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An Institutional Theory of WTO Decision-Making: Why Negotiation in the WTO Resembles Law-Making in the U.S. Congress

Gilbert R. Winham

In recent years negotiation practices in the GATT/WTO have become vastly more institutionalized, to the extent that a practitioner stated, "the Uruguay Round had effectively created a new international organization for its four-year life" (Oxley 1990). What accounts for this development in negotiation behaviour? In pursuing this question, analogies are made to the U.S. Congress, where institutions similar to those of the WTO (e.g., committees, committee chairs, and staffs) have long been part of the legislative process. An explanation of this development makes use of the theory of transactions costs, in which Ronald Coase and his later associates explained the existence of the firm in terms of its capacity to reduce economic transactions costs compared to other means of organizing production. This theory has been used to account for the development of institutions in Congress, and it provides a plausible explanation for institutionalization in the WTO. The role of organizational phenomena in multilateral trade negotiation should be taken into account by both practitioners and scholars.

I. Introduction

The World Trade Organization (WTO) is a curious institution. It effectively originated as the General Agreement on Tariffs and Trade (GATT), a set of trading rules created in 1947 to accompany multilateral tariff-reduction negotiations held in 1948. Since then, *faute de*

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mieux, the GATT served as a regime to facilitate multilateral trade negotiations and implement their results. Mostly the regime developed through customary practice, which was especially the case with the important dispute settlement system (Hudec 1991). GATT negotiations eventually produced a modicum of constitutional change mainly to facilitate the management of non-tariff measures (Jackson 1980), and then in 1993 the Uruguay Round negotiations greatly expanded the rules and created a more formalized regime under the WTO. Although the WTO had the appearance of being a new institution in the trade regime, its institutional structure and procedures were largely a codification of nearly fifty years of GATT experience.

The *rules* and negotiation practices of the WTO represent a largely unplanned and incremental accretion of political and legal powers in an international institution. What is it that accounts for the development of this institution? What first needs to be explained are the central rules of the WTO regime and the purpose they serve for their adherents. Next to be explained are the practices of multilateral negotiation that have evolved under the GATT and the WTO. Why, for example, have institutions like negotiating committees, committee chairs, and the secretariat staff become so important in WTO multilateral negotiations? In the GATT and WTO the negotiation process has evolved from a series of primitive bilateral tariff agreements, multilateralized by a most favoured nation (MFN) rule, to enormously complex multilateral rule-making negotiations that commit all parties through the mechanism of a single undertaking. What problems existed for nation-states that the WTO machinery and negotiation practices were created to address?

A seminal effort to explain the central rules of the GATT regime based on economic analysis has been provided by Bagwell and Staiger (2002). These authors observe that customs duties have been steadily reduced through reciprocal tariff-cutting negotiations under the GATT. The reason this occurred is not easily explained by economic theory, which normally accounts for tariff liberalization in terms of the welfare benefits received by the importing country that lowers its tariffs. Bagwell and Staiger ask what is the economic purpose of tariff agreements; in other words, are they simply an economic nonsense explained by political expediency, or do they function to advance economic efficiency? The answer is that since tariffs can impose costs on trading partners through diminished terms of trade, against which countries might normally retaliate, the purpose of tariff agreements is

to escape from a terms-of-trade-driven Prisoners' Dilemma. By extension, the GATT itself is an institution whose central rules, reciprocity and non-discrimination are designed to achieve the same purpose.[1]

The *negotiation practices* of the WTO demand as much by way of explanation and interpretation as do the rules of the institution. Multilateral negotiation in the WTO is the means by which the institution produces the rules. Behind every one of the remarkable agreements of the Uruguay Round was a lengthy negotiation process. Understanding this process is an imperative for policy-makers and analysts.

The tasks confronting the GATT and WTO have grown. At the outset the institution managed mainly tariffs, for which the bargaining procedures are comparatively straightforward, even simple. By the Tokyo Round of the 1970s the agenda expanded to include non-tariff measures, and then it expanded again in the Uruguay Round to include subjects like services and trade-related intellectual property rights (TRIPS) which were essentially novel to the institution. The negotiation process expanded as well. By the time of the Uruguay Round the work of the GATT had become international rule-making, which reflected practices and sub-institutions that are more reminiscent of national law-making than of the give and take of traditional tariff haggling. These changes are not easy to account for in negotiation theory, where the main concern of analysts is to explain the strategy of competitive versus cooperative actions, rather than the impact of organizational structure and substantive complexities on the negotiation process. The central puzzle in explaining negotiation in the GATT or WTO is what accounts for the institutionalization of this process, and what purpose do these institutions serve for the participating governments?[2]

In pursuing the above question, it is helpful to search for analogous examples of institutional behaviour. In the case of the WTO, such

1. Bagwell and Staiger (2002, p. 187) state, "The principles of reciprocity and nondiscrimination work in concert to remedy the inefficiency created by the terms-of-trade externality." This argument is particularly appropriate as applied to tariff agreements. The authors apply it to more modern WTO issues such as rules-based negotiations with "mixed" results. The impact of this analysis is to emphasize economic interest as an explanation for the GATT, rather than "politics" or international comity.

2. By institution, I mean, depending on context, the overall structure of the GATT or WTO, or the internal sub-institutions that impact on the negotiation process, particularly negotiating committees, committee chairs, and the WTO Secretariat.

analogies are easier to find in domestic practices than in international politics. Specifically, there is a case to be made that negotiating behaviour in the WTO resembles legislative behaviour in some national institutions, and especially the U.S. Congress.[3] The self-evident purpose of legislative behaviour is to make laws; but arguably, this has also been done in WTO negotiations where rules are made for the purpose of regulating trade relations between nation-states. For example, the Uruguay Round effectively produced a form of legislation, and the ministers who signed off on the Round acknowledged "the stronger and clearer legal framework they have adopted for the conduct of international trade" (WTO 1994b). On the other hand, the self-evident purpose of diplomatic behaviour in WTO negotiations is to bargain and reach agreements between contending parties (i.e., countries); but arguably, this is also done in Congress, where students of the legislative process are accustomed to analyzing legislative behaviour in terms of bargaining (Baron and Ferejohn 1989). Furthermore, the laws that result from legislative behaviour can be viewed as agreements reached between contending parties, or as the outcome of negotiations. For example, a volume on the U.S. legislation that authorized U.S. participation in the GATT Uruguay Round emphasized the negotiation aspects of law-making (Schwab 1994). Indeed, the title of this volume — *Trade Offs: Negotiating the Omnibus Trade and Competitiveness Act* — could have been adapted to a book about the Uruguay Round itself.

The analogy between WTO negotiation and congressional law-making receives some support in modern literature. For example, Martin and Simmons (1998), in the context of arguing for the importance of international institutions in research on international relations, have noted that scholars are making greater use of models drawn from domestic politics to analyze institutions at the international level. Similarly, Milner (1998, p. 787) has argued that an understanding of some major issues of international politics will require a greater use of systematic analysis of domestic politics, and concluded that scholars "might move toward more comparative institutional analysis at both the domestic and international levels." Lying behind the arguments of these scholars is a critique of the theory of realism in international

3. Comparisons between the WTO and the U.S. Congress have been made frequently. For example, a U.S. trade negotiator, with previous experience on Capitol Hill, observed, "[My colleague] and I used to joke about how similar the process is, the WTO and Congress" (confidential interview).

relations scholarship. As noted by Milner, realism established international relations as a separate field from the study of politics, with the state as its primary (and even exclusive) variable operating in the context of anarchy, where power is the main motivating factor behind behaviour. This conception of international relations left little place for institutions: either they were dismissed as irrelevant or they were explained away as a reflection of the distribution of power between nation-states. The conclusion reached by these scholars is that institutions matter and that research on international relations will benefit from linkages being made between international and domestic institutions.

Important support for the use of domestic institutional analogies comes from the literature on non-cooperative games. Non-cooperative games assume strategic interactions between actors that are rational and opportunistic, in situations where actors are unable to make binding agreements enforced by third parties and therefore are obliged to make self-enforcing agreements based on the present and future interests of the actors. In such games, the research task is to explain how cooperation is established among the parties and what incentives are present or created to maintain that cooperation.

