence is weak that the WTO has made the difference intended by proponents of more legalized dispute-resolution procedures. While developing countries appear more willing to lodge formal complaints than they were previously, the complaints do not target the behavior of powerful states any more than they did before. One plausible interpretation of the evidence on the number of complaints being brought is that the GATT was in fact quite influential in constraining powerful states, leading us to ask how much value will be added by increased legalization. Considering the drawbacks of increased legalization discussed earlier, the benefits must be clear in order to justify further moves in this direction. Dispute outcomes do not show evidence of coercion by powerful states, consistent with the idea that the political sensitivity of the GATT was not as much of an impediment to liberalization as legalization proponents presumed.

## **Conclusion**

This article was motivated by questions about the relationship between international legalization and trade. The benefits of legalization lie in the fact that the more efficiently a regime provides information, reduces transaction costs, and monitors member behavior, the harder it is for a unitary state to behave opportunistically and renege on trade agreements. However, an analysis of the domestic requisites of free trade suggests potential negative effects of legalization that must be weighed against its benefits. When we consider cooperation with the trade regime to be a function of the interests of domestic political actors, the assumption that increased legalization leads to more trade openness becomes questionable. Although we cannot demonstrate that legalization has gone so far that it threatens liberalization, we do wish to sound a cautionary note based in the impact of legalization on the mobilization of protectionist groups.

We examined three theoretical issues implicated by the legalization of the trade regime. First, we asked how greater precision at the time of negotiating treaties changes the incentives of antitrade groups to mobilize. In that legalization leads to more and better information about the distributional effects of proposed agreements, we suggested that it could actually deter the conclusion of cooperative deals. Faced with certainty of loss, the expected utility of a group's organizing increases, suggest-

ing that negotiators could find themselves confronted by powerful veto groups, undermining their ability to construct a majority in favor of a treaty. This dynamic of information provided by a legalized regime leading to massive mobilization may help explain the level of social activism at the 1999 WTO meetings in Seattle.

Second, we applied the same logic of information and mobilization to expectations about the maintenance of agreements already in force. The logic of information here predicted a different outcome from that during negotiations. By focusing on the incentives of exporters, we argued that when exporters know that they are likely targets of retaliation, they are more motivated to organize in support of the trade regime than those subject to an imprecise threat of retaliation. Thus the prediction about the effect of changes in the information environment varies, depending upon whether we are considering the expansion of trade liberalization or compliance with enacted treaties.

Finally, we looked at the effects of a system of highly deterministic penalties on domestic actors. Here we suggested that trade regimes need to incorporate some flexibility in their enforcement procedures; too little enforcement may encourage opportunism, but too much may backfire, undermining the ability of domestic actors to find support for an open trade policy. By decreasing the ability to breach agreements, WTO negotiators may have underestimated the inherently uncertain character of the international economy and so the need to allow practical flexibility in enforcement of regime rules.

These theoretical arguments suggest the need to carefully examine the trend toward increasing legalization, weighing both its benefits and its costs. Legalization can increase social resistance to new cooperative agreements by reducing the number and type of instruments available to politicians to deal with a rise in antitrade sentiment. In addition, with less ability to finesse international rules, leaders could find themselves forced to renege on trade agreements.

Given the short history of the WTO, the empirical support for our theoretical arguments is inconclusive. Still, evidence suggests that the effects of legalization may not be as glowing as proponents argue. First, legalization may be one reason for the increased attention and activity of antitrade groups. We cannot say whether this will deter nations from further liberalization, since policy will ultimately depend on the balance of national forces between pro- and antitrade groups. Still, it is clear that those groups who are targeted for liberalization in the new round of discussions have become active proponents of particularistic policies. Second, some evidence suggests that changes in WTO rules undermine the incentive for export groups to mobilize in defense of free trade. In that the WTO makes retaliation more difficult, both because of changes in the rules on safeguard provisions and because of the process of dispute resolution, we expect exporters to mobilize less often to balance the action of rent-seeking import-competing groups.

Consideration of the effect of the more precise and binding safeguard and dispute-settlement provisions also raises questions about the turn toward legalization. Given the difficulty of their use, few countries turned to GATT safeguards, choosing instead alternative methods to deal with difficulties in compliance. Making these safeguards

more difficult to use may have been both unnecessary and counterproductive—if countries found it necessary to turn to alternative mechanisms to deal with the political effects of market dislocation before, the change in rules on safeguards does little to solve the underlying problem. Similarly, our investigation of the WTO dispute-settlement mechanism gives us little reason to think that legalization in the realm of settling disputes will have significant effects on trade compliance. The GATT system was relatively effective at deterring opportunism, in spite of its political nature.

The source of stability of trade agreements is found in domestic political mechanisms. The rules of the regime influence countries by making it easier or harder to find majority support for trade openness; if the regime supports rules that are unhelpful to politicians at home, it may well undercut its own purpose. Thus the legalization of international trade could turn on itself if analysis of the benefits of legalization neglects associated political costs. Thomas Franck has argued that the greater the “determinacy” of a rule, the more legitimate it becomes.<sup>62</sup> Determinacy, however, may be of greater value to lawyers than to politicians, whose interests in trade liberalization will be constrained by elections. Elected officials face a dilemma. If there is too little formalism in international trade rules, politicians will be unable to commit for fear of opportunism by others; too much formalism and they lose their ability to opt out of the regime temporarily during especially intense political opposition or tough economic times. Analyses of legalization that focus on maximizing state compliance neglect complex domestic political dynamics. It is well possible that attempts to maximize compliance through legalization will have the unintended effect of mobilizing domestic groups opposed to free trade, thus undermining hard-won patterns of cooperation and the expansion of trade.

62. Franck 1995.