Non-cooperative games effectively model international relations because nation-states are said to operate in an environment of anarchy and self-help, which meets the assumptions of the theory. What is more interesting, however, is that scholars of legislative institutions have turned to non-cooperative game theory to explore important elements of the behaviour of individuals in these institutions (Shepsle and Weingast 1995). The use of non-cooperative game theory by students of congressional behaviour enhances the prospects for making robust analogies between domestic and international politics for, as Martin and Simmons (1998, p. 742) observe, "in many essential respects the problems faced by individual legislators mirror those faced by individual states in the international system." In the discussion that follows, an attempt will be made to compare the situation faced by members of Congress to that faced by nation-states in the WTO.

This paper will examine multilateral negotiation mainly in the Uruguay Round through the lens of legislative behaviour in the U.S. Congress. To this end, it will first outline a formal comparison between Congress and the WTO, and will follow up with specific institutional comparisons, including the operations of committees, negotiation groups, chairs, and staff officials. The paper will then

advance an explanation for the behaviour examined here based on the new economics of organization, or transactions cost analysis (Klein 2000). Finally, this paper considers the implications of this research for practitioners and for the theory of negotiations.

II. Formal Comparison of Congress and the WTO

A. The Weingast/Marshall Model

The U.S. Congress has members, like the WTO, and these members may represent many diverse interests. Few of these interests command enough support to be automatically accepted by the whole body; hence it is common that the members will be pressured to build coalitions to reach a final agreement. A major problem is to explain how the many agreements legislators might make along the way to creating legislation are enforced and carried through.

In approaching this problem, Weingast and Marshall (1988) review research on decision-making in legislatures focused on various forms of vote trading, such as log-rolling or IOUs. It was assumed that legislators supported those measures that benefited their constituents, but since those measures may not command a majority, they exchanged their votes on issues of little interest to their constituents for the votes of other legislators on issues of greater importance. This behaviour effectively established a market in votes, and the search by legislators for votes that had a higher marginal benefit for their constituents created a price mechanism. Thus the price mechanism accounted for the behaviour of legislators. This kind of analysis worked best on pork-barrel issues decided in the legislature.

This analysis encountered various problems. One is that commitments to exchange votes were less workable for dissimilar issues or issues with dissimilar legislative agendas or deadlines. For example, trade-offs on legislation to create infrastructure (e.g., bridges) with legislation to protect civil rights would be intrinsically difficult; furthermore, once the bridges were approved, would there be any guarantee that commitments on civil rights would not be reneged? A second problem is the sheer number of contingencies that would be faced in a vote-exchange arrangement, with attendant increased transactions costs of gaining accurate information on parties' preferences. Finally, legislation is a complex interactive process, and perceptions of issues can change and increase the prospect that voting commitments may not be durable.

Weingast and Marshall conclude that "[legislative] coalitions lack durability under an explicit market exchange system" (pp. 142–43).

They argue that legislators will create institutions that permit a greater degree of durability to agreements made in the course of creating legislation. This analysis itself can be usefully compared to the WTO, and will be further examined in Section IV of this paper. However, in making their argument, the authors lay out the assumptions of legislative behaviour in the U.S. Congress, as well as the conditions for the operation of committees in Congress. These formal statements can be juxtaposed to the behaviour and institutions of the WTO in order to sharpen the definition of the latter and to facilitate comparisons between the WTO and Congress.

Assumption 1 (Weingast/Marshall): Congressmen represent the (politically responsive) interests located in their district.

The authors elaborate this assumption with two observations: first, that rational ignorance pervades the political system, underpins interest group advantages, and biases the attention of legislators toward those groups that promote positions in politics; and second, that interest groups are not uniformly distributed across constituencies and therefore different legislators represent different groups. These observations support the basic contention that legislative districts are differentiated and that legislators have conflicting interests that establish an incentive to bargain with each other.

Assumption 1 (WTO): National delegations (ministers and/or officials) represent the (politically responsive) interests located within their nation.

The point of departure in international law is that diplomats represent the national interests of their country.[4] Beyond this truism, the above assumption that underlies congressional behaviour also describes the behaviour of international representatives in international trade. Observations about rational ignorance are transferable to international diplomacy, and the existence and activities of interest group pressures in international trade negotiations are extensively chronicled (Preeg 1995). Interest groups are not uniformly distributed, but are produced by varying economic interests such as the differential allocation of the factors of production. The main point is that national interests differ, and therefore nations have an incentive for trade-offs and coalition behaviour in international negotiations.

4. "The functions of a diplomatic mission consist inter alia in: protecting in the receiving State the interests of the sending State" (United Nations 1961, Article 3 [1] [b]).

Assumption 2 (Weingast/Marshall): Parties place no constraints on the behaviour of individual representatives.

The authors state that political parties were strong influences on congressional behaviour at the turn of the twentieth century, but that this no longer holds true at their writing in the late 1980s.[5] Therefore, in their analysis they treat the individual Congressman as the decision-making unit. This assumption is certainly not the case for the Westminister parliamentary system, which is the most popular form of government in the world. This explains why comparisons between behaviour in international institutions and domestic legislatures are more likely to be made with the U.S. Congress than with institutions of many other countries.

Assumption 2 (WTO): Parties place no substantial or continuing constraints on the behaviour of individual national representatives.

The above observation of the authors about Congress mirrors the situation in WTO negotiations, as there are no equivalents in the latter forum to the political parties found in a national legislature. There are informal negotiating groups which can place pressures on national decision-making during negotiations (such as the Cairns Group of agricultural exporters), but they constitute voluntary coalitions of special interests and lack the broad aggregating characteristics of political parties. The closest institutional comparison to political parties in the WTO context is the bloc of developing countries, and there is anecdotal evidence that the positions taken by this bloc influence individual countries.[6] However, it is implausible that even this bloc could exercise the constraint on behaviour of individuals that political parties might exercise in a British or Canadian Parliament. In sum, there is no substantial difference between Congress and the WTO with respect to political parties.

5. This assumption is somewhat compromised following the reforms in House procedures introduced by the Republicans in 1995 (Wolfensberger 2002). These reforms underscore that party discipline has fluctuated in Congress over time, but in any case it remains relatively weak in comparison with other countries. Wolfensberger (p. 11) notes, "Congress is still an independent branch made up of members whose first loyalty is to their constituents, not their party or president."

6. For example, on the subject of negotiating instructions, one WTO staffer observed, "One-third of developing countries received instructions from their capitals; one-third received no instructions at all; and the remaining third received instructions to support developing countries" (confidential interview).

Assumption 3 (Weingast/Marshall): Majority rule is a binding constraint.

The authors state simply: "Proposed bills...must command the support of a majority of the entire legislature in order to become law" (p. 137).

Assumption 3 (WTO): The consensus rule is a binding constraint.

GATT customary practice, now formally adopted in the WTO, was to take decisions in all bodies by consensus of the GATT Contracting Parties (now WTO Members). Consensus is now defined formally in the WTO as "the body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision" (WTO 1994a, Article IX, p. 1). Alternative provisions are made for voting, but these provisions have not been used.

Consensus can be viewed from three perspectives. First, consensus formally prevents a country from being obligated to comply with a measure with which it disagrees. This perspective is wholly consistent with traditional conceptions of national sovereignty. Second, consensus probably prevents a decision from being taken that does not enjoy wide support of the membership. This perspective is reasonably consistent with conceptions of democracy.[7] Third, consensus does not require countries to be present or to formally object on issues where they may not have a major concern, nor does it prevent some countries from dissuading other countries from formally objecting on issues that the latter may not support. This perspective is reasonably consistent with conceptions of interest and power in international affairs. In sum, consensus is a unique blend of sovereignty, democracy, and power. It is a decision-making mechanism suited for a system characterized partly by anarchy and partly by rules-based institutionalism.[8]

7. For example, Dahl (1956, p. 4) stated, "Democracy, it is frequently said, rests upon compromise [especially]...a compromise between the power of majorities and the power of minorities."

8. There is considerable criticism that in practice the democratic component of consensus decision-making is overwhelmed by the power component. For example, Steinberg (2002, p. 365) argues that "GATT/WTO decision-making rules based on the sovereign equality of states are organized hypocrisy in the procedural context." Depending on one's viewpoint this may be the case, but it would hardly be unexpected. As Froman (1967, p. 172) notes of Congress, which is equally applicable to the GATT/WTO, "now we can see even from a cursory glance that organizations, by *definition*, violate the rules of perfect democracy." The more important point, as noted by Narlikar (2001, p. 14), is that "most member states themselves — developed and developing — do not support [the consensus principle's] replacement with majority voting or even any significant qualifications to the full consensus principle."

In formal terms, the different requirements for decision-making by majority rule and decision-making by consensus are profound; they go mainly to the greater protection of sovereignty in the consensus system, which removes the formal threat of the "tyranny of the majority." But in *behavioural terms*, the differences are fewer. The main task in either system is to assemble a coalition behind any given proposal, which requires bargaining and persuasion. Hence the comment from a former U.S. negotiator about the WTO: "[There is] coalition building there...shifting coalitions...[you] build a deal from the ground up through informal processes...then bridges are built between capitals that are centrists, this is done in Congress and the WTO" (confidential interview). A similar observation is made by Narlikar (2001, p. 15): "It may be noted that the entire structure and workings of the WTO rest on bargaining, consultation, negotiation and compromise." Arguably, this observation could also apply to Congress.

The Weingast/Marshall model also examined the legislative committee system of Congress. The importance of this examination is indicated by Woodrow Wilson's classic observation that "Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work" (1981, p. 69), an observation that could also be made of WTO negotiation. Committees in Congress arose with the institution itself and are durable. In WTO negotiations, by comparison, committees are also centrally important and are normally established at the start of a negotiation. For example, the Kennedy, Tokyo, and Uruguay Rounds each commenced with the formation of a Trade Negotiations Committee (TNC). In the latter negotiation, which began in 1986, two additional major groups were established: a Group for Negotiations on Goods (GNG) and a Group for Negotiations on Services (GNS), with the GNG further subdivided into fourteen subject-specific subgroups (Hart 1995, p. 214).

Weingast and Marshall note that congressional committees have a restricted membership and the following properties: they have jurisdiction over specific subjects (e.g., commerce, agriculture); within their jurisdiction, they have monopoly rights to bring legislative proposals to the whole legislature; and their proposals must receive a majority vote to become law. By comparison, negotiating committees and groups in the WTO are plenary bodies and have the following properties: they have jurisdiction over specific subjects (e.g., subsidies, agriculture); within their jurisdiction, they have effective monopoly rights to bring negotiating proposals by consensus to the

TNC; and their proposals must receive consensus to be included in a final agreement.

In sum, committees in Congress and negotiating groups in the WTO are organized along similar subject-specific lines and with similar powers to bring proposals forward to a superior body. Beyond that, congressional committees are more exclusive and committee chairs have more formal powers, whereas WTO negotiating groups are more open due to their plenary construction and committee chairs are less powerful due in part to more frequent rotation.

B. Single Undertaking and Trade-Offs

The foregoing comparison of WTO negotiating behaviour to congressional legislative behaviour indicates important similarities and differences. First, both reflect large representational decision-making processes comprising many contending parties. The parties as representatives are essentially unconstrained in their capacity to pursue their own interests. Second, there are major institutional similarities, such as subject-specific committees or negotiating groups that reflect a division of labour in the overall body. Third, each institution is characterized by a decision-making mechanism that forces coalition building among diverse interests. As for differences, first, the congressional committee system arguably establishes property rights in committee memberships and leadership positions, which has no analogy in WTO procedures. Second, decisions in Congress are taken by majority rule as opposed to consensus in the WTO. This difference is crucial, for while it may not result in differentiated behaviour, it certainly reflects a difference in the parties' ultimate commitment to the system (Waltz 1979). Parties in a majority rule system are obliged to accept the result of the decision, whereas parties in a consensus system can formally withhold consensus and prevent a decision, or they can disengage from the process altogether. This is the essential manifestation of state sovereignty in the WTO system, and it is unlikely to change in the foreseeable future.

There are changes, however, that have increased the parties' commitment to the WTO system. One such change is the single undertaking, a negotiating construct that was adopted in both the Tokyo and Uruguay Rounds.[9] In principle it means that the various parts of an

9. "The negotiations shall be considered as one undertaking, the various elements of which shall move forward together" (GATT 1973). "The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking" (GATT 1986).

agreement, or set of agreements, are treated as a single unit for the purpose of final approval. Single undertaking means that no party can opt out of any portion of the agreement, that the package has to be taken as a whole, and that in the bargaining language of the day "there are no carve outs" and "it's not approved until it's all approved."

The single undertaking was ignored in the conclusion of the Tokyo Round. Countries signed final agreements on a piecemeal basis, and few developing countries signed any of the Tokyo Round codes (Winham 1986). In the Uruguay Round, there was pressure from three directions that prevented a similar occurrence in that negotiation. The first pressure came from a legal analysis presented by Professor John H. Jackson in Geneva in 1989 (Jackson 1990) and debated in a series of private sessions led by GATT Director-General Arthur Dunkel. Jackson's argument was that the existing GATT was not a single treaty instrument, but rather a cluster of more than 180 agreements that had differing memberships and even differing purposes. Unless there was a formal mechanism of coordination, it was likely that the agreements flowing from the Uruguay Round would produce further decentralization and even legal chaos in the trade regime. A second source of pressure was the Europeans. The European Union (EU) recognized from the outset that it would be under attack in agriculture, and it sought to offset that pressure by expanding the package of issues at the negotiation. The bargaining mechanism chosen to carry out this strategy was the principle of "globality," which a senior EU negotiator makes clear was equivalent to "all or nothing," i.e., the single undertaking (Paemen and Bensch 1995, pp. 58, 98). The third source of pressure was the Americans, who recognized that the single undertaking would be a useful mechanism to engineer the commitment of developing countries to the trade regime, thereby avoiding the piecemeal results of the Tokyo Round (Steinberg 2002).

The single undertaking, which was "always there" in the words of a senior Uruguay Round negotiator (confidential interview), came to a head in the negotiations that preceded the Draft Final Act (i.e., the Dunkel Text) of December 1991. The issue that brought it to a head was cross-retaliation in the dispute settlement system. It was clear that dispute settlement would have to be integrated into a single undertaking, but the idea that countries could be authorized to retaliate in one area (e.g., textiles) for a transgression in another area (e.g., intellectual property) was something that developing countries strongly resisted. And yet, without cross-retaliation it might be

difficult or impossible to provide meaningful sanctions (i.e., suspension of concessions) to back up the dispute settlement system. This matter was finally settled on December 19, 1991, when India, long the principal holdout, accepted the principle of cross-retaliation.[10] The single undertaking and cross-retaliation remained part of the Uruguay Round package through to the conclusion of the negotiation on December 15, 1993.

The single undertaking had enormous consequences for the WTO regime. In the first place, as many commentators have observed, it constrains national decision-making in that countries are not permitted to pick and choose those parts of the agreement they wish to sign. This is a significant departure from the procedure followed in the Tokyo Round in 1979. Second, the single undertaking reflects an increased commitment of the parties to the regime in that it obliges parties to assess small losses within the regime against the large (and mainly unacceptable) loss of exit from the regime. This choice is not an issue in (stable) domestic politics: a single undertaking is what occurs in Congress or any other parliamentary body when it passes legislation. For example, in the massive U.S. Trade and Competitiveness Act of 1988, no legislator or group of legislators could choose to opt out from any portion of the Act that was deemed unacceptable. In the words of the Uruguay Round Agreements, the Act was a "single undertaking." By comparison, on this point the Uruguay Round Agreements were closer to the Act than they were to the agreements reached at the Tokyo Round, where countries exercised their option to refuse signing individual agreements they did not support.

Third, the most important effect of the single undertaking is on the bargaining behaviour of the parties. Trade-offs are considered an essential aspect of bargaining, whether it is diplomatic bargaining conducted in the WTO or legislative bargaining conducted in Congress. However, in the diplomatic setting, trade-offs have long been considered a delicate matter. Trade-offs (like prices) communicate value, they evaluate a concession in favour of one constituency against a concession denied another constituency, and they appear to force the losers to pay for the gains of the winners. For this reason, GATT negotiators traditionally have been more comfortable with

10. Information on this matter comes from confidential interviews and Croome (1995, pp. 320–27).

trade-offs within sectors than trade-offs between sectors because the gains and losses from the exchange are taken by the same parties.[11] With a single undertaking, parties are more obliged to pursue trade-offs across sectors, however unpalatable they might be, because the alternative of rejecting the agreement or a portion thereof is less possible. The result is that bargained trade-offs became a more explicit process in the Uruguay Round than in previous GATT negotiations.[12]

The above comments reflect trade-offs between developed and developing countries. Other trade-offs occurred between developed countries, such as the agreement by the EU to forego blocking the dispute settlement mechanism in return for the United States' agreement to forego unilateral sanctions, which Croome (1995, p. 324) discusses without naming the countries. This further increases the similarity between congressional bargaining behaviour (where trade-offs are widely recognized as part of the game) and the equivalent behaviour found in the WTO.

The above formal comparison of congressional law-making and WTO negotiation suggests there are enough similarities to justify the call by international relations scholars for more comparative study of domestic and international institutions (Milner 1998, p. 786). This call is further justified by looking at the internal institutions of Congress and the WTO. The next section will examine the elements of congressional organization, namely, committees, committee chairs, and the congressional staff, which have their analogies in negotiating groups, group chairs, and the secretariat staff of the WTO.

III. Institutional Comparison of Congress and the WTO

How is law-making in Congress and negotiation in the WTO organized? As for Congress, it is an assembly of representatives. "Congress," writes Oleszek, "is a collegial, not a hierarchical body" (1984, p. 9).

11. See Hufbauer and Chilas (1974, p. 6), who state, "GATT negotiations very much favor intra-industry over inter-industry specialization."

12. Examples of trade-offs in the Uruguay Round abound in confidential interviews with trade diplomats. In published sources, two former negotiators have commented on trade-offs. Paemen and Bensch (1995) take note of trade-offs between services and textiles at the beginning of the Uruguay Round (p. 39), and safeguards and intellectual property later in the Round (p. 144). Oxley (1990, p. 211) notes, "The fundamental compact in the Uruguay Round is between those who want the traditionally protected sectors of trade liberalized and those who want new areas of trade liberalized. At its simplest level, if there is no liberalization of agriculture, there will be no liberalization of services. To this mix can also be added textiles and intellectual property."

Law-making is its task, which is the process by which Congress transforms an idea into national policy (Oleszek 1984, p. 1). However, Congress is also described as an organization (Froman 1967, p. 169). Like other organizations, it has specialization and a division of labour, which is reflected in the system of committees in Congress. Furthermore, like organizations generally, Congress has leaders, which are the committee chairs and the senior leadership positions in the body. Finally, Congress has formal rules and procedures, which are also typically found in organizations.[13]

In the same manner, a WTO negotiation is an assembly of representatives of constituents. Negotiating and concluding agreements is its appointed task. However, a large multilateral negotiation can also be described as an organization, as in the following observation by an Uruguay Round participant: "The Uruguay Round had effectively created a new international organization for its four-year life. This would run separately and in parallel with the GATT's own activities" (Oxley 1990, p. 145). This organization exhibits many of the elements found in Congress, namely, specialization and division of labour, positions of leadership, and rules of procedure. Much of its activity would be described as organizational behaviour.

A. Congressional Committees and WTO Negotiating Groups

Many observers of Congress, from Woodrow Wilson onward, have emphasized the role of committees in accomplishing the work of Congress. Oleszek (1984, p. 6) states, "For Congress, committees are the heart of its legislative process. They provide the division of labour and specialization that Congress needs to handle about 15,000 measures that are introduced biennially." This division of labour is currently managed by nineteen standing committees, with each committee being able to establish subcommittees (e.g., the Subcommittee on International Trade of the House Ways and Means Standing Committee). The number of committees fluctuates slowly, with three committees being abolished by the Republican reforms of 1995. Committees have limited membership, and appointments to important committees are eagerly sought by congressmen.

13. Polsby (1968, p. 82) has also described Congress as an institutionalized organization having the following characteristics: (i) it is well differentiated from its environment (especially, it recruits leaders from within the organization); (ii) it is relatively complex; and (iii) it tends to use universalistic rather than particularistic criteria (i.e., rules), and automatic rather than discretionary methods, to conduct its internal business.

Committees are responsible for the decentralization of congressional politics and create a process characterized by "messiness, openness, pragmatism, compromise and deliberateness" (Oleszek 1984, p. 243). They are composed disproportionately of "interesteds" (Hall 1987, p. 122), and are the main source of policy expertise in their respective areas. Committees have considerable control over the agenda in their area, they are policy innovators, and most important, they are deferred to by other committees, and in turn reciprocate that deference (Shepsle and Weingast 1987, p. 85). Committees have both positive and negative political power (Smith 1989, p. 171). The positive power flows from the fact that they are responsible for making proposals and, especially, that they are better informed about the often complex matters with which they are entrusted. Negative power comes from their "gatekeeping" function (i.e., the capacity to veto legislative proposals in their area), their discretion over amendments, and especially their role in conference committees.[14]

WTO negotiations contain a committee structure reminiscent of that found in Congress. The structure is established at the start of a negotiation, as noted earlier, and will be restructured over time as needed. In the Uruguay Round, the initial fifteen negotiating groups were constructed on the basis of the negotiating issues identified in the Punta del Este Ministerial Declaration of September 20, 1986, which started the negotiation. (See Table 1 on pages 34–35.) These groups were continued until April 1991, when the negotiation restarted after a hiatus and after the tabling of the Draft Final Act (i.e., the Dunkel Text). The fifteen groups were compressed to seven, reflecting the progress and consolidation occurring in the negotiation. And the seven groups were reduced to four (called "tracks") shortly after Peter Sutherland replaced Arthur Dunkel as GATT Director-General. These changes can be contrasted to the relatively greater stability of congressional committees and reflect the shorter time span of international negotiations in comparison to domestic legislatures.

14. Conference committees are established to reconcile bills passed in the Senate and House of Representatives into a single piece of legislation. Conference committees normally include members drawn from the committees that managed the bill in the first instance, thereby offering those members an opportunity to deal harshly with any amendments they disapprove of that might have been attached to the bill in floor debates before the whole chamber. Shepsle and Weingast (1987) describe this power as an ex post veto, and argue that this power mainly explains the strong hand committees have in legislation.

WTO negotiating groups are plenary bodies in contrast to the limited membership committees of Congress. This means that the former are more widely representative but less powerful than the latter. The similarity between these institutions lies in the capacity of both to provide for specialization and division of labour, and on this dimension negotiation groups are equally capable as congressional committees to be the main source of policy expertise in their respective areas. Beyond that, however, negotiating groups cannot control the negotiating agenda in their area (because all parties can participate in the negotiating group), much less can the groups bargain and log-roll with other negotiating groups to achieve trade-offs and progress toward an eventual settlement. For this purpose the WTO makes use of a wide array of more limited informal negotiating institutions,[15] especially meetings known as "Green Rooms."[16] Usually these were initiated by the Director-General of the WTO and included representatives of powerful WTO Members.

B. Congressional Committee Chairs and WTO Negotiating Group Chairs

An important principle of congressional law-making has been clearly stated by Jones (1975, p. 269), "It is primarily the function of leadership *to see to it that conclusions are reached in Congress*." Carrying this principle one step further encounters yet another principle enunciated by Woodrow Wilson (1981, pp. 186–87): "If there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, *somebody must be trusted*, in order that when things go wrong it may be quite plain who should be punished." When applied to congressional committees, these principles lead one to assume that the committees which are the locus of the real work in Congress also provide a role for vigorous and effective committee chairs. Generally this assumption is correct, but it must always be qualified by the potential impact of strong party leadership on committee independence. When political circumstances in Congress are conducive to strong leadership from the top, that leader-

15. For example, in the current Doha Round, provision is made for the following structure in the agricultural negotiations: *formal* special sessions of the Agriculture Committee, for decision-making; *informal* sessions of the Agriculture Committee, for "first reading" of technical issues; *consultations* at a more technical level ("open-ended," meaning all members can attend in a smaller room); and *specialist* consultations among a smaller, representative group (WTO 2004, p. 18).

16. Wolfe (2004, p. 2) defines "Green Room" as a generic term for small group meetings.

ship can constrain the control exercised by committees and their chairs over the legislative process. For much of the twentieth century, the balance favoured the independence of the committee system, which led to strong committee chairs selected by custom through the automatic process of seniority. Today the committee system is in flux, owing to the reforms introduced by the Republican Party in 1995 that curtailed the independence of committee chairs and increased the power of the party leadership.[17] The pressure militating for stronger party leadership is the intensified party competition resulting from a near-equal balance of parties in Congress, while pressure for greater committee independence continues to come from the need for specialization and division of labour in the face of increasingly complex law-making.

Regardless of the exact balance of power between committee chairs and party leadership, observers of Congress continue to ascribe a considerable role to chairs in law-making. One observer noted, "If you want to know how Congress operates, you need to know how the committees work, and how the chairs interact."[18] And a former subcommittee chair observed, "Most of the time as a Congressman I felt totally impotent, but I felt I had impact on the process as a chair."[19] The reason chairs are important is that majorities behind legislative proposals seldom occur naturally, but rather are the result of conscious consensus-building. As Froman (1967, p. 19) puts it, "on most bills majorities are the *result* of the legislative process, not the pre-condition for it." The work of managing that process falls disproportionately to committee chairs.

In WTO negotiating groups, chairs are also instrumental in providing direction to the negotiating process (Tallberg 2004). Like congressional committee chairs, they are expected to provide leadership and to produce an agreement in a specialized portion of the overall negotiation (Odell 2004). They are both less and more powerful than congressional committee chairs. Negotiating group chairs do not

17. Wolfensberger (2002, p. 13) notes a turnover of fifteen of twenty committee chairs occurred as a result of the reforms.

18. Remarks by Elizabeth A. Palmer, former Legal Affairs Reporter for the CQ Weekly Report, at a conference on Committee Leadership in Congress, Woodrow Wilson International Center, Washington, D.C., February 8, 2002.

19. Remarks by Howard E. Wolpe (D-Mich.), former Chairman, House Subcommittee on Africa, at a conference on Committee Leadership in Congress, Woodrow Wilson International Center, Washington, D.C., February 8, 2002.

enjoy longevity based on seniority or other criteria (WTO 2003), and outside the right to call meetings and to shape the agenda, they have few formal powers at all. Their strength lies in the fact that their committees are plenary, and therefore they will be responsible for managing the full range of cross-pressures of the entire negotiation in their committee's specific area of expertise. Their task is to find consensus; it is the same task faced by the senior leadership of the negotiation (e.g., TNC chairman). Therefore, negotiating group chairs have no reason to face an institutional challenge to their leadership such as that faced by congressional chairs from senior party leadership. The way they accomplish this task, in the words of a negotiating group chair at the end of the Uruguay Round, is as follows: "You're trying to build a package deal, you must propose trade-offs. There's a need to control overly high expectations. Once you have a sense of where the negotiation is going, the role is one of transparency. You sell it, persuade that it's not a fix, that it is good for all. I spent a lot of time with [various groups]" (confidential interview).[20]

One important tool in the "selling" of multilateral agreements by WTO group chairs was the generally accepted right of the chair to declare closure in multilateral sessions. This technique was the hallmark of GATT Director-General Peter Sutherland, as evidenced in the following vignette (Croome 1995, pp. 374–75): "During the same evening [December 14, 1993], Sutherland 'gavelled through' more than twenty of the Uruguay Round texts in a six-hour meeting of the heads of delegation." As used by Sutherland and others, "negotiation by gavel" could be simply a mechanism for ending a meeting when agreement is reached. However, in the context of consensus decision-making, it is also an effective means of achieving closure in a negotiation meeting where it is a matter of judgment when consensus has been reached.

20. This formulation is consistent with Tallberg's analysis of the chair in multilateral negotiation, in which "decentralized bargaining is subject to collective-action problems that lead states to delegate functions of agenda management, brokerage, and representation to negotiation chairs. With these functions follow a set of power resources: asymmetrical access to information and asymmetrical control over procedure. By executing the functions they have been delegated, and by wielding these resources to collective benefit, formal leaders help states to negotiate more effectively" (p. 5). Both Tallberg and the analysis presented here differ from the conclusions of Moravscik (1999, p. 298) that in multilateral negotiations, "Decentralized bargaining is 'naturally' efficient."

Negotiation by gavel is clearly a means for putting pressure on parties hesitant to join an incipient consensus. However, it is unlikely to be effective without considerable preparation. As noted by a chair from the Uruguay Round negotiation, "yeah, I did it [negotiation by gavel], but it's not a big thing. You do it only when you have an underlying agreement. It is mainly a mechanism to avoid reopening the debate, or to avoid any unravelling. It needs to be pre-managed" (confidential interview). Perhaps the biggest advantage chairs found in this technique is that it served as a means to change the mindset of negotiators from haggling to decision-making, and especially as a way to deal with negotiators seeking to carry on the bargaining process for its own sake. As an interviewee expressed it, "[negotiation by gavel] requires timing and good judgment, but it's necessary. In big groups, you always have a problem with procedural games players, and this needs to be cut off. This is why it's necessary to firm up a decision."[21]

C. Congressional Staff and WTO Staff

Legislation in Congress and negotiation in the WTO are both large-scale, technically complex affairs. In neither forum do the participants have the capacity to fully engage without assistance from some quarter. In Congress this assistance comes from staff assigned to committees or to the offices of Congressmen themselves. In the WTO, the assistance comes from the international secretariat attached to the organization itself.

There is widespread agreement among observers of Congress that "the staff's influence pervades the legislative process" (Mann and Ornstein 1981, p. 154). This influence is especially noticed in policy areas of great complexity, where the staff's capacity to access and process information will be critical in putting Congress on a more equal basis with the Executive. In those areas where Congress takes the lead in law-making, the staff will be involved in setting the legislative agenda. Staff interact with constituents and interest groups, and therefore are in a position to come up with the ideas and proposals

21. Procedural games playing is an example of "opportunism," defined by Williamson (1979, p. 234) as "self-interest seeking with guile," and argued to be a central concept in the analysis of transactions costs. The reason is that "as transactions become more complex and the environment more uncertain, the limitations of contracting as a safeguard against opportunism grow, increasing the attraction of other institutional arrangements [such as committee chairs] that better support adaptive, sequential decision making while circumscribing or redirecting opportunistic tendencies" (Masten, 1999, p. 41).

that constitute the early stages of law-making. As law-making moves forward, staffs will play a central role in the negotiations needed to build a coalition to support their legislative proposals.

Congressmen have various functions in government, but the closer they get to policy-making, the more they will interact with and rely on staff. As noted by former Congressman Wolpe, "staff are the key to policy. The more esoteric the subject, the more influence have the chairman and his staff."[22] As a result of the increasing complexity of government, "committee staff have evolved from small, centralized, support groups to relatively complex suborganizations of Congress" (Smith and Deering 1984, p. 225). While this better positioned Congress to manage modern policy-making, it also led to the criticism that congressional committees were too large and independent to be controlled by senior leadership.

The observation that Congress needs staff assistance to conduct law-making is mirrored in equivalent statements about the importance of staff in WTO negotiations. Consistent with GATT custom, the Marrakesh Agreement on the WTO mandated that the organization "shall provide a forum for negotiations," but it also established a Secretariat that is "exclusively international in character" and prohibited from taking any action that might compromise that international character (WTO 1994a). This mandate ensured that the Secretariat would have a role in assisting negotiations, but also that the role would be carried out in an objective and neutral manner. Whereas the staff in Congress are expected to owe allegiance to certain committees or Congressmen, the WTO staff have been obliged to serve without partisan engagement. And whereas congressional staff engage in the negotiations and coalition-building that support legislation, international trade staffers have been obliged to leave the negotiations to the delegates from nation-state Members of the GATT and WTO.

The role that remains for the Secretariat is largely one of information gathering and dissemination, analysis and advice, and drafting of negotiating texts. These functions, which may seem prosaic, can nevertheless serve an important and even vital role during negotiations. For example, at a critical juncture in 1991 in the Uruguay Round negotiation, Director-General Arthur Dunkel pulled together and

22. Remarks by Howard E. Wolpe (D-Mich.), former Chairman, House Subcommittee on Africa, for the CQ Weekly Report, at a Conference on Committee Leadership in Congress, Woodrow Wilson International Center, Washington, D.C., February 8, 2002.

promulgated a 436-page Draft Final Act (the Dunkel Text), intending to propose a hypothetical solution to the outstanding issues of the negotiation. This action was bold and risky, but it is likely the negotiation would have failed without the guidance that this Draft provided. At a lower level, it has become customary for negotiating group chairs to rely heavily on the Secretariat for the management of written drafts, which are the essence of progress in a multilateral negotiation. For an insight as to how well this cooperation worked in the TRIPS (intellectual property) negotiation during the Uruguay Round, consider the following comment from Preeg (1995, p. 104): "The highly able chairman of the negotiating group, Lars Anell, with strong Secretariat support centering around David Hartridge [Director of GATT TRIPS Division], laboriously molded the various drafts into a consolidated text." The point is that in the TRIPS negotiation, as in many other areas of the Uruguay Round, the negotiators relied on staff for both drafting and compilation of texts as the agreements moved forward to completion. When one considers that the outcome of the negotiation is a written agreement, the contribution of the Secretariat to the negotiation process becomes apparent.

The conclusion of this brief review of committees/groups, chairs, and staff is that there is a functional similarity in the operation of these institutions at the domestic level in the U.S. Congress and the international level in negotiations in the WTO. These institutions are not identical, nor would one expect them to be, since there are individual differences between legislatures at the domestic level and even in the same country.[23] But the important point is that analogous institutions have arisen in legislative behaviour and international negotiation to solve similar problems that the actors (legislators and nation-states) face in either environment.[24] These problems include the transactions costs and complexity of conducting legislative or negotiating business in the absence of institutions, as examined in the next section.

IV. Explanations of Institutionalization in Congress and the WTO

We return to the puzzle that was outlined earlier: what accounts for

23. Oleszek (1984, p. 196) notes: "There are more differences than similarities between Senate and House floor procedures."

24. As Martin and Simmons (1998, p. 740) note: "The point is *not*, as much of the earlier literature assumed, that 'legislative activity' at the international level is interesting per se. The power of the analogy rests solely on how actors choose strategies to cope with similar strategic environments."

the institutionalization that can be observed in the law-making process in Congress or the negotiation process in the WTO? The explanation for the organizational characteristics of Congress is provided in Weingast and Marshall's aforementioned study. This study makes use of the theory of the economics of organization, the purpose of which is "to understand social institutions" (Yarborough and Yarborough 1990, p. 238). Weingast and Marshall argue the foundation of this theory is Robert Coase's seminal article "The Nature of the Firm" (1937). Coase observed that economic theory holds that production outside the firm is directed by the price mechanism, but inside the firm price-directed market transactions are eliminated and production is directed by the entrepreneur. The question arises as to what explains the firm's existence, since production could be conducted by price movements in the open market without any organization at all. The answer, in the author's words, is that "there is a cost of using the price mechanism...the most obvious cost...is that of discovering what the relevant prices are" (1937, p. 390). This is further explained as follows:

> Although production could be carried out in a completely decentralized way by means of contracts between individuals, the fact that it costs something to enter into these transactions means that firms will emerge to organize what would otherwise be market transactions whenever their costs were less than the costs of carrying out the transactions through the market. The limit to the size of the firm is set where its costs of organizing a transaction become equal to the costs of carrying it out through the market. This determines what the firm buys, produces and sells. (Coase 1988, p. 7)

Weingast and Marshall adeptly apply Coase's economic theory to political institutions. They argue that Congress as an assembly of representatives faces a problem initially to form coalitions to pass legislation, and to ensure those coalitions will not be reneged. One way to establish coalitions is through decentralized market exchanges (e.g., vote trading), but such market or price mechanisms are cumbersome and the agreements reached may not be durable. Instead of market exchanges, legislative committees are established because they organize the work and provide greater assurance that the exchanges made in the context of law-making will be durable. This analysis relies on the proposition that the reason for the existence of the firm and its institutions is that they are more efficient than the price mechanism in organizing production. The specific form of the institutions, such as legislative committees, is related to the setting in which they arise; or,

as Weingast and Marshall note, "the institutions that evolve to support the exchange reflect the specific pattern of transaction costs underlying the potential trades" (p. 157). For example, since one of the main costs that Congress faces is that coalitions tend to fall apart in plenary floor debates, a major purpose of legislative committees is to build coalitions in support of legislation (Weingast 1989).

Like Congress, WTO negotiations are also an assembly of representatives. In principle, they are nothing more than a group of delegates assembled for a multilateral trade negotiation. Negotiating trade agreements is the task, a process whereby proposals are transformed into international agreements. However, as we have seen, WTO negotiations also exhibit organizational behaviour, which was reflected in the creation of formal subject-specific negotiating groups (Hart 1995, p. 214), and informal groups such as the Green Room established for consultation and decision-making. Furthermore, WTO negotiations have leaders, which consist of the negotiating group chairs and the senior leadership positions in the negotiation, such as the chair of the Trade Negotiations Committee or the Director-General of the WTO. Finally, WTO negotiations have formal rules and procedures (such as consensus or the single undertaking), which in some cases have evolved by custom since the formation of the GATT in 1947.[25]

In the above descriptions of congressional law-making or WTO negotiation, few would be surprised to hear Congress described as an organization, but this description is unusual for a trade negotiation such as the Uruguay Round. The Uruguay Round was a multilateral negotiation, and the definition of negotiation from a classic text is "negotiation is a process in which explicit proposals are put forward ostensibly for the purpose of reaching agreement on an exchange or on the realization of a common interest where conflicting interests are present" (Ikle 1967, pp. 3–4).[26] The common elements in definitions of negotiations are parties, proposals, agreements (or more precisely,

25. Occasionally, rules or procedures were informal. For example, "in order to protect his text from an avalanche of amendments, Arthur Dunkel introduced a principle whereby no amendment would be taken into consideration unless the proposing country had held informal negotiations beforehand with other partners and obtained their support" (Paemen and Bensch 1995, p. 203).

26. More recently, Odell (2000, p. 4) has offered a similar definition: "Briefly, negotiation and bargaining refer to a sequence of actions in which two or more parties address demands and proposals to each other for the ostensible purpose of reaching agreement and changing the behavior of at least one actor."

behaviour-changing agreements), and, likely, conflict. The typical negotiating situation is often portrayed as a faceoff between parties, accompanied by a process of give and take. From these definitions one might expect in WTO negotiations to see delegates arranged in occasional bilateral, plurilateral, or multilateral sessions that mainly provide for the confrontation of position against position. One would not necessarily expect to find a bureaucratic organization, much less a complex institution, with a continuity of form and structure.

The reason why the Uruguay Round took on the attributes of an organization can be appreciated by examining the situation faced by negotiators. One would expect negotiators to seek out exchanges in order to build coalitions behind their preferred outcomes. However, there were 128 countries at the Uruguay Round. Whom would delegations seek to negotiate with?[27] And what would they negotiate? Negotiators at the outset identified fifteen separate issues for negotiation. Now assume that issues could be expressed in binary categories (a heroic oversimplification as a cursory glance at any Uruguay Round Agreement would demonstrate), and further assume that delegations could express preferences only in binary choices. Even given such simplifying assumptions, each delegation would still have the daunting task of acquiring and processing the needed information to make agreements with all other parties to assure that any given proposal would achieve multilateral consensus, and to ensure that agreements, once made, would be durable. The transactions costs of any such endeavour would be formidable. These costs are further increased because, even though formal equality among participants is ensured by the consensus principle, the reality is more complicated since participants are not homogeneous and are sharply differentiated in terms of the percent of world trade that they represent.

Institutions arise in WTO negotiations for the same reason they arise in Congress, namely, to reduce "the costs of negotiating and concluding a separate contract for each exchange transaction which takes place on a market [basis]" (Coase 1937, pp. 392–93). In the above example of 128 countries and fifteen issues, negotiations would not have succeeded if conducted on a bilateral or plurilateral basis. Nor would decentralized negotiations have succeeded where the issues

27. Coase lists the need "to discover who it is that one wishes to deal with" as one of the principal "costs of market transactions" (Coase 1988, p. 6).

involved complex rule-making agreements that are increasingly the subject of multilateral trade diplomacy.

Coase's transactions cost analysis helps to explain why sovereign countries tolerate the imposition into international trade negotiations of the institutions examined in the previous section. A case in point is the use of the Green Room at the Uruguay Round, which was an example of an informal top-down governance structure deeply distasteful to developing countries.[28] On the one hand, given that developing countries accounted for over two-thirds of the negotiating delegations, it would seem counterproductive to try to reach consensus through the use of institutions of which they disapproved. On the other hand, all delegates to the Uruguay Round shared the problem of producing concrete results on agreements that they all sought, in a context where the transactions costs of producing durable agreements dictated that not all 128 countries could participate equally in achieving the results. Given these conflicting motivations, what principles might have applied and how might the negotiation have gone forward?

Transactions cost analysis assumes that all but the most basic exchanges require some kind of mechanism or "governance structure" (Williamson 1985). As Klein (2000, p. 466) notes, "the appropriate governance structure depends on the characteristics of the transaction." In the Uruguay Round, the characteristics (or "realities") that were faced could be described as follows: (i) delegations are accorded unequal influence in relation to their technical negotiation expertise or their political capacity to represent a group of like-minded countries; (ii) delegations are accorded unequal influence in relation to the trade flows of their countries; and (iii) two delegations (the U.S. and EU) are accorded unequal influence because without their participation international trade agreements are effectively valueless. Given that the transactions costs encountered in the Uruguay Round made it impossible to conduct a multilateral negotiation on the basis of (in Coase's terms) a market or price mechanism, these characteristics

28. See fn. 16. Paemen and Bensch (1995, p. 128) explain that "the name comes from the colour of the walls in the room in the GATT building in Geneva in which [Director-General] Arthur Dunkel was wont to hold informal meetings with a score of delegations to discuss particularly delicate matters, prior to submitting these same questions to all the Contracting Parties at a plenary session." Narlikar (2001, p. 9) notes, "Informal meetings [like the Green Room] were often by invitation only, or through a process of self-selection by a small clique within the WTO."

shaped the institutions through which the negotiation was conducted. Specifically, the Green Room evolved from these unique characteristics of the WTO negotiating situation. Even though unpalatable, informal top-down direction was accepted by all Uruguay Round participants as a necessary decision-making mechanism in the process of reaching multilateral consensus. In the case of the Green Room itself, the name was dropped for political reasons following the tenure of Director-General Arthur Dunkel, but the practice of informal top-down consensual meetings continues in the WTO when appropriate.

The Green Room represented an accommodation to political power and took the form of an ad hoc hierarchical governance structure. Its existence was not automatic, but rather depended on the circumstances of the negotiation process. To explain this further by analogy, economists assume in the transactions cost literature "that exchanges take place along a continuum"(Acheson 1985, p. 396). At one end of the continuum is a classical market where exchanges are determined mainly by price, at the other end is a hierarchical relationship where exchanges are determined more by administrative directive. The place on the continuum where any given exchanges occur is not fixed, but depends on the nature of the exchanges involved and on the relationships between the parties. In WTO negotiations, the role and existence of informal institutions like the Green Room are not a given, but will depend on the extent to which countries can cooperate to establish governing structures that facilitate the work of the negotiation. Therefore, one of the most important issues in the negotiation is the subtle question of what role institutions like the Green Room will be allowed to play in the negotiation itself.

Coase's transactions cost model provides further insight into the historical development of the negotiation method in the GATT and WTO. Traditionally, tariff negotiations have been the mainstay of the GATT regime. Tariff negotiations are mainly bilateral and are based on the interplay between request and offer, which are the basic elements of bargained exchange in any negotiation. The rules of tariff negotiations are simple: (i) requests to importing countries for a tariff reduction are made in principle by countries that constitute the principal suppliers of the product in question; (ii) importing countries might or might not grant a concession, consisting of a tariff binding or reduction; (iii) importing countries from which concessions were requested are in turn to make reciprocal requests on those countries from which requests were received; and (iv) concessions extended to another

GATT country must be extended to all countries (i.e., MFN) (Hoda 2001, pp. 26–27). Arguably, the latter rule "multilateralized" the results of tariff negotiations, but the negotiation process remained inherently bilateral and decentralized.

Tariff negotiations are an example of price-directed market transactions that in Coase's schema represent the alternative to transactions carried out within the firm. The purpose of GATT negotiations is to produce agreements, and in the manner by which they are negotiated, tariff agreements represent "production carried out in a completely decentralized way by means of contracts between individuals" (Coase 1988, p. 7). The institutional structure needed to carry out such negotiation was minimal. In the Kennedy Round, which was primarily a tariff negotiation, the parties established a TNC in the GATT, with three sub-committees below it (GATT 1963). The committee structure remained stable throughout the negotiation. The committees had chairs, but since the main action of the negotiation was over industrial tariffs which were negotiated bilaterally, neither the chairs nor the committees played a significant role in the negotiation. More influential were informal groups such as the "bridge club" of the U.S., European Community, Britain, and Canada, but even this group was constrained by the fact that trade-offs were ultimately exchanged between principal suppliers and their major customers (Preeg 1970).

Over time, tariff negotiators clearly faced a situation of advancing complexity due to the increase in products and parties at the negotiations, but this problem was largely handled by improved data management techniques and not by a change in negotiation methods. Thus, by the time of the Uruguay Round, tariff negotiators would have found an essentially similar bargaining structure to what existed at mid-century. The Uruguay Round did produce the innovation of "zero-for-zero" (i.e., free trade) bargaining in industrial sectors, but the Round also reverted to the "product-for-product" approach that characterized the earliest negotiations in the GATT.

The essential nature of GATT negotiation began to change in the 1970s as GATT countries tackled the problem of non-tariff measures (NTMs). The difference between NTMs and tariffs has been explained in the literature (Baldwin 1970), but what is important here is the way they are disciplined in international trade negotiations. Tariffs are reduced through an accumulation of contracts between individual countries, whereas NTMs are disciplined through written agreements that all or most participants intend to sign. Negotiations on NTMs are

inherently multilateral, where all participants work toward the completion of a single text. The tasks for NTM negotiators are to reach common understandings of the practices they are seeking to discipline, to reach agreement on the disciplines to be placed on those practices, and to draft clear rules that direct and constrain national decision-makers in the pursuit of international commercial policy. The negotiation of NTMs changed the nature of most GATT negotiation from a mainly bilateral exchange over numbers to a multilateral exchange over words. The idiosyncratic nature of GATT tariff bargaining gave way to a model of rule-making negotiations that is typical of those found in national governments, and increasingly in international organizations.[29]

The change toward NTM negotiation came in the Tokyo Round of the 1970s. In comparison to the Kennedy Round, the negotiation process in the Tokyo Round became more elaborate and, especially, more bureaucratized. At the outset a TNC was established for the Tokyo Round, similar to that of the Kennedy Round, but concurrently six substantive negotiating groups were drawn up from the six negotiating areas outlined in paragraph 3 of the Tokyo Declaration (Winham 1986, pp. 97–100). These groups were eventually designated as Tariffs, Non-tariff Measures, Sector Approach, Safeguards, Agriculture, and Tropical Products. Later in the negotiation, three negotiating subgroups were created under Agriculture (Grains, Meat, and Dairy Products), and five subgroups were set up under the Non-tariff Measures Group (Quantitative Restrictions, Technical Barriers to Trade, Customs Matters, Subsidies and Countervailing Duties, and Government Procurement). A final organizational change was the addition of a seventh negotiating group called the Framework Group, tasked to respond to requests of the developing countries to re-examine the legal structure of the GATT.

Committee and group chairs gradually assumed more responsibility in the negotiation process, and with that came an informal power to influence the flow of the negotiation and, where possible, to get results. The GATT Secretariat also became more involved with the negotiation process. In the Kennedy Round, there had been a very small GATT Secretariat that assisted the negotiation, but that assistance was wholly record keeping and not substantive. In the Tokyo Round, the analytical

29. An example of multilateral rule-making negotiations in international relations was the Negotiations on the Law of the Sea, which exhibited similar characteristics as WTO rule-making negotiations. See Koh and Jayakumar (1985).

tasks in the tariff negotiation alone had multiplied; the staff became larger and took on roles of analysis and preparation of the issues under negotiation. However, the role of the Secretariat became even more important in the negotiation of non-tariff measures, especially where the subjects were conceptually difficult (e.g., subsidies and countervailing duties), or particularly numerous and diverse (e.g., technical barriers to trade), or novel to the GATT (e.g., government procurement).[30] In short, in response to the increasing complexity of the issues before GATT negotiations, the negotiation process itself became more organized and characterized by a hierarchical structure, and more in need of assistance of technical expertise.

The move from tariff bargaining to NTM negotiation in the GATT could not be accomplished without a change in the negotiation process. Just as Coase has argued that "the distinguishing mark of the firm is the suppression of the price mechanism" (Coase 1937, p. 399), the distinguishing mark of NTM negotiation was the relative de-emphasis of decentralized bilateral contractual bargaining in the GATT. What replaced the price mechanism was the "system of relationships"(Coase 1937, p. 393) established by the firm, and what took the lead over contractual bargaining in the GATT were the institutions of the GATT and WTO described earlier in this paper. The motivation for the institutionalization of the negotiation process was the transactions costs that were encountered when a model designed for tariff bargaining among a few countries confronted the more complex tasks of negotiating NTMs among many countries.

V. Conclusion

This paper has made two arguments. One is that comparisons can be made between congressional legislative behaviour and WTO negotiation behaviour for the purpose of deepening our understanding of the latter. The second is that negotiation behaviour in the WTO can be explained with reference to transactions cost analysis in the same manner that legislative behaviour has been explained by use of this analysis. Beyond these concerns, the findings may also speak to the practice of multilateral diplomacy and to the development of the theory of multilateral negotiation.

To appreciate the question of practice, consider the following hypothetical representation of the situation faced by a trade negotiator. In

30. For example, the Secretariat was particularly instrumental in creating an Inventory of Non-tariff Measures, which was an important part of the preparatory phase of the NTM negotiations of the Tokyo Round (Winham 1986).

a traditional tariff negotiation, an ambassador might receive instructions to seek increased market access in country X for a particular product or sector, which translated would mean "get X to lower its tariff on that product or sector." *Who* and *what* would enter into the ambassador's negotiation, determined largely by knowable patterns of trade and protection, specifically trade volumes and tariff levels. *How* the ambassador would proceed would be determined by learned patterns of bargaining exchanges, such as the basic request/offer procedure, the principle of negotiating with the principal supplier, and then later, the existence of formula approaches for tabling offers. The process of negotiating tariffs thus had an essentially simple structure, notwithstanding that the numbers of products and countries in a multilateral negotiation could present an intimidating problem of scale for the ambassador, or that the economic decisions on what levels of tariffs are appropriate for particular products or sectors could present a challenging task of analysis.

By comparison, early in the Uruguay Round the ambassador might have received instructions to ensure that specific subsidies to isolated geographical points in a regionally disadvantaged area within a subsidizing country should be non-actionable. A little investigation would reveal to the ambassador that subsidies are a long-standing issue in the international trade regime. They were the subject of two GATT Articles and one Tokyo Round Code, and in none of this legal verbiage were subsidies even defined, let alone subsidies to regionally disadvantaged areas. Can one calculate who gains and who loses when the subject of the negotiation has not even been defined? Where does the ambassador start amid this uncertainty?

Who should the ambassador call to arrange a negotiation session on this subject: the Americans? the Colombians? possibly the Malaysians? Then, too, *what* should the ambassador negotiate? In this case, *who* and *what* will enter the ambassador's negotiation, determined partly by certain fixed realities in the negotiation, such as the economic importance and influence of major actors, but also by the ephemeral interplay of issues, actors, and institutions, as an often indeterminate number of countries wrestle with ostensibly the same problem. *How* the ambassador will proceed will be determined less by a standardized recipe of bargaining strategies and more by the ambassador's assessment of the state of play of the negotiation, understood especially in institutional terms. Included in that state of play will be varying perspectives of many countries on how to define the issues

before the negotiation and on how to make progress. The ambassador will find that the negotiation lacks the simple structure that existed in tariff negotiations, with the result that negotiation behaviour is inherently more complex and considerably richer than what was encountered in typical tariff bargaining.

In the Uruguay Round, any successful ambassador would have quickly learned that to carry out his or her instructions it was necessary *to engage in an organizational process*. That process contains institutions and procedures that have evolved to facilitate the task of reaching agreements in the sort of negotiations s/he was about to enter. An argument as to how these institutions work and why they have arisen has been presented in this paper. In any case, the successful ambassador would have learned by practice that one has to achieve an understanding of these institutions before one can even address adequately questions like subsidies to regionally disadvantaged areas. Only then is one capable of representing a country to the best of one's ability.

For the scholar, there should be as much interest as for the ambassador to understand the role of institutions of multilateral diplomacy. Institutions change the character of human interactions. Coase has argued that the institution of the firm alters economic behaviour from production organized through a series of exchange transactions on the market to production organized through the hierarchical relations of the firm, observing in summary that "the distinguishing mark of the firm is the supersession of the price mechanism" — a profound statement about change in human behaviour (1937, p. 389). A similar argument has been made in this paper that the institutions of the WTO changed the behaviour in that organization from agreements reached through a process of decentralized bargaining to agreements reached in a more complex bargaining process conducted in the committees and other structures of the WTO. This change should be reflected in diplomatic theory. In contemporary theories of bargaining and negotiation, there is more emphasis put on the interaction between parties than on the environment in which the parties interact. In most multilateral negotiations, these interactions cannot take place without working through an institution-rich environment, and that environment itself can deeply influence the way parties interact with one another.

There are a number of research questions that can be posed based on the analysis presented here. First, in making use of the Coasian

theory of the firm, attention becomes focused not only on the existence of institutions in the negotiation process, but, more importantly on the role of these institutions in producing agreements. Negotiation theory is critically concerned with the balance between cooperation and conflict in negotiation, and with the actions that lead to agreement, but much of this concern is focused inward toward an analysis of the motivations of the parties and their resultant behaviour. A recognition of the importance of institutions in shaping and determining the bargaining process would enrich the analysis of international negotiation. Not incidentally, it would also encourage negotiation theorists to make greater use of other theories, such as theories of leadership, bureaucratic organization, and political recruitment. Negotiation is not the only thing that occurs in negotiations. Just as in domestic law-making, where one would not entertain a single-dimensioned explanation of the behaviour of congressmen, what now occurs in international rule-making negotiations is so variegated that it is unlikely to be accounted for by a single set of theoretical tools. A greater focus on institutions requires analysts to make use of a wider range of theoretical tools, but this is the inevitable result of conducting analysis on a decision-making process at the international level that is becoming richer and more complex over time.

Second, the comparison that has been advanced in this paper between domestic legislative behaviour and international negotiation may profitably be used to speculate about future problems at the international level. For example, pressure groups are phenomena that occur in both Congress and the WTO, and informal negotiating groups (e.g., the Cairns Group) have an analogy in informal voting-bloc groups in Congress. An examination of these phenomena in the domestic context could generate useful propositions about WTO processes. The impact of political cleavage, particularly through party activities, is an area where analogies can be drawn, especially at a time when developing countries are increasing their influence in WTO politics.

Finally, it is recognized in research on Congress (Froman 1967, p. 31) that Congress handles certain issues well, others poorly, and some not at all, which could suggest the basis for an analysis of the future political competence of the WTO. In short, the study of diplomacy and international negotiation stands to gain from comparative research on domestic and international institutions, and because of its constitution and politics the WTO is a likely area for this effort to take place.

Table 1
Negotiating Groups in the Uruguay Round over Time

February 1987[1]		
	Category	**Negotiating Groups**
Group of Negotiations on Goods (GNG)	Market access	1. Tariffs 2. Non-tariff measures 3. Natural-resource-based products 4. Textiles and clothing 5. Agriculture 6. Tropical products
	Reform of GATT rules	7. GATT articles 8. NTM agreements 9. Safeguards 10. Subsidies/countervailing duties
	GATT as an institution	11. Dispute settlement 12. Functioning of the GATT system
	New issues	13. Trade-related Intellectual Property (TRIPS) 14. Trade-related Investment Measures (TRIMs)
Group of Negotiations on Services (GNS)		15. Services[2]

1. See GATT 1987.
2. Owing to a compromise early in the negotiation, services were negotiated separately from other issues in the Group of Negotiations on Services (GNS). All other groups are negotiated under GATT Group of Negotiations on Goods (GNG).

April 1991[1]	
	Negotiating Groups
Group of Negotiations on Goods (GNG)	1. Market access (tariffs, non-tariff measures, natural-resource-based products, tropical products) 2. Textiles and clothing 3. Agriculture 4. Rule-making (subsidies, anti-dump, preshipment inspection, rules of origin, technical barriers to trade, import licensing, customs valuation, government procurement, GATT articles, TRIMs 5. TRIPS 6. Institutions (Final Act, dispute settlement, functioning of GATT system)
Group of Negotiations on Services (GNS)	7. Services

1. See GATT 1991.

January 1992[1]		
	Tracks	
Group of Negotiations on Goods (GNG)	Track 1	Market access (including agriculture)
Group of Negotiations on Services (GNS)	Track 2	Services
	Track 3	Legal drafting
	Track 4	Adjustments to Draft Final Act (The Dunkel Text)

1. See GATT 1992.

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